

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

Black font, red font, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

Regulation 35**Human remains and objects and sites of an archaeological or historical nature**

1. ~~[The Contractor shall immediately cease exploitation activities within [X] radius of any finding of Underwater Cultural Heritage in the Contract Area.]~~ The Contractor shall ~~[without undue delay]~~ notify the Secretary-General in writing within 24 hours of any finding in the Contract Area of any ~~[human remains of an archaeological or historical [and paleontological] nature, or any object or site of a similar nature,]~~ [Underwater Cultural Heritage] and its location, including the Preservation and Protection measures taken.

2. The Secretary-General shall transmit such information, ~~[within 7 Days [48 hours] of receiving it]~~ to the [Council, the] Sponsoring State ~~[or State from which the Underwater Cultural Heritage originated,]~~ [to the State from which the remains, object or site originated, if known, ~~to~~ the Director General of the United Nations Educational, Scientific and Cultural Organization and to any other competent international organization.

[3. ~~The Authority shall work with relevant States and the United Nations Education, Scientific and Cultural Organization to compile a record of proposals relating to the protection of any finding of Underwater Cultural Heritage referred to in paragraph 1. Subject to paragraph 5 below, the Council shall decide, not later than 90 Days after the first Council meeting following its receipt of a notification in accordance with paragraph 2, whether, and if so, how the Underwater Cultural Heritage found shall be protected for the benefit of humankind as a whole. The Council decision shall include a determination as to whether, and if so, where within the radius in which exploitation had immediately ceased following the finding, exploitation may re-commence.]~~ [Such] human remains, object or site in the Contract Area should be disposed of for the benefit of humankind as a whole or preserved, so that no further Exploration or Exploitation shall take place, within a reasonable radius, [to be determined by the Authority in consultation with the Contractor], after taking into account the views of the State from which the remains or objects originated. [If the Council decides that Exploration or Exploitation cannot continue, the Contractor shall be compensated, including but not limited to the vicarious areas of equivalent size or value elsewhere or appropriate waiver of fees.]

[4. ~~The Contractor shall not be entitled to compensation for any measures required by this regulation.]~~

[2. As part of its decision-making process in paragraphs 1-3, the Authority shall take into account the work of the Authority and the ~~work~~ [views of the Secretary-General] of the United Nations Educational, Scientific and Cultural Organization with respect to

underwater cultural heritage, [particularly as defined in Article 1(a) of the 2001 Convention on the Protection of the Underwater Cultural Heritage].

[6. In relation to the finding by a Contractor of a shipwreck which has sovereign immunity, no decision shall be taken about the disposal, protection or preservation of the shipwreck and associated human remains without the consent of the flag State.]

Comments

- It has been attempted to include in the regulation a system for the protection of human remains and cultural heritage under the sea on the basis of notification and cooperation. Furthermore, great focus has been on describing the different stages to be taken when findings are identified.
- It has been proposed to include a definition of Underwater Cultural Heritage that follows the definition in Article 1(a) of the 2001 UNESCO Convention.
- It has been questioned by some delegations whether it is appropriate to reference the 2001 UNESCO Convention since the Convention has limited subscription and making an express reference would not future proof the regulation.
- An alternative version has also been provided below by the intersessional working group on underwater cultural heritage (See draft regulation 35 Alt.).

Regulation 35 Alt

Chance discovery of human remains and Underwater Cultural Heritage

1. Exploitation activities in the Area shall be conducted in a way that does not affect human remains and/or Underwater Cultural Heritage.

2. The Contractor shall notify the Secretary-General in writing within 24 hours of any chance discovery of suspected human remains and/or Underwater Cultural Heritage in the Contract Area, and their location. The notification shall include the provisional mitigation and preservation measures taken to avoid any interference with these human remains and/or Underwater Cultural Heritage and their archaeological and natural context and within a reasonable radius thereof.

3. Following the discovery of any such human remains and/or Underwater Cultural Heritage, and in order to avoid their disturbance, no further exploitation shall take place, within a reasonable radius, based on the type of resource and as informed by relevant Standards and taking into consideration relevant Guidelines, until the [Council][Commission] adopts a decision in accordance with paragraph 5. Pending any action by the [Council][Commission], the Secretary-General may suggest to the Contractor further provisional measures to preserve the human remains and/or Underwater Cultural Heritage and their archaeological and natural context taking into consideration [the applicable relevant guidelines][generally accepted underwater archaeological standards][the recommendations of the Committee on Underwater Cultural Heritage].

4. The Secretary-General shall transmit in writing within 48 hours the information concerning the discovery and the provisional measures suggested to the contractor, if any, to all Members of the Authority, the President of the Council, the Director General of the United Nations Educational, Scientific and Cultural Organization, as well as to any other relevant international organization or other stakeholders having asked the Authority to be notified in such cases.

4. Alt. The Secretary-General shall transmit such information in writing, within two (2) days of receiving it:

(a) to all States parties;

(c) to all accredited observers.

(b) to the Director General of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and to any other competent international organization; and

4 Alt. bis. Any State party may declare its interest in being consulted on how to ensure the effective protection of the human remains and/or Underwater Cultural Heritage. Such a declaration, shall be transmitted to the Secretary-General within ten (10) days of the notification of the discovery by the Secretary-General, [and shall be based on a verifiable link to the human remains or Underwater Cultural Heritage concerned,] with particular regard being paid by the declaring State to its preferential rights as a State of cultural, historical or archaeological origin. [The sponsoring State and the flag State of the mother-vessel from which the exploitation is being carried out shall be considered interested States.]

4. Alt. ter. Within fifteen (15) days of the notification of the discovery by the Secretary-General, a meeting of the interested States referred to in the previous paragraph shall be convened to include the contractor, the Secretary-General, the Director General of the UNESCO and accredited observers. [Only States parties shall have the right to vote, but the views of the Contractor, the Director General of the UNESCO and accredited observers shall be taken into account.]

4. Alt. Quater. Within fifteen (15) days of the convened meeting, the meeting of the interested States shall make to the [Council][Commission] one of the following recommendations:

- (a) that the contractor may continue with their exploitation activity;
- (b) that further investigation should be necessary to suggest an appropriate recommendation, in which case, the convened meeting shall have an additional fifteen (15) non-extendable days to do so; or
- (c) in the case of human remains, that the remains shall be preserved under [relevant][best][generally accepted underwater] archaeological standards or practices, with a proposal made to the Council to create an [Area of Particular Environmental Interest] [Area of Particular Cultural Interest]; or
- (d) that other protection measures shall be applied to human remains and/or Underwater Cultural Heritage.

5. After ascertaining the views of Member States, particularly those with preferential rights under Article 149 of the Convention, within sixty 60 days of the notification of the discovery by the Secretary-General, the Council shall make a decision on the termination of exploitation activities within an area surrounding the discovered human remains and/or Underwater Cultural Heritage. The Council may also suggest to the Member States any measure necessary for the preservation and protection of the human remains and/or Underwater Cultural Heritage and their archaeological and natural context taking into consideration [the applicable relevant guidelines][generally accepted underwater archaeological standards][the recommendations of the Committee on Underwater Cultural Heritage].

5 Alt. After ascertaining the views of Member States, particularly those with preferential rights under Article 149 of the Convention, and all other interested parties identified in paragraph 4 alt ter, and taking into consideration the relevant Guidelines, the Commission shall, at its next meeting and in any case within 60 days of the notification of the discovery by the Secretary-General, make a determination with respect to the discovery of suspected human remains and/or Underwater Cultural Heritage. The determination of the Commission may include one or more of the following:

- (a) confirmation of the nature of the discovered human remains and/or Underwater Cultural Heritage;

- (b) a determination of the buffer zones;
- (c) a requirement for the Contractor to provide additional information or share additional data with the Authority;
- (d) a determination as to the termination of exploitation activities within a clearly defined area surrounding the discovered human remains and/or Underwater Cultural Heritage; or
- (e) any other matters that the Commission determines to be appropriate and necessary in the circumstances and in light of the applicable Guidelines.

The Commission may also suggest to the Member States any measure to preserve the human remains and/or Underwater Cultural Heritage and their natural context taking into consideration the applicable Guidelines.

[5bis. If the Commission determines that exploitation activities cannot continue, the Contractor shall be compensated, including but not limited to the vicarious areas of equivalent size or value elsewhere or appropriate waiver of fees in accordance with the applicable Standard.]

6. [IF PARA 4 RATHER THAN PARA 4 ALT AND REST OF SERIES IS CHOSEN] In taking such a decision, the Council will also take into account the views of the United Nations Educational, Scientific and Cultural Organization and of other international organizations mentioned in paragraph 4, as well as the views of any other mentioned stakeholders or non-Member States of the Authority if so decided by the Council.

7. The [Council][Commission] shall forward all information used in making its decision under paragraph 5, including the location of the human remains and/or Underwater Cultural Heritage, to the Secretary-General for inclusion in the Authority's database. Access to such information shall be decided by the Council under Part IX on 'Information-gathering and handling' of this Regulation.

7 bis No decision shall be taken by the Council about the disposal, protection or preservation of a wreck entitled to sovereign immunity and associated human remains without the consent of the flag State.

Comments

- The intersessional working group on underwater cultural heritage has provided valuable and significant input on several draft regulations that has an implication on underwater cultural heritage. The outcome of the group's current work can be accessed [here](#).
- In this revised consolidated text, the President has included the group's alternative version of draft regulation 35. Furthermore, the President invites for discussions hereof, and in general, resolution of the cross cutting issue of how to handle underwater cultural heritage. Since the remaining proposals from the group very much depends on such discussions and that it has an implication on many regulations, the updating of other draft regulations still remain.
- The group has suggested an alternative version of draft regulation 35. It is suggested by the group that discussions are carried out on the basis of this alternative version of draft regulation 35.
- The alternative proposal establishes a multi-part system of protection for the chance discovery of human remains and/or underwater cultural heritage, with various obligations for the respective actors and bodies involved in the system.

We support the use of DR35 Alt, as proposed by the Inter-sessional Working Group on UCH. We are grateful for inclusion here by the President and look forward to discussions. However, we note that discussions will be hampered by the failure to include elsewhere in this document other key provisions proposed by the Working Group that work with DR35 Alt in order to create a means of regulating UCH, for example paragraphs (4 bis) and (4 ter), and the definitions of UCH, intangible UCH, and tangible UCH proposed in the Schedule, among others. For example, we strongly support the creation of a UCH Committee, as proposed in DR 4 ter.

Generally, we prefer **paragraphs (4 alt) and (5 alt)** and note the importance of a role for the UCH Committee. We look forward to hearing from Member States and Observers regarding possibilities for implementation.

We would welcome more discussion about **paragraph (5 bis)**' provision for compensation to a Contractor. We imagine different scenarios regarding identification of UCH could play out in different ways, and it may be overly limiting for the Regulations to require compensation as mandatory or to specify the mode of compensation, if this is not reasonable in an individual case.