

Non-Paper submitted by Spain to the Intersessional Working Group on Underwater Cultural Heritage on the system of protection of human remains and cultural heritage

18 February 2024

1. On 11 December 2023, Spain submitted to the intersessional Working Group (**WG**) proposals for consideration on the “term of art” and “definitions” regarding the protection of human remains and cultural heritage in future regulations on exploitation in the Area.
2. This second Non-Paper, based on the previous one,¹ offers a possible system on reporting, notification and decision-making in the event that human remains and/or cultural heritage are found during exploitation in the Area. As with the “term of art” and “definitions”, Spain seeks to find an effective, practicable and generally accepted system, with the understanding that Spain maintains the need for a precautionary pause.²

Management of the existing information

3. Information on the location, conditions and natural context of human remains and/or cultural heritage located in the Area should be included in the ISA Deep Seabed and Ocean Database (**DeepData**).³ The DeepData should be provided with the most accurate and updated data on these remains and should host all data related to deep-seabed activities, particularly those collected by the contractors during their exploration (but also future exploitation) activities and other relevant archaeological, environmental and resources-related data for the Area. It should include the archaeological baseline/assessment data. Its linkage with the “Sustainable Seabed Knowledge Initiative”⁴ could be explored.
4. In the case of human remains and/or cultural heritage, DeepData should receive information from three different sources:
 - (i) Information notified by contractors, both under the Regulations on Prospecting and Exploring,⁵ and under the future Regulations on exploitation;
 - (ii) Information notified to the SG of the Authority by States parties to the 2001 UNESCO Convention under its Art. 11(2);⁶ and

¹ Therefore, mention to the term of art in this second Non-Paper refers to this concept and definitions as proposed in the first Non-Paper.

² See Paragraph 1 *in fine* of Spain’s first Non-Paper.

³ See <https://www.isa.org.jm/deepdata-database/>.

⁴ See <https://www.isa.org.jm/sski/>.

⁵ See regulations 35 (Nodules) and 37 (Sulphides and Crusts).

⁶ Under this article States parties shall notify the SG of the Authority of discoveries of underwater cultural heritage located in the Area reported to them by a national, or a vessel flying their flag. So far, except error or omission, there has been no information transmitted to the Authority under the Regulations or the 2001 UNESCO Convention.

- (iii) Any further information provided to the Authority under other applicable agreements or on a voluntary basis by States or any stakeholder (including ISA observers).
5. The information compiled in DeepData should be used to decide on the creation of “no-fly zones” for deep-sea mining. These zones could be created following the general scheme of the already existing “Areas of Particular Environmental Interest” (APEI), and be declared as such (perhaps changing its name) or under a different label such as “Areas of Particular Heritage Interest” (APCI).⁷ It is important to underline that most APCI would be also APEI since cultural heritage —either tangible or intangible— has a close link with its natural context, thus connecting cultural and natural interests (what could be labelled as our “Ocean Heritage”).
 6. Located human and/or tangible cultural heritage remains should constitute an archaeological site that, together with its buffer zone, should be the physical basis for the creation of an APCI.
 7. The existence of intangible heritage should be evaluated among States and other interested stakeholders (most particularly Indigenous Peoples and local communities) for the creation of an APCI. Spain considers that this could, potentially, be the most effective way to protect intangible heritage —practices, representations, expressions, knowledge, skills, traditions, memories among other intangible features—, beyond and in addition to the protection of tangible heritage as proposed in previous paragraph 6. The model of the BBNJ Agreement could form the basis of the system. Under the BBNJ Agreement it is foreseen that the use of area-based management tools, including marine protected areas (Arts. 19) could be applied. In these cases, there is a requirement for an environmental impact assessment (EIA) to be based not only on best available science and scientific information but also on ‘relevant traditional knowledge of Indigenous Peoples and local communities’ (Art 31(1)(c)). Indeed, Indigenous Peoples and local communities, and their traditional knowledge, enjoy a relevant and important feature within the BBNJ Agreement (see e.g. Arts. 7(j), (k), 13, 21 among others) and are specifically mentioned with respect to stakeholder consultations on EIAs (Art. 37(4)(c)). The BBNJ Agreement is thus generally based on the best available science and scientific information and, where available, relevant traditional knowledge of Indigenous Peoples and local communities, always taking into account the precautionary approach.
 8. Once created, APCI could replicate *mutatis mutandi* the regime provided for the APEIs (including their delimitation, management, monitoring, etc.).

Reporting during exploitation

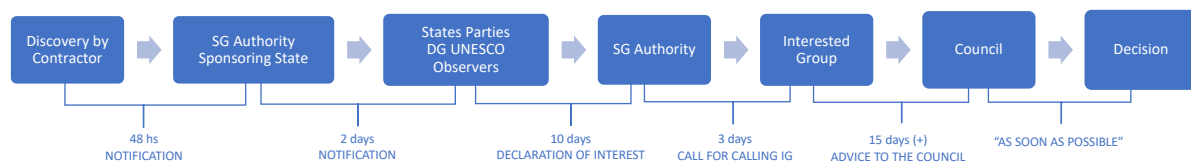
9. Regarding the information on the discovery of human remains and/or cultural heritage by exploiting contractors, Spain considers that the contractor should notify such discoveries and their location both to the Authority and to its sponsoring State.⁸ If the former is already well

⁷ The term “heritage” is used to encompass both tangible and intangible heritage. For the purposes of this proposal, the term “tangible heritage” includes those tangible objects associated with intangible heritage, as explained in Spain’s first Non-Paper.

⁸ All the notifications envisaged in this system shall be in writing.

established in the Regulations on Prospecting and Exploring,⁹ the latter shall permit the sponsoring State to comply with its due diligence as clarified by the International Tribunal for the Law of the Sea (ITLOS) in its 2011 Advisory Opinion on the responsibilities and obligations of States with respect to activities in the Area.¹⁰ It should also help to clarify possible liabilities in case of non-compliance.

10. The Regulations on Prospecting and Exploring establish that the contractor shall “immediately” notify the SG of any discovery. As “immediately” is considered an indeterminate legal term, Spain proposes to establish a more specific period of forty-eight (48) hours which is believed to be a realistic time period in which to notify the Authority.¹¹ The establishment of such a time-lapse in respect to the particular circumstances of the exploiting activities, the need of prompt reaction, the gathering of information to be notified also on the preventive measures adopted, and the detailed content of such notification to the Authority is considered a necessity.
11. Following the discovery of human remains, no further exploitation shall take place, within a reasonable radius, until one of the final decisions referred to in paragraph 19 of this Non-Paper is adopted. A basic scheme of the proposed process of notification and decision making, with suggested lapses, may be as follows:



Scheme of the process and lapses

Notification of information

12. Once the Authority receives the information from the contractor (including the location, as well as the preservation measures provisionally adopted),¹² within two (2) days the SG should transmit the data:
 - (a) to all States parties, to permit the effective application of Art. 149 of UNCLOS which obliges States to pay particular regard “to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin”;¹³ and

⁹ See *supra* n. 5.

¹⁰ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10.

¹¹ Once notified by the contractor, it is the Authority that initiates the information system. The contractor should notify the discovery to its sponsoring State as soon as possible, having in mind that the State should be notified as State party by the Authority in any case.

¹² The Authority, with the assistance of scientific institutions—like the International Committee on the Underwater Cultural Heritage of ICOMOS (ICUCH-ICOMOS)—, may prepare guidelines for contractors on how to adopt these provisional measures as well as identify the pertinent information that should be gathered and transmitted to the Authority.

¹³ If there is no communication to *all* States parties, the effectiveness of that article could be severely impaired. Only once the information is received, States as envisaged in Art. 149 of UNCLOS would be able to react as interested States with preferential rights, if they consider it appropriate.

(b) to the DG of the UNESCO¹⁴ and to other competent international organisations, replicating what is established in the Regulations on Prospecting an Exploration.¹⁵

13. Spain proposes that the practical way to make effective the particular regard to States' rights foreseen in Art. 149 of UNCLOS may be analogous to the system of reporting and notification established in Art. 11 of the 2001 UNESCO Convention. This system is based on the notion of "interested State", that is, a State that should declare to the SG of the Authority its interest in being consulted on how to ensure the effective protection of the human remains and/or cultural heritage found in the Area. Such declaration should be based on a verifiable link to these objects.¹⁶
14. Once notified by the SG of the Authority, States parties should have ten (10) days to duly transmit their interest in being consulted as "interested State". Spain proposes to discuss in this WG whether the sponsoring State and the flag State of the registered-vessel from which the exploitation is being carried out should necessarily be an interested State.
15. It should be decided, however, what are the "other competent organisations".¹⁷ Spain proposes to replicate the system of agreements concluded so far by the Authority with other organisations (IMO, OSPAR, RFMOs, etc.) to identify such "accredited" organisations, competent in the field of the protection of underwater cultural heritage. Spain proposes to discuss in this WP whether it should be feasible a system of accreditation for these "competent organisations".
16. Adopted regulations do not however offer to NGOs, nor to Indigenous Peoples and local communities a similar status regarding the transmission of information. The 'Guidelines for observer status of non-governmental organizations with ISA'¹⁸ helps to identify the NGO Observers, but there is no mention in these Guidelines to Indigenous Peoples and local communities. They could, if willing and able, profit from such a procedure to become observers before ISA as NGOs. The same time-lapse of two (2) days could be also applicable to notify all observers the discovery of human remains and/or cultural heritage in the Area, as well as the limit of ten (10) days to transmit the SG of the Authority their interest in participating in consultations. Spain also proposes to discuss in this WG whether it is feasible and appropriate to incorporate a system of accreditation for observers, with an interest and competence in the field of the protection of underwater cultural heritage (including intangible cultural heritage).

¹⁴ UNESCO DG should normally transmit the information to (a) all States members of UNESCO and (b), particularly, to the Secretariat of the 2001 UNESCO Convention, a focal point of UNESCO for the underwater cultural heritage. The Scientific and Technical Advisory Body of the Meeting of States Parties to such Convention, as well as accredited NGOs could also be informed by the DG of UNESCO. This, however, shall be a decision to be adopted under UNESCO internal rules.

¹⁵ See again *supra* n. 5.

¹⁶ The clarification given in Art. 9(5) of the 2001 UNESCO Convention of such "verifiable link" (applicable to finds in the EEZ and on the continental shelf but arguably applicable to the Area) explains that the link should be "especially a cultural, historical or archaeological link". The Operational Guidelines of the 2001 UNESCO Convention adopted in 2015 (as amended) says that the link must be demonstrated by "the results of scientific expertises" [sic], "historic documentation" or "any other adequate documentation" (UNESCO Doc CLT/HER7CHP/OG 1/REV, para 28, available at <https://unesdoc.unesco.org/ark:/48223/pf0000234177>).

¹⁷ See more information at <https://www.isa.org.jm/observers/>.

¹⁸ Doc. [ISBA/25/A/16](#), Annex.

Decision-making regarding human remains and/or cultural heritage

17. Once information of the discovery is circulated as explained in previous paragraphs, within fifteen (15) days an [informal] “interested group” (**IG**) should be created by the representatives of the Authority, the contractor, the interested States, the DG of UNESCO, other competent organisations and accredited observers.¹⁹ Only States attending the IG should have the right to vote but the views of the UNESCO and observers should be taken into account.
18. The IG should advise the Council of the Authority (**Council**) in making its decisions regarding human remains and/or cultural heritage found by the contractor. Both in the IG’s advice and in the decision to be taken by the Council, it shall be duly taken into account that “[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole (Art. 149 of UNCLOS) and that States parties “have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose” (Art. 303(1) of UNCLOS).
19. Once convened, the IG should have fifteen (15) days to advise/suggest the Council to adopt and communicate to the contractor and its sponsoring State a decision on the discovery. Such a decision—to be adopted by the Council as soon as possible—²⁰ could be:
 - (a) that there is no scientific or cultural reason to preserve the remains found and that the contractor can continue with their exploitation activity, although the Authority will curate and where appropriate make available all information related to the discovery;
 - (b) that if it is deemed necessary for further research relating to the discovery in order to adopt a decision, a limit of fifteen (15) days to gather more information with the assistance of the contractor, to collect further archaeological data relevant to the discovery will be allowed in order to take a final decision which could be, either that foreseen in subparagraph (a) above or that foreseen in subparagraph (c) below; or
 - (c) to decide that the remains deserve to be preserved under archaeological standards, the Council would then propose the creation of an APCI as mentioned in paragraph 6 of this Non-Paper.
20. If a decision to propose the creation of an APCI is adopted, the Council should:
 - (i) Immediately notify the contractor to discontinue its exploitation activities in a provisional delimited area suggested by the IG and decided by the Council under strict archaeological and environmental reasons;
 - (ii) Initiate the procedure to create an APCI;
 - (iii) Once created, transfer all relevant information to DeepData; and

¹⁹ The 15-day window would begin from the date of notification of the discovery by the Secretary-General and should permit (i) include the 10 days for States, IO and NGO to declare its interest in being consulted, and (ii) five days to evaluate such declarations and convene the meeting.

²⁰ Although “as soon as possible” is also an indeterminate legal concept (see *supra* paragraph 10), the time-lapse reserved to the Council should be adopted within the limits and conditions established in the regulations for the Council’s general decision-making process.

- (iv) Evaluate the compensation to be received by the contractor for the discontinuance of the exploitation (as well as for the assistance provided to the IG under paragraph 19(b) of this Non-Paper), including but not limited to the vicarious areas of equivalent size or value elsewhere or appropriate waiver of fees.

Proposed draft-regulation 35

21. Awaiting further proposals, discussions and developments, Spain suggests the following draft text for regulation 35:

Human remains and cultural heritage

1. The Contractor shall notify the Secretary-General and its sponsoring State in writing within 48 hours the discovery of any human remains and/or cultural heritage, and its location, in the Contract Area. The notification shall include the preservation and protection measures provisionally taken by the Contractor. In order to avoid the disturbance of such human remains and/or the cultural objects, no further exploitation shall take place, within a reasonable radius, to be determined by the Council in consultation with the contractor.
2. The Secretary-General shall transmit such information in writing, within two (2) days of receiving it:
 - (a) to all States parties;
 - (b) to the Director General of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and to any other competent international organization; and
 - (c) to all accredited observers.
3. Any State party may declare its interest in being consulted on how to ensure the effective protection of the human remains and/or 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 cultural heritage concerned, particular regard being paid to the preferential rights of States 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. 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.
5. Within fifteen (15) days of the convened meeting, the meeting of the interested States shall make to the Council 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 decision, having an additional fifteen (15) non-extendable days to do so; or
 - (c) that the remains deserve to be preserved under archaeological standards, with a proposal made to the Council to create an [Area of Particular Environmental Interest] [Area of Particular Cultural Interest].
6. After taking into account the advice given under previous paragraph, the Council shall take a decision. If the Council decides that exploitation must not 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.