



**IMO**  
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**A SUPREME DECREE TO INCORPORATE  
THE CONVENTION ON THE PROTECTION  
OF UNDERWATER CULTURAL HERITAGE  
INTO THE LAWS OF THE REPUBLIC OF  
PERU AND TO PROVIDE FOR THE  
EFFECTIVE IMPLEMENTATION THEREOF**

**A Legislation Drafting Project submitted in partial fulfillment of the  
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**Declaration**

The views expressed herein are strictly personal and in no way represent or reflect the views of the Ministry of Foreign Affairs of Peru.

## EXPLANATORY NOTE

### I. INTRODUCTION

Cultural heritage is the legacy of physical artefacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations.<sup>1</sup> An extensive amount of cultural heritage lies beneath the ocean. Over the last centuries, archaeological and historical objects found at sea have helped humanity to understand its past, identity, and cultural diversity. In this regard, the underwater cultural heritage (hereinafter, 'UCH') means all traces of human existence having a cultural, historical or archaeological character which has been partially or totally under water, periodically or continuously, for at least 100 years.<sup>2</sup> UCH is an integral part of the cultural heritage of humanity and a particular element in the history of people, nations, and their relations with each other concerning their common heritage.<sup>3</sup>

Despite its utmost importance, the richness of the world's UCH is often underestimated.<sup>4</sup> Constantly, UCH is threatened by looting, commercial salvaging activities, and destruction by incidental activities. In addition, despite States' efforts to issue national regulation for the recovery and preservation of UCH, lack of uniformity in the applicable law has been a huge challenge for its efficient protection around the world. In this regard, international regulation for the protection of UCH was developed in order to stop activities which threaten its existence and, therefore, the interests of the international community.

The United Nations Convention on the Law of the Sea<sup>5</sup> (hereinafter, 'UNCLOS') provides a general framework which sets the duty to protect objects of an archaeological and historical nature found at sea and to cooperate on that purpose. Notwithstanding this

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<sup>1</sup> UNESCO, *Tangible Cultural Heritage* <<http://www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/>> accessed 1 February 2020.

<sup>2</sup> Article 1(1)(a) of the Convention on the Protection of the Underwater Cultural Heritage (adopted on 2 November 2001, entered into force on 2 January 2009) 2562 UNTS 3 (CPUCH).

<sup>3</sup> First paragraph of Preamble of the CPUCH.

<sup>4</sup> UNESCO, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 3. <[http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/UNDERWATER/pdf/Infokit\\_en\\_Final.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/UNDERWATER/pdf/Infokit_en_Final.pdf)> accessed 27 January 2020.

<sup>5</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

important framework, UNCLOS does not develop a specific regime for the protection of UCH found in all maritime zones. Furthermore, there is a gap regarding the protection of the special interests of States which have a historical link with the UCH found. In this context, the international community expressed its concern about the increasing commercial exploitation of UCH and the threats caused by activities, directed or incidentally, which harm its protection and preservation.<sup>6</sup>

For these reasons, within the framework of the United Nations Educational, Scientific and Cultural Organization (hereinafter, 'UNESCO'), the Convention on the Protection of the Underwater Cultural Heritage<sup>7</sup> (hereinafter, 'CPUCH') was adopted in 2001 to ensure and strengthen the protection of UCH. The CPUCH provides a comprehensive regime that regulates the protection of UCH in every maritime zone they are found.<sup>8</sup> It fosters the cooperation between States parties, among others, by the establishment of agreements and exchange of information. In addition, the Annex of the CPUCH provides technical rules to ensure the accomplishment of the goal of protecting the UCH.

Today, the protection of UCH is still an important matter to deal with. Recently, the United Nations General Assembly has urged all States to cooperate, directly or through competent international bodies, in taking measures to protect and preserve objects of an archaeological and historical nature found at sea, in conformity with UNCLOS.<sup>9</sup> Furthermore, the General Assembly called the States to work together on such diverse challenges and opportunities as the appropriate relationship between salvage law and scientific management and conservation of UCH, increasing technological abilities to discover, and reach underwater sites, looting and growing underwater tourism.<sup>10</sup>

In this context, the Republic of Peru is a maritime nation located at the South Pacific basin, with 3,080 kilometers of coast, internal waters, and a 'maritime domain' which is composed of the waters and seabed under its jurisdiction. The maritime domain represents

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<sup>6</sup> See Preamble of the CPUCH.

<sup>7</sup> *ibid.*

<sup>8</sup> It must be noted the UCH on the high seas is not covered due to its difficulty to remain so much time in the water column.

<sup>9</sup> United Nations, General Assembly resolution 74/19, *Oceans and the Law of the Sea*, A/RES/74/19 (10 December 2019) para. 8. <<https://undocs.org/en/A/RES/74/19>> accessed 27 July 2020.

<sup>10</sup> *ibid.*

65 percent of the State compared to its continental territory and reaches a distance of 200 nautical miles counted from its baselines. Regarding its almost two hundred years of independence, the colonization period it faced, and the evidence of civilizations that lived in the current location of the State, Peru has a vast history that is strongly influenced by its adjacent sea.

Although the quantity of UCH in Peruvian waters is vast, its exploration is just beginning.<sup>11</sup> Concerning the legal framework for the protection of UCH, it must be underscored that Peru is not a party to UNCLOS nor to the CPUCH. Thus, an important challenge arises on how the State should apply the provisions of protection of UCH in the maritime zones it recognizes, internal waters and the ‘maritime domain’. Although it has developed national law to protect UCH in 2006, that legal framework does not follow the regime developed by the aforementioned international instruments. Therefore, Peru is excluded from the rights provided by those instruments.

For these reasons, this explanatory note will address the need to incorporate and implement the CPUCH in the Peruvian internal waters and maritime domain. To that purpose, this document will address, first, the current Peruvian position towards UNCLOS. Then, it will briefly discuss the regime applicable to the UCH, starting from UNCLOS, in order to understand the need and utility of the regime of the CPUCH. Additionally, the national law of the Republic of Peru applicable to UCH will be commented on while analyzing the importance to accede the CPUCH and ensure its efficient implementation. Finally, this work will suggest the accession of the CPUCH and a Supreme Decree which will amend and enhance the existing national law regarding UCH.

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<sup>11</sup> Ministry of Culture of Peru, *National Cultural Policy to 2030*, 78. <[https://cdn.www.gob.pe/uploads/document/file/1025961/PNC\\_VERSI%C3%93N\\_FINAL\\_2.pdf](https://cdn.www.gob.pe/uploads/document/file/1025961/PNC_VERSI%C3%93N_FINAL_2.pdf)> accessed 4 August 2020.

## II. THE PERUVIAN POSITION TOWARDS UNCLOS

Peru's legal system follows a civil law approach in which the Constitution is the highest hierarchy norm.<sup>12</sup> According to Article 54 of the 1993 Peruvian Constitution, Peru possesses a 'maritime domain' which includes the sea adjacent to its coasts, as well as the seabed and subsoil thereof, extending out to a distance of 200 nautical miles measured from the baselines established by law. In its internal waters and 'maritime domain', Peru exercises sovereignty<sup>13</sup> and jurisdiction, without prejudice to the freedoms of international communications, in accordance with the law and treaties ratified by the State. Although not stated explicitly, this constitutional provision must be read as including other sources of international law as enshrined in Article 38 of the Statute of the International Court of Justice (hereinafter, 'ICJ'), particularly, the norms of customary international law.

Although it has been argued that Peru claims a 200 nautical miles territorial sea,<sup>14</sup> the term 'maritime domain' shall be interpreted as in the judgment of the ICJ in the *Case Concerning Maritime Dispute* (Peru v. Chile) of 2014.<sup>15</sup> In this regard, the ICJ noted that Peru was not a party to UNCLOS; however, it recalled the declaration of the Peruvian agent during the oral proceedings which stated that the term 'maritime domain' used in Peru's Constitution is applied in a consistent manner with the maritime zones as prescribed by UNCLOS.<sup>16</sup> The Tribunal took note of this declaration and considered it to be a formal undertaking by Peru.<sup>17</sup>

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<sup>12</sup> Although the Constitution states that international treaties have law hierarchy (except for Human Rights treaties, which have Constitutional hierarchy), Peru respects the supremacy of international law. This is reflected in its current State practice.

<sup>13</sup> The term 'sovereignty' used by the 1993 Peruvian Constitution is to be understood as 'modal sovereignty'. The terms 'sovereignty and jurisdiction' have been used by Peru in its Supreme Decree No 781 of 1947 and, jointly with Chile and Ecuador, in the Santiago Declaration of 1952. In this respect, Ambassador Juan Miguel Bákula quotes Peruvian author Alberto Ulloa Sotomayor who stated that the terms 'sovereignty and jurisdiction' used in the Santiago Declaration utilized it only for the 'effects of defense and protection of marine resources'. Juan Miguel Bákula, *La imaginación creadora y el nuevo régimen jurídico del mar. Perú y Chile: ¿El desacuerdo es posible?* (Universidad del Pacífico 2008) 38.

<sup>14</sup> See Sandra Namihas, '¿Mar soberano de 200 millas o derechos soberanos hasta las 200 millas?' (2014) *Panorama Mundial*, Boletín Electrónico del IDEI Año 6 No 30. <<https://idei.pucp.edu.pe/ano-6-no-30/?e=articulos>> accessed 10 June 2020.

<sup>15</sup> *Maritime dispute* (Peru v. Chile), Judgment, I.C.J. Reports 2014, p. 3.

<sup>16</sup> Public sitting held on Monday 3 December 2012, at the Peace Palace, President Tomka presiding, in the case concerning the Maritime Dispute (Peru v. Chile) [2012], 38. <<https://www.icj-cij.org/files/case-related/137/137-20121203-ORA-01-00-BI.pdf>> accessed 15 June 2020.

<sup>17</sup> *Maritime dispute* (n 15) para. 178.

Furthermore, while depositing its instrument of ratification to the ‘Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean’<sup>18</sup>, the Peruvian State made the following declaration:

[G]iven that Peru is not party to the United Nations Convention on the Law of the Sea of 10 December 1982 or the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995, Peru wishes to emphasize that those rules are applicable in so far as they form part of customary international law or reflect general principles of law.<sup>19</sup> (emphasis added)

In this regard, although the Peruvian Constitution claims 200 nautical miles of ‘maritime domain’, this term must be understood in the sense that Peru is obliged by the provisions of UNCLOS which form part of customary international law or reflect general principles of law, not by the treaty itself. As shall be commented in this document, the approach of having a single maritime zone signifies a challenge for the implementation of international provisions concerning the protection of UCH due to its zonal approach regarding where the UCH is found. However, this issue will be assessed in the context of the CPUCH which does not oblige the States to become a State party to UNCLOS,<sup>20</sup> but demands a consistent application with it.

### **III. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA REGIME**

UNCLOS established a cautious balance between the different interests of the States regarding the issues of the ocean. However, certain matters, such as the protection of the UCH was not addressed *in toto*. Thus, regarding the maritime zone in which the UCH is

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<sup>18</sup> Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (adopted on 14 November 2009, entered into force on 24 August 2012) (SPRFMO Convention).

<sup>19</sup> Foreign Affairs & Trade of New Zealand. Current Status of the Convention. <<https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/convention-on-the-conservation-and-management-of-high-seas-fishery-resources-in-the-south-pacific-ocean-sprfmo/>> accessed 7 January 2020.

<sup>20</sup> On this obligation, see Article 4 of the ‘Agreement relating to the implementation of Part XI of the United Convention on the Law of the Sea of 10 December 1982’ (adopted 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3 (Part XI Agreement).

found, UNCLOS does not provide a comprehensive regime.<sup>21</sup> The closest references are found in articles 149 and 303 in which the concept of ‘archaeological and historical objects’ is developed regarding the maritime zone where they are found. In this approach, the mentioned articles provided by UNCLOS will be commented in order to identify gaps and areas in which the protection of UCH evidenced the need to develop a new international instrument.

**a) Article 303: Archaeological and historical objects found at sea**

Article 303 of Part XVI ‘General Provisions’ of UNCLOS prescribes the following:

Article 303. – Archaeological and historical objects found at sea

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

Article 303 envisages general provisions regarding archaeological and historical objects found at sea. A general view of such article states that, regarding the duty to protect and cooperate on matters of UCH, it covers all maritime zones set by UNCLOS (Article 303(1)), including areas beyond national jurisdiction. However, the provision in Article 303(2) makes a particular reference to Article 33 (contiguous zone) by giving the coastal State certain rights over that matter. Furthermore, another particular reference is found in Article 149, which specifically regulates over the archaeological and historical objects

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<sup>21</sup> Tullio Scovazzi, ‘Article 303: Archaeological and historical objects found at sea’ in Alexander Proelss (ed), *United Nations Convention of the Law of the Sea: A commentary* (C.H.Beck Hart Nomos 2017) 1950.



found in the Area, leaving the exclusive economic zone (hereinafter, 'EEZ'), the continental shelf, and the high seas,<sup>22</sup> without specific provisions.

Regarding the obligation in Article 303(1), the duty to protect objects of an archaeological and historical nature entails the prohibition of destroying or allowing to destroy UCH, wherever at sea they are found. Likewise, States are under the obligation to cooperate for this purpose; this means that a State which persistently refuses any request by other States to establish some forms of cooperation aiming at the protection of the UCH could be responsible for breaching this duty.<sup>23</sup>

Concerning Article 303(2), UNCLOS provides a reference to the contiguous zone while extending the jurisdiction that the coastal States exercises to UCH located within internal waters, archipelagic waters and territorial sea. Thus, UNCLOS provides to the coastal State the right to control traffic of archaeological and historical objects. Additionally, it can determine that its removal without the State's approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in Article 33, which relates to the prevention of infringement of customs, fiscal, immigration or sanitary laws and regulations. Therefore, the removal of archaeological and historical objects located in the contiguous zone can determine the violation of domestic provisions that are not related to the protection of such objects.<sup>24</sup> Finally, it should be noted that the provision commented states the word 'removal'. This excludes, at least literally, the actions of destroying archaeological and historical objects, which is a detriment of UCH.

An interesting issue arises if a State has not claimed a contiguous zone. As State practice of UNCLOS' parties and even non-parties have shown, the contiguous zone is a functional zone that must be declared.<sup>25</sup> Then the question is whether Article 303(2) of UNCLOS is applicable on States parties to UNCLOS that has not claimed a contiguous zone. The

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<sup>22</sup> However, the protection of this UCH on the high seas still needed further development in international instruments; see note 8.

<sup>23</sup> Tullio Scovazzi, 'A contradictory and Counterproductive Regime' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage* (Martinus Nijhoff Publishers Leiden/Boston 2003) 4.

<sup>24</sup> *ibid* 5.

<sup>25</sup> Daniel Erasmus Khan, 'Article 33: Contiguous Zone' in Alexander Proelss (ed), *United Nations Convention of the Law of the Sea: A commentary* (C.H.Beck Hart Nomos 2017) 269-270.

position of the author is that it should not apply. First, because Article 303(2) of UNCLOS states the word ‘may’ regarding the attributions given to the coastal State; and, second, because it states the term ‘application’ which indicates that Article 33 is on the discretionary will of the coastal State to be applicable or not. This is also reflected in the dispositive way the provision on the maximum extent of the contiguous zone was drafted. Without prejudice of this, one may appreciate that the CPUCH has brought this issue into attention so States would be more attentive to claim a contiguous zone if they have not yet.

Article 303(3) of UNCLOS gives an overarching status to rights of identifiable owners, the law of salvage law, and other admiralty rules.<sup>26</sup> Therefore, in a conflict between UCH and the rules stated in that provision (in which may be included the law of finds), the latter prevails. For that reason, it has been argued that this provision let the application of the principle ‘first come, first served’,<sup>27</sup> which is harmful to the aims of the protection of UCH. Finally, Article 303(4) of UNCLOS states that the whole article does not prejudice other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature. According to this provision, UNCLOS recognizes the feasibility of other regimes that deal with the protection of UCH. Apparently, this provision would suggest that other regimes will not be covered by UNCLOS’ provisions; however, there is no reason to support this statement since other regimes, like CPUCH, develops the general provisions set by UNCLOS.<sup>28</sup>

#### **b) Article 149: Archaeological and historical objects**

Concerning the objects found in the Area, which is defined in Article 1(1) of UNCLOS as the seabed and ocean floor and subsoil thereof, beyond national jurisdiction, Article 149 states the following:

Article 149. - Archaeological and historical objects

All 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, particular regard being paid 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.

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<sup>26</sup> Scovazzi (n 21) 1956.

<sup>27</sup> Scovazzi (n 23) 9.

<sup>28</sup> *ibid* 10.

By providing a more specific provision that Article 303, Article 149 deals with archaeological and historical objects found in the Area. It is worthy to note that it states that the objects found shall be preserved or disposed of for the benefit of mankind as a whole; however, this benefit is not materialized in any further provisions. For this reason, it is understood that the benefits give priority to the uses having a public character, such as research or exhibition, while private uses are given little weight.<sup>29</sup> The commented provision does not develop the particular regard that should be paid 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; nor how this regard should be harmonized with the benefit of mankind as a whole. Over this approach, it must be underscored that the International Seabed Authority (hereinafter, 'ISA') has provided the obligation to notify if objects of an archaeological or historical nature are found in the area. This duty is found in the regulations on prospecting and exploration of certain minerals.<sup>30</sup>

Due to the gaps evidenced by the regime set by UNCLOS, the recognition of the importance of UCH as an integral part of the cultural heritage of humanity and a particularly important element in the history of people, and their relations with each other concerning their common heritage, it was necessary to develop further instruments of international law which would stand as a *lex specialis* for UCH,<sup>31</sup> in order to protect UCH and foster cooperation over this important matter.

#### **IV. THE CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE REGIME (CPUCH)**

##### **a) Historical background**

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<sup>29</sup> Tullio Scovazzi, 'Article 149: Archaeological and historical objects' in Alexander Proelss (ed), *United Nations Convention of the Law of the Sea: A commentary* (C.H.Beck Hart Nomos 2017) 1055.

<sup>30</sup> Examples of these regulations are found in ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex (Polymetallic Nodules Regulations); and, ISA, Regulations on Prospecting and Exploration of Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex (Polymetallic Sulphides Regulations).

<sup>31</sup> Guido Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage' (2002) 96 *The American Journal of International Law* 419, 420.

In 1956, UNESCO included underwater sites in its ‘Recommendation on International Principles Applicable to Archaeological Excavations situated inside territorial waters’.<sup>32</sup> However, the protection of this heritage on the high seas still needed further development in international instruments. In addition, in 1976, the Culture and Education Commission of the Council of Europe undertook a study of the subject of the protection of UCH; though, no text could be adopted.<sup>33</sup>

By 1991, the actions regarding the protection of this cultural heritage strengthened. Thus, by Resolution 29C/3.9 of 1991, the 29<sup>th</sup> General Conference requested the Director-General to make a report on the reinforcement of UNESCO’s action for the protection of the world cultural and natural heritage. Two years later the Executive Council asked the Director-General to consider the feasibility of an international instrument on the protection of UCH.<sup>34</sup>

In 1994, the International Law Association (hereinafter, ‘ILA’) prepared a draft convention on this matter which was sent to UNESCO. In 1995 the ILA draft was taken into consideration in the feasibility study carried out by UNESCO.<sup>35</sup> In 1996, a group of experts was convened by the Executive Board in order to discuss the main issues of the draft and report to the General Conference.<sup>36</sup> The group of experts concluded on the necessity of adopting an international instrument.<sup>37</sup> Therefore, the Director-General recommended to prepare a draft and convene a meeting of governmental experts and representatives of the competent international organizations.<sup>38</sup>

Between 1998 and 2001, a total of four meetings were organized by UNESCO in its headquarters. On 8 July 2001, the governmental experts approved the draft convention and

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<sup>32</sup> UNESCO, *The History of the 2001 Convention on the Protection of the Underwater Cultural Heritage*, 1. <<https://unesdoc.unesco.org/ark:/48223/pf0000189450>> accessed 27 January 2020.

<sup>33</sup> *ibid.*

<sup>34</sup> Roberta Garabello, ‘The Negotiation History of the Convention on the Protection of the Underwater Cultural Heritage’ in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage* (Martinus Nijhoff Publishers Leiden/Boston 2003) 89.

<sup>35</sup> UNESCO, *Feasibility Study for the Drafting of a New Instrument for the Protection of Underwater Cultural Heritage*, Paris, 23 March 1995, UNESCO Doc 146 EX/27.

<sup>36</sup> UNESCO, *Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, Paris, 4 October 1995, UNESCO Doc. 28C/39.

<sup>37</sup> Garabello (n 34) 91.

<sup>38</sup> *ibid.*

sent it to the General Conference which started its session in October 2001. The draft convention was finally approved with 94 votes in favor, 5 against and 19 abstentions, and transmitted to the plenary.

### **b) The Convention: Object, purpose and status**

The CPUCH was adopted on 2 November 2001 by vote (87 States in favor, 4 against and 15 abstentions) after a complex negotiation. It became the fourth international instrument dealing with cultural heritage adopted by UNESCO and the first one specifically dealing with UCH existing at the international level.<sup>39</sup> The CPUCH is composed of a Preamble, 35 Articles, and an Annex. The CPUCH entered into force on 2 January 2009, and as to 4 August 2020, there are 64 States parties. The main purpose of the CPUCH is to ensure and strengthen the protection of UCH.

### **c) Main provisions**

Regarding the main provisions of the CPUCH, the definition given to UCH is of utmost importance. In this regard, according to Article 1(1) of the CPUCH:

‘Underwater cultural heritage’ means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

- (i) Sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
- (ii) Vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and,
- (iii) Objects of prehistoric character.

One of the main achievements of the CPUCH is to define the cultural character of the property and objects found at sea.<sup>40</sup> The establishment of the concept UCH reflects an agreement of the international community in a matter which was mainly unilaterally oriented, and usually approached from national law. It is worthy to underline that the definition provides a non-exhaustive list of examples that may constitute UCH. Therefore,

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<sup>39</sup> *ibid* 92.

<sup>40</sup> Carducci (n 31) 422.

to consider another object not listed in Article 1(1) of the CPUCH as UCH, it must be assessed in light of the main provisions of the CPUCH.

As stated before, the CPUCH has as object and purpose to ensure and strengthen the protection of UCH (Article 2(1)). Concerning the general principles which would lead the States to accomplish the object and purpose, the following provisions must be underscored: States parties shall cooperate in the protection of UCH (Article 2(2)) and persevere it for the benefit of humanity in conformity with the provisions of the CPUCH (Article 2(3)). In addition, the CPUCH obliges the State parties to take, individually or jointly, all appropriate measures in conformity with it and with international law to protect UCH, using for this purpose the best practicable means at their disposal and in accordance with their capabilities (Article 2(4)). It must be underscored the obligation of considering the preservation *in situ* of UCH as the first option before allowing or engaging in any activities directed at this heritage (Article 2(5)). Also, the recovered UCH shall be deposited, conserved, and managed in a manner that ensures its long-term preservation. Finally, the prohibition of commercial exploitation of UCH (Article 2(7)) and the provision which states that no act or activity undertaken based on the CPUCH shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction (Article 2(11)), must be highlighted due to its relation with gaps left in the UNCLOS regime.

Another important article of the CPUCH is Article 3 which deals with the relationship between the CPUCH and UNCLOS. The CPUCH prescribes that nothing in it shall prejudice the rights, jurisdiction, and duties of States under international law, including UNCLOS. In addition, it states that the CPUCH shall be interpreted and applied in the context of and in a manner consistent with international law, including UNCLOS. This is of utmost importance since it guarantees that a State non-party to UNCLOS may become a State party to the CPUCH, like is the case of the Peruvian State.

Article 4 develops the relationship to the law of salvage and law of finds. By clarifying the provision stated in Article 303(3) of UNCLOS, the CPUCH prescribes that any activity related to UCH shall not be subject to the law of salvage or law of finds, unless it, jointly, is authorized by the competent authorities, is in full conformity with the CPUCH and ensures that any recovery of UCH achieves its maximum protection. The practical effect

of the CPUCH regime is the prevention of all undesirable effects of the application of the law and salvage and finds, as stated in UNCLOS. Therefore, the freedom of ‘fishing’ for archaeological and historical objects is banned.<sup>41</sup>

Concerning Article 6, the CPUCH seeks to strengthen the cooperation by means of bilateral, regional, or other multilateral agreements. In this regard, States are encouraged to enter into agreements, or develop the existing agreements, for the preservation of UCH. These agreements are deemed to contain rules and regulations in conformity with the CPUCH and which would ensure better protection of UCH. Additionally, the parties of such agreements can invite States with a verifiable link, especially cultural, historical or archaeological link to the UCH concerned, to join those agreements.

From Article 7 to 12, the CPUCH regulates the UCH regarding the maritime zone in which they are found. As stated before, this is one of the gaps found in the UNCLOS regime. Article 7 prescribes that State parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at UCH in their internal waters, archipelagic waters, and territorial sea. By doing so, the State shall require the application of the Rules contained in the Annex of the CPUCH. Regarding the contiguous zone, Article 8 mandates that, without prejudice of Articles 9 and 10 (concerning the EEZ and the continental shelf), and in accordance with Article 303(2) of UNCLOS, States parties may regulate and authorize activities directed at UCH within their contiguous zone. In doing so, they shall require that the Rules in the Annex be applied.

During the negotiation of the CPUCH, the thorny question was whether it was necessary to extend the jurisdiction of the coastal State to the EEZ and the continental shelf in order to ensure the protection of UCH since it would alter the balance achieved by UNCLOS.<sup>42</sup> It is important to notice that even though the regimes of the EEZ and the continental shelf are different, the two institutions are linked together in modern law.<sup>43</sup> This is why the approach over those institutions had to have a similar approach.<sup>44</sup> In the end, the

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<sup>41</sup> Scovazzi (n 23) 11.

<sup>42</sup> *ibid.*

<sup>43</sup> *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p.3, para. 33.

<sup>44</sup> Here the author is of the opinion that the omission of claiming an EEZ arises the same problem as pointed out with the lack of a claim of contiguous zone. However, this issue turns out to be more critical since the

negotiation process came up with a solution that established a regime of three steps: reporting, consulting, and taking urgent measures. In this regard, articles 9 and 10 develop this regime concerning the protection, reporting, and notification of the UCH in the EEZ and on the continental shelf.

By reaffirming the general principle stated in UNCLOS (Article 303(1)), the CPUCH prescribes that all States parties have a responsibility to protect UCH in the EEZ and on the continental shelf (Article 9(1)). Concerning the reporting, Article 9(1)(a) determines that a State party shall require its nationals or vessels flying its flag who discovers or intend to engage in activities directed to UCH, to report such discoveries or activity. On the other hand, when these activities are undertaken in the EEZ or continental shelf of other State party, States parties shall require its nationals or the master of the vessel to report such discovery or activity to them and to that other State party or, alternatively, to report it and ensure rapid and effective transmission of such reports to all other States parties (Article 9(2)(b)). Furthermore, the State party shall notify the Director-General of UNESCO of such discoveries or activities (Article 9(3)); and he/she will make available that information to all States parties (Article 9(4)). Finally, a State party may declare to the State party in whose EEZ or continental shelf the UCH is located, its interest in being consulted on how to ensure the effective protection of the UCH. Such declaration shall be based on a verifiable link, especially a cultural, historical. or archaeological link to the UCH concerned (Article 9(5)).

The CPUCH establishes that no authorization shall be granted for any activity directed at UCH located in those maritime zones except in conformity with the provisions of Article 10. Likewise, a State party in whose EEZ or on whose continental shelf UCH is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including UNCLOS (Article 10(2)). Furthermore, where there is a discovery of UCH or it is intended that activity shall be directed at UCH in a State's party's EEZ or on its continental shelf, the State party shall consult all other States parties, which have declared

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existence of an EEZ is essential for the application of the provisions of the CPUCH. Therefore, the State needs to prioritize the establishment of an EEZ if they have not claimed one yet.



its interest under Article 9(5), on how best to protect the UCH (Article 10(3)(a)). In doing so, that State party will be the ‘coordinating State’ unless it renounces to that duty. In that situation, the States parties that have declared its interest will select a ‘coordinating State’ (Article 10(3)(b)). The ‘coordinating State’ will be in charge of implementing the measures of protection of the UCH, issue authorizations, and conduct any necessary research on the UCH (Article 10(5)). In doing these activities, the ‘coordinating State’ will act on behalf of the State parties as a whole and not in its own interests. Finally, if necessary, even prior consultations, the ‘coordinating State’ can take measures to prevent any immediate danger to the UCH (Article 10(4)).

Concerning the UCH found in the Area, the CPUCH establishes a similar regime (reporting, consulting, and taking urgent measures) as the one of the EEZ and the continental shelf, but conferring special duties to the Director-General of UNESCO instead of the coastal State. In this regard, State parties shall require its nationals or the master of the vessel which is flying its flag if they discover or intend to engage in activities directed at UCH in the Area (Article 11(1)). State parties shall notify the Director-General of UNESCO and the Secretary-General of the ISA of such discoveries or activities (Article 11(3)). Likewise, State parties may declare to the Director-General the interest in being consulted on how to ensure the effective protection of that UCH. Such declaration shall be based on a verifiable link to the UCH concerned and particular regard should be paid to the preferential rights of States of cultural, historical, or archaeological origin (Article 11(4)).

The Director-General shall invite the interested States to select a ‘coordinating State’ and consult on how best to protect the UCH, this consultation includes the participation of the ISA (Article 12(2)). The ‘coordinating State’ shall implement the measures of protection (Article 12(4)(a)), issue authorizations for such agreed measures (Article 12(4)(b)), and conduct any necessary preliminary research on the UCH (Article 12(5)). Finally, all State parties may take all practicable measures, if necessary prior consultations, to prevent any immediate danger to the UCH (Article 12(3)).

Among other important provisions, the CPUCH states that warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, shall not be obliged to report discoveries of UCH under Articles 9 to 12, but they are

encouraged to comply as far as is reasonable and practicable with those provisions (Article 13). The State parties shall take measures to prevent the entry to their territory of UCH recovered by defaulting the CPUCH (Article 14); to prohibit the use of their territory or facilities to undertake UCH activities which are not in conformity with the CPUCH (Article 15), and to ensure that its nationals and vessels flying its flag do not engage in activities directed at UCH in a manner not in conformity with the CPUCH (Article 16). State parties also have to impose sanctions for violations of the measures taken in application of the CPUCH (Article 17) and seizure the UCH recovered in a manner not in conformity with the CPUCH (Article 18).

Following the spirit of Article 6, Article 19 of the CPUCH prescribes the duty of State parties to cooperate and assist each other in the protection and management of UCH, including where practicable, collaborating in investigation, excavation, documentation, conservation study and presentation of that UCH. Furthermore, in conformity with the CPUCH, State parties undertake to share information between each other concerning UCH, including the discovery, location, and recovery.

According to Article 22, State parties shall establish competent authorities or reinforce the existing one where appropriate in order to ensure the proper implementations of the CPUCH by providing for the establishment, maintenance and updating of an inventory of UCH, the effective protection, conservation, presentation and management of UCH, as well as research and education. State parties shall communicate to the Director-General of UNESCO the names and addresses of their competent authorities relating to UCH.

Other important provisions of CPUCH are enshrined in Article 25, peaceful settlement of disputes; Article 28, declaration as to inland waters; and, Article 30, reservations. The importance of the first two mentioned articles lies on the need to express the position of the State regarding the means of dispute settlement procedures, which includes the options provided by UNCLOS, even though the State is not a party to it; and, the application of the Rules of the Annex to inland water not of a maritime character. Finally, the CPUCH forbids the formulation of reservations with the exception of Article 29 (limitation of geographical scope). This is of utmost importance since the State has to be aware of the full commitment in applying the whole regime of the CPUCH.

The Annex of the CPUCH is the best-known and most widely applied part of the treaty.<sup>45</sup> It provides rules concerning activities directed at UCH. In this regard, the Annex provides, *inter alia*, regulations as to how a project envisaging and intervention on UCH is to be designed; guidelines regarding the competence and the qualifications required for persons undertaking activities; and methodologies on conservation and site management.<sup>46</sup>

#### **d) Benefits of Being a Party to the CPUCH**

Regarding the main provisions commented above, the following benefits of the CPUCH must be highlighted. By filling the gaps and establishing the mechanisms in which the State parties shall protect the UCH, the CPUCH has developed the general rules provided by the UNCLOS regime on UCH. Thus, the CPUCH provides legal protection for UCH wherever located,<sup>47</sup> while establishing a common approach on how to protect UCH. In addition, the CPUCH guarantees that a State non-party to UNCLOS may become a party to it. In this regard and as seen before, Article 3 of the CPUCH prescribes that nothing in the treaty shall prejudice the rights, jurisdiction, and duties of States under international law, including UNCLOS. This is of utmost importance due to the fact that Peru is not a party to the latter.

Moreover, the CPUCH encourages a broad scope of cooperation which includes States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties, and the public at large is essential for the protection of UCH.<sup>48</sup> Furthermore, State parties are encouraged to enter into agreements with the purpose of preserving the UCH and exchanging information.<sup>49</sup> The promotion of cooperation is also reflected in the obligations of assistance in the protection and management of UCH, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of a determined

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<sup>45</sup> UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions*, 7. [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UHC\\_FAQ\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UHC_FAQ_en.pdf) accessed 3 February 2020.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid* 4; see note 8.

<sup>48</sup> Preamble of the CPUCH.

<sup>49</sup> Article 6 of the CPUCH.

heritage;<sup>50</sup> the exchange of information regarding UCH;<sup>51</sup> the training in underwater archaeology<sup>52</sup> and effective exchange or use of archaeologist and other relevant professionals;<sup>53</sup> and, the enforcement of sanctions for contravention of the CPUCH.<sup>54</sup> Therefore, by providing strong cooperation, the CPUCH fosters underwater archaeology, helps develop tourism and enables capacity building, and the exchange of knowledge.<sup>55</sup>

Another important benefit of the CPUCH is the protection of the interests of State parties with a verifiable link, especially a cultural, historical, or archaeological link to the UCH concerned. This is reflected in the provision that encourages State parties to enter into agreements to protect UCH which may include the invitations to States with this verifiable link.<sup>56</sup> In addition, the CPUCH gives the right to State parties to declare its interests in being consulted on how to ensure the effective protection of that UCH, whether it is located in the EEZ, continental shelf or the Area, provided that such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the UCH concerned.<sup>57</sup> Concerning archipelagic waters and territorial sea, States parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State party to the CPUCH and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.<sup>58</sup>

The CPUCH guarantees uniformity and complementarity with other international instruments on the protection of cultural heritage, for instance, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 and the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972.

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<sup>50</sup> Article 19.1 of the CPUCH.

<sup>51</sup> Article 19.2 of the CPUCH.

<sup>52</sup> Article 21 of the CPUCH.

<sup>53</sup> Rule 8 of the Annex of the CPUCH.

<sup>54</sup> Article 17.3 of the CPUCH.

<sup>55</sup> UNESCO, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 15. <[http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/GB-2001CONVENTION-INFOKIT-2018\\_02.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/GB-2001CONVENTION-INFOKIT-2018_02.pdf)> accessed 16 June 2020.

<sup>56</sup> Article 6.2 of the CPUCH.

<sup>57</sup> Article 9.5 of the CPUCH.

<sup>58</sup> Article 7 of the CPUCH.

Therefore, States are provided with international instruments that seek to cover all aspects of the protection of cultural heritage.

Becoming a State party to the CPUCH gives the State access to the meetings of State parties. In March 2009, during the first session of the Meeting of States parties to the CPUCH, the Scientific and Technical Advisory Body (hereinafter, 'STAB') to the Meeting of States parties to the CPUCH was established.<sup>59</sup> Mainly, the STAB assists State parties in questions of a scientific and technical nature. Therefore, the CPUCH provides not only the assistance of the STAB but also the possibility to nominate experts to become one of its twelve members.

Finally, the CPUCH provides technical rules on how to intervene with and research of UCH, which constitutes an innovative solution for the way activities on UCH shall be taken. These Rules include regulations, *inter alia*, as to how a project is to be designed; guidelines regarding the competence and the qualifications required for persons undertaking activities; and best practices of underwater cultural heritage conservation and site management.<sup>60</sup> Through the years, the Rules have become a reference document in the field of underwater archaeology and activities related to UCH, setting out regulations for responsible management of such heritage. They constitute one of the most valuable achievements of the 2001 Convention.<sup>61</sup>

For these reasons, the CPUCH is a treaty that provides State parties with tools in order to protect the UCH and its interests regarding these cultural objects found at sea. In the next paragraphs, the protection of the UCH in Peru will be discussed in order to address the need to accede the CPUCH and incorporate it into the Peruvian national law for and effective implementation. By doing so, the challenges and advantages of incorporating and implementing the CPUCH will be assessed, considering the Peruvian position towards UNCLOS.

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<sup>59</sup> UNESCO, *First Session of the Meeting of States parties to the Convention on the Protection of the Underwater Cultural Heritage*, 26/27 March 2009, Paris, UNESCO Headquarters, Room IV, Resolution 5/MSP 1, 2. <<https://unesdoc.unesco.org/ark:/48223/pf0000182123>> accessed 16 June 2020.

<sup>60</sup> UNESCO (n 55) 20.

<sup>61</sup> *ibid.*

## V. PERU AND THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

### a) Importance of UCH in Peru

Since the end of the last ice age until today, the oceans have been considered as the great mean by which men and women were able to transport people and goods throughout history. The Pacific Ocean is not excepted from this fact. More than 500 years after being sighted and claimed by the Spanish Crown as the South Sea, by Vasco Núñez de Balboa on 25 September 1513, the Pacific Ocean on the American coasts is currently the repository of thousands of years of pre-Hispanic sailing traditions, of colonial history, of hundreds of years of international navigation, as well as evidence of the populations and cultures that preceded us.<sup>62</sup>

In this context, the Republic of Peru is a maritime nation located at the South Pacific basin of the Pacific Ocean with 3,080 kilometers of coast, internal waters, and a maritime domain which represents 65 percent of the State compared to its continental territory.<sup>63</sup> Peru's adjacent sea, rivers, lakes and lagoons have witnessed some of the richest and most fruitful civilization processes in the world.<sup>64</sup> Therefore, the cultural heritage plays a transcendental role since it encompasses all the tangible and intangible assets that for its historical and archaeological value allows the Peruvian to keep its identity.<sup>65</sup> Peru has a very vast and diverse cultural heritage. Thus, UCH is of utmost importance for the Peruvian history since it enables the State to build a better future, while understanding and protecting the past.

The trade routes that pass in front of the Peruvian coast have witnessed a huge amount of maritime activity which today composed the unexplored UCH that lies in the Peruvian internal waters and maritime domain. There is a significant number of shipwrecks, from colonial times to republican times; in addition, shipwrecks are also linked to the 'golden

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<sup>62</sup> Carlos Ausejo, 'El Océano Pacífico y su Patrimonio Cultural Subacuático: El caso de Perú' (2013) Revista de Marina (Valparaíso, Chile) 55, 56.

<sup>63</sup> Ministry of Culture of Peru, '¿Qué es el patrimonio cultural?' 10. <<https://www.cultura.gob.pe/sites/default/files/paginternas/tablaarchivos/04/1manualqueespatriimonio.pdf>> accessed 26 January 2020.

<sup>64</sup> UNESCO, 'Perú. El Patrimonio Cultural Subacuático' in Cultura & Desarrollo (No 13, 2015) 42. [http://www.lacult.unesco.org/lacult\\_en/docc/CyD\\_13\\_en.pdf](http://www.lacult.unesco.org/lacult_en/docc/CyD_13_en.pdf) Accessed 16 June 2020.

<sup>65</sup> Ministry of Culture of Peru (n 63) 13-15.

age' of guano extraction around the *guaneras* islands and linked to the independence of Peru or the Pacific War.<sup>66</sup> Indeed, Lima, as the Spanish colonial capital, and the port of Callao, due to its strategic location as a hub for maritime traffic on the South American coasts, played an important role not only in colonial but also republican times.<sup>67</sup>

In this respect, the Peruvian coastline contains evidence of shipwrecks of different types of vessels corresponding to different nationalities. The development and importance of the port of Callao, from colonial to republican times has left its marks on the seabed near the coast. In this sense, the maritime areas near Callao contain a large number of cultural materials, such as anchors, bottles, and other loose materials that are important for the reconstruction of the Peruvian history and are also part of its UCH.<sup>68</sup>

The UCH of Peru is also related to coastal and maritime expressions and activities, comprising oral traditions and ancestral knowledge corresponding to intangible heritage inserted in a specific territory, forming in itself a cultural landscape and favoring the development of new ecosystems.<sup>69</sup> Likewise, Peru is distinguished for the great diversity that characterizes all areas of its existence, and where the most varied enclaves of natural life coexist. For this reason, the Peruvian coast has large archaeological sites located near the sea that, despite their fragility, have managed to survive through time, and in the same way the technologies associated with their use have been integrated into the archaeological record, historical and ethnographic.<sup>70</sup>

Although the quantity of UCH in Peruvian waters is vast, its exploration is just beginning.<sup>71</sup> In this respect, maritime and underwater archaeology in Peru started taking important steps in the last years. By 2006 the existing experiences were carried out by amateurs, treasure hunters, or enthusiastic divers. Various findings have been made under this modality, for

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<sup>66</sup> Ausejo (n 62) 58.

<sup>67</sup> *ibid* 56.

<sup>68</sup> *ibid* 58.

<sup>69</sup> UNESCO. For instance, the archaeological site of Pachacamac is located 13 kilometers from the city of Lima. It has an area greater than 450 hectares only in its monumental sector and a cultural continuity that begins around 1800 BC and prevails to these days, constituting the most important coastal sanctuary in pre-Hispanic Peru. In front of its coasts, the existence of an island and an islet is the material representation of two main deities of Inca pantheon, 'Cavillaca and his daughter'. UNESCO (n 64) 43.

<sup>70</sup> Ausejo (n 62) 56.

<sup>71</sup> National Policy of Culture (n 11) 78.

instance, the schooner *Covadonga* in Chancay, a vessel involved in the Spanish American War and the Pacific War; and, the vessel *San Martin* in front of Lima city; a vessel probably from the 17<sup>th</sup> Century near the Port of Matarani.<sup>72</sup>

In 2006, the first formal underwater archaeology project was carried out in the ‘Paraiso cove – San Lorenzo island’, with the objective to locate and identify a floating dock sunk in the area on 9 October 1860. This project was carried out by archaeologists from the former National Institute of Culture (hereinafter, ‘NIC’), supported by a group of enthusiastic divers in the protection of UCH. In 2007, the first underwater archaeological assessment project was carried out, where the ‘Muelle Sur’ port concession is currently located. Likewise, in 2012 archaeological assessment and monitoring projects were carried out in the ‘APM Terminals’ in Callao. Other similar projects are expected to be carried out in the expansion and renovation of port infrastructure on our coasts.<sup>73</sup>

In 2013, a research project name ‘Epic Battles on the South Sea: Nautical Archaeology on the Peruvian Coast’ directed by Dr. Jorge Ortiz Sotelo located the remains of two shipwrecks, the galleon *Santa Ana* and the vessel *San Francisco* of the southern Navy, on the shores of ‘Cerro Azul’ (south of Lima). Currently, there are some research projects that are being developed for Peruvian UCH, including the continuation of the research of the aforementioned vessels.<sup>74</sup>

In September 2013, the first works of the national inventory of UCH assets began. This tool will maximize the protection of UCH by ensuring its identification, registration, diagnosis, declaration, intangibility, and monitoring procedures.<sup>75</sup> The importance of the inventory lies in the detailed knowledge of the composition, locations, and state of these UCH with the aim of designing and executing management, conservation, and management plans for their protection. By 2017, the Ministry of Culture had established a procedure by

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<sup>72</sup> Ausejo (n 62) 61.

<sup>73</sup> *ibid* 62.

<sup>74</sup> *ibid*; in 2010 it was established the ‘Centro Peruano de Arqueología Marítima y Subacuática’, an institution conformed by archaeologist specialized in maritime and underwater affairs.

<sup>75</sup> UNESCO (n 64) 43.



which UCH has to be assessed and identified in order to build the Peruvian inventory of UCH.<sup>76</sup>

The first steps that Peru has taken in the maritime and underwater archaeology, along with the protection of UCH are not excepted from challenges. The main problems regarding the protection of UCH in Peru are those related to treasure hunters, mainly because of their questionable working methodologies and their policies for trading precious metals that are found. Likewise, the occasional ‘junk’ of shipwrecks is usually traded by fishermen and artisan divers who recover materials that usually have a good sale price; generally, in times when fishing is not particularly profitable.

Despite the current work and initiatives, another major problem is the lack of a UCH inventory. The lack of an inventory makes it difficult to efficiently allocate resources and efforts for their protection, research, dissemination, and enhancement. This involves the problem of current regulations and their application, and the lack of efficient cooperation between Government authorities. Finally, another issue is the implementation of the professionals’ capacities. The number of specialists on this subject is very few. Therefore, the possibilities of effective research are low.

Recently, the Peruvian Government has started to prioritize its concerns on the issues of its UCH. In December 2019, the Peruvian Government approved the National Maritime Policy 2019-2030 in order to define the priority objectives of the State in its internal waters and maritime domain.<sup>77</sup> Guideline 5(7) of priority objective No 5 ‘Strengthen security in the maritime field’ of the National Maritime Policy prescribes that the State has the task to protect the UCH that is located in the national internal waters and maritime domain.

In addition, in July 2020, the Peruvian Government approved the National Cultural Policy to 2030 which underscores the priority to take action for the effective protection of the UCH. These actions include the formulation of specific regulations for the management of

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<sup>76</sup> Ministry of Culture, Programa Presupuestas ‘Puesta en valor y en uso social del patrimonio cultural’, 86 and 116. <<https://www.cultura.gob.pe/sites/default/files/pagbasica/tablaarchivos/02/anexo2pp0132.pdf>> accessed 15 June 2020.

<sup>77</sup> Supreme Decree No 012-2019-DE of 20 December 2019.

UCH, the elaboration of database regarding the precise ubication of UCH and its status of conservation, formulation of protocols and guides for the correct intervention of UCH, and dissemination and awareness of the importance of UCH.<sup>78</sup>

A suitable way to enhance the protection of UCH is to make a meticulous assessment of the current national law regarding UCH and start suggesting ways to strengthen that regime. One way is to adapt the current regime to the CPUCH as it is going to be recommended in this work.

### **b) National law concerning UCH**

The overall legal regime of cultural heritage in Peru derives from Article 21 of the Constitution. In this regard, it states that archaeological sites and remains, buildings, monuments, places, bibliographic and archive documents, artistic objects and testimonies of historical value, expressly declared cultural property, and provisionally those that are presumed as such, are the cultural heritage of the Nation, regardless of its status as private or public property. In addition, it prescribes that cultural heritage is protected by the State. It is from this constitutional provision that the specific legal regime for UCH is built. In this respect, the following legal instruments, which will be discussed in the beneath paragraphs, form part of the national law regime applicable to UCH in the Peruvian internal waters and maritime domain:<sup>79</sup>

- a) Law No 28296, General Law of Cultural Heritage of the Nation (hereinafter, 'general law');<sup>80</sup>
- b) Supreme Decree No 011-2006-ED, Regulations of the General Law No 28296 (hereinafter, 'regulations of the general law');<sup>81</sup>
- c) Supreme Decree No 003-2014-MC, Regulations of Archaeological Interventions (hereinafter, 'archaeological intervention regulations');<sup>82</sup>

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<sup>78</sup> National Policy of Culture (n 11) 78.

<sup>79</sup> All the legal instruments mentioned include its amendments.

<sup>80</sup> Adopted 22 July 2004.

<sup>81</sup> Adopted 31 May 2006.

<sup>82</sup> Adopted 03 October 2014.

- d) Supreme Decree No 005-2019-MC, Regulations of the Sanctioning Administrative Procedure in charge of the Ministry of Culture (hereinafter, ‘administrative sanction regulations’);<sup>83</sup>
- e) Legislative Decree No 635, Penal Code.<sup>84</sup>

The legal framework regarding UCH in Peru is within the scope of the general law. The objective of this general law is to establish the national policy of defense, protection, promotion, property, legal regime, and destiny of the goods that are the cultural heritage of the Nation.<sup>85</sup> According to Article II of the Preliminary Title of the general law, the cultural heritage of the Nation is:

Any manifestation of human endeavor – material or immaterial – that due to its importance, value and paleontological, archaeological, architectural, historical, artistic, military, social, anthropological, traditional, religious, ethnological, scientific, technological or intellectual meaning, is expressly declared as such or on which there is a legal presumption to be so. Those assets have the condition of public or private property with the limitations established by this law.<sup>86</sup>

In addition, Article III of the Preliminary Title of the general law prescribes the legal presumption that pre-Hispanic, viceregal and republican time, regardless of their status as public or private property, that have the importance, value and meaning referred to in Article II and/or that are included in the treaties and conventions on the matter to which Peru is a party, are the cultural heritage of the Nation. Finally, it is important to underscore that the general law prescribes the protection regime of cultural heritage and points out the duty of the State and citizens to apply this particular regime.<sup>87</sup> In this general regime, the general law classifies the UCH as material goods.<sup>88</sup>

The specific rules regarding UCH are contained in the regulations of the general law. In this regard, Chapter 7 provides six articles (71 to 76) describing the specific regulations of

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<sup>83</sup> Adopted 24 April 2019.

<sup>84</sup> Adopted 03 April 1991.

<sup>85</sup> Article I of the Preliminary Title of the General Law.

<sup>86</sup> Non-official translation.

<sup>87</sup> Article V of the Preliminary Title of the General Law.

<sup>88</sup> Article 1 of the General Law.

UCH in the Peruvian internal waters and maritime domain. Concerning the definition of UCH in Peru, the regulations of the general law state the following:

Article 71. - Underwater Cultural Heritage

Underwater cultural heritage is understood as all those goods that have the importance, value and meaning referred to in articles II and III of the Preliminary Title of the Law, that is submerged under water, be it in the Peruvian territorial sea, lacustrine or riparian spaces, and other aquatic spaces of the national territory, partially or totally, periodically or continuously for at least 50 years, among other:

1. Sites, structures, buildings, objects and human remains, along with their archaeological and historical context;
2. Ships, aircraft, other means of transport or any part thereof, their cargo or other content, together with their archaeological and historical context; and,
3. Paleontological objects.

The cables, pipes and facilities located at the bottom of the sea and still in use will not be considered underwater cultural heritage.<sup>89</sup>

As one may appreciate, in its structure of drafting, the above definition reflects some similarities with the definition of UCH in Article 1(1)(a) of the CPUCH; however, important differences arise. In this respect, the Peruvian regulations stipulate 50 years of periodically or continuously under water as a condition to consider the object as UCH. It should be noted that the 100-years approach followed by the CPUCH is supported by a trend identified in State practice.<sup>90</sup> In addition, due to the CPUCH's prohibition to formulate reservations, except for Article 29, the time period stipulated in the Peruvian regulations of the general law should be amended.

The quoted article also refers to the geographical water zones in which the UCH must be located. Thus, it refers to the 'Peruvian territorial sea, lacustrine or riparian spaces, and

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<sup>89</sup> Non-official translation.

<sup>90</sup> Craig Forrest, 'Defining 'underwater cultural heritage'' (2002) 31 *The International Journal of Nautical Archaeology* 3, 7; it should be noted, however, that some States not a party to the CPUCH prefers to adjust this period of time, Martijn Manders, *Management of Underwater Cultural Heritage* (UNESCO 2012) 3 <<http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNIT3.pdf>> accessed 5 August 2020.

other aquatic spaces of the national territory'. Concerning lacustrine or riparian spaces and other aquatic spaces of the national territory, the regulations reflect consistency with the option enshrined in Article 28 of the CPUCH allowing the State to apply the Rules of the Annex to inland waters not of a maritime character. However, it is of utmost importance to clarify the meaning of the territorial sea.

As mentioned before, although it has been argued that Peru claims a 200 nautical miles territorial sea, the term 'maritime domain' of Article 54 of the Peruvian Constitution is flexible enough to match the current maritime zones as enshrined in UNCLOS and, as pointed out by ICJ in 2014, is applied in a consistent manner with it. Therefore, it is the position of the author that the term 'territorial sea' as used by the Supreme Decree is understood as the institution of the territorial sea of the contemporary law of the sea. The above clarification is of utmost importance due to the identification of a need for regulation regarding the whole Peruvian maritime domain. This is an advantage provided by CPUCH.

The following provisions of the regulations of the general law further develop the regime of UCH in Peru by involving the functions of the competent authority. For this, it is worthy to point out that the regulations under assessment determined that the competent authority was the NIC. However, the duties of the NIC have been replaced by the General Directorate of Underwater Cultural Heritage of the Ministry of Culture.<sup>91</sup>

Article 72 of the regulations of the general law prescribes that UCH is of exclusive property of the State. Thus, its extraction, removal, and intervention not authorized by the competent authority are administratively punishable according to the rules on the matter, without prejudice to the relevant criminal liability. Therefore, it is possible to distinguish among the sanctions the ones of administrative nature and penal sanctions.

Over the first one, it is relevant to mention the administrative sanction regulations. In this regard, the types of applicable administrative sanctions are fines, pecuniary sanction; seizure, temporary deprivation of possession of the movable cultural property; forfeiture, total loss of property of the movable cultural property in favor of the State; or, demolition,

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<sup>91</sup> See Article 51 of the Supreme Decree No 005-2013-MC of 19 June 2013.

partial or total destruction of work carried out in buildings that are part of or linked to UCH of the nation.<sup>92</sup> In accordance with the aforementioned, Article 75 of the regulations of the general law includes the confiscation of instruments in case of unauthorized activity regarding UCH.

Regarding penal sanctions, the Penal Code prescribes that anyone who destroys, alters, extracts from the State or trade goods of the pre-Hispanic cultural heritage or does not return them in accordance with the authorization granted to him/her, will be punished with a prison term of not less than three nor more than eight years and with one hundred and eighty to three hundred sixty-five days fine. In the event that the agent is a public official or servant with the custody of the property, the prison will be not less than five nor more than ten years.<sup>93</sup>

According to Article 73 of the regulations of the general law, any modality of a research project related to UCH must have prior authorization from the competent authority for its execution, without exception. Furthermore, Article 74 states that any person who when diving in any aquatic space of the national territory discovers UCH has an obligation to report this fact to the competent authority, indicating the necessary data for its location. In this respect, the archaeological intervention regulations, require a ‘Monitoring Plan in Underwater Environment’ in order to give authorization for carrying out activities directed to UCH.<sup>94</sup> This requisite includes the issuing of a final report that has to be presented to the competent authority. In the case of discoveries, these regulations encourage conservation *in situ*.<sup>95</sup>

Finally, Article 76 of the regulations of the general law stipulates that the Navy of Peru must collaborate with the competent authority in the defense and protection of UCH, and must inform the competent authority of the wrecks of those who have a record and any new findings made. This article reflects the importance of cooperation of Government institutions as well as helps to identify the areas where Peru can request for cooperation

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<sup>92</sup> Article 17 of the Supreme Decree No 005-2019-MC og24 April 2019.

<sup>93</sup> Article 228 of the Penal Code.

<sup>94</sup> Article 60 of the Supreme Decree No 003-2014-MC.

<sup>95</sup> Article 61(c) of the Supreme Decree No 003-2014-MC.

when becoming a State party to the CPUCH. Therefore, as will be proposed by the Supreme Decree, implementation of the CPUCH, which will be led by the General Directorate of UCH of the Ministry of Culture, will also require the participation of other Government institutions.

### **c) Accession to the CPUCH: The procedure**

As stated before, the Republic of Peru is a civil law country that has a Constitution as the highest hierarchy norm.<sup>96</sup> Peru follows a monism approach that postulates that national and international law form on single legal order, or at least a number of interlocking orders that should be presumed to be coherent and consistent.<sup>97</sup> This position is reflected in Article 55 of the Constitution which prescribes that ‘the treaties concluded by the State and in force are part of the national law’.<sup>98</sup> According to the Constitution, the President leads the foreign affairs policy and international relations; he/she also concludes and ratifies treaties. Without prejudice of this, the Constitution provides special rules for the approval of treaties. Therefore, it is important to review how the Government approves international treaties before explaining the procedure of accession.

According to the Constitution, there are three mechanisms by which the Government approves international treaties depending on their subject matter; one in Article 56 and two in Article 57. Article 56 of the Constitution states that treaties must be approved by the Parliament before their ratification<sup>99</sup> by the President provided that they deal with human rights; sovereignty, domain or integrity of the State; national defense; financial obligations of the State; the modification or deletion of taxes; the modification or repeal of law hierarchy norms; or, the need to execute legislative measures.

Article 57 of the Constitution provides that the President can conclude or ratify treaties or adhere to these without the requirement of prior approval by the Parliament in matters not covered in the preceding article. In all those cases, he/she has to inform the Parliament after

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<sup>96</sup> See note 12.

<sup>97</sup> James Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> Edition, Oxford University Press 2012) 280. (e-version)

<sup>98</sup> See Gattás Abugattás, ‘Sistemas de Incorporación Monista y Dualista: ¿Tema resuelto o asignatura pendiente?’ (2006) XII, No 23 *Agenda Internacional* (Instituto de Estudios Internacionales PUCP) 439.

<sup>99</sup> According to national law, ‘ratification’ is an internal act by which the President approves the treaty.

the ratification or accession. Finally, the same Article states that when the treaty affects constitutional provisions, it must be approved by the same procedure that governs the reform of the Constitution,<sup>100</sup> before being ratified or adhered by the President. It is important to point out that these procedures include the approval of any declaration or reservation that the State shall incorporate in its instrument of consent to be bound.

For Peru to become a State party to any international treaty by accession, the following procedure must be applied: the competent authority of the Government must express its political will and sustain in a written document the feasibility of implementing the treaty, along with its main advantages. This document shall be sent to the Ministry of Foreign Affairs (hereinafter, 'MFA') by a formal request in order to start internal procedures for the accession. MFA determines the mechanism of approval (Article 56 or 57 of the Constitution) and applied it; either send it to the Parliament<sup>101</sup> or the President for ratification.<sup>102</sup> After approval, MFA will elaborate an instrument of accession and ensure its deposit on the depositary of the treaty. Then, MFA ensures that the treaty, along with its date of entry into force is published in official gazette 'El Peruano'. Finally, the competent authority of the Government has to implement the necessary national law for the efficient application of the treaty.

The competent authority for the accession of the CPUCH is the Ministry of Culture through the General Directorate of Underwater Cultural Heritage. Thus, it is the task of the Ministry of Culture to request to the MFA the beginning of the accession procedure to the CPUCH. Concerning the mechanism of approval, is the position of the author that, despite the position of the Peruvian State regarding the application of the maritime domain, the fact that the CPUCH develops its regime applying the maritime zones of UNCLOS involves the adjustment of the interpretation of the term maritime domain, this time, by national law. Therefore, the approval of the CPUCH should follow the procedure of Article 56 since it deals within the scope of sovereignty, domain, or integrity of the State matters. The

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<sup>100</sup> According to Article 206 of the Constitution, all constitutional reform must be approved by the Parliament with the absolute majority of the legal number of its members, and ratified by referendum. In addition, the referendum may be omitted when the agreement of the Parliament is obtained in two successive ordinary legislatures with a favorable vote, in each case, more than two-thirds of the legal number of congressmen.

<sup>101</sup> The final outcome of approval is a Legislative Resolution. Then, the file shall go to the President for ratification.

<sup>102</sup> The final outcome of approval is the Supreme Decree of ratification.



author suggests that the Parliament should also discuss the inclusion of a declaration that is to be deposited along with the instrument of accession.

The declaration must include the Peruvian position towards UNCLOS, as well as the State's position where the CPUCH requires an express declaration of it; for instance, the manner in which reports of discoveries or activities of UCH in the EEZ or continental shelf will be transmitted (Article 9(2) of CPUCH), the means for dispute settlement (Article 25(5) of CPUCH), or the decision of applying the Annex of the CPUCH to inland waters not of a maritime character (Article 28 of CPUCH).

Concerning the Peruvian position towards UNCLOS, the author suggests that the declaration states that even though Peru is not a party to UNCLOS, the rules of that treaty are applicable in so far as they form part of customary international law or reflect general principles of law. This will be reflected in the implementing norm which will use the term maritime domain of the Constitution in a consistent way with the maritime zones established by international law of the sea, and, when necessary, will specify the breadth of the maritime zone where the CPUCH prescribes specific provisions, such as in the case of the EEZ and the continental shelf.

Regarding the mentioned articles of the CPUCH, the decision is a political one. Therefore, the position of the Ministry of Culture is of utmost importance in order to decide according to which is the best for the maritime interests of the State. Without prejudice of this, the author suggests that, concerning the manner in which reports of discoveries or intended activities of UCH in the EEZ or continental shelf will be transmitted, it should be requiring the nationals or master of the vessel to report such discovery or activity to it and ensuring the rapid and effective transmission of such reports to all other States parties (Article 9(1)(b)(ii) of CPUCH). This will enhance the cooperation between States and provide a quick and efficient response in cases where the protection of UCH requires emergency actions.

Concerning Article 25(5) of the CPUCH, it is important to reiterate that Peru is not a party to UNCLOS. However, by acceding to the CPUCH and when negotiation and mediation fail in order to settle the disputes of the interpretation or application of the CPUCH, the

State it is free to choose the mean for dispute settlement provided by Article 287 of UNCLOS. In this regard, it is the position of the author that arbitration as provided by Annex VII of UNCLOS is a feasible option for Peru due to its efficiency and alacrity. Finally, it is recommendable that, according to Article 28 of the CPUCH, the Rules apply to inland waters not of a maritime character since Peru has important rivers and lakes where the protection of the UCH is needed.

A recommendation of the instrument of accession along with the declaration that should be made by the Peruvian Government is presented in the Annex of this explanatory note. According to Article 26 of the CPUCH, the instrument of accession shall be deposit to the Director-General of UNESCO. Following Article 27 of the CPUCH, three (03) months after the Peruvian Government deposits its instrument of accession to the CPUCH, it will enter into force. Within this time, the last internal procedures must be fulfilled. These include the publications of the official text of the CPUCH in the official gazette 'El Peruano' and the date in which the treaty will enter into force.

By this time, the Executive Power must have already issued the national law in order to implement the CPUCH which application the Ministry of Culture, through the General Directorate of Underwater Cultural Heritage, will lead. After the assessment of the national law regarding UCH in Peru, is the position of the author that the best type of norm for implementing the CPUCH is a Supreme Decree which will repeal articles 71 to 76 of the regulations of the general law and replace them with a new legal instrument encompassing the regime established by the CPUCH within the scope of the general law.

#### **d) Supreme Decree for the incorporation of the CPUCH**

Following the above discussion, the legal instrument to implement the CPUCH into the Peruvian national law will be a Supreme Decree. The proposed norm of incorporation has the same hierarchy as the current norm in force and, therefore, it has to be aligned with the general law and the international treaties related to cultural heritage to which the Peruvian State is a party. In addition, following Article 118(8) of the Constitution and Article 11(3) of the Law of the Executive Power, Law No 29158, the President of the Republic has the power to issue a Supreme Decree.

According to the Annex IV of the ‘Legislative Technique Guide for the elaboration of normative projects of the Entities of the Executive Power’<sup>103</sup> the structure of a Supreme Decree is composed by a justification, which is the purpose of this explanatory note; the normative category and numeration, which is given when the President issues this norm; a Preamble; the normative formula, which, *inter alia*, contains the article that approves the regulations, the article that derogates former regulations in force and the article of countersigned; the closing; and, the Regulations themselves, which may contain annexes.

Therefore, the Supreme Decree will be composed of a Preamble stating the main national law that sustains the new norm and the objective of strengthening the protection of underwater cultural heritage. In addition, it contains four (04) article: First one, approving the ‘National Regulations on the Protection of the Underwater Cultural Heritage’ which form part of this Supreme Decree; the second one, derogating Articles 71 to 76 of the regulations of the general law; the third one, stating that this Supreme Decree will enter into force one day after its publication in the official gazette ‘El Peruano’; and, the fourth one, prescribing which Ministries have to undersign this norm.

The ‘National Regulations on the Protection of the Underwater Cultural Heritage’ will be composed by eleven (11) chapters, twenty-four (24) articles, and one (01) annex titled ‘Rules concerning activities directed at underwater cultural heritage’, containing thirty-six (36) rules.

Chapter I prescribes the general principles of the regulations. In this regard, Article 1 deals with the objective of the regulations; Article 2 specifies the scope of application; and, Article 3 states the definitions to be used in the regulations. Chapter II addresses the competent national authority which leads the application of the regulations. In this respect, Article 4 prescribes that the General Directorate of the UCH of the Ministry of Culture is the competent national authority; Article 5 states the cooperation between national institutions; and, Article 6 develops the tasks of the competent national authority.

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<sup>103</sup> Approved by Directorial Resolution No 002-2018-JUS/DGDNCR of the Ministry of Justice and Human Rights. <<https://www.minjus.gob.pe/wp-content/uploads/2019/01/GUIA-DE-TECNICA-LEGISLATIVA-4TA-EDICION.pdf>> accessed 19 June 2020.

Chapter III develops the procedures of reporting discoveries and intended activities at UCH. In this regard, Article 7 deals with the specific regulations for reporting of discoveries and intended activities even when such activities are undertaken beyond national jurisdiction. Chapter IV addresses the permission for activities directed at UCH. In this respect, Article 8 set the rules for the granting of permission, and Article 9 prescribes special rules for activities directed at the remains of State vessels and aircraft.

Chapter V prescribes the regime for UCH beyond the limits of national jurisdiction. This regime includes the maritime zone of the Peruvian maritime domain between twelve (12) nautical miles measured from the baselines established by law and two hundred (200) nautical miles measured from the baselines established by law due to the special regulations provided by the CPUCH. In this respect, Article 10 deals with the information and notification of discoveries and intended activities. Article 11 regulates the receipt of information and declaration of interest of being consulted on how to ensure the effective protection of a particular UCH considering a verifiable link. Article 12 develops the regulations regarding the carrying out of consultations and coordination. Finally, Article 13 deals with coordinating measures in case the Peruvian State is a ‘coordinating State’.

Chapter VI addresses the immediate danger to UCH. Thus, Article 14 refers to the necessary measures to be taken to that aim. Chapter VII addresses activities incidentally affecting UCH. In this regard, Article 15 prescribes the regulations concerning activities undertaken in areas that contain or where is a reasonable expectation to contain UCH. Chapter VIII develops the regulations concerning the ownership of UCH. In this respect, Article 16 states that UCH is owned by the State provided that there is no existing ownership immediately prior to its discovery. In cases where UCH has a previous owner, Article 17 provides regulation for public acquisition.

Concerning control, sanctions, and seizure, Chapter IX provides specific regulations. In this regard, Article 18 prescribes the seizure and disposition of UCH. Article 19 allows the General Directorate UCH, with saved exceptions, to access to premises if necessary, in order to fulfill its tasks of protecting UCH. Article 20 prescribes the prohibition of use and entry into State territory, dealing o possession of UCH unlawfully exported and/or recovered from another Star or recovered in a manner not in conformity with CPUCH.

Article 21 states the infringements and sanctions applicable in case of breach of any obligation stipulated in the regulations.

Chapter X refers to the return of UCH in case of illegality trafficked UCH. In this regard, Article 22 develop specific regulations to that aim. Chapter XI deals with further regulations. In this respect, Article 23 refers to cooperation agreements regarding the protection of UCH. Article 24 states that the regulations contain one Annex which provides technical rules concerning activities directed at UCH. Finally, the Annex develops the mentioned specific technical rules.

## ANNEX

### **Instrument of accession of Peru to the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage, to be deposited with the Director-General of UNESCO**



#### **INSTRUMENT OF ACCESSION**

Whereas the Convention on the Protection of the Underwater Cultural Heritage is subject to accession by the Republic of Peru, under the terms of its Article 26 of the Convention.

Now therefore the Government of the Republic of Peru having considered the aforesaid Convention hereby accede to the said Convention and undertake faithfully to carry out the stipulations therein contained.

By acceding to the Convention, the Republic of Peru presents the following declaration:

*'The Republic of Peru declares that according to Article 9, paragraph 2, of the Convention on the Protection of the Underwater Cultural Heritage, the information referred to in paragraph 1(b) of that same article will be transmitted in the manner stipulated in subparagraph (ii).*

*Moreover, the Republic of Peru, in regard to Article 25, paragraph 5, relating to the peaceful settlement of disputes declares that arbitration as set by Annex VII of the United Nations Convention on the Law of the Sea of 10 December 1982 would be the mean for dispute settlement arising from the interpretation or application of this Convention.*

*In regard to Article 28, the Republic of Peru declares that the Rules attached to the Convention shall apply to inland waters not of a maritime character.*

*Finally, given that the Republic of Peru is not a party to the United Nations Convention on the Law of the Sea of 10 December 1982, it wishes to emphasize that those rules are applicable in so far as they form part of customary international law or reflect general principles of law.'*

IN WITNESS THEREOF, I have signed and sealed this instrument of accession.

Done at Lima, this day of .... 2020.

**(Signature)**

President of the Republic of Peru

**(Seal)**

# **SUPREME DECREE DRAFT**

**Republic of Peru**



**MINISTRY OF CULTURE**

## **SUPREME DECREE THAT APPROVES THE NATIONAL REGULATIONS ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE**

**Supreme Decree**

**N° \_\_\_\_\_ - 2020-MC.**

**THE PRESIDENT OF THE REPUBLIC**

PROVIDED that Article 21 of the Constitution states that archaeological sites and remains buildings, monuments, places, bibliographic and archive documents, artistic objects and testimonies of historical value, expressly declared cultural property, and provisionally those that are presumed as such, are the cultural heritage of the Nation, which are protected by the State;

REMINDING that the objective of the General Law of Cultural Heritage of the Nation, Law No 28296, is to establish the national policy of defense, protection, promotion, property, legal regime and destiny of the goods that are the cultural heritage of the nation;

DESIRING to enhance the legal regime for the protection of underwater cultural heritage in the internal waters and maritime domain and the protection of the Peruvian maritime interests where this underwater cultural heritage is beyond its jurisdiction, in particular, in accordance with international law on the subject matter;



HAVING ratified to the Convention on the Protection of Underwater Cultural Heritage adopted 2 November 2001 and accomplished its accession on the \_\_\_\_\_ of 2020;

IN ACCORDANCE to Article 118(8) of the Constitution; the Law of the Executive Power, Law No 29158; the General Law of Cultural Heritage of the Nation, Law No 28296, and General Administrative Procedure Law, Law No 27444;

**DECREES:**

**Article 1.-** To approve the ‘National Regulations on the Protection of the Underwater Cultural Heritage’ that is composed of twenty-five (24) articles and one (01) annex, which form part of this Supreme Decree.

**Article 2.-** To derogate articles 71 to 76 of the Regulations of the General Law of Cultural Heritage of the Nation, Supreme Decree No 011-2006-ED.

**Article 3.-** This Supreme Decree will enter into force one day after its publication in the official gazette ‘El Peruano’.

**Article 4.-** This Supreme Decree will be endorsed by the Minister of Culture, the Minister of Defense, and the Minister of Foreign Affairs.

Held in the Government House, in Lima, on the \_\_\_\_\_ of \_\_\_\_\_ 2020.

(Signature)

President of the Republic

(Signature)

Minister of Culture

(Signature)

Minister of Defense

(Signature)

Minister of Foreign Affairs

# NATIONAL REGULATIONS ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

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## CHAPTER I: GENERAL PRINCIPLES

### Article 1.- Objective of the Regulations

These Regulations aim to ensure and strengthen the protection of underwater cultural heritage.

### Article 2.- Scope of application

1. These Regulations apply to the maritime domain of the Republic of Peru as enshrined in Article 54 of the Constitution, its internal waters, and to inland waters not of a maritime character.
2. These Regulations also apply to vessels flying the Peruvian State flag and Peruvian nationals wherever located.

### Article 3.- Definitions

1. (a) 'Underwater cultural heritage' means all traces of human existence having a cultural, historical or archaeological character which has been partially or totally under water, periodically or continuously, for at least one hundred (100) years such as:
  - (i) sites, structures, buildings, artefacts, and human remains, together with their archaeological and natural context;
  - (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and,
  - (iii) objects of prehistoric character.(b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.  
(c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.
2. 'UNESCO' means the United Nations Educational, Scientific, and Cultural Organization.
3. 'Director-General' means the Director-General of UNESCO.
4. 'UNESCO 2001 Convention' means the Convention on the Protection of the Underwater Cultural Heritage, adopted in 2001.
5. 'Foreign jurisdictional waters' means the water column, seabed, and subsoil where a foreign State exercises sovereign rights and jurisdiction.

6. 'Area' means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.
7. 'Activities directed at underwater cultural heritage' means activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage
8. 'Activities incidentally affecting underwater cultural heritage' means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.
9. 'State vessels and aircraft' means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.
10. 'Rules' means the Rules concerning activities directed at underwater cultural heritage, as referred to in the Annex of these Regulations.
11. 'Verifiable link' means the relationship between the State and cultural heritage, in particular of a cultural, historical or archaeological character.
12. 'International Seabed Authority' means the International Organization established under Article 156 of the United Nations Convention on the Law of the Sea.

## **CHAPTER II: COMPETENT NATIONAL AUTHORITY**

### **Article 4.- Competent National Authority**

1. The Competent National Authority for the protection of the underwater cultural heritage is the General Directorate of Underwater Cultural Heritage of the Ministry of Culture (hereinafter, 'General Directorate UCH').

### **Article 5.- Cooperation between national institutions**

1. The Peruvian Navy must collaborate with the General Directorate UCH in the defense and protection of underwater cultural heritage and must also inform the General Directorate UCH of the list of any new discovery it makes.
2. The Ministry of Foreign Affairs must collaborate with the General Directorate UCH in providing the means for informing UNESCO or other States matters concerning the

protection of underwater cultural heritage and enhancing international cooperation regarding the protection of underwater cultural heritage.

#### **Article 6.- Tasks of the General Directorate UCH**

1. The General Directorate UCH has the task, in particular, to:
  - (a) ensure the effective control, protection, conservation, presentation and management of underwater cultural heritage;
  - (b) issue permissions for activities directed at underwater cultural heritage;
  - (c) encourage and foster research, public awareness, appreciation, and education in underwater cultural heritage.
2. The General Directorate UCH shall establish, maintain, and update an inventory of underwater cultural heritage located on land or under water which includes also:
  - (a) a list of important public and private cultural heritage whose export would constitute an appreciable impoverishment of the national cultural heritage;
  - (b) a list of underwater cultural heritage, that is located beyond the limits of national jurisdiction if that underwater cultural heritage has a verifiable link with the State.The inventory shall be open to limited public access. No information shall be disclosed if this would endanger the protection of the heritage concerned.
3. The General Directorate UCH may conduct any necessary research on underwater cultural heritage.
4. The General Directorate UCH shall act as the Competent National Authority according to the UNESCO 2001 Convention. The Director-General of UNESCO shall be notified of its name and address, as well as of any update of information.
5. Other tasks prescribed on these Regulations.

### **CHAPTER III: REPORTING DISCOVERIES AND INTENDED ACTIVITIES**

#### **Article 7.- Report of discoveries and intended activities**

1. No person or vessel flying the State flag shall search for, explore, investigate, interfere with, displace or remove underwater cultural heritage without a permit issued by the General Directorate UCH.

2. Any person or vessel flying the State flag, who discovers underwater cultural heritage should leave it undisturbed, unless disturbance or recovery is authorized by the General Directorate UCH or if it:
  - (a) is under actual or immediate danger of serious damage or destruction; or,
  - (b) poses a concrete and immediate danger to human life.
3. Any person or vessel flying the State flag, who displaces underwater cultural heritage has to declare this to the General Directorate UCH and has to deposit the object with it or hold it at its disposal in conditions ensuring conservation.
4. Any person or vessel flying the State flag, who discovers underwater cultural heritage shall report this to the General Directorate UCH within three (03) working days of discovery or on reaching the first national port, whichever first.
5. Any person or vessel flying the State flag who is aware of any activity by any unauthorized person that poses an actual and immediate danger of serious damage or destruction to underwater cultural heritage shall report that activity to the General Directorate UCH.
6. Any person or vessel flying the State flag wishing to apply for permission to undertake an activity directed at underwater cultural heritage must submit an application to the General Directorate UCH at least six (06) months prior to the intended activity commencing. In case of immediate danger of destruction or damage to such cultural heritage, a shorter application time may be admitted. Such an application must be submitted irrespective of whether the underwater cultural heritage is situated within, or beyond, national jurisdiction.
7. Nationals and the masters of the vessels flying the State flag shall report any discovery of or an intended activity directed at underwater cultural heritage to the General Directorate UCH, even if located beyond the limits of national jurisdiction
8. No person or vessel flying the State flag shall engage in any activity directed at underwater cultural heritage that is not in accordance with the Rules in the Annex of these Regulations.
9. Warships, government ships, and military aircraft, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at cultural heritage are not obliged to report discoveries. They shall, however, make reports if this is reasonable and practicable.

10. In case of discoveries or activities concerning underwater cultural heritage located in foreign jurisdictional waters of another State, nationals, and vessels flying the State flag shall report to the General Directorate UCH who will rapidly inform such reports to all other State parties to the UNESCO 2001 Convention.

## **CHAPTER IV: PERMISSIONS FOR ACTIVITIES DIRECTED AT UNDERWATER CULTURAL HERITAGE**

### **Article 8.- Permissions for activities**

1. A permit for an activity directed at underwater cultural heritage including, for example, search, intervention, recovery, displacement, or excavation, as well as renovation and alteration may only be granted by the General Directorate UCH.
2. The permit shall only be granted in the best interest of protection and if the concerned activity:
  - (a) significantly contributes to the protection of, enhancement or knowledge about, the concerned cultural heritage;
  - (b) is in full conformity with these Regulations and the Rules in the Annex; and
  - (c) ensures in the case a proper scientific study and, in case of recovery, maximum protection and conservation of recovered objects.
3. A permit shall only be granted based on a Project Design in accordance with the Rules of the Annex.
4. No permit shall be issued for any commercial exploitation of underwater cultural heritage.
5. A permit:
  - (a) shall contain conditions to ensure the proper conduct of the activity, documentation, and conservation as well as its control and the access to the site by the General Directorate UCH;
  - (b) shall be issued for a limited time period not exceeding one (01) year and may be renewed after revision of the project by the General Directorate UCH;
  - (c) may be revoked in case of non-compliance with the conditions mentioned in the permit, the Regulations, the project design deposited with the General Directorate UCH or in the interest of the proper protection of the concerned heritage;
  - (d) may contain any other condition deemed necessary by the General Directorate UCH.



6. Permits are non-transferable. A public register of all permits issued shall be kept by the General Directorate UCH.
7. Permitted activities shall only be executed:
  - (a) under the effective supervision of the person authorized;
  - (b) respecting proper safety measures and the protection of the environment.
8. A permit for activities directed at underwater cultural heritage located beyond the limits of national jurisdiction may only be issued, if:
  - (a) the Republic of Peru is the ‘coordinating State’; or
  - (b) an immediate danger threatens the concerned heritage; or
  - (c) the concerned heritage is located in foreign jurisdictional waters and the permit is granted in order to prevent interference with sovereign rights or jurisdiction.
9. This Article does not prejudice the State’s action to protect underwater cultural heritage in case of immediate danger.

**Article 9.- Activities directed at the remains of State vessels and aircraft**

1. If underwater cultural heritage is identified as a State vessel or aircraft of another State, the General Directorate UCH, through the Ministry of Foreign Affairs, should inform the flag State and States with a verifiable link to such cultural heritage.
2. No activity shall be permitted or directed at such heritage if it is located in the Peruvian maritime domain, from twelve (12) nautical miles measured from the baselines established by law, until two hundred (200) nautical miles measured from the baselines established by law, without the agreement of the flag State and, if applicable, the collaboration of the States which have assumed the obligation to coordinate protection measures under international law other than to prevent immediate danger.
3. If the concerned heritage is located beyond the limits of national jurisdiction, no activity shall be directed at such heritage without the consent of the flag State other than to prevent immediate danger.

**CHAPTER V: UNDERWATER CULTURAL HERITAGE BEYOND THE  
LIMITS OF NATIONAL JURISDICTION**

**Article 10.- Information and notification**

1. The General Directorate UCH, through the Ministry of Foreign Affairs, shall notify the Director-General of UNESCO of discoveries of or intended activities directed at underwater cultural heritage located beyond the limits of national jurisdiction. Any discovery or intended activity concerning underwater cultural heritage located in the Area shall also be notified by General Directorate UCH, through the Ministry of Foreign Affairs, to the Secretary-General of the International Seabed Authority.
2. In case of discoveries or intended activities directed at underwater cultural heritage located in foreign jurisdictional waters of another State party to the UNESCO 2001 Convention all States Parties to the Convention shall be informed by the General Directorate UCH, through the Ministry of Foreign Affairs.

**Article 11.- Receipt of information and declaration of interest**

1. Any declaration or invitation for consultation from other States and/or the Director-General of UNESCO regarding underwater cultural heritage shall be lodged with the General Directorate UCH.
2. Where the General Directorate UCH determines that the State has a verifiable link with certain underwater cultural heritage, it shall declare the interest of the State, where it is located in:
  - (a) the foreign jurisdictional waters of another State to that State, if that State is a State Party to the UNESCO 2001 Convention;
  - (b) the Area, to the Director-General of UNESCO and any State who coordinates, controls, authorizes, or undertakes a search of or activities directed at such heritage.

**Article 12.- Consultation and coordination**

1. In case of discoveries of or intended activities directed at underwater cultural heritage located in the Peruvian maritime domain, from twelve (12) nautical miles measured from the baselines established by law, until two hundred (200) nautical miles measured from the baselines established by law, the General Directorate UCH, through the Ministry of Foreign Affairs, shall:
  - (a) consult all States Parties to the UNESCO 2001 Convention, which have declared their interest on how to best protect such heritage, if this declaration is based on a verifiable link as ‘coordinating State’; or

- (b) make a declaration that it does not wish to act as ‘coordinating State’ if a reasonable motive exists that makes it desirable for the State not to act as such.
- 2. Where the relevant underwater cultural heritage is located in the Area and General Directorate UCH has declared the interest of the State to be consulted and is invited by the Director-General of UNESCO it shall:
  - (a) declare how this underwater cultural heritage should be best protected;
  - (b) declare which State should be appointed as ‘coordinating State’; and
  - (c) conduct and coordinate consultations as ‘coordinating State’ if the Republic of Peru was appointed to this function.

### **Article 13.- Coordination of measures**

1. If the Peruvian State acts as ‘coordinating State’ according to the UNESCO 2001 Convention, the General Directorate UCH shall implement the measures of protection for the underwater cultural heritage which have been agreed in consultation with all other States consulted and issue all necessary permits for such measures in conformity with the Rules of the Annex, unless it has been agreed that another State Party shall do so.
2. In coordinating or authorizing activities and in implementing measures the General Directorate UCH shall act on behalf of all concerned States and for the benefit of humanity
3. Particular regard shall be paid to the preferential rights of States of cultural, historical, or archaeological origin in respect of the underwater cultural heritage concerned.

## **CHAPTER VI: IMMEDIATE DANGER TO UNDERWATER CULTURAL HERITAGE**

### **Article 14.- Immediate danger**

1. The General Directorate UCH shall take all practicable measures, and/or issue any necessary permits, if necessary, prior to any consultations, to prevent immediate danger to any underwater cultural heritage. In taking such measures, the General Directorate UCH, through the Ministry of Foreign Affairs. may seek assistance from other States.
2. The General Directorate UCH shall, as far as practicable and, provided it is not contrary to national interests, when requested by another State or States, take all necessary

measures to assist the other State or States in taking measures preventing immediate danger to underwater cultural heritage.

## **CHAPTER VII: ACTIVITIES INCIDENTALLY AFFECTING UNDERWATER CULTURAL HERITAGE**

### **Article 15.- Activities incidentally affecting underwater cultural heritage**

1. Any person or vessel flying the State flag, intending to undertake an activity in an area that contains underwater cultural heritage; or where there is a reasonable expectation that an area may contain such cultural heritage such as:
  - (a) known cultural heritage sites or settlements;
  - (b) ports or former ports;
  - (c) shipping or trade routes; or
  - (d) marine battlefields;has to notify the General Directorate UCH of its intended activity at least sixty (60) days prior to the commencement of that activity. The intended activity shall be prohibited if it endangers or damages such heritage more than appears to be reasonable in comparison to the achieved public benefit.
2. Industrial activities impacting areas, where underwater cultural heritage is or may possibly be present, have to undertake an impact assessment study as part of their application for the authorization of the concerned development or other projects.
3. The General Directorate UCH has to be consulted mandatorily in the authorization of development and resource extraction projects that concern areas where underwater cultural heritage is or may possibly be present.
4. The public and private developers of such projects shall provide the funds and be responsible for:
  - (a) the assessment of the project area and the identification of underwater cultural heritage therein;
  - (b) the prevention, to the extent possible, of impact to underwater cultural heritage caused by the project in the project area and its surrounding environment;
  - (c) the mitigation of negative effects caused by the project in the project area and its surrounding environment;

- (d) the conservation of the affected underwater cultural heritage; and the promotion of affected cultural heritage and the dissemination of knowledge about it.

## **CHAPTER VIII: OWNERSHIP OF UNDERWATER CULTURAL HERITAGE**

### **Article 16.- Ownership of underwater cultural heritage**

1. Underwater cultural heritage is owned by the State, provided there is no existing ownership immediately prior to its discovery.
2. The law of finds nor the law of salvage shall not apply to underwater cultural heritage.
3. A person who discovers underwater cultural heritage may be rewarded at the discretion of the General Directorate UCH.

### **Article 17.- Public acquisition**

1. The General Directorate UCH may decide upon the public utility of an acquisition by the State of any underwater cultural heritage, and if applicable, its context or the site where it is located. If such utility is given, it may negotiate acquisition for the State.
2. If negotiations are not successful, the General Directorate UCH may in the case of objects, upon approval by the Ministry of Culture declare the compulsory transfer of ownership against indemnification in the amount of the value of the object to its owner, and publish this decision in the official gazette 'El Peruano'. Upon publication, the concerned object vests immediately in the State.
3. If no agreement can be reached about the amount of indemnification or if there is an objection to the declaration of compulsory transfer of ownership, a proceeding may be brought to the Judicial Power by an administrative contentious process, in accordance with Supreme Decree No 011-2019-JUS.
4. No person shall dispose of or acquire an object while it is under consideration for the public acquisition or when the compulsory transfer has been declared.
5. For sites, buildings, and structures the applicable national laws apply.

## **CHAPTER IX: CONTROL, SANCTIONS AND SEIZURE**

### **Article 18.- Seizure and disposition of underwater cultural heritage**

1. Underwater cultural heritage is subject to seizure if:

- (a) it has been recovered without a valid permit;
  - (b) was stolen or illicitly imported, exported or the transfer of ownership was illegal.
2. Seized underwater cultural heritage shall be immediately recorded, protected and stabilized, as far as needed and practicable. The disposition shall be for the public benefit, taking into account the need for conservation and research, the reassembly of a dispersed collection, the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the cultural heritage concerned.
  3. If underwater cultural heritage which had been recovered from Peruvian maritime domain from twelve (12) nautical miles measured from the baselines established by law, until two hundred (200) nautical miles measured from the baselines established by law is seized, General Directorate UCH, through the Ministry of Foreign Affairs, shall notify the Director-General of UNESCO and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the heritage concerned of this seizure.
  4. The authorities authorized to seize are the police authorities, the Peruvian Navy, and the General Directorate UCH.

**Article 19.- Access to premises**

1. The General Directorate UCH shall have the right of access to any private or public property, aircraft or vessel, with the exception of property in the use of the military, and conduct any inspection if this is reasonably necessary to fulfill its tasks, in particular regarding an object, which appears to be underwater cultural heritage. To do so it needs a judicial warrant to be delivered by the Judicial Power.
2. It may remove or seize any such object for further inspection and safekeeping.

**Article 20.- Prohibition of use and entry into State territory, dealing, possession**

1. The entry into national territory, the dealing in, or the possession of cultural heritage unlawfully exported and/or recovered from another State or recovered in a manner not in conformity with the UNESCO 2001 Convention is prohibited.
2. The use of State territory under national jurisdiction and control, including maritime ports, artificial islands, installations, and structures, in support of any illegal or damaging activity directed at cultural heritage is prohibited.

## **Article 21.- Infringements and sanctions**

1. A person or vessel flying the State flag, who:
  - (a) undertakes any research, activity or recovery directed at underwater cultural heritage, without a valid permit;
  - (b) damages or destroys underwater cultural heritage;
  - (c) exports any cultural heritage without a valid export certificate;
  - (d) alienates underwater cultural heritage, which is under consideration for the public acquisition or has been publicly acquired;is guilty of an offense and is liable to a fine up to 1000 TAX UNIT (UIT)<sup>104</sup> or, in the case of a person, to imprisonment not less than three (03) nor more than eight (08) years or to both a fine and imprisonment. In the event that the agent is a public official or servant with the custody of the property, the prison will be not less than five (05) nor more than ten (10) years.
2. A person or vessel flying the State flag, who by hiding, falsifying or refusing factual information or by violent action steals, damages, destroys, exports or unlawfully recovers underwater cultural heritage or opposes any actions of the General Directorate UCH in an unlawful manner is guilty of an offense and is liable to a fine of up to 500 TAX UNIT (UIT)<sup>105</sup> or in the case of a person, to imprisonment not less than three (03) nor more than eight (08) years or to both a fine and imprisonment. In the event that the agent is a public official or servant with the custody of the property, the prison will be not less than five (05) nor more than ten (10) years.  
not less than three (03) nor more than eight (08) years and with one hundred and eighty (180) to three hundred sixty-five (365) days fine. In the event that the agent is a public official or servant with the custody of the property, the prison will be not less than five (05) nor more than ten (10) years.

## **CHAPTER X: RETURN**

### **Article 22.- Return of illegality trafficked underwater cultural heritage**

1. Any underwater cultural heritage, which has been brought into the State, be it:

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<sup>104</sup> According to Article 1 of Supreme Decree No 380-2019-EF of 19 December 2019, for the year 2020, one TAX UNIT (UIT) equates to four thousand three hundred and 00/100 Peruvian Soles (PEN) (S/ 4,300.00).

<sup>105</sup> *ibid.*

- (a) without an export certificate, if this is mandatory due to the regulations of the State of origin;
  - (b) has been stolen from a public institution or museum, in whose register it had been inscribed;
  - (c) was lost against the will of the owner;
  - (d) was illegally excavated or legally excavated but unlawfully retained; or
  - (e) was declared inalienable by the national authorities of the State of origin,
- shall be returned if reciprocity is ensured by the demanding State. All expenses incident to the return and delivery of the underwater cultural heritage shall be borne by the requesting State and this State has to furnish at its expense the evidence necessary to establish its claim.
2. As soon as a case falling under subsection 1 is learned, the General Directorate UCH, through the Ministry of Foreign Affairs, shall inform the embassy of the concerned State or of the State likely to be concerned.
  3. The claim for return shall be brought through diplomatic offices to the attention of the Ministry of Culture within a period of three (03) years from the moment when the requesting State learns of the location of the cultural heritage and the identity of its possessor, and in any case within a period of one hundred (100) years from the time of the theft or of the export, otherwise, it loses its claim.
  4. A claim for return of cultural heritage forming an integral part of a classified site, or belonging to a public collection, shall not be subject to time limitations other than a period of one (01) year from when the claimant knew the location of the object and the identity of its possessor

## **CHAPTER XI: FURTHER REGULATIONS**

### **Article 23.- Cooperation agreements**

1. The General Directorate UCH, with the contribution of the Ministry of Foreign Affairs, will encourage the adoption of bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage.
2. All such agreements shall be in full conformity with the provisions of the UNESCO 2001 Convention and shall not dilute its universal character. Such agreements should



adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in the UNESCO 2001 Convention.

3. The General Directorate UCH, with the contribution of the Ministry of Foreign Affairs, may invite States with a verifiable link, especially a cultural, historical, or archaeological link, to the underwater cultural heritage concerned to join such agreements.

#### **Article 24.- Annex**

1. These Regulations contain one (01) Annex which provides the Rules concerning activities directed at underwater cultural heritage.
2. The Rules are also applicable to inland waters not of a maritime character of the Peruvian State.

### **ANNEX**

#### **RULES CONCERNING ACTIVITIES DIRECTED AT UNDERWATER CULTURAL HERITAGE**

##### **I. General principles**

**Rule 1.** The protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.

**Rule 2.** The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

This Rule cannot be interpreted as preventing:

- (a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with these Regulations and are subject to the authorization of the General Directorate UCH;

(b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with these Regulations, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34, and is subject to the authorization of the General Directorate UCH.

**Rule 3.** Activities directed at underwater cultural heritage shall not adversely affect the underwater cultural heritage more than is necessary for the objectives of the project.

**Rule 4.** Activities directed at underwater cultural heritage must use non-destructive techniques and survey methods in preference to the recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.

**Rule 5.** Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

**Rule 6.** Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of cultural, historical, and archaeological information.

**Rule 7.** Public access to *in situ* underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.

**Rule 8.** International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.

## II. Project design

**Rule 9.** Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the General Directorate UCH for authorization and appropriate peer review.

**Rule 10.** The project design shall include:

- (a) an evaluation of previous or preliminary studies;
- (b) the project statement and objectives;
- (c) the methodology to be used and the techniques to be employed;
- (d) the anticipated funding;
- (e) an expected timetable for completion of the project;

- (f) the composition of the team and the qualifications, responsibilities, and experience of each team member;
- (g) plans for post-fieldwork analysis and other activities;
- (h) a conservation program for artefacts and the site in close cooperation with the competent authorities;
- (i) a site management and maintenance policy for the whole duration of the project;
- (j) a documentation program;
- (k) a safety policy;
- (l) an environmental policy;
- (m) arrangements for collaboration with museums and other institutions, in particular, scientific institutions;
- (n) report preparation;
- (o) deposition of archives, including underwater cultural heritage removed; and,
- (p) a program for publication.

**Rule 11.** Activities directed at underwater cultural heritage shall be carried out in accordance with the project design approved by the General Directorate UCH.

**Rule 12.** Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the General Directorate UCH.

**Rule 13.** In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage, including conservation measures or activities for a period of short duration, in particular site stabilization, may be authorized in the absence of a project design in order to protect the underwater cultural heritage.

### **III. Preliminary work**

**Rule 14.** The preliminary work referred to in Rule 10 (a) shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and the surrounding natural environment to damage by the proposed project, and the potential to obtain data that would meet the project objectives.

**Rule 15.** The assessment shall also include background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site, and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

#### **IV. Project objective, methodology, and techniques**

**Rule 16.** The methodology shall comply with the project objectives, and the techniques employed shall be as non-intrusive as possible.

#### **V. Funding**

**Rule 17.** Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation, and curation of recovered artefacts, and report preparation and dissemination.

**Rule 18.** The project design shall demonstrate an ability, such as by securing a bond, to fund the project through to completion.

**Rule 19.** The project design shall include a contingency plan that will ensure the conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

#### **VI. Project duration – timetable**

**Rule 20.** An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation, and curation of recovered underwater cultural heritage, as well as report preparation and dissemination.

**Rule 21.** The project design shall include a contingency plan that will ensure the conservation of underwater cultural heritage and supporting documentation in the event of any interruption or termination of the project.

#### **VII. Competence and qualifications**

**Rule 22.** Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist with scientific competence appropriate to the project.

**Rule 23.** All persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the project.

### **VIII. Conservation and site management**

**Rule 24.** The conservation program shall provide for the treatment of the archaeological remains during the activities directed at underwater cultural heritage, during transit, and in the long term. Conservation shall be carried out in accordance with current professional standards.

**Rule 25.** The site management program shall provide for the protection and management *in situ* of underwater cultural heritage, in the course of and upon the termination of fieldwork. The program shall include public information, reasonable provision for site stabilization, monitoring, and protection against interference.

### **IX. Documentation**

**Rule 26.** The documentation program shall set out thorough documentation including a progress report of activities directed at underwater cultural heritage, in accordance with current professional standards of archaeological documentation.

**Rule 27.** Documentation shall include, at a minimum, a comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, and photographs or recording in other media.

### **X. Safety**

**Rule 28.** A safety policy shall be prepared that is adequate to ensure the safety and health of the project team and third parties and that is in conformity with any applicable statutory and professional requirements.

### **XI. Environment**

**Rule 29.** An environmental policy shall be prepared that is adequate to ensure that the seabed and marine life are not unduly disturbed.

## **XII. Reporting**

**Rule 30.** Interim and final reports shall be made available according to the timetable set out in the project design and deposited in relevant public records.

**Rule 31.** Reports shall include:

- (a) an account of the objectives;
- (b) an account of the methods and techniques employed;
- (c) an account of the results achieved;
- (d) basic graphic and photographic documentation on all phases of the activity;
- (e) recommendations concerning conservation and curation of the site and of any underwater cultural heritage removed; and
- (f) recommendations for future activities.

## **XIII. Curation of project archives**

**Rule 32.** Arrangements for the curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design.

**Rule 33.** The project archives, including any underwater cultural heritage removed and a copy of all supporting documentation, shall, as far as possible, be kept together and intact as a collection in a manner that is available for professional and public access as well as for the curation of the archives. This should be done as rapidly as possible and, in any case, not later than ten (10) years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.

**Rule 34.** The project archives shall be managed according to international professional standards, and subject to the authorization of the General Directorate UCH.

## **XIV. Dissemination**

**Rule 35.** Projects shall provide for public education and popular presentation of the project results where appropriate.

**Rule 36.** A final synthesis of a project shall be:

- (a) made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and,
- (b) deposited in relevant public records.