Ece Velioğlu Yıldızcı

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International, Swiss and Turkish Law Perspectives

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Abbreviations

Art.	Article
BO	*Bulletin officiel du Parlement suisse*
Const.	Constitution
ECHR	The European Court of Human Rights
ETS	European Treaty Series
FF	*Feuille fédérale*
Fig.	Figure
*f*TCC	Former Turkish Civil Code
GIS	Geographic Information System
JdT	*Journal des tribunaux*
RO	*Recueil officiel du droit federal suisse*
RS	*Recueil systématique du droit fédéral Suisse*
SCC	Swiss Civil Code
SJ	*Semaine judiciare*
TCC	Turkish Civil Code
UK	United Kingdom
UN	United Nations
UNESCO	The United Nations Educational, Scientific and Cultural Organization
UNIDROIT	The International Institute for the Unification of Private Law
UNTS	United Nations Treaty Series
U.S.	United States of America

Cantonal laws

Bern

LPat/BE	Loi sur la protection du patrimoine, 1999 (RSB 426.41)
OC/BE	Ordonnance sur les constructions, 1985 (RSB 721.1)

Fribourg

LPBC/FR	Loi sur la protection des biens culturels, 1991 (RSF 482.1)
RELPBC/FR	Règlement d'exécution de la loi sur la protection des biens culturels, 1993 (RSF 482.11)

Geneva

LPMNS/GE	Loi sur la protection des monuments, de la nature et des sites, 1976 (RSGE L 4 05)
RPMNS/GE	Règlement général d'exécution de la loi sur la protection des monuments, de la nature et des sites, 1976 (RSGE L 4 05.01)
LCI/GE	Loi sur les constructions et les installations diverses, 1988 (RSGE L 5 05)
LDPu/GE	Loi sur le domaine public, 1961 (RSGE L 1 05)

Jura

LPPAP/JU	Loi sur la protection du patrimoine archéologique et paléontologique, 2015 (RSJU 445.4)

Neuchatel

LSPC/NE	Loi sur la sauvegarde du patrimoine culturel, 2018 (RSN 461.30)
RA/NE	Règlement d'application de la loi sur la protection des biens culturels, 1995 (RSN 461.301)

Valais

LcPN/VS	Loi sur la protection de la nature, du paysage et des sites, 1998 (RSVS 451.1)
OcPN/VS	Ordonnance sur la protection de la nature, du paysage et des sites, 2000 (RSVS 451.100)

Vaud

LPNMS/VD	Loi sur la protection de la nature, des monuments et des sites, 1969 (RSVD 450.11)
RLPNMS/VD	Règlement d'application de la loi du 10 décembre 1969 sur la protection de la nature, des monuments et des sites, 1989 (RSVD 450.11.1)
LPMI/VD	Loi sur le patrimoine mobilier et immatériel, 2014 (RSVD 446.12)

Ticino

LBC/TI	Legge sulla protezione dei beni culturali, 1997 (445.100)

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§ 203; 288 et seq.	Swiss Federal Court Judgment 100 II 8 (treasures)
§ 233	ZBI 33 p. 113 (preservation *in situ* of archaeological sites)
§ 235 et seq.	Swiss Federal Court Judgment No. 1C_616/2015 of 8 December 2016 (preservation *in situ* of archaeological sites)

Turkey

§ 248 et seq.	Turkish Council of State Judgment No. 2000/4226 of 22 June 2000, Case No. 1999/3296 (preservation *in situ* of archaeological sites)
§ 377	Turkish Council of State, 14th Chamber, Judgment of 26 December 2018, Case No. 2018/3536 (EIA regulation)
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Introduction

A. Legal Research

1. Context

States usually have the obligation to protect the cultural heritage situated in their territories under domestic and international law (*infra* Chapter 1). When such heritage is under States' ownership, its protection is usually considered reinforced since, unlike private owners, States have an interest in cultural heritage that serves a general and ideal purpose. This is the reason why many countries declare archaeological objects originating from their territories (also called the archaeological subsoil) to be State property ("national ownership laws").[1] While there are no global statistics, it is well-known that many countries around the Mediterranean Sea, such as Turkey,[2] Greece and Egypt, and other European countries like Switzerland, have adopted such ownership laws.[3] 1

Despite this special status, the protection of archaeological objects can become the subject of controversies. For instance, in 2013, the Canton of Geneva in Switzerland considered selling prehistoric wooden piles discovered in Lake Geneva. Following archaeologists' opposition, the Canton had to abandon this project (*infra* 347). In Turkey, the negative effects of dam construction on archaeological sites have been widely debated over the last two decades. Despite the adoption of special guidelines by the State to manage this delicate situation (*infra* 404), protests reached beyond national borders in certain cases.[4] These two examples show that archaeological objects and sites owned by States are not immune from dispersion and destruction. The examples could easily be multiplied if one focused on other parts of the world. 2

International organizations have expressed little concern about national ownership laws, considering the issue to be a domestic matter (*infra* 156). The most recent instrument dealing with this principle is a soft-law document, the Model Provisions 3

1 They are also called patrimony laws, umbrella statutes, blanket legislations or vesting laws in legal literature.

2 Please note that during the preparation of the publication of this thesis, Turkey changed its official name to "Türkiye" in English.

3 For examples of countries which have adopted national ownership laws, see Boillat, *Trafic illicite de biens culturels et coopération judiciaire*, 24 fn. 103. See also Prott and O'Keefe, *Law and the Cultural Heritage Vol. 1*, 188 et seq.

4 See Aykan, "Saving Hasankeyf."

on State Ownership of Undiscovered Cultural Objects, elaborated by UNESCO and UNIDROIT in 2011 ("Model Provisions") (*infra* Part III; Annex 1). Here, "undiscovered cultural objects" imply archaeological objects located in the soil or underwater within States' territories (*infra* 463). The Model Provisions specifically aim to facilitate the restitution of illegally removed archaeological objects by proposing a legislative framework for State ownership over such objects.[5] It therefore focuses on the phase following the objects' illegal export from the country of origin and on aspects playing a significant role in restitution cases (i.e., transfers subsequent to the act of theft). The Model Provisions do not respond, for instance, to questions such as "What if the State wishes to sell a (legally excavated) archaeological object?" or "What if a large public work puts an archaeological site in danger?"

4 Regarding the issue of sale, the drafters of the Model Provisions have reserved the right of States to sell archaeological objects since they are the "actual owners" and have valid title.[6] From the perspective of archaeologists however, this is a much more complicated issue which raises ethical concerns (*infra* 57 et seq.). Regarding the problem of balancing heritage preservation with a country's economic development, important instruments have been adopted at the international level to propose common standards, in particular ICOMOS's 1990 Charter for the Protection and Management of the Archaeological Heritage ("ICAHM Charter") (Annex 2),[7] a soft-law document, and the Council of Europe's 1992 European Convention on the Protection of the Archaeological Heritage ("Valletta Convention") (Annex 3), a multilateral convention with 50 State parties.[8]

2. Research Questions

5 This thesis concentrates on the issues left unresolved by the Model Provisions that deal with the protection of archaeological heritage within States' borders. To what extent does State ownership contribute to protection? What are the limits of States' ownership regimes? Does a country's political structure, social and archaeological context have an impact on how State ownership is implemented? These questions bring the themes of State property and archaeological heritage protection closer, which are mostly treated as separate in legal literature, with the exception of the restitution field. Nevertheless, restitution is only one segment of protection. This thesis

5 UNESCO and UNIDROIT, "Explanatory Report," 1.

6 UNESCO and UNIDROIT, 7.

7 Prepared by the International Committee for the Management of Archaeological Heritage (ICAHM) and approved by the 9th General Assembly in Lausanne in 1990.

8 Valletta, 16 January 1992. ETS No.143. Switzerland ratified the Valletta Convention on 27 March 1996, and Turkey ratified it on 29 November 1999.

promotes a more comprehensive vision of State ownership of archaeological heritage at an international level as a preservation tool and not solely as a restitution tool.

It is important to note that this thesis does not intend to respond to the question of what the best protection regime for archaeological heritage is (e.g., public ownership? Private ownership? A mixed regime?). Instead, the thesis is based on the observation that most States prefer to vest their ownership in their archaeological subsoil such that international organizations guide them in their drafting of ownership laws, and thus it is concerned with the details and application of this public ownership regime in different contexts. 6

3. Main Argument

The declaration of undiscovered archaeological heritage in a State's territory as State property is not sufficient *per se* for States to ensure the proper protection of this heritage. In other words, a State cannot content itself with having passed a national ownership law related to archaeological heritage and expect that such heritage will not be dispersed or destroyed, even in peacetime. The challenges faced by States today are quite complex, as States must balance their needs in the fields of, for instance, public infrastructure and energy (*infra* 30) with the preservation of archaeological heritage. The objective of this thesis is to identify what States can do more of at the legal level to ensure the efficient protection of the archaeological heritage that they own in the general interest. 7

4. Methodology and Choice of Legal Systems to Study

The starting point of this research is the analysis of the normative framework on the protection of archaeological heritage that has been elaborated, on the one hand, by international law, and on the other hand, by domestic laws. To illustrate the domestic level, Switzerland and Turkey have been chosen. Both countries have vested the State's ownership in archaeological objects for over a century. Nevertheless, they position themselves at the two extremes of the spectrum traditionally recognized in international cultural heritage law: Switzerland being one of the important "market" countries, feeding the demand in illegally excavated archaeological objects, and Turkey being one of the "source" countries where such objects are illegally excavated. This distinction[9] perfectly serves the vision of this thesis, which is to promote State ownership as a preservation tool regardless of whether the country suffers from looting problems. 8

9 See Merryman, "Two Ways of Thinking about Cultural Property," 832; O'Keefe and Prott, "National Legal Control of Illicit Traffic in Cultural Property," 1–3.

9 Furthermore, Switzerland and Turkey have important differences in terms of their political structure (Switzerland being a federal State, and Turkey, a unitary State) and the type and scale of archaeological sites situated in their territories (*infra* 432). The comparative analysis of the Swiss and Turkish systems allows one to take into consideration different contexts and dynamics where the question of protection is raised and thereafter reach common conclusions, which may inspire efforts in other countries.

10 Finally, civil-law rules – in particular those related to possession and ownership – are very similar in Swiss and Turkish law due to the fact that Turkish legislators drafted the former civil code (*f*TCC)[10] on the basis of the Swiss civil code of 10 December 1907 (SCC).[11] This creates a unique and interesting opportunity to observe the interpretation and implementation of the same legal provisions in two different contexts, specifically with regard to the provision declaring undiscovered archaeological objects to be the property of the State. In this respect, the well-known *Basel* case (*infra* 186),[12] in which Turkey claimed the restitution of five archaeological objects from the Antikenmuseum in Basel during the 1990s, will be thoroughly discussed in light of the amendments made to the SCC in 2005.

5. Structure of the Thesis

11 This thesis is comprised of three parts: Part I, where the legal framework on the protection of archaeological heritage is examined from international and comparative (Swiss-Turkish) perspectives; Part II, which further develops the comparative study by focusing on the preservation of archaeological heritage owned by the State in Switzerland and Turkey; and Part III, which goes back to international law and analyzes the Model Provisions adopted by UNESCO and UNIDROIT on State ownership in 2011. The purpose of Part II is to explore the issues which are not completely dealt with in the law (Part I) and to concentrate on the questions raised with regard to movable and immovable archaeological heritage separately. The purpose of Part III is to review the existing Model Provisions with a different perspective (considering State ownership as a preservation tool) based on the conclusions of Parts I and II.

10 Turkish Civil Code No. 753 adopted in 17 February 1926 and abrogated in 1 January 2002.

11 RS 210.

12 Basel Court of Appeals Judgment of 18 August 1995, *Republic of Turkey v. the Canton of the City of Basel and Prof. Peter Ludwig*, published in *Basler Juristische Mitteilungen* (BJM) 1997 17 (in German).

6. Delimitation

It is important to note that this thesis focuses on the protection of archaeological heritage during peacetime. The protection of cultural heritage, including archaeological heritage, in times of conflict is a fully separate matter to which different set of rules apply; thus, it remains out of the scope of this thesis.[13] 12

As far as Swiss law is concerned, for matters regulated under cantonal law, this thesis primarily refers to comparative studies prepared by Swiss Archaeology, an archaeology association based in Basel. To further develop specific aspects, this thesis limits itself to seven cantons (Bern, Fribourg, Geneva, Jura, Neuchatel, Valais and Vaud) and sometimes to only the Canton of Geneva. It is important to note that each canton has its own specific context when it comes to the discovery, preservation and management of archaeological heritage.[14] Therefore, the conclusions that this thesis draws from the analysis of cantonal law should be read with this fact in mind. 13

7. Outcome of the Thesis

This thesis proposes revised model provisions with a new title, "Model Provisions on the State's Ownership of Archaeological Heritage Originating from its Territory," and two (interrelated) sub-sections on territorial (Provisions 1, 2 and 3) and extra-territorial application (Provisions 4, 5 and 6). The revisions concern the first three provisions of the original Model Provisions. Moreover, this thesis examines the integration of revised provisions in Swiss and Turkish law and suggests specific changes to current legislation. For Swiss law, it takes Geneva's heritage legislation as an example. 14

8. Terminology: Definition of the "State"

For the purposes of this comparative study, the use of the term "State" in the Swiss context shall mean the canton. To recall, Switzerland is a federal state with three levels of government: the Confederation, cantons and communes.[15] The SCC vests the 15

13 The combination of international humanitarian law and international cultural heritage law gives rise to a set of principles applicable to cultural property in armed conflict. See, e.g., Craig Forrest, *International Law and the Protection of Cultural Heritage* (New York: Routledge, 2010); *Christiane Johannot-Gradis, Le patrimoine culturel matériel et immatériel: quelle protection en cas de conflit armé?* (Geneva: Schulthess, 2013); Marina Lostal, *International cultural heritage law in armed conflict: Case-studies of Syria, Libya, Mali, the invasion of Iraq, and the Buddhas of Bamiyan* (Cambridge: Cambridge University Press, 2017); Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: Cambridge University Press, 2006).

14 See, for instance, Gilbert Kaenel, "Les Archéologies en Suisse: Un regard critique," *Annuaire d'Archéologie Suisse* 90 (2007): 37–40.

15 Thommen, "Swiss Legal System," 8.

ownership of undiscovered archaeological objects in cantons. There are twenty-six cantons (twenty-three cantons and six half-cantons) in total. Each canton owns the archaeological objects discovered in its territory (*infra* 195).

16 Having said this, it should be noted that the Confederation and communes own archaeological collections as well. Nevertheless, such collections have passed into their ownership through purchase or donation, and not by the operation of law.[16] Special rules applicable to the Confederation's collections are provided in Chapter 1 as part of the Swiss legal framework (*infra* 71). Communal collections are normally subject to the regime applicable to cantonal collections.[17] Certain cantons also have archaeological objects originating from other countries in their collections.[18]

17 Turkey, on the other hand, is a unitary state with a single government. Therefore, in the Turkish context, "State" shall mean the central administration to which are attached the government and the ministries, including the Ministry of Culture and Tourism ("Ministry of Culture") and its bodies.[19]

9. Terminology: Definition of "Archaeological Heritage"

18 This thesis uses the definition of archaeological heritage formulated by ICOMOS, which also inspired the drafters of the Valletta Convention. The term "archaeological heritage" will be used in this thesis to generally refer to this particular category of cultural heritage without specifying which of its elements are concerned.

> **ICAHM Charter**
>
> Definition and Introduction
>
> **Art. 1**
> The "archaeological heritage" is that part of the material heritage in respect of which archaeological methods provide primary information. It comprises all vestiges of

16 Swiss law recognizes two forms of acquisition of ownership: originary acquisition (where the validity of the acquirer's title does not depend on the validity of the transferor's title) and derivative (where the validity of the acquirer's title depends on the validity of the transferor's title). See Steinauer, *Les droits réels vol. II*, n. 2948.

17 For instance, the collections of the Art and History Museum of the City of Geneva. For information on the collections' background, see Wüthrich, "Histoire des collections: le cas particulier de l'archéologie régionale (I)"; Wüthrich, "Histoire des collections: le cas particulier de l'archéologie régionale (II)."

18 For example, the University of Zurich has an extensive collection of archaeological objects originating from Egypt, Mesopotamia, Asia Minor, Greece and Italy. Visit to the University of Zurich's website, accessed 23 May 2023, ‹https://www.archaeologie.uzh.ch/en.html› (Department of Archaeology› The Archaeological Collection).

19 Güran, "Administrative Law," 62–63. *f*TCC uses the term "treasury" (*hazine*) in its Art. 697 (providing the State's ownership of objects having a scientific interest) to refer to the central administration.

human existence and consists of places relating to all manifestations of human activity, abandoned structures, and remains of all kinds (including subterranean and underwater sites), together with all the portable cultural material associated with them.

Valletta Convention

Definition of the archaeological heritage

Art. 1

(1) The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study.
(2) To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs:
  (i) the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;
  (ii) for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and
  (iii) which are located in any area within the jurisdiction of the Parties.
(3) The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water.

These two definitions include terms as such as "portable cultural material" and "places relating to all manifestations of human activity" or "their context," which essentially belong to the field of archaeology. They will be detailed below (*infra* 21 et seq.). The question of whether they are subject to State ownership is determined by law and separately for each country (*infra* Chapter 2). 19

10. Translation into English

English is not an official language of Switzerland or Turkey. Direct quotations from Swiss and Turkish legislation have been translated into English by the author of this thesis. For Swiss federal law, priority was given to unofficial translations provided by the Swiss Confederation (admin.ch/gov/en/start/federal-law.html). For Turkey's Law on the Protection of Natural and Cultural Property (*infra* 121), priority was given to its unofficial translation provided in the UNESCO National Cultural Heritage Laws database (en.unesco.org/cultnatlaws/list). However, in both cases, revisions were made by the author of this thesis when needed. 20

B. Issues Related to Other Fields

1. What Do Archaeologists Study in the Field?

In order to understand what legal systems are trying to protect and why, it is indispensable to know what exactly archaeologists study in the field. If one considers the 21

purpose of archaeology to be the reconstruction of the human past, there are four general categories that help archaeologists meet this objective: artifacts, ecofacts, features and sites. To interpret these categories, however, it is also important to understand their "context."[20]

1.1. Artifacts and Ecofacts

22 Artifacts are portable objects made or modified by humans such as tools, pottery and metal weapons (fig. I.1).[21]

Fig. I.1 A decorated knife from the late Bronze Age discovered near Zurich, now in the collection of the Swiss Confederation. © Swiss National Museum (source: sammlung.nationalmuseum.ch).

23 Ecofacts are organic and environmental remains, which, as opposed to artifacts, are not made by humans. Human skeletons, animal bones, plant remains, soils[22] and sediments[23] are examples of ecofacts.[24] Ecofacts usually survive under special environmental conditions.[25] For instance, the oak piles (*pieux de chêne*) which supported the foundations of prehistoric lake dwellings in Switzerland (fig. I.2) could survive thanks to the humid soil that favored their preservation.

20 Renfrew and Bahn, *Archaeology*, 49–52.
21 Giraud, "L'invention de l'objet archéologique," 7; Renfrew and Bahn, *Archaeology*, 49.
22 For instance, a wooden structure may leave a discoloration in the soil from which archaeologists can draw conclusions. Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 3.
23 Sediment is a global term for material deposited on the earth's surface, such as gravel, sand or clay. The study of soils and sediments, like other organic remains, allows archaeologists to interpret human activities within their surrounding landscape. Renfrew and Bahn, *Archaeology*, 242.
24 Giraud, "L'invention de l'objet archéologique," 7, 8; Renfrew and Bahn, *Archaeology*, 50.
25 Renfrew and Bahn, *Archaeology*, 55 et seq.

Fig. I.2 A painting of the La Tène site by Auguste Bachelin. Oil on canvas, 1879. Laténium, permanent exhibition (source: ne.ch).

1.2. Features

Non-portable artifacts are called "features." Features are divided into simple and complex features. Simple features are "all humanly modified components of a site or landscape, such as hearths, postholes, and storage pits" (fig. I.3). Complex features or structures are buildings of all kinds, from houses to palaces and temples.[26] 24

26 Renfrew and Bahn, *Archaeology*, 50. There is another way of distinguishing simple and complex features. While complex (or positive) features are defined in terms of constructions or accumulations such as walls or floors, simple (or negative) features are defined in terms of holes left by the removal of material such as postholes or ditches. Darvill, "Feature."

Fig. I.3 Examples of simple features from the Neolithic site of Çatalhöyük in Turkey (i.e., a hearth to the front left, one oven to the far left and another oven to the right, and a bin in the center). Photograph by Jason Quinlan (source: Çatalhöyük 2016 Archive Report, catalhoyuk.com).

25 For instance, the remains of the fortifications of the city of Geneva that were discovered through archaeological excavations (*infra* 416) qualify as structures.

1.3. Sites

26 A site is "a distinct spatial clustering of artifacts, features, structures, and organic and environmental remains (ecofacts) – the residue of human activity."[27] For instance, in Turkey, there are many ancient settlements called "tells" (*höyük* or *tepe* in Turkish) indicating human occupation over thousands of years.[28] A site can also be a single monument like the Uluburun wreck, a trading shipwreck dating from circa 1300 B.C. discovered close to the east shore of Uluburun, near Kaş in Turkey.[29]

1.4. Context of a find

27 The ICAHM Charter states that archaeological heritage is "that part of the material heritage in respect of which archaeological methods provide primary information" (Art. 1, first sentence, *supra*). Even though the word "context" is not explicitly stated, the information obtained through scientific methods is very much related to the

27 Renfrew and Bahn, *Archaeology*, 603 (Glossary).
28 A tell is an artificial mound or hill resulting from the accumulation of occupation debris over a long period of time. See Darvill, "Tell."
29 Renfrew and Bahn, *Archaeology*, 380–81.

archaeological context. The archaeological context refers to the stratigraphic units recognized in an excavation, also known as layers.[30] Renfrew and Bahn provide a more technical definition of the context in archaeology: "A find's context consists of its immediate matrix (material surrounding it, usually some sort of sediment such as gravel, sand or clay), its provenience (horizontal and vertical position within the matrix), and its association with other finds (occurrence together with other archaeological remains, usually in the same matrix)."[31]

28 The context is what gives meaning to the various elements unearthed during an excavation. In fact, the purpose of archaeology is not to find rare objects, but to reach a global comprehension of them.[32] To interpret the human past, certain archaeologists explain that they should act like scientists by collecting data (i.e., evidence), formulating a hypothesis and testing the hypothesis against more data to develop a model.[33]

Summary of the Categories of Elements Studied by Archaeologists

<table>
<tr><td colspan="4">*Sites*: Places that show significant traces of human activity</td></tr>
<tr><td rowspan="2">*Artifacts*:
Portable objects used, modified or made by humans</td><td rowspan="2">*Ecofacts*:
Organic and environmental remains not made by humans</td><td colspan="2">*Features*:
Non-portable artifacts</td></tr>
<tr><td>*Simple features*:
All humanly modified components of a site or landscape</td><td>*Complex features*:
Structures</td></tr>
</table>

29 For ease of reference, artifacts and ecofacts will be covered together by the term "archaeological objects," and features (simple features and structures) by the term "archaeological sites" throughout this thesis. Objects and sites shall together form archaeological heritage. Other terms like "remains" and "finds" will sometimes be used interchangeably with archaeological heritage. The term "antiquity," which is vague and has an economic connotation, is avoided on purpose, except for when it is explicitly used in the law.[34]

30 Darvill, "Context."
31 Renfrew and Bahn, *Archaeology*, 50.
32 Kaenel, "Le rôle déterminant du contexte de la découverte pour l'archéologue," 7.
33 Giraud, "L'invention de l'objet archéologique," 9 et seq.; Renfrew and Bahn, *Archaeology*, 13.
34 E.g., "*antiquité*" in Art. 724(1) of the SCC and "*antika*" in *f*TCC.

2. Which Activities Have the Potential to Conflict with the Preservation of Archaeological Sites?

30 Considering that archaeological heritage is often buried in the soil, activities that have the potential to conflict with its preservation are related to the use of the subsoil. The latter has been studied within the framework of different disciplines such as economics, urbanism, engineering, geography and law (i.e., the extent of property rights).[35] This thesis will take as a reference the categories of the subsoil use identified by three different studies (1989, 2003 and 2009) and put together by Laurent (2011).[36] These categories will be particularly helpful for the analysis undertaken in Part II, Chapter 4. With regard to the interactions between categories, Laurent concludes that underground infrastructure (A) and waste storage (B) (table I.1) put the preservation of the archaeological heritage in danger. When discovered unexpectedly, such heritage may be destroyed. Nevertheless, the same activities may also lead to discoveries that could not have been made otherwise. If construction works are coordinated with archaeological excavations, the remains can be preserved and even integrated into the construction in question.[37] Other categories of activity (C, D, E) (table I.1) have also been identified as threats to the preservation of archaeological heritage.[38]

A	**Underground infrastructure**	
	A1	Underground constructions
	A2	Pipes (i.e., water pipes, gas pipelines)
	A3	Military underground facilities
	A4	Road and railways tunnels
	A5	Electricity and communication networks
B	**Waste storage**	
	B1	Storage of radioactive waste
	B2	Discharge of waste (i.e., inert waste, residual waste)
	B3	Storage of CO_2

35 See the references cited in Laurent, *Perspectives et défis de la gestion durable du sous-sol en Suisse*, 3–4.

36 Laurent, 30.

37 Laurent, 50–51.

38 The author does not further develop these aspects. Laurent, 54.

C	**Underground water extraction and storage**	
	C1	Storage of underground water
	C2	Extraction of underground water
D	**Extraction of rocks, metals and carbon**	
	D1	Mineral substances
	D2	Metallic substances (iron, precious metals)
	D3	Hydrocarbon (carbon, gas, petroleum)
	D4	Oil shale
	D5	Salt
E	**Geothermal energy**	
	E1	By conduction
	E2	By pumping wells
	E3	Crystalline rocks

Table I.1 Activities having the potential to conflict with the preservation of archaeological heritage.

Part I: Defining the Legal Framework

States have the obligation to protect and preserve archaeological heritage situated on their territories, regardless of its ownership status. This obligation is well-established by international law and often enshrined in domestic legislation. Switzerland and Turkey make no exception. International rules on the protection of archaeological heritage and their counterparts in Swiss and Turkish law are examined in Chapter 1. 31

Declaring certain elements of archaeological heritage to be State property by law is a measure of protection, among others. So far, this measure has been considered an individual choice made by each State based on its customs. Having said this, its relevance encompasses national territories because disputes over illegally excavated and exported archaeological objects are frequently of a cross-border nature. The role of national ownership laws on archaeological heritage in the international context, as well as Swiss and Turkish legislation in this area, is analyzed in Chapter 2. 32

Chapter 1: Obligation to Protect

A. International Law

Today, the protection of archaeological heritage is covered by numerous international conventions dealing with cultural heritage in the broader sense (*infra* 34 et seq.). However, only one convention makes archaeological heritage its specific focus: the Council of Europe's Valletta Convention (*infra* 41 et seq.). Certain principles regarding archaeological objects are also provided by professional organizations' ethical codes, which are not yet endorsed by international law (*infra* 57 et seq.). 33

1. UNESCO's Cultural Heritage Conventions

UNESCO first showed interest in archaeology through the regulation of the principles applicable to archaeological excavations.[39] The 1956 Recommendation on International Principles Applicable to Archaeological Excavations ("1956 UNESCO Recommendation")[40] recognized States' regulatory role in archaeological research and their responsibility for the preservation of archaeological heritage.[41] Fundamental principles of the 1956 UNESCO Recommendation have been reiterated in the Council of Europe's Convention on the Protection of the Archaeological Heritage, adopted in 1969 and later replaced.[42] 34

During the same period when the Council of Europe adopted its first and short-lived convention on archaeological heritage, UNESCO reflected on new and emerging threats. In fact, policies on urbanization and territorial development introduced following the Second World War were putting pressure on archaeological heritage. New political and legal strategies were needed in particular to reconcile economic development and cultural heritage preservation.[43] Such reflections were expressed in UNESCO's 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works ("1968 UNESCO Recommendation").[44] 35

39 Négri, "Les figures du droit international de l'archéologie," 61 et seq.
40 5 December 1956.
41 See, in particular, Arts. 4 and 5. Négri, "Les figures du droit international de l'archéologie," 68.
42 ETS No.066. London, 6 May 1969. Négri, 70.
43 Négri, 71–72.
44 19 November 1968. Art. 2: "The term "cultural property" includes not only the established and scheduled architectural, archaeological and historic sites and structure, but also the unscheduled or unlisted vestiges of the past as well as artistically or historically important recent sites and structures." See Négri, 72 et seq.

36 Notably, the 1968 UNESCO Recommendation underlines that "measures for the preservation or salvage of cultural property should be preventive and corrective" (Art. 7). This approach lays the base for the Valletta Convention,[45] which is still today the only multilateral convention focusing exclusively on the protection of archaeological heritage. Below, it will be analyzed and construed together with the ICAHM Charter. The Charter appears to have been influential on its conceptualization and drafting.[46]

37 Many other international conventions apply to archaeological heritage, yet come from different perspectives. For instance, UNESCO's 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property ("1970 UNESCO Convention")[47] and UNIDROIT's 1995 Convention on Stolen or Illegally Exported Cultural Objects ("UNIDROIT Convention")[48] are the two principal conventions dealing with the illicit traffic of cultural property. They apply to illegally excavated and exported archaeological objects,[49] and provide mechanisms for their restitution.[50] They do not necessarily answer the question of how States can better protect archaeological heritage still present in their territories.[51]

38 UNESCO's 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage ("World Heritage Convention") is also of interest for archaeological heritage since it covers, among others, archaeological sites of outstanding universal value (Art. 1).[52] Each State Party to the Convention recognizes its "duty of ensuring

45 Négri, 72.

46 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 3, 4, 6–9.

47 UNTS 823 (p. 231). Paris, 14 November 1970. Switzerland ratified the 1970 UNESCO Convention on 3 October 2000, and Turkey on 21 April 1981.

48 Rome, 24 June 1995. Switzerland signed the UNIDROIT Convention on 26 June 1996 but has not ratified it. Turkey has not ratified it either.

49 Art. 1 of the 1970 UNESCO Convention: "For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (…) (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries (d) elements of artistic or historical monuments or archaeological sites which have been dismembered (…)". The same definition is provided by Art. 2 of the UNIDROIT Convention and its Annex.

50 See, e.g., O'Keefe, *Commentary on the UNESCO 1970 Convention*; Prott, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects*.

51 Except for Art. 5(d) of 1970 UNESCO Convention which obliges States to ensure the preservation *in situ* (*infra* 50) and to protect certain areas reserved for future archaeological research (*infra* 46).

52 UNTS 1037 (p. 151). Paris, 16 November 1972. Switzerland ratified the Convention on 17 September 1975, and Turkey on 16 March 1983. To be included on the World Heritage List, sites must be of outstanding universal value and meet at least one out of ten selection criteria. These criteria are

the identification, protection, conservation, presentation and transmission to future generations" of the cultural heritage of outstanding universal value situated in their territories (Art. 4). What this set of duties comprises is detailed in Article 5 of the World Heritage Convention.[53]

39 UNESCO's 2001 Convention on the Protection of the Underwater Cultural Heritage ("Underwater Cultural Heritage Convention") may be the convention that has the closer connection to archaeological heritage.[54] Nevertheless, it focuses on a specific type of archaeological material, "which [has] been, partially or totally under water, periodically or continuously, for at least 100 years" (Art. 1(a) of the Convention). The Underwater Cultural Heritage Convention recognizes States' exclusive rights to regulate activities in their internal waters, archipelagic waters and territorial sea (Art. 7). It then lays down rules for coordination between States in other zones[55] (Arts. 8–10) and in the "Area" beyond the limits of national jurisdiction (Arts. 11–12). It also establishes a set of technical standards ("Rules concerning activities directed at underwater cultural heritage") to be applied in all the zones in its Annex.[56]

40 Since underwater cultural heritage necessitates a special approach for conservation, this Convention will not be further analyzed. Nevertheless, it is important to cite certain principles endorsed by the Convention, which are also examined below. First, the Convention recognizes the preservation *in situ* (*infra* 50) of underwater cultural heritage as the first option before any intervention is made over this heritage (Art. 2(5) of the Convention). Second, recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation (Art. 2(6)) (*infra* 55). These two principles are also found in the Valletta Convention. Lastly, the Convention underlines that underwater cultural heritage cannot be commercially exploited (Art. 2(7)). The issue of commercialization of archaeological heritage will be discussed in the Ethical Codes section (*infra* 57).

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explained in the Operational Guidelines for the Implementation of the World Heritage Convention, §§ 77–78.

53 Art. 5(4) is of interest for our purposes: Each State Party shall "take the appropriate *legal*, scientific, technical, administrative and financial *measures necessary for the identification, protection, conservation, presentation and rehabilitation* of this heritage" (emphasis added). For further details, see Carducci, "Art. 4–7 National and International Protection of the Cultural and Natural Heritage."

54 UNTS 2562. Paris, 2 November 2001. Switzerland ratified the Convention on 25 October 2019. Turkey has not ratified it.

55 These are the contiguous zone, the exclusive economic zone and the continental shelf.

56 For further information on underwater cultural heritage and international law, see, e.g., Dromgoole, *Underwater Cultural Heritage and International Law*; Garabello and Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and after the 2001 UNESCO Convention*; O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*.

2. The Valletta Convention

41 The Valletta Convention is comprised of eighteen provisions dealing with issues that range from protection measures and integrated conservation to financing and promotion of archaeological heritage.[57] It is not intended here to provide a full commentary of the Convention.[58] Instead, the task at hand consists of identifying the legal minimum required for the adequate protection of archaeological heritage.

42 In particular, Articles 2, 4 and 5(iv) oblige States to make provision for certain matters.[59] In other words, the following issues should appear in domestic legislation: the maintenance of an inventory of archaeological heritage; the designation of protected monuments and areas; the creation of archaeological reserves; the mandatory reporting of chance discoveries; the conservation of the archaeological heritage, preferably *in situ*; and appropriate storage places.

2.1. Creation and Maintenance of an Inventory

> **Valletta Convention**
> Art. 2
> Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for: (i) the maintenance of an inventory of its archaeological heritage and the designation of protected monuments and areas; (...) (emphasis added)

43 Article 2(i) of the Valletta Convention imposes a double obligation.[60] First, States should make use of an inventory recording their archaeological heritage. An inventory means ongoing records for identifying and describing heritage places for heritage management and protection purposes.[61] Including a heritage place in an official inventory signifies that its whereabouts thereafter are known and allows, if needed,

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57 Definition of the archaeological heritage (Art. 1); Identification of the heritage and measures for protection (Arts. 2, 3 and 4); Integrated conservation of the archaeological heritage (Art. 5); Financing of archaeological research and conservation (Art. 6); Collection and dissemination of scientific information (Arts. 7 and 8); Promotion of public awareness (Art. 9); Prevention of the illicit circulation of elements of the archaeological heritage (Arts. 10 and 11); Mutual technical and scientific assistance (Art. 12); Control of the application of the (revised) Convention (Art. 13); Final clauses (Arts. 14 to 18).

58 For further information on the Valletta Convention, see van der Haas and Schut, *The Valletta Convention: Twenty Years After - Benefits, Problems, Challenges*.

59 Cf. Art. 3 of the ICAHM Charter.

60 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 4.

61 Myers, "Heritage Inventories," 105. A definition for inventory is also given by the Comparative Dictionary on Cultural Heritage Law in French: "*Inventaire: instrument ou méthode de recensement des biens, matériels ou immatériels, mobiliers ou immeubles, faisant partie du patrimoine culturel, necessaire aux fins de leur identification protection et mise en valeur.*" Cornu, Fromageau and Wallaert, *Dictionnaire comparé du droit du patrimoine culturel*, 596.

the monitoring of its physical condition by public authorities (i.e., so that the authorities can restrict construction permits).[62]

Article 7 of the Valletta Convention, which addresses the collection and dissemination of scientific information, also mentions inventories.[63] It urges each State to "make or bring up to date surveys, inventories and maps of archaeological sites in the areas within its jurisdiction" (Art. 7(i) of the Valletta Convention).[64] This provision is closely related to the concept of "integrated conservation," discussed in Article 5 of the Convention.[65] In a nutshell, archaeologists conduct non-destructive research techniques, called "surveys," to locate archaeological sites,[66] then compile the information gathered in inventories and/or maps, which help public authorities 44

62 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 4.

63 Council of Europe, 7; Cornu, Fromageau, and Wallaert, *Dictionnaire comparé du droit du patrimoine culturel*, 597.

64 Cf. Art. 4 of the ICAHM Charter: "(1) The protection of the archaeological heritage must be based upon the fullest possible knowledge of its extent and nature. General survey of archaeological resources is therefore an essential working tool in developing strategies for the protection of the archaeological heritage. Consequently, archaeological survey should be a basic obligation in the protection and management of the archaeological heritage. (2) At the same time, inventories constitute primary resource databases for scientific study and research. The compilation of inventories should therefore be regarded as a continuous, dynamic process. It follows that inventories should comprise information at various levels of significance and reliability, since even superficial knowledge can form the starting point for protectional measures."

65 "Integrated conservation of the archaeological heritage," Art. 5: "Each Party undertakes: (i) to seek to reconcile and combine the respective requirements of archaeology and development plans by ensuring that archaeologists participate: (a) in planning policies designed to ensure well-balanced strategies for the protection, conservation and enhancement of sites of archaeological interest; (b) in the various stages of development schemes; (ii) to ensure that archaeologists, town and regional planners systematically consult one another in order to permit: (a) the modification of development plans likely to have adverse effects on the archaeological heritage; (b) the allocation of sufficient time and resources for an appropriate scientific study to be made of the site and for its findings to be published; (iii) to ensure that environmental impact assessments and the resulting decisions involve full consideration of archaeological sites and their settings; (iv) to make provision, when elements of the archaeological heritage have been found during development work, for their conservation in situ when feasible; (v) to ensure that the opening of archaeological sites to the public, especially any structural arrangements necessary for the reception of large numbers of visitors, does not adversely affect the archaeological and scientific character of such sites and their surroundings.
Cf. Art. 2 of the ICAHM Charter.

66 Different survey methods do exist. For instance, through a "reconnaissance survey" on the ground or from the air, archaeologists locate and record (already known or new) sites. To assess the layout of a particular site, they conduct "site surface survey." Only after such steps, excavations (as a destructive technique) may be conducted at individual sites. Sometimes, entire landscapes are studied through regional surveys. Renfrew and Bahn, *Archaeology*, 74 et seq. "Survey" is also used in a narrow sense, implying the step where the likely effects of a development project upon the archaeological heritage is assessed; see Renfrew and Bahn, 568–69. Cf. Art. 4 of the ICAHM Charter.

to better assess the impact of development projects on archaeological heritage.[67] This is why the "up-to-date" nature of surveys and inventories is underlined in Article 7(i) of the Valletta Convention.[68]

2.2. Designation of Protected Monuments and Areas

45 Pursuant to Article 2(i) of the Valletta Convention, States should, in addition to inventorying, designate protected monuments and areas. This is particularly useful when the extent of a site or monument is not known.[69] Each State has its own tools of designation, often applicable to all types of cultural property. For instance: in Swiss and French law, one will refer to "*classement*" (classification)[70]; in Turkish law, to "*tespit*" (identification) and "*tescil*" (registration) (*infra* 123); and in English law, to the "listing"[71] of cultural property. In Switzerland, administrative measures and how they are referred to (i.e., terminology) may change from one canton to another. In the Canton of Geneva, for example, the two main protection measures are the listing (*l'inscription à l'inventaire*) and the classification (*le classement*) (*infra* 415). In Geneva's system, the French term "*inventaire*" does not correspond to "inventory" in English (within the sense of Art. 2(i) of the Valletta Convention, above) but rather to listing or classification. Once archaeological heritage is put under protection by being listed or classified (in the sense of having undergone classification), there will be direct implications on its legal regime.[72]

2.3. Creation of Archaeological Reserves

Valletta Convention

Art. 2
Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for: (…) (ii) the creation of archaeological reserves, even where there are no visible remains on the ground or under water, for the preservation of material evidence to be studied by later generations; (…) (emphasis added)

67 Renfrew and Bahn, *Archaeology*, 565 et seq. Excavations, if needed, can be planned ahead, in some cases construction plans can be altered or the presentation of the remains may be incorporated in the project.

68 Art. 4(2) of the ICAHM Charter also describes the compilation of inventories as a continuous and dynamic process.

69 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 4.

70 Cornu, Fromageau and Wallaert, *Dictionnaire comparé du droit du patrimoine culturel*, 300 et seq.

71 Cornu, Fromageau and Wallaert, 574–78.

72 See Cornu, Fromageau and Wallaert, 812.

> Art. 4
> Each Party undertakes to implement measures for the physical protection of the archaeological heritage, making provision, as circumstances demand:
> (i) for the acquisition or protection by other appropriate means by the authorities of areas intended to constitute archaeological reserves; (...) (emphasis added)

Creation of reserves is a protection measure explicitly mentioned in Article 2(ii) of the Valletta Convention. Archaeological reserves are "areas of land subject to certain restrictions in order to preserve the archaeological heritage contained within the borders."[73] As stressed in the provision, the aim is to preserve archaeological heritage intact so that it can be studied by later generations.[74] Moreover, it is not necessary that the remains be visible on the ground or under water. 46

Article 2(ii) is read in conjunction with Article 4(i) of the Convention, which provides the tools for creating archaeological reserves: either acquisition by the State of the lands concerned or the application of "other appropriate means."[75] Protection by other appropriate means may include the creation of archaeological reserves or protection zones through spatial planning instruments.[76] 47

2.4. Mandatory Reporting of Chance Discoveries

> **Valletta Convention**
>
> Art. 2
> Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for: (...) (iii) the mandatory reporting to the competent authorities by a finder of the chance discovery of elements of the archaeological heritage and making them available for examination.

It is possible that movable or immovable elements of archaeological heritage are discovered by individuals by chance. Under Article 2(iii) of the Valletta Convention, States must oblige finders to report such discoveries to the competent authority and to make them available for examination. The purpose here is to make the discovery 48

73 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 4.

74 Its purpose is not to completely prohibit the use of certain lands, but rather to mitigate the effects of development by, for instance, requiring an authorization for activities which are likely to disturb the soil. Council of Europe, 4.

75 Cf. UNESCO's 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (19 November 1968) Art. 24(a): "Archaeological reserves should be zoned or scheduled and, if necessary, immovable property purchased, to permit thorough excavation or the preservation of the ruins found at the site."

76 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 5.

known to public authorities in a timely manner so that protection measures can be applied if needed.[77]

49 The challenge with the notification of chance discoveries is, of course, most problematic in countries where clandestine excavations are practiced, like Turkey.

2.5. Preservation Preferably in Situ

Valletta Convention

Art. 4
Each Party undertakes to implement measures for the physical protection of the archaeological heritage, making provision, as circumstances demand: (…) (ii) for the conservation and maintenance of the archaeological heritage, preferably in situ; (…)

Art. 5
Each Party undertakes: (…)

(iv) to make provision, when elements of the archaeological heritage have been found during development work, for their conservation in situ when feasible; (…).

50 Article 4(ii) of the Valletta Convention stipulates that archaeological heritage should be preserved *in situ* whenever possible.[78] What does "*in situ*" mean? Why is *in situ* preservation important? When cannot it be guaranteed? What happens in such cases?

51 The Latin expression "*in situ*" signifies "in its original position."[79] It can be construed in two different ways: either excavating a site and preserving immovable remains in their original position, or not precipitating the excavation and preserving a site, known or supposed, intact so that it can be studied later. The current tendency in the scientific world favors the second approach over the first one.[80] In other words, excavations should be carried out only when archaeological heritage is in unavoidable danger (rescue excavations) or when they are absolutely necessary to answer a scientific question (programmed excavations).[81]

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77 Council of Europe, 4.

78 Cf. Art. 3(3) of the ICAHM Charter: "Legislation should afford protection to the archaeological heritage that is appropriate to the needs, history, and traditions of each country and region, providing for in situ protection and research needs."

79 Darvill, "In Situ."

80 Excavation not only leads to short and long-term costs, but also to the likely degradation of the archaeological heritage, which is left exposed. Council of Europe, *Guidelines for the Protection of the Archaeological Heritage*, 13. See also Art. 8 (2) of the ICAHM Charter: "The objective of academic archaeological training should take account of the shift in conservation policies from excavation to in situ preservation (…)"; Art. 5 of the ICAHM Charter: "Non-destructive techniques, aerial and ground survey, and sampling should therefore be encouraged wherever possible, in preference to total excavation."

81 See Art. 3(i)(b) of the Valletta Convention: "(…) each Party undertakes (…) (b) to ensure that archaeological excavations and prospecting are undertaken in a scientific manner and provided

Having said this, certain activities related to the soil make *in situ* preservation difficult, if not impossible. These are mainly construction works (i.e., roads, quarries and dams), agricultural intensification and land reclamation (creating new land from oceans, riverbeds or lakebeds).[82] Such activities are often necessary and inescapable. The challenge is therefore to find a compromise between development needs and *in situ* preservation, which becomes more and more complex. Hence, Article 5(iv) of the Valletta Convention urges States to enact a specific provision ensuring that elements of the archaeological heritage found during development works are preserved *in situ* "when feasible." 52

How can development's effects on the preservation of archaeological heritage be mitigated? This depends largely on "the nature of the site and what is being constructed."[83] One method is to conduct excavations and then cover the site over so that it remains available for future research, while allowing the construction to be built on top of it.[84] Another solution is to cancel or modify the project so that the damage to archaeological heritage can be avoided once and for all. In practice, however, this will rarely happen. In most cases, sites threatened by development works are excavated and recorded, but destroyed.[85] 53

2.6. Scientific Study

When destruction is unavoidable, "legislation should in principle require full archaeological investigation and documentation" of the site (Art. 3(6) of the ICAHM Charter).[86] The Valletta Convention also provides for this principle, though in a weaker way. Article 5(ii)(b) stipulates that States should allocate "sufficient time 54

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that: non-destructive methods of investigation are applied wherever possible; [and] the elements of the archaeological heritage are not uncovered or left exposed during or after excavation without provision being made for their proper preservation, conservation and management." See Art. 5(4) of the ICAHM Charter: "Excavation should be carried out on sites and monuments threatened by development, land-use change, looting, or natural deterioration."

82 Renfrew and Bahn, *Archaeology*, 565. See also Table I.1.

83 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 6.

84 Council of Europe, 6. For instance, the site of Allianoi, discovered along the path of Yortanlı Dam in Western Turkey, has been filled with sand and was left under the dam's reservoir in 2011 pursuant to the competent Regional Commission's several decisions (2010). These decisions were challenged before the Administrative Court in Ankara (2013) and the Council of State (2015), which both rejected the claims on annulment. See the ECHR Judgment of 29 April 2019 (violation of the right to freedom of expression), *Cangı v. Turkey*, Case No. 24973/15, § 7.

85 Renfrew and Bahn, *Archaeology*, 568. There is also the option of dismantling and transporting the elements of an archaeological site, which is in general not encouraged. See Art. 6(1) of the ICAHM Charter: "Any transfer of elements of the heritage to new locations represents a violation of the principle of preserving the heritage in its original context."

86 See also Art. 5 of the ICAHM Charter (Investigation).

and resources for an appropriate scientific study to be made of the site and for its findings to be published."[87] The obligation to conduct a scientific study before the destruction of archaeological sites can be considered the corollary obligation of *in situ* preservation.

2.7. Appropriate Storage Places

Valletta Convention

> Art. 4
> Each Party undertakes to implement measures for the physical protection of the archaeological heritage, making provision, as circumstances demand: (...) (iii) for appropriate storage places for archaeological remains which have been removed from their original location.

55 Art. 4(iii) of the Valletta Convention deals in particular with the protection of archaeological objects. Under this article, States should ensure that "archaeological remains which have been removed from their original location" are appropriately stored. The aim here is to oblige States to allocate physical and human resources for storage. States should ensure that public authorities are aware of the necessity of establishing appropriate storage places and have the means to do it.[88]

56 In this regard, it is important to recall that the long-term preservation of archaeological objects goes beyond the act of putting the objects in proper storage places.[89] Archaeological objects are studied, used to train future archaeologists,[90] curated by museums and presented to the public.[91] In this context, they may also be part of public collections. While the concept of "public collection" varies from country to coun-

87 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 6.

88 Council of Europe, 5.

89 The ICAHM Charter mentions the "proper long-term conservation and curation of all related records and collections" in Art. 6(1). See Elia, "ICOMOS Adopts Archaeological Heritage Charter," 101.

90 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 7. See also Art. 8 of the Valletta Convention ("[D]issemination of the scientific knowledge").

91 Council of Europe, *Guidelines for the Protection of the Archaeological Heritage*, 10. It is further explained that "in order to fully appreciate the value of the archaeological heritage, the public must have access to sites and objects. This is a crucial part of the educational process and an essential method of promoting an understanding of the origins and development of modern societies." Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 8. See also Art. 9 of the Valletta Convention.

try,[92] objects placed in public collections are usually inalienable (*infra* 404), their recovery is not subject to any time limits and they cannot be seized.[93]

Summary of the Legal Minimum as Fixed by the Valletta Convention

	Inventory	Protection		Chance finds	Preservation		Scientific study
		Monuments or areas	Reserves		*In situ*	Storage	
Valletta Convention	Art. 2(i)	Art. 2(i)	Art. 2(ii) Art. 4(i)	Art. 2 (iii)	Art. 4(ii)	Art. 4(iii)	Art. 5(ii) (b)

3. Ethical Codes

While the 1970 UNESCO Convention and the UNIDROIT Convention aim at preventing the international circulation of illegally excavated archaeological objects, no position is explicitly taken with regard to the sale of *legally* excavated archaeological objects by their legitimate owners, the States.[94] Can public authorities sell archaeological objects on the grounds that they no longer serve the public interest, or that other pressing projects need financing? 57

The Society for American Archaeology (SAA) has long recognized that "the commercialization of archaeological objects – their use as commodities to be exploited for personal enjoyment or profit – results in the destruction of archaeological sites and of contextual information that is essential to understanding the archaeological record."[95] Therefore, SAA requires their members to discourage, and themselves avoid, activities that enhance the commercial value of archaeological objects. In a similar way, the European Association of Archaeologists (EAA), in particular its Committee on the Illicit Trade in Cultural Material, expects that archaeologists "contribute, in any form, to discourage commercialisation of archaeological material."[96] 58

92 For the definition of "public collection" in various countries and a comparative synthesis, see Cornu, Fromageau and Wallaert, *Dictionnaire comparé du droit du patrimoine culturel*, 309 et seq.

93 Council of Europe, *Guidelines for the Protection of the Archaeological Heritage*, 14–20.

94 Art. 13(d) of the UNESCO 1970 Convention recognizes States' "indefeasible right" to "classify and declare certain cultural property as inalienable."

95 See the SAA's Principles of Archaeological Ethics (adopted in 1996), available at the SAA's website, accessed 23 May 2023, ‹https://www.saa.org/career-practice/ethics-in-professional-archaeology›. The principles are currently under revision.

96 European Association of Archaeologists, "The European Archaeologist," 17.

Nevertheless, EAA's Committee on the Illicit Trade in Cultural Material accepts the sale of "objects that have a certificate of legal and ethical origin (e.g., pre-1970 known and proven as valid origin)."[97] The year 1970 is when UNESCO adopted its convention on the prevention of illicit trafficking, the 1970 UNESCO Convention (*supra* 37). Even if the date of 1970 bears no legal effect, it has been endorsed as a standard for the acquisition of archaeological material by many museums and professional associations.[98] The Code of Ethics of the International Council of Museums (ICOM) states that "museums should not acquire objects where there is reasonable cause to believe their recovery involved unauthorized or unscientific fieldwork" without specifically referring to the date of 1970.[99] As for disposal, it considers that "a strong presumption that a deaccessioned item should first be offered to another museum."[100]

59 In sum, there are two positions with regard to the sale of archaeological objects: (i) prohibiting any activity enhancing the commercial value of archaeological objects (commerce in general), and (ii) allowing the commerce of objects that either meet the 1970 standard or have been legally excavated. There are two important arguments in favor of the first position.

60 An international convention, UNESCO's Underwater Cultural Heritage Convention (*supra* 39), has already endorsed the principle that "underwater cultural heritage shall not be commercially exploited" (Art. 2(7) of the Convention). The reasons which motivated the drafters of this Convention to adopt such a rule is also valid for archaeological heritage buried in the subsoil: "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" (Annex Rule 2 of the Convention).[101] What is meant by "commercial exploitation" is further developed in Annex Rule 2: "Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods."[102]

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97 European Association of Archaeologists, 18. *Contra* Stevenson, "Why Archaeological Antiquities Should Not Be Sold on the Open Market, Full Stop"; Wecker, "A Record-Setting $30.1m Sale of an Assyrian Relief at Christie's Raises Red Flags."

98 In order to meet the 1970 standard, objects should be documented as having been removed from their country of origin before 1970 or legally exported after 1970. Gerstenblith, "The Meaning of 1970 for the Acquisition of Archaeological Objects," 364.

99 International Council of Museums, "ICOM Code of Ethics for Museum," Principle 2.4. See also Principle 2.3 on provenance and due diligence: "Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin (…)."

100 International Council of Museums, "ICOM Code of Ethics for Museums," Principle 2.15.

101 For further information on commercial exploitation of underwater cultural heritage, see Dromgoole, *Underwater Cultural Heritage and International Law*, 210 et seq.

102 O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 50–52.

Although Rule 2 crafted a "formula which provides some 'wiggle room' on the question of sale,"[103] the sale of archaeological objects on the open market in a way that results in its "irretrievable dispersal" is not allowed.[104] 61

Furthermore, Stevenson draws attention to increasing sales of legally excavated archaeological objects on the market. She questions whether museums who have been under the pressure not to acquire objects "without context" (illegally excavated) are now looking to dispose of their collections "with context."[105] Putting documented and undocumented archaeological objects together on sale in auctions is very problematic since the former sale "confer an air of legitimacy" to the latter ones.[106] Although the examples used by Stevenson concern private collections in the U.S., the same rationale certainly applies to States and to archaeological objects they acquire under ownership laws. 62

B. Domestic Law

1. Switzerland

1.1. Federal Level

1.1.1. The Swiss Constitution

The Federal Constitution of the Swiss Confederation of 18 April 1999 ("Swiss Const.")[107] declares that the cantons are responsible for all culture-related matters (Art. 69(1) of the Swiss Const.), including the protection of natural and cultural heritage (Art. 78(1) of the Swiss Const.). Nevertheless, the Confederation may support "cultural activities of national interest" (Art. 69(2) of the Swiss Const.) and "shall take account of concerns for the protection of natural and cultural heritage" in the 63

103 Dromgoole, *Underwater Cultural Heritage and International Law*, 232.
Annex Rule 2: "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 this Convention and are subject to the authorization of the competent authorities;
(b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, 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 competent authorities."

104 Dromgoole, 234–35.

105 Stevenson, "Conflict Antiquities and Conflicted Antiquities," 232.

106 Stevenson, 232.

107 RS 101.

fulfillment of its duties (Art. 78(2) of the Swiss Const.).[108] It is in this context that the federal laws examined below have been adopted.

64 The obligation regarding preservation *in situ* (*supra* 50) is explicitly mentioned at the constitutional level in Swiss law: "[The Confederation] shall protect landscapes, the local character of places, historic sites and natural and cultural monuments; it shall preserve them in their entirety[109] if required to do so in the public interest" (Art. 78(2) of Swiss Const.). The Federal Act on the Protection of Nature and Cultural Heritage of 1 July 1966 ("Nature and Cultural Heritage Act," or "NCHA")[110] retains a wording very similar to this provision (*infra* 66).

1.1.2. Nature and Cultural Heritage Act

65 The NCHA contains provisions aiming at the protection and preservation of the country's natural and cultural heritage, essentially of immovable nature.[111] Its first chapter (Arts. 2–12*g* of the NCHA) corresponds to Article 78(2) of the Swiss Const. and lays down the five pillars of the protection system: definition of the "fulfillment of federal tasks" (Art. 2),[112] categorization of the objects and sites according to their importance (Art. 4),[113] inscription in the inventories of those having a national importance (Arts. 5–6), expert reports (Arts. 7–9) and the right of appeal of communes and organizations (Art. 12–12*g*).[114]

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108 See also Art. 78(3) of Swiss Const. on expropriation and purchase; § (4) on animals, plants and endangered species; and § (5) on wetlands.

109 Swiss Const. of 29 May 1874 used the expression "conserve them intact" instead of "preserve them in their entirety." Both expressions imply the same: to ensure that the heritage items in question are not destroyed. Favre, "LPN Art. 3," n. 2.

110 RS 451.

111 Gabus and Renold, *Commentaire LTBC*, Art. 32 n. 55.

112 Art. 2 of the NCHA: "The fulfilment of federal tasks (…) mean in particular: (a) the construction of buildings of the federal administration, motorways or national railways can be cited. The planning, construction and alteration of works and installations by the Confederation, its institutions and enterprises, such as buildings and installations of the federal administration, national roads, and buildings and installations of the Swiss Federal Railways; (b) the issuing of licences and authorisations, such as those for the construction and operation of transport infrastructure and facilities (including approval of plans) and of works and installations for conveying energy, liquids or gases, and for telecommunications, as well as authorisations for forest-clearing operations; (c) the provision of subsidies for planning, works and installations, e.g., for land improvement projects, renovation of agricultural buildings, river training, water body protection structures and transport infrastructure."

113 Art. 4 of the NCHA distinguishes between sites of national importance (*infra* 68) and those of regional and local importance.

114 Zufferey, "Chapitre premier: Le fondement constitutionnel," n. 6.

(a) General Duty

66 In the fulfilment of federal tasks, the Confederation, its institutions and services, and the cantons[115] shall ensure that the characteristic appearance of landscapes and local places, historical sites, natural specimens and historical monuments are carefully managed and, where there is an overriding public interest, preserved in their entirety (Art. 3(1) of the NCHA). The list of categories of objects enumerated in this provision (landscapes, local places, historical sites and monuments) is not exhaustive: the entire Swiss landscape, natural or built, is considered covered as long as it is worthy of protection.[116] Archaeology is included in the protection of "monuments."[117] Article 3(1) of the NCHA applies regardless of the importance of the site (national or regional/local) and whether the site has been listed or not (Art. 3(3) of the NCHA).[118]

67 The obligation to "carefully manage" and to "preserve in the entirety" (or to preserve intact) is further detailed in Article 3(2) of the NCHA.[119] Nevertheless, such an obligation is not absolute: a protection measure should not exceed what is required for the protection of the site itself and its surroundings (the principle of proportionality) (Art. 3(3) of the NCHA).[120] The obligation to carefully manage first implies avoiding or minimizing the damage to the site, yet it also covers reconstruction or replacement measures.[121] Preservation in the entirety does not necessarily mean that construction is strictly forbidden. The purpose here is to maintain the identity of the site within the framework assigned for its protection.[122]

(b) Federal Inventories of Sites of National Importance

68 According to Article 5(1) of the NCHA, the Federal Council establishes, in collaboration with the cantons, federal inventories of sites of national importance in Switzerland. To date, there are three inventories within the meaning of Article 5(1) of the NCHA: the Federal Inventory of Landscapes and Natural Monuments, the Federal

115 Art. 3 of the NCHA does not apply during the execution of tasks which are purely of cantonal nature. Favre, "LPN Art. 3," n. 5.

116 Favre, n. 3; Zufferey, "Chapitre premier: Le fondement constitutionnel," n. 24.

117 See the Federal Council's message regarding the partial revision of NCHA (1995) *in* FF 1991 III 1137, 1150.

118 Favre, "LPN Art. 3," n. 4.

119 Art 3(2) of the NCHA: "The Confederation and cantons shall fulfill this obligation by: (a) suitably designing and maintaining their own buildings and installations, or by foregoing their construction altogether; (b) imposing conditions or requirements on the issue of licenses and authorizations or refusing to issue them; and (c) restricting or refusing subsidies."

120 Favre, "LPN Art. 3," n. 6.

121 Favre, n. 7.

122 Favre, n. 9.

Inventory of Built Sites of National Importance and the Federal Inventory of Historic Traffic Routes of Switzerland.[123]

69 The Federal Inventory of Built Sites of National Importance (French acronym: ISOS) is the one that mainly covers archaeological sites. A "built site" means an agglomeration in its entirety.[124] Besides the topographic, spatial and architectural-historical assessment criteria,[125] other factors such as "archaeological value" may influence the qualification of a site.[126] Since there is no separate category for archaeology in ISOS,[127] it is difficult to assess the numbers of listed archaeological sites, or whether they are included in the agglomerations inscribed on ISOS.

70 The inclusion of a site in one of these lists implies that such sites particularly deserve to be preserved intact (Art. 6(1) of the NCHA).[128] This entails an enhanced obligation to protect for the Confederation, as opposed to sites of regional and local importance, whose protection is mainly the duty of the cantons.[129] Only other interests of national importance that "carry equal or greater weight" can justify a breach to the obligation to fully preserve the sites inscribed in federal inventories (Art. 6(2) of the NCHA).[130] Federal inventories also have implications for cantons. Cantons should take account of the sites of national importance during the establishment of their cantonal structure plans (*infra* 381).[131]

123 Leimbacher, "LPN Art. 5," n. 1.

124 See Art. 17 of the Guidelines (*directives*) on ISOS of 1 December 2017 adopted by the Federal Department of Home Affairs ("ISOS Guidelines").

125 See Art. 18 of the ISOS Guidelines.

126 The "archaeological value" concerns, in particular, built sites containing important historic and prehistoric remains or archaeological sites, which have significantly contributed to the advancement of the research on settlements (Art. 19(a) of the ISOS Guidelines).

127 See Art. 16 of the ISOS Guidelines for the different categories of agglomeration (*ville, petite ville/bourg, village urbanisé, village, hameau, cas particulier*).

128 Art. 6(1) of the NCHA: "The inclusion of a site of national importance in a federal inventory indicates that it particularly deserves to be preserved undiminished, or in any case to be managed with the greatest possible care, including the application of restoration or appropriate replacement measures." The Swiss Federal Court explains that Arts. 3 and 6 of the NCHA are not different in terms of the concept of protection, but only with regard to the weight accorded to conservation while balancing the interests at stake. Federal Administrative Court Judgment of 31 July 2012, No. A-1251/2012, § 25.3 et seq. (in German). See Favre, "LPN Art. 3," n. 7.

129 Favre, "LPN Art. 4," n. 2.

130 Favre, n. 4.

131 This duty is explicitly mentioned in the ordinances regarding the three inventories. See Art. 8 of the Ordinance regarding the Federal Inventory of Landscapes and Natural Monuments (French acronym: OIFP); Art. 4a of the Ordinance regarding the Federal Inventory of Built Sites of National Importance (French acronym: OISOS); and Art. 9 of the Ordinance regarding the Federal Inventory of Historic Traffic Routes of Switzerland (French acronym: OIVS). For further reading on the subject of federal inventories, see Barbara, "Les inventaires fédéraux au sens de l'art. 5 LPN. Quelle portée pour la Confédération, les cantons et les communes?"

1.1.3. Museums and Collections Act

71 Before Switzerland's adoption of its national ownership law in favor of cantons, it was possible for individuals to appropriate undiscovered archaeological objects. In the mid-1880s, Swiss lacustrine collections became so popular that their sale abroad increased significantly.[132] In order to keep the collections "at home," the Confederation passed a special decree in 1886,[133] allowing the Confederation not only to financially support cantons in their acquisitions, but also to purchase objects of national importance on their behalf.

72 The Confederation's acquisitions, and further donations, contributed to the creation of the federal archaeology collection, which is today part of the *Musée national suisse*, the Swiss National Museum. The latter operates as three museum sites (Zurich, Prangins and Schwyz) and one center for collections (Affoltern am Albis).[134]

73 The Federal Act on the Confederation's Museums and Collections of 12 June 2009 ("Museums and Collections Act," or "MCA") regulates, among other things, the functioning of the Swiss National Museum.[135] Being a public establishment endowed with a moral status (Art. 5(1) of the MCA), the Museum is independent in its organization and conducts its own accounting (Art. 5(2) of the MCA).[136]

74 The Swiss National Museum has the usufruct (i.e., the right of use) of the collection items, property of the Confederation (Art. 15(1) of the MCA), the terms of which are detailed in a contract concluded between the Museum and the Confederation (Art. 15(5) of the MCA). The Museum's activities are overseen by the Federal Council (Art. 21(1) of the MCA), which also sets the Museum's strategic objectives for each four-year period (Art. 22(1) of the MCA).

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132 See the Federal Council's message regarding the acquisition of the collection of lacustrine antiquities of Dr. Gross and the creation of a Swiss national museum of 20 November 1884 *in* FF 1884 IV 530.

133 See the Federal Decree regarding the Confederation's participation to the conservation and the acquisition of national antiquities of 30 June 1886 (abrogated in 1950). A translation in English of this Decree is provided by Brown, *The Care of Ancient Monuments*, 177–79.

134 Swiss National Museum, "Our Establishments." The archaeology collection includes archaeological finds from Switzerland dating from the Paleolithic Age to the Early Middle Ages, i.e., from approximately 100,000 BC to around 800 AD. Following the creation of cantonal archaeology services (and cantonal museums), the Confederation ceased in principle to acquire Swiss archaeological objects. Kaeser and Kunz Brenet, *La collection Paul Wernert au Musée national suisse*, 7.

135 RS 432.30.

136 Before the adoption of the MCA, the Swiss National Museum was an administrative body attached to the Federal Office for Culture, having its own accounting department but limited in its autonomy. Knapp, "Liberté des musées de procéder à des transactions d'objets d'art," 137; Renold and Contel, "Rapport National - Suisse," 354.

75 The duties of the Swiss National Museum are defined in Articles 4 and 7 of the MCA. These provisions do not explicitly provide for the appropriate storage of archaeological objects (*supra* 55). Nevertheless, the MCA lays down the rules regarding the Museum's bodies, staff (Arts. 10–14), and finances (Arts. 17–20), all critical to the fulfillment of the storage duty.

Fig. 1.1 The Confederation's archaeological collection in the Centre d'études (source: www.landesmuseum.ch/fr/services/centre-detudes).

76 Again, it is important to underline that the long-term preservation of archaeological objects goes beyond the act of putting the objects in proper storage places. Archaeological objects are also studied, documented, restored and presented to the public. Some of these tasks can take years to be carried out.

77 For instance, it was only in 2018 that the Swiss National Museum completed the scientific study of the Hallwil Collection, donated to the Museum over a century ago, in 1912. This collection contains, among others, thousands of archaeological objects discovered within the surroundings of Hallwyl Castle in the Canton of Aargau. Since 2019, a part of the collection has been permanently displayed in the National Museum in Zurich.[137]

78 The MCA does not provide for rules affecting the legal regime of the Confederation's collections, which are part of the Confederation's *patrimoine administratif* (i.e., public assets) (*infra* 328).[138] Regarding the issue of transfer, Article 24 of the MCA states

137 Swiss National Museum, "Management Report 2018," 50–51; Swiss National Museum, "Management Report 2019," 12–13.

138 Renold and Contel, "Rapport National - Suisse," 354.

that the Federal Council may transfer the ownership of museums attached to the central federal administration, and also the Confederation's collections, to third parties.[139] In fact, Swiss law does not expressly recognize the inalienability of the Confederation's collections, as opposed to, for instance, the Confederation's archives.[140]

Fig. 1.2 Objects preserved in storage from the Hallwil collection (source: the Swiss National Museum's Management Report of 2014, landesmuseum.ch).

1.1.4. Cultural Property Transfer Act

The Federal Act on the International Transfer of Cultural Property ("Cultural Property Transfer Act," or "CPTA") of 20 June 2003[141] is the implementation law of the 1970 UNESCO Convention, ratified by Switzerland in 2003. Its main contributions 79

139 This Article allowed the Confederation, for instance, to transfer the *Château de Wildegg* to the Canton of Aargau. See the Federal Council's message regarding the MCA of 21 September 2007 *in* FF 2007 6437; 6462. The possibility of transfer is considered to be "attractive" for sponsors. See FF 2007 6437; 6446.

140 Renold and Contel, "Rapport National - Suisse," 355. See Art. 20 of the Federal Act on Archiving of 26 June 1998 (RS 152.1): "(1) The archive records of the Confederation are inalienable. The Federal Council may provide for exceptions by means of an ordinance. (2) Third parties may not acquire archive records, even through acquisitive prescription."

141 RS 444.1.

are therefore the provisions concerning the due diligence obligation[142] and the system of bilateral agreements facilitating the restitution process.[143]

80 Nevertheless, the CPTA also contains a chapter applicable to movable cultural property that belongs to the Confederation and is inscribed in the Federal Inventory of Cultural Property. To be included in this inventory, objects should have a "significant importance for the Swiss cultural heritage" (Art. 3(1) of the CPTA).[144] Among the items in the Confederation's collections that were examined above, objects listed in the Federal Inventory of Cultural Property enjoy an enhanced level of protection. They cannot be acquired through prescription, their recovery is not subject to any time limit and their permanent export abroad is prohibited (Art. 3(2) of the CPTA).[145] Published in December 2018 and updated in July 2021, the Federal Inventory of Cultural Property is a very restricted inventory of objects that currently lists just one archaeological object.[146]

1.1.5. National Highways Legislation

81 The construction of the national highway network plays an important role in the development of preventive archaeology in Switzerland.[147] Hence, it is worth examining the federal legislation specific to this field, the National Highways Act of 8 March 1960,[148] alongside the culture-related laws discussed above.

82 The Confederation must ensure the construction of a network of national highways and guarantee that they remain useable. It must construct, operate and maintain the national highways (Art. 83(2) of the Swiss Const.). If national highway construction conflicts with other important interests, such as national defense, economic use of the soil or protection of sites, it should be decided which one prevails (Art. 5(2) of the National Highways Act). This principle of balancing of interests goes in parallel with Article 3(1) of the NCHA (*supra* 66).

142 See in particular Arts. 15 (Transfer to Institutions Attached to the Confederation) and 16 (Diligence Duty).
143 See in particular Arts. 7 (Agreements) and 9 (Action for Recovery Based on Agreements).
144 Gabus and Renold, *Commentaire LTBC*, Art. 3 n. 4.
145 Gabus and Renold, Art. 3 n. 7–13. Cf. Art. 724(1bis) of the SCC.
146 Available at Federal Office of Culture's website, accessed 23 May 2023, ‹https://www.bak.admin.ch› (Cultural heritage ›Transfer of cultural property ›Federal Registry). In the draft Cultural Property Transfer Ordinance (RS 444.11), archaeological and paleontological objects were considered to be of "significant importance" regardless of their material or aesthetical value. Gabus and Renold, Art. 3 n. 3.
147 See Kaenel, "Autoroutes et archéologie en Suisse."
148 RS 725.11.

When opposing national interests of equal or greater importance than archaeological heritage are at stake, it results that archaeological heritage may not be preserved intact and may instead end up being destroyed. In particular, when archaeological sites not yet investigated are concerned, the issue of scientific study (*supra* 54) becomes important. The NCHA (or the National Highways Act) does not explicitly oblige the Confederation, or cantons, to carry out a full investigation of archaeological sites in case they are destroyed during the fulfilment of federal tasks. There are two possibilities: either the Confederation decides on such a measure as part of its general protection duty (Art. 3(1) of the NCHA), or it will be up to each canton to decide on the matter. The latter possibility risks creating a fragmented situation where cantons execute their duties with regard to archaeology differently than one another.[149] 83

To avoid such a situation, the Federal Roads Office (FEDRO), Switzerland's federal authority responsible for road infrastructure, has taken action. In 2012, FEDRO adopted the ASTRA 7A020 guidelines on the "Procedure applicable in case of archaeological and paleontological discoveries during the construction of highways" ("FEDRO Guidelines"). This administrative document has binding force for public authorities.[150] It allows, in particular, for the application of a uniform procedure with regard to the Confederation's tasks related to archaeology during the construction of highways. 84

Article 2(2) of the FEDRO Guidelines establishes the joint obligation of the Confederation and cantons to conduct archaeological and paleontological investigations (i.e., excavations) if "the discoveries cannot be preserved intact" and if "their presumed importance justifies it." The conduct of archaeological and paleontological investigations is considered a compensatory measure. FEDRO and the competent canton decide together on the importance of the site (Art. 8), yet the criteria to do so are not defined in the Guidelines. 85

This obligation should be read in conjunction with Article 7a of the Ordinance on Highways of 7 November 2007.[151] The Confederation determines during the planning phase of the projects whether it is necessary to adopt certain measures to protect the interests regarding the protection of nature and cultural heritage within the mean- 86

149 FEDRO noted that cantons treated their tasks differently from one another during the construction of highways. Federal Roads Office, "Protection de la nature et du paysage dans le cadre de la construction des routes nationales," 1.

150 Available at FEDRO's website, accessed 23 May 2023, ‹https://www.astra.admin.ch› (Public professionnel › Documents pour les routes nationales › Standards pour les routes nationales › Administration et finances). It is cited amongst "*instructions à caractère obligatoire*."

151 RS 725.111. See Federal Roads Office, "Protection de la nature et du paysage dans le cadre de la construction des routes nationales," 4–5.

ing of Article 3(1) of the NCHA (*supra* 66). The Confederation's role is to finance the implementation of such measures, which are normally of cantonal competence (Art. 7a(1) of the Ordinance on Highways). The type of measures (i.e., excavations) and the percentage of the Confederation's participation are fixed in the final project plan ("*le projet définitif*") (Art. 7a(2) of the Ordinance on Highways). If extra measures are needed due to incidental findings, the competent canton and FEDRO conclude an agreement (Art. 7a(4) of the Ordinance on Highways).

87 The Confederation's duties within Art. 3(1) of the NCHA are not limitless. The FEDRO Guidelines underline that the Confederation is not responsible for financing the printing of publications, scientific works realized after the "final report," restoration works, storage and display of objects and other discoveries (Art. 3(3) of the FEDRO Guidelines). This means that cantonal law decides on such issues (*infra* 88). Nevertheless, the Confederation ensures that archaeological or paleontological objects discovered during excavations are removed, cleaned, consolidated, inventoried and packaged in order to be remitted to the competent canton and stored properly (Art. 14(2) of the FEDRO Guidelines).

Summary of Swiss Federal Law on the State's Obligation to Protect

<table>
<tr><th rowspan="2"></th><th rowspan="2">Inventory</th><th colspan="2">Protection</th><th rowspan="2">Chance finds</th><th colspan="2">Preservation</th><th rowspan="2">Scientific study</th></tr>
<tr><th>Monuments or areas</th><th>Reserves</th><th>In situ</th><th>Storage</th></tr>
<tr><td>Valletta Convention</td><td>Art. 2 (i)</td><td>Art. 2 (i)</td><td>Art. 2 (ii)
Art. 4 (i)</td><td>Art. 2 (iii)</td><td>Art. 4 (ii)</td><td>Art. 4 (iii)</td><td>Art. 5 (ii) (b)</td></tr>
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See Arts. 4, 7 of the MCA</td><td rowspan="2">Depends on the sector
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<tr><td>Art. 14(2) of the FEDRO Guidelines</td></tr>
</table>

1.2. Cantonal Level

1.2.1. General Overview

88 A study realized in 2016 and revised in 2017 by the association Swiss Archaeology is a valuable source of information providing a preliminary overall view of cantonal laws on the protection of archaeological heritage.[152]

89 In this study, Swiss Archaeology asked cantons eleven questions to evaluate the place accorded to archaeology in their laws and ordinances. Each question corresponds to a selected article of the Valletta Convention,[153] some of which have already been examined above.

90 Question 1 refers to the duty of creating archaeological reserves, provided in Articles 2(ii) and 4(i) of the Valletta Convention, examined earlier (*supra* 46). Swiss Archaeology's study reports that almost all cantons (with two exceptions) confirm having such a mechanism in their laws, an outcome which the authors of the study consider "pleasing."[154]

91 Question 2 refers to the duty of designating protected monuments or sites, provided in Art. 2(i) of the Valletta Convention, examined earlier (*supra* 45). Swiss Archaeology's study reports that a clear majority of the cantons (twenty-two) confirm having such a requirement in their laws.[155] Unfortunately, the second part of Article 2(i) of the Valletta Convention regarding the maintenance of an inventory, examined earlier (*supra* 43), is missing from the questionnaire.

92 Question 3 refers to the duty of mandatory scientific study, provided in Article 5(ii) (b) of the Valletta Convention and Article 3(6) of the ICAHM Charter, discussed earlier (*supra* 54). Swiss Archaeology's study reports that only a third of cantons (nine) provide in their laws that a site which cannot be preserved should be investigated and documented before it is destroyed.[156]

93 Question 4 relates to Article 3(iii) of the Valletta Convention, which requires States, respectively, to "apply procedures for the authorization and supervision of excavation and other archaeological activities," and to "ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially author-

152 Available at ‹http://www.archaeologie-schweiz.ch› (Swiss Archaeology › Commissions › Archaeology and Spatial Planning Commission).
153 Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 4.
154 Swiss Archaeology, 21. Two exceptions are Appenzell AI and Appenzell AR.
155 Swiss Archaeology, 21.
156 Swiss Archaeology, 21–22.

ized persons."[157] Swiss Archaeology's study reports that a clear majority of cantons (twenty-three) require prior authorization for any kind of archaeological research work conducted by third parties.[158]

94 Question 5 refers to the mandatory reporting of chances discoveries, provided in Article 2(iii) of the Valletta Convention, examined earlier (*supra* 48). Swiss Archaeology's study reports that almost all cantons (with one exception) confirm having such a mechanism in their laws.[159]

95 Question 6 question relates to Article 3(i–ii) of the Valletta Convention, which obliges States to require prior authorization for "the use of metal detectors and any other detection equipment or process" for archaeological investigation.[160] This provision aims at preventing the indiscriminate use of metal detectors, which risks destroying archaeological context. In fact, there is no way of knowing in advance if the metal object traced by the detector is an archaeological object or a discarded remnant of the 20th century.[161] Swiss Archaeology's study reports that a minority of cantons (ten) require prior authorization for the use of metal detectors for prospecting purposes. In other cantons (six), such a requirement may be implied from more general rules existing in cantonal legislation.[162] The specific issue of metal detectors is further developed in Chapter 3 (*infra* 310).

96 Question 7 relates to Article 5 of the Valletta Convention on integrated conservation (*supra* 44). Swiss Archaeology's study reports that a clear majority of cantons (twenty-one) require in their laws that the protection of listed archaeological sites be taken into consideration during spatial planning.[163] The aspects of conservation and spatial planning are further developed in Chapter 4 (*infra* 384).

97 Question 8 refers to the duties regarding the preservation *in situ* of sites and the appropriate storage of archaeological objects, provided in Article 3(ii–iii) of the Valletta Convention, examined earlier. Swiss Archaeology's study reports that a small majority of cantons (fourteen) have envisaged such duties in their laws.[164]

157 For further information, see Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 4–5.
158 Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 21.
159 Swiss Archaeology, 21. The exception is Appenzell AR.
160 The expression "any other detection equipment" is intended to cover equipment used for a similar purpose such as ultrasound and ground radar. Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 5.
161 Council of Europe, 5.
162 Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 21.
163 Swiss Archaeology, 21.
164 Swiss Archaeology, 21.

Question 9 relates to Article 9 of the Valletta Convention on the promotion of public awareness. Article 9(i) requires States to conduct educational actions to develop "an awareness in the public opinion of the value of the archaeological heritage," and Article 9(ii) provides that States should promote access to archaeological sites and encourage the display of "suitable selections of archaeological objects."[165] 98

The Valletta Convention does not require that the promotion of archaeological heritage be explicitly envisaged in domestic legislation, but rather that States take concrete action. Nevertheless, Swiss Archaeology's study inquired about the place of the promotion of archaeological heritage in cantonal laws. The study reports that only a third of cantons (ten) explicitly encourage archaeological heritage promotion in their laws.[166] 99

Question 10 relates to Article 6 of the Valletta Convention on the financing of archaeological research and conservation. The Convention requires States not only to "arrange for public financial support for archaeological research," (Art. 6(i) of the Valletta Convention) but also to "increase the material resources for rescue archaeology" by placing the burden of funding on those responsible for the projects (public or private) that necessitated the execution of archaeological activities in the first place (Art. 6(ii) of the Valletta Convention). The funding also covers the post-excavation stage, in particular the full recording and publication of the findings.[167] 100

Again, the Valletta Convention does not require that the financing be specifically envisaged in domestic legislation (cf. Art. 6(i) of the Valletta Convention), but it does mandate that funding appear at least in "major public or private development schemes" (Art. 6(ii)(a) of the Valletta Convention) and their budgets (Art. 6(ii)(b) of the Valletta Convention). Notwithstanding this, Swiss Archaeology's study inquired about its place in cantonal laws. The study reports that a small majority of cantons (sixteen) clearly address the financing of archaeology in their laws.[168] 101

The last question, Question 11, is related to the transfer of archaeological objects and will be discussed in Chapter 3. 102

Overall, Swiss Archaeology has recognized that the gaps in cantonal laws do not necessary mean that cantons do not comply with their responsibilities in practice. Even so, Swiss Archaeology has encouraged cantons to fill these gaps on the basis that it 103

165 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 8.
166 Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 21.
167 Council of Europe, "Explanatory Report to the Convention on the Archaeological Heritage," 1992, 6–7.
168 Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 21.

should be the law which identifies "the responsibilities and the rights of the state and of its citizens."[169]

Summary of Swiss Cantonal Law (General Overview) on the State's Obligation to Protect

	Inventory	Protection		Chance finds	Preservation		Scientific study
		Monuments or areas	Reserves		*In situ*	Storage	
Valletta Convention	Art. 2(i)	Art. 2(i)	Art. 2(ii) Art. 4(i)	Art. 2 (iii)	Art. 4 (ii)	Art. 4 (iii)	Art. 5(ii) (b)
Swiss law > Federal tasks	N/A	Arts. 5–6 of the NCHA	N/A	N/A	Art. 3 of the NCHA	Not explicit See Arts. 4, 7 of the MCA Art. 14(2) of the FEDRO Guidelines	Depends on the sector i.e., Art. 2(2) of the FEDRO Guidelines
Swiss law > Cantonal tasks	---	22 / 26 cantons	24 / 26 cantons	25 / 26 cantons	14 / 26 cantons		9 / 26 cantons

169 Swiss Archaeology, 22.

1.2.2. Selected Cantons

Swiss Archaeology's study has shown that cantonal laws make little mention of *in situ* preservation, its corollary obligation of conducting a scientific study and the provision of appropriate storage places. In addition, the creation and maintenance of an inventory was not in the questionnaire. The place of such duties in the laws of the seven selected cantons – Bern (BE), Fribourg (FR), Geneva (GE), Jura (JU), Neuchatel (NE), Valais (VS) and Vaud (VD) – is further examined below. 104

(a) Creation and Maintenance of an Inventory

The Canton of Bern provides that ruins, archaeological sites and places of discoveries, exhumated or presumed, are inventoried (Art. 23(1) of the LPat/BE).[170] Inventories serve as a basis for spatial planning (Art. 13*c*(1) of the OC/BE) and are updated periodically (Art. 13*d*(1) of the OC/BE). The Archaeology Service of the Canton is responsible for establishing the archaeological inventory (Art. 13(2) of the OC/BE). 105

The Canton of Fribourg formulates general rules for the inventorying of cultural property. Inventories are in the form of explanatory notes on cultural property which is of interest for the Canton (Art. 44 of the LPBC/FR). Inventories serve the purpose of informing the owners, the public authorities and the public (Art. 45(1) of the LPBC/FR). Inventories are one of the primary sources that communes use when they elaborate or modify local land-use plans (Art. 45(2) of the LPBC/FR). Inventories are updated regularly (Art. 46 of the LPBC/FR). Special inventories are established for ruins and archaeological sites (Art. 51 of the RELPBC/FR). 106

The Canton of Neuchatel refers to the "archaeological map" (*carte archéologique*) in its law. Other cantons, such as Geneva[171] and Vaud (fig. 1.3), also make use of archaeological maps despite the fact that they are not explicitly envisaged in their laws. The archaeological map of the Canton of Neuchatel shows the "archaeological perimeters," areas where archaeological heritage has been or may be found (Art. 23(1) of the LSPC/NE). All activities on land and under water within such areas are subject to prior authorization (Art. 23(2) of the LSPC/NE). In addition, archaeological perimeters are indicated on communes' land-use plans (Art. 23(3) of the LSPC/NE). 107

170 The procedural aspects are provided in Bern's Law on Constructions (RSB 721), in particular Art. 10*d* and 10*f*.

171 Inventorying is not explicitly provided by law in the Canton of Geneva. It remains an internal management tool for the administration, allowing the latter to identify the heritage items located on its territory. Lazzarotto, "La protection du patrimoine," 118.

Fig. 1.3 A screen shot of the archaeological map developed by the Canton of Vaud. It comes in the form of a Geographic Information System (GIS) which allows one to connect the archaeological database to cartographical information. The archaeological map gathers roughly 1,650 archaeological zones, 3,600 sites and almost 10,000 bibliographic references (source: ‹https://www.vd.ch/themes/territoire-et-construction/archeologie/recenser-et-gerer›).

108 The Canton of Vaud also refers in its law to the "archaeological zones" (*régions archéologiques*) within which all the works on land and under water are subject to prior authorization (Art. 67(1) of the LPNMS/VD). The Canton must update the list of archaeological zones and communicate it to the communes (Art. 38(1) of the RLPNMS/VD). Communes, cantonal bodies and federal bodies must inform the Canton about their projects that are likely to affect the subsoil of archaeological zones (Art. 38(2) of the RLPNMS/VD).

109 The Canton of Jura provides in its law on archaeological and paleontological heritage that "sites, identified or suspected, are inscribed in a cantonal inventory" (Art. 9(1) of the LPPAP/JU). This provision creates some confusion. On one hand, "suspected" sites are included in the inventory and indicated on land-use plans to fully integrate preservation measures in spatial planning (Art. 17 of the LPPAP/JU). On the other hand, the inventorying procedure is very similar to a measure of listing (*classement*) by having legal effects on landowners.[172] It is possible to argue that the Canton of Jura applies a mixed system of inventorying/listing for archaeological sites.

172 See Arts. 9–18. See also the Jura Government's message regarding the LPPAP/JU of 19 August 2014, p. 3, available at the Canton of Jura's website, accessed 23 May 2023, ‹https://www.jura.ch› (Autorités › Parlement › Projets de lois › Textes adoptés).

Finally, the Canton of Valais does not legally require an exhaustive inventory of archaeological heritage, but rather mandates inventories in the form of "technical catalogs recording objects of same nature" to serve as a basis for listing (*classement*) decisions (Art. 8(1) of the OcPN/VS).[173] Inventories do not have any legal effect. Each administrative body within the Canton is competent for creating the inventory in its specific field (Art. 8(2) of the OcPN/VS). 110

The overall result of cantonal law on inventories is positive: all of the selected cantons except for Geneva and Vaud provide in their laws for the creation and the maintenance of archaeological inventories. 111

(b) Preservation Preferably *in Situ*

None of the selected cantons explicitly provide for the preservation *in situ* of archaeological sites.[174] However, the laws of the Cantons of Bern and Jura state clearly that if archaeological sites cannot be preserved, they should be subject to a scientific study (Arts. 24(1) of the LPat/BE and 23(1) of the LPPAP/JU). In this context, "scientific study" covers excavations and prospections, data evaluation, preservation and restoration of objects, documentation and the publication of results (Arts. 24(2) of the LPat/BE and 23(2) of the LPPAP/JU). What is meant here by excavations is rescue excavations.[175] During the adoption of the LPPAP/JU in 2015, lawmakers underlined that it often happens that a construction project results in the total or partial destruction of immovable archaeological heritage. Rescue excavations allow for the documentation and collection of immovable remains so that construction can start on the land in question.[176] They are conducted within a time limit.[177] 112

Who covers the costs of these studies? In principle, it is the cantonal state (Arts. 24(3) of the LPat/BE and 27(1) of the LPPAP/JU). Nevertheless, in the Canton of Bern, if communes (or other organizations carrying out public duties) are the owners of the lands and if the scientific study is prompted by their activities, they cover ten to fifty percent of the costs, according to their financial abilities (Art. 24(3) of the LPat/ 113

173 See also Arts. 8 (*Inventaire des objets de protection*) and 9 (*Classement*).

174 See the answer to the first question on "general protection duty." Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 5.

175 The other type is programmed excavation. In the Canton of Jura, the State can decide on a scientific study to be conducted for other reasons: for instance, to improve scientific knowledge or to raise public awareness (Art. 23(3) of the LPPAP/JU). Such exceptional interventions are generally carried out by universities. See the Jura Government's Article-by-Article Commentary, p. 12, available at the Canton of Jura's website, accessed 23 May 2023, ‹https://www.jura.ch› (Autorités › Parlement › Projets de lois › Textes adoptés).

176 Jura Government's Article-by-Article Commentary, p. 11.

177 The law of the Canton of Bern also indicates that the scientific study should be carried out "rapidly" and "within a reasonable time" (Art. 24(2) of the LPat/BE).

BE). The Canton of Jura also provides for specific arrangements (Art. 27(2–5) of the LPPAP/JU).

114 In the Canton of Neuchatel, the category to which a site belongs determines whether it will be investigated before its destruction. For instance, for category 1 and 2 sites, destruction cannot be allowed without rescue excavations (Art. 10(1–2) of the RA/NE). Heavy works such as drainage or pipe laying should be avoided as far as possible on category 1 sites (Art. 10(1) of the RA/NE).[178] For category 3 sites, rescue excavations remain optional and if they take place, they should correspond to the scientific interest at stake. Nevertheless, the State has an obligation to conduct archaeological surveys before any destruction (Art. 10(3) of the RA/NE).[179]

115 The Canton of Fribourg also covers the conduct of rescue excavations; however, this procedure figures as a right rather than an obligation (Art. 38(1) of the LPBC/FR). The State can conduct, if deemed necessary, archaeological excavations when there is a risk of destruction or damage. Otherwise, excavations can take place only if the remains in question are presumed to be important (Art. 38(2) of the LPBC/FR). The Canton of Vaud, in its answer to Swiss Archaeology's questionnaire, refers to "temporary measures" applicable to all cultural property in case there is imminent danger (Art. 47 of the LPNMS/VD). This does not guarantee, though, a full investigation of archaeological sites at risk of destruction. The cantons of Geneva and Valais answered in the negative to the question of whether archaeological sites which cannot be preserved should be subject to a scientific study.[180]

116 The overall result is result is not satisfactory: in four out of seven selected cantons, archaeological heritage may be destroyed without being properly studied as the result of public works.[181]

178 According to Art. 9(2) of the RA/NE, "category 1" covers protected sites (according to the law) and "category 2" covers sites of importance, duly identified.

179 According to Art. 9(2) of the RA/NE, "category 3" covers minor sites, potential sites, or sites the nature of which has not been clearly identified. "Category 4" covers unknown sites, usually buried in the subsoil.

180 Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 5.

181 In Switzerland, the possibility of stopping construction to conduct archaeological excavations usually appears as a condition when construction permits are delivered on private lands. See Jungo, "Droits et obligations du propriétaire en cas de fouilles archéologiques."

(c) Appropriate Storage Places

The Canton of Jura is the only canton in the sample that explicitly provides for the appropriate storage of archaeological objects. The State takes the necessary measures to guarantee "the adequate and sustainable storage" of archaeological objects, either directly or by delegating the task to a private or public institution (Art. 28(2) of the LPPAP/JU).[182] 117

The other cantons either provide for the preservation and maintenance of archaeological objects in general terms, or state that they will be placed in public collections. For instance, the law of the Canton of Valais mentions that archaeological objects are in principle transferred to the public collections after they have been studied (Art. 27(3) of the OcPN/VS).[183] The law of the Canton of Vaud states that the competent department assigns objects to suitable collections (Art. 28 of the LPMI/VD). 118

The law of the Canton of Bern states that archaeological objects should be, as much as possible, accessible to the public. The Archaeology Service is responsible for their maintenance, unless otherwise agreed with the department in charge of preservation (Art. 26(2) of the LPat/BE). The law of the Canton of Neuchatel defines the "cantonal archaeological collections" as all the finds discovered on the territory of the Canton, as well as the scientific documentation allowing their preservation and presentation to the public (Art. 38 of the LSPC/NE). In practice, the preservation of cantonal archaeological collections is ensured by the "Laténium," the Canton's archaeological museum and park (Art. 39(1) of the LSPC/NE). While carrying out its tasks, the Laténium complies with ICOM's ethical rules of (Art. 39(2) of the LSPC/NE). In the Canton of Fribourg, the Archaeology Service identifies the objects discovered in excavations and takes the necessary measures for their preservation (Art. 57(3)(b) of the RELPBC/FR). Similarly, the Canton of Geneva takes the necessary measures for the preservation and study of archaeological remains (Art. 34 of the LPMNS/GE).[184] 119

182 See Jura Government's Article-by-Article Commentary, p. 14.

183 Art. 27(3) of the OcPN/VS reserves the decision of the Department in charge of cantonal museums with regard to the choice of the objects to be transferred.

184 Moreover, the Cantonal Archaeologist ensures the conservation of archaeological remains (Art. 9(2)(d) of the RPMNS/GE).

Summary of Swiss Cantonal Law (Selected Cantons) on the State's Obligation to Protect

	Inventory	Preservation		Scientific study
		In situ	Storage	
Valletta Convention	Art. 2(i)	Art. 4(ii)	Art. 4(iii)	Art. 5(ii)(b)
Bern	Art. 23(1) of the LPat/BE Art. 1 (2) of the OC/BE	N/A	N/A**	Art. 24(1) of the LPat/BE
Fribourg	Art. 51 of the RELPBC/FR	N/A	N/A**	N/A
Geneva	N/A*	N/A	N/A**	N/A
Jura	*Mixed system* Art. 9(1) of the LPPAP/JU	N/A	Art. 28(2) of the LPPAP/JU	Art. 23(1) of the LPPAP/JU
Neuchatel	Art. 23 of the LSPC/NE	N/A	N/A**	Art. 10 of the RA/NE
Valais	*Partial* Art. 8(1) of the OcPN/VS	N/A	N/A**	N/A
Vaud	N/A*	N/A	N/A**	N/A

* The canton makes use of an archaeological map even if it is not explicitly stipulated in its law.

** The canton makes provision for the preservation, maintenance, or admission to public collections of archaeological objects, even if their adequate storage is not explicitly mentioned.

2. Turkey

2.1. The Turkish Constitution

120 The Constitution of the Republic of Turkey of 18 October 1982 ("Turkish Const.")[185] refers to the protection of "historic, cultural and natural property" in Article 63. The State ensures the protection of historic, cultural and natural properties and values, and to this end takes measures to provide encouragement and support (Art. 63(1) of the Turkish Const.). The restrictions imposed on private owners of such prop-

185 Law No. 2709. Submitted to a referendum on 7 November 2011 and published on the Official Gazette No. 17863 (*mükerrer*) of 9 November 1982.

erties, as well as the incentives and exemptions thereto, are to be regulated by law (Art. 63(2) of the Turkish Const.).

2.2. Cultural Property Legislation

The Law No. 2863 on the Protection of Natural and Cultural Property of 21 July 1983 ("Protection Law") sets the rules applicable to cultural and natural property "requiring protection" (*infra* 214–222) in Turkey, which includes movable and immovable elements of archaeological heritage.[186] The Protection Law is construed together with its numerous regulations.[187] 121

The Ministry of Culture's General Directorate of Cultural Property and Museums ("General Directorate") (*Kültür Varlıkları ve Müzeler Genel Müdürlüğü*) is the administrative body in charge of the implementation of the Protection Law. It is composed of a central administration in the capital, Ankara, provincial organizations called "Museum Directorates" (*Müze Müdürlükleri*) and permanent scientific commissions that are closely involved in the preservation process. On one hand, regional commissions for the preservation of cultural property (*koruma bölge kurulları*) ("Regional Commissions") deal with practical issues (Art. 57(1) of the Protection Law, e.g., (a) registration, (e) determining buffer zones, (g) deciding on the use of sites). On the other hand, a high commission (*Koruma Yüksek Kurulu*) ("High Commission") harmonizes the practice of Regional Commissions by adopting common rules and standards called "guidelines" (*ilke kararları*).[188] Guidelines are binding on all public authorities.[189] 122

186 Official Gazette No. 18113 of 23 July 1983. Last amendment on 15 June 2022, amending Law No. 7410.

187 A list of the regulations adopted by the Ministry of Culture on the topic of cultural property and museums is available at the Ministry of Culture, Inspection Board's website, accessed 23 May 2023, ‹https://teftis.ktb.gov.tr/› (*Mevzuat › Bakanlık Mevzuatı › Kültür Varlıkları ve Müzeler Genel Müdürlüğü İle İlgili Mevzuat*).

188 For further information on Regional Commissions and the High Commission, see Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 149 et seq.; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 169 et seq.

189 A complete list of the guidelines adopted by the High Commission is available at the Ministry of Culture, Inspection Board's website, accessed 23 May 2023, ‹https://teftis.ktb.gov.tr/› (*Mevzuat ›Bakanlık Mevzuatı › Kültür Varlıkları ve Müzeler Genel Müdürlüğü İle İlgili Mevzuat*). The guidelines qualify as "unnamed regulatory acts" (*idarenin adsız düzenleyici işlemi*) and therefore should comply with the Protection Law and its regulations. They are published in the Official Gazette (Art. 61(1) of the Protection Law). It is possible to contest the unlawfulness of the guidelines before the Council of State. See Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 187 et seq.

2.2.1. The Protection Law and Its Regulations

(a) Registration Process

123 The main protection tool provided by the Protection Law is the double process of "identification" (*tespit*) and "registration" (*tescil*), regulated under Article 7 of the Law. While the Ministry of Culture is responsible for identifying cultural properties to be protected, the decision with regard to their registration is taken by the competent Regional Commission.[190] The protection may be granted to a single cultural property item (*birel koruma*) or an area (*alan ölçeğinde koruma*).[191] The latter corresponds to a "site," defined as: (i) cities and remains of cities that are product of various prehistoric to present civilizations reflecting the social, economic, architectural and similar characteristics of their respective period; (ii) areas that have witnessed social life or important historical events with an intense concentration of cultural property; and (iii) areas requiring protection due to their natural characteristics, which have been identified (Art. 3(a)(3) of the Protection Law).[192] This tripartite definition actually refers to archaeological, urban or historic, and natural sites.[193]

124 A similar definition for "archaeological site" is given by the Regulation on the Identification and Registration of Immovable Cultural Property Requiring Protection and Sites ("Regulation on Sites").[194] An archaeological site is a settlement or area containing all kinds of cultural property that: (i) represent the products of ancient civilizations, which are located under the ground, on the ground and under water, and have lasted from the beginning of humanity until present; and (ii) reflect the social, economic and cultural characteristics of their respective period.[195]

125 The Regulation on Sites lays down three degrees of protection for archaeological sites. In addition to these, when archaeological areas overlap with the "traditional urban fabric" where social life continues to exist, they are listed under "urban archaeological sites" (Art. 4(e) of the Regulation on Sites).

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190 See Art. 7 of the Protection Law.

191 Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 141–42.

192 The same definition is also provided by Art. 3(1)(k) of the Regulation on Sites.

193 Umar and Çilingiroğlu find this definition unnecessarily complicated and propose the following definition instead: "A site is a topographically definable area, formed by nature, or both by man and nature, whose protection as a whole is in the public interest due to its historical, archaeological or similar characteristics." Umar and Çilingiroğlu, *Eski Eserler Hukuku*, 46. On this issue, see also Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 149–50.

194 Official Gazette No. 28232 of 13 March 2012.

195 See Art. 3(a) of the Regulation on Sites. The original text in Turkish is as follows: "*Arkeolojik sit: İnsanlığın varoluşundan günümüze kadar ulaşan eski uygarlıkların yer altında, yer üstünde ve su altındaki ürünlerini, yaşadıkları devirlerin sosyal, ekonomik ve kültürel özelliklerini yansıtan her türlü kültür varlığının yer aldığı yerleşmeler ve alanları, (…) ifade eder.*"

Archaeological sites of the first degree fully reflect the characteristics of earlier civilizations and contain a significant density of archaeological remains (Art. 4(d)(1) of the Regulation on Sites). Sites of the second degree, on the other hand, partly reflect the characteristics of earlier civilizations and are not as dense as the sites of the first degree in archaeological remains, or, have had their essence partly damaged by modern settlements (Art. 4(d)(2) of the Regulation on Sites). Finally, sites of the third degree are either sites which may contain archaeological remains according to scientific research, or sites whose protection is of public interest since they interact with sites of the first and second degree (Art. 4(d)(3) of the Regulation on Sites).[196] 126

The most important consequence of this categorization is that while the sites of the first and second degree are preserved intact (i.e., no construction permitted), new construction may be allowed on third-degree sites.[197] In this respect, sites of the first and second degree fulfill the role of archaeological reserves as described under Article 2(ii) of the Valletta Convention (*supra* 46). 127

By the end of 2022, there were, in total, 23,632 categorized sites in Turkey, 97 percent of which are archaeological.[198] 67 percent of such archaeological sites are of the first degree, 13 percent are of the third degree, 12 percent are mixed, 4 percent are of the second degree, and the rest is undergoing the process of registration.[199] 128

It should be noted that certain areas of archaeological interest have also been registered as "ruins" (*ören yerleri*). Today, there are 143 "organized ruins" (*düzenlenmiş ören yeri*) in Turkey, some of which are important heritage places such as Troy and Ephesus.[200] Ruins are defined as areas combining the works of man and nature, which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest (Art. 3(a)(7) of the Protection Law).[201] 129

196 See Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 547–51; Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 272–89; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 6–7.

197 See Guideline No. 658 (*infra* 144) of the High Commission on "Archaeological Sites: Conditions of Protection and Use." Adopted on 5 November 1999.

198 Ministry of Culture and Tourism, "Türkiye Geneli Sit Alanları İstatistikleri." The statistics are available at ‹https://kvmgm.ktb.gov.tr› (*Kültür Varlıkları ve Müzeler Genel Müdürlüğü › Taşınmaz Kültür Varlıkları ve Sit Alanları › Sit Alanları › Türkiye Geneli Sit Alanları İstatistikleri*).

199 Ministry of Culture and Tourism, "Türkiye Genelinde Derecelerine Göre Arkeolojik Sit Alanları İstatistiği."

200 The complete list is available at ‹https://kvmgm.ktb.gov.tr› (*Kültür Varlıkları ve Müzeler Genel Müdürlüğü › Faaliyetler › Müzecilik Faaliyetleri › Bakanlığımıza Bağlı Müzeler*).

201 The original text in Turkish is as follows: "*Ören yeri; tarih öncesinden günümüze kadar gelen çeşitli uygarlıkların ürünü olup, topoğrafik olarak tanımlanabilecek derecede yeterince belirgin ve mütecanis özelliklere sahip, aynı zamanda tarihsel, arkeolojik, sanatsal, bilimsel, sosyal veya teknik bakımlardan dikkate değer, kısmen inşa edilmiş, insan emeği kültür varlıkları ile tabiat*

130 This very comprehensive definition does not offer any objective criteria to separate "ruins" from "archaeological sites."[202] The concept of "ruins," introduced in the Protection Law in 2004,[203] is mentioned only once while defining a "landscaping project" (*çevre düzenleme projesi*), which is a specific type of land-use plan (Art. 3(a)(9) of the Protection Law).[204] Taking an example from practice, the management plan of Ephesus shows that while the entire area is registered as a first-degree archaeological site, the part of the antique city open to visitors is described as ruins.[205] As a result, from the perspective of legal protection, there is no difference between areas registered as ruins or archaeological sites. The difference lies in their management as a heritage place. Since ruins can be opened to visitors, they need a special land-use plan, called a landscaping project. Categorized archaeological sites, which are not ruins, are subject to protection-oriented plans (*infra* 394).[206]

(b) Mandatory Reporting of Chance Discoveries

131 The mandatory reporting of chance discoveries (*haber verme zorunluğu*) is regulated under Article 4 of the Protection Law. Finders, regardless of where they have found the objects, should notify the nearest Museum Directorate within three days at the latest (Art. 4(1) of the Protection Law). The Museum Directorate, together with the Ministry, takes the necessary measures to protect the object (Art. 4(4) of the Protection Law). In villages or other places, finders should notify the village headman

varlıklarının birleştiği alanlardır." Introduced by Law No. 5226 of 14 July 2004 amending the Protection Law, among other laws. See also Art. 3(1)(j) of the Regulation on Sites.

202 Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 159; Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 59; Soysal, "745 Sayılı Ilke Kararı Kapsamında Arkeolojik Sit Alanlarının Tüzel Kişilere Kullandırılması," 18–19; Umar, "2863 Sayılı Kültür ve Tabiat Varlıklarını Koruma Kanununa Getirilen Değişiklikler Üzerine," 17.

203 Law No. 5226 amending the Protection Law and other legislation. Official Gazette No. 25535 of 27 July 2004.

204 Art. 3(a)(9) defines landscaping projects as projects using the scales of 1/500, 1/200 and 1/100, taking into consideration the unique characteristics of each ruin area. Under Art. 3(a)(9), projects are prepared for the purposes of the controlled opening of the area to visitors, promoting the area, solving existing problems related to the use and circulation of visitors in the area, and meeting the area's needs through modern, state-of-the-art facilities, all while protecting the archaeological potential of the area.

205 Accessed 23 May 2023, ‹http://www.kulturvarliklari.gov.tr/Eklenti/ 57319,efes-yonetim-planipdf.pdf›.

206 Soysal, "745 Sayılı Ilke Kararı Kapsamında Arkeolojik Sit Alanlarının Tüzel Kişilere Kullandırılması," 19. Soysal also finds it problematic that the official Turkish translation of Council of Europe's Convention for the Protection of the Architectural Heritage of Europe (Granada, 1 December 1987, CETS No. 121) uses the terms "ruins" and "sites" interchangeably. Under Turkey's Protection Law and the Regulation on Sites, only archaeological sites can be defined as ruins, and not other types of sites. See the Law No. 3534 regarding Turkey's ratification of the Convention for the Protection of the Architectural Heritage of Europe of 13 April 1989. Published in the Official Gazette No. 20229 of 22 July 1989.

(*muhtar*) or the governor in charge (*mülki amir*), who then follow the procedure detailed in Article 4(3) of the Protection Law. In military zones, the commander-in-chief receives the notification (Art. 4(2) of the Protection Law). The mandatory reporting applies both to movable and immovable property.[207]

The concept of "finder" provided by the Protection Law is a complex one. Article 4 covers: (i) persons who find the object (*bulanlar*); (ii) persons who know that cultural property exists on the land they own or use (*bilenler*); and (iii) persons who have been informed that cultural property exists on the land they own or use (*yeni haberdar olan malik ve zilyetler*). The act of knowing (and being informed) triggers the obligation to report as well. The purpose here is to oblige those who become the owners of land, assuming they know it holds cultural property, along with existing landowners who are not the finders (in case the latter fails to report the finds) but learn about the discovery afterwards.[208] 132

Finders who do not respect the obligation to report are punished with imprisonment (Art. 67(1) of the Protection Law);[209] those who respect it are granted a reward (Art. 64 of the Protection Law) (*infra* 304). 133

(c) Preservation Preferably *in Situ*

The Protection Law explicitly provides for the principle of preservation *in situ* of immovable cultural property and its parts (Art. 20 of the Protection Law, first sentence). Nevertheless, in cases of necessity, such property can be moved elsewhere if the competent Regional Commission gives its consent (Art. 20 of the Protection Law, second sentence).[210] It is unfortunate, though, that such an important principle is stated in a provision entitled "Transport of immovable cultural property." To make *in situ* preservation possible in practice, particularly on private land, the Protection Law provides for some tools such as an exchange procedure. If lands registered as 134

207 For further information on Art. 4 of the Protection Law, see Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 477–78; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 18–21.

208 See Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 19–20.

209 Art. 67(1) of the Protection Law: "Persons who contradict with the obligation to report cultural and natural properties intentionally and without excuse shall be punished with a prison sentence of six months to three years."

210 Art. 20 of the Protection Law: "Immovable cultural property and its parts shall be conserved *in situ*. However, if transporting the immovable cultural property to another location is mandatory or necessary due to its characteristics, the Ministry of Culture and Tourism can undertake the transport with the consent of the Regional Commission by taking the necessary security measures. If the owner of the immovable property suffers damage because of the transport of the cultural property, compensation shall be determined by a commission formed by the Ministry of Culture and Tourism and paid to the aggrieved party."

first and second-degree archaeological sites are owned by private parties, the latter may ask the State to exchange their land (on which construction is banned) with parcels of public land (Art. 15(f) of the Protection Law).[211]

135 In case archaeological heritage cannot be preserved *in situ* or transported, the Protection Law does not explicitly guarantee the execution of a scientific study. It mentions, generally, that the State has the "right" to conduct research and excavations in order to discover cultural property (Art. 35 of the Protection Law).[212] No further clarification is given by the relevant regulation.[213] Certain rules can be deduced, however, from the High Commission's guidelines (*infra* 143).

(d) Transport and Storage of Archaeological Objects

136 Article 41 of the Protection Law provides that archaeological objects discovered during excavations must be transported by the excavation team to a state museum selected by the Ministry of Culture at the end of the excavation year. Human and animal skeletons and all fossils must be submitted to natural history museums, universities, or other Turkish scientific institutions, if deemed appropriate by the Ministry of Culture. Additionally, Article 2(b) of the Protection Law states that the director of the state museum is in charge of the inventorying, registration, storage (*depolama*), maintenance, restoration and display of the objects.

137 The adequate storage of archaeological objects has great importance for Turkey since it experiences far more seismic activity than many other countries.[214]

2.2.2. Guidelines of the High Commission

(a) Creation and Maintenance of an Inventory

138 The Protection Law does not mention explicitly any inventory or any obligation of the State to compile one.[215] Nevertheless, it can be argued that such a duty is implicit

211 See also the Regulation regarding the exchange of lands remaining in areas declared as sites, with lands owned by the Treasury. Published in the Official Gazette No. 27588 of 22 May 2010. Referred to in the ECHR's judgment *Sinan Yıldız v. Turkey* (*infra* 253).

212 Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 195 et seq.; Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 277 et seq.; Umar and Çilingiroğlu, *Eski Eserler Hukuku*, 260.

213 See the Regulation regarding the investigation, drilling and excavations in relation to cultural and natural property of 1984. Published in the Official Gazette No. 18485 of 10 August 1984. It deals rather with the technical aspects of the subject. See Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 627.

214 See, e.g., Ertürk, "Müzelerde Risklere Hazırlık."

215 Only Art. 7(4) mentions the duty of the General Directorate of Foundations to compile an inventory of the immovable cultural and natural property owned by foundations that are governed or controlled by the General Directorate of Foundations, and of immovable cultural and natural

in Article 7 of the Protection Law, which puts the Ministry in charge of identifying immovable cultural properties requiring protection in Turkey (§ 1). "Identification" (*tespit*) is understood as documenting such properties following a technical assessment and according to the principles laid down in the Regulation on Sites.[216] Cultural properties identified in this way may then be registered (*tescil*)[217] by Regional Commissions (§ 3), whose decisions are communicated to the land registry offices so that a reserve may be made on the Land Registry with regard to the immovable in question (§ 5) and published in the Official Gazette (§ 7).

It is only natural to expect that archaeological sites, which are registered under Article 7 of the Protection Law (*supra* 123), are internally inventoried by the Ministry and that this inventory is provided to other administrative bodies upon request. Furthermore, since 2011, the Ministry has been working on creating a national GIS-based inventory of all immovable cultural property registered under the Protection Law in Turkey (Turkish acronym: TUES).[218] The data is registered to TUES at the local level by the directorates attached to Regional Commissions (*Kültür Varlıklarını Koruma Bölge Kurulu Müdürlükleri*). The General Directorate in Ankara centralizes such data and shares it with other administrative bodies through Turkey's national spatial data system. The data entry into TUES is planned to be completed by 2023.[219] 139

There is an explicit reference to an "archaeological inventory" in one of the High Commission's guidelines. Guideline No. 702 on urban archaeological sites[220] states 140

property requiring protection (such as mosques, tombs or public baths) and owned by individuals or private entities. The original text in Turkish is as follows: "*Vakıflar Genel Müdürlüğünün idaresinde veya denetiminde bulunan mazbut ve mülhak vakıflara ait taşınmaz kültür ve tabiat varlıkları, gerçek ve tüzelkişilerin mülkiyetinde bulunan cami, türbe, kervansaray, medrese han, hamam, mescit, zaviye, sebil, mevlevihane, çeşme ve benzeri korunması gerekli taşınmaz kültür ve tabiat varlıklarının tespiti, envanterlenmesi Vakıflar Genel Müdürlüğünce yapılır.*"

216 Art. 3(o) of the Regulation on Sites. The original text in Turkish is as follows: "*Tespit: 2863 sayılı Kültür ve Tabiat Varlıklarını Koruma Kanununun 3 üncü maddesinde tanımlanan ve 6 ncı maddesinde açıklanan korunması gerekli taşınmaz kültür varlıklarının 2863 sayılı Kültür ve Tabiat Varlıklarını Koruma Kanununun 7 nci maddesine göre bu yönetmelikte belirtilen usuller, esaslar ve kıstaslar doğrultusunda, oluşturulacak bir ekip tarafından, teknik bir çalışma ile değerlendirilerek belgelendirilmesini, koruma amaçlı imar planı müellifi, üniversiteler ya da bilimsel araştırma yapan uzmanlarca veya ilgili meslek odası gibi konu ile doğrudan ilgili kişi, kurum ve kuruluşlarca bu yönetmeliğe göre hazırlanarak Bakanlık ilgili birimlerine iletilen çalışmaların Bakanlık ilgili birim elemanlarınca yerinde kontrol edilmesini (…) ifade eder.*"

217 Art. 3(n) of the Regulation on Sites. The original text in Turkish is as follows: "*Tescil: Bakanlıkça tespiti yapılan taşınmaz kültür varlıkları ile sitlerin korunması gerekli olanlarının, koruma bölge kurulu kararıyla belirlenmesini (…) ifade eder.*"

218 "TUES" stands for National Inventory System for Registered Immovable Cultural Property ("*Tescilli Kültür Varlıkları Taşınmaz Ulusal Envanter Sistemi*").

219 Gülbay (Ministry of Culture), interview. Since TUES has not been officially launched, no official document refers to it.

220 Adopted on 15 April 2005. Published in the Official Gazette No. 25843 of 12 June 2005.

in paragraph (a) that in areas registered as urban archaeological sites, land-use plans (*infra* 394) should be prepared without delay on the basis of *a comprehensive archaeological inventory* so that archaeological elements can be unearthed through scientific methods, restored and displayed. Until such plans are approved, no activity should be undertaken at the scale of individual parcels.[221] This paragraph recalls the importance of inventories in spatial planning.

141 What about archaeological sites which have been identified[222] but not yet registered? They are in principle not included in the above-mentioned national inventory, TUES.[223] It is important to stress that while there are over 10,000 registered archaeological sites in Turkey (*supra* 128), the number of *published* archaeological sites totals over a hundred thousand.[224] This means that when public authorities plan development projects, they will not have a complete picture of the archaeological situation in the area concerned by solely consulting the national inventory, TUES, which is limited to registered sites.[225]

142 There is no doubt that creating and keeping an up-to-date inventory of all of the archaeological settlements in Turkey would be an enormous task.[226] Nevertheless,

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221 The original text in Turkish of paragraph (a) of Guideline No. 702 of the High Commission is as follows: "*Bu alanlarda, arkeolojik değerlerin bilimsel yöntemlerle açığa çıkarılması, onarılması ve sergilenmesi işlemlerinin esas alınarak sağlıklı ve kapsamlı arkeolojik envanter temeline dayalı öz gerekli bütün ölçeklerdeki planlama çalışmalarının ivedilikle yapılmasına, bu planlar onanmadan, parsel ölçeğinde uygulamaya geçilmemesine … karar verildi.*"
For further information on Guideline No. 702, see Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 559–69; Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 276–77; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 8.

222 The identification process should rely on written documents, remains on the surface or a scientific investigation. The areas concerned should have the necessary topographical characteristics. See Art. 4(d) of the Regulation on Sites. To identify archaeological sites, archaeologists use methods such as site surveys (*yüzey araştırmaları*, *supra* 44), drilling type excavations (*infra* 145) and air photography.

223 Gülbay (Ministry of Culture), interview. Nevertheless, Art. 4(3) of the Regulation on Sites states that local authorities must take the necessary measures to avoid any destruction until they are registered by Regional Commissions.

224 Özdoğan, "Dilemma in the Archaeology of Large Scale Development Projects," 1.

225 Regarding this point, Özdoğan gives the examples of Birecik and Ilısu dams. He explains that "(…) at that time there was not a single registered [categorized] site within the reservoir areas of the proposed dams. However, there had been numerous surveys specifically focusing on the areas to be submerged, which recorded hundreds of major sites (…) when a mosaic panel was accidentally recovered at Zeugma, [it] activated public opinion both inside and outside of Turkey and called for immediate action, which consequently initiated rescue excavations. In spite of intensive efforts, only a small section of the site was exposed, and some mosaics removed. However, the rest of Zeugma, like most other sites in the region, was flooded." Özdoğan, 2. See also Özdoğan, "Barajların Yok Ederken Kazandırdıkları."

226 There have been some attempts. The Turkish Academy of Science (TÜBA), a public institution having legal personality, initiated the Turkish Cultural Inventory Project in 2000 to resolve,

heritage specialists insist that without such a comprehensive and updatable inventory, it will not possible to effectively protect archaeological sites or cultural heritage in general.[227] Therefore, it would be ideal if the Protection Law explicitly provided an obligation for the State to compile an inventory of all archaeological settlements, regardless of whether they have been categorized or not.

(b) Preservation Preferably *in Situ*

143 The High Commission's Guideline No. 37[228] on urban areas provides for certain principles to be applied in case new archaeological heritage is discovered during infrastructure works (e.g., fiber optic cables, natural gas pipelines or tunnels for subways) (§ 1) or unearthed because of natural events such as tectonic activity, floods, or landslides (§ 2). It states that if immovable archaeological remains are discovered as a result of such works (outside of the Ministry's long-term, research-based excavations), regardless of the registration of the area as a site, such heritage items will be studied and displayed *in situ* as part of urban archaeology (Guideline No. 37 § 3).

144 Nevertheless, the High Commission's Guideline No. 658, entitled "Archaeological Sites: Conditions of Protection and Use," remains the main reference for the rules to be applied to different categories of registered archaeological sites.[229] It provides that archaeological sites of the first and second degree be preserved intact.[230]

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among other issues, the problem of the destruction of non-categorized archaeological sites during development activities. Özdoğan explains why it was stopped in "Dilemma in the Archaeology of Large Scale Development Projects," 3. A private initiative, the TAY (Turkey's Archaeological Settlements) project, publishes an online searchable database organized by the historic period the settlements belong to, their type, the geographical area and the type of investigation on which the information is based (survey or excavation). Visit to the TAY project's website, accessed 23 May 2023, ‹http://tayproject.org›.

227 Dinçer, "Türkiye'de Kültürel Miras Politikaları ve Uygulama Araçları," 80; Özdoğan, "Dilemma in the Archaeology of Large Scale Development Projects," 2.

228 Adopted on 10 April 2012. The complete title is "Yerleşim Alanlarında; Mevcut Arkeolojik Sitlerin veya Daha Önceden Varlığı Bilinmeyen Ancak Yeni Yapılanma, Alt Yapı Çalışmaları ya da Doğal Afetler Sonucu Ortaya Çıkan-Çıkarılan Kültür Varlıklarının Korunması ve Değerlendirilmesine İlişkin Kültür Varlıklarını Koruma Yüksek Kurulu İlke Kararı."

229 Adopted on 5 November 1999.

230 Sancakdar notes that an exception to this rule may be infrastructure projects presenting an overriding public interest (*üstün kamu yararı*). See *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 280.

The essential provisions of Guideline No. 658 are summarized in Table 1.1 below:

	First degree	Second degree	Third degree
	Article 1	**Article 2**	**Article 3**
Rule	– Preserved intact (mentioned in the land-use plan) – Construction strictly forbidden – Excavations possible only for scientific purposes	– Preserved intact – Regional Commissions decide on the use – New construction is not allowed	– Regional Commissions may allow new construction (including wind power plants) – Construction permits should be preceded by a drilling-type excavation
Exceptions	Some specific activities are allowed if the competent Regional Commission approves (i.e., urgent subsoil infrastructure, growing vegetables or fruits, organization of the visitor routes and facilities in ruins)	– Simple repair of non-registered buildings still in use is possible – Same exceptions as sites of the first degree apply	– Mining and quarrying activity forbidden

Table 1.1 Summary of the conditions of protection and use of archaeological sites provided by Guideline No. 658.

(c) Scientific Study

145 Certain rules regarding the conduct of scientific studies before physical interventions on archaeological heritage are provided in the High Regional Commission's guidelines. First, on third-degree archaeological sites, before any construction permit is delivered by municipalities or governorships, the competent Museum Directorate conducts a drilling-type excavation (*sondaj kazısı*). The purpose here is not to excavate the entire site but to drill small holes of a certain depth at a certain distance in order to understand the content of the site.[231] The results of the excavation are transmitted to the competent Regional Commission, which decides on the project's feasibility (Art. 3(ç) of Guideline No. 658). Second, for urban areas, Guideline No. 47 points out that when new archaeological material is discovered during excavations prompted by public works, it is "appropriate" that it is "investigated through scientific methods" (§ 3, point 1). What is implied here is most likely the conduct of rescue excavations.

231 Sevin, *Arkeolojik Kazı Sistemi El Kitabı*, 75.

In the case that archaeological heritage is discovered outside of third-degree sites or urban areas, is a scientific study mandatory before any physical intervention? There is no straightforward answer. From a reading of the directive on the conduct of surveys, drillings and excavations ("Directive on Excavations"),[232] it is possible to conclude that a rescue excavation is not automatically required. Museum Directorates, who are responsible for conducting rescue excavations, should first obtain permission from the General Directorate. Before giving any permission, the latter takes certain factors into consideration, such as the urgency of the situation, the availability of staff and the workload of the Museum Directorate that year (Art. 14(d) of the Directive on Excavations). 146

Summary of Turkish Law on the State's Obligation to Protect

	Inventory	Protection		Chance finds	Preservation		Scientific study
		Monuments or areas	Reserves		*In situ*	Storage	
Valletta Convention	Art. 2(i)	Art. 2(i)	Art. 2(ii) Art. 4(i)	Art. 2 (iii)	Art. 4(ii)	Art. 4 (iii)	Art. 5(ii) (b)
Turkish law	Guideline No. 702 *(urban archaeological sites)**	Art. 7 of the Law Art. 4(1)(d) and (e) of the Regulation on Sites Guideline No. 658		Art. 4 of the Law	Art. 20 of the Law Guidelines Nos. 658, 37	Art. 41 and Add. Art. 2(b) of the Law	*Partial*: See Guidelines Nos. 658, 37 and the Directive on Excavations

* A physical inventory of all registered sites exists at the administrative level.

232 The title in Turkish: "*Kültür ve Tabiat Varlıklarıyla İlgili Yapılacak Yüzey Araştırması, Sondaj ve Kazı Çalışmalarının Yürütülmesi Hakkında Yönerge.*" Entry into force: Ministry's approval of 17 February 2016 No. 94949537-10.04-32178. Regarding the legal status of directives, see Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 106.

Chapter 2: Attribution of the State's Ownership

A. International Law

1. Who Should Own Archaeological Objects?

Does the international community have a common position on who should own archaeological objects? Should States' ownership be privileged? 147

1.1. Post-World War I

Long before the adoption of 1956 UNESCO Recommendation (*supra* 34), certain standards in archaeology were formed within the framework of the League of Nations. Following World War I, several treaties were signed between the principal victorious parties (the British Empire and France), the defeated Ottoman Empire, and former Ottoman territories, soon to become mandates under the Covenant of the League of Nations.[233] 148

Since archaeology was an important issue among victors, it was strictly regulated in these treaties.[234] They all contained the same eight provisions on antiquities,[235] which are defined as "any construction or any product of human activity earlier than the year 1700" (Annex of Art. 421 of the Treaty of Sèvres, Point 1). These provisions included the reporting of chance finds in exchange for rewards (Point 2), the possibility of export only with authorization (Point 3), penalties for damage (Point 4), the possibility of "clearing of ground or digging" for the purposes of finding antiquities 149

233 These treaties are in particular:
(1) the unratified Treaty of Peace Between the Allied and Associated Powers and Turkey of 10 August 1920, signed in Sèvres ("Treaty of Sèvres") (Treaties of Peace 1919–1923, vol. II, Carnegie Endowment for International Peace, New York, 1924);
(2) the British Mandate for Palestine, approved by the League of Nations on 24 July 1922 (League of Nations Official Journal, vol. 3, August 1922, pp. 1007–12, accessed 23 May 2023, HeinOnline);
(3) the French Mandate of Syria and Lebanon, approved by the League of Nations on 24 July 1922 (League of Nations Official Journal, vol. 3, August 1922, pp. 1013–17, accessed 23 May 2023, HeinOnline);
(4) the Treaty of Alliance Between Great Britain and Iraq of 10 October 1922 (League of Nations Treaty Series, vol. 35, pp. 13–34, accessed 23 May 2023, ‹https://treaties.un.org›).
For further discussion, see Négri, "Les figures du droit international de l'archéologie," 61–62; Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, 84–87.

234 Goode, *Negotiating for the Past: Archaeology, Nationalism, and Diplomacy in the Middle East, 1919–1941*, 33.

235 See the Annex of Art. 421 of the Treaty of Sèvres; Art. 21 of the British Mandate for Palestine; Art. 14 of the French Mandate of Syria and Lebanon; and Art. 14 of the Anglo-Iraqi Treaty of 1922.

only with authorization (Point 5) and expropriation of lands of archaeological interest (Point 6), which are all principles that are acknowledged today.

150 Nevertheless, the Allied powers also obliged the signatories to abrogate their existing antiquities laws, enact new laws based on these principles and apply them "on a basis of perfect equality between all nations" (Art. 421 of the Treaty of Sèvres).[236] This implied not discriminating against archaeologists of a particular country without good reason, while granting authorizations (Annex of Art. 421, Point 7) and a guarantee that the finds from excavations would be shared, called *partage* (Annex of Art. 421, Point 8).[237]

151 Had Turkey ratified the Treaty of Sèvres' rule regarding the *partage* of excavation finds, it would have been against the State ownership principle provided by the regulation in force at that time, the Ottoman Decree of 1906.[238] As will be detailed below, the Ottoman State passed several regulations on antiquities in the late 1800s. The 1884 Decree was the first one declaring State ownership over archaeological heritage, but it also featured one exception allowing landowners to acquire chance finds.[239] The 1906 Decree removed this exception and established absolute State ownership, which has continued ever since (*infra* 177). Before the 1884 Decree, excavation finds were divided between the Ottoman State and the excavator. The Treaty of Sèvres was aiming at restoring this pre-1884 system, under which foreign excavation teams could acquire ownership over their finds.[240] Since the Treaty of Sèvres was not ratified by Turkey, such a detour in legislation did not happen.

1.2. Inter-War Period

152 An important document to mention here is the "International Principles Concerning the System of Antiquities and Excavations" adopted by the International Conference

236 Art. 421 of the Treaty of Sèvres: "The Turkish Government will, within twelve months from the coming into force of the present Treaty, abrogate the existing law of antiquities and take the necessary steps to enact a new law of antiquities which will be based on the rules contained in the Annex hereto, and must be submitted to the Financial Commission for approval before being submitted to the Turkish Parliament. The Turkish Government undertakes to ensure the execution of this law on a basis of perfect equality between all nations."

237 Point 8, Annex of Art. 421 of the Treaty of Sèvres: "The proceeds of excavations may be divided between the excavator and the competent Turkish Department in a proportion fixed by that Department. If division seems impossible for scientific reasons, the excavator shall receive a fair indemnity in lieu of a part of the find."

238 The Decree on Antiquities (Asar-ı Atika Nizamnamesi) of 10 April 1906. For the translation in modern Turkish, see Madran, 199–206.

239 The Decree on Antiquities (*Asar-ı Atika Nizamnamesi*) of 22 February 1884. For the translation in modern Turkish, see Madran, *Tanzimat'tan Cumhuriyet'e*, 195–99.

240 The partage was a *sine qua non* for most Western archaeologists. See Goode, *Negotiating for the Past: Archaeology, Nationalism, and Diplomacy in the Middle East, 1919–1941*, 34.

on Excavations held in Cairo in March 1937 and approved by the Assembly of the League of Nations ("1937 Cairo Act").[241] This document contained recommendations regarding the definition of "object of antiquity," the question of ownership, the trade in antiquities, excavations, international collaboration, the assignment of finds and the repression of clandestine excavations. As opposed to the post-World War I treaties, it recognized that "certain countries explicitly or implicitly recognize the principle that the archaeological subsoil is state property" (Art. 2), and that this implied that the State had "*de jure* ownership in respect of all objects found in the course of excavations undertaken by the State or with its authority, even on privately owned ground, as well as in respect of chance finds or objects discovered in the course of illicit excavation" (Art. 2*b*).[242] The 1937 Cairo Act also admitted that other countries might accept "the private ownership of the subsoil" and that it was "impossible to advocate one system to the exclusion of another" (Art. 3). Nevertheless, it suggested that States which accepted the principle that the archaeological subsoil was State property, but whose legislation did not actually mention this, consider formulating their law more clearly to avoid all possible disputes (Art. 3*b*).

While the 1937 Cairo Act recognized in principle the State's ownership over archaeological objects, it also encouraged a certain flexibility. For instance, it stated that national laws should not exclude the possibility of granting private individuals ownership over antiquities found in the course of excavation when the State was willing to waive its right to them (Art. 3*c*). To foster international collaboration, it suggested that national authorities give the excavator a share of the finds, which consisted of duplicates or objects similar to those already in the possession of national museums (Art. 13*b*). To do so, the internal laws of the country were to recognize that objects which had no interest to its national museums might be ceded, exchanged, or deposited for the benefit of foreign museums (Art. 13*c*). The foreign excavator had the obligation to place the objects in public collections. If he or she failed, the objects were to be returned to the country of origin (Art. 13*d*). 153

241 Négri, "Les figures du droit international de l'archéologie," 64. For the 1937 Cairo Act, see the Report of the International Committee on Intellectual Co-operation of the League of Nations on the Work of its Nineteenth Plenary Session, 9 August 1937, Doc. C.327 M. 220.1937.XII, Appendix 11, accessed 23 May 2023, ‹https://archives.ungeneva.org/international-committee-on-intellectual-co-operation-report-of-the-committee-on-the-work-of-its-nineteenth-plenary-session›.

242 See also Art. 13*a*: "It is essential that the objects found in the course of excavations should be set apart, in the first place, for the formation, in the museums of the country where the excavations are carried out, of complete collections fully representative of the civilization, history and art of that country."

1.3. Post-World War II

154 UNESCO, which continued the work of the League of Nations, borrowed heavily from the text of the 1937 Cairo Act to draft the principles on archaeological excavations that became the UNESCO 1956 Recommendation (*supra* 34). The provisions with regard to the State's ownership and the assignment of finds were almost identical to the 1937 Cairo Act. The Recommendation first urged countries where the State's ownership of the archaeological subsoil was recognized to specifically mention it in their legislation (Art. 5*e*). Then, the Recommendation acknowledged that States "might consider" allocating to the excavator a number of finds from his or her excavation, in particular duplicates or objects "which can be released in view of their similarity to other objects from the same excavation" (Art. 23*c*). In any case, States themselves had to define the principles with regard to the "disposal" of excavation finds that would be applicable in their territories (Art. 23*a*). In a nutshell, the 1956 UNESCO Recommendation was the "culmination of a 1930s-inspired international effort to standardize and secure access to ancient wonders of the world," which has largely been forgotten in archaeological and academic circles today.[243]

155 Nevertheless, it is important to note an important shift in the way that archaeological heritage is defined in the 1956 UNESCO Recommendation. Before, "an object of antiquity" was defined based on the criterion of belonging to a given period or having the minimum number of years of existence fixed by law. The 1956 UNESCO Recommendation does not refer to any age criterion, or historical or artistic characteristics. It focuses instead on the "archaeological character" of objects (Art. 1) "whose preservation is in the public interest" (Art. 2).[244]

1.4. Twenty-First Century

156 The question of who should own undiscovered archaeological objects still remains a domestic matter, to be determined by the legislators of each country. As a novelty, however, in 2011 UNESCO and UNIDROIT drafted a model provision on State ownership for countries that wish to declare archaeological objects State property or to revise the wording of their current ownership laws. As mentioned earlier, this model provision, together with the other five, will be examined in detail in Part III of this thesis. Here, it will be stressed that UNESCO and UNIDROIT do not intend to impose on States a public ownership of archaeological objects (*infra* 456). The adoption of such a provision remains optional.

243 Meskell, *A Future in Ruins: UNESCO, World Heritage, and the Dream of Peace*, 21.
244 Négri, "Les figures du droit international de l'archéologie," 69.

Having said this, the fact that UNESCO and UNIDROIT felt the need to draft a model provision on State ownership of archaeological objects suggests that this principle is endorsed by most countries. For the time being, there are no statistics to prove such a point. Nevertheless, it is worth citing the example of France, which has made radical changes in the ownership regime of its archaeological heritage in recent years. 157

For immovable archaeological property (*biens archéologiques immobiliers*), the key date is 2001. Before 2001, a landowner used to own the immovable archaeological property discovered on his or her land (Art. 552 of the French Civil Code).[245] As of 2001, immovable archaeological property (discovered on land acquired after 2001) belongs to the State. Article 552 of the French Civil Code is no longer applicable.[246] For movable archaeological property (*biens archéologiques mobiliers*), the key date is 2016. Before 2016, the owner of movable archaeological property was determined according to the above-mentioned Article 552 and Article 716 of the French Civil Code on treasures,[247] as well as by the circumstances of the discovery.[248] As of 2016, movable archaeological property (discovered on land acquired after 2016) "is presumed to belong" to the State regardless of the circumstances. Articles 552 and 716 of the French Civil Code are no longer applicable.[249] 158

245 Art. 552(1) of the French Civil Code: "*La propriété du sol emporte la propriété du dessus et du dessous.*" See Cornu, "La propriété et la dimension collective du patrimoine archéologique," 159–60; Mathieu, "Le droit français," 332.

246 Art. L541-1 of the French Heritage Law § 1: "*Les dispositions de l'article 552 du code civil relatives aux droits du propriétaire du sol ne sont pas applicables aux biens archéologiques immobiliers mis au jour à la suite d'opérations archéologiques ou de découvertes fortuites réalisées sur des terrains dont la propriété a été acquise après la publication de la loi n° 2001-44 du 17 janvier 2001 relative à l'archéologie préventive. Ces biens archéologiques immobiliers appartiennent à l'Etat dès leur mise au jour à la suite d'opérations archéologiques ou en cas de découverte fortuite.*"
See Cornu, "La propriété et la dimension collective du patrimoine archéologique," 160–62; Mathieu, "Le droit français," 332–33.

247 Art. 716 of the French Civil Code: "*(1) La propriété d'un trésor appartient à celui qui le trouve dans son propre fonds; si le trésor est trouvé dans le fonds d'autrui, il appartient pour moitié à celui qui l'a découvert, et pour l'autre moitié au propriétaire du fonds. (2) Le trésor est toute chose cachée ou enfouie sur laquelle personne ne peut justifier sa propriété, et qui est découverte par le pur effet du hasard..*"

248 Four scenarios were possible: archaeological objects discovered (i) through excavations authorized by the State, belonged to the landowner (Art. 552 of the French Civil Code); (ii) through excavations carried out by the State, were shared between the State and the landowner (Art. 716 of the French Civil Code); (iii) by chance, were shared between the finder and the landowner (Art. 716 of the French Civil Code); (iv) through "preventive archaeology operations," were shared between the State and the landowner unless the latter renounced his or her ownership (Arts. 523–14 of the French Heritage Law, repealed).
See Cornu, "La propriété et la dimension collective du patrimoine archéologique," 163–65; Mathieu, "Le droit français," 330.

249 Article L541-4 French Heritage Law § 1: "*Les articles 552 et 716 du code civil ne sont pas applicables aux biens archéologiques mobiliers mis au jour à la suite d'opérations de fouilles archéologiques ou de découvertes fortuites réalisées sur des terrains dont la propriété a été acquise après la date*

2. Recognition of National Ownership Laws in Foreign Courts

159 While international law does not have a particular position on who should own archaeological objects, the issue of recognition of States' ownership rights in foreign courts has been the subject of numerous judgments. Some of the key decisions referred to in this thesis are: the UK decision, *Iran v. Barakat Galleries* (*infra* 172); *United States v. Schultz* (*infra* 448), where Iran and Egypt's ownership laws were recognized; and *United States v. McClain* (*infra* 448), where Mexico's ownership law was not recognized. Frigo describes international judicial practice as "unpredictable" since it is difficult to foresee whether a foreign court will appropriately interpret and apply State ownership over undiscovered archaeological objects for the purposes of restitution.[250]

160 The illicit traffic of cultural property is a complex and multifaceted phenomenon, involving among other things the illegal excavation of archaeological objects (clandestine excavations), followed by their illegal export abroad to be sold.[251] If clandestine excavations happen in countries that vest the ownership of archaeological objects in the State, such States, as the dispossessed owners, can claim the objects' restitution when they surface in foreign markets. These restitution cases are seen as a powerful tool in the mitigation of illicit traffic.[252]

161 The restitution of archaeological objects will not be discussed in this thesis, which instead focuses on the territorial protection of such objects.[253] Nevertheless, in light of the connection between restitution and some of the UNESCO-UNIDROIT Model Provisions, the following paragraphs will briefly consider certain restitutionary issues that have an impact (positively or negatively) on the recognition of national ownership laws by foreign courts. The issues at question are related to the field of private international law, which is also called conflict-of-law rules.[254]

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d'entrée en vigueur de la loi nº 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine. Ces biens archéologiques mobiliers sont présumés appartenir à l'Etat dès leur mise au jour au cours d'une opération archéologique et, en cas de découverte fortuite, à compter de la reconnaissance de l'intérêt scientifique justifiant leur conservation."

250 Frigo, "Model Provisions on State Ownership of Undiscovered Cultural Objects - Introduction," 1030–32.

251 More information is available on ICOM's web-based International Observatory on Illicit Traffic in Cultural Goods, accessed 23 May 2023, ‹https://www.obs-traffic.museum›.

252 Having said this, the most powerful and effective techniques remain the preventive measures as set forth in the 1970 UNESCO Convention. See Boz, *Fighting the Illicit Trafficking of Cultural Property: A Toolkit for European Judiciary and Law Enforcement*, 27.

253 A selected bibliography on cultural heritage law and dispute settlement is available on the ArThemis database, ‹https://plone.unige.ch/art-adr/library-bibliotheque›.

254 These are domestic rules developed by each State to help domestic judges decide whether they have jurisdiction and what the applicable law is in cases that present a "foreign" element. See Chechi, *The Settlement of International Cultural Heritage Disputes*, 84 fn. 90.

2.1. Statute of Limitations

Restitution claims are usually brought before the courts of the place where the objects are located (i.e., the forum State). Depending on the characterization of the issue, the requesting State will have to respect the time limits posed by the law of the forum or the law applicable to substance in order to initiate the legal proceedings.[255] The problem which arises in the context of illegally excavated archaeological objects is that such objects may surface in the market long after the applicable limitation period has run.[256] Dealers are informed about the length of the limitation periods in different market countries and use this knowledge to the detriment of the objects' original owners.[257] 162

To overcome this problem, the UNIDROIT Convention adopted a fifty-year period (starting from the time of the theft)[258] within which States can file their claim.[259] In addition, the Convention gives State Parties the possibility to extend this period to seventy-five years "or such longer period as is provided in [their] law."[260] Nevertheless, these "longer" periods do not satisfy countries like Turkey (not a party to the UNIDROIT Convention), which does not apply any time limitations for the recovery of archaeological objects owned by the State. Such claims are imprescriptible under 163

255 Knoepfler, Schweizer, and Othenin-Girard, *Droit International Privé Suisse*, n. 291.

256 In civil-law countries, the period is relatively short (three to six years) and usually begins at the time of theft. In common law countries, there are different approaches as for the starting point of the limitation period. See Chechi, 89; Roodt, *Private International Law, Art and Cultural Heritage*, 96–98.

257 Movable objects are easy to conceal, easily transportable, and non-perishable. Prott, "Problems of Private International Law for the Protection of the Cultural Heritage," 254–55. See also Kaye, "Litigation in Cultural Property: A General Overview"; Redmond-Cooper, "Limitation of Actions in Art and Antiquity Claims."

258 Art. 3(2) of the UNIDROIT Convention: "For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place." Cf. Provision 4 of the Model Provisions (*infra* 468).

259 Art. 3(3) of the UNIDROIT Convention: "States should also respect the three-year period starting from the time they become aware of the location of the object and the identity of its possessor."
Art. 3(4) UNIDROIT Convention: "However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor."

260 Art. 3(5) of the UNIDROIT Convention: "Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation."
See Forrest, *International Law and the Protection of Cultural Heritage*, 204 et seq.; O'Keefe, "Using UNIDROIT To Avoid Cultural Heritage Disputes: Limitation Periods."

Turkish law.[261] In Switzerland, the recovery of archaeological objects belonging to cantons has been imprescriptible since 2005 (Art. 724(1bis) of the SCC).[262]

164 Switzerland did not ratify the UNIDROIT Convention, yet it adopted a special limitation period applicable to the restitution of stolen cultural property (*action en revendication*). The normal time period of five years was extended to thirty years for cultural property within the meaning of the CPTA (*supra* 79), including "products of archaeological excavations" (Art. 1(a) of the 1970 UNESCO Convention).[263] Once the thirty-year limitation period has run, it is possible for good-faith purchasers to acquire title to such objects (*infra* b).

2.2. Acquisition in Good Faith

165 Depending on the law of the location of the object at the time of transfer (the *lex situs* rule[264]), an object stolen in one country may be acquired in good faith by third parties in another country. This well-known dilemma of restitution cases is covered in the UNIDROIT Convention. Its Article 3(1) states that "the possessor of a cultural object which has been stolen shall return it." If the possessor proves to be in good faith, he or she will be entitled to "fair and reasonable compensation" (Art. 4(1) of the UNIDROIT Convention). The UNIDROIT Convention reverses the good-faith acquisition rule applied mostly in civil-law countries, including Switzerland and Turkey.[265]

166 Since Switzerland did not ratify the UNIDROIT Convention, the good-faith acquisition rule is still applied to archaeological objects illegally excavated in another country and purchased in Switzerland. One year after the original owner becomes aware of where and by whom such objects are being held, but at the latest thirty years after

261 This is a customary law rule applied to public property in general. It is construed together with the principles of inalienability (*infra* 342) and prohibition of acquisition through prescription (*infra* c). Özel proposes that Turkey make a declaration in this respect before its ratification of the UNIDROIT Convention. Özel, "Kültür Varlıklarının İadesinde Doğrudan Uygulanma Kabiliyeti Olan Uluslararası Sözleşme," 248.

262 See Gabus and Renold, *Commentaire LTBC*, Art. 32 n. 19; Pannatier Kessler, "CC Art. 724," n. 8.

263 See Art. 934(1bis) of the SCC. The 30-year limitation period starts after the loss ("*30 ans après qu'il en a été dessaisi*"). Since this paragraph entered into force in 2005, the extended time limitation applies to thefts occurring after 2005. See Gabus and Renold, *Commentaire LTBC*, Art. 33 nn. 1–7.

264 *Lex situs* means "the law of the jurisdiction in which the property that is the subject of litigation, is located." See Fellmeth and Horwitz, "Lex Situs." It is a conflicts-of-law rule applied by national judges to settle proprietary rights, adopted by both Swiss and Turkish law. See Art. 100(1) of Switzerland's Federal Act on Private International Law of 18 December 1987 (RS 291) and Art. 21(1) of Turkey's Code on Private International and Procedural Law No. 5718 (Official Gazette No. 26728 of 12 December 2007).

265 For Swiss law, see Art. 714(2) of the SCC. For Turkish law, see Art. 763(1) of the TCC.

the loss, such objects may be acquired in good faith by third parties (Art. 934(1bis) of the SCC).[266]

Under Swiss[267] and Turkish[268] law, archaeological objects owned by the State cannot be acquired in good faith. 167

2.3. Acquisition through Prescription

Depending on the law of the location of the object at the time of transfer (the *lex situs* rule), an object stolen in one country may be acquired through prescription (or adverse possession) in another country. Rules of prescription allow a possessor who has held an object (either lost or stolen) for a considerable length of time to acquire title to it.[269] Under both Swiss and Turkish law, a person who: (i) possesses an object belonging to another person, (ii) retains possession of the object without interruption and without challenge for five years, and (iii) believes in good faith that he or she owns it, becomes its owner through adverse possession.[270] To better fight against illicit trafficking, Swiss law has extended the time limit to 30 years when cultural property is concerned.[271] 168

Under Swiss[272] and Turkish[273] law, archaeological objects owned by the State cannot be acquired through prescription. 169

2.4. Non-Application of Foreign Public Law

In restitution cases, judges usually distinguish between laws vesting ownership of certain categories of cultural objects in the State, national ownership laws, and laws prohibiting or restricting the export of cultural objects. The effect of the distinction is important because only the first has an extraterritorial effect. While as a princi- 170

266 Gabus and Renold, *Commentaire LTBC*, Art. 32 nn. 24–26; Pichonnaz, "CC Art. 934," n. 92.

267 See Art. 724(1bis) of the SCC. Gabus and Renold, *Commentaire LTBC*, Art. 32 n. 19; Pannatier Kessler, "CC Art. 724," n. 8.

268 This is a customary law rule applied to public property in general. See Akyılmaz, Sezginer, and Kaya, *Türk İdare Hukuku*, 704–12; Düren, *İdare Malları*, 75–80; Giritli et al., *İdare Hukuku*, 986–87; Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2018, nn. 1110–1132; Gülan, "Kamu Malları," 686–89.

269 See Chechi, *The Settlement of International Cultural Heritage Disputes*, 88; Prott, "Problems of Private International Law for the Protection of the Cultural Heritage," 255.

270 For Swiss law, see Art. 728(1) of the SCC. For Turkish law, see Art. 777(1) of the TCC.

271 See Art. 728(1ter) of the SCC. The extended prescription applies to cultural property which was not yet acquired in 2005. Gabus and Renold, *Commentaire LTBC*, Art. 728ter nn. 1–7; Pannatier Kessler, "CC Art. 728," n. 26.

272 See Art. 724(1bis) of the SCC. Gabus and Renold, *Commentaire LTBC*, Art. 32 n. 19; Pannatier Kessler, "CC Art. 724," n. 8.

273 This is a customary law rule applied to public property in general. See Akyılmaz, Sezginer, and Kaya, *Türk İdare Hukuku*, 704–12; Düren, *İdare Malları*, 75–80; Giritli et al., *İdare Hukuku*, 986–87; Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2018, nn. 1110–32; Gülan, "Kamu Malları," 686–89.

ple of private international law, courts should "judicially enforce foreign private rights,"[274] they tend to be reluctant to apply foreign laws that reflect pure public policy such as export regulations.[275]

171 Consequently, the requesting State should ensure that the wording of its law leaves no doubt about the fact that the ownership of archaeological objects is vested *ipso iure* in the State.[276] This issue is further developed in Part III of this thesis, which deals with the UNESCO-UNIDROIT Model Provisions. In fact, one of the purposes of this document is to offer a standard legal declaration of States' ownership of archaeological objects that is recognizable and enforceable by foreign judges.

172 A key judgment that recognized a foreign State's national ownership law (and thereby its ownership over archaeological objects) by holding that this recognition should not be interpreted as the enforcement of public foreign law was the *Barakat* case. In this case, the Islamic Republic of Iran claimed the restitution of a collection of archaeological objects from the London-based Barakat Galleries on the grounds that they belonged to Iran and had been illegally excavated and exported.[277]

173 The High Court of London held that the Iranian law under which Iran had acquired title (the "1979 Legal Bill") "was a penal law which had as its purpose the aim of protecting the national heritage."[278] Therefore, even if Iran had title to the archaeological objects under Iranian law, the English court would not recognize or enforce it.[279] The Court of Appeal did not agree with this interpretation and reversed the decision of the High Court of London. The Court of Appeal concluded that: (i) "the fact that some of the provisions of the 1979 Legal Bill impose penalties [did] not render penal all the other provisions of the Bill;"[280] (ii) the claim in this case was not an attempt to enforce a public law or to assert sovereign rights, but to assert rights of ownership ("patrimonial claim");[281] and (iii) there was no reason in principle why the English

274 Merryman, "Cultural Property, International Trade, and Human Rights," 58.

275 In other words, courts will not enforce claims which involve the exercise of sovereign authority. Chechi, *The Settlement of International Cultural Heritage Disputes*, 92–96.

276 Chechi, 66–69.

277 *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd*. [2007] EWCA Civ. 1374, [2008] 1 All ER 1177. See also Chechi, Contel and Renold, "Case Jiroft Collection – Iran v. The Barakat Galleries Ltd." on Platform ArThemis (‹http://unige.ch/art-adr›). Turkish readers may refer to Özel, "Kaynak Ülkelerin Kendi Çıkardığı Kanunlara Dayanarak Devlet Mülkiyetine Tabi Tuttuğu Kültür Varlıklarının Dava Yoluyla İadesinin Barakat Kararı Işığında Değerlendirilmesi."

278 *Iran v. Barakat*, § 91.

279 For details, see *Iran v. Barakat*, § 95 et seq.

280 According to the Court of Appeals, provisions on the State's ownership of archaeological objects were not penal or confiscatory. See *Iran v. Barakat*, § 111.

281 *Iran v. Barakat*, §§ 131, 149.

court should not recognize such claim.[282] On the contrary, there were "positive reasons of policy[283] why a claim by a State to recover antiquities which form part of its national heritage … should not be shut out."[284]

Summary of the International Law Section

The question of who should own undiscovered archaeological objects is a domestic matter to be determined by the legislators of each country. States that opt for the public ownership of archaeological objects should be aware that in case these objects leave the country illegally, they may claim their restitution in foreign courts; however, such claims will not be automatically recognized. The main obstacles are: (i) the time limitations for filing a claim, (ii) the possibility of the object's acquisition in good faith by a third party, (iii) a third party's claim to ownership through adverse possession and (iv) the risk that foreign courts will not enforce States' ownership laws because of unclear or ambiguous wording that makes them appear to be reflections of public policy. While the UNIDROIT Convention brings solutions for the first three obstacles, the Model Provisions deal with the latter one. 174

B. Domestic Law

1. State's Right of Ownership

1.1. Legal Basis in Swiss and Turkish Law

1.1.1. Civil Codes

Swiss law vests the State's ownership in archaeological objects through Article 724(1) of the SCC: "Ownerless natural specimens and antiquities of scientific value are the property of the canton on whose territory they are found." The original text of 175

282 *Iran v. Barakat*, § 133: "Where the foreign state has acquired title under its law to property within its jurisdiction in cases not involving compulsory acquisition of title from private parties, there is no reason in principle why the English court should not recognise its title (…)."

283 By "policy," the Court of Appeal refers to the "international recognition that States should assist one another to prevent the unlawful removal of cultural objects including antiquities" (§ 155) evolved thanks to instruments such as the 1970 UNESCO Convention and the UNIDROIT Convention (§ 159 et seq.). Even if they do not directly apply to the case, "they do illustrate the international acceptance of the desirability of protection of the national heritage" (§ 163). The Court of Appeals notes that "a refusal to recognise the title of a foreign State, conferred by its law, to antiquities unless they had come into the possession of such State, would in most cases render it impossible for this country to recognise any claim by such a State to recover antiquities unlawfully exported to this country." (§§ 163–64).

284 *Iran v. Barakat*, § 154.

Article 724(1) of the SCC, which remained in force until 2005,[285] was slightly different: "Ownerless natural specimens and antiquities of *considerable* scientific value *become* the property of the canton on whose territory they are found" (discussed in detail *infra* 195 et seq.) (emphasis added). The principle of State ownership was already being applied before the adoption of the SCC rule in 1902, during the railway concessions and agreements on dewatering works. Article 724(1) of the SCC aimed at extending the application of such a principle since it was in the public interest that archaeological objects would belong to the State.[286]

176 On the Turkish side, when the *f*TCC was adopted in 1926 based on the Swiss model, Article 724 of the SCC ("Objects of Scientific Value") was transposed as Article 697 in the *f*TCC. The first sentence of Article 697(1) of the *f*TCC stated: "Ownerless rare natural specimens and antiquities of significant scientific value become the property of the treasury."[287] This article was modified during the revision of the *f*TCC and became Article 773 in the TCC adopted in 2001. Article 773 of the TCC states that "in case ownerless natural things and antiquities of scientific interest are found, special laws shall apply."[288]

1.1.2. Turkey's Heritage Legislation

177 Turkey's first legislation on cultural property was enacted during the time of the Ottoman Empire. In the 19th century, the Empire passed through a process of modernization and westernization, which particularly concerned the respect of individuals' rights and justice. This process led to law-making efforts in different areas, including the protection of antiquities.[289]

178 The first two decrees on antiquities date from 1869 and 1874.[290] Both decrees allowed the establishment of private ownership over newly found antiquities.[291] In particular, the Decree of 1874 set up a *partage* mechanism, according to which antiquities

285 Amendment in force as of 1 June 2005 (RO 2005 1869; FF 2002 505).

286 Huber, *Code civil suisse*, 96. See also Pannatier Kessler, "CC Art. 724," n. 6.

287 The Turkish version replaced the reference to the "canton" by "the Treasury." Morevoer, the expression "natural specimens" was narrowed down by adding the adjective "rare" (*nadire*).

288 Art. 773 of the TCC: "*Bilimsel değeri olan sahipsiz doğal şeyler ile eski eserlerin bulunması halinde özel kanun hükümleri uygulanır.*"

289 There were also external factors. At that time, foreign excavation teams could easily remove antiquities, and even parts of immovable heritage, out of the Empire's territory because of the economic and political environment and the lack of regulatory measures. Madran, *Tanzimat'tan Cumhuriyet'e*, 19–20.

290 The Decree on Antiquities (*Asar-ı Atika Nizamnamesi*) of 13 February 1869; the Decree on Antiquities (*Asar-ı Atika Nizamnamesi*) of 24 March 1874. For the texts' translation in modern Turkish, see Madran, 188–94.

291 Özel, "Kültür Varlıkları Üzerinde Geniş Kapsamlı Kanunlarla Tesis Edilen Devlet Mülkiyeti," 79.

unearthed during an authorized excavation were divided between the State, the excavation team and the landowner.[292] Soon the Ottoman State realized the negative outcomes of this method and adopted a new decree in 1884 (*supra* 151).[293]

The Antiquities Decree of 1884 is considered the basis of cultural property law in Turkey.[294] It adopted the principle of the State's ownership over antiquities with an exception for those accidentally discovered on private land, i.e., during construction works.[295] This exception was later removed by the Antiquities Decree of 1906 (*supra* 151), which granted the State absolute ownership of antiquities while maintaining the essential principles established by the 1884 Decree.[296] The Antiquities Decree of 1906 continued to be implemented during the Republican era.[297] 179

The subsequent legislation – the Antiquities Law of 1973[298] and the Protection Law of 1983 (*supra* 121), currently in force – maintained the same State ownership principle. Article 5 of the Protection Law states that "movable and immovable cultural and natural property requiring protection, known or to be discovered in the future, and situated on immovable property that belongs to public authorities, individuals and private entities, has the quality of state property."[299] 180

It is important to note that while the term "*varlık*" used by the Protection Law is often translated in English as "property" to respect the internationally recognized terminology,[300] it does not exactly have this meaning. "*Varlık*" means existence, 181

292 Mumcu, "Eski Eserler Hukuku ve Türkiye II," 70; Özel, "Kültür Varlıkları Üzerinde Geniş Kapsamlı Kanunlarla Tesis Edilen Devlet Mülkiyeti," 79–80.

293 Foreign excavation teams had control over excavation sites and thus the sharing of archaeological finds. Madran, *Tanzimat'tan Cumhuriyet'e*, 41.

294 Mumcu, "Eski Eserler Hukuku ve Türkiye I," 73.

295 In such a situation, the landowner could keep half of the antiquities (Art. 12). See Özel, Özel, "Kültür Varlıkları Üzerinde Geniş Kapsamlı Kanunlarla Tesis Edilen Devlet Mülkiyeti," 80.

296 Mumcu, "Eski Eserler Hukuku II," 74. The provisions of the Antiquities Decree of 1906 which did not contradict the *f*TCC remained applicable. See Turkish Court of Cassation's General Assembly Judgment No. 3/6 of 20 March 1963, cited in Mumcu, "Eski Eserler Hukuku ve Türkiye II," 46, fn. 58.

297 Turkish Constitutional Court Judgment No. 1965/41 of 6 July 1965. Published in the Official Gazette No. 12142 of 4 November 1965. The Court confirmed that the Antiquities Decree of 1906 had the force of law and therefore rejected the claim on the unconstitutionality of the penal sanctions provided by this Decree.

298 Law (abrogated) No. 1710 of 25 April 1973. Official Gazette No. 14527 of 6 May 1973.

299 Art. 5 in Turkish: "*Devlete, kamu kurum ve kuruluşlarına ait taşınmazlar ile özel hukuk hükümlerine tabi gerçek ve tüzelkişilerin mülkiyetinde bulunan taşınmazlarda varlığı bilinen veya ileride meydana çıkacak olan korunması gerekli taşınır ve taşınmaz kültür ve tabiat varlıkları Devlet malı niteliğindedir.*"

300 See, e.g., the unofficial translation of the Protection Law in the UNESCO National Law Database.

both materially and intangibly.[301] It can be argued that the Protection Law sends a message through this choice of words, suggesting that cultural objects cannot be regarded as ordinary goods (*mal*) or property (*eşya*). Sometimes, heritage specialists translate "*varlık*" as "asset" in English (i.e., archaeological assets).[302]

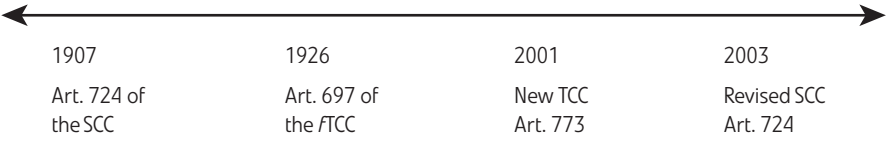

Table 2.1 A chronological timeline showing the evolution of legal provisions providing for the State's ownership of archaeological objects in the Swiss and Turkish civil codes.

	Ottoman State Antiquities Decree Art. 4	**Turkey Antiquities Law Art. 3**	**Turkey Protection Law Art. 5**
Date	1906	1973	1983
Scope	Antiquity (in Ottoman Turkish *asar-ı atika*)	Antiquity[303] (in modern Turkish *eski eser*)	Cultural and natural property requiring protection
	Movable and immovable	Movable and immovable	Movable and immovable
	Known or to be discovered	Known or to be discovered	Known or to be discovered
Status	State property	State property	Having the quality of State property[304]

Table 2.2 Comparison of the legal provisions providing for the State's ownership of archaeological heritage in the Ottoman and Turkish heritage legislations.

1.2. Matter of Public or Private Law?

182 What is the nature of the relationship between the State and archaeological objects? In other words, what is the source of the State's ownership: private or public law? In Swiss law, this relationship is considered of private character, as is the case for all

301 Dictionary of the Turkish Language Institution (Turkish acronym: TDK), accessed 23 May 2023, ‹https://sozluk.gov.tr›.

302 See, e.g., "Safeguarding Archaeological Assets of Turkey" project, accessed 23 May 2023, ‹https://saratprojesi.com/en›.

303 Mumcu, "Eski Eserler Hukuku ve Türkiye II," 44–45.

304 This expression does not suggest that the State has a right lesser than ownership. For the relevant Turkish literature, see *infra* 183. This issue has also been discussed in a U.S. court, see the Elmalı Hoard case (*infra* 292).

State property.[305] According to the majority view among Swiss authors, the State's ownership over its property is a right of ownership "*modifié*," where public entities own property in the same way as any private party (Art. 641 et seq. of the SCC). In addition, public law rules apply as well (Art. 664 of the SCC).[306]

183 In Turkish law, the nature of the relationship between the State and its property varies depending on the type of State property. In the case of public property (dedicated to the public interest, *infra* 322), such a relationship has a public-law character and the State's ownership is recognized as "public ownership" (*kamu mülkiyeti* or *idare hukuku mülkiyeti*), which differs from private ownership (*özel mülkiyet*) (Art. 683 et seq. of the TCC).[307] When the State's private assets (i.e., those not dedicated to the public interest) are concerned, such a relationship has a private-law character, similar to Swiss law.[308] As a result, under Turkish law, the State's ownership over archaeological objects is recognized as a type of ownership deriving from public law,[309] whose scope and limits must be set according to the rules in this field.

184 It is important to have this distinction in mind when examining the very interesting *Basel* case of 1995 (cited *supra* 10 and discussed *infra* 186 et seq.). If the judges of Swiss civil courts were aware of this aspect of Turkish law, they might have excluded all the scholarly discussions based on Swiss private law, focused solely on Turkish administrative law and reached a different conclusion. The *Basel* case draws attention, in fact, to the importance of judges' knowledge (in particular, in market countries) of foreign legal cultures in cases regarding cultural property.

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305 Swiss Federal Court Judgment 1A.215/2000, § 4b (in German), ‹https://www.bger.ch›. The case concerned the extradition to Turkey of a German citizen arrested in Switzerland for having attempted to illegally export cultural property from Turkey. For a detailed summary, see Boillat, *Trafic illicite de biens culturels et coopération judiciaire*, n. 745 et seq.

306 Dubey and Zufferey, *Droit administratif général*, n. 1494; Piotet, *Droit cantonal complémentaire*, n. 608; Tanquerel, *Manuel de droit administratif*, n. 180; Zen-Ruffinen, *Droit administratif*, n. 912 et seq.

307 See Akyılmaz, Sezginer, and Kaya, *Türk İdare Hukuku*, 703–4; Düren, *İdare Malları*, 58; Giritli et al., *İdare Hukuku*, 967; Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2013, n. 1102; Gülan, "Kamu Malları," 674–75.
For case law, see, e.g., Turkish Court of Cassation, 4th Chamber, Judgment No. 985/5074 of 20 May 1985, Case No. 985/398; Turkish Council of State's General Assembly Judgment No. 981/25 of 13 April 1981, Case No. 981/4, cited in Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2013, n. 1126. The Turkish Constitutional Court recognizes that the protection granted to private ownership under Art. 35 of the Turkish Const. also applies to State ownership. See Turkish Constitutional Court Judgment No. 994/45-2 of 7 July 1994, Case No. 994/49. Published in the Official Gazette No. 22047 of 10 September 1994.

308 Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2013, nn. 1175–76.

309 Giritli et al., *İdare Hukuku*, 872 et seq.; Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 85–86; Özel, *Uluslararası Alanda Kültür Varlıklarının Korunması*, 79; Umar and Çilingiroğlu, *Eski Eserler Hukuku*, 68 and the references cited in fn. 4; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 24–26.

1.3. Nature of the Right

185 In Swiss and Turkish law, undiscovered archaeological objects belong *ipso iure* to the State.[310] "*Ipso iure*" literally means "by the right itself."[311] In the context of property rights, it implies that the owner acquires ownership by operation of law, regardless of the owner's will:[312] more specifically, "without seizure and without any kind of appropriation by government officials."[313] Nevertheless, for a long time, Swiss authors were divided as to the nature of the cantons' right under Article 724 of the SCC. Leemann, together with most authors, claimed that it was a right of ownership (*droit de propriété*),[314] while according to Liver, it was only a right of appropriation (*droit d'appropriation*).[315] Interestingly, Swiss courts had to give their opinion on these theories in a case where Turkey introduced a restitution claim before the civil court of the Canton of Basel Stadt.

1.3.1. The Basel Case

186 The case concerned five gravestones (*stele*) illegally excavated in the village of Gökçeler (ancient Phrygia) and later acquired by the Antikenmuseum in Basel.[316] Turkey based its claim on its vesting laws and the testimony of a professor who had seen two of the gravestones in Gökçeler in 1973 and informed the authorities.[317]

187 The exact date of the illegal excavation could not be identified during the procedure. Since the gravestones were already in Basel in 1983, when the Protection Law was adopted, the Civil Court rejected its application.[318] In particular, the Court analyzed Article 697 of the *f*TCC, which read, as mentioned earlier, almost the same as Article 724 of the SCC (*infra* 195). Turkey had provided to the Court a legal opinion which

310 For Swiss law, see Foëx, "Un point de vue de civiliste," 34; Leemann, "ZGB Art. 724," n. 9; Pannatier Kessler, "CC Art. 724," n. 6; Schwander, "ZGB Art. 724," n. 2; Steinauer, *Les droits réels vol. II*, n. 3170. See also Swiss Federal Court Judgment of 16 October 2000, 1A.215/2000, § 4(b).
For Turkish law, see Kantar, *Eşya Hukuku*, 591; Akipek, *Türk Eşya Hukuku*, 272; Ergüne, *Taşınır Mülkiyeti*, n. 158; Esener and Güven, *Eşya Hukuku*, 314; Karahasan, *Yeni Türk Medeni Kanunu Eşya Hukuku I*, 1454; Oğuzman, Seliçi, and Oktay-Özdemir, *Eşya Hukuku*, n. 2658; Özel, "Case Note. The Basel Decisions," 329–30.

311 Fellmeth and Horwitz, "Ipso Iure."

312 Steinauer, *Les droits réels vol. II*, nn. 3162, 3170. See also Oğuzman, Seliçi, and Oktay-Özdemir, *Eşya Hukuku*, n. 2622.

313 Siehr, "Protection of Cultural Property," 78.

314 *Supra* fn. 310.

315 Liver, "Das Eigentum," 366.

316 BJM 1997 17.

317 BJM 1997 17.

318 BJM 1997 17, 19.

also referred to the prevailing view among Swiss scholars that Article 724 of the SCC recognized the State's right as full ownership.[319]

188 The Civil Court, however, found Liver's theory of appropriation more "convincing"[320] and by applying it to the case, held that Turkey had not exercised its right of appropriation on two of the gravestones that the professor had seen. Thus, restitution was not possible on the grounds of Article 697 of the *f*TCC.[321] As for the Antiquities Decree of 1906 and the Antiquities Law of 1973, the Civil Court examined the German translation of the texts of several articles and concluded that Turkey did not have *ipso iure* ownership on undiscovered archaeological objects. According to the Court, such texts supported Liver's theory about the right of appropriation as well.[322]

189 It is worth providing here a brief comparison of the two theories by using two interconnected criteria: (i) how an object's value is evaluated, and (ii) the role of the State's discretion in acquiring ownership. Generally speaking, a newly found object's scientific value is independent of the finder's personal opinion. Its value is to be determined by "art and science circles."[323] Under the *ipso iure* ownership theory, experts' validation of the scientific interest (i.e., an objective statement) confirms the State's ownership over such an object, considering that it has acquired ownership even before the discovery (*infra* fn. 504).[324] Under the right of appropriation theory, the object's value is also assessed by the State in the sense that it must be of sufficient interest in the State's eyes (i.e., a subjective statement).[325] This assessment is one of the factors that determines whether the State will exercise its right of appropriation. The State may prefer not to use its right of appropriation due to a lack of financial means (i.e., conservation costs, finders' fees), storage places or specialized staff to restore or take care of the object.[326] In contrast, under the *ipso iure* ownership theory,

319 BJM 1997 17, 18.
320 BJM 1997 17, 18.
321 BJM 1997 17, 19.
322 BJM 1997 17, 19–20.
323 Leemann, "ZGB Art. 724," n. 10.
324 It is possible to argue that under both theories, expert evaluation has a declaratory, and not constitutive, effect.
325 Liver explains the following: "In many cases, the canton is unwilling or unable to take over the discovered objects, which cannot be denied a considerable scientific value." See Liver, "Das Eigentum," 367 fn. 4.
326 In the *Basel* case, the Court of Appeals argued that the State could decide to renounce its right (regardless of its nature) and abandon the artifact for various reasons such as a lack of financial means, storage places, specialized staff or simply because the artifact in question had no particular significance (BJM 1997 17, 24). In my opinion, an "abandonment" is only possible under the right of appropriation theory. Under *ipso iure* ownership, the State may "transfer" the object, not abandon it (further developed below, *infra* 335).

the State does not have any discretion in the acquisition of ownership. It acquires objects of scientific interest regardless of its will.

	Evaluation of the object's value	Acquisition of ownership
Ipso iure ownership	Experts' evaluation of the scientific interest	Scientific interest → State's ownership
Right of appropriation	1. Experts' evaluation of the scientific interest (objective) 2. State's evaluation (subjective)	State's discretion matters: 1. The State exercises its right of appropriation and acquires ownership. 2. The State does not exercise its right of appropriation, thus no ownership (e.g., because of lack of financial means, storage places or specialized staff for preserving the object, or lack of sufficient interest).

Table 2.3 Comparison of the theories about ipso iure ownership and the right of appropriation within the context of the State's acquisition of ownership of archaeological objects.

190 Coming back to the *Basel* case, the Civil Court added that even if *ipso iure* ownership was to be accepted, Turkey could not obtain the gravestones' restitution because of its "inactivity." According to the Court, the fact that Turkish authorities had remained inactive after the professor informed them about the objects[327] implied that they did not show any interest in the objects and "renounced" their ownership.[328] The Court of Appeals confirmed the Civil Court's rejection of Turkey's claim on this inactivity argument, leaving open the question on the nature of the State's right.[329] According to the Court of Appeals, Turkey had remained inactive following the information communicated by the professor since no investigation was undertaken to recover the archaeological objects until the 1980s. The Court of Appeals held that this period of ten years was not reasonable, and that Turkey's inactivity should be construed as renunciation (further discussed *infra* 335).[330] According to the Court, under the *ipso iure* ownership theory, the State had implicitly renounced its ownership, and under the right of appropriation theory, the State had renounced its right of appropriation, thus never acquiring ownership. In any case, Turkey could not claim the

327 BJM 1997 17, 18, 20.
328 BJM 1997 17, 21.
329 BJM 1997 17, 24.
330 BJM 1997 17, 25.

restitution under Article 697 of the *f*TCC.[331] The Swiss Federal Court confirmed the Court of Appeals' decision.[332]

1.3.2. Difference in Approaches between Swiss and Turkish Law

191 Admitting that the State has a right of appropriation over undiscovered archaeological objects means that each time such an object is discovered, the State must take possession of the object, assess its value and decide whether it wishes to appropriate it. Such an approach, which may be applicable in the Swiss context, is barely practicable in a country where archaeological sites are systematically looted like Turkey. In Özel's words, it would "turn the blanket legislation on its head, creating the very situation that provoked its adoption in the first instance."[333] That is perhaps why a theory similar to Liver's right of appropriation has never been suggested by Turkish authors or courts.

192 The original text of Article 724(1) of the SCC indeed left some margin of interpretation regarding whether archaeological objects "passed directly to the hands of the canton"[334] since the text said that objects became, instead of were, State property. During the adoption of the CPTA (*supra* 79), the Federal Council proposed to amend, in parallel with the majority view, Article 724(1) of the SCC, which "lacked precision."[335] As mentioned earlier, the verb "become" was replaced by "are" so that the text now reads as "ownerless antiquities … *are* the property of the canton on whose territory they are found." This change was interpreted by the Swiss authors to be a confirmation of the nature of the State's right as an *ipso iure* ownership.[336]

193 It is not surprising that the two theories were tested in a case regarding illegally excavated archaeological objects from Turkey. In fact, when there is no threat of looting, the nature of the State's right has limited impact in practice. As Jungo points out, "the important point is that the State can, whenever needed, claim ownership over archaeological objects or renounce it."[337] This kind of pragmatic approach could have guided Swiss courts in the *Basel* case. Nevertheless, it is not sufficient to reach

331 BJM 1997 17, 26. See also Özel, "Case Note. The Basel Decisions," 330.
332 See Özel, 321 et seq., 330–31, 334; Wantuch-Thole, *Cultural Property in Cross-Border Litigation*, 49.
333 Özel, "Case Note. The Basel Decisions," 330.
334 FF 2002 505, 517.
335 FF 2002 505, 570.
336 Foëx, "Un point de vue de civiliste," 34; Gabus and Renold, *Commentaire LTBC*, Art. 32 n. 16. See also Siehr, "Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property," 508 fn. 10.
337 Jungo, "Droits et obligations du propriétaire en cas de fouilles archéologiques," 87.

a conclusion from the perspective of Turkish law, since it ignores the administrative law aspect of the question.

194 In Turkish law, public property and the nature of the State's right to it have always been discussed from an administrative law perspective in light of the French literature.[338] As mentioned earlier, the relation between the State and its property, including archaeological objects, is considered to be of a public-law nature in Turkish law (*supra* 183). Therefore, any hypothesis put forward should have a basis in public-law theory. Considerations based solely on private law (i.e., Liver's theory) will not be applicable. The change in the content of Article 697 of the *f*TCC and the reference to the Protection Law introduced in Article 773 of the TCC supports this vision. Since the position of Turkish scholars and courts on the nature of the State's right to its property has long been that the right is an ownership specific to public law, the State's right to archaeological objects originating in Turkey will also be full ownership.

Summary of the Section on the State's Right of Ownership

	Legal basis	Nature of the State's right
Swiss law	Art. 724 of the SCC	Modified private ownership
Turkish law	Art. 5 of the Protection Law	Public ownership (distinct from ownership within the meaning of private law)

2. Scope of Application

2.1. Switzerland

195 Under Swiss law, natural specimens and antiquities which: (i) have no prior owner, (ii) have been buried or hidden for a long time, and (iii) have a scientific interest, belong to the State (i.e., the canton) under Article 724(1) of the SCC.

2.1.1. Natural Specimens and Antiquities

196 Natural specimens and antiquities are movable objects.[339] Authors often cite crystals, bones and fragments of meteorites as examples of natural specimens; ancient

338 Regarding the French literature's impact on the concept of public property in Turkish law, see Düren, *İdare Malları*, 57 et seq.; Gülan, "Kamu Malları," 659 et seq.

339 An object is movable when it is possible to transport it from one place to another without altering its substance (Art. 713 of the SCC). Steinauer, *Les droits réels vol. I*, n. 98.

coins, jewelry or books are cited as examples of antiquities.[340] This approach corresponds to archaeologists' distinction between artifact and ecofact, the former being an object made or modified by humans and the latter being an organic material (*supra* 22–23). Besides, the age of the object is not a criterion applied by the SCC.

197 If an archaeological object is an integral part of the land (Art. 642(2) of the SCC) – for instance, a fossil attached to a rock – Article 724 of the SCC does not apply. The integral part belongs to the landowner according to the principle of accession (Arts. 642(1) and 667(1) of the SCC).[341] The same goes for remains of structures (buildings of all kinds, *supra* 24) or their parts (e.g., mosaics on the floor) which also qualify as integral parts regardless of their scientific, aesthetic or architectural importance.[342] Certain cantonal legislations explicitly mention that immovable elements of archaeological heritage belong to the landowner.[343]

198 The landowner, who is a private party, can give his or her consent for the separation of the integral part from the land. The integral part then becomes a distinct, movable object.[344] Nevertheless, this does not allow the canton to claim ownership over it following the separation based on Article 724(1) of the SCC. Instead, the canton may convince the landowner to sell the object or donate it. It is possible to reverse the scenario. In 2013, a farmer in the Canton of Vaud discovered a Roman milestone while doing drainage work on his land. The stone was "lying less than one meter below the surface," and therefore was not attached to the land. The farmer extracted the milestone from the ground and "planted it on an adjacent land," probably to protect it from drainage works.[345] There is no doubt that the stone, having an important scientific significance, is the Canton's property under Article 724(1) of the SCC, even if it was attached to a person's land following its discovery.[346]

340 Leemann, "ZGB Art. 724," n. 4; Liver, "Das Eigentum," 366; Pannatier Kessler, "CC Art. 724," n. 3; Steinauer, *Les droits réels vol. II*, n. 3167; Scherrer, "ZGB Art. 723, 724," n. 6.

341 Pannatier Kessler, "CC Art. 724," n. 3.
Art. 667(1) of the SCC: "Land ownership extends upwards into the air and downwards into the ground to the extent determined by the owner's legitimate interest in exercising his or her ownership rights."

342 Pannatier Kessler, n. 3; Tissot, "A qui appartiennent les trouvailles archéologiques," 66, 72.

343 See, for instance, Art. 8(1) of the LPPAP/JU: "*Les sites appartiennent au propriétaire du terrain sur lequel ils se situent.*"

344 Leemann, "ZGB Art. 724," n. 8; Schwander, "ZGB Art. 724," n. 2. See also Swiss Federal Court Judgment 100 II 8 = JdT 1974 I 576, 581.

345 Mottas, "Le milliaire de Pré Girard à Pompaples," 59.

346 The canton eventually placed the object in a museum for preservation purposes. A copy was put at the original place. See Mottas, 65–66.

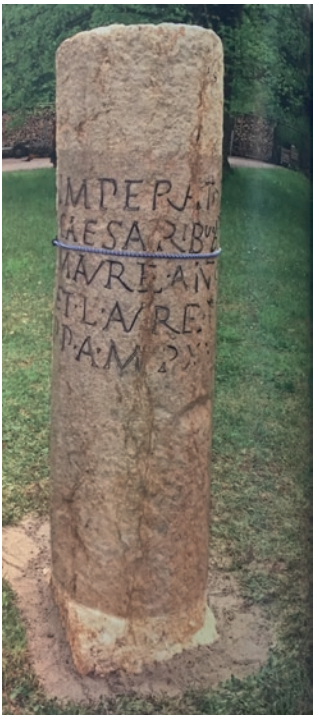

Fig. 2.1 A Roman milestone discovered in the Canton of Vaud in 2013 (source: Archéologie vaudoise Chroniques 2015, p. 58).

2.1.2. No Prior Owner

199 Article 724(1) of the SCC applies to natural specimens and antiquities that belong to no one. This means that the objects have never had any owner or that their owner cannot be identified.[347] Such a criterion is necessary in order to protect prior ownership rights[348] duly established over archaeological objects before the entry into force of the SCC rule or even before the rules of certain cantons, such as Ticino.[349].

347 Pannatier Kessler, "CC Art. 724," n. 2; Schwander, "ZGB Art. 724," n. 2; Steinauer, *Les droits réels vol. II*, n. 3167. See also Swiss Federal Court Judgment 113 Ia 368, 383.

348 Very few privately owned archaeological collections of Swiss origin should exist today. The Confederation acquired most of these collections in the late 1800s and the early 1900s and some of them were sold abroad. See Kapeller, "Trésors du Musée national suisse," 78.

349 See Swiss Federal Court Judgment 113 Ia 368, 383: "*(…) decreto legislativo circa gli scavi per la ricerca di oggetti archeologici, del 19 maggio 1905 (…), che precorrendo quasi la soluzione adottata dal Codice civile svizzero conferiva la proprietà dei rinvenimenti per due terzi allo Stato e per un terzo allo scopritore, 'con facoltà nello Stato di far propria anche questa parte rimborsandone all'inventore il valore corrispondente' (…).*"

Indeed, in the *Balli* case regarding three private archaeological collections from the Canton of Ticino, the Federal Tribunal recalled that the applicants were legitimate owners since they could prove that they had acquired such collections during the past century, before any State ownership rule entered into force. Deciding that their rights were somehow less valuable because of the change of the regime in favor of the State's ownership would have been against equality of treatment before the law.[350] 200

The UNESCO-UNIDROIT Model Provisions envisage a similar restriction. Provision 3 states that "undiscovered cultural objects are owned by the State, provided there is no prior existing ownership." Hypothetically speaking, a person could bury a cultural object belonging to him or her in order to protect it during a conflict, intending to retrieve it later, and thereby not abandon ownership.[351] 201

2.1.3. Buried or Hidden

Being buried or hidden for a long time is a criterion applied by most authors despite the lack of an explicit mention in Article 724(1) of the SCC.[352] Instead, it appears in Article 723(1) of the SCC on treasures. A treasure is a precious object discovered in circumstances that indicate with certainty that it has been hidden or buried for a long time and no longer has an owner.[353] 202

For instance, in 1974, the Swiss Federal Court held that gold coins hidden inside the beam (*poutre*) of a barn should be considered a treasure under Article 723(1) of the SCC. The Court took into account the value of the coins (some of them were worth more than CHF 2,000), the nature of the place where the coins were hidden, the fact that they were all minted before 1800 (and thus must have been hidden for a long time) and that it was impossible to determine who had hidden them in the first place even though the barn had been owned by a single family for generations until its sale in 1963.[354] 203

It is important, though, to differentiate the way in which archaeological objects and treasures come to be buried or hidden. An archaeological object (or site) becomes buried and survives following a series of "formation processes"[355] governed by human activity or natural events. The burial is the result of these processes that 204

350 See Swiss Federal Court Judgment 113 Ia 368, 383.

351 UNESCO and UNIDROIT, "Explanatory Report," 5–6.

352 Jungo, "Droits et obligations du propriétaire en cas de fouilles archéologiques," 88; Pannatier Kessler, "CC Art. 724," n. 2; Scherrer, "ZGB Art. 723, 724," nn. 18–19.

353 Pannatier Kessler, "CC Art. 723," n. 2; Steinauer, *Les droits réels vol. II*, n. 3160.

354 See Swiss Federal Court Judgment 100 II 8 = JdT 1974 I 576, 579.

355 These are "processes affecting the way in which archaeological materials came to be buried, and their subsequent history afterwards. Cultural formation processes include the deliberate or accidental activities of humans; natural formation processes refer to natural or environmental events

can go on for centuries, or even millennia. This is why the discovery of archaeological objects is a scientific process and not a simple removal. As for treasures, people intentionally hide or bury them for some particular reason.[356] The length of time that has passed since the act is very much related to the possibility of finding the original owner. In fact, if it is still possible to find the owner or his/her heirs, the treasure should be returned to them (Art. 722 et seq. of the SCC).[357]

205 Certain authors further restrict the criterion by arguing that archaeological objects should be discovered inside immovable property (or its integral parts) and not in movable property.[358] Leemann suggests that they have to be found exclusively in the subsoil.[359] In practice, cantons do not interpret the criterion of being buried or hidden too restrictively. Artifacts may be found under the ground (subsoil), in water, in caves or even above the ground in certain cases. It is possible to think of circumstances where glaciers melt, and fossils appear, or where the water level lowers and underwater artifacts become visible on the surface. For the Canton of Valais, "elements of archaeological heritage" include not only objects buried in the ground but also objects discovered above ground (*hors-sol*) on the condition that they are products of human activity, belong to no one and present a scientific interest (Art. 27(1bis) of the OPNLS/VS).[360]

2.1.4. Scientific Interest

206 Authors define scientific interest as the utility of an object for staff specialized in natural sciences or humanities, particularly in terms of research, education, or publication.[361] Whether the artifact is rare, has a local or national interest or is worthy to be displayed in a museum are not decisive factors.[362] Moreover, it is no longer necessary that scientific interest be "significant" under Article 724(1) of the SCC.[363]

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which govern the burial and survival of the archaeological record" (i.e., wet preservation, dry preservation or cold preservation). See Renfrew and Bahn, *Archaeology*, 599 (Glossary).

356 Pannatier Kessler, "CC Art. 723," n. 2.

357 Pannatier Kessler, n. 3.

358 Pannatier Kessler, "CC Art. 724," nn. 2–3; Scherrer, "ZGB Art. 723, 724," nn. 13–15; Steinauer, *Les droits réels vol. II*, n. 3167.

359 Leemann, "ZGB Art. 724," n. 6.

360 This provision was introduced in 2011 (Official Bulletin of the Canton of Valais 52/2011). It is important to note that it regulates the protection of archaeological heritage, and not the attribution of ownership.

361 Gabus and Renold, *Commentaire LTBC*, Art. 32 n. 17; Pannatier Kessler, "CC Art. 724," n. 2; Scherrer, "ZGB Art. 723, 724," n. 9; Schwander, "ZGB Art. 724," n. 2.

362 Fischer, "La nouvelle loi sur le transfert des biens culturels," 9; Pannatier Kessler, "CC Art. 724," n. 2; Scherrer, "ZGB Art. 723, 724," n. 9; Steinauer, *Les droits réels vol. II*, n. 3168. See also Swiss Federal Court Judgment of 16 October 2000, 1A.215/2000, §4(c).

363 Before the modification of Art. 724 of the SCC, a "significant" (*considérable*) scientific interest was required. See Boillat, *Trafic illicite de biens culturels et coopération judiciaire*, 159; Gabus and

Being rare or worthy of display and having a public interest are among the criteria used by the Federal Office of Culture (FOC) to determine if an object is "of importance for archaeology, prehistory, history, literature, art or science" in order to be qualified as cultural property under the CPTA (Art. 2(1) of the CPTA).[364] Since an object being of importance for archaeology corresponds to the object having a scientific interest, most artifacts will be considered cultural property as well.[365] For instance, broken pottery may not be worthy of display in a museum, but it may be used for research or teaching purposes by archaeologists and therefore have a public interest. 207

In practice, experts in archaeology or related fields have to decide whether an object has scientific interest or not.[366] It is fairly easy to assess the interest when the archaeological objects are discovered by archaeologists during a scientific investigation. It is generally accepted that all objects (artifacts and ecofacts) are of scientific interest within the context of the site in which they are found.[367] When such objects are discovered individually, such as by metal detectorists, there can be little information on their context. In such cases, one should examine how each canton interprets the notion of scientific interest with regard to its own heritage (*infra* 353). 208

2.2. Turkey

Under Turkish law, cultural and natural property which: (i) requires protection, (ii) is either immovable or movable, and (iii) is known or to be discovered on land owned by the State, public bodies, or institutions, or on land owned by individuals or legal entities, belongs to the State under Article 5(1) of the Protection Law. 209

2.2.1. Cultural and Natural Property

The Protection Law first provides a general definition of cultural property. It covers all movable and immovable property found on the ground, below the ground or underwater that either: (i) belongs to prehistoric and historic periods and relates to 210

Renold, *Commentaire LTBC*, Art. 32 n. 16. See also Swiss Federal Court Judgment of 16 October 2000, 1A.215/2000, § 4(bb).

364 See Federal Office for Culture, "Checklist Cultural property."

365 Pannatier Kessler, "CC Art. 724," n. 4.

366 Pannatier Kessler, n. 2.
See also Swiss Federal Court Judgment of 16 October 2000, 1A.215/2000, §4(c). In this case, the Federal Court dealt with a request for the extradition of a German-Turkish individual accused of having attempted to illegally export cultural objects from Turkey. He argued, among other things, that the objects in question (coins, gravestone and marble pieces) lacked significant scientific interest. The Federal Court took into consideration the expert report presented by Turkish authorities, recognizing the archaeological value of the objects. A summary in French of the case is available at the Swiss Confederation's website, accessed 23 May 2023, ‹https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-22457.html›.

367 Fischer, "La nouvelle loi sur le transfert des biens culturels," 10.

science, culture, religion, or the fine arts, or (ii) has been part of the social life during prehistoric or historic periods and presents authentic scientific and cultural value (Art. 3(a)(1) of the Protection Law).[368]

211 The second part of the definition stressing the "social life" component was added through a 2004 modification in order to "comply with the definitions provided by international conventions."[369] The term "historic periods" should be understood broadly and includes modern times.[370]

212 Natural property is understood as assets found on the ground, below the ground or under water that belong to geological, prehistoric and historic periods and require protection due to their rarity or beauty and similar characteristics (Art. 3(a)(2) of the Protection Law). As opposed to cultural property, rarity and beauty play a role in the definition of natural property.[371]

213 Such definitions do not have any legal implications. In order to apply the measures provided by the Protection Law (including State ownership), cultural or natural property must fall within the category of "requiring protection" (Art. 2 of the Protection Law). Separate definitions are given for cultural and natural property of immovable and movable nature.[372]

2.2.2. Requiring Protection and Immovable

214 The Protection Law establishes four categories of immovable cultural property requiring protection: (a) immovable property built before the end of the 19th century, (b) post-19th century immovable property to which the Ministry of Culture may grant protection due to its characteristics, (c) immovable cultural properties located within a site and (d) buildings and places that witnessed important historic events during the Turkish War of Independence and the foundation of the Republic, as well as houses inhabited by Mustafa Kemal Atatürk (Art. 6(1) of the Protection Law).[373] Categories (a) and (c) are more likely to be of interest for archaeology. Categories (b)

368 Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 5.

369 Minutes of the Turkish Parliament, Draft Law No. 5226, p. 4, accessed 23 May 2023, ‹https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c057/tbmm22057115ss0641.pdf›.

370 Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 48. See also Turkish Council of State, 6th Chamber, Judgment No. 2000/6504 of 20 December 2000, Case No. 1999/5915 in Kanadoğlu, 111.

371 Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 6.

372 See Art. 2 of the Protection Law: "This Law covers issues regarding movable and immovable cultural property requiring protection and the relevant duties and responsibilities of individuals and legal entities."

373 Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 83; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 28–29.

and (d) deal with property built after 1900, which normally stands upon the ground if it has not been destroyed. There is little chance that this property will be included in the archaeological record in the Turkish context.

The criteria chosen for cultural property "requiring protection" appear to be very comprehensive. In fact, Regional Commissions (*infra* 122) can declare that certain property does not require protection based on the property lacking architectural, historic, aesthetic, archaeological and other types of characteristics (Art. 6(2) of the Protection Law).[374] This measure should be interpreted within the context of protection, and not that of State ownership. For instance, a house built in the 1800s qualifies as cultural property requiring protection by definition. In practice, the competent Regional Commission can "cancel" this qualification on the basis that the house does not have any characteristics worth protecting; however, the Commission, which is a ministerial body, is not entitled to make decisions about the house's ownership status. 215

Article 6(3) of the Protection Law contains a long, non-exhaustive list of examples of immovable cultural property requiring protection.[375] The list includes different kinds of cultural property such as ruins, remains of ancient walls, caves with paintings, historic palaces, mosques, shorefront houses and fountains. Article 6(4) of the Protection Law gives examples of natural property requiring protection, such as historic caves, rock shelters and groups of trees with characteristics. 216

Two clarifications are needed here. First, the purpose of Article 6 is to determine, among all kinds of cultural and natural property, which property is placed under protection. Therefore, not all cultural and natural property requiring protection under Article 6 will be subject to State ownership according to Article 5. In order to be covered by State ownership, cultural and natural cultural property requiring protection must also satisfy the fourth criterion of being "known or to be discovered" on public or private land (*infra* 223). Second, the examples given in Article 6(3) of 217

374 Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 89, 100; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 29.

375 "Mosaics" and "fairy chimneys" (*peri bacaları*, being rock formations sculpted by erosion in the volcanic landscape of Cappadocia and transformed partly into cave-dwellings and churches) were added to the list in 2004. Since the list is not exhaustive, it may be asked why these objects were explicitly mentioned. Regarding the fairy chimneys of Cappadocia, the question seems to be related to the competent authority, considering that the place of the heritage has both natural and cultural characteristics (see the Turkish Parliament's minutes, Draft Law No. 5226, p. 5). Under the additional Article 4(1) of the Protection Law, the Ministry of Environment and Urbanism is responsible for carrying out the tasks laid down in the Law with regard to natural property (except for movable property), natural sites and their buffer zones. The legislature probably wanted to confirm the "cultural property" nature of fairy chimneys so that there would be no ambiguity about the responsible authority.

the Protection Law include structures (e.g., basilicas) and their integral parts (e.g., frescoes), and also parcels of land (e.g., tumuli or acropolises). To prevent any misinterpretation, the Turkish legislature clarified during the adoption of the Protection Law that State ownership (i.e., Article 5) only covers the structures themselves and not the land on which they are found in the event that such land is subject to private ownership.[376]

2.2.3. Requiring Protection and Movable

218 Article 23(a)(1) of the Protection Law defines movable property requiring protection as all cultural and natural property that: (i) belongs to geological, prehistoric, or historic periods, (ii) has a documentary value (*belge değeri*) in terms of geology, anthropology, prehistory, archaeology and art history, and (iii) reflects the social, cultural, technical and scientific characteristics of the period it belongs to.[377]

219 Article 23(a)(2) cites many examples, including cultural objects such as tools and pottery and natural objects such as animal and plant fossils. They correspond to the ownerless antiquities and natural "things" of scientific interest under Article 773 of the TCC (*supra* 176). The list is not exhaustive since it mentions "similar movable objects and their parts" at the end.

220 The rest of Article 23 deals with ethnographical objects in paragraph (a)(3), coins that can be traded freely in Turkey in paragraphs (a)(4) and (5), and movable objects documenting the Turkish War of Independence, the foundation of the Republic and that which belonged to Atatürk in paragraph (b).[378] For coins, those minted during the era of the Ottoman sultans Abdülmecit, Abdülaziz V, Murat II, Abdülhamit V, Mehmet Reşat and Vahidettin are not subject to registration (*tescil*) and can be bought and sold freely in Turkey (Art. 23(a)(4) of the Protection Law). In other words, such coins are not covered by State ownership.

221 The Regulation on Identification and Registration of Movable Cultural Property Requiring Protection and Its Admission to Museums ("Regulation on Movable Cultural Property") envisages special categories for cultural property requiring pro-

376 See the Minutes of the Turkish Parliament, Draft Protection Law, p. 3, accessed 23 May 2023, ‹https://www.tbmm.gov.tr/tutanaklar/TUTANAK/DM__/d02/c018/dm__02018105ss0348.pdf›: "*Özel mülke konu taşınmaz mallardaki taşınmaz eski eserlerdeki devlet malı olan taşınmaz eski eserlerin kendisidir.*"

377 Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 179; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 115.

378 Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 179–80; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 115.

tection (i.e., objects for study[379]) and deals with admission in public collections (in particular, ethnographic objects).[380] However, such categories are for administrative purposes like preservation and do not deal with ownership issues.

There is no doubt that the archaeological objects (artifacts and ecofacts) discovered during excavations have documentary value, and that they are therefore subject to State ownership. For individual finds, the evaluation of their scientific interest is less lenient towards finders than that of Switzerland as a result of Turkey's looting problem. The Ministry of Culture's approach is to give all chance finds State ownership except for the coins cited in Article 23(a)(4) of the Protection Law. Even copies may be confiscated by public museums if their presence in the market is considered dangerous (Art. 9(1) of the Regulation on Movable Cultural Property). Having said this, it is of course a difficult task to manage the preservation of all chance finds in a large country like Turkey and, at the same time, to lessen the desire of certain individuals or entities to collect them (*infra* 353). 222

2.2.4. Known or to Be Discovered on Public and Private Land

To recall, Article 5 of the Protection Law vests State ownership in cultural property requiring protection "*located on land* owned by the State, public bodies and institutions as well as that owned by individuals and legal entities subject to private law rules; and *whose existence is known or to be discovered in the future*" (emphasis added). 223

This wording comes from the Ottoman Antiquities Decrees of 1884 and 1906 (*supra* 179). They used a similar formula for declaring State ownership, which covered all antiquities, movable and immovable, whose existence was known or to be discovered in the future.[381] In these Decrees, the term "antiquity" referred in particular to archaeological heritage. It was defined as "objects left by ancient civilizations"[382] or "objects related to the fine arts, science, literature, religion (…) and all 224

379 See Art. 3(c) of the Regulation on Movable Cultural Property: "Objects for study are objects requiring protection that fall within the scope of the Protection Law, however do not have the characteristics to be registered in the Inventory Book (*Eser Envanter Defteri*) [of museums], and that may be used for scientific purposes." See also Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 118–19.

380 Official Gazette No. 27206 of 20 April 2009.

381 Art. 3 of the Decree of 1884: "*Memaliki Osmaniye'de mevcut ve mekşuf ve bundan böyle hafriyat ile zahire çıkarılacak ve deniz ve göl ve nehir ve çay ve derelerde zuhur edecek olan her nevi asarı âtika kâmilen devlete aittir.*"
Art. 4 of the Decree of 1906: "*Hükümete ait bulunan arazi ve emlâk ile efrat cemaati muhtelifenin uhdelerindeki emlak ve arazide mevcudiyeti bilinen veyahut atiyen keşfedilecek olan her nevi abidat ve asarı atikai menkule ve gayri menkulenin cümlesi hükümeti Osmaniyenin malıdır* (…)."

382 Art. 1 of the Decree of 1884: "(…) *kıt'at ehalii kadimesinin terk etmiş oldukları âsarın cümlesi* (…)."

types of objects from ancient civilizations that once lived on Ottoman territory."[383] The Antiquities Decree of 1884 stated expressly that antiquities could have already been discovered (*mekşuf*), could be unearthed through excavations (*hafriyat*) or could surface (*zuhur*) in seas or lakes.[384] In consequence, the term "whose existence is known" implied archaeological objects (and structures), excavated or surfaced, which belonged to no one, and yet-to-be-discovered archaeological objects located in the soil or under water.[385] The same rationale applies to Article 5 of the Protection Law. Cultural property that requires protection, either currently known or to be discovered on public and private land, refers to archaeological heritage that has existed on Turkish territory since 1906 and will be discovered in future.[386]

Summary of the Section on the Scope of Application of State Ownership

***Ipso lure* State Ownership**		
Archaeological objects	Archaeological sites	
	Structures	Simple features (the land itself)
Covered by Swiss law Covered by Turkish law	Only covered by Turkish law	N/A The land may belong to the State independently from national ownership laws

3. Protection of Sites on Private Land

225 At the time of the discovery of an archaeological site, the land on which it is situated may already belong to the State. In such a case, the site covering the objects, structures and land itself will be under State ownership (*infra* Part II) independently from the ownership laws examined above. What happens if the land on which an archaeological site is discovered belongs to a private party?

383 Art. 5 of the Decree of 1906: "*Hükümeti Osmaniyenin tasarrufunda bulunan arazide vaktiyle sakin olan alelumum akvamı kadimenin sanayii nefise ve ulûm ve edebiyat ve edyan ve hırfete müteallik bilâistisma kâffei muzaheret ve her türlü mamulatı asarı atikadan mahduttur.*"

384 See Art. 3 of the Decree of 1884.

385 Özel, "Türk Hukukunda Kültür Varlıklarının Mülkiyeti," 227.

386 Özel, 226–28.

3.1. General Overview in Switzerland and Turkey

To protect archaeological sites discovered on private land, the first option for the State is to purchase or expropriate the land so that it becomes State property. 226

In Switzerland, there are examples of State purchase or expropriation for the sole purpose of protecting still-buried archaeological sites or a structure such as a Roman amphitheater.[387] However, in most cases, discoveries on private land are made during construction works or the exploitation of natural resources like quarries. In these situations, cantons may have no interest in purchasing land or may simply not have the necessary financial means. As a consequence, the State often turns to protection measures (i.e., declaring archaeological zones, registration) which work best when used preventively, or by refusing construction permits.[388] 227

In Turkey, the situation may seem different at first since, contrary to Swiss law, structures discovered on private land belong to the State. Turkish law creates a derogation to the accession principle (Art. 718(1) of the TCC) and separates the ownership status of the land from its integral parts (structures) in order to protect them. It is true that this derogation initially creates an advantageous situation for the State. The landowner's use of the land is restricted even without the implementation of any protective measure. Therefore, the question of the violation of private ownership and an eventual compensation does not even arise; the landowner must accommodate the State. In some cases, the landowner manages to complete a given project without endangering protected structures. 228

387 For instance, during the 1970s, the Swiss Confederation expropriated the lands on which the Roman amphitheater in Martigny (VS) is located. See Tissot, *Protection juridique des vestiges archéologiques*, 107–10.
In another example, the Municipality of Yverdon-les-Bains (VD) purchased a part of a privately owned park (*Parc Piguet*) to protect the archaeological heritage potentially situated in the subsoil. See Report PR10.10PR of 4 March 2010, addressed to the Communal Parliament, accessed 23 May 2023, ‹https://www.yverdon-les-bains.ch/vie-politique/conseil-communal/preavis-rapports-et-interventions›.

388 Refusals should comply with the requirements of the law. See, e.g., Swiss Federal Court Judgment No. 1C_177/2009 of 18 June 2009, accessed 23 May 2023, ‹https://www.bger.ch/fr/index/juridiction.htm› (*Jurisprudence gratuit › Autres arrêts dès 2000*). The Federal Court confirmed the Cantonal Court's annulment of the Yverdon Municipality's refusal of delivery of a construction permit because the conditions for refusal laid down in the law were not satisfied. What is interesting for our purposes is that this judgment concerned a portion of the above-mentioned *Parc Piguet* (*supra* fn. 387), which remained in private ownership. By refusing the delivery of the construction permit, the Municipality aimed to protect the archaeological remains discovered on the parcel and to transform the area into a "*parc archéologique et paysager*." However, no concrete measures were taken to this end when the owners applied for a permit. Moreover, the Cantonal Archaeologist had informed the Cantonal Court that the remains in question were not susceptible to *in situ* preservation (§ 2.2.2). As a consequence, the Municipality allowed the construction of residences to take place on a portion of the *Parc Piguet* while purchasing the remaining part.

229 For instance, during the construction of a hotel in the historic center of Istanbul (Sultanahmet), archaeologists discovered the remains of a building (fig. 2.2), supposedly the Great Palace (*Büyük Saray*) of the Byzantine emperors. These structures have been preserved *in situ* in various parts of the hotel (fig. 2.3).[389]

Fig. 2.2 Remains of a wall that probably belonged to the Byzantine Great Palace, later integrated into the lobby of a hotel in Istanbul (source: thebyzantinelegacy.com/eresin-hotel).

Fig. 2.3 Fragment of a mosaic preserved as part of a hotel's floor in Istanbul (source: thebyzantinelegacy.com/eresin-hotel).

389 Özgümüş, "2007 İstanbul Suriçi Arkeolojik Yüzey Araştırması," 3.

Nevertheless, in most cases, particularly when large archaeological sites are concerned, it is difficult to accommodate the needs of both parties. Therefore, and similarly to the Swiss context, the Turkish State very often uses protection measures to restrict private owners' use of land (i.e., registration as sites) and eventually expropriates such lands or exchanges them with parcels of public land (Art. 15(f) of the Protection Law). 230

3.2. Administrative Law Tools

When protection measures based on administrative law are applied, the main challenge for the State is to reach a fair balance between preservation needs and the respect of private ownership. The purpose of this section is not to go over the types of protection measures that may be applied, but to identify the factors justifying the restriction of private ownership to protect archaeological sites through selected examples from case law. 231

3.2.1. Examples from Swiss Case Law

The Swiss Federal Court has dealt at least twice with the restriction of private land ownership for the purposes of preserving archaeological sites *in situ*, in particular by leaving them buried in the soil. 232

(a) Schweizersbild Case (1931)

The first case took place in the Canton of Schaffhausen in the early 1930s.[390] The Municipality of Herblingen rejected a request for a construction permit on the grounds that the land in question was located near the rock shelters of Schweizersbild, an important Upper Paleolithic site.[391] In 1931, the Canton of Schaffhausen (i.e., the respective Cantonal Government) had made a decision to prohibit all construction within the surroundings of Schweizersbild.[392] 233

390 ZBI (Schweizerisches Zentralblatt für Staats und Verwaltungsrecht) 33 pp. 113–16. For a summary in French of the case, see Tissot, *Protection juridique des vestiges archéologiques*, 27–28.

391 *Dictionnaire historique de la Suisse*, accessed 23 May 2023, ‹https://hls-dhs-dss.ch/fr/›.

392 Tissot, *Protection juridique des vestiges archéologiques*, 27.

Fig. 2.4 Rock shelters of Schweizersbild (source: Schaffhausen-geschichte.ch).

234 The Swiss Federal Court held that the measure taken by the Cantonal Government was in conformity with the law since cantons could restrict private land ownership in the public interest, including for "the preservation of antiquities and natural specimens or the protection of sites" (Art. 702 of the SCC). However, the Court could only decide on proportionality (i.e., whether the measure taken justified the aim pursued) if the principle of equality had been violated or if the measure exceeded the limits authorized by law. According to the Court, that was not the case here. Nevertheless, the Court noted that the construction ban was to be considered well-balanced (*bien pesé*) since it had been the decision of the Cantonal Government and thus reflected the "local perspective," instead of a group of experts who were particularly sensitive about archaeology.[393]

(b) Bern Case (2015)

235 In the second and more recent case, the Swiss Federal Court discussed in depth the issue of balancing different interests, this time within the framework of the Federal Act on Spatial Planning of 22 June 1979 ("Spatial Planning Act," or "SPA")[394] and its ordinance of 28 June 2000 ("Spatial Planning Ordinance," or "SPO")[395].

393 Tissot, 27–28.
394 RS 700.
395 RS 700.1.

In 2011, the owner of a field and their associate (the claimants) submitted a request to the Municipal Court in the Canton of Bern to be authorized to backfill their field (*remblayage du terrain*), which was situated in an agricultural zone. Their request was rejected by the Municipality in 2013 following the recommendation of the Canton's Archaeology Service, according to which the backfilling would adversely affect "an archaeological zone of national importance." The claimants contested this decision before the Department of Public Works (dismissed in 2014) and appealed to the Administrative Court of the Canton of Bern (dismissed in 2015).[396] 236

Article 22(2)(a) of the SPA states that a permit may be delivered only if the construction is in conformity with the zone planning (*affection de la zone*). Article 34(4) of the SPO lists the criteria to assess the conformity: a permit is delivered only if (a) the construction is necessary for the operation in question, (b) there is no overriding interest opposing the construction, and (c) it is foreseeable that the operation may continue in the long term. The claimants argued before the two courts that their project fulfilled all these conditions.[397] 237

It was undisputed that the backfilling project would facilitate the agricultural use of the land (condition a). However, this did not mean that there was no overriding interest opposing the project (condition b).[398] Other interests could have included those cited in the SPA[399] or other objectives pursued in special legislation (e.g., NCHA), among which was the protection of archaeological heritage.[400] 238

The Administrative Court balanced the public and private interests affected by the project. In 2011 and 2013, the Archaeology Service of the Canton of Bern had provided two reports to assess the archaeological interest of the land affected by the project.[401] Based on these reports, the Administrative Court first considered that the preservation of the site, dating from the Middle Ages, represented an important public interest and that the backfilling project could cause irreversible damage to archaeological objects and destroy, in the medium term, organic remains situated on the land and beyond due to drainage.[402] 239

The Administrative Court then cited the public interest in the expenditure of financial resources to protect cultural heritage. In fact, excavating the site and ensuring the follow-up operations (study, preservation and restoration) would be very expen- 240

396 Swiss Federal Court Judgment No. 1C_616/2015 of 8 December 2016, Facts A.
397 Swiss Federal Court Judgment No. 1C_616/2015, § 3.1.
398 Swiss Federal Court Judgment No. 1C_616/2015, § 3.3.
399 See Arts. 1 and 3 of the SPA.
400 Swiss Federal Court Judgment No. 1C_616/2015, § 3.1. The Court stated: "*La protection du patrimoine archéologique représente également un intérêt public.*"
401 Swiss Federal Court Judgment No. 1C_616/2015, § 3.3.1.
402 Swiss Federal Court Judgment No. 1C_616/2015, § 3.3.2.

sive. The Court concluded that if it was possible to preserve the site as it was and the excavation was not a priority (i.e., there was no imminent threat), financial resources should be allocated to other urgent cases related to the protection of cultural heritage.[403]

241 The Administrative Court finally analyzed the claimants' private interest in improving the land's use. The Court concluded that the land remained operable at the agricultural level, even without carrying out the backfilling project. It was possible, and even desirable, to use the land as a wet meadow.[404]

242 The claimants contested the way in which such interests were balanced by the Administrative Court. According to them, the public interest in preserving buried remains "without the intention to exhume them, considering the lack of financial resources," should not have prevailed over the landowner's interest in using the land for agricultural purposes in conformity with local zoning.[405]

243 Moreover, the claimants argued that preservation of the site within the meaning of Bern's heritage legislation, the Lpat/BE,[406] was not possible. According to them, if preservation was possible, the site should have been accessible to the public (Art. 26(2) of the Lpat/BE) and should not remain underground. If preservation was not possible, they argued that the site should have been subject to scientific study (Art. 24 of the Lpat/BE), which did not happen. The objects in question were also not inventoried (Arts. 10 and 23 of Lpat/BE). Finally, the claimants blamed the Municipality for not having tried to reach an agreement with them to list (*classer*) the land as immovable heritage (Art. 15(1)(b) and (c) of the Lpat/BE).[407]

244 The Swiss Federal Court confirmed the Administrative Court's decision with regard to these claims.[408] According to the Administrative Court, the site could be preserved in the ground and nothing suggested that its study in the future was impossible. Considering the site's importance, the public interest in adequately using public resources and the "claimants' lower private interest" at stake, the preservation of the site was not only possible, but also indispensable. The Administrative Court had also added that the inventory was for indicative purposes and that listing (*classement*)

403 Swiss Federal Court Judgment No. 1C_616/2015, § 3.3.2.
404 Swiss Federal Court Judgment No. 1C_616/2015, § 3.3.2.
405 Swiss Federal Court Judgment No. 1C_616/2015, § 3.3.3.
406 rs/BE 426.41.
407 Swiss Federal Court Judgment No. 1C_616/2015, § 3.3.3.
408 The Swiss Federal Court first noted that the claimants cited the same arguments they raised before the Administrative Court and could not show how the Administrative Court's decision violated the law. Therefore, these claims were inadmissible before the Federal Court.

was an additional protection tool offered by the Lpat/BE that was not relevant to the case.[409]

To conclude, in both of the cases examined, the State was able to preserve *in situ* archaeological sites discovered on private land through administrative-law measures. The enforcement of the archaeological interest (as a public interest) proved to be efficient. Nevertheless, it is important to underline certain decisive factors – namely, the nature of the site and the type of the construction. 245

First, it was proven through objective criteria and scientific reports that the sites were important and that they could technically be preserved *in situ*. It should be noted that if archaeological remains are not susceptible to being preserved *in situ* (i.e., due to degradation), it would normally be difficult for the commune to deny a construction permit.[410] Second, it seems legitimate for the landowner to support the burden of preservation *in situ* as long as he or she can continue to use the land according to its purpose. The *Bern* case shows that agricultural lands permit some types of activities which are not harmful to archaeology. 246

The question appears to be more delicate for construction zones. It would be interesting to know, for instance, whether the construction ban in the *Schweizersbild* case had a time limit or whether the Canton of Schaffhausen later expropriated or purchased the land within the perimeters of the ban. Imposing an indefinite construction ban on a construction zone may be considered *de facto* expropriation. Moreover, the State (or the commune) may have even less flexibility in cases where important sites are discovered during the exploitation of quarries by industrial companies having a license for the exploitation.[411] In such cases, the use of planning tools (e.g., archaeological zones) becomes more significant. 247

3.2.2. Examples from Turkish Case Law

(a) Patara Case (2000)

In 1978, the ancient city of Patara (Antalya) was registered under three different categories: a first-degree archaeological site, a third-degree archaeological site and a first-degree natural site. In 1996, a parcel registered as a third-degree archaeological site was upgraded to the first-degree. The landowner of the parcel contested the upgrade before the Antalya Administrative Court on the grounds that the decision was unfounded. In its analysis of the case, the Antalya Administrative Court specifically looked into the scientific reports prepared by the archaeologists working at the 248

409 Swiss Federal Court Judgment No. 1C_616/2015, § 3.3.3.
410 See, e.g., the *Parc Piguet* case cited above (*supra* fn. 387).
411 See, e.g., Dietrich et al., "Le Sanctuaire Helvète Du Mormont."

Patara site. The reports suggested that the upgraded area contained underground rock-cut chamber tombs used during the Hellenistic and Roman eras, which were not visible from the outside. The tombs would possibly yield archaeological material as well. Furthermore, the tombs and their content could not be interpreted alone, separated from the rest of the ancient city. Considering that only one percent of the categorized area had been excavated in a period of ten years, the need for *in situ* protection became more evident and the parcel in question was upgraded. Based on this evidence, in 1998, the Antalya Administrative Court held that the parcel fell within the definition of a first-degree archaeological site and rejected the landowner's claim for annulment, which was confirmed by the Council of State in 2000.[412]

249 This case highlights two important points. First, whether archaeological remains are visible from outside is not determinant in deciding how to categorize a site. In other words, the fact that the remains are not visible does not imply that the site should be registered as a third-degree site and be open to new construction. Second, scientific documentation, including excavation reports and preliminary research such as surveys, is crucial when justifying the need for the *in situ* preservation of a specific area to judges.

(b) Sinan Yıldız and Others v. Turkey (2010)

250 The second case, *Sinan Yıldız v. Turkey*,[413] took place in Hakkari in southeastern Turkey, where the claimants (among whom was Mr. Sinan Yıldız) owned a house on a building plot. In 1999, the Diyarbakır Regional Commission registered the land as an archaeological site of the first degree. In 2000, the Municipality of Hakkari requested that the Ministry of Culture expropriate such land (Lot No. 47) and the adjacent land (Lot No. 48).

251 While the Ministry expropriated the adjacent land in 2001 (then worth about € 28,800), it did not expropriate the claimants' land (worth about € 97,000) due to a lack of financial resources. However, the claimants considered the registration of their building plot as a first-degree site to be a *de facto* expropriation and introduced an action before the Hakkari Civil Court to claim compensation.[414]

252 In its decision of 21 January 2003, the Court held that the registration of the land as an archaeological site did not automatically imply a *de facto* expropriation. According to the Court, the Ministry never had the intention to acquire the land. Further-

412 See Turkish Council of State Judgment No. 2000/4226 of 22 June 2000, Case No. 1999/3296 in Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 112.

413 The ECHR decision of 12 January 2010 (admissibility), *Sinan Yıldız and Others v. Turkey,* Case No. 37959/04. Available in French and Turkish in HUDOC database.

414 *Sinan Yıldız v. Turkey*, p. 2.

more, the claimants could continue to live in their house. The claimants appealed against the Court's decision of 21 January 2003, which was confirmed by the Court of Cassation on 15 December 2003.[415]

253 The claimants believed that they had exhausted all legal remedies under Turkish law and applied to the European Court of Human Rights (ECHR). The ECHR first determined the applicable law by citing Articles 9, 11 and 15 of the Protection Law. Article 9 prohibits all material intervention or construction on the lands that are not in conformity with the Regional Commissions' decisions. Article 11(2) states that landowners are entitled to exercise their ownership rights as long as they do so in conformity with the Protection Law. Finally, Article 15 lists the conditions of expropriation. Article 15 also provides an alternative solution to expropriation. For instance, lands registered as first-degree archaeological sites can be exchanged with public lands (Art. 15(f) of the Protection Law).[416]

254 Before the ECHR, the claimants notably argued that their land's registration as an archaeological site without the issuance of any compensation should be considered a disproportionate violation of their property rights within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights.[417] The Turkish Government responded that the registration was justified by the fact that archaeologists had discovered the remains of a medieval city on the land, under which were also located earlier remains. According to the Government, a fair balance had been found between the archaeological interest and claimants' private interest under the principles set by the ECHR in the *Perinelli* and *Longobardi* cases.[418] The claimants were not under the obligation to destroy their house; they could continue to cultivate their land or transfer it; and construction was not completely prohibited, even if the claimants had to obtain an authorization from the competent Regional Commission before any intervention.[419]

255 The ECHR concluded that Article 1 of Protocol No. 1 was not violated, confirmed the arguments of the Turkish government and dismissed the plaintiffs' request. The protection measure (registration as an archaeological site) had a legal basis (Art. 7),

415 *Sinan Yıldız v. Turkey*, pp. 2–3.

416 *Sinan Yıldız v. Turkey*, pp. 3–4.

417 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11. Paris, 20 March 1952. ETS No.009.
Art. 1(1) (Protection of property) states; "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

418 *Perinelli and Others v. Italy* (Decision), No. 7718/03, 26 June 2007; *Longobardi and Others v. Italy* (Decision), No. 7670/03, 26 June 2007.

419 *Sinan Yıldız v. Turkey*, p. 5.

pursued a public interest (protection of archaeological heritage) and did not place an excessive burden on the landowners despite the absence of compensation. The claimants could continue exercising their right of ownership while respecting the requirements of the Protection Law.[420]

256 To conclude, the two cases above show that despite State ownership over structures, the long-term preservation of archaeological sites necessitates the restriction of private property, similarly to the Swiss context. With regard to the proportionality of the restriction, the same factors discussed in the Swiss context were brought out: the importance of the site and the impact of the restriction on the land's use. The *Patara* case shows that for unexcavated *in situ* protection, it is important that archaeologists prove the importance of the archaeological heritage buried in the soil through scientific data, like in the *Schweizersbild* case. The *Sinan Yıldız* case shows that if the landowner's use is not completely restricted, then the preservation *in situ* is justified, as was held in the *Bern* case.

257 It is interesting to note that in the *Sinan Yıldız* case, the plaintiffs also argued that the restrictive measure imposed upon them was different from the *Perinelli* and *Longobardi* cases. They claimed that following the registration of their land as an archaeological site, their land was "included within the State property sphere" and that they were deprived of their *fructus*, *usus* and *abusus* rights.[421] Such a contention is not legally correct. The registration as an archaeological site under Article 7 of the Protection Law (*supra* 123) is a protection measure, which has nothing to do with ownership rights. Of course, the landowners' use of their ownership will be restricted, but the lands do not suddenly become State property. They remain the property of the landowners. What is, in fact, State property is the structures located on the lands pursuant to Article 5 of the Protection Law (*supra* 217). The structures' ownership is separated from the land's ownership. It seems that this difference is not sufficiently clear in practice. In order to efficiently implement the Protection Law's protection measures, it is important that the Ministry of Culture seek to understand why a registration measure may be felt like an expropriation for landowners.

3.3. Civil Law Tools

258 Both the Swiss and Turkish systems use civil-law tools to protect archaeological sites discovered on private land.

420 The inability to exercise their right of ownership would be a substantial reduction in the property's availability (*réduction substantielle de la disponibilité du bien*). See *Sinan Yıldız v. Turkey*, p. 7.

421 *Sinan Yıldız v. Turkey*, p. 6.

3.3.1. Swiss Law: Granting the State a Surface Right

(a) In General

The surface right[422] is a servitude which allows a person to own or build constructions on or under the land on which such servitude is established (Art. 779(1) of the SCC). Its major consequence is that the beneficiary of the surface right becomes the owner of the constructions built on and under such land (Art. 675(1) of the SCC). In other words, it constitutes an exception to the principle of accession.[423] 259

The regime of the surface right is regulated in Articles 779 and 779*a*–779*l* of the SCC.[424] It can be established in favor of the current owner of a land (*servitude foncière*) or of a specifically designated person.[425] In the latter case, the surface right is usually established as a separate and permanent right in practice,[426] and is registered in the Land Registry.[427] Its duration is in principle limited to 100 years (Art. 779*l*(1) of the SCC).[428] 260

While Article 779(1) of the SCC provides the framework of the surface right as a servitude, its exact content is determined by the duly registered[429] *acte constitutive* contract creating the right.[430] The provisions of this contract are enforceable against third parties: in particular, the owner of the land.[431] As opposed to the usufruct right, the beneficiary of the surface right is not required by law to maintain the construction or to construct if the land is not already built upon.[432] The owner of the land and the beneficiary of the surface right can agree on additional obligations: for instance, the consideration (*contre-prestation*) offered by the beneficiary in exchange for its right.[433] 261

422 Also translated as "building right" in Foëx and Marchand, "National Report of the Transfer of Movables in Switzerland," 168.

423 Steinauer, *Les droits réels vol. III*, n. 2513. For further details, see Michel Mosser, "Introduction au droit de superficie – la constitution du droit," in *Droit de superficie et leasing immobilier – Deux alternatives au transfert de propriété,* ed. Benedict Foex (Genève: Schulthess, 2011), pp. 1–24.

424 See Steinauer, n. 2517.

425 Steinauer, n. 2518 et seq.

426 Within the meaning of Art. 655(3) of the SCC. See Steinauer, *Les droits réels vol. II*, n. 2010 et seq.

427 Art. 779(3) of the SCC. Steinauer, *Les droits réels vol. III*, n. 2519.

428 Foëx and Marchand, "National Report of the Transfer of Movables in Switzerland," 730.

429 See Art. 779*a* of the SCC.

430 See Art. 779*b*(1) of the SCC.

431 Steinauer, *Les droits réels vol. III*, n. 2536.

432 Steinauer, *Les droits réels vol. III*, n. 2537. Cf. Arts. 764, 765 and 767 of the SCC.

433 Steinauer, *Les droits réels vol. III*, n. 2545 et seq. Such obligations, only enforceable among the parties, may be invoked against third parties such as the respective heirs, if registered in the Land Registry pursuant Art. 779*b*(2) of the SCC. The SCC does not address the issue of expenses. The beneficiary of the surface right is usually responsible for the expenses related to the maintenance of constructions and the use of the parcels that are not built. Steinauer, *Les droits réels vol. III*, nn. 2538–2538a.

262 The surface right expires at the end of its term (usually 30, 50 or 100 years).[434] Parties may also decide together to terminate the servitude before its term ends.[435] When the surface right is extinguished, the principle of accession re-enters into force and the constructions, which become integral parts of the land, return to the landowner (Art. 779*c* of the SCC).[436] Unless otherwise agreed, the landowner must pay "adequate compensation" to the beneficiary of the surface right for the constructions (Art. 779*d* of the SCC).[437]

(b) Martigny Example

263 In 1987, archaeologists discovered the remains of a large house once owned by a Roman dignitary, now called *Domus Minerva*, during the construction of a building in Martigny. The Swiss Confederation and the Martigny Municipality reached an agreement with the landowner, who cancelled the construction of an underground parking which would have destroyed the remains.[438] According to the agreement, the Confederation "transferred a part of the density"[439] of the adjacent Archaeological Park, allowing the landowner to change the initial project and construct the building without endangering the remains of *Domus Minerva*. In exchange, the landowner established a surface right in favor of the Confederation on the rest of its lot. As for the Martigny Municipality, it took over the maintenance of the structures and the organization of public access.[440]

434 The term cannot be more than 100 years under Art. 779*l* of the SCC. Steinauer, *Les droits réels vol. III*, n. 2557.

435 Steinauer, n. 2557.

436 Steinauer, n. 2558.

437 The compensation is calculated on the basis of the market value of the constructions at the moment of the termination of the surface right, the value they added to the land and the elements which may reduce the value of the constructions. See Steinauer, nn. 2560–2561.

438 Wiblé, "Conservation du patrimoine archéologique valaisan," 45–46.

439 In French: "*indice d'utilisation du sol*." Wiblé, 45 fn. 17. Density of use is the "prescribed ratio of built-up area in relation to the lot size in a settlement area." See Evert, "Density of Use."

440 Wiblé, "Conservation du patrimoine archéologique valaisan," 45–46.

Fig. 2.5 Archaeological Park in Martigny. The building on the upper left is the Residence Minerva built by the landowner. The red circle shows the location of Domus Minerva (source: Wiblé, Conservation du patrimoine archéologique valaisan, 43).

Fig. 2.6 Domus Minerva, situated under the garden ("jardins suspendus") of the Residence (source: Conservation du patrimoine archéologique valaisan, 46).

The use of a surface right may indeed be an alternative to the acquisition of the land 264
by the State for *in situ* preservation. Through the establishment of the surface right in the present case, the Confederation, as the beneficiary, became the owner of the

remains of the *Domus Minerva* structures and acquired control over the use of the lot and its subsoil, except for the area where the Residence was built. However, it is important to acknowledge that unique factors contributed to this result. First, the landowner in question was Léonard Gianadda, an engineer-philanthropist with a strong interest in archaeology. This likely facilitated the negotiations related to the preservation of structures.[441] Second, two public entities – the Confederation and the Martigny Municipality – had to join forces to satisfy the landowner's wish to construct the building and manage the preservation *in situ* of structures. A third public entity, the Canton of Valais, joined them in the financing of a shelter specially prepared to protect the structures.[442]

3.3.2. Turkish Law: Prohibiting Acquisition through Prescription

265 Article 11(1) *in fine* of the Protection Law states that "immovables on which [are situated] first-group cultural property,[443] as registered by Regional Commissions, and immovables . . . located on archaeological sites of first and second-degree of importance cannot be acquired through possession". This rule disables the application of Article 713 of the TCC on "extraordinary acquisitive prescription"[444] with regard to said immovable property.[445]

441 Another site, the *Mithraeum*, which was discovered in early 1990s in Martigny during the construction of a building, could also be preserved *in situ* thanks to the "enthusiasm of Léonard Gianadda" who cancelled the construction of storage areas for the said building. See the Gianadda Foundation's website, accessed 23 May 2023, ‹www.gianadda.ch/360_a_decouvrir_aussi/martigny-la-romaine/mithraeum/›.

442 The Confederation (35%), the Canton of Valais (32.5%) and the Commune of Martigny (32.5%) shared the costs of the 1,250 m. shelter. Wiblé, "Conservation du patrimoine archéologique valaisan," 45 fn. 17.

443 The term "first-group immovable cultural property" concerns the protection of cultural property as a single item and not as an area (*supra* 122). First-group cultural properties usually are historic buildings. See Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku, 160–63.*

444 Turkish law provides for two mechanisms that allow the acquisition of non-registered lands by their possessors. The first one, "extraordinary acquisitive prescription" (*olağanüstü kazandırıcı zamanaşımı*) regulated under Art. 713 of the TCC (Art. 639 of the *f*TCC), allows the acquisition of lands previously suitable for agriculture, but not registered in the Land Registry. The second one, *ihya*, meaning reviving or revitalizing, and regulated under Art. 17 of Cadastral Law No. 3402 of 21 June 1987 (Official Gazette No. 19512 of 9 July 1987), allows the acquisition of lands not suitable for agriculture, such as mountains and hills. See Turkish Constitutional Court Judgment No. 2016/200 of 28 December 2016, Case No. 2016/49, § 9. Published in the Official Gazette No. 29952 of 18 January 2017.
Art. 713(1) of the TCC states that a person who has possessed, as the owner, a land not registered on the Land Registry in an undisputed and uninterrupted way for 20 years may demand the registration of his or her right of ownership over such land (or a part of such land) on the Land Registry.

445 Özel, "5226 *Sayılı Kanun Üzerine Bir Değerlendirme*," 123.

Article 11(1) *in fine* of the Protection Law has been amended twice during the course of its existence. The original text, adopted in 1983, provided that "cultural and natural property requiring protection and their buffer zone (*koruma alanı*)"[446] could not be acquired through possession.[447] In 2004, the expression "sites" (*sit alanları*) was added to the scope of the article.[448] In discussing its motivation for changing Article 11 of the Protection Law, the legislature noted that the rule on acquisitive prescription had to be changed due to "problems encountered in practice" by taking into account case law developed on this topic.[449] 266

Such motivation appears to be confusing since the case law on acquisitive prescription suggested the opposite of what the amendment did. Indeed, many Turkish courts had underlined that a total ban on acquisitive prescription, including in the areas declared as sites, would be "contrary to the needs of the public and the reality of the country."[450] In fact, in Turkey, some sites cover entire cities.[451] 267

Just a year after the 2004 amendment, a new one was proposed. It was argued that the 2004 amendment's total ban eliminated the possibility of citizens registering the lands they possessed and had been using for years on the Land Registry, some of which were located in the settlement areas of villages.[452] Consequently, Article 11(1) *in fine* was revised again to limit the ban to the lands on which first-group cultural property is situated and to the lands situated within the perimeters of archaeological 268

446 "Buffer zones" are the areas having an impact on immovable cultural property's preservation or protection as a part of the historic environment. That is why the protection of such zones is also indispensable. See Art. 3(5) of the Protection Law.

447 Official Gazette No. 18113 of 23 July 1983. Original text in Turkish: "*Ancak, korunması gerekli kültür ve tabiat varlıkları ile bunların korunma alanları, zilyedlik yoluyla iktisap edilemez.*"

448 Law No. 5226. Official Gazette No. 25535 of 27 July 2004. For comments on the 2004 general revision of the Protection Law, see Özel, "5226 *Sayılı Kanun Üzerine Bir Değerlendirme*"; Umar, "2863 *Sayılı Kültür ve Tabiat Varlıklarını Koruma Kanununa Getirilen Değişiklikler Üzerine*."

449 Minutes of the Turkish Parliament, Draft Law No. 5226, p. 7, accessed 23 May 2023, ‹https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c057/tbmm22057115ss0641.pdf›.

450 See, e.g., Turkish Court of Cassation, 1st Civil Chamber, Judgment No. 2010/842 of 1 February 2010, Case No. 2009/13583 (Kazancı database); Court of Cassation's General Assembly of Civil Chambers Judgment No. 1999/16-143-141 of 10 March 1999 (Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 128–130). See also *Kanadoğlu, Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 138–39.

451 For instance, the island Gökçeada, on which the land litigated in the *İpseftel v. Turkey* case was located. See Turkish Court of Cassation, 8th Civil Chamber, Judgment No. 2005/32 of 10 January 2005, Case No. E. 2004/8875 (Kazancı database): "*Sit alanları kamu malı niteliğindedir. Gökçeada ilçesinin büyük bir kısmının doğal ve arkeolojik sit alanında kaldığı hususu da ihtilafsızdır (…) 2863 sayılı Kanunun 5 ve 5226 sayılı Kanunla değişik 11. maddesi hükümlerine göre zilyetlikle kazanılıp kazanılamayacağının üzerinde durulması ondan sonra uyuşmazlık hakkında hüküm kurulması gerekmektedir.*"

452 See Minutes of the Turkish Parliament, Draft Amending Law No. 5663, p. 1, accessed 23 May 2023, ‹https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c158/tbmm22158109ss0970.pdf›.

sites of the first and second degree.[453] This second amendment entered into force in 2007.[454]

269 Does Article 11(1) *in fine* of the Protection Law violate private ownership rights? A recent case brought before the ECHR dealt with this question: *İpseftel v. Turkey*. In its judgment of 26 May 2015, the ECHR held that Turkey violated Article 1 of Protocol 1 regarding the respect of property rights.[455]

270 In 1995, the Land Registry Office registered land on Gökçeada Island in the name of the State (i.e., the Treasury), considering the land's lack of clear ownership status. The Land Registry further indicated that the ownership of this land could not be acquired through prescription since it was located within the buffer zone of cultural property requiring protection (a mosque).[456] Article 11 of the Protection Law banned the acquisition through prescription of such land.[457] In 2002, Eftaliya İpseftel, who was living in Athens, applied for the cancellation of the Treasury's title to the land by claiming that her father had acquired the land in 1976 and had donated it to her.[458] The Gökçeada Lower Court rejected İpseftel's request on the basis of Article 11 of the Protection Law. The Court of Cassation affirmed this decision.[459]

271 On review before the ECHR, the first issue to be analyzed was whether the plaintiff owned such land (Art. 1 of Protocol 1), or, according to the ECHR's case law, whether she had a legitimate expectation of acquiring it.[460] The Turkish Government argued that İpseftel did not have valid title since she had failed to demonstrate that she had been in the possession of the land in an uninterrupted way, as required by Article 713 of the TCC.[461] Moreover, according to the Government, the fact that İpseftel moved

453 Natural sites and third-degree archaeological sites are not covered by the prohibition. See Turkish Court of Cassation, 7th Civil Chamber, Judgment No. 2010/3641 of 10 June 2010, Case No. 2009/5806 (Kazancı database): "(…) *doğal sit alanları ve 3cü derece arkeolojik sit alanında bulunan taşınmazların koşulları oluştuğu takdirde kazandırıcı zamanaşımı zilyetliği yolu ile kazanılmalarının mümkün hale getirildiği gözönünde bulundurulmalı* (…)."

454 Amending Law No. 5663. Official Gazette No. 26537 of 30 May 2007. See also temporary Art. 7 of the Protection Law (allowing the possessors who fulfilled the conditions of acquisitive prescription after 27 July 2004 to register the lands as belonging to them upon their request, except for lands remaining within the perimeters of archaeological sites of the first and second degree).

455 ECHR Judgment of 26 May 2015 (merits), *İpseftel v. Turkey*, Case No. 18638/05. Available in French and Turkish in the HUDOC database (‹www.echr.coe.int›).

456 *İpseftel v. Turkey*, § 15: "(…) *le conseil de protection du patrimoine culturel et naturel confirma que le terrain en cause se trouvait dans la zone de protection d'un édifice qui avait été répertorié, le 17 octobre 1985, comme monument culturel à protéger. Il précisa que tous les types de travaux sur ce terrain nécessitaient une autorisation préalable de sa part.*"

457 *İpseftel v. Turkey*, § 8.

458 *İpseftel v. Turkey*, § 10.

459 *İpseftel v. Turkey*, §§ 16–18.

460 *İpseftel v. Turkey*, § 48.

461 *İpseftel v. Turkey*, §§ 45, 54.

abroad with her father meant that she abandoned the land.[462] İpseftel rejected such allegations, indicating that the Gökçeada Lower Court recognized in principle "an uninterrupted possession of 40 years in her favor."[463] Indeed, the Gökçeada Lower Court, following the evidence gathered, concluded that İpseftel's father had fulfilled the requirement of "peaceful (undisputed) and uninterrupted possession as the owner for more than 20 years," allowing him to be recognized as the owner by 1982 at the latest.[464] In consequence, the ECHR held that İpseftel had a legitimate expectation that her ownership of the land would be recognized.[465]

272 The second question was whether the deprivation of property could be justified in the public interest, which in this case was the protection of the buffer zone of cultural property requiring protection under Turkey's Protection Law. The ECHR indicated that the plaintiff did not receive any compensation for the loss of her property and that the Government did not mention any exceptional circumstance which would justify the lack of compensation, as the ECHR's case law required.[466] Consequently, the ECHR held that the Turkish Government violated the fair balance between the demands of the public interest and the requirements of the protection of the individual's fundamental rights.[467]

273 In conclusion, Article 11 *in fine* of the Protection Law disables the acquisition through prescription of lands that are not registered in the Land Registry (Art. 713 of the TCC) but have been declared archaeological sites of the first and second degree of importance. It is thus possible that before such a declaration is made, individuals will have acquired such lands through possession. Therefore, if compensation is not provided to such owners, the application of Article 11 *in fine* of the Protection Law will continue to violate the respect of private property, not only within the ECHR framework, but also under Article 35(1) of the Turkish Constitution.[468]

274 Interestingly, following the ECHR's *İpseftel v. Turkey* decision, in 2016 the Marmaris Civil Court Chamber 1 raised the question of constitutionality with regard to Article 11(1) *in fine* of the Protection Law on the grounds that it violated Articles 2 (Characteristics of the Republic), 5 (Goals and Duties of the State), 10 (Equality before the Law), 35 (Right to Property) and 44 (Land Ownership) of the Turkish Constitution.[469]

462 *İpseftel v. Turkey*, § 46.
463 *İpseftel v. Turkey*, § 47.
464 *İpseftel v. Turkey*, § 56. The years are accumulated (Art. 639(1) of the *f*TCC).
465 *İpseftel v. Turkey*, § 57.
466 *İpseftel v. Turkey*, § 67.
467 *İpseftel v. Turkey*, § 68.
468 Art. 35(1) of the Turkish Const.: "Everyone has the right to own and inherit property."
469 Turkish Constitutional Court Judgment No. 2016/200 of 28 December 2016, Case No. 2016/49. Published in the Official Gazette No. 29952 of 18 January 2017.

The case before the Marmaris Court was brought by the possessors of a property which remained within the perimeters of a first-degree archaeological site and which was registered in the Land Registry in favor of the Treasury following cadastral surveying in 2009.[470] The possessors claimed that they had a legitimate expectation of acquiring the land through possession by the application of Article 713 of the TCC before the 2004 amendment (*supra* 266).[471] The Turkish Constitutional Court examined the unconstitutionality question specifically within the scope of Article 35 of the Turkish Constitution on the right to property[472] and Article 13 of the Turkish Constitution[473] on the restriction of fundamental rights. The Court's reading of both articles provided that ownership could only be restricted by law and in the public interest if it was necessary in a democratic society.[474] The Court then held that the prohibition of the acquisition through possession of lands situated on first-degree archaeological sites had a legitimate purpose, which was the protection of cultural and natural property (Art. 63 of the Turkish Const.). On the issue of proportionality, the Court affirmed, and stated without going in further detail that "there is no doubt that the interference with the possessors' legitimate expectancy in acquiring ownership is proportionate to the purpose to be achieved in the public interest (...)."[475]

275 It is unfortunate that the Turkish Constitutional Court did not mention the ECHR's *İpseftel v. Turkey* judgment, which also dealt with Article 11(1) of the Protection Law from a fundamental-rights approach. Article 11(1) of the Protection Law *per se* may not be unconstitutional. However, its application deserves particular attention in cases such as the *İpseftel v. Turkey* case. For lands not registered in the Land Registry, the application of Article 11(1) of the Protection Law depends on the status of such

470 Turkish Constitutional Court Judgment No. 2016/200, § 14.

471 Turkish Constitutional Court Judgment No. 2016/200, § 25.

472 Art. 35 of the Turkish Const.: "(1) Everyone has the right to own and inherit property. (2) These rights may be limited by law only in view of the public interest. (3) The exercise of the right to property shall not contravene the public interest."

473 Art. 13 of the Turkish Const.: "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

474 Turkish Constitutional Court Judgment No. 2016/200, § 32.

475 Turkish Constitutional Court Judgment No. 2016/200, § 34.
The original text in Turkish: "*Zilyetlerin, mülkiyet hakkını kazanacakları yönündeki meşru beklentilerine yapılan müdahale ile kamusal yararı gerçekleştirmeye ilişkin amacın orantılı olduğu şüphesizdir. Ülkemiz ve hatta aralarında bütün insanlığın ortak mirası kabul edilen evrensel değerlere sahip bulunan kültür varlıklarının, korunması amacıyla birinci derece arkeolojik sit alanlarının zilyetlikle kazanılamamasının, belirtilen amacı gerçekleştirmek için elverişli ve gerekli olduğu, bu nedenle kuralın Anayasa'nın 13. maddesi kapsamında demokratik toplum düzeninin gereklerine ve ölçülülük ilkesine aykırılık teşkil etmediği anlaşılmaktadır.*"

lands at the moment of their registration as archaeological sites. If they have been acquired through prescription before the registration, Article 11(1) of the Protection Law cannot be applied. The State may instead expropriate the land and compensate the owner. The Turkish Constitutional Court could have emphasized this point in Judgment No. 2016/200 and explained the rationale behind the ECHR's decision. To prevent administrative bodies and Turkish courts from wrongfully applying Article 11(1) *in fine* of the Protection Law in the future, it would be possible for the legislature to add an additional phrase (in the same paragraph) stating that lands which have been acquired through prescription before the registration date may be expropriated.[476]

476 Current text of Article 11(1) *in fine* in Turkish: "*Ancak, kültür ve tabiat varlıklarını koruma bölge kurullarınca birinci grup olarak tescil ve ilan edilen kültür varlıklarının bulunduğu taşınmazlar ile birinci ve ikinci derece arkeolojik sit alanlarındaki taşınmazlar zilyetlik yoluyla iktisap edilemez.*"
Proposed addition in Turkish: "*Tescil tarihinden önce zilyetlik yoluyla iktisap edilmiş taşınmazlar usulüne uygun olarak kamulaştırabilirler.*"

Comparative Conclusion

A. Obligation to Protect

276 The comparative inquiry into the legal minimum required for the adequate protection of archaeological heritage in Swiss and Turkish law has produced some interesting results. The basic principle governing the protection of archaeological sites is their preservation *in situ* when feasible. While this obligation is explicitly stated at the federal level in Swiss law and Turkish law, none of the selected Swiss cantons mention it in their laws. Explicit language is important because it without a doubt facilitates greater integration of the principle in the regulatory context. Most importantly, it determines the weight that should be given by public authorities to the preservation *in situ* of archaeological heritage in a context where other interests (e.g., competing public interests) are at stake (*infra* Chapter 4). This observation suggests that the mandatory scientific study of sites in case of destruction is even more crucial, but such study is only envisaged in three out of seven selected cantons. At the federal level, since the law with a general application remains silent, each activity sector has to regulate this matter internally. In Turkish law, mandatory scientific study is partially regulated but by instruments of administrative nature such as the guidelines of the Ministry of Culture's High Commission and the Ministry's directives. Furthermore, the duty to create and maintain an inventory of archaeological heritage needs a legal basis so that the public authorities can act in this respect by allocating the personnel and funds required for this elaborate task. Regarding archaeological objects – in particular excavation finds – their adequate and sustainable storage is explicitly mentioned by only one out of seven selected cantons. Nevertheless, it is still noteworthy that three cantons make a clear connection between archaeological objects and cantonal collections, articulating the public interest in their preservation (*infra* Chapter 3). This is also the case for Turkish law.

B. Attribution of State Ownership

277 The comparative analysis of Swiss and Turkish ownership laws has showed that the *ipso iure* ownership of the State may not cover, in every circumstance, all the elements of archaeological heritage. While Swiss law vests State ownership in movable archaeological objects (artifacts and ecofacts), Turkish law declares both these and structures to be State property. First of all, it is interesting to observe that these two countries with two different archaeological contexts (i.e., the presence versus absence of clandestine excavations) and political systems established State own-

ership over archaeological objects discovered on their territories around the same period (the early 1900s). Could it be that public ownership is the most appropriate regime for the long-term preservation of archaeological objects (*infra* Chapter 3)? Second, the distinction between the two systems concerning the ownership status of structures discovered on private land appears to have little impact on the long-term preservation of archaeological sites. In fact, in both systems, lands owned by private parties that are also studied by archaeologists remain out of the scope of the national ownership laws. The challenge faced in practice is therefore the same in both places: finding a fair balance between the archaeological interest and the private owner's interest.

Part II: Using State Ownership to Preserve: Switzerland and Turkey

Movable and immovable elements of archaeological heritage require different approaches in terms of preservation. Chapter 3, which focuses on archaeological objects, first examines the discovery phase where the State takes possession of archaeological objects. It then goes to the phase of the objects' dedication to the public interest, when the State usually places such objects in public collections or sometimes allocates them to other institutions (e.g., universities) for research and education. The purpose of this Chapter is to question and compare the types of challenges Swiss cantons and Turkey encounter while using their ownership to preserve archaeological heritage. 278

Chapter 4 deals with archaeological sites. The fact that the State owns the land on which an archaeological site is buried or discovered does not automatically mean that the site will be protected in all circumstances and transmitted to future generations. In fact, the State's activities related to the subsoil may pursue many different interests which are not always compatible with each other. In each case, public authorities should first identify the different (and conflicting) interests at stake and then weigh them to make the optimum choice. The purpose of this Chapter is to question and compare the mechanisms through which the archaeological interest is identified in the Swiss and Turkish systems and how the impacts of public works on archaeological sites are mitigated in practice in both countries. 279

Chapter 3: Archaeological Objects

A. Taking Possession

1. In General

1.1. Possession at the Moment of Discovery

1.1.1. Basic Rules

Who has possession of archaeological objects at the moment of discovery? Is it the finder, the State or both? Does the answer make any difference in practice? 280

In both Switzerland and Turkey, the person who has effective control over an object is its possessor (Art. 919(1) of the SCC; Art. 763 of the TCC). Possession is defined as a *de facto* relationship, meaning that a person having effective control over an object is its possessor even if he or she has no right over the object or no right to possess the object.[477] 281

According to Swiss and Turkish legal literature, possession entails two elements: a factual control (the factual element) and the intent to exercise such control (the subjective element). Regarding the factual element, the control may be physical or result from the circumstances. For instance, there is physical control if the object remains in the possessor's sphere of influence even though it is in the hands of a third party. Regarding the subjective element, a general intent to possess is sufficient; no degree of specificity or intensity is required.[478] 282

Swiss and Turkish law recognize different forms of possession, which may co-exist with regard to the same object (multiple possession). For instance, there is direct and indirect possession depending on whether the possessor possesses the object through an intermediary (Art. 975 of the TCC).[479] If the possessor possesses the object as owner, its possession is called originary; otherwise, it is derivative (Art. 920 of the SCC; Art. 974 of the TCC).[480] 283

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477 Foëx and Marchand, "National Report of the Transfer of Movables in Switzerland," 172.

478 For Swiss law, see Foëx and Marchand, "National Report of the Transfer of Movables in Switzerland," 172; Steinauer, *Les droits réels vol. I*, n. 185 et seq. For Turkish law, see Oğuzman, Seliçi, and Oktay-Özdemir, *Eşya Hukuku*, n. 275 et seq.

479 For Swiss law, see Foëx and Marchand, "National Report of the Transfer of Movables in Switzerland," 173; Steinauer, *Les droits réels vol. I*, n. 234 et seq. For Turkish law, see Oğuzman, Seliçi, and Oktay-Özdemir, *Eşya Hukuku*, n. 319 et seq.

480 For Swiss law, see Steinauer, *Les droits réels vol. I*, n. 238 et seq. For Turkish law, see Oğuzman, Seliçi, and Oktay-Özdemir, *Eşya Hukuku*, n. 312 et seq. It is not necessary for the possessor to

284 A thief, for instance, has immediate possession of a stolen item (single possession). If the thief loans the object to a third party, the latter becomes its derivative and direct possessor, while the thief retains indirect and originary possession. The thief is also the illegitimate possessor (as opposed to legitimate possessor), since he does not have the right to possess the object in the first place.[481]

285 Accordingly, when archaeological objects are concerned, the intention of individuals who find them becomes important. If the finder acts with the intent of delivering the object to the State (which owns it), the finder acquires derivative possession and gives rise to the State's originary possession.[482] If the finder misappropriates the object, the answer is less straightforward. Unlike in most theft cases, archaeological objects are not in somebody's direct possession for a long time. Archaeological objects and treasures have this characteristic in common ("to be buried or hidden for a long time"), as discussed earlier (*supra* 202).

1.1.2. Swiss Case Law

286 Turkish civil-law scholars often place Articles 772 (Treasure) and 773 (Objects of Scientific Interest) of the TCC among types of originary acquisition of movables where the owner's possession or intent is not required to acquire ownership.[483] However, they do not comment further on the subject, probably because the rules on originary acquisition of ownership have rarely been discussed before courts.[484]

287 Swiss civil-law scholars also place Articles 723 (Treasure) and 724 (Objects of Scientific Interest) of the SCC among types of originary acquisition of movables where the owner's possession is not required to acquire ownership.[485] Nevertheless, the previously discussed 1974 case about gold coins before the Swiss Federal Court (*supra* 203) paved the way for some debate on the issue.

288 This case about gold coins discovered in a barn combined unusual circumstances that led to the question of whether the owner of a treasure acquires its possession if the finder misappropriates it. The barn where the coins (the treasure) were hidden was entrusted by its owner, who was unaware of the coins, to a carpenter for disman-

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actually be the owner of an object to be its originary possessor; it suffices that he behaves as such. Foëx and Marchand, "National Report of the Transfer of Movables in Switzerland," 173.

481 Foëx and Marchand, "National Report of the Transfer of Movables in Switzerland," 173–74; Steinauer, *Les droits réels vol. I*, n. 263.

482 By analogy with treasure, see Steinauer, *Les droits réels vol. II*, n. 3164. See also Steinauer, *Les droits réels vol. I*, n. 241.

483 Oğuzman, Seliçi, and Oktay-Özdemir, *Eşya Hukuku*, nn. 2622, 2653 et seq.; Serozan, *Eşya Hukuku I*, n. 1324. See also Steinauer, *Les droits réels vol. II*, n. 2948 et seq.

484 Karahasan, *Yeni Türk Medeni Kanunu Eşya Hukuku I*, 1454.

485 Steinauer, *Les droits réels vol. II*, n. 2951.

tling. The carpenter eventually discovered the coins and sold them to a third party. The owner claimed the restitution of the coins.[486]

289 The Swiss Federal Court asked whether the treasure qualified as an entrusted object (*chose confiée*) (Art. 933 of the SCC) in the same way as the barn, or simply a lost or stolen object (*chose perdue ou volée*) (Art. 934 of the SCC). The Federal Court held that "by entrusting the carpenter with the barn, the owner has taken the risk that an object, possibly hidden in the barn, may be illegally alienated," and qualified the treasure as an entrusted object.[487]

290 Piotet has strongly criticized the Swiss Federal Court's interpretation in this case, pointing out two issues, among others: (i) to entrust an object, one should be its possessor first; (ii) to be a possessor, one should be aware of the existence of the object (the subjective element).[488] The second point is very much related to the case of treasure and archaeological objects in general. Piotet argues that under both Articles 723 and 724 of the SCC, it is not possible for the owner to acquire possession if the finder misappropriates the object.[489]

291 In conclusion, the question of the State's possession of archaeological objects remains a theoretical discussion and will have little impact in practice both in Switzerland and Turkey. Under both systems, archaeological objects cannot be acquired in good faith or through acquisitive prescription (*supra* 167–169). The State can claim restitution from any third party at all times. If the State tries to obtain the restitution of an archaeological object illegally exported to another country, however, the discussion around the State's possession may become crucial.

1.1.3. Foreign Decisions Dealing with Turkey's Possession

292 In practice, foreign judges have had to reflect on the Turkish State's possession of archaeological objects at the moment of discovery. In the well-known *Elmalı Hoard* case, the U.S. District Court of Massachusetts held, following its analysis of Turkish law, that "from the issuance of an imperial decree of 1906 up to the enactment of the Law on Protection of Cultural and Natural Antiquities in 1983," the Turkish State had, "at the very least, an immediate, unconditional right of possession" of newly

486 Swiss Federal Court Judgment 100 II 8 = JdT 1974 I 576, 577–78.

487 Swiss Federal Court Judgment 100 II 8 = JdT 1974 I 576, 582.

488 In other words, no one can entrust an object of which he does not suspect the existence. See also Steinauer, *Les droits réels vol. II*, n. 3164.

489 Piotet, "Trésor et chose confiée," 502. Cf. Scherrer who admits that the owner has possession at the moment when the finder knows that he wrongfully possesses the object and should give it back to its owner, in "ZGB Art. 723, 724," n. 27.

discovered archaeological objects.[490] This led the Court to agree to hear Turkey's civil claim of restitution. In fact, the defendants argued that Turkey did not have a sufficient proprietary interest in the objects to give it standing to bring the case.[491] In consequence, the recognition of Turkey's right of possession permitted Turkey to bring an action for the recovery of archaeological objects in the United States.[492]

293 In a more recent case, the Frankfurt Civil Court in Germany reached the opposite conclusion.[493] Following the confiscation of five archaeological objects of Turkish origin by the German police in 2008,[494] Turkey filed a civil lawsuit against the possessor, an art dealer, to determine ownership. Turkey's claim was based on its ownership right granted by Turkish law (as in the *Elmalı Hoard* case) and Article 935(1) of the German Civil Code prohibiting the good-faith acquisition of stolen property.[495]

294 The Frankfurt Civil Court rejected the case on the ground that Turkey could not prove a better proprietary right. The major factor in this failure was, according to Wantuch-Thole, the fact that Turkey could not enjoy "the simplification of German rules concerning the taking of evidence," keeping in mind that the Court chose German law as the applicable law.[496] Under Article 1006(1) of the German Civil Code, the possessor of movable property is presumed to be its owner. However, this presumption does not apply to a former possessor from whom the property is stolen.[497] The Frankfurt Civil Court did not consider Turkey the former possessor. According to

490 *Republic of Turkey v. OKS Partners*, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994). See also Özel, *Uluslararası Alanda Kültür Varlıklarının Korunması*, 84–85.

491 The main question in this case was to determine the nature of Turkey's proprietary interest under Turkish law. *Republic of Turkey v. OKS Partners*, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass 1994).

492 The case was eventually resolved through negotiation. See Velioglu, Chechi and Renold, "Case Elmali Hoard – Turkey and OKS Partners."

493 *Landgericht Frankfurt a.M.* judgment 18.08.2011-2-13 O 212/10 (available at BeckRS 2013, 20789), cited in Wantuch-Thole, *Cultural Property in Cross-Border Litigation*, 343 fn. 1540.

494 The police seized the objects based on the suspect of dealing with stolen goods (*recel*). A separate legal procedure was initiated before the Frankfurt Administrative Court. The Court eventually decided that there was no dealing with stolen goods. See Wantuch-Thole, 343–44.

495 Art. 935(1) of the German Civil Code: "The acquisition of ownership under sections 932 to 934 does not occur if the thing was stolen from the owner, is missing or has been lost in any other way. The same applies, where the owner was only the indirect possessor, if the possessor had lost the thing." The German Federal Ministry of Justice provides online the English translation of the German Civil Code. Accessed 23 May 2023, ‹http://www.gesetze-im-internet.de/englisch_bgb/index.html›.

496 Wantuch-Thole, *Cultural Property in Cross-Border Litigation*, 345.

497 Art. 1006(1) of the German Civil Code: "It is presumed in favour of the possessor of a movable thing that he is the owner of the thing. However, this does not apply in relation to a former possessor from whom the thing was stolen or who lost it or whose possession of it ended in another way, unless the thing is money or bearer instruments." Accessed 23 May 2023, ‹http://www.gesetze-im-internet.de/englisch_bgb/index. html›.

the Court, Turkey could not lose possession of the objects as it had never acquired possession in the first place. As a result, under Article 1006(1) of the German Civil Code, the art dealer was presumed to be the owner and Turkey carried the burden to prove otherwise. In the absence of substantive evidence demonstrating that the archaeological objects were illegally excavated from Turkish territory, Turkey failed to meet the burden of proof.[498]

For the purposes of the present section, the important point is that the Frankfurt Civil Court did not recognize that Turkey had possession at the time of the archaeological objects' discovery. Accordingly, the illegally excavated objects could not be considered stolen under German law, which contradicts UNESCO and UNIDROIT's positions on the issue,[499] the Swiss approach in a recent case,[500] and "the growing awareness of the transnational public policy to return misappropriated antiquities."[501] 295

1.1.4. A Nuanced Approach for Treasures and Archaeological Objects

It is possible to argue that the question of possession is better discussed separately for treasures and archaeological objects under both Swiss and Turkish civil law. In the case of treasures, as Piotet suggests, the owner of the movable or immovable property where the treasure is found cannot have an intent (even a general one) to possess the treasure of which he is unaware. If the finder misappropriates the treasure, he becomes the only possessor, both direct and illegitimate. The owner loses control of the treasure before acquiring any possession. This should not create any major problems in practice since the owner can still claim restitution based on its ownership (Art. 934 of the SCC; Art. 989 of the TCC).[502] 296

As opposed to treasures, it is possible to argue that the owner of archaeological objects, the State, has a general intent to possess them. The situation can be com- 297

498 Wantuch-Thole, *Cultural Property in Cross-Border Litigation*, 345.

499 See Art. 3(2) of the UNIDROIT Convention (*infra* 468).

500 In the *Roman Sarcophagus* case, the Court of Appeals of Geneva held that the sarcophagus was "illegally subtracted from [Turkey's] cultural heritage," which constituted the crime of theft under Turkish and Swiss law (Art. 139 of the Swiss Penal Code). See Geneva Court of Justice, Criminal Appeals Chamber Judgment, 2 May 2016, points 7.2. and 7.2.(*vi*). See also Vuille, Velioglu Yildizci and Renold, "Affaire Sarcophage romain – I. SA c. Ordonnance de restitution et Turquie," Plateforme ArThemis (‹http://unige.ch/art-adr›).
Under Art. 139 of the Swiss Penal Code, theft involves an act of subtraction, which cannot be achieved if no one exercises possession over the thing the perpetrator seizes (Swiss Federal Court Judgment of 17 March 2006, 6S.358/2005 = SJ 2006 277, 279). See Art. 137 of the Swiss Penal Code for unlawful appropriation.

501 Wantuch-Thole, *Cultural Property in Cross-Border Litigation*, 346.

502 The owner of the treasure acquires ownership when the finder takes possession. See Steinauer, *Les droits réels vol. II*, nn. 3161–62.

pared to the example of a mailbox and its letters. In one particular case, the Swiss Federal Court opined that the owner of a mailbox is also the possessor of the letters deposited in the box, even before he or she checks them. By placing the mailbox, the owner expresses, in a general manner, his or her intent to possess the contents of the box.[503] Similarly, considering that the scientific "content" of the subsoil is declared State property, it is only logical that the State has a general intent to possess this content. This implies that at the moment of discovery, the finder and the State are both possessors. The finder's discovery of the archaeological object gives rise to the State's legitimate possession, regardless of the finder's intention.[504]

1.1.5. The Public Law Perspective in Turkish Law

298 Turkish administrative law recognizes a concept of possession unique to "public ownership" (*kamu mülkiyeti*; *supra* 183). It is usually expressed through the formula "being under the State's sovereignty" (*devletin hüküm ve tasarrufu altında olmak*).[505] This formula not only covers the State's right of ownership (comparable to private law's *dominium*), but also an ensemble of powers arising from public law called "*imperium*" (*hakimiyet*). The latter is related to the State's power to "set a legal regime unique to public property in a way that benefits the public."[506] Principles such as inalienability (*infra* 342) or the prohibition of good-faith acquisition (*supra* 167) are all the result of this approach.

299 As will be developed further below, archaeological objects originating in Turkey are a special category of public property under Turkish law (*infra* 341) – a category to which the status of public property is granted even before their existence is known.[507] It is therefore not possible to deny that under Turkish administrative law, archaeological objects originating in Turkey and belonging to the State (Art. 5 of the

503 Swiss Federal Court Judgment of 19 January 2001, 6S.583/2000 (not published) cited in Steinauer, *Les droits réels vol. I*, n. 200. See also Oğuzman, Seliçi, and Oktay-Özdemir, *Eşya Hukuku*, n. 289.

504 This also goes in parallel with the assumption that the State owns the artifacts even before their discovery. See Foëx, "Un point de vue de civiliste," 35. *Contra* Steinauer, *Les droits réels vol. II*, n. 3170. In Turkish law, the text of Art. 5 of the Protection Law ("to be discovered") also suggests that artifacts are State property even before their discovery. *Contra* Oğuzman, Seliçi, and Oktay-Özdemir, *Eşya Hukuku*, n. 2658. Cf. Model Provisions, Provision 3 Guidelines: "As drafted, the text clearly indicates that such objects are owned by the State before being discovered."

505 To read more on this, see Düren, *İdare Malları*, 63; Giritli et al., *İdare Hukuku*, 952 et seq.; Gülan, "Kamu Malları," 676 et seq.
Düren also makes a connection with Arts. 664 of the SCC and 641 of the *f*TCC (715 of the TCC). Art. 664(1) of the SCC: "*Les choses sans maître et les biens du domaine public sont soumis à la* haute police de l'Etat *sur le territoire duquel ils se trouvent.*" Art. 715(1) of the TCC: "*Sahipsiz yerler ile yararı kamuya ait mallar, Devletin* hüküm ve tasarrufu *altındadır.*"

506 Düren, *İdare Malları*, 63–64.

507 Gülan, "Kamu Malları," 679 fn. 1376.

Protection Law) are also under the State's sovereignty at the moment of their discovery. This statement should be construed independently from civil-law theories on possession (*supra* 287–291).

Summary of the Section on Possession of Archaeological Objects at the Time of Discovery

	If the finder of the object acknowledges the State's ownership	If the finder misappropriates the object with the intention of keeping it
Swiss law	The finder is the possessor	Whether the State or the finder has possession is open to discussion under civil law (*supra* 290)
Turkish law	The finder is the possessor	The State has possession arising from administrative law

1.2. Finders' Fees

Under both Swiss and Turkish law, the finder receives a fee when he or she notifies public authorities about the discovery of archaeological objects. What is the nature of this fee in both systems? 300

In Swiss law, Article 724(3) of the SCC grants to the finder of the archaeological object "fair compensation" which cannot exceed the value of the object. If the artifact discovered is considered, at the same time, a treasure under Article 723(1) of the SCC, the compensation is divided between the finder and the owner of the object in which the treasure is found. In any case, the compensation paid by the canton cannot exceed the value of the archaeological object and, if any, the expenses.[508] 301

In Turkish law, Article 697(2) of the *f*TCC used to read the same as Article 724(3) of the SCC, except for the expression "fair compensation," which had been replaced by "adequate reward" (*münasip bir ikramiye*). This may be because a reward system already existed in 1926 when *f*TCC was adopted, thanks to the Antiquities Decree of 1906, which remained into force until 1973 (*supra* 151). 302

It is interesting to recall that under the Swiss and Turkish civil codes, a fee is also due to the finder of found property[509] and treasure.[510] In the case of found property, the Swiss and Turkish civil codes do not provide a threshold for the finder's fee. However, it is generally accepted that the fee corresponds to ten percent of the object's 303

508 Pannatier Kessler, "CC Art. 724," n. 11; Steinauer, *Les droits réels vol. II*, n. 3171.
509 See Art. 722(2) of the SCC; Art. 771(2) of the TCC.
510 See Art. 723(3) of the SCC; Art. 772(3) of the TCC.

value, or in any case, cannot exceed half of the object's value by analogy with the treasure.[511] The "effort undertaken" can also be taken into consideration in the calculation of the fee.[512]

304 In Turkish law, the finder's fee is governed by the Protection Law. Article 64 of the Protection Law states the rules regarding "rewards" (*ikramiye*) to be paid to finders of movable cultural property. The reward is calculated on the basis of the ratio provided by Article 64 and depends on the circumstances of discovery. The finder may discover the archaeological object on: (a) his or her land, (b) somebody else's land or (c) public land.[513]

> **Article 64 of the Protection Law**
> For persons that report movable cultural property found on the ground, under the ground and under the water within the borders of the Republic of Turkey to the competent authorities within the periods mentioned in Article 4 the following shall apply:
> (a) If the find is on their property, Articles 24 and 25 of this Law shall apply. No additional reward shall be given.
> (b) If the find is on the property of a person, 80 percent of the amount estimated by the Ministry of Culture and Tourism as the value of the property shall be divided equally as reward between the person finding the property and the owner of the property.
> (c) If the cultural property is found on land owned by the state, 40 percent of the appraised value shall be given to the finder as bonus.

305 The finder's "compensation" under Swiss law and "reward" under Turkish law are of different legal nature. Compensation in terms of civil law usually means the payment of damages. Compensation may also make "amends for something which was taken without the owner's choice, yet without commission of a tort."[514] In fact, without the State ownership principle, archaeological objects would be the property of their finder (Art. 718 of the SCC) unless the object qualified as a treasure. Therefore, the compensation provided to the finder under Article 724 of the SCC can be interpreted as a rule of equity.

306 The reward provided by the Protection Law, on the other hand, is of public law nature and has little to do with equity. It is an incentive to encourage finders to report their discoveries. Certain authors also call the finder's fee a "notification reward" (*bildirim ödülü*).[515] If the finder reports his or her discovery, he or she is rewarded; if the finder fails to report the discovery, he or she is penalized (a carrot and stick approach).[516]

511 For Swiss law, see Steinauer, *Les droits réels vol. II*, n. 3110. For Turkish law, see Hatemi, Serozan, and Arpacı, *Eşya Hukuku*, 331.
512 Esener and Güven, *Eşya Hukuku*, 320.
513 See Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 757 et seq.; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 205 et seq.
514 Campbell, "Compensation."
515 Umar and Çilingiroğlu, *Eski Eserler Hukuku*, 330, 332.
516 See Art. 67 of the Protection Law.

Under public law, rewards can also be given to other people (such as the landowner and the informants) if necessary for the public interest. In this respect, the Protection Law grants rewards to "informants" (*haber verenler*) who notify the authorities of archaeological objects that have been unreported and hidden, and to state officials who seize such objects.[517] Similarly, in Swiss law, certain cantons provide for rewards to those who "contribute" to the discovery, safeguarding or recovery of artifacts.[518] 307

The difference between compensation and reward has certain implications. First, under Swiss civil law, the criterion of predictability plays an important role in the entitlement to compensation. For instance, if an archaeological object is discovered by a farmer while plowing his field, the discovery is a pure coincidence which justifies the right to compensation.[519] However, if the archaeological object is discovered during construction works undertaken by the landowner, the discovery is hardly a surprise.[520] Therefore, no compensation should be paid in these circumstances under Swiss civil law. However, under Turkish public law, the criterion of predictability does not apply. The finder is entitled to the reward even if the archaeological objects are discovered during construction works, as practice shows.[521] 308

Second, in the event of a dispute under Swiss law, civil courts must settle the amount of the compensation.[522] The civil judge takes into consideration the circumstances of the discovery, the value of the object and the way in which the finder carried out his or her obligation.[523] Under Turkish law, however, the finder must contest the amount 309

517 Art. 64(e) of the Protection Law. See also Turkish Council of State Judgment No. 93/4182 of 13 October 1993, Case No. 1992/4833, cited in Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 268. The Court held that informing the police about the discovery and helping the collection of coins dispersed on the ground is not sufficient to receive an award.

518 See Art. 20(2) of the LcPN/VS: "*Les objets archéologiques mobiliers ainsi que les dossiers de fouille sont propriété de l'Etat. Le canton* peut *accorder une gratification appropriée à celui qui a contribué de façon importante à la découverte, à la sauvegarde ou à la récupération de tels objets.*"

519 Cornu, "La propriété et la dimension collective du patrimoine archéologique," 163–64.

520 In fact, as a standard practice in Switzerland, construction permits reserve the State's right to conduct archaeological excavations if necessary. Jungo, "Droits et obligations du propriétaire en cas de fouilles archéologiques," 93. See also, Wagner, "Protéger et gérer le patrimoine archéologique," 9.

521 See Turkish Council of State Judgment No. 1989/111 of 24 January 1989, Case No. 1988/2745, cited in Kanadoğlu, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 268–69. The Court held that the excavator operator and their assistant, who were working on public land, should each receive half of the reward since they found the cultural property in question together and contributed equally to its conservation until the State took possession.

522 Cf. Art. 39 of the LBC/TI: "*(1) Il diritto al compenso spettante allo scopritore ed al proprietario del fondo è regolato dall'articolo 724 cpv. 3 del Codice civile. (…) (3) In difetto di accordo, l'equo compenso e l'indennità sono stabiliti dal Tribunale di espropriazione, secondo le modalità del titolo IV della legge di espropriazione*".

523 By analogy with found property, see Steinauer, *Les droits réels vol. II*, n. 3110 fn. 73.

of the reward before the administrative courts, not the civil courts.[524] The administrative judge controls whether the Ministry of Culture's decision is in conformity with the law; however, the judge cannot recalculate the amount since this remains within the administration's discretionary power.[525]

Summary of the Section on Finders' Fees

<table>
<tr><th></th><th>Criterion of predictability</th><th colspan="3">Finder</th><th>In case of dispute</th></tr>
<tr><td>Swiss law</td><td>Applicable</td><td colspan="3">Fair compensation not exceeding the object's value</td><td>Civil courts are competent</td></tr>
<tr><td rowspan="3">Turkish law</td><td rowspan="3">N/A</td><td colspan="3">Reward = "Amount" × Ratio
"Amount" is calculated by the Ministry of Culture on the basis of the object's value[526]</td><td rowspan="3">Administrative courts are competent</td></tr>
<tr><td>Finder = Landowner</td><td>Finder ≠ Landowner</td><td>Public land</td></tr>
<tr><td>Totality of the amount[527]</td><td>Each one receives 40% of the amount</td><td>The finder receives 40% of the amount</td></tr>
</table>

2. Specific Issues

309a The issues identified for the purposes of this section shall not be identical for Switzerland and Turkey due to contextual differences (e.g., absence/presence of looting; federal/unitary State). They are analyzed in a general manner, without going into depth, since their impact on the comparative conclusion is limited (*infra* 441).

524 Esener and Güven, *Eşya Hukuku*, 323. See also Turkish Court of Cassation Judgment No. 374 of 24 March 1975, Case No. 9359, in *Yargıtay Kararları Dergisi* 1976: 3.

525 Art. 125(4) of the Turkish Const. See Gözübüyük, *Yönetim Hukuku*, n. 517.

526 Art. 64(b) of the Protection Law.

527 The text of Art. 64(a) of the Protection Law is not very straightforward. It states that in case a person finds cultural property on his or her land, "Articles 24 and 25 of this Law shall apply. No additional reward shall be given." According to Art. 3(a) of the implementing regulation on rewards (Official Gazette No. 18486 of 11 August 1984), this means that public museums "acquire" the object by paying the amount determined by the Ministry. Since artifacts are already State property, the finder/landowner receives, as reward, the totality of the amount determined by the Ministry. See Karaduman, *Türkiye'de Eski Eser Kaçakçılığı*, 102.

2.1. Switzerland

In Switzerland, archaeological discoveries are mostly made during construction works. Moreover, "difficulties caused by the problem of looting are modest" – in other words, non-existent.[528] Cantons do not therefore encounter major problems in getting possession of newly discovered archaeological objects. Nevertheless, the use of metal detectors for the purposes of prospecting remains an issue. Recently, a treasure hunter who discovered a very rare artifact (a 3,500-year-old bronze hand) and turned it in to the authorities in Bern was fined CHF 3,000 because he had used his metal detector without authorization.[529] The Swiss Confederation has noted that the improper use of metal detectors may result in the destruction of the archaeological context and, in certain cases, the eventual illegal sale of the finds.[530] 310

The first issue with metal detectors is related to the scope of application of the regulations. For instance, though prospecting through the soil to discover archaeological objects (in particular through the use of metal detectors) is usually subject to prior authorization,[531] such authorization may only concern registered sites or protection zones.[532] 311

The second issue is related to the general behavior of metal detectorists. It has been observed that except for a few permit holders who contribute positively, the majority considers themselves primarily "collectors or treasure hunters," making it difficult to evaluate their honesty and integrity. Some "bad experiences" that the Canton of Geneva had with permit holders resulted in the suspension of the issuance of all permits on cantonal territory.[533] 312

528 Swiss Confederation, "Rapport sur l'application de la Convention de l'UNESCO de 1970," 4.

529 ATS, "Le Découvreur de La 'Main de Prêles' Condamné."

530 Swiss Confederation, 4.

531 See Art. 25(2) of the LPat/BE, Art. 28(1) of the LPMNS/GE, Art. 41(1) of the RELPBC/FR, Art. 24(2) of the LPPAP/JU, Art. 24(2) of the LSPC/NE, Art. 41 of the RLPNMS/VD, and Art. 27(1) of the OcPN/VS.

532 Terrier, "L'usage des détecteurs de métaux," 41–42. The cantons of Geneva, Fribourg and Valais require an authorization for prospecting on the whole cantonal territory.
See also Motion No. 12.4199 submitted by Rossini Stéphane on 13 December 2012, "Coordination of the protection of archaeological sites," accessed 23 May 2023, ‹https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20124199›.

533 Terrier, 43.

Fig. 3.1 A debatable cover of a popular magazine, associating the profession of archaeology with "Indiana Jones"-style investigation (source: Migros Magazine, 3 August 2018, No. 36).

313 Furthermore, a total prohibition of prospecting in one canton may not be enough to discourage treasure hunters since they can choose to apply for a permit in another canton or neighboring country. Therefore, it is crucial that cantons adopt a common policy on the subject. It is important for public authorities to have a clear idea about why, and on which basis, a permit should be granted to one individual and refused for another.[534]

314 In light of the above, in 2013, an association of the cantonal archaeologists in Switzerland (*La Conférence suisse des archéologues cantonaux*) published the "Directives Regarding Volunteers," which also covered those who prospect with metal detectors. This document provides recommendations for cantons and does not intend to disturb their competence on the subject. The Directives argue that the contribution of volunteers may be useful for archaeologists if the volunteers act within a well-defined framework.[535]

534 Terrier, 43.
535 La Conférence suisse des archéologues cantonaux, "Directives concernant les bénévoles," 4.

The term "volunteer" is understood very broadly. The volunteer can be involved at all stages of archaeological activity, such as the cleaning of archaeological objects, their storage, excavations, inventorying, prospecting, or tracking the ongoing construction works in the canton. To become a volunteer, the individual should first file an application. If the request is accepted, he or she then receives basic training. The canton may give the volunteer a proper permit or a simple letter of consent as proof of authorization. In principle, volunteers do not receive any remuneration.[536] 315

Before the Directives Regarding Volunteers were adopted, the regulation of prospecting was also discussed at a federal level. Following a motion submitted by a Parliament member, the Federal Government recognized that artifacts and sites are sources of information and therefore that their discovery and study are of public interest. However, even if unauthorized prospecting poses a threat to such sources of information, the regulation of the activity of prospecting remains, according to the Federal Government, a cantonal matter under Article 78(1) of the Swiss Constitution.[537] 316

2.2. Turkey

As opposed to Swiss cantons, gaining possession of newly discovered archaeological objects can be a very problematic issue for the Turkish State, particularly when chance finds are concerned. This is due to clandestine excavations still taking place over the whole of Turkish territory. Due to their illegal nature, it is difficult to know the exact number of illegally excavated archaeological objects. Official statistics on illicit trafficking in Turkey (*kültür varlığı kaçakçılığı*) show that sixty-one percent of 9,551 cases registered from 2012 to 2017 were clandestine excavations.[538] 317

536 La Conférence suisse des archéologues cantonaux, 4–6.

537 The Federal Government's Opinion of 13 February 2013 regarding the Motion No. 12.4199 submitted by Rossini Stéphane on "Coordination of the protection of archaeological sites," accessed 23 May 2023, ‹https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20124199›.

538 These are the statistics of the rural police (*jandarma*), which is competent over ninety percent of Turkish territory. During the same period, the central police (*emniyet genel müdürlüğü*), responsible for the areas within a municipality, reported an additional 2,533 cases. See Turkish Parliament, "Special Research Commission Report," 47.

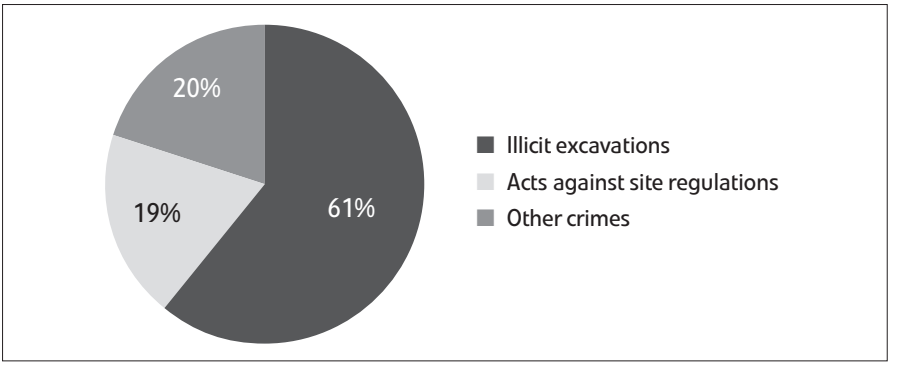

Fig. 3.2 Statistics on illicit trafficking in Turkey (source: Turkish Parliament, "Special Research Commission Report, 48).

318 The fight against the illicit trafficking of artifacts is a very complex subject that is beyond the scope of this thesis. However, it is worth mentioning a report prepared in 2018 by a special commission under the Turkish Parliament that focused on the restitution of cultural property smuggled abroad and the protection of cultural property situated in Turkey.[539] This report suggests, particularly at the normative level, that the government: (i) enhance notification incentives, (ii) prohibit the use of metal detectors, (iii) increase criminal charges, (iv) extend technical surveillance, (v) establish a special police force like the Italian *carabinieri*, (vi) consolidate the competences in the area of heritage protection and (vii) ensure the restitution of smuggled objects.[540]

319 In relation to what has been examined above, it is interesting to detail the first two points. By enhancing the notification incentives, the report suggests increasing the amount of rewards paid to informants of illegally excavated archaeological objects and State officials who seize them, and also making the payments in short-term installments (like in drug-smuggling cases).[541] On the other hand, the report argues that the informants of stolen cultural property from museums, libraries, ruins or similar places, along with the State officials who seize it, should also get rewards.[542]

539 For all the suggestions made by the special commission (categorized under the normative level, execution level and techniques for raising public awareness), see Turkish Parliament, "Special Research Commission Report," 149 et seq. The Ministry of Culture and Tourism also notes in its Strategic Plan 2019–2023 that the lack of public awareness about cultural heritage protection creates difficulties in effectively combating illicit trafficking. Ministry of Culture and Tourism, "Strategic Plan 2019–2023," 70–71.

540 Turkish Parliament, "Special Research Commission Report," 149–52.

541 Turkish Parliament, 56–57, 149.

542 Turkish Parliament, 149.

Recently, the Ministry of Culture, following the written question of a member of the Turkish Parliament, shared statistics about the number of archaeological objects reported by finders and the reward money paid out to finders. Between 2014 and 2018, nearly 70,384 archaeological objects were brought to public museums by individuals. In return, a total amount of TL 4,815,736 was paid.[543] This implies that each month, about 1,000 archaeological objects are discovered by chance in Turkey and reported to the authorities. On average, the reward corresponds to approximately TL 68 (USD 13) for one object. 320

As for metal detectors, the report draws attention to the fact that the use of metal detectors is not subject to any prior authorization in Turkey. Considering the scale of the looting problem and the role of metal detectors in it, this loophole should be closed as soon as possible. The report explains that there have been attempts to do so in the past; however, an absolute ban has not been possible due to the use of metal detectors in other fields, such as prospecting for mines. The report suggests limiting the use of metal detectors to such fields and establishing a permit system.[544] It is important to add that under the Protection Law, "treasure hunting" is permitted for persons with authorization (*define arama ruhsatnamesi*) only outside of the areas cited in Article 6, registered sites, and cemeteries (Art. 50(1) of the Protection Law). No mention of metal detectors is made in the Law or the implementing regulation.[545] 321

B. Dedication to the Public Interest

1. Archaeological Objects as Public Property

1.1. Categories of State Property

Both Swiss and Turkish law distinguish between public property (*domaine public; kamu malları*) and the State's private assets (*patrimoine financier; devletin özel malları*). The criterion that determines the category to which a particular State property belongs is the dedication to the public interest (*affectation à l'intérêt public; kamu yararına özgülenme*).[546] 322

543 See the Response of the Ministry of Culture of 12 November 2018 to the Question No. 7/3923 of Omer Fethi Gürer, accessed 23 May 2023, ‹https://www.tbmm.gov.tr/denetim/yazili-soru-onergeleri (Legislative term/year: 27/2›).

544 Turkish Parliament, "Special Research Commission Report," 56, 150.

545 Regulation on Treasure Hunting. Published in the Official Gazette No. 18294 of 27 January 1984.

546 For Swiss law, see Dubey and Zufferey, *Droit administratif général*, n. 1475 et seq.; Moor, Bellanger, and Tanquerel, *Droit administratif vol. III*, 673–75, 751 et seq.; Tanquerel, *Manuel de droit administratif*, n. 178 et seq.
For Turkish law, see Akyılmaz, Sezginer, and Kaya, *Türk İdare Hukuku*, 697 et seq.; Düren, *İdare Malları*, 22 et seq.; Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2018, nn. 1091–92; Gülan, "Kamu

323 Public property is dedicated to the public interest either through its common use (e.g., roads and rivers) or its use for the accomplishment of specific tasks (e.g., schools and their equipment) (tables 3.1, 3.2). As opposed to public property, the State's private assets are not used for a public purpose. Their value lies in their capital value or their proceeds.[547]

324 In Swiss and Turkish law, State property becomes public property through an act of dedication (*acte d'affectation; özgüleme işlemi*). This act can be a law, an administrative decision in due form or the actual use of the property in question (e.g., designation of the roads for common use by their opening to traffic).[548] In Turkish law, additionally, property that has been in common use for a very long time is conventionally considered to be dedicated to the public interest.[549] The status of public property may be withdrawn by the same method used during the designation process (*parallelisme des formes; usülde paralellik*) unless otherwise provided by law.[550] The withdrawal should be duly motivated.[551]

State property in Swiss law				
Public property (*domaine public au sens large*)				Private assets (*patrimoine financier*)
Public property in common use (*domaine public au sens étroit*)[552]		Public assets (*patrimoine administratif*)		
Natural	Artificial	Administration buildings	Property of public services	

Malları," 665 et seq. Gülan also provides a comparison with Ottoman law's approach (before the adoption of the *f*TCC). For a different type of categorization, see Giritli et al., *İdare Hukuku*, 972 et seq.

547 For Swiss law, see Dubey and Zufferey, *Droit administratif général*, nn. 1487–88; Moor, Bellanger, and Tanquerel, *Droit administratif vol. III*, 763; Tanquerel, *Manuel de droit administratif*, n. 182 et seq.
For Turkish law, see Gülan, "Kamu Malları," 668.

548 Dubey and Zufferey, *Droit administratif général*, n. 1506.

549 Giritli et al., *İdare Hukuku*, 864, 879 et seq; Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2013, nn. 1131–1132.

550 For Swiss law, see Hottelier, "La réglementation du domaine public à Genève," 155.
For Turkish law, See Giritli et al., *İdare Hukuku*, 864.

551 Giritli et al., *İdare Hukuku*, 884.

552 Public property in common use is usually cantonal or communal, and not federal.

State property in Swiss law				
Rivers, lakes, glaciers	Roads, public squares	Schools, hospitals	Equipment of administrative staff	Foreign currencies, securities, rental buildings
cf. Art. 664 of the SCC (*choses sans maître et les biens du domaine public*)				

Table 3.1 An overview of the categories of State property in Swiss law.

State property in Turkish law			
Public property (*kamu malları*)[553]			Private assets (*devletin özel malları*)
Ownerless property (*sahipsiz mallar*)	Common property (*orta malları*)	Public service property (*hizmet malları*)	
Natural	Artificial	Artificial	
Rivers, lakes, glaciers	Roads, public squares	Schools, hospitals	Foreign currencies, securities, rental buildings
cf. Art. 715 of the TCC (*sahipsiz mallar ve yararı kamuya ait mallar)*			

Table 3.2 An overview of the categories of State property in Turkish law.

1.2. Applicable Law

Depending on the choice made by each legal system, public property is subject partly or entirely to the public law regime. In this respect, two main systems exist in Europe: the monist and the dualist systems. 325

The "monist" system applies one category of law to public property, which is public law. The State's ownership of public property is considered a particular type of ownership, different from private ownership regulated under civil law. Public property is therefore outside of the scope of private law rules, especially those regarding sale. French law is the classic example of the monist system. Conversely, under the "dualist" system adopted by, for example, German law, the status of public property 326

553 Other terms are also used, e.g., "*idare malı*" or "*devlet malı*." See Giritli et al., *İdare Hukuku*, 840.

does not prevent the application of private law rules. Private law remains applicable as long as it is compatible with the task to which public property is dedicated and if public law does not provide for another solution.[554]

327 While the dualist approach has been widely applied by Swiss cantons,[555] which are competent in the choice of law applicable to their public property,[556] Turkish law has opted for the monist approach.[557] As a result, archaeological objects are exclusively subject to public law in Turkish law, whereas they may be governed by both public and private law in Swiss law.[558]

1.3. Status of Archaeological Objects

1.3.1. Swiss Law

328 Swiss authors agree on the fact that cultural objects in museum collections qualify as public assets (*patrimoine administratif*).[559] They are dedicated to the public interest and used for the accomplishment of specific tasks related to education and research. Accordingly, archaeological objects admitted into public collections are public assets too.

329 What is interesting is to question whether archaeological objects at the time of discovery fall within the category of public or private State assets. Three hypotheses are

554 For Swiss law, see Dubey and Zufferey, *Droit administratif général*, nn. 1494–1495; Knapp, *Précis de droit administratif*, n. 2905; Moor, Bellanger, and Tanquerel, *Droit administratif vol. III*, 646–48; Piotet, *Droit cantonal complémentaire*, nn. 610–611; Tanquerel, *Manuel de droit administratif*, n. 179; Zen-Ruffinen, *Droit administratif*, nn. 910–911.
For Turkish law, see Giritli et al., *İdare Hukuku*, 842 et seq.; Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 84 et seq.

555 Dubey and Zufferey, *Droit administratif général*, n. 1494; Knapp, *Précis de droit administratif*, n. 2906; Piotet, *Droit cantonal complémentaire*, n. 603 et seq.; Tanquerel, *Manuel de droit administratif*, n. 180; Zen-Ruffinen, *Droit administratif*, n. 911 et seq. Piotet explains that while the Swiss-German cantons generally apply the dualist system, several cantons of Latin tradition have opted for the monist approach with regard to their *domaine public* in the narrow sense.

556 Swiss Federal Court Judgment 97 II 371, 378–79 (in German) cited in Knapp, *Précis de droit administratif*, n. 2907; Moor, Bellanger, and Tanquerel, *Droit administratif vol. III*, 647. Moor, Bellanger and Tanquerel underline that this ability is not related to cantons' status as owners, but to their competence in public law matters; see in *Droit administratif vol. III*, 646. See also Steinauer, in Pichonnaz et al., *Commentaire Romand, Code Civil II*, Art. 664 n. 1, 10.

557 Giritli et al., *İdare Hukuku*, 849 et seq.; Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2013, n. 1113.

558 Nevertheless, Moor, Bellanger and Tanquerel note that in practice, the impact of the choice between monist or dualist theories is less relevant than expected in Swiss law; see *Droit administratif vol. III*, 647. Dubey and Zufferey have pointed out that the act of dedicating a property to the public interest should in general disable the application of civil-law rules; see *Droit administratif général*, n. 1496.

559 Knapp, "Liberté des musées de procéder à des transactions d'objets d'art," 138; Moor, Bellanger, and Tanquerel, *Droit administratif vol. III*, 753; Renold and Contel, "Rapport National - Suisse," 354.

possible: (i) archaeological objects are private State assets until they are specifically dedicated to a task (e.g., admission to public collections), (ii) archaeological objects automatically become public assets under Article 724 of the SCC, or (iii) it depends on cantonal law.

It is possible to argue that Article 724(1) of the SCC not only vests archaeological objects' ownership in the State, but also dedicates them to the public interest, thereby giving them the status of public property. An intent to dedicate archaeological objects to the public interest is indeed implicit in Article 724 of the SCC because it is in the public's benefit that they be possessed and preserved by the State.[560] 330

In fact, this situation is very similar to cases where the State acquires cultural property or accepts a donation from a third party. In these cases, since the intent to dedicate the property to the public interest exists before the acquisition of ownership, such property is automatically incorporated into the State's public assets following the purchase.[561] The only difference is that in the event of purchase or donation, the State's acquisition of ownership is derivative, whereas under Article 724 of the SCC, the State's ownership is originary (*supra* 287). 331

Nevertheless, it is not possible to deduce from this analysis that archaeological objects are inalienable under Swiss law. Article 724(1bis) of the SCC states that archaeological objects "cannot be alienated without the consent of the competent cantonal authorities."[562] In other words, under Swiss federal law, artifacts are alienable through a duly executed transfer of ownership.[563] Thus, cantonal law determines the transferability of artifacts. 332

None of the selected Swiss cantons (*infra* 343) explicitly provides for the inalienability of the archaeological objects they own.[564] Therefore, if they decide not to dedicate a particular archaeological object to the accomplishment of a public task, such an object can be transferred.[565] If a canton sets out a special withdrawal procedure for 333

560 Pannatier Kessler, "CC Art. 724," n. 6.

561 Moor, Bellanger, and Tanquerel, *Droit administratif vol. III*, 766.

562 Gabus and Renold, *Commentaire LTBC*, Art. 32 n. 18; Pannatier Kessler, "CC Art. 724," n. 6.

563 Foëx, "Un point de vue de civiliste," 35. Cf. Ernst, "Neues Sachenrecht Für Kulturgüter," 6; Raschèr, "6. Kapitel Kulturgütertransfer - §1 Grundlagen," n. 14.

564 Cf. Art. 2(3) of the LDPu/GE, declaring public archives to be public property and stating that they cannot be acquired by good faith. See also the Canton of Geneva's website, accessed 23 May 2023, ‹http://ge.ch/archives/actualites/restitution-mandat-de-calvin›: "*Finalement, le 12 octobre 2017, l'État de Genève s'est vu restituer ce document issu de ses fonds d'archives. Il s'agit ainsi d'une conclusion heureuse et d'un signe fort: le caractère* imprescriptible et inaliénable *du patrimoine archivistique public a été reconnu.*"

565 In general, dedication (*affectation*) of properties to the public interest and their withdrawal (*désaffectation*) do not require formal acts. Tanquerel, *Manuel de droit administratif*, n. 193.

its public assets or the cultural property in its collections, then this procedure will apply.[566]

334 It is also interesting to question whether Swiss cantons have the competence to declare archaeological objects inalienable in the first place. As of 2005, the SCC explicitly provides in the first sentence of Article 724(1bis) that archaeological objects "cannot be alienated without the consent of the competent cantonal authorities."[567] What is the impact of such a provision? Does it stipulate a substantive rule to be imposed on cantons? Or does it repeat what is already evident: that cantons, as the owners, should authorize any transfer?[568] The discussions in the Swiss Parliament on the subject indicate that this sentence does not concern civil law but rather administrative law. By mentioning the authorization of the competent authority, the lawmaker invites the canton to make the decision on the transfer very carefully and to take the advice of specialists.[569] Cantons can therefore provide for further restrictions at the cantonal public law level if they wish,[570] and prohibit the transfer of archaeological objects they own.[571]

Comment on "Abandon" vs. "Transfer"

335 With regard to the alienation of archaeological objects, certain Swiss authors claim that cantons may renounce their ownership right after the object's discovery and thereby "abandon" the object to its finder instead of paying compensation.[572] In the *Basel* case (*supra* 186), the Court of Appeals expressed a similar opinion as well.[573]

336 In my opinion, however, such an act would rather qualify as a transfer and not an abandonment. In Swiss law, the "abandonment" or "renunciation" of a right *in rem* implies that the holder unilaterally extinguishes its own right in a definite manner.[574] By renouncing its ownership, the holder also renounces its right to transfer.[575]

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566 Knapp, *Précis de droit administratif*, n. 2933.

567 The paragraph (1bis) was added to Art. 724 of the SCC through the adoption of the CPTA, which entered into force in 2005.

568 Gabus and Renold, *Commentaire LTBC*, Art. 32 n. 18. Cf. Foëx, "Un point de vue de civiliste," 35.

569 See the intervention of David Eugen, Council of States member *in* BO CE 2003 p. 557 and the intervention of Vreni Müller-Hemmi, National Council member *in* BO CN 2003 p. 1057.

570 Pannatier Kessler, "CC Art. 724," n. 8; Piotet, *Droit cantonal complémentaire*, nn. 784–85; Schwander, "ZGB Art. 724," n. 1.

571 See also Art. 6(2) of the CC on cantonal competence: "The cantons are entitled within the limits of their sovereignty to restrict or prohibit the trade in certain goods or to declare transactions involving such goods legally invalid." Bovet and Grodecki, "CC Art. 6," nn. 13, 19; Steinauer, *Les droits réels vol. I*, nn. 78–79.

572 Steinauer, *Les droits réels vol. II*, n. 3170. For a commentary before the CPTA amendments, see Jungo, "Droits et obligations du propriétaire en cas de fouilles archéologiques," 89 fn. 11.

573 BJM 1997 17, 25–26.

574 Ventura, "L'abandon d'un droit réel," n. 28.

575 Ventura, n. 11.

While cantons can transfer archaeological objects (assuming that cantonal law allows it), they cannot, in my view, renounce their ownership for several reasons. First, the holder of a right *in rem* cannot abandon its right for the benefit of a specific person. Otherwise, the act is qualified as a transfer, not an abandonment.[576] The act of renouncing is unilateral, meaning that it is based on a spontaneous decision of the holder and that no reception (i.e., by a transferee) is needed.[577] Therefore, the abandonment of the archaeological object for the benefit of the finder is technically not possible. 337

Second, the act of renouncing is extinctive, meaning that it extinguishes the right of the holder[578] and the object becomes an ownerless object within the meaning of Article 718 of the SCC.[579] This contradicts the objective of Article 724 of the SCC, which is to create a *lex specialis* over Article 718 of the SCC so that artifacts are not treated as ownerless objects.[580] 338

Third, the abandonment of public property may constitute an abuse of rights since such property serves the public interest.[581] In this respect, one may argue that the State may exceptionally abandon an archaeological object if it appears that its conservation will be burdensome. Even though the purpose of the right to abandon is to allow individuals to free themselves from burdens they cannot bear,[582] the State can hardly rely on this argument. In fact, the State is not only the owner of archaeological objects but also has, as discussed earlier, the duty to preserve them and allocate the necessary resources to this aim (*supra* 50, 55). If preservation in the long-term appears to be problematic, archaeologists will insist on choosing another solution other than transferring the object to private ownership (e.g., burying the object; transfer to another public entity). 339

Referring to the State's right to abandon under Article 724 of the SCC is also troublesome from the perspective of *ipso iure* ownership. Under such a principle, now confirmed by the Swiss legislature, cantons acquire ownership regardless of their intent (*supra* 192). This means that cantons do not have the discretionary power to decide whether or not to acquire the archaeological object, as in the case of a right of appropriation. Cantons may decide not to keep the object, yet their act would qual- 340

576 Ventura, n. 589 and the authors cited in fn. 843.
577 Ventura, n. 214.
578 Ventura, n. 550 et seq.
579 Ventura, n. 584 et seq.
580 Steinauer, *Les droits réels vol. II*, n. 3166.
581 According to Ventura, it should not be possible for the state to abandon the immovable public assets for this reason or "political concerns" in general, see in "L'abandon d'un droit réel," n. 326. The same may apply to movable public assets.
582 Ventura, n. 326 fn. 88.

ify, in my view, as a transfer and not an implicit renunciation like that found by the Court of Appeals in the *Basel* case (*supra* 190).

1.3.2. Turkish Law

341 Turkish scholars are unanimous that cultural property which belongs to the State and requires protection, including archaeological objects within the meaning of Article 5 of the Protection Law, be considered public property instead of the State's private assets.[583] Nevertheless, different opinions exist about which category of public property it belongs to (as shown in table 3.1 above). This discussion remains theoretical since public law applies in the same way to all types of public property.[584] For our purposes, it is possible to consider archaeological objects as a *sui generis* category of public property.[585]

342 Contrary to Swiss federal law, archaeological objects are inalienable under Turkish administrative law.[586] Inalienability, as well as other principles deriving from customary principles of administrative law, apply to all public property.

Summary of Section on Archaeological Objects as Public Property

	Status of archaeological objects	Applicable law	Transferability
Swiss law	Public property	Private law and public law	Transferable if not prohibited by cantonal law
Turkish law	Public property	Public law	Inalienable

2. Inalienability v. Collecting

2.1. Switzerland

2.1.1. Selected Cantons

343 Certain cantons declare that cultural property under protection and situated on their territories is inalienable and also prohibit its permanent exportation out of the

583 See, e.g., Düren, *İdare Malları*, 60; Giritli et al., *İdare Hukuku*, 908, 999 et seq.; Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2018, n. 954; Gülan, "Kamu Malları," 674.

584 For an in-depth discussion, see Özel, "Türk Hukukunda Kültür Varlıklarının Mülkiyeti," 221–26.

585 Giritli et al., *İdare Hukuku*, 972; Gülan, "Kamu Malları," 672. See also Özel, "Türk Hukukunda Kültür Varlıklarının Mülkiyeti," 225–26.

586 Akyılmaz, Sezginer, and Kaya, *Türk İdare Hukuku*, 704–12; Düren, *İdare Malları*, 75–80; Giritli et al., *İdare Hukuku*, 981–84; Gülan, "Kamu Malları," 683 et seq.; Gözübüyük and Tan, *İdare Hukuku Cilt I*, 2018, nn. 1110–1132.

canton.[587] In the Canton of Bern, movable heritage properties (*biens du patrimoine mobilier*) that are public property (*domaine public*) can be inventoried (Art. 11(1) of the LPat/BE); once inventoried, they become inalienable, cannot be permanently moved out of the Canton without permission (Art. 11(2) of the LPat/BE) and should be preserved and maintained according to professional standards (Art. 11(2) of the LPat/BE) (e.g., ICOM's Code of Ethics). "Archaeological discoveries" are inventoried according to Article 11 of the LPat/BE (Art. 23(2) of the LPat/BE). In sum, inventoried discoveries are inalienable.[588] In the Canton of Vaud, movable cultural property that belongs to the State and is inscribed in the inventory is in principle inalienable and cannot be permanently displaced from the Canton (Art. 15(1) of the LPMI/VD). Nevertheless, the competent authority can authorize a cultural institution to remove an item from its collections through "donation, transfer, exchange, sale, repatriation or destruction/disposal" (Art. 15(2) of the LPMI/VD). In the Canton of Fribourg, public authorities cannot transfer cultural objects under protection without permission from the competent authority (Art. 24(1) of the LPBC/FR).[589]

344 In a more general way, the law of the Canton of Neuchatel states that public authorities should comply with professional standards, in particular ICOM's Code of Ethics (Art. 39(2) of the LSPC/NE). As mentioned earlier, ICOM suggests that a deaccessioned item be first offered to another museum instead of sold privately (*supra* 58). The cantons of Geneva and Valais do not explicitly provide for the inalienability of cultural or archaeological objects.[590] The Canton of Jura is examined separately below since it provides for a special clause on collecting (*infra* 350).

345 In conclusion, none of the selected cantons mandate the absolute inalienability of archaeological objects owned by the State.[591] Public authorities often have a discretionary margin when placing archaeological objects under protection so that they become inalienable (BE, VD) or are subject to permission before transfer (FR). Otherwise, the issue of transfer is settled through general principles applicable to the State's public assets,[592] ethical rules (NE) or institutions' internal policies. It is important to recall here that cantons can restrict or prohibit the commerce of cer-

587 Renold and Contel, "Rapport National - Suisse," 357–58. See also Raschèr and Bucheli, "Kulturgütertransfer §5 Kantonales Recht Zum Kulturgütertransfer," nn. 410–12.

588 Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 8.

589 Swiss Archaeology, 9.

590 Renold and Contel, "Rapport National - Suisse," 357; Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 9, 17.

591 Cf. Renold and Contel, "Rapport National - Suisse," 358 (Tableau récapitulatif).

592 Certain authors suggest that inalienability is a general principle applicable *de facto* to public assets (*patrimoine administratif*). See Knapp, "Liberté des musées de procéder à des transactions d'objets d'art," 138; Renold and Contel, "Rapport National - Suisse," 354.

tain objects or declare that the transactions related to such objects are null and void (Art. 6(2) of the SCC).[593]

2.1.2. Excavation Finds vs. Chance Finds

346 In practice, it is not common for Swiss cantons to sell archaeological objects discovered during excavations. However, an example from the Canton of Geneva shows that this theoretical possibility can easily become reality.

347 During the excavation of the underwater site of Plonjon in the city of Geneva, archaeologists discovered over 2,000 wooden piles which used to be the foundations of prehistoric lake-dwellings. The *Tribune de Genève* reports that the Cantonal Government initially considered selling some of the piles on the market to cover the conservation costs of the remaining ones. However, following the archaeologists' opposition, the Cantonal Government renounced this action and put the majority of the piles back in the lake. Only 150 piles have been preserved for scientific purposes and public display.[594]

348 It is interesting to note that while the State did not face any legal obstacle to selling the archaeological objects (i.e., inalienability or prohibition within the meaning of Art. 6(2) of the SCC), it chose to comply with ethical standards promoted by archaeologists (*supra* 58). Now that Switzerland has ratified the Underwater Cultural Heritage Convention (*supra* 39), "prohibition of commercial exploitation" has become a legal obligation.

Fig. 3.3 Extraction of piles from the site of Plonjon (Image: Olivier Zimmermann).

593 Renold and Contel, "Rapport National - Suisse," 358.
594 See Bernet, "Des Centaines de Pilotis Lacustres Remis Au Lac"; "Qui Paie Commande?"

The situation is slightly different for chance finds, which are discovered by individuals out of the context of an archaeological excavation. If the discovery does not lead to a comprehensive investigation, cantons may judge that it is not necessary to include the chance find in public collections. In fact, Jean Terrier explains that some cantons in western Switzerland prefer leaving certain archaeological objects with their finders by granting them permanent loans.[595] In particular, the Canton of Jura provides for a special clause in its law allowing the collection of archaeological objects by their finders: "The Canton may renounce its right of ownership (…) provided that an agreement is established for the adequate and long-term preservation of the object in the Canton" (Art. 8(2) of the LPPAP/JU).[596] 349

This practice is detailed further in a 1978 ordinance still in force on the protection and preservation of natural specimens and antiquities.[597] The ordinance refers to "collectors" (instead of finders) without defining the term and states that "the State shall not exercise its right of ownership[598] with regard to objects in possession of collectors who respect the rules set out in the ordinance and agree to be inspected in this respect" (Art. 3). The rules are the following (Art. 3): (a) the objects cannot be exported or destroyed without the competent authority's authorization; (b) the finder/collector should notify the competent authority of the finds, as well as the place of discovery at all times; (c) the finder/collector should bring the objects to the competent authority and leave them for a suitable amount of time for study and publication purposes; (d) the competent authority can register the objects in an inventory; and (e) if a find is going to be transferred, the transferor should immediately inform the competent authority, which may purchase the object on behalf of the Canton. 350

To summarize, in the Canton of Jura, finders can become owners and collectors of archaeological objects discovered in the Canton under the conditions listed above. Nevertheless, such collections seem to concern ecofacts rather than artifacts. During the adoption of the LPPAP, there were certain concerns about the scope of the law potentially covering "archaeological or paleontological objects of *scientific interest*" (emphasis added) (Art. 6(1)(b) of the LPPAP/JU). Paleontology associations were worried that "paleontological objects would be subject to the same restrictions as 351

595 He does not specify the cantons in question. Terrier, "L'usage des détecteurs de métaux," 42.

596 The text in French is as follows: "*Les objets appartiennent à l'Etat conformément à l'article 724 du Code civil suisse. En particulier en cas de découvertes isolées, le Canton peut déroger à son droit de propriété sur un objet en faveur de l'auteur de la découverte, sous réserve de l'établissement d'une convention garantissant la conservation adéquate et durable de l'objet dans le Canton.*"
See also Swiss Archaeology, "La situation de l'archéologie dans les legislations cantonales," 12.

597 rs/JU 445.2.

598 Cf. *supra* 335.

the archaeological objects, while fossils are very abundant [in Jura] and collected by many individuals, without causing any harm to the preservation of such heritage and neither to the development of science."[599] The Cantonal Government reassured the associations by stating that "the draft law does not prohibit the collection of fossils, except for exceptional discoveries," but it also underlined that the protection granted to objects of scientific interest by Article 724 of the SCC cannot be challenged by cantonal law. Moreover, the notion of scientific interest is not fixed by law and should be interpreted differently for archaeology and paleontology by the competent authority, which is the expert commission mentioned in Article 5(2) of the LPPAP/JU in Jura.[600]

352 An interesting question to raise here is why do cantons not simply declare that an object lacks scientific interest at the time of evaluation (meaning that Art. 724 of the SCC therefore does not apply), instead of complicating the process by granting a permanent loan in favor of the finders or transferring the object back to the finder/collector (like in Jura)? It is possible that this situation relates to different interpretations of "scientific interest" by each canton. In fact, during the revision of Article 724(1) of the SCC (through the CPTA, *supra* 79), thirteen cantons (all Germanic cantons, plus the Canton of Jura) together with ICOMOS Switzerland and the Swiss Information Centre for Cultural Heritage Conservation (NIKE) suggested completely removing the term "scientific interest" from Article 724(1). They claimed that the term created interpretation challenges.[601] It may also be possible that the administrative body that performs the evaluation (i.e., the Archaeology Service) is different from the body that decides on the task to which the object is dedicated (i.e., the department in charge of culture, research, or education).

599 See the Jura Government's Consultation Report, p. 4, available at the Canton of Jura's website, accessed 23 May 2023, ‹https://www.jura.ch› (*Autorités* › *Parlement* › *Projets de lois* › *Textes adoptés*).

600 See the Jura Government's Consultation Report, pp. 4–5.

601 Federal Office for Culture, "LTBC Rapport," 22, 32. The Federal Government followed this suggestion and proposed to modify the text accordingly. Following the parliamentary discussions however, "scientific interest" was kept and the adjective "significant" was removed as a middle-ground solution. Foëx, "Un point de vue de civiliste," 34.

2.2. Turkey

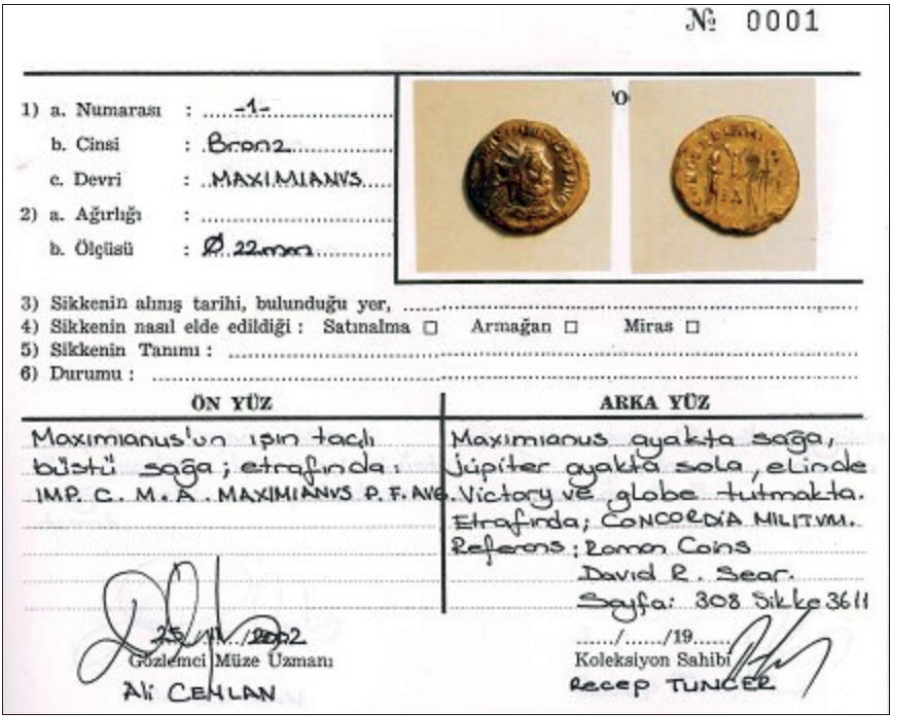
353 While all excavation finds are preserved in public collections, Turkish law makes some exceptions for chance finds in a similar way to certain Swiss cantons. However, the scale of the looting in Turkey renders this approach very problematic in practice.[602]

354 The finder/collector has the possibility of keeping the archaeological object under certain conditions. First, the collector must in advance possess a permit for collecting (Art. 26(6) of the Protection Law). Second, he or she must inform the competent public museum of the discovery and register the object in an official inventory (Art. 26(7) of the Protection Law). Having said this, public museums can always preserve the objects they consider to be museum-worthy (Art. 10(5) of the Regulation on Movable Cultural Property, *supra* 221). Collectors can also keep objects that have been reported by their finders according to Article 4 of the Protection Law (obligation to notify, *supra* 131) yet are not considered to be museum-worthy by public museums (Art. 10(5) of the Regulation on Movable Cultural Property).[603]

355 The major problem with the implementation of this system is that collectors are seldom the original finders of archaeological objects. Therefore, when they present the objects to public museums, they usually only have vague information about the objects' place of discovery (fig. 3.4). The object might have been accidently discovered by a farmer or might be looted. In either case, the context of the find is damaged. Moreover, there is no way to know how many times the object has changed hands and how much money the people involved have received or paid, including the collector. This lack of transparency benefits the looters and the illicit trade network present in Turkey. In other words, such objects are legally transformed from criminal objects to legitimate collection items.

602 For a detailed analysis, see Velioglu Yıldızcı, "Collecting Archaeological Objects in Turkey."

603 Art. 10(5) of the Regulation on Movable Cultural Property reads as follows in Turkish: "*Kültür ve Tabiat Varlıklarını Koruma Kanununun 4 üncü maddesine göre Bakanlığa bildirilen korunması gerekli taşınır kültür ve tabiat varlıkları ile aynı Kanunun 26 ncı maddesi kapsamında faaliyette bulunan taşınır kültür ve tabiat varlığı koleksiyoncuları veya özel müzeler tarafından ilgili müzelere getirilen taşınır kültür ve tabiat varlıklarından değerlendirme komisyonu tarafından müzeye alınmasına gerek duyulmayanlar, envanter bilgileri çıkartılarak müze emanetinde alıkonulur. Talepte bulunulması halinde bu şekilde belgelendirilen taşınır kültür ve tabiat varlıklarının Bakanlık denetimindeki özel müze veya koleksiyoncuların envanterlerine kaydedilmelerine izin verilir. Bir yıl içerisinde özel müzelere veya koleksiyonculara devri gerçekleşmeyen bu tür taşınır kültür ve tabiat varlıkları durumlarına uygun olarak müzelerde kayıt altına alınır.*"


№ 0001

1) a. Numarası : -1-
b. Cinsi : Bronz
c. Devri : MAXIMIANVS
2) a. Ağırlığı :
b. Ölçüsü : Ø 22mm

3) Sikkenin alınış tarihi, bulunduğu yer, ...
4) Sikkenin nasıl elde edildiği : Satınalma ☐ Armağan ☐ Miras ☐
5) Sikkenin Tanımı : .....
6) Durumu : .....

ÖN YÜZ	ARKA YÜZ
Maximianus'un ışın taçlı büstü sağa; etrafında: IMP. C. M. A. MAXIMIANVS P. F. AVG.	Maximianus ayakta sağa, Jüpiter ayakta sola, elinde Victory ve globe tutmakta. Etrafında; CONCORDIA MILITVM. Referans; Roman Coins David R. Sear. Sayfa: 308 Sikke 3611

25/11/2002
Gözlemci Müze Uzmanı
Ali CEHLAN

...../...../19.....
Koleksiyon Sahibi
Recep TUNCER

Fig. 3.4 A collector's official inventory. Point 3 on the object's provenience and Point 4 on the acquisition method (purchase, donation, inheritance) are left empty (source: ‹https://kvmgm.ktb.gov.tr/› > Kaçakçılığın Önlenmesi İle İlgili Faaliyetler > Koleksiyonculardan Çalınan / Kaybolan Kültür Varlıkları).

356 Another relevant issue here is the collectors' use of the objects. They not only collect and preserve unprovenienced archaeological objects, but they can also trade them with other collectors who own collecting permits. On legal grounds, the State transfers possession of the object to the collector who brings and registers it in its inventory.[604] This can be seen as a loan with special conditions.[605] However, collectors can also trade such objects between themselves (Art. 26(8) of the Protection Law),[606] which makes the loan transferable. This creates an internal market of

604 Özel, "Kültür Varlığı Koleksiyoncuları," 672.

605 For the conditions, see the Regulation on Collecting Movable Cultural and Natural Property Requiring Protection and Its Control. Official Gazette No. 27530 of 23 March 2010.

606 Art. 26(8) of the Protection Law: "Collectors are obliged to report their activities to the Ministry of Culture and record the movable cultural property in the inventory according to the relevant regulation."

unprovenienced archaeological objects, which further encourages looting alongside the international market.[607]

This problem of "internal demand" has finally been recognized by official authorities in the report prepared by the Parliament's special commission in 2018 (*supra* 318). The report states that as long as private museums or collectors in Turkey continue to collect illegally excavated archaeological objects originating from Turkey, it is impossible to prevent illicit trafficking.[608] The special commission also formulated recommendations to counter this problem, such as stopping the collecting activities of private museums and collectors, freezing the sales of archaeological objects (except for sales to museums) and encouraging collectors to collect ethnographic objects.[609] 357

Summary of the Section on Inalienability

	General principle	Collecting
Swiss law	Transferable under the SCC	It depends on cantonal law: – Certain cantons grant inalienability to listed cultural property: Art. 11(2) of the LPat/BE, Art. 15(1) of the LPMI/VD; – Certain cantons follow ethical standards: Art. 39(2) of the LSPC/NE; – Certain cantons allow collecting artifacts and ecofacts: 1978 Ordinance (JU).
Turkish law	Inalienable	Collecting is possible under certain conditions and through the transfer of the objects' possession. The State retains ownership.

607 Karaduman, *Türkiye'de Eski Eser Kaçakçılığı*, 192; Tırpan, "Arkeoloji ve Koleksiyonerlik," 43.
608 Turkish Parliament, "Special Research Commission Report," 153.
609 Turkish Parliament, 154.

Chapter 4: Archaeological Sites

A. Identification of the Archaeological Interest

1. Environment Impact Assessment

An Environment Impact Assessment (EIA) is a process where the anticipated environmental effects of a proposed project are examined. It provides an opportunity to identify key issues and stakeholders in the planning and decision-making stage so that adverse effects can be mitigated in advance. Under Article 5(iii) of the Valletta Convention, State Parties undertake to ensure that EIAs and the resulting decisions involve full consideration of archaeological sites and their settings. What type of projects are included in the EIA process in Switzerland and Turkey? Do EIAs, as they are currently applicable in Swiss and Turkish law, cover the assessment of archaeological impact (including on already identified and presumed sites)? 358

1.1. Swiss Law

The Federal Act on the Protection of the Environment of 7 October 1983 (Environmental Protection Act, EPA)[610] provides that before public authorities make a decision on the construction or modification of buildings, transportation lines or other structures fixed on the ground (all together "infrastructure"),[611] they must examine, at the earliest possible stage, their compatibility with the regulations regarding the environment (Art. 10*a*(1) of the EPA). "Infrastructure capable of significantly affecting the environment," to be determined by the Federal Government (Art. 10*a*(3) of the EPA), must be subjected to an EIA (Art. 10*a*(2) of the EPA). The implementing Ordinance related to the Environmental Impact Assessment (OEIA), adopted by the Federal Government in 1988, provides a series of infrastructure types subject to the EIA in its Annex.[612] 359

1.1.1. Scope of Application

(a) Infrastructure Capable of Significantly Affecting the Environment

Infrastructure capable of significantly affecting the environment is divided into eight categories in the Annex of the OEIA: (i) transportation (roads, railways, waterways, 360

610 RS 814.01.

611 Appliances, machines, vehicles, ships, and aircraft are also considered infrastructure. See Art. 7(7) of the EPA.

612 RS 814.011.

and air navigation), (ii) energy (production, transportation, storage), (iii) hydraulic constructions, (iv) disposal of waste, (v) military facilities, (vi) sport/tourism/leisure, (vii) industry and (viii) other infrastructure (e.g., large shopping centers). Such categories cover infrastructure, which falls under the responsibility of both the Confederation and the cantons.[613] While certain facilities are systematically subject to the EIA, others have threshold values.[614] If a type of infrastructure is included in the Annex, there is no possible derogation from the EIA.[615]

361 Table 4.3 below compares potentially conflicting activities related to the subsoil with projects included in the Annex of the OEIA. The majority of the activities conflicting with the preservation of archaeological heritage (listed A to E in table 4.3) is subject to an EIA. Nevertheless, the extraction of certain materials such as metallic substances (D2), salt (D5) and the storage of underground water (C2) is not included in the EIA process. More importantly, there is no general category for underground constructions. Only certain activities that may significantly disturb the subsoil (e.g., parking lots of more than 500 places, land improvements greater than 400 ha and shopping malls greater than 7,500 m^2) are subject to an EIA (table 4.3, A1).

(b) Notion of Environment

362 The EIA determines if a project related to the construction or modification of infrastructure complies with environmental protection standards, including the EPA and the provisions on the protection of nature, landscape, water and forests, and the provisions on hunting, fishing and genetic engineering (Art. 3(1) of the OEIA). The list of "environmental protection standards" (*les prescriptions sur la protection de l'environnement*) is considered non-exhaustive.[616] For instance, certain authors include the respect of principles regarding land-use planning (Art. 3 of the SPA) in the EIA process.[617]

363 At first sight, it seems that archaeological sites are not covered by the term "environment" as understood within the framework of the EIA.[618] Article 74(1) of the Swiss Constitution, which is the basis of the EPA, mandates the Confederation to regulate

613 Nicole, *L'étude d'impact dans le système fédéraliste suisse*, 164.

614 For further information see the EIA Manual, "Module 2: EIA obligation for infrastructure." This module details the criteria allowing to determine if a new infrastructure or a modification to existing infrastructure requires an EIA or not. The EIA Manual is the Directives on the EIA elaborated by the Confederation as per Arts. 10*b*(2) of the EPA and 10(1) of the OEIA.

615 Nicole, *L'étude d'impact dans le système fédéraliste suisse*, 144.

616 Ayer and Revaz, *Droit suisse de l'environnement*, 153; Nicole, *L'étude d'impact dans le système fédéraliste suisse*, 157.

617 Morand, "Pesée d'intérêts et décisions complexes," 58; Nicole, *L'étude d'impact dans le système fédéraliste suisse*, 158.

618 See Nicole, *L'étude d'impact dans le système fédéraliste suisse*, 88 et seq.

the "protection of the human being and its natural environment against harmful or disagreeable effects." The emphasis on the "natural environment" is also present in the Federal Government's message regarding the EPA, describing the environment as the soil, water and air on one hand, and animals and plants on the other.[619] When the original article on environment was added to the Swiss Constitution of 1874,[620] the Federal Government clearly stated that "objects which are placed under protection due to the reasons related to the protection of nature and landscape (e.g., natural specimens and monuments) or to aesthetics (e.g., panoramas) are not covered by this article since they are not part of the natural environment as understood by this constitutional provision."[621]

Nevertheless, the currently applicable EIA Manual explicitly cites archaeological sites among "environmental areas" (*domaines environnementaux*) in which one may expect significant impacts (table 4.1 below). Therefore, it is possible to argue that the notion of environment has expanded over time to include the study of archaeological impacts within an EIA. 364

Phases de projet / Domaines environnementaux	Phase de réalisation	Phase d'exploitation
Protection de l'air	■	■
Bruit	■	■
Vibrations / bruit solidien propagé	■	○
Rayonnement non ionisant	○	○
Eaux souterraines	●	●
Eaux de surface et écosystèmes aquatiques	●	●
Evacuation des eaux	○	●

Légende:

○ Non pertinent, pas d'impact

● Impacts significatifs, domaine environnemental traité exhaustivement dans l'enquête préliminaire

■ Impacts significatifs, domaine environnemental à traiter en détail dans le RIE

619 FF 1979 III 741, 747.

620 Art. 24septies of the Swiss Constitution of 29 May 1874 (RS 1 3): "(1) *La Confédération légifère sur la protection de l'homme et de son milieu naturel contre les atteintes nuisibles ou incommodantes qui leur sont portées. En particulier, elle combat la pollution de l'air et le bruit.*"

621 Federal Government's message of 6 May 1970 regarding the integration of Art. 24septies in the Swiss Const. of 1874. FF 1970 I 773, 787.

Phases de projet / Domaines environnementaux	Phase de réalisation	Phase d'exploitation
Sols	■	■
Sites contaminés	■	○
Déchets, substances dangereuses pour l'environnement	■	○
Organismes dangereux pour l'environnement	■	○
Prévention des accidents majeurs/protection contre les catastrophes	○	■
Forêts	■	○
Flore, faune, biotopes	■	■
Paysages et sites (y c. immissions de lumière)		●
Monuments historiques, sites archéologiques	●	○

Légende:

○ Non pertinent, pas d'impact

● Impacts significatifs, domaine environnemental traité exhaustivement dans l'enquête préliminaire

■ Impacts significatifs, domaine environnemental à traiter en détail dans le RIE

Table 4.1 Matrix for the identification of environmental impacts (source: Federal Office for the Environment, "The EIA Manual," 7).

1.1.2. Procedure

365 Swiss law does not consider the EIA to be a procedure in itself, but rather a basis on which public authorities can rely to make decisions on specific projects. The EIA is always part of a procedure that leads to a decision ("*procédure de decision*").[622] The purpose of the EIA is to ensure that public authorities take environmental requirements into consideration before making a decision. From this perspective, the EIA can be seen as a "legal compliance study." In fact, the environmental requirements in question apply to all infrastructure types regardless of whether they require an

622 Federal Office for the Environment, "The EIA Manual," 2. In Annex 1 OEIA, the Federal Government specifically states the decisive procedural steps to be taken in relation to infrastructure under the Confederation's responsibility. For infrastructure under the cantons' responsibility, the cantons are usually free to determine the procedure in which the EIA will be integrated. See Nicole, *L'étude d'impact dans le système fédéraliste suisse*, 164 et seq.

EIA or not.[623] Nevertheless, Swiss law does not provide for any verification after the project's completion, which is also called "EIA a posteriori."[624]

The party[625] willing to build or modify infrastructure subject to an EIA is responsible for preparing an impact report (Art. 10*b* of the EPA). It is on the basis of this report that the competent authority (Art. 5 of the OEIA) decides whether the environmental requirements have been respected or not. Therefore, the impact report should contain the relevant elements from each "environmental area," including archaeological sites, in relation to the proposed infrastructure.[626] 366

The "specialized services of environmental protection," at the federal or cantonal level (Art. 12 of the OEIA),[627] assess the impact report and give their opinion to the competent authority (Art. 10*c* of the EPA). The competent authority can only diverge from the material observations of the specialized services, which qualify as an expertise, based on "reasonable motives."[628] Finally, according to Article 10*d* of the EPA, anyone can consult the impact report and the results of its assessment, except for cases where business secrecy should be respected. While the EIA process is ongoing, only the holders of procedural rights under federal or cantonal law have the right to consult.[629] 367

623 Federal Office for the Environment, "The EIA Manual," 2.

624 Federal Office for the Environment, 2. For Morand, this constitutes a "significant deficiency." Morand, "Pesée d'intérêts et décisions complexes," 59.

625 The responsible party for the project can be a private or a public entity, or mixed-capital companies which are often used in Switzerland in the fields of transportation, energy production and waste disposal. See Nicole, *L'étude d'impact dans le système fédéraliste suisse*, 201–2.

626 Federal Office for the Environment, "The EIA Manual," 3. See also Arts. 8 (*enquête préliminaire et cahier des charges*), 8*a* (*enquête préliminaire en guise de rapport d'impact*) and 9 (*contenu du rapport d'impact*) of the OEIA.

627 Art. 12 of the OEIA: *"(1) Si l'EIE est effectuée par une autorité cantonale, le service spécialisé de la protection de l'environnement du canton évalue l'enquête préliminaire, le cahier des charges et le rapport d'impact. (2) Si l'EIE est effectuée par une autorité fédérale, l'OFEV évalue l'enquête préliminaire, le cahier des charges et le rapport d'impact. Il prend en compte l'avis du canton. (3) S'il s'agit d'un projet pour lequel l'annexe prévoit que l'OFEV doit être consulté, celui-ci évalue de façon sommaire l'enquête préliminaire, le cahier des charges et le rapport d'impact en s'appuyant sur l'évaluation du service spécialisé de la protection de l'environnement du canton."*
The purpose of the third paragraph is to integrate the experience of the Confederation's specialized services into projects falling within the cantons' responsibility and which may have significant impacts on the environment. Federal Office for the Environment, 4.

628 Federal Office for the Environment, 4. For the effects of the impact report on the decision of public authorities, see Nicole, *L'étude d'impact dans le système fédéraliste suisse*, 65 et seq.

629 Federal Office for the Environment, "The EIA Manual," 4.
See also Art. 15 of the OEIA: *"(1) L'autorité compétente veille à ce que le rapport d'impact soit accessible au public, sous réserve des dispositions légales concernant l'obligation de garder le secret. (2) Si la demande de construction ou de modification d'une installation doit être mise à l'enquête, l'avis d'enquête doit préciser que le rapport d'impact peut être consulté. (3) Si la mise à l'enquête n'est pas prescrite, les cantons rendent le rapport accessible selon leur législation propre. L'autorité compé-*

1.2. Turkish Law

368 The Turkish Law on the Environment ("Environmental Law")[630] provides in its Article 10 that developers whose activities may cause environmental problems should prepare an EIA report or a "project description file" (Art. 10(1) of the Environmental Law). Unless such projects receive the "EIA Positive" or "EIA Not Required" decision, no permits or licenses can be issued or obtained (Art. 10(2) of the Environmental Law). This two-stage screening process has been modeled from the European Union's (EU) EIA directive,[631] as part of Turkey's accession to the EU and the harmonization of its legislation with EU standards.[632]

369 The first implementing regulation regarding the EIA (Turkish acronym: ÇED), which was enacted in 1993,[633] has since been replaced by several other regulations, most recently in 2014 ("ÇED Regulation").[634]

1.2.1. Scope of Application

(a) Projects Subject to EIA

370 All projects listed in Annex I of the ÇED Regulation are considered to have significant effects on the environment and require an EIA, regardless of circumstances (Art. 7(a) of the ÇED Regulation). These are, for instance, railways greater than or equal to 100 km (No. 8 (a) of Annex I), airports with a basic runway length greater than or equal to 2,100 m (No. 8(b) of Annex I), motorways and express roads (No. 8(c) of Annex I) or installations for the disposal of non-hazardous waste greater than or equal to 100 tonnes/day (No. 11 Annex I). If projects that initially fall out of the EIA's scope are planned to be expanded and reach the thresholds defined in Annex I, they also require an EIA (Art. 7(c) of the ÇED Regulation).

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tente de la Confédération fait savoir dans la Feuille fédérale ou dans tout autre organe approprié où le rapport d'impact peut être consulté. (4) Le rapport d'impact peut être consulté pendant 30 jours. Les dispositions spéciales régissant la procédure décisive sont réservées."

630 Law No. 2872 on the Environment of 9 August 1983. Official Gazette No. 18132 of 11 August 1983.

631 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

632 See Innanen, "Environmental Impact Assessment in Turkey." Art. 10(2) of the Environmental Law also refers to the "Strategic Environmental Assessment" (SEA) which is slightly different from the EIA. The SEA is regulated under Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment, which was transposed into Turkish law by the Regulation on Strategic Environmental Assessment (Turkish acronym: SÇD). Official Gazette No. 3002 of 8 April 2017.

633 Official Gazette No. 21489 of 7 February 1993.

634 Official Gazette No. 29186 of 25 November 2014.

For the projects listed in Annex II, the State must decide whether an EIA is needed (Art. 7(b) of the ÇED Regulation).[635] This is done through a "screening process" which determines the effects of a project on a case-by-case basis, based on several "selection and elimination" criteria listed in Annex IV of the ÇED Regulation. The projects listed in Annex II are generally those not included in Annex I due to their thresholds, yet they also include other types of projects such as those regarding urban development (e.g., social housing, No. 33 of Annex II; shopping centers, No. 39 of Annex II). 371

Sector	Number of EIA reports	
	Approved	Rejected
Industry	108	2
Energy	54	1
Mining and petroleum	208	9
Waste and chemicals	62	0
Agriculture and food	35	0
Transportation and coastal structure	40	2
Tourism	94	2
Total	**614**	**16**

Source: Senter International (2001)

Table 4.2 Overview of EIA reports according to the sector of activity (1993–2001) (source: Innane, "Environmental Impact Assessment in Turkey," 143).

The first ÇED Regulation, enacted in 1993, excluded from its scope all activities *approved* by the competent authorities before its entry into force, as per the environmental law requirements (Temporary Art. 1). The second ÇED Regulation, adopted in 1997, extended the scope of the derogation to "projects which have been included in the public investment program" before 23 June 1997.[636] In 2013, a temporary Article 3 was introduced in the Environmental Law that further extended the derogation to projects "which are already in the planning and tender phases or in operation" by 29 May 2013 (the date of entry into force of the provision).[637] The Constitutional Court partly annulled this provision so that the EIA derogation applied only to pro- 372

635 Through the "EIA is required" decision or "No EIA is required" decision.

636 Temporary Art. 1 of the 1997 ÇED regulation. Official Gazette No. 23028 of 23 June 1997.

637 See Art. 12 of the Amending Law No. 6486 published in the Official Gazette No. 28661 of 29 May 2013.

jects included in the public investment program before 23 June 1997 and which were in operation by 29 May 2013.[638]

373 Table 4.3 below compares potentially conflicting activities related to the subsoil with projects included in the Annexes of the ÇED Regulation. The majority of activities conflicting with the preservation of archaeological heritage (listed A to E in table 4.3) are subject to an EIA. Nevertheless, there is no general category for underground constructions. Only certain activities that may significantly disturb the subsoil (i.e., land improvements greater than 10,000 m^2, urban transportation systems, dredging greater than 50,000 m^3, social housing of more than 200 houses, shopping malls larger than 10,000 m^2) are included in Annex II, which means that they are subject to the screening process but not directly to an EIA (table 4.3, A1).

(b) Archaeological Impact Assessment

374 For projects both subject to an EIA (Annex I) and the screening process (Annex II), the developer should identify the environmental sensitivity of geographical areas likely to be affected, which are also called "sensitive regions" (*duyarlı yöreler*) in Annex V. Annex V states that sensitive regions include not only the areas registered under the Cultural Property Law, but also the areas falling within the very general definition of "cultural property," "natural property" and "sites" provided in Article 3(a) of the Protection Law.[639] In other words, the EIA process under Turkish Law covers the assessment of archaeological sites, both identified and presumed.

1.2.2. Procedure

375 With regard to Annex I projects, the Ministry of Environment and Urban Planning ("Ministry of Environment") renders an "EIA Positive" or "EIA Negative" decision. With regard to Annex II projects, the Ministry of Environment, again, has the authority to assess the project description files and decide whether an EIA is required or not. However, for Annex II projects, the Ministry of Environment can transfer such competence to local governorships (*valilik*) (Art. 5 of the ÇED Regulation).

376 The steps to be taken during the EIA process are further detailed by the ÇED Regulation: (i) the "institutions and organizations authorized by the Ministry of Environment"[640] and mandated by project owners submit the EIA application to the Minis-

638 Turkish Constitutional Court Judgment No. 2014/116 of 3 July 2014. Case No. 2013/89. Accessed 23 May 2023, ‹https://normkararlarbilgibankasi.anayasa.gov.tr›.

639 Art. 1(c) of the ÇED Regulation.

640 A list is published on the website of the General Directorate of EIA, Authorization and Monitoring, Ministry of Environment, ‹https://ced.csb.gov.tr/›.

try, which examines the file and, if all is in order, establishes a commission (Art. 8);[641] (ii) a "public participation meeting" is held to inform the public about the project (Art. 9); (iii) following the remarks collected during this meeting and those gathered from commission members, the Ministry of Environment prepares an "EIA report special format" determining the scope of the EIA report, which must be submitted to the Ministry by the authorized institutions and organizations within 18 months at the latest (Art. 10); (iv) the commission inspects the report and finalizes it (Arts. 12 and 13), after which the report is opened to public opinion for ten calendar days (Art. 14); (v) the Ministry takes into consideration public remarks and recommendations, if any, during its decision-making process and delivers an "EIA Positive" or "EIA Negative" decision for the project in question (Art. 14); and finally, (vi) the Ministry monitors and checks whether the points guaranteed under the EIA report or the project description file (which serves as the basis for the "EIA Not Required" decision) are respected (Art. 18).[642]

In practice, the EIA still suffers from many shortcomings at the functioning and monitoring levels in Turkey. Environmental engineers report that the EIA has been wrongfully interpreted as a mandatory and bureaucratic process usually leading to "EIA Positive" or "EIA Not Required" decisions.[643] Moreover, it has been observed that changes made to the ÇED Regulation have rendered the system more flexible, and the reports less satisfactory.[644] Recently, the Council of State suspended the execution of an amendment made to Annex I allowing developers to evade the EIA requirement by submitting separate applications for mining activities affecting an area greater than or equal to 25 hectares.[645]

377

641 The commission consists of the representatives of the concerned public institution and organization, Ministry officers, the project owner, and institutions/organizations authorized by the Ministry (Art. 8(4) of the ÇED Regulation).

642 Bilgin, "Analysis of the Environmental Impact Assessment (EIA) Directive and the EIA Decision in Turkey," 42. The public's participation in the administration's decision-making process is a novelty in the Turkish political system: see Demirkol, "Kamu Yönetiminde Bir İlk; ÇED Raporu Uygulaması ile İşlem Üretme Sürecine Halkın Katılımının Sağlanması."

643 According to official statistics, between 1993 and 2022, 6,926 "EIA Positive," 67 "EIA Negative," 73,210 "EIA Not Required," and 1,303 "EIA Required" decisions were issued. Accessed 23 May 2023, ‹https://ced.csb.gov.tr/› (*Resmi İstatisikler › ÇED İstatisikleri 1993–2022 Güncelleme Tarihi 12.03.2023*).

644 Serter, "Türkiye'de Çevresel Etki Değerlendirmesinin Tarihsel Süreçteki Gelişimi," 50; Turan and Güner, "Türkiye'de Çevresel Etki Değerlendirme Mevzuatının Değişimi," 47.

645 The amendment concerned Point 27(a) of Annex I. See Turkish Council of State, 14th Chamber, Judgment of 26 December 2018. Case No. 2018/3536. Accessed 23 May 2023, ‹https://ekolojikolektifi.org/ portfolio/danistaydan-madencilik-faaliyetlerine-ced-denetim/›.

	Potential conflicts with the preservation of archaeological heritage	EIA requirement	
		Swiss law – Annex of the OEIA	Turkish law – Annexes I and II of the ÇED Regulation
A	**Underground infrastructure**		
	A1 Underground constructions	No. 11.4 (parking lots of more than 500 spaces); No. 80.1 (land improvements > 400 ha); No. 80.5 (shopping malls > 7,500 m^2)	No. 31 Annex II (infrastructure projects including (ç) land improvements > 10,000 m^2; (h) urban transportation systems; (m) dredging > 50,000 m^3); No. 33 Annex II (social housing > 200 houses); No. 39 Annex II (shopping malls > 10'000 m^2)
	A2 Pipes (i.e., water pipes, gas pipelines)	No. 21.1	No. 29 Annex I
	A3 Military underground facilities	No. 50 (military facilities)	N/A
	A4 Road and railways tunnels	No. 11.1 (roads); No. 12 (railways)	No. 8 (a), (c), (ç), (d) Annex I
	A5 Electricity and communication networks	No. 22.2 (> 220 kV)	No. 46 Annex I (> 154 kV + 15 km length)
B	**Waste storage**		
	B1 Storage of radioactive waste	No. 40.1	No. 3 Annex I
	B2 Discharge of waste (i.e., inert waste, residual waste)	No. 40.4 (> 500,000 m^3 inert waste), 40.5	No. 10 Annex I (dangerous waste); No. 11 Annex I (surface > 10 ha or > 100 tons/day waste other than inert); No. 5 Annex II (< 100 tons/day waste other than inert)
	B3 Storage of CO2	No. 22.3 (> 50,000 m^3)	No. 49(ç) Annex II
C	**Underground water extraction and storage**		
	C1 Storage of underground water	N/A	No. 12 Annex I (> 10 million m^3/year); No. 47 Annex II (> 300,000 m^3/year)
	C2 Extraction of underground water	No. 80.9 (> 30 million m^3/year)	

	Potential conflicts with the preservation of archaeological heritage	EIA requirement	
		Swiss law – Annex of the OEIA	Turkish law – Annexes I and II of the ÇED Regulation
D	**Extraction of rocks, metals and carbon**		
	D1 Mineral substances	No. 80.3 (> 300,000 m^3)	No. 27(a) Annex I (surface > 10 ha, mining); No. 49(a) Annex II (mining)
	D2 Metallic substances (iron, precious metals)	N/A	
	D3 Hydrocarbon (carbon, gas, petroleum)	No. 21.7	No. 27(b) Annex I (surface > 150 ha, carbon); No. 28 Annex I (500 tons/day petroleum, 500,000 m^3/day natural gas or oil shale); No. 49(c) Annex II (> 1 million m^3/year marsh gas); No. 49(ç) Annex II (oil shale, other gas)
	D4 Oil shale		
	D5 Salt	N/A	No. 25 Annex II
E	**Geothermal energy**		
	E1 By conduction	No. 21.4 (> 5 MWth)	No. 44 Annex I (> 20 MWe) No. 43 Annex II (> 5 MWe) No. 55 Annex II
	E2 By pumping wells		
	E3 Crystalline rocks		

Table 4.3 Comparison of the Swiss and Turkish legal standards for EIAs applicable to projects potentially conflicting with the preservation of archaeological heritage.

2. Spatial Planning

Under Article 5(i) of the Valletta Convention, State parties undertake to seek to reconcile and combine the respective requirements of archaeology and development plans by ensuring that archaeologists participate (a) in planning policies designed to ensure well-balanced strategies for the protection, conservation and enhancement of sites of archaeological interest, and (b) in various stages of development schemes. 378

It is important to note that spatial planning instruments analyzed below are essential to protect archaeological sites discovered not only on public land, but also on private land. The purpose of this section is to look at these tools from the perspective of public authorities who, in certain cases, have to balance the protection of sites that the State owns with other interests present on the public land (*infra* 413 et seq.). 379

2.1. Swiss Law

2.1.1. Federal Law

380 The Confederation sets the principles of spatial planning in Switzerland. These principles are binding on the cantons and serve to ensure the appropriate and economical use of the land.[646] They are stated in the SPA (*supra* 235).[647] Under the SPA, the Confederation, cantons and communes must ensure that the land is used economically and that building areas are separated from the areas where building is not possible. They must also coordinate their activities that have an impact on spatial planning (Art. 1(1) of the SPA).[648] It is possible to cite archaeology as one of these activities since the management of archaeological heritage has implications for territorial development.[649]

381 Before questioning the place of archaeology in spatial planning (*infra* 384), it is important to recall the main instruments used in this field: cantonal structure plans (*les plans directeurs des cantons*) and land-use plans (*les plans d'affectation*). Cantonal structure plans (Arts. 6–12 SPA) indicate the means to coordinate the activities having an impact on the organization of spatial planning (Art. 8 of the SPA).[650] Land-use plans (Art. 14 et seq.) govern the permissible use of the land (Art. 14(1) of the SPA); therefore, they should be consistent with the structure plans (Arts. 2(1) and 9(1) of the SPA).[651] As for construction permits, they serve to verify the conformity of projects with the rules applicable to the zone in question. They materialize land-use plans case by case. In sum, structure plans and land-use plans complete each other: the former highlights the interdependences in due time and at full scale, and also shows how to align activities having a spatial impact at national, regional and cantonal levels, while the latter regulates the admissible use for each parcel, in a manner binding on landowners.[652]

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646 Art. 75(1) of the Swiss Const.

647 RS 700.

648 See also Art. 2 (planning obligation) and Art. 3 (planning principles) of the SPA.

649 Swiss Archaeology, "Evaluation des plans directeurs cantonaux," 2.

650 Art. 8 of the SPA on the minimum content of structure plans: "(1) Each canton shall prepare a structure plan, which shall define the following as a minimum: (a) how the canton aims to develop in spatial terms; (b) how activities that have a spatial impact are to be coordinated with a view to achieving development targets; (c) the proposed schedule and resources for fulfilling tasks. (2) Projects with significant effects on space and the environment must have a basis in the structure plan."

651 See also Art. 11(1) of the SPA: "The Federal Council shall approve the structure plans and their amendments if they conform to this Act, and in particular take proper account of the activities by the Confederation and by neighboring cantons that have a spatial impact. (2) The structure plans shall become legally binding on the Confederation and the neighboring cantons only when approved by the Federal Council."

652 See Swiss Federal Court Judgment 137 II 254 § 3.1.

Land use plans separate the land into three main categories: building zones, agricultural zones and protection zones (Art. 14(2) of the SPA). Protection zones (*zones à protéger*) include, among others, "important sites of local character, historic sites, as well as natural or cultural monuments" (Art. 17(1)(c) of the SPA).[653] This definition covers archaeological sites as well.[654] Since the protection of natural and cultural heritage is primarily the responsibility of cantons (*supra* 63), the text of Article 17 is relatively short. Moreover, cantons (and communes) are not obliged to create protection zones, as they are free to "provide for other suitable measures" (Art. 17(2) of the SPA). In this sense, Article 17 of the SPA introduces, at the very least, "an independent and directly applicable principle for planning."[655] 382

The establishment of protection zones contributes to the achievement of several of the objectives of spatial planning as expressed in the SPA. The preservation of sites and monuments plays a part in the "harmonious development of the entire territory" (Art. 1(1) of the SPA) and in particular in the creation of a "compact built environment."[656] Protection zones are normally primary and independent zones just like building zones or agricultural zones. Nevertheless, they also have the particularity of being superposed on other zones.[657] 383

2.1.2. Cantonal Law

(a) General Overview

Swiss Archaeology conducted a study in 2012 to identify the place granted to archaeology in cantonal structure plans.[658] In five cantonal structure plans (AR, BL, SZ, UR and ZH), archaeology is not mentioned at all. Uri and Zurich reported that they plan to fill this gap during the next revision. In the rest of the twenty-one cantons, archaeology is explicitly cited in cantonal structure plans. All of these structure plans, except for Geneva, refer to a list of protected archaeological sites. In Appenzell Innerrhoden and Nidwald, the list is still to be drafted, and in Neuchatel, the list 384

653 See Jeannerat and Moor, "LAT Art. 17," n. 56 et seq.

654 Swiss Archaeology, "Evaluation des plans directeurs cantonaux," 3.

655 Jeannerat and Moor, "LAT Art. 17," n. 3.

656 Jeannerat and Moor, n. 6.

657 When protection zones are integrated into building zones, building may be possible to a limited extent. In all other cases, protection zones remain outside of building zones and no construction is allowed. This distinction becomes important when construction permits are requested. See Jeannerat and Moor, n. 9.

658 Swiss Archaeology, "Evaluation des plans directeurs cantonaux." This study refers to cantonal structure plans in effect in 2012. They may have been revised since then, e.g., the Canton of Geneva (*infra* 387).

is limited to lacustrine sites. Only seven structure plans (FR, LU, JU, SO, TI, VS and VD) explicitly provide for a regular update.[659]

385 In the twenty structure plans that refer to a list of protected archaeological sites, only five suggest measures to protect previously unknown archaeological sites (BE, FR, GR, JU and VS). Three of them mention explicitly archaeological perimeters (FR, GR and VS).[660] The Canton of Valais, for instance, establishes the integration of "newly discovered archaeological zones (*secteurs archéologiques*) worthy of protection" as a principle for coordination in cantonal and communal inventories.[661] In this respect, the Canton keeps the list of already known or presumed archaeological zones up-to-date, and communes show such information, indicatively, in their land-use plans (*plans d'affectation des zones, PAZ*) and also lay down the rules related to protection and damage prevention in their building regulations (*règlement des constructions et des zones, RCCZ*).[662] In the Canton of Bern, the structure plan refers to the applicable cantonal legislation in case of unexpected discoveries (*supra* 112). The structure plan of the Canton of Jura makes provision for a prior consultation of the Archaeology Service during the development (*viabilisation*) of parcels not already built, in order to avoid the destruction of previously unknown sites.[663]

386 The most important outcome of this study appears to be the focus it puts on the situation of unknown sites. In Switzerland, most archaeological sites remain unknown until their discovery during construction works. Since they cannot be inscribed on lists or categorized beforehand, their protection becomes a real problem.[664] Swiss Archaeology suggests that cantonal structure plans address this specific problem: it "can only produce positive impacts, not only at the level of preserving this buried heritage, but also of reconciliating diverging interests and fostering mutual understanding between the developers and the public authorities."[665]

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659 Swiss Archaeology, 8.

660 These perimeters define the zones which have shown archaeological potential, but where sites have not been precisely located. Cf. "Archaeological reserves" (*supra* 46).

661 The 2019 Structure Plan of the Canton of Valais, section *C Urbanisation*, subsection *C.3 Sites construits, bâtiments dignes de protection, voies historiques et sites archéologiques*, p. 3. Accessed 23 May 2023, ‹https://www.vs.ch/web/sdt/plan-directeur-cantonal-2019›.

662 The 2019 Structure Plan of the Canton of Valais, section C, subsection C.3, p. 4.

663 Swiss Archaeology, "Evaluation des plans directeurs cantonaux," 8. Cf. Art. 17 of the LPPAP/JU and Art. 23(3) of the LSPC/NE.

664 Swiss Archaeology, 9. Not only minor sites but also sites of major importance may be unexpectedly discovered – e.g., the Celtic site of Mormont in the Canton of Vaud, which was unearthed during the extension of a quarry.

665 Swiss Archaeology, 9.

(b) The Canton of Geneva

Swiss Archaeology's comparative study was based on the Canton of Geneva's 2007 structure plan. A new cantonal structure plan called "2030 Structure Plan" (*le plan directeur cantonal 2030*) was adopted in 2013 and approved by the Federal Council in 2015. The 2030 Structure Plan has recently been subject to revisions, which were approved by the Cantonal Government in 2018 and the Cantonal Parliament in 2019. Approval by the Confederation is currently pending.[666] 387

The 2030 Structure Plan puts a greater emphasis on archaeology compared to the previous plan.[667] One of the 21 measures listed in chapter A on "Urbanization" is to preserve and promote heritage (*fiche* A15).[668] The 2030 Structure Plan specifies that heritage protection should be a major component of spatial planning. This notably implies that in certain cases, archaeological sites should be preserved and promoted. Accordingly, the archaeological map of the cantonal territory (*supra* 107) should be updated regularly.[669] The 2030 Structure Plan also defines the map as "the inventory of archaeological sites, known or presumed" maintained by the Office for Heritage and Sites (*Office du patrimoine et des sites, OPS*), to which the Archaeology Service is attached.[670] All construction works to be undertaken within the sectors identified on the archaeological map[671] should be subject to a prior analysis ("*diagnostic*") of the Archaeology Service. If elements of archaeological heritage are identified in the construction area, adequate measures shall be taken for the study and/or the preservation of the remains.[672] 388

666 See the Canton's website, accessed 23 May 2023, ‹https://www.ge.ch/consulter-plans-amenagement-adoptes/plan-directeur-cantonal›.

667 The Canton of Geneva's 2007 Structure Plan briefly covered "archaeology" in its section on the protection of urban heritage. See Swiss Archaeology, "Evaluation des plans directeurs cantonaux," 15.

668 See the Canton of Geneva's 2030 Structure Plan following the first update, section A (*urbanisation*), subsection A15 (*préserver et mettre en valeur le patrimoine*), pp. 167–71. Accessed 23 May 2023, ‹https://www.ge.ch/document/1re-mise-jour-du-plan-directeur-cantonal-2030›.

669 The Canton of Geneva's 2030 Structure Plan following the first update, p. 167.

670 The Canton of Geneva's 2030 Structure Plan following the first update, p. 169.

671 They are called "sensitive zones." The information about sensitive zones is accessible to all public authorities which are responsible for spatial planning, particularly the Department of Territory. The fact that the Archaeology Service (part of the Office for Heritage and Sites) is attached to the Department of Territory (fig. 4.1) facilitates the coordination. Personal discussion with Jean Terrier, 5 November 2018.

672 The Canton of Geneva's 2030 Structure Plan following the first update, p. 170.

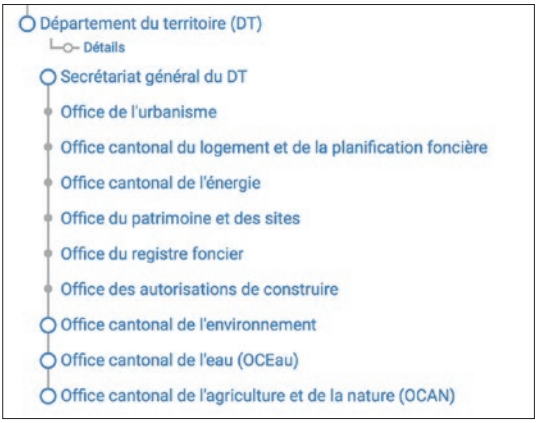

Fig. 4.1 Organizational chart of the Department of Territory of the Canton of Geneva (source: ge.ch).

389 As for land-use planning, Article 29 of the law implementing the SPA in Geneva, LaLAT/GE,[673] provides a list of protection zones within the meaning of Article 17 of the LAT. Protection zones are defined as perimeters to be fixed within a building (or development) zone which aim to protect the architectural character of neighborhoods and towns (Art. 12(5) of the LaLAT/GE).[674] This method of "zoning" (*zonage*) is not new in the Canton of Geneva. It has been practiced since the 1930s and has significantly contributed to the protection of the countryside and landscapes by limiting the spreading of construction.[675] Nevertheless, the perimeters of certain protection zones such as *Vieille-Ville* or *vieux Carouge* have been reduced over time due to the pressures of modernization (e.g., new houses and roads).[676]

390 The protection zones listed in Article 29 of the LaLAT/GE do not correspond *per se* to archaeological sites.[677] Nevertheless, their impact on the protection of archaeological heritage should not be undermined. For instance, in the zone of *Vieille-Ville*, the

673 rs/GE L 1 30.
674 Lazzarotto, "La protection du patrimoine," 111.
675 Nemec-Piguet, "La protection du patrimoine à Genève," 45.
676 Nemec-Piguet, 46.
677 Art. 29(1) of the LaLAT/GE: "*Sont désignées comme zones à protéger au sens de l'article 17 de la loi fédérale: a) les eaux publiques et privées ainsi que les rives (…); b) les sites et paysages au sens de l'article 35 de la loi sur la protection des monuments, de la nature et des sites, du 4 juin 1976, ainsi que les réserves naturelles; c) la zone de la Vieille-Ville et du secteur sud des anciennes fortifications, selon les dispositions des articles 83 à 88 de la loi sur les constructions et les installations diverses; d) les ensembles du XIXe siècle et du début du XXe siècle, selon les articles 89 à 93 de la loi sur les constructions et les installations diverses; e) la zone du vieux Carouge, selon les articles 94 à 104 de la loi sur les constructions et les installations diverses; f) les villages protégés, selon les articles 105 à 107 de la loi sur les constructions et les installations diverses; g) les zones de verdure (…); h) le site du Rhône (…); i) les rives du lac (…); j) les rives de l'Arve (…); k) les rives de la Versoix (…).*"

rule is to maintain the existing buildings as they are (Art. 83(1) of the LCI/GE).[678] This means that new construction is not permitted, thereby allowing the preservation *in situ* of archaeological heritage buried in that area. Furthermore, all modifications to the zones' limits must undergo "a fairly democratic process" that includes a public inquiry (Art. 16 of the LPMNS/GE), and then once the modification is adopted, the possibility to contest it before the administrative court.[679] Certain authors argue that protection measures integrated into land-use plans have a "greater popular legitimacy" compared to measures that are individually adopted, such as listing.[680] Finally, any activity undertaken on immovable property situated in a protection zone should be examined first by the Commission of Monuments, Nature and Sites (Art. 5(2)(f) of the RPMNS/GE), of which the Cantonal Archaeologist is a member (Art. 9(1) of the RPMNS/GE). This ensures coordination between communes, which may be the owner-builders (*maître d'ouvrage*), and the Canton, which is responsible for the conduct of archaeological research.

2.2. Turkish Law

391 The Law No. 3194 on Development of 9 May 1985 (*İmar Kanunu*) ("Development Law") regulates the field of spatial planning in Turkey. The rules provided in the Development Law and its regulations are applicable within the entire territory of Turkey.[681] Nevertheless, if an area is awarded a special status through another law, its planning will first depend on that law (Art. 4 of the Development Law).[682] For instance, if an area is identified as a tourism area, land-use plans will be prepared according to the law on the encouragement of tourism. If the latter law lacks certain information, then the Development Law will apply.[683]

392 The legal instruments used in the field of spatial planning are divided into two general categories: socioeconomic plans and spatial plans.[684] Socioeconomic plans are the national development plan (*ülke kalkınma planı*) and any regional plans (*bölge planları*) (Art. 6(2) of the Development Law). Regional plans aim to identify socioeconomic development tendencies, sectorial objectives and the distribution of activities and infrastructure (Art. 8(1)(a) of the Development Law). Spatial plans are stra-

678 Lazzarotto, "La protection du patrimoine," 113.
679 See Art. 15 et seq. of the LaLAT/GE, Art. 35 of the LaLAT/GE and Art. 40 of the LPMNS/GE. See also Lazzarotto, 111.
680 Lazzarotto, 112. The Canton of Geneva's 2030 Structure Plan (following the first update) provides a non-exhaustive list of land-use plans adopted under LaLAT/GE (*les plans de site*), see pp. 170–71.
681 Ünal, *Türk Şehir Planlama ve İmar Mevzuatı*, 18. See also Arts. 2 (Scope) and 3 (General rule) of the Development Law.
682 Art. 4 explicitly refers to the Protection Law.
683 Ünal, *Türk Şehir Planlama ve İmar Mevzuatı*, 21.
684 Ünal, 23, 25–26.

tegic spatial plans (*mekansal strateji planları*),[685] environmental plans (*çevre düzeni planları*)[686] and land-use plans (*imar planları*) (Art. 6(1) of the Development Law).[687] Land-use plans define the general use of parcels and are divided into two categories: master plans (*nazım imar planları*) and implementation plans (*uygulama imar planları*).[688]

393 Among the objectives to be attained through the establishment of spatial plans, the Regulation on Spatial Plans cites protecting and promoting "natural, historic and cultural values" and finding "the balance between preservation and use" (*koruma ve kullanma dengesi*).[689] At each level of spatial planning, during the preparation of the plans, the competent authorities are required to gather information about the existing protection zones at particular sites. For instance, strategic spatial plans should ensure, among other objectives, the protection of "natural, historical and cultural values;"[690] therefore, during the preparation phase, information on sites is collected, analyzed and studied.[691] Similar rules are envisaged for the preparation of environmental plans[692] and master plans.[693] As for implementation plans, they should show in detail the natural and cultural properties that are registered according to the Protection Law, as well as their accessories (*eklentiler*) and buffer zones (*koruma alanları*).[694]

394 Last but not least, under Article 4 of the Development Law, the Protection Law provides for special planning regulations for sites. When the competent Regional Commission registers a site, its decision suspends all applicable land-use plans (Art. 17(a)(1) of the Protection Law). Municipalities then have three years to adopt a protec-

685 The purpose of a strategic spatial plan is to guide development and sectorial decision-making through the implementation of economic, social and environmental policies at a spatial level (Art. 5 of the Development Law). Strategic spatial plans are prepared at the scales of 1/250,000, 1/500,000 or more (Art. 4(1)(ı) of the Regulation on Spatial Plans) and may be adopted at national and regional levels (Art. 13(1) of the Regulation on Spatial Plans). They should take into consideration the objectives identified in the national development plan, regional plans and in other strategy documents (Art. 6(2) of the Development Law). The Regulation on Spatial Plans (*Mekansal Planlar Yapım Yönetmeliği*) was published in the Official Gazette No. 29030 of 14 June 2014.

686 Environmental plans are upper-scale plans. For details, see Art. 5 of the Development Law and Art. 18(1) of the Regulation on Spatial Plans.

687 See also Art. 6(1) of the Regulation on Spatial Plans.

688 Land use plans are lower-scale plans. For details, see Art. 5 of the Development Law, Arts. 8(b) and 21–26 Regulation on Spatial Plans.

689 Arts. 1(1) and 7(f) of the Regulation on Spatial Plans. See also Ünal, *Türk Şehir Planlama ve İmar Mevzuatı*, 69.

690 Art. 14(1)(a) of the Regulation on Spatial Plans.

691 Art. 17(1)(b) of the Regulation on Spatial Plans.

692 Art. 19(1) and (2)(ç) of the Regulation on Spatial Plans.

693 Art. 23(6)(ğ) of the Regulation on Spatial Plans.

694 Art. 24(8) of the Regulation on Spatial Plans.

tion-oriented land-use plan (*koruma amaçlı imar planı*). Meanwhile, the competent Regional Commission identifies the conditions of use during the transition period (Art. 17(a)(2) of the Protection Law).[695]

In conclusion, the protection-oriented land-use plans are the most concrete illustration of how archaeological heritage conservation can be integrated into spatial planning in Turkish law. Nevertheless, it is important to note that certain problems regarding the application of such plans (e.g., delays in the adoption, lack of coordination) remain to be solved.[696] Moreover, protection-oriented land-use plans only cover areas registered as sites. None of the tools cited above seem to address the situation of unknown sites, which may be situated in areas not registered as sites. In a country like Turkey, it would only be for the best if this issue were addressed, at least in a strategic plan applicable to the whole territory such as the national development plan, but this is currently not the case.[697] 395

B. Impact Mitigation

1. Large-Scale Public Works

The following two examples of large-scale public works were not subject to the relevant Swiss and Turkish EIA regulations for different reasons. In Switzerland, the Federal Government determined the network of motorways in 1960, which was long before the adoption of the EIA requirement. In Turkey, the EIA regulation contains an exception clause that excludes the projects listed in the State's investment program before 1997 from the scope of the regulation (*supra* 372).[698] In the absence of an EIA, how does the Swiss Confederation and the Turkish State mitigate the effects of large-scale projects on archaeological sites? 396

695 Regarding protection-oriented land-use plans, see Çolak, *Kültür ve Tabiat Varlıklarını Koruma Hukuku*, 426–49; Sancakdar, *Taşınmaz Kültür ve Tabiat Varlıkları Hukuku*, 300–27; Yağcı, Taş, and Kılıç, *Kültür ve Tabiat Varlıklarını Koruma Kanunu*, 9, 91–103.

696 Regarding major functional problems (i.e., delays in the adoption of the protection-oriented plans, lack of coordination between the authorities, and incorrect registration of sites), see Ahunbay, "Arkeolojik Alanlarda Koruma Sorunları. Kuramsal ve Yasal Açılardan Değerlendirme"; Örnek Özden, "'Kentsel Sit Alanı' İlanı 'Mutlak Korunuyor'Anlamına Geliyor mu?"

697 See Presidency of the Republic of Turkey, Strategy and Budget Department, 11th National Development Plan (2019–2023), accessed 23 May 2023, ‹https://www.sbb.gov.tr/kalkinma-planlari/›. In its 2019–2023 Strategic Plan, the Ministry of Culture also notes the need for a strategy document for cultural heritage. See Ministry of Culture and Tourism, "2019–2023 Strategic Plan," 71.

698 See also Scheumann et al., "Environmental Impact Assessment in Turkish Dam Planning."

1.1. Switzerland: the Example of National Highways

397 The mitigation of development impacts on archaeological sites is carried out on a case-by-case basis at the federal level. In specific sectors, it is possible to observe the establishment of common directives to be applied in all sector-related work in Switzerland, such as the already-examined FEDRO Guidelines of 2012 for national highways (*supra* 84). The approach chosen with regard to archaeology in this directive has a background that goes back to the 1960s.

398 Switzerland's highway network was established by the Federal Decree of 21 June 1960.[699] Until the end of 2007, the construction, maintenance and operation of the motorways were undertaken jointly by the Confederation and the cantons. The cantons used to construct, maintain and operate the motorways, and were also their owners. The Confederation provided general supervision and important financing of the tasks performed by cantons. As of January 2008, the distribution of the tasks has changed.[700] Since then, the highways have belonged to the Confederation, which has become solely responsible for their construction, maintenance and operation (Art. 8(1) of the National Highways Act).[701] By 2009, ninety-three percent of the Swiss highway network was in use.[702] Today, this has risen to ninety-eight percent.[703]

399 In 1961, one year after the highway network was established, the Federal Government adopted another decree related to the archaeological excavations to be undertaken during the highway layout ("Federal Decree on Archaeological Excavations"). It stated that "the costs related to excavations for the research of antiquities on the layout of future highways, site clearance or scientific analysis of the finds (photographs, sketches, measurements)" were part of the costs of the highway construction to which the Confederation would contribute (Art. 1).[704] Such financial support was the first of its kind in Switzerland. Between 1960 and 2000, the Confederation invested CHF 349,850,000 in the archaeology of motorways, from which the Cantons of Neuchatel, Jura, Fribourg, Vaud and Valais benefited the most.[705]

400 During the construction of road section A9 in the Canton of Valais in the late 1990s, archaeological excavations carried out in the village of Gamsen at a place called

699 RS 725.113.11.

700 Reform of Fiscal Equalization and Task Distribution between the Confederation and Cantons of 2008.

701 RS 725.11.

702 Galliker, "Situation et aménagement du réseau suisse des routes nationales," 13.

703 Federal Roads Office, "Rapport 2017 sur l'entretien, l'aménagement et l'exploitation des routes nationales," 11–12.

704 For the full text of the Federal Decree of 31 March 1961, see Kaenel, "Autoroutes et archéologie en Suisse," 36.

705 Kaenel, 38.

Waldmatte revealed "the remains of 250 prehistoric and roman period settlements (…) considered unique in the alpine zone." Following this discovery, a member of the Swiss Parliament asked the Federal Government whether it would consider the possibility of changing the trajectory of the future highway in order to save this site and bequeath it to future generations.[706]

401 The Federal Government's answer was twofold. First, it recognized that the construction of highways had presented both an opportunity and a danger for archaeology. This dilemma had been resolved, however, at the beginning of the construction works through the Federal Decree on Archaeological Excavations, in which the Confederation undertook to contribute to the costs of excavations and the preparation of scientific documentation (e.g., CHF 33.5 million for Gamsen alone), while leaving cantons responsible for preservation. Therefore, cantons could remove excavated archaeological elements to preserve them if they wanted. Nevertheless, the Federal Government did not intend to change the trajectory just for the preservation of sites and have to start from scratch.[707]

402 Second, if the trajectory of the highway had to be reviewed due to archaeological discoveries, this would imply that the highways could not be built in suitable places from ecological, economic and technical points of view. In addition, the cantons would have to carry out a survey beforehand to select the trajectory (at their expense), and if it had to be changed, cantons would have to cover the excavation costs at the original location as well. The Federal Government considered that both options would have been more harmful to archaeological interests compared to the "destruction of a few remains" and would have entailed disproportionate costs.[708]

403 This mitigated view – the Confederation paying the excavations, the canton accepting the destruction – is stated today in the FEDRO Guidelines. An example of its application comes from the Canton of Geneva. Due to the construction of a highway interchange in Grand-Saconnex, FEDRO ordered the cantonal Archaeology Service to undertake archaeological surveys upon the construction area, which led to excavations over an area of 4,000 m^2 in 2014–2016. Despite the discovery of significant

706 Question No. 99.1109 submitted by Jossen-Zinsstag Peter on 18 June 1999 on "Archaeology and Motorway A9," accessed 23 May 2023, ‹https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId= 19991109›.

707 Response of the Federal Government to Question No. 99.1109 on 4 October 1999, accessed 23 May 2023, ‹https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=19991109›.

708 Response of the Federal Government to Question No. 99.1109 on 4 October 1999.

remains,[709] the Canton never considered changing the road's position to preserve the archaeological site *in situ*.[710]

1.2. Turkey: Hydroelectric Plants and Dams

404 In Turkey, the mitigation of the impact of development on archaeological sites is done on a case-by-case basis. Nevertheless, in specific sectors such as dams and reservoirs, the Ministry of Culture has adopted guidelines to be applied to all projects. The following section details the regulatory background for the impact mitigation of dams.

405 The first guideline regarding the protection of immovable cultural heritage affected by dam reservoirs, Guideline No. 717, was adopted in 2006 by the Ministry's High Commission.[711] Guideline No. 717 stated that in principle, dams should not be built within archaeological sites. Nevertheless, its Article 2 allowed the construction of dams "in areas where immovable cultural heritage and archaeological sites were present *if* the State Hydraulic Works (Turkish acronym: DSI) decided, based on technical, administrative and scientific aspects, that it was not possible to construct the dam elsewhere" (emphasis added). According to Article 3 of Guideline No. 717, the State Hydraulic Works would also make proposals with regard to the sites that would be affected by dams whose construction was still ongoing.[712]

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709 FEDRO, "La parcelle du Pré-du-Stand"; Besse and Steimer, "Grand-Saconnex, Pré-du-Stand."

710 This issue has indeed been discussed in the Communal Parliament (*Conseil municipal*) of Grand-Saconnex. One member raised the question of the site's preservation *in situ* following Tribune de Genève's news article praising the site (Grand-Saconnex City, Minutes of the Communal Parliament meeting of 20 February 2017, p. 360, accessed 23 May 2023, ‹https://www.grand-saconnex.ch/fr/politique/conseil-municipal/seances/›). The Cantonal Archaeologist, Jean Terrier, provided clarification to the Communal Parliament by explaining that the remains in question were not "spectacular." They essentially consisted of archaeological layers/fragments that could be studied but not preserved. There were therefore no plans to preserve the site in its original place (Grand-Saconnex City, Minutes of the Communal Parliament meeting of 10 April 2017, p. 403, accessed 23 May 2023, ‹https://www.grand-saconnex.ch/fr/politique/conseil-municipal/seances/›).

711 Adopted on 4 October 2006. Official Gazette No. 26329 of 27 October 2006.

712 Around that time, the preservation of emblematic sites such as Hasankeyf and Allianoi (due to the construction of, respectively, Ilısu Dam and Yortanlı Dam) was largely discussed at national and international levels. The case of Hasankeyf was brought before the ECHR. After an examination that lasted 15 years, the ECHR rendered its decision in 2019 and declared the application inadmissible. The ECHR held that "there was to date no European consensus, or even a trend among the member States of the Council of Europe, which would have made it possible to infer from the Convention's provisions that there existed a universal individual right to the protection of one or another part of the cultural heritage" (the ECHR's decision of 29 January 2019, *Zeynep Ahunbay and Others v. Turkey*, Case No. 6080/06, § 25).
For further information on the Hasankeyf case, see Aykan, "Saving Hasankeyf"; Drazewska, "Hasankeyf, the Ilisu Dam, and the Existence of 'Common European Standards' on Cultural Heritage Protection."

406 The Turkish Archaeologists Association, the Turkish Chamber of Architects and three other associations complained to the Council of State that Guideline No. 717 violated Article 63 of the Turkish Constitution and Turkey's obligations under the Valletta Convention (*supra* 41). Their main argument was that Guideline No. 717 assigned the decision-making authority regarding the protection of cultural heritage to the State Hydraulic Works, whereas this power properly belonged to the Ministry of Culture.[713]

407 After recalling Articles 9 (*supra* 253), 10 (competence and management)[714] and 57 (*supra* 122) of the Protection Law, the Council of State agreed with the claimants and annulled Articles 2 and 3 of Guideline No. 717 on the grounds that they violated the Regional Commissions' competence. According to the Council of State, Articles 2 and 3 of Guideline No. 717 gave the powers that the Protection Law granted to Regional Commissions to the State Hydraulic Works, as the latter had the final say on the fate of cultural heritage. Under these articles, the competent Regional Commission was only notified of the decision (i.e., preservation *in situ* versus dam construction) and had to choose between the possible scenarios in accordance with the choice of the State Hydraulic Works. For instance, if archaeological sites were not to be preserved *in situ*, then the competent Regional Commission had to decide whether the cultural heritage would be moved somewhere else or left under the dam's reservoir.[715]

408 Accordingly, the High Commission modified the text of Articles 2 and 3 of Guideline No. 717 by issuing Guideline No. 749. The amended Article 2 provided that a commission comprised of academics from relevant fields and representatives of investment institutions would confirm that it was in the public interest to construct a dam in an area where archaeological sites were present, thereafter submitting a proposal to the competent Regional Commission. As for the dams whose construction was still ongoing as of 2006, the "[investment] institutions concerned" would submit proposals related the conservation of archaeological sites to the competent Regional Commission (amended Art. 3).[716]

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713 Turkish Council of State, 6th Chamber, Judgment No. 2008/8268 of 26 November 2008, Case No. 2006/8266, p. 1. Available at the Turkish Bars Association's website, Environment and City Commission, accessed 23 May 2023, ‹https://chk.barobirlik.org.tr/dokuman/karar/2006-8266.pdf›.

714 Art. 10(1): "The Ministry of Culture is in charge of taking or ordering the necessary measures for the protection of immovable cultural property regardless of its ownership or management status, and of the control of such measures (…)."

715 Turkish Council of State, 6th Chamber, Judgment No. 2008/8268 of 26 November 2008, Case No. 2006/8266, p. 6: "*(…) 2863 sayılı Kanunun ilgili hükümleriyle koruma bölge kuruluna verilen görev ve yetkinin, Enerji ve Tabii Kaynaklar Bakanlığına (D.S.I.)'ine verilmesi suretiyle (DSI)'nin taşınmaz kültür ve tabiat varlığını su altında bırakma kararı vermesi, bu kararını koruma bölge kuruluna bildirmesi ve koruma bölge kurulunun bu konuda bir proje seçmesinin istenmesine yol açması nedeniyle anılan 2. ve 3. Maddeler, Yasanın (…) hükümlerine aykırı bulunmaktadır.*"

716 Adopted on 20 March 2009. Official Gazette No. 27193 of 7 April 2009.

409 Once again, several professional associations (landscape architects and environmental engineers) and the Ankara Bar Association contested the amendments made by Guideline No. 749. According to the claimants, the State Hydraulic Works was replaced by a commission in which the Ministry of Culture was not even present; therefore, the problem with regard to competence persisted.[717]

410 The Turkish Council of State first suspended the execution of Guideline No. 749 and then annulled it. The Council of State began by underlining that it was against the public interest to have two different commissions in charge of advising the competent Regional Commission with regard to the conservation of archaeological sites affected by dams. In fact, a first commission of academics and representatives of investment institutions was making the proposal regarding the location of the dam. This short-lived commission was then dissolved, and a second commission called "Scientific Committee" (already mentioned in the original text of Guideline No. 717) was supposed to determine the measures to be taken with regard to archaeological heritage and would operate until the end of the dam's construction. According to the Council of State, these two tasks were so interrelated that assigning them to two different bodies could endanger the scientific and technical welfare of the operation, and thus it did not serve the public interest. Second, regarding the dams whose construction was still ongoing as of 2006, the Council of State found it unlawful that the "[investment] institutions concerned" were assigned to prepare the proposals in relation to the conservation measures. This duty required technical expertise. The role conferred to the investment institutions in this respect was against the functioning mechanism of the Regional Commissions that were empowered by the Protection Law.[718]

411 In 2010, the High Commission adopted a brand-new document, Guideline No. 765.[719] Nevertheless, it remained in force for only two years and the High Commission itself decided to revoke it because of "its insufficiency in practice."[720] In 2012, the High Commission adopted Guideline No. 36, which is still in force. This Guideline goes back to the initial approach concerning the procedure for deciding whether a dam is going to be built despite the presence of archaeological sites. It states that if it is not possible to relocate the dam "due to imperative reasons," the competent authority (which is none other than the State Hydraulic Works) must inform the Ministry of Culture of the situation and submit its evidence (Art. 2).[721] The Ministry of Culture must then follow the procedure described in Article 2 to determine the measures

717 Turkish Council of State, 6th Chamber, Judgment of 7 December 2009, Case No. 2009/7466.
718 Turkish Council of State, 6th Chamber, Judgment of 7 December 2009, Case No. 2009/7466.
719 Adopted on 22 April 2010.
720 See Guideline No. 36. Adopted on 10 April 2012. Official Gazette No. 28281 of 3 May 2012.
721 The original text in Turkish: "*Barajın başka yerde yapımının zorunlu nedenlerle mümkün*

applicable to the sites which will be affected by the dam's reservoir (i.e., the translocation or the abandonment of the archaeological assets under water after they are documented). As for the dams whose construction has started, Regional Commissions are in charge of determining conservation measures (Art. 3).

As can be observed, Guideline No. 36 barely brings a real solution to the problem of the conflict of public interests. The State Hydraulic Works alone weighs the interests at stake (construction of the dam versus protection of the sites along the path) and determines whether "imperative reasons" exist. It is not clear what is meant by "imperative reasons." The Ministry of Culture intervenes only after the decision regarding the dam's construction (i.e., the determination of which sites will be affected) is confirmed, in order to determine the measures to be taken regarding the affected sites. 412

2. Ad Hoc Public Works

2.1. Canton of Geneva

2.1.1. General Overview

Table 4.4 below summarizes the major archaeological excavations caused by public works on public land in the Canton of Geneva in the last ten years. 413

Site	Legal protection	Public work	Excavation period	Preservation *in situ*
Underwater sites of Plonjon and La Grange[722]	Listed in 1923, withdrawn in 2014 (Plonjon)	A new harbor and public beach in Eaux-Vives	Plonjon (2009–2013) La Grange (2017–2018)	Preservation *in situ* already at risk due to erosion
Simon Goulart Square[723]	None	Reorganization of the public square	2012	Not preserved *in situ*
Esplanade Saint-Antoine (*infra* 423)	Bastion Saint-Antoine listed in 1921 + *Vieille-Ville* protection zone	Reorganization of the public promenade	2012–2015	Preserved *in situ*

olmaması ve bu durumun ilgili idarece belgelere dayalı olarak Bakanlığımıza iletilmesi halinde (…)."

722 See Corboud, "Les sites littoraux préhistoriques du canton de Genève"; Corboud, "La fouille de sauvetage de la station littorale de Genève - Plonjon."

723 See Genequand, "Les fouilles de la place Simon-Goulart en 2012."

Site	Legal protection	Public work	Excavation period	Preservation *in situ*
Courtyard of Collège Calvin[724]	*Vieille-Ville* protection zone	Reorganization of the courtyard	2014	Little of the archaeological record has survived
Pré-du-Stand site in the Commune of Grand-Saconnex (*supra* 403)	None	Construction of a motorway interchange	2014–2016	Not preserved *in situ*
Gallo-Roman tile production site in the Bois de Fargout, the Commune of Chancy[725]	None	Establishment of temporary waterholes (biotopes)	2009–2013	Not preserved *in situ*
Rouelbeau Castle[726]	Listed in 1921	Programmed excavations	2001–2014	Preserved *in situ*

Table 4.4 Major archaeological excavations carried out on public land in the Canton of Geneva in the last ten years.

414 In the majority of cases, archaeological sites (or elements of sites) are removed once the excavations are finished. The two cases where preservation *in situ* has been possible following excavations concern the Esplanade Saint-Antoine and Rouelbeau Castle. Both had been listed long before the public works in question took place. This observation confirms that the archaeology practiced in the Canton of Geneva, as in the rest of Switzerland, is primarily of "preventive" nature.[727] Preventive archaeology, also referred to as "salvage," "rescue," or "emergency" archaeology, is "a planned undertaking, mobilizing a series of legal, operational, and scientific measures ahead of projected infrastructure and building works to ensure that any archaeological remains that may be hidden in their path are effectively identified, assessed, and studied prior to their eventual destruction."[728] The eventual destruction of remains is, therefore, expected by both archaeologists and public authorities. In case of programmed excavations, the probability of preservation *in situ* is higher since there

724 See de Weck, "La cour du collège Calvin et ses environs."
725 See de Weck and Zoller, "Un atelier de tuileries gallo-romain"; Zoller, "Chancy, Bois de Fargout."
726 See Broillet-Ramjoué, Regelin, and Terrier, "Entre ville et campagne."
727 Personal discussion with Jean Terrier, 5 November 2018.
728 Schlanger, "Preventive Archaeology."

are no planned public works, as was the case for Rouelbeau Castle.[729] The main purpose of preventive archaeology is therefore the identification, assessment and study of archaeological heritage discovered in the path of public (and private) works. The Cantonal Archaeologist, Jean Terrier, has explained that the key instrument to reach this goal is the archaeological map (*supra* 107).

Fig. 4.2 Aerial view of Rouelbeau Castle (source: Wikimedia Commons).

Fig. 4.3 Educational panels at Rouelbeau Castle (source: ge.ch/dossier/archeologie).

729 The intervention of the Archaeology Service saw the restoration of the remains of the medieval castle in stone, which had been invaded by vegetation since the site's listing, and the execution of excavations to find out more about the site. Excavations yielded, among other things, the remains of an earlier construction in wood (*bâtie* Rouelbeau), which were too fragile to leave on site. A virtual reconstruction of the site is available at batie-rouelbeau.ch. A list of scientific publications on the site is available at ge.ch/dossier/archeologie-genevoise.

415 It is also interesting to note that to date, 284 items have been listed and inscribed on the "List of Monuments and Sites" of the Canton of Geneva.[730] 95 of them were listed between 1921 and 1923, among which were: the Bastion Saint-Antoine; the ruins of Rouelbeau Castle; the underwater sites of Lake Geneva (*sites palafittiques*); La Grange Park, which houses an archaeological promenade; and the three churches of Saint-Pierre Cathedral, Madeleine Church and Saint-Gervais Church, which had an archaeological site in their subsoil. Except for the underwater sites, they together constitute the whole spectrum of Geneva's archaeological sites accessible to the public today.[731]

2.1.2. Case Study: Bastion Saint-Antoine

Fig. 4.4 Archaeological excavations taking place in the Promenade Saint-Antoine due to the construction of the underground parking (source: Haldimann and Terrier, "L'archéologie à l'est de la cité," 99). The area with trees was excavated later on in order to reorganize the remaining part of the promenade (also called the Esplanade Saint-Antoine).

730 *Liste des immeubles et objets classés du canton de Genève*, accessed 23 May 2023, ‹https://www.ge.ch/document/immeubles-objets-classes›.

731 See Terrier, "L'aménagement de sites archéologiques accessibles au public en contexte urbain.". The only site mentioned by Jean Terrier and not cited above is the archaeological promenade inside the parc Saint-Jean, which conserves the remains of the monastery Saint-Jean-hors-les-murs.

The two projects examined below took place in the city center of Geneva around the Promenade Saint-Antoine (a green protection zone),[732] which is situated on the remains of several fortifications, such as the Bastion Saint-Antoine (fig. 4.4). The Bastion, a 16th century fortification, was listed in 1921.[733] Opposition to the first project, which concerned the construction of an underground parking lot, caused it to take almost ten years to receive authorization; in contrast, public authorities and the public itself embraced the second project, being the reorganization of the remaining part of the promenade (Esplanade Saint-Antoine), along with its outcomes. 416

(a) Saint-Antoine Parking Lot

The case of the Saint-Antoine parking lot was analyzed in depth from the perspective of environmental protection organizations and their right of appeal in a 2000 study undertaken by the University of Geneva. This study will serve as the main reference in this section.[734] 417

The construction of an underground parking lot is a typical example of when different public interests, including that of archaeology, must be mitigated. In the case of the Saint-Antoine parking lot, the project was proposed following a failed attempt to build the parking lot under another promenade very close to Saint-Antoine, the Promenade of the Observatory. The citizens of Geneva had rejected the latter through a referendum.[735] 418

From 1983 to 1993, the Saint-Antoine parking project remained blocked in the construction permit phase. Each time the developer, the Parking Foundation,[736] obtained an authorization from the Canton,[737] various organizations would contest the decision before administrative authorities and courts. The main disagreement was about transportation policy.[738] 419

732 See Arts. 24 and 25 of the SPA. The promenade also falls within the protection zone of *Vielle-Ville* regulated under Art. 83 et seq. of the LCI/GE.

733 Under the Reference Number: MS-c 17.

734 Flückiger, Morand, and Tanquerel, *Evaluation du droit de recours des organisations de protection de l'environnement*.

735 Flückiger, Morand, and Tanquerel, 130.

736 A foundation established under public law in 1968 (Law on the Parking Foundation, rs/GE H 1 13). The parcel in question (No. 7122 *feuille* 13) is part of the *domaine public immatriculé communal*.

737 In the Canton of Geneva, the protection of cultural heritage, as well as spatial planning and the delivery of construction permits, are all the responsibility of the Canton instead of communes, unlike the practice in the majority of cantons. Nemec-Piguet, "La protection du patrimoine à Genève," 31.

738 Flückiger, Morand, and Tanquerel, *Evaluation du droit de recours des organisations de protection de l'environnement*, 130–31.

420 The initial construction permit delivered in 1985 by the Canton's Department of Public Works (today, the Department of Territory) contained a particular clause regarding archaeological remains. The permit was notably conditioned upon the "promotion of archaeological remains" unearthed during the parking lot's construction.[739] This clause is stronger than the usual condition attached to construction permits (in particular for private owners) reserving the State's right to conduct archaeological excavations.[740] In the present case, the probability of discovering important archaeological remains and the need to display them publicly were anticipated. This shows good coordination between the service delivering the permits and the Archaeology Service, both of which depended on the same department (today, the Department of Territory).[741]

421 Finally, the member in charge of the Cantonal Government (*conseiller d'Etat*) entered into negotiations with the organizations opposing the project. An agreement was made, and the opposition was withdrawn. The authors of the study conducted by the University of Geneva believe that a solution could only be reached after the Cantonal Government member integrated the project, which initially stood alone, into a global perspective. Such an approach created a positive atmosphere for negotiation. The organizations (namely, the local "Association of the Inhabitants of the Historic Center" and the countrywide "Association Transports et Environnement") were assured that the parking lot was part of a coherent circulation plan which would enhance the value of the Promenade Saint-Antoine.[742]

422 A large section of the bastion unearthed during the project is displayed today inside the underground parking lot with boards explaining the evolution of the city's fortifications (fig. 4.5).[743]

739 Flückiger, Morand, and Tanquerel, 131.

740 Jungo, "Droits et obligations du propriétaire en cas de fouilles archéologiques," 93.

741 According to the Cantonal Archaeologist, Jean Terrier, this is not a coincidence. Personal discussion with Jean Terrier, 5 November 2018. See also Nemec-Piguet, "La protection du patrimoine à Genève," 31.

742 Flückiger, Morand, and Tanquerel, *Evaluation du droit de recours des organisations de protection de l'environnement*, 143.

743 Terrier, "L'aménagement de sites archéologiques accessibles au public en contexte urbain," 8. For further details on the excavations, see Haldimann and Terrier, "L'archéologie à l'est de la cité."

Fig. 4.5 Archaeological site accommodated inside the Saint-Antoine parking lot (source: Terrier, "L'aménagement de sites archéologiques accessibles au public en contexte urbain," 10).

(b) Reorganization of the Esplanade Saint-Antoine

Soon after the City of Geneva decided to reorganize the remaining part of the promenade (fig. 4.4), also known as the Esplanade Saint-Antoine, archaeological excavations started.[744] Even though the archaeological potential of the area was known, the discoveries made exceeded expectations.[745] 423

The Cantonal Parliament described the discoveries at the Esplanade Saint-Antoine as "exceptional," stressing their "great historical, archaeological and heritage value."[746] In a similar way, the City of Geneva recognized the "richness" of the remains and their "importance for Geneva's heritage," stating that they were "spectacular" 424

744 The parcel in question (No. 4277 *feuille* 12) belongs to the City of Geneva.

745 Excavations yielded, in particular, the remains of an earlier bastion from 1537 ("*mottet*" Saint-Laurent), a funerary church from the 6th–7th century (known as Saint-Laurent) with cemeteries and a structure which goes back to the Gallo-Roman period (1st century). Such discoveries brought new data regarding the history of the eastern part of the citadel. This helped archaeologists better understand the urban development of the citadel's outskirts from antiquity into the Middle Ages, as well as the foundation of the first funeral areas. See Broillet-Ramjoué, "Esplanade de Saint-Antoine - Nouvelles découvertes"; Broillet-Ramjoué, "L'esplanade de Saint-Antoine - un complément essentiel à la connaissance."

746 See the Cantonal Government's Report M 2225-A of 28 May 2015 on the motion regarding the preservation of the archaeological site of the Esplanade Saint-Antoine and its access to the public

and "new" for the local history.[747] Both authorities saw potential for integrating the site into the city's wider cultural context, considering its proximity to the Art and History Museum and the archaeological subsoil of the Saint-Antoine parking lot.[748]

425 The Association of the Inhabitants of the Historic Center – one of the parties opposing the parking project discussed above – was thrilled about the discoveries and in 2013 submitted a petition to the authorities requesting the preservation of the site and its opening to the public.[749] The Archaeology Service organized several tours for the public while the site was still being excavated, raising people's awareness of the site.[750]

426 The City of Geneva, the owner-builder, and the Canton of Geneva have collaborated since 2012 on the creation of a museum/public space to display the archaeological site of the Esplanade Saint-Antoine. Two phases were envisaged: (i) the launch of an architecture competition and execution of studies prior to the construction, and (ii) the construction and organization of the public space. During the first phase, while the Canton of Geneva (mainly its Archaeology Service) offered technical help to the City, it later withdrew its initially agreed contribution to financial costs (50 percent). The City of Geneva ended up covering the totality of the costs.[751] For the second phase of the project, total costs will be shared between the City (1/3), the Canton (1/3) and a private foundation from Geneva (1/3), with the participation of the *Loterie romande*.[752] The City has not provided any specific date for the termination of the construction.

("Report M 2225-A") p. 1, accessed 23 May 2023, ‹http://ge.ch/grandconseil/data/texte/M02225A.pdf›.

747 Proposition of the Communal Government of the City of Geneva PR-1166 of 25 November 2015 regarding the allocation of CHF 1,230,000 for studying the recovery and preservation of archaeological remains in Bastion Saint-Antoine ("Proposition PR-1166"), pp. 1–2, accessed 23 May 2023, ‹https://conseil-municipal.geneve.ch/conseil-municipal/objets-interventions/detail-objet/objet-cm/1166-173e/›.

748 Proposition PR-1166, pp. 2–3; Rapport M 2225-A, pp. 1–2.

749 The Journal of the Association of the Inhabitants of the Historic Center, No. 121 Summer 2013, accessed 23 May 2023, ‹http://ahcvv.ch/journal-2/›.

750 See Zimmermann, "Des lanterneaux pour éclairer les fouilles de Saint-Antoine."

751 Proposition PR-1166, p. 5; Rapport M 2225-A, p. 3. Zimmermann, "Un petit musée pour les fouilles de Saint-Antoine."

752 Proposition of the Communal Government of the City of Geneva PR-1393 of 15 January 2020 regarding the construction of a structure to protect and promote the archaeological site as well as the organization of Bastion Saint-Antoine, accessed 23 May 2023, ‹https://conseil-municipal.geneve.ch/conseil-municipal/objets-interventions/detail-objet/objet-cm/1393-177e/›.

Fig. 4.6 The future look of the Esplanade (source: ‹https://estar.archi›). In the background, it is possible to see the "Lanterneaux," being the construction with four elements rising up from the surface that won the architecture competition.[753]

In conclusion, these two examples paint an accurate picture of the practice in the Canton of Geneva regarding the preservation of archaeological heritage in ad hoc public works projects. They also illustrate some particularities of the Swiss system. First, in Switzerland, the public has the power to reject an urban development project through a referendum if it feels that it is poorly conceived.[754] Second, environmental protection organizations have a significant impact on public authorities' decision-making, as shown in the Saint-Antoine parking project. When these organizations use their right of appeal, public authorities feel obligated to negotiate rather than wait for the legal procedure to end.[755] Finally, the local public's opinion plays an important role in both examples. In its proposition regarding the allocation of funds

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753 The jury appreciated in particular the modesty and simplicity of the project, which also constitute its strength. The four roof-windows (*lanterneaux*) emerge from the surface and invite the public to discover the secrets in the subsoil. The reorganization of the public area, through both the vegetation and the floor coverings, provides a continuity with the promenade of Saint-Antoine. The City of Geneva's website, accessed 23 May 2023, ‹https://www.geneve.ch/fr/themes/amenagement-construction-energie/construction-entretien-renovation-batiments/projets/bastion-saint-antoine#›.

754 See Art. 77 et seq. of the Cst-GE (*Référendum communal*).

755 Flückiger, Morand, and Tanquerel, *Evaluation du droit de recours des organisations de protection de l'environnement*, 191. Organisations wish above all to be involved in the conceptualization of the project. See Flückiger, Morand, and Tanquerel, 155.

for the Esplanade Saint-Antoine, the Communal Government of the City of Geneva expressed in particular how important it is to obtain the public's support for these kinds of "sensitive projects."[756]

2.2. Turkey

2.2.1. General Overview

428 Overall, over 200 scheduled and over 200 rescue excavations are carried out in Turkey each year (table 4.5). Scheduled excavations mostly concern areas registered as first or second-degree archaeological sites, to be preserved intact, where investigations are not pressured by a project deadline. The question of mitigation is more critical when public works require the conduct of rescue excavations.[757] Despite the principle of *in situ* preservation laid down in Guideline No. 37 (*supra* 143), not all archaeological remains can be displayed *in situ* in urban areas considering the number of rescue excavations (table 4.5) and the variety of constructions and installations built by public authorities.

	Excavations authorized by the Council of Ministers*		**Excavations directed by Museum Directorates****	**Rescue excavations**			
				Directed by Museum Directorates	**Public investment areas**		
	Turkish teams	**Foreign teams**			***Ilısu* Dam*****	**Dams**	**Coal/ Natural gas**
2018	122	31	50	193	5	21	2 + 3 (Road)
2017	118	32	59	180	8	7	8
2016	112	29	59	192	7	5	10
2015	120	36	54	209	11	5	5
2014	117	36	44	175	15	9	3
2013	109	34	65	127	13	9	1
2012	116	39	47	151	17	5	5

756 Proposition PR-1166, p. 3.

757 A significant number of rescue excavations are conducted by Museum Directorates outside of public investment zones. These numbers cover rescue excavations realized on both private and public lands. Guideline No. 37 is applicable in principle to private lands as well (Guideline No. 37 § 3 *in fine*).

	Excavations authorized by the Council of Ministers*		Excavations directed by Museum Directorates**	Rescue excavations			
				Directed by Museum Directorates	Public investment areas		
	Turkish teams	Foreign teams			*Ilısu* Dam***	Dams	Coal/ Natural gas
2011	123	43	N/A	N/A	N/A		
2010	111	40	5	148	24		-

* Scheduled excavations conducted by universities.

** This group seems to cover the scheduled excavations conducted by the Museum Directorates.

*** In the statistics between 2011 and 2017, the Ilısu Dam area is referred to as "public investment" without specifying the dam's name.

Table 4.5 Statistics on the number of excavations conducted in Turkey since 2010 (source of the yearly statistics: kulturvarliklari.gov.tr).

For instance, the largest metropolitan project undertaken by Turkish public authorities in recent years has been the Marmaray-Metro Project in Istanbul. The project involved the construction of a subway through the city's historic center and a subway tunnel below the Bosphorus connecting the Asian and European sides (fig. 4.7). Rescue excavations conducted on the locations of Üsküdar, Sirkeci and Yenikapı stations lasted for almost ten years.[758] At Yenikapı alone, archaeological investigations extended over an area of 58,000 m^2 due to spectacular discoveries dating back to the Byzantine era, the Theodosian Harbor and a collection of shipwrecks (fig. 4.8), and to the Neolithic era (i.e., burials of people who were soon after called the "earliest inhabitants of Istanbul"). The findings helped develop knowledge not only about material culture, but also past environmental conditions.[759] 429

758 For further information, see Kızıltan, "Marmaray-Metro Projeleri Kapsamında Yapılan, Yenikapı, Sirkeci ve Üsküdar Kazıları."

759 Özdoğan, "Dilemma in the Archaeology of Large Scale Development Projects," 5–6.

Fig. 4.7 Extent of the Marmaray-Metro Project (source: marmaray.gov.tr).

Fig. 4.8 Late 9th or early 10th-century shipwreck (source: nauticalarch.org).

430 Overall, the Marmaray-Metro Project affected more than 58,000 m² of Istanbul's metropolitan area, including newly discovered archaeological sites.[760] Among such sites, only a specific perimeter inside the Theodosian Harbor site was declared by

760 The historic peninsula of Istanbul is registered as a "mixed" (*karma*) site. See Istanbul Metropolitan Municipality, "Istanbul Historic Peninsula Management Plan," 35.

the competent Regional Commission to be an "area to be protected [*in situ*] and promoted as an archaeological park."[761] The rest of the archaeological heritage was either transported or left under the construction once the excavations were completed. Construction of a multipurpose facility where the recovered shipwrecks and movable objects will be displayed is scheduled to begin in early 2020 (fig. 4.9).

Fig. 4.9 Image from the Yenikapı Archaeological Museum and Archeo-Park project, which won the competition (source: eisenmanarchitects.com). The archaeological site is located on the upper left.

Unfortunately, not all rescue excavations are carried out as successfully as in the Marmaray-Metro Project. In fact, the archaeologist and professor Mehmet Özdoğan identifies three main factors that render rescue archaeology problematic in Turkey. First, as discussed earlier, Turkey's official inventory only includes listed archaeological sites (*supra* 141). Professor Özdoğan reports that besides such sites, there are over 100,000 archaeological settlements which have been identified by archaeologists.[762] This leads to situations where, for instance, roads are built right in the middle of tells without proper investigation (fig. 4.10). 431

761 See Istanbul University Yenikapı Shipwrecks Project, "Architectural Findings."
762 Özdoğan, "Dilemma in the Archaeology of Large Scale Development Projects," 1.

Fig. 4.10 A section of the "Konya-Seydişehir" road built in the 1990s and splitting a presumed Neolithic site into two parts (source: tayproject.org).

432 The second factor is related to Turkey's unitary system as a State. Rescue excavations are technically ordered by the Ministry of Culture: in other words, the central government in Ankara. Therefore, each time a rescue excavation is needed, a bureaucratic struggle ensues. Another related issue concerns the people who actually conduct the excavation. "Contract archaeology," where private entities can be mandated to excavate, is not practiced in Turkey as opposed to most countries in Europe. This creates a problem for understaffed Museum Directorates, which are forced to make choices.[763] The third, and perhaps the most fundamental factor, is the size and depth of archaeological sites located in Turkey. Professor Özdoğan explains that like most parts of the Near East, archaeological sites in Turkey are very large in size compared to Europe and their depth of deposition can be tens of meters. Therefore, the limited time allocated for rescue operations is "totally inadequate" in the Turkish context.[764]

2.2.2. New Policies

433 New policies adopted by the High Commission, especially as of 2016, show some attempts to loosen the regime applicable to archaeological sites of the first and second degree.

763 For the Yenikapı excavations for instance, freelance or professional archaeologists were employed. Özdoğan, 3.

764 Özdoğan, 4.

(a) Public Security and Natural Disaster Exception

In 2016, the High Commission (*supra* 122) added an extra paragraph (g) to Guideline No. 658 which is applicable to both first and second-degree sites (*supra* 144).[765] This new rule opens the door to "necessary temporary interventions" on such sites on the grounds of "public security" and "natural disaster" (Art. 1(g) of Guideline No. 658). "Intervention" means here any kind of physical intervention, from planting trees to construction.[766] 434

The rationale behind this rule has been rightfully questioned by practitioners. First, the temporary or permanent nature of an intervention *per se* cannot technically determine whether it is likely to damage the site or not. Second, the rule does sufficiently explain how allowing such "temporary" interventions will help the protection of archaeological sites when a natural disaster occurs or when public security is compromised. During armed conflicts, international conventions tend to oblige State Parties to ensure the immunity of the property in question.[767] Therefore, the High Commission's perspective suggesting the contrary risks being interpreted in a way to circumvent the law and allow construction on archaeological sites of the first and second degree.[768] 435

(b) Solar Power Plants

In 2016, the High Commission adopted a new guideline creating another exception to the core principle according to which archaeological sites of the first and second degree are preserved intact. Guideline No. 662 on the Construction of Solar Power Plants on Archaeological Sites of the First and Second Degree provides conditions under which construction can be allowed.[769] 436

The Turkish Archaeologists Association, the Turkish Chamber of Architects and the Ecology Association requested that the Council of State annul Guideline No. 662 on the grounds that it violated, among other laws, Guideline No. 658 on the use and pro- 437

765 Guideline No. 562 adopted on 7 April 2016. Official Gazette No. 29696 of 27 April 2016. Art. 1(g) in Turkish reads as follows: "*Kamu düzeni veya güvenliğinin olağan hayatı durduracak veya kesintiye uğratacak şekilde bozulduğu ya da doğal afet yaşanan yerlerde, yapılmasında zorunluluk bulunan geçici uygulamalara ilişkin, zemine en az müdahale edilecek şekilde hazırlanan ve süresi belirlenen projelerin ilgili koruma bölge kurulunda değerlendirilebileceğine, projesi koruma bölge kurulunca uygun görülen geçici uygulamaların Kültür ve Turizm Bakanlığınca oluşturulacak bilim kurulu denetiminde yapılabileceğine [karar verildi].*"

766 Ozar, "Arkeolojik Sit Alanlarına İlişkin Mevzuatın Esnetilmesi," 179.

767 See, e.g., Art. 9 et seq. UNESCO's Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.

768 Ozar, "Arkeolojik Sit Alanlarına İlişkin Mevzuatın Esnetilmesi," 180–81.

769 Adopted on 29 December 2016. Official Gazette No. 29952 of 18 January 2017.

tection of archaeological sites. According to the claimants, the construction of solar plants would have destroyed the archaeological record on such sites. In response, the Ministry argued that the construction of solar power plants was only possible on sites where no excavation was planned, provided that the competent Regional Commission's opinion was previously considered (§ 2 of Guideline No. 662), and that all the works would be carried out under the supervision of Museum Directorates (§ 5 of Guideline No. 662) so that no damage would be done to the archaeological record.[770]

438 In December 2018, the Council of State cancelled Guideline No. 662 on several grounds. First, even if the projects were to be examined by Regional Commissions and supervised by Museum Directorates, it was not possible, according to the Council of State, to build solar power plants without damaging the archaeological record on sites. In fact, before adopting the Guideline, the Ministry of Culture had requested the advice of the Ministry of Energy and Natural Resources ("Ministry of Energy") regarding the impact of solar power plants on archaeological sites. The Ministry of Energy had responded that the construction works included the flattening of the surface, digging up to two meters of soft soils, making holes through explosive blasting in harder soils (e.g., rocks) and installing power lines and cables under the soil. The Council of State held that such activities would doubtlessly damage archaeological sites of the first and second degree. Allowing this damage would notably constitute a violation of Turkey's obligation to protect archaeological heritage under the Valletta Convention.[771]

439 Second, the Council of State did not agree with the criteria chosen for the selection of sites: the absence of any programmed excavation (§ 2 of Guideline No. 662) and the lack of any visible archaeological remains on the surface (§ 3 of Guideline No. 662). According to the Council of State, such criteria did not guarantee that no discoveries would be made during construction works. On the contrary, archaeological sites of the first and second degree are sites that are identified as possessing an important density of heritage. Third, Guideline No. 658, which provides the framework on the protection and use of archaeological sites, prohibits all construction on such sites. Guideline No. 662 clearly violated its antecedent framework guideline.[772] Lastly, when the Ministry of Energy gave the advice mentioned above, it stated that there were many other locations in Turkey which were well-suited to accommodate solar power plants compared to archaeological sites of the first and second degree.[773]

770 Turkish Council of State, 14th Chamber, Judgment No. 2018/7759 of 19 December 2018, Case No. 2017/859, p. 1. Accessed 23 May 2023, ‹https://ekolojikolektifi.org/portfolio/i-ve-ii-derece-arkeolojik-sit-alanlarinda-gunes-enerjjsi-santralleri-kurulamaz/›.

771 Turkish Council of State, 14th Chamber, Judgment No. 2018/7759 of 19 December 2018, pp. 5–6.

772 Turkish Council of State, 14th Chamber, Judgment No. 2018/7759 of 19 December 2018, p. 6.

773 Turkish Council of State, 14th Chamber, Judgment No. 2018/7759 of 19 December 2018, p. 5.

In conclusion, there seem to be certain blockages in mitigating different public interests (e.g., construction and energy) and the archaeological interest, especially when sites of the second and third degree are concerned. This may be partly due to the Ministry's contradictory policies. On one hand, Regional Commissions classify a significant number of sites as having a first-degree importance, thus confirming the necessity of preserving them intact. On the other hand, the High Commission mistrusts their judgments and makes other interests prevail over preservation. It may be asked whether the sites are too easily registered as having a first-degree importance,[774] or whether the High Commission makes its decisions in an arbitrary way.[775] In any case, it seems necessary for the Ministry to develop a coherent and global policy for the registration of archaeological sites and their use together with its specialized bodies. 440

774 Ahunbay suggests that the contrary is true: certain archaeological sites are incorrectly registered below their importance degree. Ahunbay, "Arkeolojik Alanlarda Koruma Sorunları. Kuramsal ve Yasal Açılardan Değerlendirme," 107.

775 According to the Ecology Association, this is due to the change of the High Commission's organization in 2011. See Ekoloji Kolektifi Derneği, "I. ve II. Derece Arkeolojik Sit Alanlarında Güneş Enerjjsi Santralleri Kurulamaz!" For the current organization of the High Commission, see Art. 5 of the Regulation on the High Commission and Regional Commissions (Official Gazette No. 28269 of 12 April 2012).

Comparative Conclusion

A. Archaeological Objects

441 Swiss cantons and Turkey have encountered some challenges when enforcing their ownership rights in the context of archaeological objects. While the challenges faced by Swiss cantons are related to the need of regulatory harmonization (due to federalism), the challenges faced by Turkey are related to its archaeological and social contexts – in particular, the problem of looting. In Switzerland, the lack of harmonization between cantons is mostly felt in the areas of archaeological prospecting and the transferability of archaeological objects. As for Turkey, it finds itself in a "chicken-and-egg" situation. On one hand, looting makes it difficult for the State to gain possession of individual finds. On the other hand, the efforts to control the flow of looted artifacts abroad through the system of collecting involuntarily encourage looting. Having said this, both systems have taken the same approach towards chance finds. As opposed to excavation finds, chance finds deprived of any context at all may present little interest for public authorities. Therefore, the rationale behind Swiss cantons' practice of allowing finders to keep some of their objects and Turkey's collecting system may not be that different: they both aim to allow people to fulfill their need and curiosity for collecting, and to share the burden of conservation. Nevertheless, implementation turns out to be much more difficult in the Turkish context, not surprisingly, considering the number of sites and the reality of looting.

B. Archaeological Sites

442 The mechanisms through which the archaeological interest, among others, is best identified in the Swiss and Turkish systems are the EIA process and spatial planning instruments. It is possible to argue that the legal framework of the EIA in both countries is overall satisfactory regarding the type of projects subject to the EIA and the inclusion of the archaeological interest in the assessment. Nevertheless, it seems important to note that the management of the subsoil is not fully addressed in either Swiss (i.e., federal) or Turkish EIA procedure. As for spatial planning, in Switzerland, each canton is responsible for integrating the preservation principles in their spatial planning instruments (i.e., cantonal structure plans and land-use plans). While Swiss Archaeology's study is particularly important and interesting in this regard, the example of Geneva shows that the study needs to be updated since many cantons have revised their structure plans. It appears that cantons have either chosen to set a prior consultation mechanism where the Archaeology Service is alerted whenever

a public (or private) work is planned on archaeological zones (shown in an inventory or map), or to directly integrate such zones into land-use plans at the communal level. In any case, more in-depth and comparative research is needed to understand the overall situation in Switzerland. In Turkey, protection-oriented land-use plans are the most concrete illustration of how archaeological heritage conservation can be integrated into spatial planning. However, they do not apply to the areas not registered as sites. It would be the for the best if this issue were addressed in a country like Turkey, at least in a strategic plan applicable to the whole territory. Of course, none of these solutions will be effective without a complete and up-to-date inventory of Turkey's archaeological heritage that is made available to public authorities.

443 Once the archaeological interest is successfully identified by public authorities among the other interests at stake in a particular case, all interests are weighed to make an optimal decision. The section on impact mitigation shows that it is very difficult to establish specific criteria to be applied for such an exercise since each case is made of different circumstances. For example, what are the interests involved? What is the type of project or construction in question? What are the characteristics of the concerned site? Nevertheless, it is possible to draw some conclusions from the Swiss-Turkish comparison of large-scale public works. For instance, during the construction of highways, the Swiss Confederation's solution has been to protect the archaeological interest by contributing to the costs of archaeological investigation, which seems to have satisfied stakeholders and the public. It is worth recalling the answer of the Federal Council to the question of whether a highway's layout could have been changed to preserve a newly discovered site *in situ* (*supra* 401). The answer shows that the archaeological interest is best protected when the impacts are evaluated in the planning phase of the project; otherwise, making changes to such a large and complex project later on will inevitably lead to disproportionate results in the overall evaluation of the public interest. Indeed, Turkey tried to avoid such a situation by adopting guidelines proposing a strategy for the protection of archaeological sites during dam constructions (*supra* 405 et seq.). Considering the court cases analyzed, it is clear that the strategy adopted by the Ministry of Culture did not satisfy all stakeholders and the public. The biggest concern seems to be related to the decision-making process. In fact, the guideline did not satisfactorily establish a real strategy to mitigate the harmful effects on archaeological sites; rather, it only states that if imperative reasons exist, dams must be constructed despite the presence of archaeological heritage, which will be either transported elsewhere or left under dams' reservoirs. Guideline No. 36 in force today does not clearly state what is meant by "imperative reasons" in this particular context, or who decides whether they exist in a specific case.

Regarding ad hoc public works, it is not possible to make an accurate comparison between Switzerland and Turkey, since the issue in Switzerland has to be analyzed at the cantonal level and the present thesis has focused only on the Canton of Geneva. While for Geneva it was possible to list the major public works undertaken on public land in the last ten years to examine how the archaeological interest has been protected, for Turkey, where over 200 rescue excavations are conducted each year, it was only possible to provide a countrywide analysis. Nevertheless, it is worth regrouping certain elements that seem to be important in the weighing of interests by public authorities: Is the site under risk listed (e.g., Esplanade Saint-Antoine)? Are the discovered remains exceptional (e.g., Esplanade Saint-Antoine; the Yenikapı site in Istanbul)? Is it possible to build the construction elsewhere (e.g., dam and solar power plant projects in Turkey; the Saint-Antoine parking lot)? What do the locals think of the project (e.g., both Saint-Antoine examples)? Does the project fit into a global strategy (e.g., the Saint-Antoine parking lot)? The last element also raises the question of whether the country or the canton has a global strategy for the preservation of archaeological heritage or for how to reach a fair balance between development and preservation in the context of archaeology.[776] 444

776 For instance, the Canton of Valais in Switzerland completed a project, Mémoire 21 Valais-Wallis, where all stakeholders, public and private, were gathered to establish a conservation strategy for the Canton. It resulted in the elaboration of ten strategies (*lignes directrices*) accompanied by specific actions. Two of these actions are, in fact, the establishment of "the cantonal concept" for the protection and promotion of historic heritage (Measure C1) and the identification of a strategy to manage heritage items soon after a threat is announced (Measure E1). See Association Valaisanne d'Archéologie (ed.), *Promouvoir et protéger le patrimoine historique enfoui et bâti du Valais. Défis actuels et plan d'action*, 2017.

Part III: Developing International Standards for the State Ownership of Archaeological Heritage

In 2011, UNESCO and UNIDROIT adopted the Model Provisions on State Ownership of Undiscovered Cultural Objects. Chapter 5 first examines the factors that led to the adoption this document and its content (six provisions). Then, it assesses the document's strengths and weaknesses and proposes revisions in light of the analysis undertaken in Parts I and II. The integration of the revised provisions in Swiss and Turkish law shall also be discussed. 445

Chapter 5: UNESCO-UNIDROIT Model Provisions

A. Background

The idea of drafting a model law or provisions on State ownership was initially discussed during the extraordinary session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation ("UNESCO Intergovernmental Committee") held in Seoul in November 2008. The issue was brought up in two distinct papers presented at the Seoul meeting.[777] 446

A closer look at those papers, however, shows that proposals made by their authors, Professor Patrick O'Keefe and Professor Jorge Sánchez Cordero, are not exactly the same. O'Keefe focuses specifically on archaeological objects and the implementation of Article 3(2) of the UNIDROIT Convention. 447

> Art. 3 of the UNIDROIT Convention
> (2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place. (emphasis added)

O'Keefe stresses that for the purposes of this article, States shoud have laws making undiscovered cultural objects State property. This is true for all kind of restitution claims, even those which are not based on the UNIDROIT Convention. He refers to two well-known cases, *Iran v. the Barakat Galleries* (*supra* 172) and *United States v. Schultz*,[778] where it "took years of effort and the expenditure of a great deal of money" for English and American courts to interpret and apply the laws of the States claiming ownership and requesting restitution (respectively, those of Iran and Egypt).[779] 448

777 UNESCO and UNIDROIT, "Explanatory Report," 2.

778 See *United States v. Schultz*, 178 F. Supp. 2d 445 (U.S. District Court for the Southern District of New York 2002) *affirmed*, 333 F. 3d 393 (U.S. Court of Appeals for the Second Circuit 2003). For the Second Circuit's judgment and comments, see Merryman, Elsen, and Urice, *Law, Ethics and the Visual Arts*, 300–17. For a case summary and comments, see Chechi, Bandle and Renold, "Case Egyptian Archaeological Objects – United States v. Frederick Schultz" in Platform ArThemis (‹http://unige.ch/art-adr›).

779 See the paper titled "State Ownership of Undiscovered Cultural Objects" by Patrick J. O'Keefe, Honorary Professor, University of Queensland, presented at the UNESCO Intergovernmental Committee's 15th session, May 2009 (hereafter, "State Ownership of Undiscovered Cultural Objects"), accessed 23 May 2023, ‹https://www.unesco.org/en/fight-illicit-trafficking› (*How we work › ICPRCP › Sessions*).
Another important case to be cited in this context is *United States v. McClain*, 593 F.2d 658 (U.S Court of Appeals for the Fifth Circuit 1979), in which the Fifth Circuit held that a Mexican claim of ownership was not expressed "with sufficient clarity to survive translation into terms under-

O'Keefe proposes a draft article on State ownership to be examined by a group of experts: "All undiscovered cultural objects are the property of, and owned by, the State. Unauthorized removal of such objects from the place they are found is theft."[780]

449 In Professor Cordero's paper presented to UNIDROIT's governing council following the Seoul meeting, Cordero makes a more general proposal for "drafting uniform regulations regarding the international protection of cultural objects" as a complement to the UNIDROIT Convention. He does not solely focus on archaeological objects but also includes "works of art which originate from small churches, local museums or private collections." Cordero stresses in particular that the differences in terminology used by States regarding cultural objects constitute a key problem.[781] Ultimately, he suggestes a much more comprehensive document compared to O'Keefe's single model article.

450 After UNESCO and UNIDROIT discussed the matter internally, the UNESCO Intergovernmental Committee adopted an official recommendation encouraging the establishment of a working group of independent experts chosen jointly by UNESCO and UNIDROIT Secretariats, which would prepare "model provisions with explanatory guidelines to be made available to States to consider in the drafting or strengthening of national laws." Despite the very general nature of this mandate, the recommendation refers in its initial paragraphs to "objects coming from illicit excavations" (i.e., archaeological objects) and to the need for States to have a "clear and precise legislation to provide a basis for an action to recover the object if it is found in another country" (in other words, national ownership laws).[782] For UNIDROIT, the model provisions were to be seen as an instrument that would facilitate the enforce-

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standable and binding upon American citizens." The judgment is available in UNODC's case law database, accessed 23 May 2023, ‹https://sherloc.unodc.org/cld/v3/sherloc/›. See also UNESCO and UNIDROIT, "Explanatory Report," 4.

780 O'Keefe, "State Ownership of Undiscovered Cultural Objects."

781 See the paper titled "The Drafting of a Uniform Law of the Protection of the Cultural Property" by Jorge Sanchez-Cordero, Professor, Mexican Centre of Uniform Law, presented at the UNESCO Intergovernmental Committee's 15th session, May 2009, accessed 23 May 2023, ‹https://www.unesco.org/en/fight-illicit-trafficking› (*How we work › ICPRCP › Sessions*).

782 See Recommendation No. 3, UNESCO Intergovernmental Committee's 16th session, September 2010, accessed 23 May 2023, ‹https://www.unesco.org/en/fight-illicit-trafficking› (*How we work › ICPRCP › Sessions*). See also UNESCO and UNIDROIT, "Explanatory Report," 3.
A member of the Expert Committee additionally mentions a letter of 21 December 2009 that was addressed by UNESCO and defines the mandate as preparing "a model law or provisions that define states' property rights, particularly those regarding archaeological heritage, that could help in the drafting of national laws and encourage uniform terminology …" See the Minutes of the Meeting of 20 September 2010, unpublished, Marc-André Renold's personal archives (hereafter, "2010 Meeting Minutes").

ment of the 1970 UNESCO and UNIDROIT Conventions and encourage their ratification by as many States as possible.[783]

The UNESCO and UNIDROIT Secretariats accordingly set up the working group of independent legal experts,[784] the Expert Committee, which formally met on three occassions on 20 September 2010, 14 March 2011 and 29 June 2011, and finalized the drafting of model provisions in July 2011.[785] During the first meeting, the addition of new members, including archaeologists, was discussed but rejected. The reasons were related to the respect of geographical representation, used by the UNESCO and UNIDROIT Secretariats, and of the mandate, which was purely legal rather than ethical in nature.[786] 451

B. Content

1. The Expert Committee's Approach

The Expert Committee thoroughly discussed the general scope of the Model Provisions in their first meeting. The main question was whether the Expert Committee would adopt a limited approach, as proposed by O'Keefe, and draft a single model article on State ownership of undiscovered archaeological objects, or take a much more comprehensive approach, as proposed by Cordero, and cover many issues related to such objects. Ultimately, the Expert Committee decided to adopt a halfway solution by sticking to the problem of State ownership while going further than just one article.[787] 452

UNIDROIT's position seems to be decisive in this respect, since it expressed a strong unwillingness to considerably expand the scope of the Model Provisions at risk of 453

783 UNESCO and UNIDROIT, 2–3.

784 As co-chairs, Jorge Sánchez Cordero (Mexico) and Marc-André Renold (Switzerland) and, as members, Thomas Adlercreutz (Sweden), James Ding (China), Manlio Frigo (Italy), Vincent Négri (France), Patrick O'Keefe (Australia), Norman Palmer (United Kingdom) and Folarin Shyllon (Nigeria). The UNIDROIT and UNESCO Secretariats were represented by Marina Schneider and Edouard Planche, respectively. See UNESCO and UNIDROIT, 3.

785 Frigo, "Model Provisions on State Ownership of Undiscovered Cultural Objects – Introduction," 1024; UNESCO and UNIDROIT, "Explanatory Report," 3.

786 See 2010 Meeting Minutes.

787 See 2010 Meeting Minutes.
As Frigo notes, "the aim of the Model Provisions is (…) to suggest a set of legal provisions in a specific domain, with a view to obtaining recognition of ownership of illicitly excavated and exported objects before a foreign jurisdiction." See Frigo, "Model Provisions on State Ownership of Undiscovered Cultural Objects - Introduction," 1034.

alienating States.[788] UNIDROIT stressed that the Committee should simply focus on the question of how a State establishes that it owns undiscovered archaeological objects. This was also a key issue for UNESCO since many States, especially Latin American countries, often ask UNESCO to help them to stop auctions they claim to be illegal. To do this, UNESCO needs solid legal arguments, in particular clear and comprehensible national ownership laws.[789]

454 With regard to the choice of style, the Expert Committee wanted the Model Provisions to be simple, transparent and clear-cut.[790] Frigo, an Expert Committee member, explains the process as follows:

> "The task of the Expert Committee, in full compliance with both UNESCO and UNIDROIT goals, was to avoid the byzantine drafting of legal provisions which is frequent in the domestic, and sometimes also in international, legislative practice. In fact, not only are the provisions limited as to their number, the Committee's efforts were also geared towards the goal of utmost simplicity, a simplicity that would be functional to the understanding of the Report, taking care to avoid oversimplification while safeguarding the clarity of the text. From the drafting point of view, the double outcome of these efforts has been the abolition of all subjects considered as not fundamental and razor-sharp technical drafting, resulting in a short text featuring short sentences and essential concepts."[791]

455 Another important feature is the status of the Model Provisions. As stated by the Expert Committee, the provisions are a model offered to States who might need one; thus, they are not binding.[792] States can either use them to draft new provisions or to adapt their existing legislation. This is the reason why the Model Provisions were never submitted to States for approval.[793] The UNESCO Intergovernmental Commit-

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788 See 2010 Meeting Minutes.
O'Keefe explains his understanding of the Committee's mandate: "(...) the mandate given the Committee was to examine the possibility of drafting a clause on undiscovered cultural heritage which States could *insert in their existing legislation*. This was to be something simple, as far as possible, *would not conflict with other aspects of a state's legislation*. At the same time, it must be such that the courts of a State where action is taken to recover stolen cultural objects cannot say that ownership by the claimant State is ambiguous or ineffective. There was no suggestion that there should be any change in the law of the State where the claim is brought, even if that might enhance the possibility of the claim being successful" (emphasis added). See "Comments on Marc-André's Preliminary Draft Model Law on State property of Archaeological Objects" by Patrick O'Keefe, 5 September 2010 (unpublished). Marc-André Renold's personal archives.

789 See 2010 Meeting Minutes.

790 Frigo, "Model Provisions on State Ownership of Undiscovered Cultural Objects - Introduction," 1032. See also UNESCO and UNIDROIT, "Explanatory Report," 4.

791 Frigo, "Model Provisions on State Ownership of Undiscovered Cultural Objects - Introduction," 1024–26.

792 UNESCO and UNIDROIT, "Explanatory Report," 3.

793 Frigo, "Model Provisions on State Ownership of Undiscovered Cultural Objects - Introduction," 1024.

tee only took note of the finalization of the Model Provisions at its 17th session in Paris.[794]

Furthermore, Frigo adds that Provision 3 on State Ownership should not be interpreted as a suggestion to impose public ownership on undiscovered archaeological objects. The aim of Provision 3 is only to provide States wishing to include such a principle in their legislation (or amend an already-existing one) "with a text capable of being recognised and appropriately interpreted by the competent courts of another country."[795] That is why the Committee also avoided all expressions such as "State of origin" that might be interpreted as a preference for the so-called "cultural retention" approach (usually including national ownership laws) over a "purely trade-oriented policy."[796] 456

Finally, it should be recalled that the Model Provisions do not claim to solve all problems related to States' restitution claims. Even if a State has clear and sufficient legislation concerning its ownership of undiscovered archaeological objects, the success of a restitution claim depends on a multitude of factors (e.g., evidence of illegal excavation).[797] 457

2. Provisions

The Model Provisions are comprised of six articles. In a nutshell, Provisions 1 to 3 deal with the core concept of States' ownership of undiscovered cultural objects; Provision 4 and 5 focus on the illegal excavation or retention of such objects from criminal and private law perspectives; and finally, Provision 6 covers international enforcement.[798] 458

During the drafting process, the Expert Committee first worked on a document called "Preliminary Draft Model Law on State Property of Archaeological Objects" ("Preliminary Draft") prepared by the chairs of the Committee. The Preliminary Draft became the "Draft Law" following the meeting of 20 September 2010, and the expression "archaeological objects" in the title was replaced by "undiscovered cul- 459

794 See Attachment I *in* UNESCO and UNIDROIT, "Explanatory Report," 9.

795 Frigo, "Model Provisions on State Ownership of Undiscovered Cultural Objects - Introduction," 1028.

796 Frigo, 1034.

797 Frigo, 1034. See also "Comments on the Proposal for the Model Law Regarding the Recovery of Unlawfully Removed Cultural Objects" by Norman Palmer, 20 September 2010, unpublished, Renold's personal archives (hereafter, "Palmer's comments 2010").

798 See Delepierre and Schneider, "Ratification and Implementation of International Conventions to Fight Illicit Trafficking of Cultural Property," 131; Shyllon, "Legislative and Administrative Implementation of 1970 UNESCO Convention by African States," 41; Prott, "Strengths and Weaknesses of the 1970 Convention."

tural objects." The Committee further elaborated the Draft Law during the meetings of 14 March 2011 and 29 June 2011.[799]

2.1. Provision 1 – General Duty

> The State shall take all necessary and appropriate measures to protect undiscovered cultural objects and to preserve them for present and future generations.

460 The initial draft of this provision included two additional paragraphs declaring that States should "encourage, through financial and other means, persons who find archaeological objects to disclose their finding to the competent authorities" and "encourage the national and international circulation of such archaeological objects, for example through loans to museums and other cultural institutions."[800] Eventually, the Expert Committee abandoned these measures, considering them too specific for a model law. Moreover, UNIDROIT rightfully pointed out that countries suffering from clandestine excavations would be skeptical of the idea of encouraging any type of circulation of archaeological objects.[801]

461 With regard to the first paragraph, which eventually became Provision 1, the initial text was not subject to major changes. One point can be noted. The initial text stated that "it is a *duty* of the State to protect" (emphasis added) in parallel with the title of the provision ("General Duty"). The Expert Committee chose to replace "duty" with an action verb, "*take* all necessary and appropriate measures," (emphasis added) to stress States' concrete obligation in this respect. Moreover, one Committee member suggested replacing the expression "*shall* take" with "*is responsible for* taking" (emphasis added) to enhance the effect. The Committee did not retain this suggestion.[802]

462 Interestingly, the Expert Committee discussed at length which verb to use to describe the State's obligation: to protect, preserve, safeguard, or perhaps all of them. Some members had a preference for the verb "safeguard," which covered the concept of sustainable development; for others, the use of such a verb would have imposed additional duties on States and overburdened them. Eventually, the Committee decided that the idea of sustainable development was inherent to the second part of the text ("to preserve them for present and future generations") and retained

799 Renold's personal archives.
800 UNESCO and UNIDROIT, "Explanatory Report," 4.
801 See 2010 Meeting Minutes.
802 See the Minutes of the Meeting of 14 March 2011, unpublished, Renold's personal archives (hereinafter, "March 2011 Meeting Minutes").

the verb "protect."[803] A mention of sustainable development was made in the "guidelines" section of Provision 1.[804]

2.2. Provision 2 – Definition

> Undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the soil or underwater.

The criterion for the scope of application of State ownership is that the concerned object must be a "cultural" and "undiscovered" object of importance for certain fields (mostly humanities and science). The Expert Committee recalled that such a definition is based on the 1970 UNESCO Convention and the UNIDROIT Convention.[805] 463

> Art. 1 of the 1970 UNESCO Convention
> For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories (...).
>
> Art. 2 of the UNIDROIT Convention
> For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

As appears from the above, the definition does not mention ecofacts, and the list of various disciplines does not include "paleontology." This issue was discussed during the first meeting of the Expert Committee, but no consensus could be reached.[806] In any case, States are free to add other types of objects to the definition, such as "anthropological objects" or "human remains." The same goes for the location: States can expand the scope of the article to objects located in a "building" or in "ice," which technically do not qualify as soil or under water.[807] 464

It is also important to note the role of the expression, "consistently with national law." The Draft Law version of Provision 2 did not make such a reference. One Committee member suggested that objects of lesser importance should also be included in the definition. The Committee agreed and added, alongside cultural objects of importance, "other cultural objects as defined by national law."[808] Eventually, this 465

803 See March 2011 Meeting Minutes.
804 UNESCO and UNIDROIT, "Explanatory Report," 4. The section in question reads as follow: "The obligation of preservation for future generations is indeed now a significant factor for sustainable development of all communities."
805 UNESCO and UNIDROIT, 5.
806 See 2010 Meeting Minutes.
807 UNESCO and UNIDROIT, "Explanatory Report," 5.
808 See March 2011 Meeting Minutes.

wording was replaced by the current one: "objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science."

2.3. Provision 3 – State Ownership

> Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership.

466 The wording of this central provision was widely discussed by the Expert Committee. First of all, everyone in the Committee agreed on the fact that the expression "owned by" was necessary so that the State's right could be expressed in a clear manner.[809] For some members, however, it was also necessary to specify that such objects "become State property;"[810] for others, it was to mention explicitly that the State has an "immediate right of possession."[811] These suggestions were not retained. The Explanatory Report observes that the wording chosen was "the most clear and simple" with regard to the nature of the State's right.[812]

467 Secondly, the Expert Committee felt it was necessary to add a restriction to the general principle of State ownership in case prior ownership by a third party could be established. The Guidelines of Provision 3 give the example of "a person who buries a cultural object belonging to him/her in order to protect it during a conflict, intending to retrieve it later so that he/she has not abandoned ownership." It is explained that the legislature in each country can provide a list of such circumstances, based on local understandings or traditions.[813]

2.4. Provision 4 – Illicit Excavation or Retention

> Cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects.

468 What are the effects of an illegal excavation? The Preliminary Draft only covered the effects under civil law (i.e., Provision 5). The Expert Committee decided that a pro-

809 UNESCO and UNIDROIT, "Explanatory Report," 6.

810 See 2010 Meeting Minutes.
O'Keefe had initially proposed to use both expressions together: "All undiscovered cultural objects are the property of, and owned by, the State" (*supra* 448).

811 This concerns common law jurisdictions where "to sustain a claim in conversion [tort] the claimant must show that it had an immediate right to the possession of the object at the time of alleged wrong." See Palmer's 2010 comments, § 14. Cf. *Elmalı Hoard* case, discussed *supra* 292.

812 UNESCO and UNIDROIT, "Explanatory Report," 5–6.
Palmer, the Expert Committee member, thinks that this explanation does not seem satisfactory since the clarity of the legislation's wording and the nature of the "legal relationship to be proved between the object and the claimant state" are two different issues. See Palmer's 2010 Comments, § 15.

813 UNESCO and UNIDROIT, 6.

vision should be added to cover criminal law aspects as well.[814] Article 3(2) of the UNIDROIT Convention served as a model in this respect: "For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, *when consistent with the law of the State where the excavation took place*" (emphasis added). Provision 4 thus ensures "a perfect harmony between the Convention and the national legislation."[815]

469 The Draft Law had provided a different wording for this provision: "unauthorized removal" of undiscovered cultural objects was "a criminal offense."[816] The expression "unauthorized removal" was criticized by some Committee members, one of which suggested that it could be a source of confusion since it might arguably include private law infractions.[817] The Expert Committee agreed and "unauthorized removal" was replaced by a more direct phrase: "excavated contrary to the law." Moreover, the Committee thoroughly discussed whether the act should be qualified as "theft" or described generally as a "criminal offence." Since there was no consensus, the Draft Law kept the term "criminal offence."[818] During the last meeting of 29 June 2011, however, supporters of the term "theft" must have strongly defended their position since it was this term that was ultimately retained.[819]

470 It should also be noted that Provision 4 uses the formula "deemed to be stolen" instead of "are stolen" in a similar way to the UNIDROIT Convention. The Expert Committee explains that this is because under certain national laws, as long as

814 See 2010 Meeting Minutes.

815 UNESCO and UNIDROIT, "Explanatory Report," 6.

816 See March 2011 Meeting Minutes.

817 See Palmer's 2010 Comments, § 19.

818 The purpose here was "to leave the characterization of the offence (theft, handling of stolen property, swindle, etc.) to the national legislator, according to its principles of criminal law. This explains the reference to term "criminal offence," which is broader than the term "theft" retained by the UNIDROIT Convention." See the Explanatory Report Resulting from the Meeting of the Committee of 14 March 2011, unpublished, Renold's personal archives.
Norman Palmer develops the idea as follows: "(…) I am not convinced that the introduction of the concept of "theft" or "stolen goods" into the language of the model law necessarily represents the best approach. What one needs to do is to find the form of words enacted by statute in the state of origin that is best calculated to trigger the relevant criminal provisions in the destination state. To do that one needs to understand the criminal law of each potential destinations state" (§ 16); "To take an example from my own jurisdiction [UK], an object need not have been stolen in an overseas country in order to activate English criminal law measures (…) [I]t is enough that the object be "criminal property" which means (broadly) the product of proceeds of any criminal act, whether theft or otherwise (…)" (§ 17). See Palmer's 2010 Comments.

819 The Expert Committee observes that "[t]he fact that this provision considers such objects as stolen has certain legal effects in domestic law (see Provision 5). This characterization of theft triggers for example the application of the National Stolen Property Act in the United States of America." UNESCO and UNIDROIT, "Explanatory Report," 7.

the State "is not in the possession of the object, such object cannot be stolen."[820] This problem has already been addressed in Chapter 3 of this thesis (*supra* 294). It appears that the Model Provisions could not find a solution in this respect. Palmer rightfully notes that "any attempt to convert national criminal enactments, evolved by States of origin, into exportable instruments of restitution viable within foreign legal systems should be proceeded by an examination of those foreign systems (…) At that point the question may arise as to whether, given those substantial local variations, the exercise is in fact workable (…)."[821]

2.5. Provision 5 – Inalienability

> The transfer of ownership of a cultural object deemed to be stolen under Provision 4 is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.

471 Provision 5 focuses on the civil-law effects of an illegal excavation. The Preliminary Draft version of the provision had a different wording and referred to concepts such as "good faith" and "just and fair compensation."[822] Such issues were abandoned since they are already dealt with in the UNIDROIT Convention.[823] In addition, a Committee member commented that it would raise complex issues of ownership in States where the claim was brought, which would go beyond the Committee's mandate.[824]

472 The heading "inalienability" can be misleading. Provision 5 intends to prevent transfers of ownership (by purchase, donation, succession, etc.) subsequent to the act of theft. It does not comment on transfers made by the State itself (or a museum), for instance by selling a collection item.[825] This matter is left to national legislators.

473 It is interesting to note that during the drafting process, though some Committee members hardly understood the provision's utility, others defended it firmly. For instance, a member explained that the concept of inalienability was unknown to Northern European systems. Another member suggested that Provision 4 already

820 UNESCO and UNIDROIT, 7.

821 See Palmer's 2010 Comments, § 18.

822 The Preliminary Draft stated as follows: "Any unauthorized transfer of property or possession of archaeological objects shall be null and void. In case the present possessor can establish his good faith, he/she shall be offered just and fair compensation." See 2010 Meeting Minutes.

823 UNESCO and UNIDROIT, "Explanatory Report," 8.

824 See 2010 Meeting Minutes.
The Guidelines of Provision 5 further explain that "[t]he enacting State should be conscious of the limited scope of the provision: if the object is transferred abroad, the nullity of the transfer of ownership will be effective only if the foreign State has adopted Provision 5 or a similar rule." UNESCO and UNIDROIT, 7.

825 UNESCO and UNIDROIT, 7.

guaranteed the effect expected from Provision 5. Yet another insisted that Provision 5 was necessary since it was the private law complement of Provision 4.[826]

2.6. Provision 6 – International Enforcement

> For the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to the law or licitly excavated but illicitly retained, such objects shall be deemed stolen objects.

474 Provision 6 complements Provision 4 on illicit excavation. While Provision 4 ensures the "setting into force" of criminal law procedures at national level, Provision 6 seeks to produce the same effect when the object is (illegally) exported abroad and international judicial cooperation in criminal matters comes into play.[827] The Expert Committee underlines that this provision is also important from a private international law point of view: "[A] foreign court having to deal with a claim for restitution, seeing that the country where the object was discovered considers it as stolen on the basis this provision, will have little difficulty in returning it on the basis of that State's law. This will even more so be the case if the States involved have ratified the UNIDROIT Convention."[828] Provision 6 did not change substantially during the drafting process except for changes made in parallel with previous provisions.

C. Strengths, Weaknesses and Possible Improvements

475 The UNESCO-UNIDROIT Model Provisions constitute a very unique and exclusive document. As Frigo notes, while many international conventions are devoted to the protection of cultural property as a whole, the Model Provisions "aimed at providing a set of provisions for the protection of a limited category of objects, almost exclusively objects belonging to the archaeological heritage of a country and even more specifically, the protection of those objects that have not yet been discovered."[829] Nevertheless, the Expert Committee did not sufficiently take advantage of such exclusiveness. This is probably due to its restricted mandate.

476 It is proposed here that the title of the document be changed and that "undiscovered cultural objects" be replaced by "archaeological heritage." Interestingly, the initial document proposed to the Expert Committee referred to "archaeological objects" instead of "undiscovered cultural objects" in its title (*supra* 459). The reason for this

826 See March 2011 Meeting Minutes.

827 UNESCO and UNIDROIT, "Explanatory Report," 7–8.

828 UNESCO and UNIDROIT, 8.
Art. 3(1) of the UNIDROIT Convention states that "[t]he possessor of a cultural object which has been stolen shall return it."

829 Frigo, "Model Provisions on State Ownership of Undiscovered Cultural Objects - Introduction," 1026.

change was not clearly given in the meetings' minutes. In my opinion, since the Model Provisions deal exclusively with archaeological heritage, it is worth avoiding the more general term "cultural," which may be misleading, and the term "undiscovered," which seems to be used to give archaeological character to cultural objects. The Model Provisions apply to archaeological heritage originating from a State's territory, either discovered or undiscovered.

477 In Provision 1 (General Duty), no definition is given for the notion of "protection" on the grounds that it "should be construed on a case-by-case basis by the relevant national legislation, in accordance with existing international tools."[830] Indeed, the Valletta Convention and the ICAHM Charter provide comprehensive standards for the protection of archaeological heritage, which are applicable worldwide, as examined in Chapter 1 above. In light of these instruments, the Expert Committee could have drafted a much more detailed provision, yet it would have gone beyond their mandate. In fact, the Expert Committee refrained from being too specific about protection measures (*supra* 460). The proposal made below aims to fill this gap.

478 Similarly, the definition suggested in Provision 2 is actually a "non-definition," as it leaves each State free to adopt what it considers an appropriate definition, as long as it includes the contents of Provision 2."[831] A major improvement that can be made in this respect is to propose a complete and precise definition. Three points are particularly important. To begin, ecofacts, which are a type of evidence used by archaeologists to understand the human past (*supra* 23), should be integrated into the definition. Next, the focus should only be placed on the archaeological interest, and not on a set of various disciplines (e.g., history, literature or art) which are not used to evaluate the scientific interest.[832] Finally, it is suggested that archaeological sites be included in the Model Provisions' content, which normally only focuses on movable objects.

479 Due to the Expert Committee's limited mandate, it did not deal with the question of the State's use of archaeological objects. In fact, this subject not only raises legal questions, but also ethical ones (e.g., Should a State sell a legally excavated archaeological object?) and public policy issues, such as the protection of archaeological heritage during large-scale construction works. In light of the comparative analysis provided in Chapters 3 and 4, Provision 3 (State Ownership) of the Model Provisions will be developed to include standards on States' use of archaeological objects and sites.

830 Frigo, 1026.

831 Frigo, 1026.

832 For instance, under Provision 2 of the Model Provisions, a coin discovered in the soil and having importance for history is owned by the State. Nevertheless, this coin may not automatically have an archaeological interest, especially if it is an isolated chance find without any context from which archaeologists can deduce any particular information.

Provisions 1, 2 and 3 concentrate on the protection of archaeological heritage through State ownership while such heritage is still on the State's territory. In contrast, Provisions 4, 5 and 6 target protection through the restitution of archaeological objects which have been illegally excavated and exported to another country. For instance, Provision 4 (Illicit Excavation or Retention) helps the enacting State trigger the relevant criminal provisions in certain countries for restitution purposes. Provision 5 (Inalienability) prevents transfers of ownership in other countries subsequent to illegal excavations. Provision 6 (International Enforcement) facilitates the restitution via judicial cooperation in case both countries have enacted it. 480

Restitution is not directly related to the comparative study undertaken in this thesis. Therefore, the content of Provisions 4, 5 and 6 will remain untouched, except for the change in terminology (*supra* 476). It is also proposed that the title of Provision 5 be changed from "inalienability" to "transferability" because of the reasons explained above (*supra* 472). 481

D. Revised Model Provisions

1. Provision 1 – General Duty

Current Text
The State shall take all necessary and appropriate measures to protect undiscovered cultural objects and to preserve them for present and future generations.

Proposed Text
(1) The State is responsible for protecting archaeological objects and sites originating from its territory and preserving them for present and future generations.
(2) In particular, the State maintains an up-to-date archaeological inventory, preserves archaeological sites in situ whenever possible and provides appropriate storage places for archaeological objects removed from their original location. If archaeological sites cannot be preserved in situ, they should be fully investigated and documented.

1.1. Comments

The original text of Provision 1 is retained in the first paragraph with some modifications. The verb phrase "to take all necessary and appropriate measures" is replaced by "to be responsible for" to strenghten the State's obligation to protect archaeological heritage (*supra* 461). The expression "undiscovered cultural objects" is replaced by "archaeological objects and sites originating from its territory." 482

A second paragraph is added to detail what is meant by "protection" in the context of archaeological heritage following the analysis made in Chapter 1. The purpose of this additional paragraph is to set out common standards and leave the rest to the discretion of public authorities. It is important to underline again that archaeo- 483

logical heritage is different in nature from other cultural heritage items; therefore, the measures specific to their protection (e.g., *in situ* preservation) should be clearly stated in the law.

1.2. Integration into Swiss Law

484 Under Swiss law, each canton must establish the State's specific duties regarding archaeological heritage protection. It is proposed here to focus on the Canton of Geneva and to further develop Article 34 of the LPMNS/GE. The latter provides that the State must take the measures necessary for the preservation and study of "archaeological remains" in a very general way (*supra* 119). In parallel to revised Provision 1(2), this article may detail the State's specific duties. Since Geneva keeps the Canton's archaeological inventory in the form of an archaeological map (*supra* 107), the wording may be adjusted accordingly. Regarding the principle of *in situ* preservation, a wording similar to Article 3(1) of the NCHA (*supra* 66) may be used ("The State (...) preserves archaeological sites in their entirety [intact], where there is an overriding public interest").

Art. 34 of the LPMNS/GE

Current Text
The State takes the necessary measures for the conservation and the study of the archaeological remains.

Proposed Text
The State takes the necessary measures for the conservation and the study of the archaeological remains. In particular:

(a) the State keeps an up-to-date archaeological map of remains, identified and presumed;
(b) the State preserves archaeological remains intact, where there is an overriding public interest;
(c) if archaeological remains cannot be preserved intact, they should be fully investigated and documented; and
(d) the State provides appropriate storage places for objects removed from their original location.

1.3. Integration into Turkish law

485 The Protection Law provides for the principle of *in situ* preservation in its Article 20, mostly dealing with the transportation of cultural property in case of necessity, which is seldom used in practice. Therefore, it is proposed to divide Article 20 in two paragraphs and change the title from "Transportation of immovable cultural property" to "Preservation *in situ*." The first sentence of Article 20 ("Immovable cultural property and its parts shall be conserved *in situ*") should become the first paragraph. The rest of Article 20 on transportation should be the second paragraph. An additional sentence should be added to the first paragraph, stating that "if archaeo-

logical sites cannot be preserved *in situ*, they should be fully investigated and documented," in parallel to revised Provision 1(2).

Art. 20 of the Protection Law

Current Text
Transportation of immovable cultural property
Immovable cultural property and its parts shall be conserved in situ. However, if transporting the immovable cultural property to another location is mandatory or necessary due to its characteristics, the Ministry of Culture and Tourism can undertake the transport with the consent of the Regional Commission by taking the necessary security measures. If the owner of the immovable property suffers a damage because of the transport of the cultural property, compensation shall be determined by a commission formed by the Ministry of Culture and Tourism and paid to the aggrieved.

Proposed Text
Preservation in situ
(1) Immovable cultural property and its parts shall be conserved in situ. If archaeological property cannot be preserved in situ, it should be fully investigated and documented.
(2) If transporting the immovable cultural property to another location is mandatory or necessary due to its characteristics, (...).

As examined above, the Ministry of Culture keeps a national inventory of registered sites. Nevertheless, this inventory excludes archaeological settlements which have not been subject to regustration (*supra* 141). Therefore, it is proposed to add an additional sentence to Article 35(1) of the Protection Law stressing the Ministry of Culture's responsibility of inventorying archaeological sites present on Turkish territory, regardless of whether they have been registered or not. Generally, Chapter Four of the Protection Law (Arts. 35–50) regulates activities such as investigation, drilling, excavation and treasure hunting. It is meaningful to insert the obligation to compile an inventory in this section. Article 35(1) states that only the Ministry of Culture has the right to conduct investigation, drilling and excavation (§ 1), with the possibility of delivering permits to foreign and Turkish institutions (§ 2). With this right comes the responsibility to compile an inventory of archaeological sites located or discovered through activities such as surveys and excavations. 486

Art. 35 of the Protection Law

Current Text
(1) Only the Ministry of Culture and Tourism has the right to conduct investigation, drilling and excavation in order to unearth movable and immovable cultural property subject to this Law.

Proposed Text
(1) Only the Ministry of Culture and Tourism has the right to conduct investigation, drilling and excavation in order to unearth movable and immovable cultural property subject to this Law. The Ministry of Culture and Tourism is responsible for inventorying archaeological sites present on Turkish territory, regardless of whether they have been registered or not.

2. Provision 2 – Definition

Current Text
Undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the soil or underwater.

Proposed Text
Archaeological objects and sites are the part of material heritage in respect of which archaeological methods provide primary information. They include all vestiges of human existence and consist of places relating to all manifestations of human activity, abandoned structures, and remains of all kinds, including subterranean and underwater sites ("archaeological sites"), together with all portable cultural material associated with them ("archaeological objects").

2.1. Comments

487 In its present state, Provision 2 of the Model Provisions does not exactly highlight the main characteristic of archaeological objects and sites. What makes an object "archaeological" is not the fact that it is old, rare or important for art or science, but the fact that information about it can only be provided through scientific methods. The definition given in Provision 2 is therefore replaced by the definition of archaeological heritage elaborated by ICOMOS in its ICAHM Charter (*supra* 18), focusing on archaeological interest. This change allows the inclusion of ecofacts and archaeological sites, which are absent from Provision 2. In ICOMOS' definition, "all vestiges of human existence" refers to ecofacts and "places relating to all manifestations of human activity, abandoned structures, and remains of all kinds" covers archaeological sites. As examined earlier, Swiss and Turkish law also include ecofacts in their national ownership laws (*supra* 195, 209).

488 The integration of revised Provision 2 in Swiss and Turkish law is discussed together with revised Provision 3 below.

3. Provision 3 – State Ownership

Current Text
Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership.

Proposed Text
(1) The State owns archaeological objects originating from its territory in the public interest, provided there is no prior existing ownership. [Such objects are inalienable.]
(2) The owner of an archaeological site is determined according to [legal basis to be inserted]. The State ensures that Provision 1 is taken into consideration when it is confronted with other public interests and that these interests are balanced in light of the protection policies in place.

3.1. Comments

Revised Provision 3 is comprised of two paragraphs: the first one focuses on objects and the second one sites. For each case, ownership status is determined and then the limits of the State's use is fixed. The original text of Provision 3 therefore becomes the first paragraph with some changes. A second paragraph has been added to cover archaeological sites. 489

The first paragraph attributes the ownership of archaeological objects to the State. The wording is similar to the original text. However, the term "undiscovered cultural objects" is replaced by "archaeological objects originating from [the State's] territory"[833] and an emphasis is put on the State's ownership of such objects for the benefit of society and its development ("in the public interest"). In other words, the attribution of ownership to the State is not about the State's enrichment, but the fulfillment of its role as custodian of heritage instead.[834] This understanding is important to make way for what comes next: the issue of alienation. 490

Since the State owns archaeological objects in the public interest, it is only natural that the State cannot transfer them for profit (*supra* 58). If the State's legal system applies inalienability for all types of public property, including archaeological objects (e.g., Turkey, *supra*), there is no need to separately specify the inalienable character of archaeological objects. In countries where inalienability is not strictly applied for public property (e.g., Switzerland, *supra*), the law should provide for a mechanism to prevent the sale of archaeological objects owned by the State on the open market as commercial goods (*supra* 58–62). Providing inalienability for archaeological objects in the law is one solution. If this is not preferred for some reason (*supra* 473), another formulation can be used. For instance, laws can state that such objects "shall not be traded, sold, bought or bartered as commercial goods" (*supra* 60) or "shall only be transferred among public institutions." The ultimate purpose here is to avoid the discretionary disposal of archaeological objects by States for non-scientific purposes. 491

The second paragraph refers to the legal basis under which the ownership of archaeological sites is determined, which will be different in each country. The law can also directly say that archaeological sites (or structures) belong to the owner of the land on which they are situated.[835] A legislature can include structures within the scope of the State's ownership as well. However, this is not suggested as part of the 492

833 The expression "provided there is no prior existing ownership" protects private ownership acquired before the object's passage into State ownership.

834 UNESCO and UNIDROIT, "Explanatory Report," 5.

835 See for instance, Art. 8(1) of the LPPAP/JU: "*Les sites appartiennent au propriétaire du terrain sur lequel ils se situent*."

revised Model Provisions due to the conclusion drawn from the comparative analysis of Chapter 2. It does not necessarily facilitate the protection or management of privately owned lands (*supra* 277). It is therefore optional in terms of revised Provision 3(2).

493 Furthermore, the State should ensure that the archaeological interest is taken into consideration when it is confronted with other public interests, and also that these interests are properly balanced. This was the conclusion reached from Chapter 4 (*supra* 442). Revised Provision 3(2) obliges States to establish mechanisms to identify the archaeological interest when confronted with other public interests and to adopt protection policies which can guide decision-making authorities in their global assessment. The comparative analysis undertaken under Chapter 4 suggests that an efficient and sustainable application of Provision 1 with regard to sites can only be guaranteed with these measures.

3.2. Integration into Swiss law

494 Article 724 of the SCC already defines archaeological objects and declares them the property of cantons (*supra* 195). Nevertheless, it does not declare them inalienable (*supra* 332). One solution is therefore to change Article 724(1bis) of the SCC, which normally allows transfers authorized by cantons. Otherwise, each canton should state in their laws that archaeological objects are inalienable (*supra* 333 for the question of competence). For example, in the Canton of Geneva, Article 33(1) of the LPMNS/GE states that the ownership of newly objects discovered is determined pursuant to Articles 723 and 724 of the SCC. Through an additional sentence, objects within the meaning of Article 724 may be declared inalienable. It will be meaningful that inalienability is mentioned together with the attribution of the State's ownership.

Art. 33 of the LPMNS/GE

Current Text
(1) Ownership of discovered objects is determined pursuant to Art. 723 and 724 SCC.

Proposed Text
(1) Ownership of discovered objects is determined pursuant to Articles 723 and 724 of the SCC. Objects within the meaning of Article 724 of the SCC are inalienable.

495 At first sight, inalienability may seem problematic for cantons who envisage in their law that archaeological objects can be transferred to finders/collectors under certain rules, such as the Canton of Jura (*supra* 350). In my opinion, these cantons can still affirm inalienability as a principle in their law and regulate collecting as an exception. For instance, the Canton of Jura stipulates that "isolated finds" in particular may be transferred to their finders, under the condition of concluding an "agreement that guarantees the object's adequate and sustainable preservation in the

canton."[836] The disposal of archaeological objects by the State therefore remains an exceptional practice. In result, inalienability can be accepted as a general principle considering that most archaeological objects will be placed in public collections. Having said this, in my view, implementing inalienability without any exception and only allowing individuals to collect objects without scientific interest is a more sustainable solution. Moreover, this will oblige cantons to efficiently evaluate the scientific interest (*supra* 352) and to spread the message throughout the country that archaeological objects are inalienable.

496 Regarding sites, their ownership status under Swiss law is determined according to Article 667(1) of the SCC (*supra* 197). Cantonal laws may either refer to this article or say directly that archaeological sites (or structures) belong to the owner of the land on which they are situated. Even if such a statement is not mandatory (Art. 667(1) of the SCC applies in any case), it is worth mentioning it to clearly indicate ownership titles. For instance, in the Canton of Geneva, an additional paragraph (1bis) to Article 33 of the LPMNS/GE ("*Attribution*") may state that the ownership of "immovable antiquities" is determined according to Article 667(1) of the SCC.

Art. 33 of the LPMNS/GE

Current Text
(1) Ownership of discovered objects is determined pursuant to Articles 723 and 724 of the SCC.

Proposed Text
(1) Ownership of discovered objects is determined pursuant to Articles 723 and 724 of the SCC. Objects within the meaning of Article 724 of the SCC are inalienable.
(1bis) Ownership of immovable antiquities is determined pursuant to Article 667(1) of the SCC.

497 Regarding the State's use of sites under its ownership, it is suggested that cantons add a sentence, preferably following the State's specific duties (*supra* 484), stressing that the State take into consideration the preservation of sites when confronted with other public interests and that it weigh them in light of the protection policies in place. Again, such a statement is not mandatory, since under Swiss administrative law rules, public authorities are obliged to identify different interests at stake and weigh them properly. However, it is worth mentioning it explicitly to oblige cantons to check if they have the necessary mechanisms in place to identify the archaeological interest and to adopt public policies specific to archaeological heritage protection. The latter will guide decision-making authorities in their global assessment

836 See Art. 8(2) of the LPPAP/JU: "*Les objets appartiennent à l'Etat conformément à l'article 724 du Code civil suisse. En particulier en cas de découvertes isolées, le Canton peut déroger à son droit de propriété sur un objet en faveur de l'auteur de la découverte, sous réserve de l'établissement d'une convention garantissant la conservation adéquate et durable de l'objet dans le Canton.*"

and prevent them from making arbitrary choices to the detriment of archaeological heritage. For instance, in the Canton of Geneva, a second paragraph can be added to Article 34 of the LPMNS/GE (*supra* 484) to cover the issue of weighing conflicting public interests.

Article 34 of the LPMNS/GE

Current Text
The State takes the necessary measures for the conservation and the study of the archaeological remains.

Proposed Text
(1) The State takes the necessary measures for the conservation and the study of the archaeological remains. In particular:

(a) the State keeps an up-to-date archaeological map of remains, identified and presumed;
(b) the State preserves archaeological remains intact, where there is an overriding public interest;
(c) if archaeological remains cannot be preserved intact, they should be fully investigated and documented; and
(d) the State provides appropriate storage places for objects removed from their original location.

(2) he State ensures that paragraph 1(b) is taken into consideration when confronted with other public interests and balanced in light of the protection policies in place.

3.3. Integration into Turkish Law

498 Based on the issues raised in this thesis, it is proposed that Article 5 of the Protection Law be completely revised and entitled "State Property Quality." It is also proposed that Article 5 be redrafted and composed of four paragraphs focused solely on archaeological heritage and entitled "State Ownership of Archaeological Assets" (*Arkeolojik varlıklar üzerindeki devlet mülkiyeti*).

499 The first paragraph shall provide a definition which is almost identical to the one found in Article 3(1)(a) of the Regulation on Movable Cultural Property (*supra* 221). The second paragraph shall establish the State ownership principle for "movable and immovable archaeological property" using a very similar wording to the actual text of Article 5(1) of the Protection Law. A second sentence shall be added to secure the protection of private ownership of lands on which structures are discovered, and of the structures themselves: "The Ministry of Culture shall establish the rules for the protection and management of immovable archaeological property discovered on lands belonging to individuals or private entities subject to private law rules." The third paragraph shall deal with archaeological objects and the fourth with archaeological sites in parallel with revised Model Provision 3(2). In case of archaeological objects, there is no need to emphasize that they are inalineable since inalienability is a general principle for all public property in Turkish law and no exception is allowed

(*supra* 342). Nevertheless, it is essential to include the conditions under which their collecting is possible and to underline that their ownership status does not change.

Art. 5 Protection Law

Current Text
State property quality
(1) Movable and immovable cultural and natural property requiring protection located on lands owned by the State, public bodies and institutions, and by individuals and legal entities subject to private law rules; whose existence is known or to be discovered in future, have the quality of State property.
(2) Property owned by foundations which are governed or controlled [by the General Directorate of Foundations], has a separate status due to its special qualities and shall not be covered by this provision.

Proposed Text
State ownership of archaeological property
(1) Archaeological property covers cultural and natural property that belongs to geological, prehistoric or historic periods, that has a documentary value in terms of geology, anthropology, prehistory, archaeology and art history, and that reflects the social, cultural, technical and scientific characteristics of the period it belongs to, usually discovered through excavations and similar activities and located in the soil or under water.
(2) Movable and immovable archaeological property located on land owned by the State, public bodies and institutions, and by individuals and legal entities subject to private law rules, whose existence is known or to be discovered in the future, is owned by the State. The Ministry of Culture shall establish the rules for the protection and management of immovable archaeological property discovered on land belonging to individuals or private entities subject to private law rules.
(3) Movable archaeological property discovered through excavations and similar activities in Turkey is in principle preserved by the State. Its preservation through the possession of private collectors or museums remains exceptional and shall be subject to a special regulation. The fact that movable archaeological property owned by the State is possessed by private collectors or museums does not alter the State's ownership of such property.
(4) The Ministry of Culture shall adopt public policies regarding the preservation of immovable archaeological property located on land owned by the State, public bodies and institutions.

Summary of the Proposals Regarding the Model Provisions

Model Provisions on the State's Ownership of Archaeological Heritage Originating from its Territory

I. Territorial Application

Provision 1

General Duty

(1) The State is responsible for protecting archaeological objects and sites originating from its territory and preserving them for present and future generations.

(2) In particular, the State maintains an up-to-date archaeological inventory, preserves archaeological sites *in situ* whenever possible and provides appropriate storage places for archaeological objects removed from their original location. If archaeological sites cannot be preserved *in situ*, they should be fully investigated and documented.

Provision 2

Definition

Archaeological objects and sites are the part of material heritage in respect of which archaeological methods provide primary information. They include all vestiges of human existence and consist of places relating to all manifestations of human activity, abandoned structures, and remains of all kinds, including subterranean and underwater sites ("archaeological sites"), together with all portable cultural material associated with them ("archaeological objects").

Provision 3

State Ownership

(1) The State owns archaeological objects originating from its territory in the public interest, provided there is no prior existing ownership. [Such objects are inalienable.]

(2) The owner of an archaeological site is determined according to [legal basis to be inserted]. The State ensures that Provision 1 is taken into consideration when it is confronted with other public interests and that these interests are balanced in light of the protection policies in place.

II. Extraterritorial Application

Provision 4

Illicit Excavation or Retention

Archaeological objects excavated contrary to the law or licitly excavated but illicitly retained are deemed stolen objects.

Provision 5

Transferability

The transfer of ownership of an archaeological object deemed to be stolen under Provision 4 is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.

Provision 6

International Enforcement

For the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to the law or licitly excavated but illicitly retained, such objects shall be deemed stolen objects.

Summary of the Proposals Regarding Geneva's Heritage Law in French

Art. 33 LPMNS/GE

Attribution

(1) La propriété des objets découverts est fixée conformément aux articles 723 et 724 du code civil. Les objects au sens de l'article 724 du code civil sont inaliénables.

(1bis) La propriété des antiquités immobilières est fixée conformément à l'article 677 al. 1 du code civil.

Art. 34 LPMNS/GE

Conservation

(1) L'Etat prend les dispositions nécessaires à la conservation et à l'étude des vestiges archéologiques. En particulier,
(a) l'Etat tient à jour la carte des vestiges archéologiques, identifiés et présumés ;
(b) lorsque l'intérêt général prévaut, l'Etat préserve l'intégrité de ces vestiges ;
(c) lorsqu'un vestige ne peut pas être conservé, il doit faire l'objet d'une étude scientifique ; et
(d) l'Etat garantit l'archivage adéquat et durable des objets à conserver.

(2) L'Etat veille à ce que l'article 34 al. 1 lettre b soit pris en considération en présence d'autres intérêts publics concurrents et pesé à la lumière des politiques de protection en vigueur.

Summary of the Proposals Regarding Turkey's Protection Law in Turkish

Madde 5

Arkeolojik varlıklar üzerindeki devlet mülkiyeti

(1) Arkeolojik varlıklar; jeolojik, tarih öncesi ve tarihi devirlere ait, jeoloji, antropoloji, prehistorya, arkeoloji ve sanat tarihi açılarından belge değeri taşıyan ve ait oldukları dönemin sosyal, kültürel, teknik ve ilmi özellikleri ile seviyesini yansıtan genellikle kazı ve benzeri çalışmalarla yer üstünde, yer altında veya su altında bulunan kültür ve tabiat varlıklarını ifade eder.

(2) Devlete, kamu kurum ve kuruluşlarına ait taşınmazlar ile özel hukuk hükümlerine tabi gerçek ve tüzelkişilerin mülkiyetinde bulunan taşınmazlarda, varlığı bilinen veya ileride meydana çıkacak olan taşınır ve taşınmaz arkeolojik varlıklar devlete aittir. Özel hukuk hükümlerine tabi gerçek ve tüzelkişilerin mülkiyetinde bulunan taşınmazlardaki taşınmaz arkeolojik varlıkların nasıl korunacağına ve yönetileceğine ilişkin Bakanlık, çerçeve kurallar oluşturur.

(3) Türkiye'de kazı ve benzeri çalışmalarla bulunan taşınır arkeolojik varlıkların devlet tarafından korunmaları esastır. Bunların istinai olarak özel koleksiyoncu veya müzelerin zilyetliğinde korunmasına ilişkin esaslar yönetmelikle düzenlenir. Devlet malı olan arkeolojik varlıkların özel koleksiyoncu veya müzelerde bulunması devletin mülkiyet hakkı üzerinde bir değişiklik yapmaz.

(4) Devlete, kamu kurum ve kuruluşlarına ait taşınmazlarda bulunan taşınmaz arkeolojik varlıkların nasıl korunacağına ilişkin, Bakanlık kamu politikaları geliştirir.

Madde 20

Taşınmaz kültür varlıklarının yerinde korunması

(1) Taşınmaz kültür varlıkları ve parçalarının, bulundukları yerlerde korunmaları esastır. Arkeolojik varlıklar yerinde korunamıyor ise, bilimsel çalışması yapılmalı ve kayıt altına alınmalıdır.

(2) Bu taşınmaz kültür varlıklarının başka bir yere nakli zorunluluğu varsa veya özellikleri itibariyle nakli gerekli ise, Koruma Bölge Kurullarının uygun görüşü ve gereken emniyet tedbirleri alınmak suretiyle Kültür ve Turizm Bakanlığınca istenilen yere nakledilebilir. Kültür varlığının nakli dolayısıyla taşınmazın maliki bir

zarara maruz kalmışsa, Kültür ve Turizm Bakanlığınca oluşturulacak bir komisyonun tespit edeceği tazminat zarar görene ödenir.

Madde 35

Araştırma, sondaj ve kazı izni

(1) Bu kanun hükümlerine tabi, taşınır ve taşınmaz kültür ve tabiat varlıklarını meydana çıkarmak üzere, araştırma, sondaj ve kazı yapma hakkı, sadece Kültür ve Turizm Bakanlığına aittir. Kültür ve Turizm Bakanlığı Türkiye'de bulunan arkeolojik sitlerin, tespit ve tescilden bağımsız olarak, envanterlemesini yapmak ile yükümlüdür.

Conclusion

For States, declaring undiscovered archaeological heritage in their territory to be State property has proved to be insufficient *per se* to ensure proper protection of this heritage. What more can States do at the legal level to ensure the proper protection of archaeological heritage owned in the general interest? 500

Chapter 1 has shown that States should first ensure that specific protection measures regarding archaeological heritage are explicitly stated in their laws (i.e., the legal minimum). These duties are summarized under revised Provision 1(2) of the Model Provisions. Specific proposals have been made for Swiss and Turkish law. 501

In Chapter 2, it has been observed that while some countries provide for State ownership only with regard to archaeological objects (e.g., Switzerland), others have chosen to cover structures as well (e.g., Turkey). It has been argued that an *ipso iure* ownership of structures is not mandatory to protect sites on private lands because the landowners' proprietary interest should eventually be balanced with sites' preservation. Revised Provision 3(2) of the Model Provisions reflects this issue by letting the standard legal regime for immovable property decide on the ownership of sites. 502

Chapter 3, which focused on archaeological objects owned by the State, has concluded that even though such objects are usually dedicated to the public interest, a country's political structure and social and archaeological context affect the State's ability to take possession of newly discovered objects – in particular, chance finds and the State's approach to the collection of such finds by individuals. Therefore, it is important that lawmakers remain in touch with their countries' realities and reinforce their legal framework accordingly. This leads to the conclusion that each country should draft its own principles on the State's use of archaeological objects. Specific proposals have been made here for Swiss and Turkish law. In both cases, inalienability has been retained as necessary in the legal regime for archaeological objects and is thus included in the text of revised Provision 3(1) of the Model Provisions. 503

Finally, Chapter 4 has approached the issue of State-owned archaeological sites by first stressing the importance of global assessment mechanisms such as the EIA and spatial planning instruments in identifying the archaeological interest in the early phases of projects so that impacts can be minimized. It has then emphasized that since each case is different, it is not possible to apply a single formula to balance the archaeological interest with other public interests. Nevertheless, it has been suggested that the State should adopt specific policies on the protection of archaeolog- 504

ical sites to guide decision-making authorities in their balancing of interests. These issues have been included in revised Provision 3(2) of the Model Provisions. The integration of revised Provision 3(2) in Swiss and Turkish law has been discussed.

505 As a final note to this thesis, it is worth opening a discussion on the place of State ownership of archaeological objects under international law. Is it possible that such a principle may become an international custom? To answer to this question, a wider comparative study is no doubt needed. Nevertheless, it is undeniable that the evolution of UNESCO's cultural heritage conventions has had an impact on countries' perceptions of their own archaeological heritage, with Switzerland being a perfect example. Through the adoption of the CPTA (*supra* 79), Switzerland has had the opportunity to reflect on the protection of archaeological objects discovered on its territory and has consequently reinforced its protection regime. The rationale behind the protection of archaeological objects originating from any country is the same: to preserve the finds' context, to interpret the human past according to such data and to preserve the objects as a material archive. One may think of archaeological objects as archives of our material culture, unique and irreplaceable, which are owned and preserved by the State. States thus have an ethical, if not legal, obligation to promote this view of archaeological objects as untradable material archives.

Annex 1: Model Provisions on State Ownership of Undiscovered Cultural Objects accompanied by explanatory guidelines (UNESCO and UNIDROIT, 2011)

Provision 1

General Duty

The State shall take all necessary and appropriate measures to protect undiscovered cultural objects and to preserve them for present and future generations.

Guidelines:

It is felt that the first provision should be a general clause that recalls the general duty of the State regarding cultural objects that have not yet been discovered.

The duty relates both to the *protection* and *preservation* of such objects. These terms are to be found also in the Preambles of the UNESCO Convention on the Protection of Underwater Cultural Heritage of 2001 and of the UNIDROIT Convention on Stolen or Illegally exported Cultural Objects of 1995.

An earlier version of the text indicated some measures to be taken: for example, a State should encourage, through financial and other means, persons who find archaeological objects to disclose their finding to the competent authorities, or encourage the national and international circulation of such archaeological objects, for example through loans to museums and other cultural institutions. It was finally decided to allow each State to take the measures it deemed necessary and appropriate in accordance with the national and international practice and standards and, among others, the 1976 UNESCO Recommendation concerning the International Exchange of Cultural Property or the Preambles of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention.

The State's duty applies both in the present times (i.e. on the date the model provisions are adopted by a State) and for the future (i.e. after they have been adopted). The obligation of preservation for future generations is indeed now a significant factor for sustainable development of all communities The model provisions will not affect past situations as they are not intended to be retroactive. It should be recalled that the 1970 and 1995 Conventions also have no retroactive application, following

the general principle stated in Article 28 of the 1969 Vienna Convention on the Law of Treaties.

This provision imposes a general obligation and indicates the intent of the law which may be adopted according to the legislative tradition of the enacting State, such as being the first clause of a national statute, or incorporated in the statute's preamble.

Provision 2

Definition

Undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the soil or underwater.

Guidelines:

The model provisions definition is based on the general definition given by the 1970 UNESCO Convention (art.1) and the 1995 UNIDROIT Convention (art. 2). This is to stress that these provisions must facilitate the implementation of the two instruments and that the definition is applied among the 120 States bound by the 1970 UNESCO Convention. As it is a model of a national legislation a reference to the national law is appropriate.

The definition incorporates both types of Undiscovered Cultural Objects, i.e. those found in the *soil* and those found *underwater*. The ownership regime under the Convention on the Protection of the Underwater Cultural Heritage of 2001 – which is different from that of these Model Provisions – will apply to States Parties to that Convention.

It should be stressed that the list of categories is not exhaustive and the enacting State is free to add what it wants (for example, also covered are anthropological objects, human remains, etc.). Similarly, the location of the object should be understood broadly (for example, an undiscovered object could be located in a building or in ice). The enacting State can of course choose on the contrary to limit the definition in its internal law.

Provision 3

State Ownership

Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership.

Guidelines:

This provision is the central rule of the model provisions. The principle adopted - State ownership - follows that of many existing national legislations, but in the most clear and simple terms. As drafted, the text clearly indicates that such objects are owned by the State before being discovered, thus avoiding the problem of interpretation of vague legislations.

The terms "*are owned by* the State" were chosen as opposed to "*are the property of* the State", for the nature of the right of ownership to be absolutely clear. It is also evident that such a right does not aim at the enrichment of the State (institutions or representatives) but allows it to fulfil its role as custodian of the heritage.

A restriction should be made in case prior ownership by a third party can be established. It could be a person who buries a cultural object belonging to him/her in order to protect it during a conflict, intending to retrieve it later so that he/she has not abandoned ownership. Some existing statutes go in the same direction when they provide for State ownership if the discovered object "belong to no one".

Given the general and abstract nature of a model law, it does not appear necessary for it to provide in detail what the precise circumstances are in which "prior existing ownership" is to be considered as established. The national legislator might wish to provide an (illustrative or exhaustive) list of such circumstances, based on local understandings or traditions.

The enacting State may wish to consider the effect of national and international human rights laws on the validity of an extended ownership of the State (see for example the 1948 Universal Declaration of Human Rights, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms – and amendments –, the national implementing legislations).

Provision 4

Illicit excavation or retention

Cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects.

Guidelines:

Once the principle of the State's ownership of undiscovered cultural objects is clearly established, the effects of it once the objects are illicitly discovered must be clearly set forth. Illicitly discovered means either illicit excavation or retention. This provision considers such objects as stolen.

It should be recalled in this connection that art. 3(2) of the 1995 UNIDROIT Convention provides that "[f]or the purpose of this Convention a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen when consistent with the law of the State where the excavation took place".

Among the several possible definitions of what "illicit excavation or retention" of a cultural object can be, the definition given by art. 3(2) of the 1995 UNIDROIT Convention should be followed, since one of the purposes of the model provisions is to facilitate the enforcement by national courts of the UNIDROIT Convention. Model provision 4 (and 6 as well) follow that purpose, although they also have an autonomous existence.

This is an indirect reference to the 1995 UNIDROIT Convention which will assist States not yet Parties to it to have the legal basis in their own legislation to become Party and benefit in particular from article 3(2) ("when consistent with the law of the State where the excavation took place"), having a perfect harmony between the Convention and the national legislation. If the enacting State is not Party to the 1995 Convention, the normal rules of private law will apply such as, for example, the fact that under certain legal systems title of a stolen object cannot be acquired.

The fact that this provision considers such objects as stolen has certain legal effects in domestic law (see Provision 5). This characterisation of theft triggers for example the application of the *National Stolen Property Act* in the United States of America.

The provision follows the wording of the 1995 Convention "are deemed to be stolen" and not "are stolen" to answer a problem which some States could have because as long as it is not in a possession of the object, such object cannot be stolen. A retention for the purposes of this provision would not then be a theft. This is why a broader formula has been chosen.

The licit or illicit nature of an excavation ("object excavated contrary to the law") will be determined by additional national legislation which very often already exists. For example, many national legislations require excavations to be authorised with an administrative process being followed.

The other effect concerns criminal law as the provision is dealing with theft. This criminal activity involves the setting into force of the criminal law procedures at national level, but also international co-operation in criminal law matters when international aspects are concerned (see Provision 6).

In case an object is lawfully excavated and lawfully exported on a temporary basis, but not returned after the expiry of the term, and thus illicitly retained, it should be deemed stolen.

Provision 5

Inalienability

The transfer of ownership of a cultural object deemed to be stolen under Provision 4 is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.

Guidelines:

Provision 5 is the private law complement of Provision 4. An undiscovered cultural object is a thing which may not be the object of private rights and remains such once it has been discovered. It can therefore not be validly acquired by a subsequent acquirer (by purchase, donation, succession, etc.).

A reservation should, however, be made if the transferor has a valid title, for example a State archeological museum that decides, validly according to its national law, to sell an item in its collection (for example by *deaccessioning*) or a private person who validly acquired the object prior to the entering into force of the model provision in the State concerned. If this is the case, the museum or the private person are the actual owners of the object and they may as such dispose of it.

The enacting State should be conscious of the limited scope of the provision: if the object is transferred abroad, the nullity of the transfer of ownership will be effective only if the foreign State has adopted Provision 5 or a similar rule.

Provision 6

International enforcement

For the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to the law or licitly excavated but illicitly retained, such objects shall be deemed stolen objects.

Guidelines:

Model provision 6 aims to facilitate the return or the restitution of a cultural object that has been exported after having been discovered and unlawfully removed. If the object is considered stolen, international judicial cooperation in criminal matters will generally enable its return to the country where it was discovered.

Also, from a private international law point of view, a foreign court having to deal with a claim for restitution, seeing that the country where the object was discovered considers it as stolen on the basis this provision, will have little difficulty in return-

ing it on the basis of that state's law. This will even more so be the case if the States involved have ratified the 1995 UNIDROIT Convention (see its art. 3(1).

It should also be noted that the model provisions cannot and do not intend to answer all questions linked to the legal status of excavations and discoveries of cultural objects. For example, the model provisions do not deal with the issue of "treasure trove", i.e. to what extent the discoverer should be rewarded for his or her discovery. If the national legislator deems it to be relevant, this will have to be dealt with separately in accordance with its legal system. The Provisions also do not purport to solve the vexed issue of the protection of the good faith acquirer and his or her duty of diligence. It should be recalled that UNESCO specifically asked UNIDROIT to deal with this fundamental issue and the 1995 UNIDROIT Convention provides an answer in Articles 3 and 4. In particular Article 4(4) indicates the criteria to determine due diligence at the time of acquisition of an object, which will be of great assistance to the potential buyer who will know in advance how to behave, but also to the judge called to decide in case of dispute. Such criteria have inspired several national legislations adopted since.

Annex 2: Charter for the Protection and Management of the Archaeological Heritage (ICOMOS, 1990)

Introduction

It is widely recognised that a knowledge and understanding of the origins and development of human societies is of fundamental importance to humanity in identifying its cultural and social roots.

The archaeological heritage constitutes the basic record of past human activities. Its protection and proper management is therefore essential to enable archaeologists and other scholars to study and interpret it on behalf of and for the benefit of present and future generations.

The protection of this heritage cannot be based upon the application of archaeological techniques alone. It requires a wider basis of professional and scientific knowledge and skills. Some elements of the archaeological heritage are components of architectural structures and in such cases must be protected in accordance with the criteria for the protection of such structures laid down in the 1966 Venice Charter on the Conservation and Restoration of Monuments and Sites. Other elements of the archaeological heritage constitute part of the living traditions of indigenous peoples, and for such sites and monuments the participation of local cultural groups is essential for their protection and preservation.

For these and other reasons the protection of the archaeological heritage must be based upon effective collaboration between professionals from many disciplines. It also requires the co-operation of government authorities, academic researchers, private or public enterprise, and the general public. This charter therefore lays down principles relating to the different aspects of archaeological heritage management. These include the responsibilities of public authorities and legislators, principles relating to the professional performance of the processes of inventorisation, survey, excavation, documentation, research, maintenance, conservation, preservation, reconstruction, information, presentation, public access and use of the heritage, and the qualification of professionals involved in the protection of the archaeological heritage.

The charter has been inspired by the success of the Venice Charter as guidelines and source of ideas for policies and practice of governments as well as scholars and professionals.

The charter has to reflect very basic principles and guidelines with global validity. For this reason it cannot take into account the specific problems and possibilities of regions or countries. The charter should therefore be supplemented at regional and national levels by further principles and guidelines for these needs.

Article 1

Definition and Introduction

The "archaeological heritage" is that part of the material heritage in respect of which archaeological methods provide primary information. It comprises all vestiges of human existence and consists of places relating to all manifestations of human activity, abandoned structures, and remains of all kinds (including subterranean and underwater sites), together with all the portable cultural material associated with them.

Article 2

Integrated Protection Policies

The archaeological heritage is a fragile and non-renewable cultural resource. Land use must therefore be controlled and developed in order to minimise the destruction of the archaeological heritage.

Policies for the protection of the archaeological heritage should constitute an integral component of policies relating to land use, development, and planning as well as of cultural, environmental and educational policies. The policies for the protection of the archaeological heritage should be kept under continual review, so that they stay up to date. The creation of archaeological reserves should form part of such policies.

The protection of the archaeological heritage should be integrated into planning policies at international, national, regional and local levels.

Active participation by the general public must form part of policies for the protection of the archaeological heritage. This is essential where the heritage of indigenous peoples is involved. Participation must be based upon access to the knowledge necessary for decision- making. The provision of information to the general public is therefore an important element in integrated protection.

Article 3

Legislation and Economy

The protection of the archaeological heritage should be considered as a moral obligation upon all human beings; it is also a collective public responsibility. This obligation must be acknowledged through relevant legislation and the provision of adequate funds for the supporting programmes necessary for effective heritage management.

The archaeological heritage is common to all human society and it should therefore be the duty of every country to ensure that adequate funds are available for its protection.

Legislation should afford protection to the archaeological heritage that is appropriate to the needs, history, and traditions of each country and region, providing for in situ protection and research needs.

Legislation should be based on the concept of the archaeological heritage as the heritage of all humanity and of groups of peoples, and not restricted to any individual person or nation.

Legislation should forbid the destruction, degradation or alteration through changes of any archaeological site or monument or to their surroundings without the consent of the relevant archaeological authority.

Legislation should in principle require full archaeological investigation and documentation in cases where the destruction of the archaeological heritage is authorised.

Legislation should require, and make provision for, the proper maintenance, management and conservation of the archaeological heritage. Adequate legal sanctions should be prescribed in respect of violations of archaeological heritage legislation.

If legislation affords protection only to those elements of the archaeological heritage which are registered in a selective statutory inventory, provision should be made for the temporary protection of unprotected or newly discovered sites and monuments until an archaeological evaluation can be carried out.

Development projects constitute one of the greatest physical threats to the archaeological heritage. A duty for developers to ensure that archaeological heritage impact studies are carried out before development schemes are implemented, should therefore be embodied in appropriate legislation, with a stipulation that the costs of such studies are to be included in project costs. The principle should also be established

in legislation that development schemes should be designed in such a way as to minimise their impact upon the archaeological heritage.

Article 4

Survey

The protection of the archaeological heritage must be based upon the fullest possible knowledge of its extent and nature. General survey of archaeological resources is therefore an essential working tool in developing strategies for the protection of the archaeological heritage. Consequently archaeological survey should be a basic obligation in the protection and management of the archaeological heritage.

At the same time, inventories constitute primary resource databases for scientific study and research. The compilation of inventories should therefore be regarded as a continuous, dynamic process. It follows that inventories should comprise information at various levels of significance and reliability, since even superficial knowledge can form the starting point for protectional measures.

Article 5

Investigation

Archaeological knowledge is based principally on the scientific investigation of the archaeological heritage. Such investigation embraces the whole range of methods from non- destructive techniques through sampling to total excavation.

It must be an overriding principle that the gathering of information about the archaeological heritage should not destroy any more archaeological evidence than is necessary for the protectional or scientific objectives of the investigation. Non-destructive techniques, aerial and ground survey, and sampling should therefore be encouraged wherever possible, in preference to total excavation.

As excavation always implies the necessity of making a selection of evidence to be documented and preserved at the cost of losing other information and possibly even the total destruction of the monument, a decision to excavate should only be taken after thorough consideration.

Excavation should be carried out on sites and monuments threatened by development, land-use change, looting, or natural deterioration.

In exceptional cases, unthreatened sites may be excavated to elucidate research problems or to interpret them more effectively for the purpose of presenting them to the public. In such cases excavation must be preceded by thorough scientific evalu-

ation of the significance of the site. Excavation should be partial, leaving a portion undisturbed for future research.

A report conforming to an agreed standard should be made available to the scientific community and should be incorporated in the relevant inventory within a reasonable period after the conclusion of the excavation.

Excavations should be conducted in accordance with the principles embodied in the 1956 UNESCO Recommendations on International Principles Applicable to Archaeological Excavations and with agreed international and national professional standards.

Article 6

Maintenance and Conservation

The overall objective of archaeological heritage management should be the preservation of monuments and sites in situ, including proper long-term conservation and curation of all related records and collections etc. Any transfer of elements of the heritage to new locations represents a violation of the principle of preserving the heritage in its original context. This principle stresses the need for proper maintenance, conservation and management. It also asserts the principle that the archaeological heritage should not be exposed by excavation or left exposed after excavation if provision for its proper maintenance and management after excavation cannot be guaranteed.

Local commitment and participation should be actively sought and encouraged as a means of promoting the maintenance of the archaeological heritage. This principle is especially important when dealing with the heritage of indigenous peoples or local cultural groups. In some cases it may be appropriate to entrust responsibility for the protection and management of sites and monuments to indigenous peoples.

Owing to the inevitable limitations of available resources, active maintenance will have to be carried out on a selective basis. It should therefore be applied to a sample of the diversity of sites and monuments, based upon a scientific assessment of their significance and representative character, and not confined to the more notable and visually attractive monuments.

The relevant principles of the 1956 UNESCO Recommendations should be applied in respect of the maintenance and conservation of the archaeological heritage.

Article 7

Presentation, Information, Reconstruction

The presentation of the archaeological heritage to the general public is an essential method of promoting an understanding of the origins and development of modern societies. At the same time it is the most important means of promoting an understanding of the need for its protection.

Presentation and information should be conceived as a popular interpretation of the current state of knowledge, and it must therefore be revised frequently. It should take account of the multifaceted approaches to an understanding of the past.

Reconstructions serve two important functions: experimental research and interpretation. They should, however, be carried out with great caution, so as to avoid disturbing any surviving archaeological evidence, and they should take account of evidence from all sources in order to achieve authenticity. Where possible and appropriate, reconstructions should not be built immediately on the archaeological remains, and should be identifiable as such.

Article 8

Professional Qualifications

High academic standards in many different disciplines are essential in the management of the archaeological heritage. The training of an adequate number of qualified professionals in the relevant fields of expertise should therefore be an important objective for the educational policies in every country. The need to develop expertise in certain highly specialised fields calls for international co-operation. Standards of professional training and professional conduct should be established and maintained.

The objective of academic archaeological training should take account of the shift in conservation policies from excavation to in situ preservation. It should also take into account the fact that the study of the history of indigenous peoples is as important in preserving and understanding the archaeological heritage as the study of outstanding monuments and sites.

The protection of the archaeological heritage is a process of continuous dynamic development. Time should therefore be made available to professionals working in this field to enable them to update their knowledge. Postgraduate training programmes should be developed with special emphasis on the protection and management of the archaeological heritage.

Article 9

International Co-Operation

The archaeological heritage is the common heritage of all humanity. International co- operation is therefore essential in developing and maintaining standards in its management.

There is an urgent need to create international mechanisms for the exchange of information and experience among professionals dealing with archaeological heritage management. This requires the organisation of conferences, seminars, workshops, etc. at global as well as regional levels, and the establishment of regional centres for postgraduate studies. ICOMOS, through its specialised groups, should promote this aspect in its medium- and long-term planning.

International exchanges of professional staff should also be developed as a means of raising standards of archaeological heritage management.

Technical assistance programmes in the field of archaeological heritage management should be developed under the auspices of ICOMOS.

Annex 3: Revised European Convention on the Protection of the Archaeological Heritage (Council of Europe, 1992)

Valetta, 16.I.1992

European Treaty Series – No. 143

Preamble

The member States of the Council of Europe and the other States party to the European Cultural Convention signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose, in particular, of safeguarding and realising the ideals and principles which are their common heritage;

Having regard to the European Cultural Convention signed in Paris on 19 December 1954, in particular Articles 1 and 5 thereof;

Having regard to the Convention for the Protection of the Architectural Heritage of Europe signed in Granada on 3 October 1985;

Having regard to the European Convention on Offences relating to Cultural Property signed in Delphi on 23 June 1985;

Having regard to the recommendations of the Parliamentary Assembly relating to archaeology and in particular Recommendations 848 (1978), 921 (1981) and 1072 (1988);

Having regard to Recommendation No. R (89) 5 concerning the protection and enhancement of the archaeological heritage in the context of town and country planning operations;

Recalling that the archaeological heritage is essential to a knowledge of the history of mankind;

Acknowledging that the European archaeological heritage, which provides evidence of ancient history, is seriously threatened with deterioration because of the increasing number of major planning schemes, natural risks, clandestine or unscientific excavations and insufficient public awareness;

Affirming that it is important to institute, where they do not yet exist, appropriate administrative and scientific supervision procedures, and that the need to protect the archaeological heritage should be reflected in town and country planning and cultural development policies;

Stressing that responsibility for the protection of the archaeological heritage should rest not only with the State directly concerned but with all European countries, the aim being to reduce the risk of deterioration and promote conservation by encouraging exchanges of experts and the comparison of experiences;

Noting the necessity to complete the principles set forth in the European Convention for the Protection of the Archaeological Heritage signed in London on 6 May 1969, as a result of evolution of planning policies in European countries,

Have agreed as follows:

Definition of the archaeological heritage

Article 1

1 The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study.

2 To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs:

i the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;
ii for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and
iii which are located in any area within the jurisdiction of the Parties.

3 The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water.

Identification of the heritage and measures for protection

Article 2

Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for:

i the maintenance of an inventory of its archaeological heritage and the designation of protected monuments and areas;
ii the creation of archaeological reserves, even where there are no visible remains on the ground or under water, for the preservation of material evidence to be studied by later generations;
iii the mandatory reporting to the competent authorities by a finder of the chance discovery of elements of the archaeological heritage and making them available for examination.

Article 3

To preserve the archaeological heritage and guarantee the scientific significance of archaeological research work, each Party undertakes:
i to apply procedures for the authorisation and supervision of excavation and other archaeological activities in such a way as:
  a to prevent any illicit excavation or removal of elements of the archaeological heritage;
  b to ensure that archaeological excavations and prospecting are undertaken in a scientific manner and provided that:
    – non-destructive methods of investigation are applied wherever possible;
    – the elements of the archaeological heritage are not uncovered or left exposed during or after excavation without provision being made for their proper preservation, conservation and management;
ii to ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially authorised persons;
iii to subject to specific prior authorisation, whenever foreseen by the domestic law of the State, the use of metal detectors and any other detection equipment or process for archaeological investigation.

Article 4

Each Party undertakes to implement measures for the physical protection of the archaeological heritage, making provision, as circumstances demand:
i for the acquisition or protection by other appropriate means by the authorities of areas intended to constitute archaeological reserves;
ii for the conservation and maintenance of the archaeological heritage, preferably *in situ*;
iii for appropriate storage places for archaeological remains which have been removed from their original location.

Integrated conservation of the archaeological heritage

Article 5

Each Party undertakes:

i to seek to reconcile and combine the respective requirements of archaeology and development plans by ensuring that archaeologists participate:

   a in planning policies designed to ensure well-balanced strategies for the protection, conservation and enhancement of sites of archaeological interest;

   b in the various stages of development schemes;

ii to ensure that archaeologists, town and regional planners systematically consult one another in order to permit:

   a the modification of development plans likely to have adverse effects on the archaeological heritage;

   b the allocation of sufficient time and resources for an appropriate scientific study to be made of the site and for its findings to be published;

iii to ensure that environmental impact assessments and the resulting decisions involve full consideration of archaeological sites and their settings;

iv to make provision, when elements of the archaeological heritage have been found during development work, for their conservation *in situ* when feasible;

v to ensure that the opening of archaeological sites to the public, especially any structural arrangements necessary for the reception of large numbers of visitors, does not adversely affect the archaeological and scientific character of such sites and their surroundings.

Financing of archaeological research and conservation

Article 6

Each Party undertakes:

i to arrange for public financial support for archaeological research from national, regional and local authorities in accordance with their respective competence;

ii to increase the material resources for rescue archaeology:

   a by taking suitable measures to ensure that provision is made in major public or private development schemes for covering, from public sector or private sector resources, as appropriate, the total costs of any necessary related archaeological operations;

b by making provision in the budget relating to these schemes in the same way as for the impact studies necessitated by environmental and regional planning precautions, for preliminary archaeological study and prospection, for a scientific summary record as well as for the full publication and recording of the findings.

Collection and dissemination of scientific information

Article 7

For the purpose of facilitating the study of, and dissemination of knowledge about, archaeological discoveries, each Party undertakes:

i to make or bring up to date surveys, inventories and maps of archaeological sites in the areas within its jurisdiction;

ii to take all practical measures to ensure the drafting, following archaeological operations, of a publishable scientific summary record before the necessary comprehensive publication of specialised studies.

Article 8

Each Party undertakes:

i to facilitate the national and international exchange of elements of the archaeological heritage for professional scientific purposes while taking appropriate steps to ensure that such circulation in no way prejudices the cultural and scientific value of those elements;

ii to promote the pooling of information on archaeological research and excavations in progress and to contribute to the organisation of international research programmes.

Promotion of public awareness

Article 9

Each Party undertakes:

i to conduct educational actions with a view to rousing and developing an awareness in public opinion of the value of the archaeological heritage for understanding the past and of the threats to this heritage;

ii to promote public access to important elements of its archaeological heritage, especially sites, and encourage the display to the public of suitable selections of archaeological objects.

Prevention of the illicit circulation of elements of the archaeological heritage

Article 10

Each Party undertakes:

i to arrange for the relevant public authorities and for scientific institutions to pool information on any illicit excavations identified;

ii to inform the competent authorities in the State of origin which is a Party to this Convention of any offer suspected of coming either from illicit excavations or unlawfully from official excavations, and to provide the necessary details thereof;

iii to take such steps as are necessary to ensure that museums and similar institutions whose acquisition policy is under State control do not acquire elements of the archaeological heritage suspected of coming from uncontrolled finds or illicit excavations or unlawfully from official excavations;

iv as regards museums and similar institutions located in the territory of a Party but the acquisition policy of which is not under State control:

  a to convey to them the text of this (revised) Convention;

  b to spare no effort to ensure respect by the said museums and institutions for the principles set out in paragraph 3 above;

v to restrict, as far as possible, by education, information, vigilance and co-operation, the transfer of elements of the archaeological heritage obtained from uncontrolled finds or illicit excavations or unlawfully from official excavations.

Article 11

Nothing in this (revised) Convention shall affect existing or future bilateral or multilateral treaties between Parties, concerning the illicit circulation of elements of the archaeological heritage or their restitution to the rightful owner.

Mutual technical and scientific assistance

Article 12

The Parties undertake:

i to afford mutual technical and scientific assistance through the pooling of experience and exchanges of experts in matters concerning the archaeological heritage;

ii to encourage, under the relevant national legislation or international agreements binding them, exchanges of specialists in the preservation of the archaeological heritage, including those responsible for further training.

Control of the application of the (revised) Convention

Article 13

For the purposes of this (revised) Convention, a committee of experts, set up by the Committee of Ministers of the Council of Europe pursuant to Article 17 of the Statute of the Council of Europe, shall monitor the application of the (revised) Convention and in particular:

i report periodically to the Committee of Ministers of the Council of Europe on the situation of archaeological heritage protection policies in the States Parties to the (revised) Convention and on the implementation of the principles embodied in the (revised) Convention;

ii propose measures to the Committee of Ministers of the Council of Europe for the implementation of the (revised) Convention's provisions, including multilateral activities, revision or amendment of the (revised) Convention and informing public opinion about the purpose of the (revised) Convention;

iii make recommendations to the Committee of Ministers of the Council of Europe regarding invitations to States which are not members of the Council of Europe to accede to this (revised) Convention.

Final clauses

Article 14

1 This (revised) Convention shall be open for signature by the member States of the Council of Europe and the other States party to the European Cultural Convention.

It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2 No State party to the European Convention on the Protection of the Archaeological Heritage, signed in London on 6 May 1969, may deposit its instrument of ratification, acceptance or approval unless it has already denounced the said Convention or denounces it simultaneously.

3 This (revised) Convention shall enter into force six months after the date on which four States, including at least three member States of the Council of Europe, have

expressed their consent to be bound by the (revised) Convention in accordance with the provisions of the preceding paragraphs.

4 Whenever, in application of the preceding two paragraphs, the denunciation of the Convention of 6 May 1969 would not become effective simultaneously with the entry into force of this (revised) Convention, a Contracting State may, when depositing its instrument of ratification, acceptance or approval, declare that it will continue to apply the Convention of 6 May 1969 until the entry into force of this (revised) Convention.

5 In respect of any signatory State which subsequently expresses its consent to be bound by it, the (revised) Convention shall enter into force six months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 15

1 After the entry into force of this (revised) Convention, the Committee of Ministers of the Council of Europe may invite any other State not a member of the Council and the European Economic Community, to accede to this (revised) Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2 In respect of any acceding State or, should it accede, the European Economic Community, the (revised) Convention shall enter into force six months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 16

1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this (revised) Convention shall apply.

2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this (revised) Convention to any other territory specified in the declaration. In respect of such territory the (revised) Convention shall enter into force six months after the date of receipt of such declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to

the Secretary General. The withdrawal shall become effective six months after the date of receipt of such notification by the Secretary General.

Article 17

1 Any Party may at any time denounce this (revised) Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective six months following the date of receipt of such notification by the Secretary General.

Article 18

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the other States party to the European Cultural Convention and any State or the European Economic Community which has acceded or has been invited to accede to this (revised) Convention of:

i any signature;
ii the deposit of any instrument of ratification, acceptance, approval or accession;
iii any date of entry into force of this (revised) Convention in accordance with Articles 14, 15 and 16;
iv any other act, notification or communication relating to this (revised) Convention..

In witness whereof the undersigned, being duly authorised thereto, have signed this revised Convention.

Done at Valletta, this 16th day of January 1992, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the other States party to the European Cultural Convention, and to any non-member State or the European Economic Community invited to accede to this (revised) Convention.

This book examines and compares the State's ownership of archaeological heritage in Switzerland and Turkey, two countries with contrasting political structures and archaeological contexts. The comparative analysis, which is based on both the movable and immovable parts of archaeological heritage, is later used to formulate general recommendations applicable to other countries. Such recommendations are built on the Model Provisions on State Ownership of Undiscovered Cultural Objects elaborated by UNESCO and UNIDROIT. The recommendations propose that States go further than the Model Provisions by enacting laws that explicitly delineate the State's duties regarding archaeological heritage protection and by reinforcing the ownership regimes for such heritage.

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Etudes en droit de l'art
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