

**THE PROTECTION OF ARCHAEOLOGICAL HERITAGE**  
**LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE**



**EDITED BY THE BELGIAN NATIONAL COMMITTEE OF ICOMOS**  
**PUBLICATION DU COMITÉ NATIONAL BELGE D'ICOMOS**

INTERNATIONAL COUNCIL ON MONUMENTS AND SITES  
CONSEIL INTERNATIONAL DES MONUMENTS ET DES SITES

**THE PROTECTION OF  
ARCHAEOLOGICAL HERITAGE /  
LA PROTECTION DU  
PATRIMOINE ARCHÉOLOGIQUE**

**ANNUAL CONFERENCE ICLAFI / RÉUNION ANNUELLE ICLAFI**

ORGANIZED BY ICOMOS VLAANDEREN – BRUSSEL vzw AND ICOMOS  
WALLONIE – BRUXELLES asbl IN COLLABORATION WITH THE BRUSSELS-  
CAPITAL REGION, THE FLEMISH REGION AND THE WALLOON REGION

ORGANISÉ PAR ICOMOS VLAANDEREN – BRUSSEL vzw ET ICOMOS WALLONIE –  
BRUXELLES asbl EN COLLABORATION AVEC LA RÉGION DE BRUXELLES-  
CAPITALE, LA RÉGION FLAMANDE ET LA RÉGION WALLONNE

*BRUSSELS (BELGIUM), 23-26 November 2005 / BRUXELLES (BELGIQUE), 23-26 novembre 2005*



EDITED BY THE BELGIAN NATIONAL COMMITTEE OF ICOMOS  
PUBLICATION DU COMITÉ NATIONAL BELGE D'ICOMOS



**International Council on  
Monuments and Sites**

**Conseil International  
des Monuments et des Sites**

The annual conference and the publication of this book have been made possible thanks to assistance from:

*La réunion annuelle et la publication de ce livre ont pu être réalisées grâce au soutien de:*

Icomos Vlaanderen – Brussel vzw  
Icomos Wallonie – Bruxelles asbl  
The Brussels-Capital Region / La Région de Bruxelles-Capitale  
The Flemish Region / La Région flamande  
The Walloon Region / La Région wallonne



**Edited by the Belgian National Committee of Icomos / Publication du  
Comité National belge d'Icomos**

**Printed by the University of Hasselt / Imprimé par l'Université de Hasselt**

**Redaction / Rédaction: Anne Mie Draye, Tom Nulens**

**Cover Photograph / Photo de couverture: Ename Center**

## Contents / Index

<b>Introduction (EN)</b>	<b>7</b>	<b>MEXICO / MEXIQUE</b>	<b>92</b>
<b>Introduction (FR)</b>	<b>8</b>	José Ernesto Beceril Miró	
<b>Inleiding</b>	<b>9</b>	Roberto Nuñez Arratia	
<b>Questionnaire</b>	<b>10</b>		
<b>AUSTRALIA / AUSTRALIE</b>	<b>13</b>	<b>NETHERLANDS / PAYS-BAS</b>	<b>102</b>
Graeme Wiffen		Leonard de Wit	
		Gerda de Bruijn	
<b>BELGIUM / BELGIQUE</b>	<b>21</b>	<b>PERU / PÉROU</b>	<b>109</b>
Anne Mie Draye		Alberto Martorell Carreño	
André Matthys			
Stéphane Demeter		<b>POLAND / POLOGNE</b>	<b>121</b>
		Wojciech Kowalski	
<b>BULGARIA / BULGARIE</b>	<b>38</b>	<b>ROMANIA / ROUMANIE</b>	<b>123</b>
Hristina Staneva		Sergiu Nistor	
Svetoslav Georgiev			
<b>CHILE / CHILI</b>	<b>47</b>	<b>SRI LANKA</b>	<b>128</b>
Amaya Irarrazaval		Prashanta B. Mandawala	
<b>COLOMBIA / COLOMBIE</b>	<b>51</b>	<b>SWEDEN / SUÈDE</b>	<b>133</b>
Claudia Fadul Rosa		Thomas Adlercreutz	
<b>FINLAND / FINLANDE</b>	<b>56</b>	<b>UNITED KINGDOM / ROYAUME-UNI</b>	<b>146</b>
Satu-Kaarina Virtala		Christopher Young	
Marianne Schauman-Lönnqvist			
<b>GERMANY / ALLEMAGNE</b>	<b>60</b>	<b>UNITED STATES / ÉTATS-UNIS</b>	<b>152</b>
Werner Von Trützschler		James K. Reap	
<b>GREECE / GRÈCE</b>	<b>64</b>	<b>URUGUAY</b>	<b>158</b>
Athina Christofidou		Alberto Quintela Peruzzo	
<b>ISRAEL / ISRAËL</b>	<b>73</b>	<b>Program of the conference</b>	<b>164</b>
Gideon Koren		<b>Programme de la réunion</b>	<b>168</b>
		<b>Report of the conference</b>	<b>172</b>
<b>ITALY / ITALIE</b>	<b>81</b>	<b>Compte Rendu de la réunion</b>	<b>176</b>
Massimo Carcione		<b>Verslag van de vergadering</b>	<b>179</b>
<b>JAPAN / JAPON</b>	<b>89</b>		
Toshi KONO			

*Every author is responsible for the contents of his/her article / Chaque auteur est responsable du contenu de son article.*

## Introduction

The International Scientific Committee on Legal, Administrative and Financial Issues (ICLAFI), founded in 1997, is one of twenty international working groups of the International Council on Monuments and Sites. Its objective is to promote international cooperation in the identification, study and solution of legal, administrative and financial issues in connection with the protection, maintenance and conservation of monuments, groups of buildings and sites.

From 23 to 26 November 2005, the Annual Conference of ICLAFI took place in Brussels, Belgium. The conference focused on the protection of the archaeological heritage. That choice can be justified by the fact that both on the national and the international scene there's much attention for the theme. Furthermore, the protection of the archaeological heritage had not been taken into consideration during previous activities of the Committee.

This book contains a summary of the questionnaires relating to the protection of the archaeological heritage, filled in by the members of the Committee. At the Conference, the participating members gave a short presentation of the current situation of the archaeological heritage protection in their country, based on the questionnaire they had filled in. The use of questionnaires is a common practice within the Committee, which makes it easier to conduct a comparative legal research.

I would like to thank the members of the Committee who contributed to a very interesting Conference and/or to the realisation of this book.

Finally, many thanks go to Icomos Vlaanderen - Brussel vzw, Icomos Wallonie - Bruxelles asbl, the Brussels Capital-Region, the Flemish Region and the Walloon Region.

*Prof. Dr. Anne Mie Draye  
Belgian Representative ICLAFI*

## Introduction

Le Comité pour les Questions de Droit, d'Administration et de Finances, créé en 1997, est un des vingt comités internationaux scientifiques au sein du Conseil International des Monuments et des Sites. Ce 'Comité Législatif' a pour but de stimuler une collaboration internationale et d'entamer un dialogue concernant les aspects juridiques de la protection, de l'entretien et de la conservation des monuments et sites.

Du 23 au 26 novembre 2005, la Réunion annuelle du Comité Législatif a eu lieu à Bruxelles, en Belgique. Elle a été consacrée à la protection du patrimoine archéologique. Ce choix se justifie par le fait que, tant au niveau national qu'international, il y a beaucoup d'intérêt pour le thème. En outre, la protection du patrimoine archéologique n'avait pas été prise en compte pendant les activités précédentes du Comité.

Ce livre contient un résumé des questionnaires se rapportant à la protection du patrimoine archéologique, complétés par les membres du Comité. À la réunion, les membres participants ont donné une brève présentation de la situation actuelle de la protection du patrimoine archéologique dans leur pays, se basant sur le questionnaire qu'ils avaient rempli. L'utilisation des questionnaires est une pratique assez courante au sein du Comité car elle facilite une recherche légale comparative.

Je tiens à remercier les membres du Comité qui ont contribué à une réunion très intéressante et/ou à la réalisation de ce livre.

Finalement, un grand remerciement à ICOMOS Vlaanderen - Brussel vzw, à ICOMOS Wallonie - Bruxelles asbl, à la Région de Bruxelles-Capitale, à la Région flamande et à la Région wallonne.

*Prof. Dr. Anne Mie Draye  
Représentante belge Comité Législatif*

## Inleiding

Het International Scientific Committee on Legal, Administrative and Financial Issues (ICLAFI), opgericht in 1997, is één van de twintig internationale werkgroepen van de International Council on Monuments and Sites (ICOMOS). Dit Comité Wetgeving heeft als doelstelling de internationale samenwerking te bevorderen bij het identificeren, bestuderen en oplossen van wettelijke, administratieve en financiële kwesties op het vlak van de bescherming, het onderhoud en de instandhouding van monumenten, groepen van gebouwen en landschappen.

Van 23 tot 26 november 2005 vond in Brussel de jaarvergadering van het Comité Wetgeving plaats. Het centrale thema van de vergadering was de bescherming van het archeologisch erfgoed. Die keuze wordt verantwoord door het feit dat er zowel op nationaal als op internationaal vlak grote belangstelling voor het thema bestaat. De bescherming van het archeologisch erfgoed kwam binnen de activiteiten van het Comité Wetgeving niet eerder aan bod.

Dit boek bevat een overzicht van de vragenlijsten over de bescherming van het archeologisch erfgoed die door de leden van het Comité Wetgeving ingevuld werden. Bij de activiteiten van het Comité werd reeds eerder gebruik gemaakt van dergelijke vragenlijsten. Ze vergemakkelijken in belangrijke mate het rechtsvergelijkend onderzoek. Op de jaarvergadering hielden de aanwezige leden een korte presentatie van de actuele beschermingsregeling in hun eigen land, zich daarbij baserend op de door hen ingevulde vragenlijsten.

Ik dank alle leden van het Comité Wetgeving die bijgedragen hebben tot een zeer boeiende vergadering en/of tot de samenstelling van dit boek.

Rest nog een speciale dank aan Icomos Vlaanderen - Brussel vzw, Icomos Wallonie - Bruxelles asbl, het Brussels Hoofdstedelijk Gewest, het Vlaams Gewest en het Waals Gewest.

*Prof. Dr. Anne Mie Draye  
Belgisch vertegenwoordigster Comité Wetgeving*

## Questionnaire

Hereafter the original questionnaire relating to the protection of the archaeological heritage, as sent to all members of the International Committee on Legal, Administrative and Financial Issues, is included. When dealing with a questionnaire filled in by a specific member, only the short title of the questions will be repeated.

*Ci-après le questionnaire original sur la protection du patrimoine archéologique, envoyé à tous les membres du Comité International pour les Questions de Droit, d'Administration et de Finances, est repris. Se traitant d'un questionnaire complété par un membre spécifique, seulement le titre des questions sera répété.*

### 1. Competences / Compétences

Describe briefly which authorities in your country are competent for heritage protection in general, and more specifically for the protection of archaeological heritage. If necessary, make a difference between movable and immovable archaeological heritage. Indicate also if there exists a specific public service dealing with the protection of archaeological heritage.

*Décrivez brièvement quelles sont les autorités compétentes en matière de protection du patrimoine en général et plus particulièrement en matière de protection du patrimoine archéologique. Au besoin, faites la différence entre le patrimoine meuble et immeuble. Indiquez également s'il existe un service spécifique qui s'occupe du patrimoine archéologique.*

### 2. Protection regimes / Régimes de protection

Is there a specific legal regime for the protection of archaeological heritage? At what level? Even if there is a specific legal regime for the protection of archaeological heritage, does it remain possible to use e.g. other legal protection tools (protection as a monument, part of a landscape...) in order to protect archaeological heritage? If there is no specific legal system in order to protect archaeological heritage, is such protection possible under a more general protection system (monuments, sites...)?

*Existe-t-il un régime juridique spécifique pour la protection du patrimoine archéologique? A quel niveau? Même s'il existe un régime spécifique juridique pour la protection du patrimoine archéologique, est-il possible d'employer d'autres instruments légaux (protection en tant que monument, partie d'un site...) en vue de protéger des biens archéologiques? S'il n'existe pas de régime de protection spécifique pour le patrimoine archéologique, y a-t-il une possibilité de protection plus générale (en tant que monument, site...)?*

### 3. Excavations / Fouilles

Are excavations controlled by public authorities? What conditions are eventually imposed (specific authorisation for a limited period, qualification of staff, guarantees about financial means...)?

*Les fouilles sont-elles contrôlées par les autorités publiques? Quelles conditions sont imposées le cas échéant (permis spécifique pour une période bien déterminée, qualifications du personnel, garanties financières...)?*

### 4. Definitions / Définitions

In which way is archaeological heritage being defined? If necessary, make a difference between movable and immovable heritage (sites and excavated goods).

*De quelle manière le patrimoine archéologique est défini? Au besoin, faites une différence entre les biens meubles et immeubles (sites archéologiques et découvertes).*

### 5. Inventories / Inventaires

Are there inventories of archaeological heritage? If so, what information do they contain? Do they have legal consequences (e.g. a protection in case of demand of a building permit)?

*Existe-t-il des inventaires du patrimoine archéologique? Si c'est le cas, quelle information contiennent-ils? Est-ce qu'il provoquent des conséquences juridiques (p.ex. une protection au moment d'une demande de permis de bâtir)?*

### 6. Protection procedure / Procédure de protection

Describe the procedure that leads to the legal protection of (immovable) archaeological heritage. Is there a specific procedure in case of urgent need?

*Décrivez la procédure de protection d'un bien archéologique (immeuble). Existe-t-il une procédure d'urgence?*

### 7. Legal consequences / Conséquences juridiques

What are the legal consequences of the protection of an archaeological good, for owners and third persons (tenants, local authorities...)? Keep in mind here e.g. permits for carrying out works, easements, maintenance duties... Are those consequences already valid during the protection procedure?

*Quelles sont les conséquences juridiques de la protection d'un bien archéologique? Envisagez p.ex. des autorisations pour effectuer des travaux, des servitudes, des obligations d'entretien... Ces conséquences, valent-elles déjà pendant la procédure de protection?*

### 8. Movable heritage / Patrimoine mobilier

Which destiny is reserved for movable goods, discovered during excavations? Is there a specific destination foreseen (museum...)? Is there a specific protection system for those goods? What about property rights?

*Quel est le sort des biens meubles découverts pendant des fouilles? Prévoit-on une destination spécifique (musée...)? Existe-t-il un système de protection spécifique pour ces biens? Qui en devient le propriétaire?*

### 9. Goods found by chance / Trouvailles fortuites

Are there legal prescriptions in case of the finding, out of the context of an official excavation, of goods supposed to have an archaeological value? What are the duties of the finder and the owner of the land?

*Y a-t-il des règles en cas de trouvaille fortuite d'un bien archéologique, en dehors d'une campagne de fouille organisée? Quels sont dans ce cas là les devoirs de la personne qui fait la découverte et/ou du propriétaire du terrain?*

### 10. Financial support / Soutien financier

Do public authorities support in one way or another: excavations, consolidation, maintenance or restoration works of archaeological heritage? Are there subsidies, premiums, tax incentives...? Describe the different systems existing.

*Les autorités publiques, supportent-elles d'une façon ou l'autre des fouilles, des travaux de consolidation, de maintien ou de restauration du patrimoine archéologique? Décrivez les systèmes existants.*

### 11. Link with other legislations / Lien avec d'autres législations

Does the fact that a piece of land, an area, a building was protected as archaeological heritage, have consequences within the context of other legislations dealing with the use of soil? Are there e.g. consequences towards legislation on urbanism?

*Le fait qu'un terrain, un site ou un bâtiment a été protégé comme patrimoine archéologique, entraîne-t-il des conséquences au niveau d'autres législations concernant l'emploi du sol, p.ex. la législation urbanistique?*

### 12. International conventions / Conventions internationales

Did your country ratify international conventions in the field of archaeological heritage? Did they influence the national legal framework?

*Votre pays a-t-il ratifié des conventions internationales concernant le patrimoine archéologique? Ces conventions ont-elles influencées le cadre juridique national ?*

### 13. Implementation and protection policy / Mise en pratique et politique de protection

What are your impressions about the implementation of the existing legal rules concerning the protection of archaeological heritage? Is there a real policy towards protection? Are there many objects protected? Is there any control?

*Quelles sont vos impressions concernant la mise en pratique de la législation existante en matière de protection du patrimoine archéologique? Y a-t-il une vraie politique de protection? Quel est le nombre de biens protégés? Y a-t-il un vrai contrôle?*

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN AUSTRALIA LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN AUSTRALIE

Graeme WIFFEN, ICLAFI Australia

### General introduction / Introduction générale<sup>1</sup>

Australia's largest archaeological project has just been announced by an authority of the Government of New South Wales, the largest constituent State in the Australian Federation. The announcement neatly illustrates the way in which archaeology is regulated in Australia.

*Australia's largest ever archaeological urban development project*

Sydney Harbour Foreshore Authority is currently seeking proposals for 'The Rocks Dig Site'.

When complete this unique project will create Australia's largest ever archaeological urban development.

The site comprises 2,650 square metres of land located in The Rocks, Sydney's premier heritage precinct, between Cumberland and Gloucester Streets.

Proposals will be expected to conserve and innovatively interpret more than 200 years of the city's history, while also opening to the public remnants of the country's first European settlement.

This announcement by the Sydney Harbour Foreshore Authority relates to an important site in Sydney. The site is nationally important containing evidence of the first European settlement in Australia, and occupies part of the headland facing across Sydney Cove to the Sydney Opera House, itself recently nominated for listing as a World Heritage place.

Legal instruments relevant that will regulate the 'Rocks Dig' are the Heritage Act 1977 (NSW), the Environmental Planning and Assessment Act 1979 (NSW) and the following planning instruments made under it:

- Sydney Regional Environmental Plan – Sydney Harbour Catchment;
- State Environmental Planning Policy – Major Proposals 2005;
- Sydney Cove Redevelopment Authority Scheme.

The Minister for Planning is the consent authority for approving work on the site.

This example makes two important points about archaeology in Australia.

Archaeology often relates to the remains of European settlement at the first sites where that took place. The remains are relatively recent as the 'first fleet' arrived from the United Kingdom in 1788.

A second stream of archaeological interest, which will be referred to below, is from the study of the important history of indigenous people with a continuous civilisation over a period of 50,000 to 60,000 years, and maybe longer. The indigenous peoples lived a largely nomadic

<sup>1</sup> For more information, see B. BOER and G. WIFFEN, *Heritage Laws of Australia*, Melbourne, Oxford University Press, 2005 and J. LYDON and T. IRELAND, *Object Lessons: Archaeology and Heritage in Australia*, Melbourne, Australian Scholarly Publishing, 2005.

life. While this characteristic can be over-emphasised, there is little evidence of building from this important past, and archaeology is of camp sites and collections of cave paintings.

The second major point is that the legal regulation of archaeology in Australia is through general heritage and planning law, with little recourse to specialist laws relating to archaeology.

### 1. Competences / Compétences

Australia is a Federation of six original States. Two federal Territories have, for most purposes, been given the same level of self government as these States. The Commonwealth or national Government and these other eight jurisdictions at the next tier of government have put in place a similar regulatory scheme for heritage.

Each has:

- A *Heritage Council* - high level body of experts appointed from outside the government service;
- A *designated Minister* in the Government of the jurisdiction, who is usually also the Minister for the Environment, advised by the Heritage Council;
- A *Government department* in the civil service of the jurisdiction.

The Heritage Councils provide a focus for heritage matters. They are independent statutory bodies, although what independence means is determined by the personalities and by the cultural context.

The bodies are:

- National Heritage Council: Australian Heritage Council;
- Territory Heritage Councils:
  - o Australian Capital Territory Heritage Council;
  - o Heritage Advisory Council of the Northern Territory;
- State Heritage Councils:
  - o Queensland Heritage Council;
  - o Tasmanian Heritage Council;
  - o State Heritage Authority of South Australia;
  - o Heritage Council of New South Wales;
  - o Heritage Council of Victoria;
  - o Heritage Council of Western Australia.

In each jurisdiction there is legislation for heritage matters which, despite the odd name of the national legislation, is remarkably similar:

- National Government: National Environment Protection and Biodiversity Conservation Act 1999;
- Territories:
  - o Heritage Act 2004 (ACT);
  - o Heritage Conservation Act 1991 (NT);
- States:
  - o Queensland Heritage Act 1992 (Qld);
  - o Historic Cultural Heritage Act 1995 (Tas);
  - o Heritage Act 1993 (SA);
  - o Heritage Act 1977 (NSW);

- o Heritage Act 1995 (Vic);
- o Heritage of Western Australia Act 1990 (WA).

The legislation broadly sets up listing schemes for items of heritage, and the definitions of items of heritage include archaeological heritage. The definitions do not distinguish archaeological heritage from other items of immovable heritage that are heritage items.

The States and Territories other than the Australian Capital Territory recognize that heritage of local significance may be dealt with at the local level, in which case the local government council is the decision maker.

### 2. Protection regimes / Régimes de protection

Australian heritage law approaches the issue of archaeological heritage by reference to two categories: European cultural heritage and indigenous heritage.

#### European cultural heritage

There are two major distinctions within this category.

- *Built heritage*: Before European settlement at the end of the eighteenth century there was little in the way of a tradition of building amongst the indigenous peoples. Thus evidence of built cultural heritage is, by European standards, recent and is dealt with under the category of heritage items, where the values are historical.
- *Shipwrecks*: The other major focus is maritime archaeology. Shipwrecks are referred to in the national legislation and the legislation of the coastal States and Territories.

#### Indigenous heritage

Provision is then made for indigenous heritage of Aborigines and Torres Strait Islanders. While there is little evidence of built items being used in what was traditionally a largely nomadic culture, this heritage may often be archaeological, comprising burial sites, or sites with evidence of long term use as camping sites. This evidence may be 'middens' or mounds of seashells, discarded after the contents were eaten, fish traps made from large stones, cave paintings and carvings on trees. Administratively this heritage may be dealt with by authorities that manage the extensive systems of national parks in the States and Territories, rather than by heritage authorities. This administrative division is considered culturally insensitive and the jurisdictions are moving to better arrangements for indigenous heritage.

### 3. Excavations / Fouilles

Heritage legislation and land use planning law which is often also relevant in archaeological matters are generally expressed to give the relevant decision maker a discretionary power whether to approve work that would impact on heritage places. Heritage sites include archaeological sites. The decision maker would consider these issues as matters of administrative practice when considering whether to permit the work.



For example, in New South Wales, Australia's most populous State:

The Heritage Act protects archaeological relics by requiring that any disturbance to those relics is carried out in accordance with an excavation permit issued by the Heritage Council of New South Wales.<sup>2</sup>

This is also the case at the local level. Note the discretionary formulations in this typical example of how the relevant legislative provisions are drafted. The Hunter is an industrial area on the Pacific coast north of Sydney.

*Hunter Regional Environmental Plan 1989 (Heritage)*

Clause 7 Development of heritage items

- (1) A person shall not, in respect of a building, work, relic, tree or place that is a heritage item:
- (a) demolish or alter the building or work,
  - (b) damage or move the relic, including excavation for the purpose of exposing the relic,
  - (c) damage or despoil land on which the building, work or relic is situated or land which comprises the place,
  - (d) erect a building on or subdivide land on which the building, work or relic is situated or on the land which comprises the place, or
  - (e) damage any tree on land on which the building, work or relic is situated or on the land which comprises the place, except with consent of the Council.
- (2) The Council shall not grant consent to a development application made under sub-clause (1) unless it has made an assessment of:
- (a) the significance of the item as a heritage item,
  - (b) the extent to which the carrying out of the development in accordance with the consent would affect the heritage significance of the item and its site,
  - (c) whether the setting of the item, and in particular, whether any stylistic, horticultural or archaeological features of the setting should be retained,
  - (d) whether the item constitutes a danger to the users or occupiers of that item or to the public, and
  - (e) measures to be taken to conserve heritage items including any conservation plan prepared by the applicant.

#### 4. Definitions / Définitions

Archaeological heritage is not separately defined in Australian legislation. This can be illustrated again by quoting legislation in the largest State, New South Wales. The protection of items of archaeological heritage is achieved by their inclusion in the following definitions.

The broadest definition is of *environmental heritage*, which means:

"Those places, buildings, works, relics, moveable objects, and precincts, of State or local heritage significance."<sup>3</sup>

A more specific definition in the same legislation is of a *relic*, which is:

- "Any deposit, object or material evidence:
- (a) which relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement, and
  - (b) which is more than 50 years old."<sup>4</sup>

<sup>2</sup> NSW Heritage Office, *Revealing the Past, An Introduction to Historical Archaeology*, 2004, 2, [www.heritage.nsw.gov.au](http://www.heritage.nsw.gov.au).

<sup>3</sup> Section 4 Heritage Act 1977 (NSW).

<sup>4</sup> Section 4 Heritage Act 1977 (NSW).

In this context, the definition should be read with:

*Aboriginal object* means: "Any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains."

*Aboriginal remains* means: "The body or the remains of the body of a deceased Aboriginal, but does not include:

- (a) a body or the remains of a body buried in a cemetery in which non-Aboriginals are also buried, or
- (b) a body or the remains of a body dealt with or to be dealt with in accordance with a law of the State relating to medical treatment or the examination, for forensic or other purposes, of the bodies of deceased persons."<sup>5</sup>

These definitions give rise to the similar forms of protection, emergency orders as a prelude to listing on an inventory.

#### 5. Inventories / Inventaires

Apart from separate inventories of historic shipwrecks and shipwreck areas, archaeological sites are listed as heritage places in the general inventories of heritage sites, called *Heritage Registers*, maintained by each government in the federation.

The Australian inventories are:

- National inventories:
  - o World Heritage places<sup>6</sup>;
  - o National heritage places;
  - o Commonwealth heritage places (listing places on commonwealth land for which the commonwealth or national government, therefore, has responsibility);
- State and Territorial Inventories: heritage places listed on the Heritage Register for the State or Territory as having State or Territory significance;
- Local government: heritage places listed in a schedule to the planning instrument for a local government area as local significance.<sup>7</sup>

Listing on the State Heritage Register provides indefinite protection. The requirements for excavation permits still apply to sites on the State Heritage Register.<sup>8</sup>

#### 6. Protection procedure / Procédure de protection

##### Listing Procedure

The relevant procedure is the same as that which leads to listing on an inventory of heritage items.

<sup>5</sup> Section 5 National Parks and Wildlife Act 1974 (NSW).

<sup>6</sup> Note the particular relevance of the Australian Fossil Mammal Sites (Riversleigh/Naracote) inscribed on the World Heritage List in 1994.

<sup>7</sup> See the example of the *Hunter Regional Plan* above.

<sup>8</sup> NSW Heritage Office, *Revealing the Past, An Introduction to Historical Archaeology*, 2004, 2, [www.heritage.nsw.gov.au](http://www.heritage.nsw.gov.au).

Listing on the inventories at the upper two levels of government, national and State or Territory, is slow and deliberate.

Nominations may be made by the public, the relevant Heritage Council or the Government.

Nominations are considered by the Heritage Councils, which advertise them in newspapers relevant to the area and call for public submissions. If a proposed nomination is sufficiently controversial, the Minister may order a public inquiry. The Heritage Councils, which are supported by staff experts, after considering submissions prepare a Report. In most jurisdictions, the Minister makes the decision whether to list a nominated place. That decision is also advertised.

Whether an appeal to a court lies in respect of a decision to list a heritage place depends on the jurisdiction.

#### Emergencies

There are two strategies available for emergencies:

- *Interim registration*, which is temporary listing on the inventory. To protect the place, there is no requirement of notice before listing. The procedural steps for listing are undertaken after interim listing, and may lead to the listing being confirmed as permanent. In the meantime, the place has the same protection as places with permanent listing.

If an archaeological site is of great significance, the Heritage Office can also place an Interim Heritage Order over it to prevent harm to that place and ensure its long term protection. Interim Heritage Orders remain in place for one year while further research on the site is carried out.<sup>9</sup>

- *Stop work orders*. A Heritage Council may order that work on a possible heritage place cease until it has time to consider whether interim listing is appropriate.

#### **7. Legal consequences / Conséquences juridiques**

The legal consequences are that a person may not carry out an action that will diminish the heritage values of a listed place, without the consent of:

- At the national level, the Minister;
- At the State or Territory level, the relevant Heritage Council.

Local heritage significance is only one of the factors that a local government council must take into account in considering a development application for a property. Generally, a council's response to this question may be the subject of an appeal to a court or a planning tribunal.

<sup>9</sup> NSW Heritage Office, *Revealing the Past, An Introduction to Historical Archaeology*, 2004, 2, [www.heritage.nsw.gov.au](http://www.heritage.nsw.gov.au).

#### **8. Movable heritage / Patrimoine mobilier**

Historic shipwrecks are the property of the Crown, which is the historical description for public ownership by the Australian Nation or the relevant State or Territory.

#### **9. Goods found by chance / Trouvailles fortuites**

##### European cultural heritage

There are no specific legal prescriptions, but there may be restrictions on export under the Protection of Moveable Property Act 1986 (Cth) giving effect in Australia to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).

##### Indigenous heritage

In New South Wales, the State museum, called the Australian Museum in anachronistic language, has custody and control of aboriginal objects under the provisions of the National Parks and Wildlife Act 1974 (NSW), and takes part in the nationally funded Return of Indigenous Cultural Property program.

In South Australia, under the Aboriginal Heritage Act 1988 (SA) and in Western Australia, under the Aboriginal Heritage Act 1972 (WA), the relevant Minister may acquire an aboriginal object or record by purchase or compulsory acquisition.

#### **10. Financial support / Soutien financier**

No. One of the general heritage grant schemes may be applicable, otherwise for a commercial development. The developer may have to bear the cost.

#### **11. Link with other legislations / Lien avec d'autres législations**

No. The scale of the subject matter is so different in Australia than in countries with a longer tradition of substantial built heritage or a less nomadic indigenous population. Urban sites, while important, are usually small sites within the boundaries of small 19<sup>th</sup> century military and convict settlements.

#### **12. International conventions / Conventions internationales**

Relevant international agreements are:

- The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;
- The Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks;
- The World Heritage Convention.

#### **13. Implementation and protection policy / Mise en pratique et politique de protection**

Archaeological work while important is not as extensive in Australia as it might be in countries with a longer tradition of settled populations with a heritage of built items. Thus my

view would be that, with special provision for shipwrecks, archaeology is adequately dealt with under general heritage laws.

Provision for the preservation of indigenous heritage is under active consideration. Indigenous peoples are struggling to have their cultures recognized as living cultures by the dominant European derived cultures. The older view is that these cultures 'stopped' in 1788 with the arrival of the first British settlers. Newer legislation is making provision for the return of items of indigenous culture to the relevant group rather than to museums.

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN BELGIUM LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN BELGIQUE

Anne Mie DRAYE, ICLAFI Belgium

André MATTHYS, Inspecteur général Division du Patrimoine (Région wallonne)

Stéphane DEMETER, Direction des Monuments et Sites (Région de Bruxelles-Capitale)<sup>10</sup>

### General introduction / Introduction générale

In Belgium, the first national heritage law was adopted on 7 August 1931<sup>11</sup>. Even if the enactment of this law contained a chapter with specific rules on archaeology, the final version only introduced the protection of monuments on the one hand and natural sites on the other hand. Nevertheless, the rules on monument protection allowed public authorities to protect visible archaeological remains as such, which indeed happened several times.<sup>12</sup>

Specific legal rules on archaeology were only introduced about sixty years later, not anymore by the national authorities, but by the three regions: the Flemish Region, the Walloon Region and the Brussels-Capital Region.

Belgium evolved in the mean time from a unitary to a federalized country, due to consecutive State reforms<sup>13</sup>. The three regions gained competences concerning the protection of immovable heritage, including the archaeological heritage. The three communities, the Flemish Community, the French Community and the German Community<sup>14</sup>, however remained competent for the protection of movable heritage. In practice, this division is quite artificial, especially in the field of archaeological heritage: many remains are immovable by incorporation, but become movable the moment they are excavated.

The competence of the regions is an exclusive one: the Federal State is no longer competent to act in order to protect or maintain archaeological heritage. International conventions are obviously ratified by the Federal State, but the regions are competent for the concrete implementation. E.g. the regions make proposals for inscriptions of goods located in their territories in the world heritage list, even if it was the Federal State that ratified the World Heritage Convention in 1996.

At this moment, the three regions have got specific decrees on archaeology. In the Walloon Region and in the Brussels-Capital Region the applicable rules are inscribed in the codes on

<sup>10</sup> The Kingdom of Belgium has got three official languages: Dutch, French and German. For practical reasons, the answers to the questionnaire relating to the Flemish Region are given in English. The answers relating to the Walloon Region and the Brussels-Capital Region are given in French.

*Le Royaume de Belgique a trois langues officielles: le néerlandais, le français et l'allemand. Pour des raisons pratiques, les réponses aux questions concernant la Région flamande ont été formulées en anglais. Les réponses aux questions concernant la Région wallonne et la Région de Bruxelles-Capitale ont été données en français.*

<sup>11</sup> Loi sur la protection des monuments et sites, *M.B.* 5 September 1931.

<sup>12</sup> E.g. in the city of Tongeren several parts of the Roman and medieval walls and some *tumuli* were protected as monuments.

<sup>13</sup> The start of the still ongoing State reforms was the amendment to the constitution of 24 December 1970, *M.B.* 31 December 1970.

<sup>14</sup> The situation of the German Community is quite particular within the Belgian context: this Community obtained from 1 January 2000 on, as a result of a collaboration agreement with the Walloon Region, the full competence concerning the protection of immovable heritage, including archaeological heritage.

urbanism, which shows the willingness of those regions to take into account archaeological interests in urban planning and in licensing building projects.

The decrees contain rules on the control of excavations by previous licences, the protection of archaeological heritage and of goods found by chance, premiums and penalties in case of non respect of the different legal consequences imposed to owners and to persons involved in the excavations.

## 1. Competences / Compétences

### Flemish Region / Région flamande

In the last couple of years an important reform of the Flemish administration has been carried out. The said reform has influenced the situation of the authorities competent for heritage protection. As from 1 July 2006, they evolved into an autonomous agency under ministerial control.

The competent institution for the protection of immovable heritage is in the first place the *Flemish Institute for Immovable Heritage*. This institute, being a scientific institution, is responsible for the scientific research on the archaeological heritage.

Its mission is to:

- Conduct all studies and researches related to possibilities of carrying out excavations;
- Carry out excavations;
- Take measures for conservation / restoration of the goods discovered during excavations;
- Collect documentation about excavations and monuments of archaeological interest;
- Support competent organisms and persons which have been authorized to undertake excavations of local importance.

Besides the Institute there is the *Agency Urbanism and Immovable Heritage Flanders*, charged with the preparation and implementation of heritage policy in general.

### Walloon Region / Région wallonne

En Région wallonne, l'administration compétente en matière de protection du patrimoine est la *Division du Patrimoine*, qui fait partie intégrante de la Direction Générale de l'Aménagement du Territoire, du Logement et du Patrimoine. La Division du Patrimoine est chargée de la coordination et de la mise en œuvre de la politique du patrimoine à travers ses Directions de la Protection, de la Restauration et de l'Archéologie.

La Direction de l'Archéologie a plusieurs missions :

- Effectuer tous les travaux d'études et de recherches relatifs aux possibilités de fouilles archéologiques;
- Entreprendre des fouilles archéologiques;
- Prendre des mesures conservatoires en vue d'assurer la conservation des produits de fouilles;
- Constituer une documentation systématique sur les fouilles archéologiques entreprises en Région wallonne sur les monuments d'intérêt archéologique et sur les produits de fouilles;

- Publier régulièrement un compte rendu systématique des fouilles et études archéologiques entreprises par la direction ou auxquelles elle a collaboré;
- Présenter au ministre des propositions concernant la répartition des objets découverts entre les musées de l'Etat, les provinces, les communes, etc.;
- Gérer les dossiers de demandes d'autorisation de fouilles, dans le cadre de la législation existante et saisir la Commission royale des Monuments, Sites et Fouilles pour avis motivé au ministre;
- Emettre un avis sur les organismes ou les personnes qui désirent entreprendre des fouilles;
- Dresser, tenir à jour et publier l'inventaire cartographique des sites archéologiques de la Wallonie;
- Etudier et mettre en œuvre la mise en valeur de certains sites archéologiques;
- ...

Par Décret du 1 avril 1999<sup>15</sup>, une nouvelle institution, organisme d'intérêt public doté de personnalité juridique, a été créée sous la dénomination *Institut du Patrimoine wallon*.

L'Institut remplit quatre missions:

- Mener des opérations immobilières;
- Valoriser des monuments qui sont la propriété de la Région wallonne;
- Assurer la transmission des savoir-faire dans les métiers du Patrimoine sur le site de l'ancienne abbaye de la Paix-Dieu et sensibiliser les jeunes à ceux-ci;
- Assurer l'essentiel du travail de sensibilisation, de publication, de diffusion et de promotion du Patrimoine wallon.

### Brussels-Capital Region / Région de Bruxelles-Capitale

En Région de Bruxelles-Capitale, l'administration compétente en matière de protection du patrimoine immobilier est la *Direction des Monuments et des Sites*. Au sein de cette Direction existe - depuis 1996 - une cellule Archéologie.

En outre, il existe un organe consultatif de 18 experts: la *Commission royale des Monuments et des Sites*, au sein de laquelle la compétence d'archéologie doit être représentée.<sup>16</sup>

Le patrimoine mobilier n'est pas du ressort de l'autorité régionale, à l'exception du 'mobilier fixe par destination' et des 'biens archéologiques mobiliers' (entre le moment de leur mise au jour et leur dévolution finale).

## 2. Protection regimes / Régimes de protection

### Flemish Region / Région flamande

There is a specific legal regime for the protection of archaeological goods, organised at regional level by the Decree of 30 June 1993 "concerning the protection of the archaeological heritage"<sup>17</sup> (called hereafter the Archaeology Decree), slightly amended by the decrees of 18 May 1999, 28 February 2003 and 10 March 2006.

<sup>15</sup> Décret du 1 avril 1999 relatif à la conservation et à la protection du patrimoine, *M.B.* du 22 mai 1999.

<sup>16</sup> En Région flamande et en Région wallonne, il existe aussi une Commission royale des Monuments et des Sites. Ces commissions disposent des compétences plus limitées que celles de la commission bruxelloise.

<sup>17</sup> Décret du 30 juin 1993 portant protection du patrimoine archéologique, *M.B.* du 15 septembre 1993.

About 13 years later, only two archaeological goods are protected in the context of this specific decree. This doesn't obstruct the protection of various archaeological goods within the legal system inscribed in the Decree of 3 March 1976 "organising the protection of monuments, and urban or rural sites"<sup>18</sup>. Some archaeological goods are also included in protected landscapes, according to the Decree of 16 April 1996 "concerning the protection of landscapes"<sup>19</sup>.

The three protection regimes exist next to each other. The texts of the decrees on the protection of monuments on the one hand and on the protection of archaeological monuments on the other hand, are not clear as to the mutual relation. In the preparatory works preceding the Archaeology Decree was suggested that protections under this decree would be temporary in function of excavations. For archaeological goods deserving a definitive protection, the other decrees would be used. Unfortunately, this distinction was not inscribed in the text of the decree itself.

#### Walloon Region / Région wallonne

La Région wallonne base son action sur la notion de conservation intégrée. Les dispositions relatives au patrimoine en général et plus spécifique au patrimoine archéologique, sont inscrites dans le Code wallon de l'Aménagement du Territoire, de l'Urbanisme et du Patrimoine (ci-après: le CWATUP).

Dans ce code, un seul régime de protection est prévu pour le patrimoine immobilier, qui est subdivisé en monuments, ensembles architecturaux, sites et sites archéologiques. Néanmoins des dispositions spécifiques pour les sites archéologiques, les découvertes archéologiques et les fouilles ont été inscrites dans le CWATUP.

#### Brussels-Capital Region / Région de Bruxelles-Capitale

Il existe un régime spécifique pour la protection du patrimoine archéologique intégré au Code Bruxellois de l'Aménagement du Territoire (ci-après COBAT), qui porte essentiellement sur l'organisation des fouilles archéologiques.

En outre, les mesures de protection générales du patrimoine immobilier (classement et inscription sur la liste de sauvegarde) peuvent également s'appliquer aux sites archéologiques qui constituent une des quatre catégories de biens immobiliers (monuments, ensembles, sites et sites archéologiques). Notons également que plusieurs vestiges archéologiques mis au jour par des fouilles ont ensuite été classés au titre de monuments.

<sup>18</sup> Décret du 3 mars 1976 réglant la protection des monuments et des sites urbains et ruraux, *M.B.* du 22 avril 1976.

<sup>19</sup> Décret du 16 avril 1996 portant protection des paysages, *M.B.* du 21 mai 1996.

### 3. Excavations / Fouilles

#### Flemish Region / Région flamande

The organisation of excavations is controlled by the regional authorities. The basic rules on this subject are inscribed in Chapter II of the Archaeology Decree and complemented in the implementing order of 20 April 1994<sup>20</sup>.

First of all, no excavation or digging with the intention to search for archaeological goods can be carried out without previous authorisation of the Government or its representative. For prospecting with intervention in the soil a previous authorisation is also needed. Excavations can only be authorised for a specific period of time and for a clearly defined zoning or area.

Conditions of maintenance can be imposed for the excavated goods. The applicant is also obligated to collaborate in the concluding of an agreement with the owner and the user of the land in this regard.

The applicant of the authorisation must dispose of the necessary qualifications: degrees, experience. He must also prove that he disposes of the necessary staff and financial means to finalise the excavation and make, on a regular basis, reports on the progress of the excavations. He takes safety measures against theft and vandalism. He finally accepts the guidance and control of the public authorities.

#### Walloon Region / Région wallonne

L'organisation des sondages et des fouilles fait l'objet des articles 237 à 248 du CWATUP. Le principe est énoncé à l'article 237:

"Nul ne peut procéder à des sondages archéologiques ou à des fouilles sans l'autorisation préalable du Gouvernement ou de son délégué."

Les sondages impliquent une modification du sol et nécessitent donc, tout comme les fouilles, une autorisation. Les prospections qui ne changent rien au terrain, ne requièrent pas d'autorisation.

L'octroi d'une autorisation est toujours relative à un site bien déterminé et indique clairement les bénéficiaires, les conditions auxquelles son octroi est subordonné ainsi que la durée des fouilles.

Ainsi, l'octroi est subordonné à:

- L'intérêt que présentent les fouilles et les sondages archéologiques;
- La compétence, les moyens humains et techniques dont disposent les demandeurs;
- La preuve d'un accord avec le propriétaire du site;
- Un accord relatif à la dévolution des biens archéologiques et au dépôt de ceux-ci;
- L'obligation d'établir des rapports périodiques sur l'état des travaux et un rapport final à déposer dans un délai déterminé;
- L'engagement de rassembler les biens archéologiques dans des dépôts agréés et accessibles aux chercheurs.

<sup>20</sup> Arrêté du 20 avril 1994 du Gouvernement flamand portant exécution du Décret du 30 juin 1993 portant protection du patrimoine archéologique, *M.B.* du 15 juillet 1994.

L'Administration peut effectuer à tout moment et de sa propre initiative des sondages, des fouilles de prévention et des fouilles de sauvetage sans avoir obtenu une autorisation préalable. La Commission royale des Monuments, Sites et Fouilles de la Région wallonne est avertie de ces sondages, fouilles de prévention et fouilles de sauvetage.

Une fouille peut être déclarée de statut régional. Dans ce cas, l'autorisation de fouiller ne peut être accordée qu'à l'Administration, à une université ou établissement scientifique, ou à une association de ces institutions. Toute fouille programmée réalisée sur un site archéologique inscrit sur la liste du patrimoine exceptionnel est d'office reconnue de statut régional.

#### Brussels-Capital Region / Région de Bruxelles-Capitale

Les fouilles sont contrôlées par les autorités publiques. A l'exception du service archéologique de l'autorité régionale, toute instance publique ou privée qui réalise des fouilles archéologiques doit avoir été agréée par le Gouvernement (les conditions d'agrément ne sont pas encore définies; un arrêté du Gouvernement se prépare).

En outre, en dehors des fouilles décidées et organisées par les autorités publiques, toute fouille doit être autorisée préalablement par le Gouvernement ou son délégué. L'autorisation peut être subordonnée à des conditions liées à la compétence du demandeur, aux moyens humains et techniques à mettre en œuvre, à la preuve d'un accord avec le propriétaire sur la dévolution des biens et au dépôt de ceux-ci ou à l'obligation d'établir des rapports périodiques sur l'état des travaux et un rapport final à déposer dans un délai déterminé.

#### **4. Definitions / Définitions**

##### Flemish Region / Région flamande

Are to be considered as *archaeological monuments*:

"All remains and objects or any other trace of human existence, which bear witness of epochs and civilisations for which excavations or discoveries are an important source of information."<sup>21</sup>

Archaeological monuments are divided into two categories: movable and immovable goods. The Archaeology Decree essentially deals with immovable archaeological monuments, meaning goods present on the surface, in the underground or under water and movable goods, immovable by destination. The Flemish Region is only competent for those categories of goods.

For movable goods, the Flemish Community is competent. Movable archaeological goods are only defined in the Archaeology decree as "all other archaeological monuments".

*Archaeological zonings* are defined as:

"All pieces of land being of scientific or cultural-historical interest for the reason of archaeological goods that might be present, including a buffer zone."<sup>22</sup>

<sup>21</sup> Article 3, 2° of the Archaeology Decree.

<sup>22</sup> Article 3, 3° of the Archaeology Decree.

##### Walloon Region / Région wallonne

Sont considérés comme des *biens archéologiques*:

"Tout vestige matériel y compris paléontologique ou sa trace, situé sous ou au-dessus du sol, envisagé comme un témoignage, de l'activité de l'homme ou de son environnement, d'époques ou de civilisations révolues, indépendamment de sa valeur artistique."<sup>23</sup>

Un *site archéologique* est défini comme:

"Tout terrain, formation géologique, monument, ensemble architectural ou site ayant recelé, recelant ou étant présumé receler des biens archéologiques."<sup>24</sup>

##### Brussels-Capital Region / Région de Bruxelles-Capitale

*Site archéologique* est défini comme une catégorie du patrimoine immobilier:

"Patrimoine immobilier: l'ensemble des biens immeubles qui présentent un intérêt historique, archéologique, artistique, esthétique, scientifique, social, technique ou folklorique, à savoir: [...] monument, [...] ensemble, [...] site, [...]; site archéologique: tout terrain, formation géologique, bâtiment, ensemble ou site qui comprend ou est susceptible de comprendre des biens archéologiques."<sup>25</sup>

Sont considérés comme des *biens archéologiques*:

"Tous les vestiges, objets et autres traces de l'homme, de ses activités ou de son environnement naturel, constituant un témoignage d'époques ou de civilisations révolues et pour lesquelles la principale ou une des principales sources d'information scientifique provient des méthodes de recherche archéologique."<sup>26</sup>

#### **5. Inventories / Inventaires**

##### Flemish Region / Région flamande

A *Central Archaeological Inventory* is being built out since about six years. It is a database in which all archaeological areas in the Flemish Region are/will be inscribed. Several partners are participating in this inventory: the Flemish institute for the Immovable Heritage, the Immovable Heritage Division, several universities and archaeological services of some towns. Only part of the information inscribed in this inventory is accessible to the public.

Until this moment the inventory hasn't got direct legal consequences, e.g. at the moment a building permit is being asked. Other administrations however, e.g. the one dealing with urbanism have of course access to the information and can take it into account drawing plans, working out programmes, etc.

<sup>23</sup> Article 232 du CWATUP.

<sup>24</sup> Article 185 du CWATUP.

<sup>25</sup> Article 206, 1° du COBAT.

<sup>26</sup> Article 205, 5° du COBAT.

### Walloon Region / Région wallonne

Le CWATUP prévoit un *inventaire des sites archéologiques*, dressé et tenu à jour par le Gouvernement.<sup>27</sup> L' inventaire est publié sous forme d' atlas du sous-sol archéologique.

Cet atlas a plus qu'une portée indicative ou documentaire: il entraîne certaines conséquences juridiques, décrites dans l'article 234 du CWATUP. En cas de demande de permis d'urbanisme, l'avis du Gouvernement est requis lorsqu'il s'agit de procéder à des actes et travaux de nature à menacer de destruction totale ou partielle un site archéologique. Le Gouvernement peut également subordonner la délivrance d'un permis d'urbanisme ou de lotir à l'exécution de sondages archéologiques et de fouilles.

### Brussels-Capital Region / Région de Bruxelles-Capitale

Un inventaire du patrimoine archéologique est en cours depuis 1991 (avec interruption entre 1996 et 2003), son achèvement est prévu pour 2008. Cet inventaire a pris la forme d'un *atlas du sous-sol archéologique de la Région de Bruxelles-Capitale*, réalisé commune par commune. Il s'agit d'une carte archéologique utilisant le cadastre comme fond de plan et qui indique tous les sites connus ou ayant fait l'objet de découvertes archéologiques par le passé (depuis le 19<sup>e</sup> siècle) avec renvoi aux sources ainsi que tous les sites archéologiques potentiels établis sur bases des autres sources historiques (archives, photographies, iconographie) qui y sont référencées. L'atlas est publié sur support papier et il est intégré numériquement à la base de donnée de l'administration de l'aménagement du territoire (urbanisme et planification).

Sur base des informations contenues dans l'atlas archéologique régional (incomplet à ce jour), l'autorité qui délivre un permis d'urbanisme (commune ou région) 'peut' imposer des conditions liées à la protection du patrimoine archéologique ou visant à permettre préalablement ou concomitamment la réalisation de fouilles par la région ou la commune.

### **6. Protection procedure / Procédure de protection**

#### Flemish Region / Région flamande

The protection procedure for archaeological heritage consists of two phases: the project of list (protection proposal) and the definitive protection.

The competent Minister orders the project of list by Ministerial Decree. He can take himself the initiative to do so, but he can also react to a proposal formulated by the administration, a local community, an association, a private person, etc. The project of list is published in the *Moniteur belge*.

The protection proposal must contain an identification and a description of the good, a map on which the goods are situated, the motives for protection and the general and specific consequences of the protection.

The protection proposal is communicated to many persons and institutions involved: owners, usufructors, local and provincial communities, administrations competent for urbanism, land use, environment and nature conservation. Local and provincial communities must give an

<sup>27</sup> Article 233 du CWATUP.

advice. Owners and usufructors can formulate objections within a period of two months. The administration makes a final report after which the division Archaeology of the Royal Commission for Monuments and Sites gives a non binding advice to the Minister.

The Minister decides, also by Ministerial Decree, on the definitive protection. This decree is again communicated to all institutions and persons involved, and published in the *Moniteur belge*.

The definitive protection must be realized within a period of one year, starting at the moment of the above mentioned notifications of the projects of lists to the local and provincial communities. During this period, the legal consequences of the definitive protection enter into force.

When a final decision is not taken within this period, the whole procedure is becoming invalid. When the Minister wants to protect the same good later on, he has to start all over again the procedure.

There is no specific procedure in case of urgent need.

#### Walloon Region / Région wallonne

Une première possibilité de protection consiste en l'inscription d'un bien archéologique sur une liste de sauvegarde.<sup>28</sup> Avec l'inscription de cet outil juridique dans le CWATUP, le législateur envisageait la création d'une sorte de procédure d'urgence, facilitant la protection immédiate d'un bien menacé de destruction ou de défiguration.

Essentiel est l'idée qu'une liste de sauvegarde ne peut offrir qu'une protection provisoire. Les effets juridiques limités dans le temps doivent seulement permettre aux autorités publiques de procéder à un examen approfondi du dossier et d'entamer au besoin une procédure de classement 'traditionnelle'.

C'est le Gouvernement, ou par délégation, le Ministre compétent, qui inscrit un bien sur une liste de sauvegarde. Il peut procéder à une telle inscription soit de sa propre initiative, soit sur proposition de la Commission royale des Monuments, Sites et Fouilles ou encore à la demande du propriétaire ou du collège des Bourgmestre et Echevins de la commune où le bien est situé. Une demande d'inscription peut également émaner des habitants de cette commune: à cette fin 300 signatures doivent être rassemblées s'il s'agit d'une commune comptant moins de 5000 habitants; 600 signatures s'il s'agit d'une commune comptant entre 5000 et 30.000 habitants. Pour les communes dépassant les 30.000 habitants, il faut 1000 signatures.

Sauf cas d'urgence dûment motivé, une inscription sur une liste de sauvegarde ne peut se faire qu'après avis de la Commission royale des Monuments, Sites et Fouilles. L'avis de la Commission royale est la seule formalité qui précède éventuellement l'arrêté d'inscription sur la liste de sauvegarde. L'arrêté inscrivant un bien sur la liste de sauvegarde est publié par extrait au *Moniteur belge* et notifié au propriétaire et aux institutions concernées. Il protège le bien sauvegardé pour un durée d'un an. L'effet de la mesure de protection s'éteint automatiquement.

<sup>28</sup> Articles 193 – 195 du CWATUP.

Outre la procédure d'inscription sur la liste de sauvegarde, le Gouvernement ou, par délégation, le Ministre compétent, dispose de la possibilité de classer des biens immobiliers comme site archéologique.<sup>29</sup> La procédure se déroule en deux phases: la procédure de classement et le classement même.

Le droit d'initiative en vue d'entamer la procédure de classement appartient aux mêmes personnes et instances qui peuvent demander l'inscription d'un bien sur la liste de sauvegarde.

L'ouverture de la procédure de classement est décidée par le Ministre en charge du patrimoine. Cette décision est notifiée, par courrier recommandé, aux propriétaires et aux instances concernées. Une vaste procédure de consultation se met en place. Son but est de permettre à toutes les parties concernées de rendre leur avis. La commune où le bien archéologique se situe organise une enquête publique. Le Conseil communal, la Députation permanente et la Commission royale des Monuments, Sites et Fouilles rendent également un avis. Ces avis ne sont pas contraignants pour le Ministre.

A l'issue de cette procédure de consultation, le Ministre en charge du patrimoine prend un arrêté de classement qui est notifié aux propriétaires, aux instances concernées et qui est transcrit au bureau des hypothèques. Il est publié, par mention, au Moniteur belge.

Les effets du classement s'appliquent provisoirement pour une durée d'un an à partir de la notification de la décision du Ministre d'entamer la procédure de classement. Cette protection provisoire s'éteint automatiquement mais le classement peut encore intervenir passé ce délai.

#### Brussels-Capital Region / Région de Bruxelles-Capitale

Les procédures de protection légale pour les sites archéologiques sont identiques à celles relatives aux d'autres catégories de patrimoine immobilier.

L'inscription d'un bien archéologique sur la liste de sauvegarde et de classement au titre de site archéologique sont des procédures en deux temps majeurs: d'abord un arrêté du Gouvernement régional ouvrant la procédure d'enquête préalable et ensuite, après enquête qui comporte la récolte des avis du propriétaire, de la commune et de la Commission royale des Monuments et des Sites, le Gouvernement régional prend un arrêté d'inscription sur la liste de sauvegarde ou de classement (maximum deux ans après le premier arrêté).

La procédure peut être accélérée si c'est le propriétaire qui en fait la demande (pas d'enquête). Les effets de l'inscription sur la liste de sauvegarde et du classement ou s'appliquent dès l'ouverture d'enquête, même avant que la protection soit définitive (pour un maximum de deux ans si la protection n'est pas confirmée).<sup>30</sup>

### **7. Legal consequences / Conséquences juridiques**

#### Flemish Region / Région flamande

As indicated in the answer to question 6, the consequences linked to a project of list and to a definitive protection are the same.

<sup>29</sup> Articles 196 – 204 du CWATUP.

<sup>30</sup> Articles 210-213 et 222-230 du CBAT.

Basically, owners have to respect the general protection regulations, inscribed in the Archaeology Decree and in the implementing order of 20 April 1994. The most important general regulations are: it is forbidden to alter protected archaeological monuments or zonings, to dig or to modify the relief of protected archaeological goods, to excavate or to dig with the intention of searching for archaeological goods. Specific authorisations to carry out these works can be granted.

Owners have to respect obligations of a more formal character: they must inform the users of the protected good about the protection and the legal consequences. In case they transfer their property rights on the protected good, there is an information duty towards the competent authorities.

Specific protection regulations can be inscribed in every individual protection decree.

The Archaeology decree also foresees legal consequences for third parties, in the first place for notary publics: their task is to inform their clients of the protected character of the good and its consequences.

Public authorities delivering building permits can for protected goods only do so after having obtained an advice from the authorities competent for the protection of the archaeological heritage. When this advice is negative, the permit must be refused. When conditions are imposed in the advice, they must be taken over in the building permit.<sup>31</sup>

#### Walloon Region / Région wallonne

Un premier effet juridique à respecter par les propriétaires est d'ordre procédural: ils doivent avertir locataires, occupants et personnes chargées d'effectuer des travaux qu'une procédure de classement est entamée ou qu'un arrêté de classement est signé. Cette obligation ne vaut pas lors d'une inscription sur une liste de sauvegarde.

Quant au contenu, il y a d'abord une imposition générale de ne pas modifier son bien protégé sans avoir obtenu un permis préalable, permis qui est délivré par voie urbanistique. Des exigences plus spécifiques, liées étroitement aux caractéristiques du bien à protéger, peuvent également être imposées. Ces 'conditions particulières de protection et de gestion' peuvent impliquer des restrictions au droit de propriété, en ce compris l'interdiction totale ou conditionnelle de bâtir, de lotir ou d'ériger des clôtures. Ces conditions spécifiques sont inscrites dans l'arrêté inscrivant un bien sur la liste de sauvegarde ou dans l'arrêté de classement.

Le CWATUP prévoit également des effets juridiques pour les notaires et pour les autorités locales. Les obligations qui incombent aux notaires sont identiques pour les biens inscrits dans la liste de sauvegarde et pour les biens protégés provisoirement ou définitivement. Ils ont pour but d'avertir les clients du caractère protégé du bien. Les autorités locales ont également un devoir d'information envers le public. Le pouvoir du bourgmestre quant à la démolition d'un bâtiment qui menace ruine est limité lorsqu'il s'agit d'un bien protégé.<sup>32</sup>

<sup>31</sup> Articles 24 – 29 of the Archaeology Decree.

<sup>32</sup> Articles 206-208 du CWATUP.



## Brussels-Capital Region / Région de Bruxelles-Capitale

Les conséquences juridique de la protection sont d'application dès l'arrêté d'ouverture d'enquête préalable. Il s'agit des mêmes effets pour toutes les catégories de patrimoine.

Dans le cas de l'inscription d'un bien archéologique sur la liste de sauvegarde, les conséquences sont:

- Le propriétaire doit maintenir le bien en bon état et respecter les mesures particulières de conservation ;
- Tous travaux portant sur le bien et nécessitant un permis délivré par une autorité publique doivent aussi faire l'objet d'une consultation de la Commission royale des Monuments et des Sites.

L'application de ces effets à un site archéologique permet d'y autoriser des fouilles archéologiques partielles ou exhaustives.<sup>33</sup>

Dans le cas du classement, les conséquences sont l'interdiction de:

- Démolir en tout ou en partie;
- Utiliser ou modifier l'usage de manière telle que le bien perdrait son intérêt;
- Exécuter des travaux méconnaissant les mesures particulières de conservation;
- Déplacer le bien, sauf si sa sauvegarde matérielle l'exige impérativement.

L'application de ces effets à un site archéologique correspond à la création d'une 'réserve archéologique' protégée, où même les fouilles archéologiques sont interdites.<sup>34</sup>

## **8. Movable heritage / Patrimoine mobilier**

### Flemish Region / Région flamande

As indicated in the General Introduction, there might be a problem of competences for the Flemish Region as far as the movable archaeological heritage is concerned. The protection of movable heritage is indeed a competence of the communities. In the Flemish region, we have only one parliament and one government dealing with regional and community matters. Within the government, different Ministers are however competent for movable and for immovable heritage.

In the Archaeology Decree, the situation of goods that became movable after excavation is hardly dealt with. Basic rule is that public authorities conclude an agreement with the owner/user of the land where the excavation takes place, before this excavation starts. The applicant for the excavation authorisation is supposed to help in concluding this agreement.<sup>35</sup>

On 24 January 2003, the Flemish community adopted a decree dealing with the protection of movable 'masterpieces'. The protection regime, inscribed in this decree, is based on a duty to maintain the protected good in a good condition, but to do so in situ. This decree foresees a very strong protection, but only for a limited number of items, inscribed in lists. At the moment a first list has been adopted, no archaeological goods are inscribed in it.

<sup>33</sup> Articles 214 – 219 du COBAT.

<sup>34</sup> Articles 231 – 238 du COBAT.

<sup>35</sup> Article 6 of the Archaeology Decree.

## Walloon Region / Région wallonne

Comme expliqué à l'Introduction Générale, la compétence pour la protection du patrimoine mobilier appartient au Communautés et non pas aux Régions. Dans le CWATUP le sort des biens archéologiques devenus meubles n'est inscrit que d'une façon indirecte: comme indiqué plus haut une autorisation pour des fouilles ou des sondages archéologiques ne peut être attribuée qu'après un accord concernant la dévolution de biens archéologiques et au dépôt de ceux-ci dans un lieu agréé et accessible aux chercheurs.<sup>36</sup>

### Brussels-Capital Region / Région de Bruxelles-Capitale

Sauf convention particulière, la propriété des biens archéologiques mobiliers découverts à l'occasion de fouilles est réglé par le code civil, c'est donc le propriétaire du terrain qui est propriétaire des objets contenus (sauf les dispositions particulières relatives aux trésors).

La législation confie à l'autorité régionale la garde des biens archéologiques mobiliers découverts à l'occasion de fouilles jusqu'à leur dévolution finale qui doit être réglée au cas par cas par des conventions particulières avec les propriétaires.<sup>37</sup>

La compétence sur le patrimoine culturel mobilier relève d'un autre type d'entités fédérées de l'Etat belge, les communautés. La question du patrimoine culturel mobilier n'est pas réglée à ce jour sur le territoire de la Région de Bruxelles-Capitale.

## **9. Goods found by chance / Trouvailles fortuites**

### Flemish Region / Région flamande

Every person discovering, out of the context of an excavation, a good of which he knows or presumes that's it's got an archaeological value, is obliged to inform the competent authorities about this discovery. The competent authorities contact the owner/user of the land, if they didn't discover the good themselves. Also the local communities are informed about the finding.

The discoveries have to be maintained in the original situation during a period of ten days after the finding. They are to be protected against damage and destruction and made accessible for examination by the competent authorities. During this period of ten days, public authorities should decide about the future of the good.

Agreements about this goods found by chance can be made by the competent authorities with the owner of the land and the person who found the good. Both of them have certain rights according to civil law; those rights must be respected.<sup>38</sup>

### Walloon Region / Région wallonne

Le CWATUP prévoit un certain contrôle sur les découvertes fortuites, mises à jour de biens archéologiques en dehors de toute activité de sondage ou de fouille.

<sup>36</sup> Article 239 du CWATUP.

<sup>37</sup> Article 243 du COBAT.

<sup>38</sup> Article 8 of the Archaeological Decree.

Toute découverte fortuite doit être déclarée par son auteur dans les trois jours ouvrables auprès de l'Administration ou de la commune du lieu de la découverte, qui avertit l'Administration. L'Administration avertit à son tour le propriétaire et l'occupant si ceux-ci ne sont pas les inventeurs ainsi que la commune.

Les biens découverts et leur site doivent, jusqu'au quinzième jour ouvrable de la déclaration, être maintenus en état, préservés de dégâts et destructions et rendus accessibles pour examen de l'Administration. Le délai peut être prolongé ou écourté par le Gouvernement.<sup>39</sup>

#### Brussels-Capital Region / Région de Bruxelles-Capitale

Toute découverte de biens archéologiques doit être déclarée par son auteur dans les trois jours au propriétaire du site archéologique ainsi qu'à la Région et, en cas de découverte lors de la mise en œuvre d'un permis d'urbanisme ou de lotir, au titulaire du permis.

Les biens archéologiques et le lieu de leur découverte sont maintenus en l'état, préservés des dégâts et destructions et rendus accessible afin de permettre à la Région d'examiner les découvertes et de procéder à des sondages ou fouilles sur le site pendant une durée ne pouvant dépasser 21 jours à compter de la déclaration.

Le délai peut être prolongé ou écourté par le Gouvernement, motivé par le caractère exceptionnel des biens archéologiques découverts.<sup>40</sup>

### **10. Financial support / Soutien financier**

#### Flemish Region / Région flamande

Subsidies can be obtained for excavations and for protection, maintenance, restoration or management works to be carried out to protected archaeological goods. Subsidies for works take into account the expenses linked to the archaeological character of the protected goods.

Conditions and modalities of the subsidies are inscribed in an implementing order of 26 April 1995.

Subsidy rate are quite important: between 60 and 80% of the total cost. As such, the rates are higher for archaeological goods than for monuments.

#### Walloon Region / Région wallonne

Le CWATUP prévoit un système de subvention spécifique pour certains activités, liées à l'archéologie. Il s'agit de :

- L'exécution de prospections, de sondages archéologiques et de fouilles archéologiques;
- La réalisation et la diffusion de publications relatives aux prospections, aux sondages archéologiques, aux fouilles et aux découvertes archéologiques;
- La protection, la réparation et la mise en valeur des sites et des biens archéologiques;
- L'organisation de colloques ou de manifestations scientifiques ou de vulgarisation relatifs aux fouilles et aux découvertes archéologiques.<sup>41</sup>

<sup>39</sup> Article 249 du CWATUP.

<sup>40</sup> Article 246 du COBAT.

<sup>41</sup> Article 250 du CWATUP.

Des travaux de restauration à effectuer à des biens archéologiques classés comme monument peuvent être subventionnés selon l'arrêté du 29 juillet 1993 qui se rapporte aux monuments classés en général.

#### Brussels-Capital Region / Région de Bruxelles-Capitale

Le COBAT prévoit un système de subvention spécifique pour certains activités, liées à l'archéologie. Il s'agit de :

- L'exécution de prospections, de sondages et de fouilles;
- La réalisation et la diffusion de publications relatives aux prospections, aux sondages, aux fouilles et aux découvertes archéologiques;
- La protection, la réparation et la mise en valeur des sites et des biens archéologiques;
- L'organisation de colloques ou de manifestations scientifiques ou de vulgarisation relatifs aux fouilles et aux découvertes archéologiques.<sup>42</sup>

Des travaux de conservation à effectuer à des sites archéologiques classés peuvent être subventionnés selon l'arrêté du 30 avril 2003 qui se rapporte aux biens classés en général.

### **11. Link with other legislations / Lien avec d'autres législations**

#### Flemish Region / Région flamande

There are several links with legislation on urbanism. A first kind of link was described in the answer to question 7: the legal consequences for third parties. It concerns the delivery of a building permit dealing with a protected archaeological good.

Besides this, a specific advice has to be given by the authorities in charge of the protection of archaeological heritage when a building permit is being asked for important public works, likely to influence the situation of the underground. This specific advice is binding as far as it imposes conditions. Those conditions are of course supposed to protect archaeological goods.

#### Walloon Region / Région wallonne

Dans la Région wallonne, le lien avec la législation sur la protection du patrimoine en général et avec la législation sur l'urbanisme est évident. Inscrites dans le même code, gérées par la même administration, ces matières peuvent être traitées d'une manière intégrée. La conservation intégrée du patrimoine en général est d'ailleurs inscrite dans le CWATUP en tant que premier objectif de la législation en cette matière.

#### Brussels-Capital Region / Région de Bruxelles-Capitale

Tout comme dans la Région wallonne, le lien avec la législation sur la protection du patrimoine en général et avec la législation sur l'urbanisme est évident. Inscrits dans le même code, gérées par la même administration, ces matières peuvent être traitées d'une manière intégrée.

<sup>42</sup> Article 249 du COBAT.

## 12. International conventions / Conventions internationales

### Flemish Region / Walloon Region / Brussels-Capital Region

In the actual federalised state model, the regions and the communities have to give approval on the text of an international convention before the federal government can deposit the ratification instrument.

Belgium did ratify the European convention on the protection of the archaeological heritage, done in London on 6 May 1969, but not yet the revised version, opened for signature in Valetta on 16 January 1992.

The Archaeology Decree was inspired by the London Convention. During the preparation of its text in the Flemish Parliament (1992-1993), numerous specific references to this convention and to the revised version were made. Inspiration was found for definitions, regulating excavations, goods found by chance and a certain form of integrated conservation.

Until now, Belgium did not ratify the UNESCO Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done in Paris on 14 November 1970.

### Région flamande / Région wallonne / Région de Bruxelles-Capitale

Dans la structure d'État actuelle, les Régions et les Communautés doivent ratifier le projet de convention internationale avant que l'État belge ne puisse le faire.

La Belgique a ratifié la Convention européenne sur la protection du patrimoine archéologique, faite à Londres, le 6 mai 1969, mais pas encore le texte adapté, ouvert à la signature à Valetta le 16 janvier 1992. La Région de Bruxelles-Capitale a ratifié le nouveau texte le 20 mai 1994, la Région wallonne l'a ratifié le 10 avril 2003. La législation en vigueur en Région wallonne et e, Région de Bruxelles-Capitale respecte entièrement l'idée de la conservation intégrée inscrite dans le texte adapté.

Jusqu'à maintenant, la Belgique n'a pas ratifié la Convention UNESCO concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels, faite à Paris, le 14 novembre 1970. La Convention a été ratifiée le 25 mars 2004 par la Région wallonne et le 3 mars 2005 par la Région de Bruxelles-Capitale.

Si la Belgique a signé la Convention UNESCO sur le patrimoine subaquatique, la procédure de ratification est toujours en cours dans les divers Régions et Communautés.

## 13. Implementation and protection policy / Mise en pratique et politique de protection

### Flemish Region / Région flamande

So far two archaeological goods have been protected: the archaeological zoning of Chartreuse in Bruges<sup>43</sup> and the archaeological zoning of Middelburg in Maldegem<sup>44</sup>.

<sup>43</sup> Ministerial Decree of 20 April 2005, *M.B.* of 30 June 2005.

<sup>44</sup> Ministerial Decree of 21 June 2005, *M.B.* of 28 April 2006.

Valuable archaeological goods are nowadays still protected as monument, part of an urban or rural site or a landscape. This is of course positive, but leaves the possibilities inscribed in a more specific legislation unused.

Regulations about excavations and goods found by chance are applied in a correct way.

From a political point of view, archaeology gets a lot of attention the last years: concrete efforts are being made to work out a complete inventory and to fulfil all obligations inscribed in the Convention of Valetta.

### Walloon Region / Région wallonne

La notion de site archéologique est relativement récente en Région wallonne. Au 31 décembre 2005, il y avait 5 arrêtés de classement comme site archéologique, 1 comme site et site archéologique, et 2 comme site archéologique et comme monument. Il s'agit des sites à Andenne, Ans, Chièvres, Dinant, Grez-Doiceau, Pont-à-Celles et La Roche-en-Andenne.

Avant la définition légale de ce type particulier de classement, les sites de nature archéologique étaient classés comme site.

Les règles concernant les fouilles et les trouvailles fortuites sont appliquées de manière correcte.

La régionalisation et l'intégration de l'archéologie à la Division du Patrimoine et à la Direction Générale de l'Aménagement du Territoire, du Logement et du Patrimoine a amené une coordination des dispositions réglementaires concrétisée par le CWATUP. Sur le terrain, cette optimisation du travail et de l'échange d'informations se perçoit par l'importance des travaux d'archéologie du bâti et par les chantiers de fouilles de sauvetage et de prévention

### Brussels-Capital Region / Région de Bruxelles-Capitale

Jusqu'à maintenant, dix biens archéologiques ont été classés comme sites archéologiques. Il s'agit des sites à Auderghem (4), Bruxelles, Jette, Woluwe-Saint-Pierre et Watermael-Boitsfort (3).

Il y a aussi des biens archéologiques qui sont classés comme monuments, comme parties des ensembles et comme parties des sites.

Les règles concernant les fouilles et les trouvailles fortuites sont appliquées de manière correcte.

THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN BULGARIA  
LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN BULGARIE

Hristina STANEVA, ICLAFI Bulgaria  
In collaboration with Svetoslav GEORGIEV

General introduction / Introduction générale

The current transitional period of the social and economic development in Bulgaria exposes a number of problems related to the cultural heritage. Due to the State's limited potential for financing and controlling, the lack of incentives for the activation of new funding sources and outdated legislation referring to protection, certain risks for the cultural heritage do exist. The archaeological monuments of culture have been strongly affected by treasure-hunting activities, illegal trafficking of valuables and insufficient safeguarding.

The first important step has already been taken. A new Monuments of Culture Act is to be passed, adequate to the new situation, complying with the international conventions ratified by Bulgaria, including the European Convention on the Protection of the Archaeological Heritage. The new legislation will provide for the following: expansion of the substance of cultural heritage in order to protect new types of valuable sites and items; rights of private collections, upgrading of the management system; use of new sources of funding and incentives for involvement in protection, more efficient control and some others.

1. Competences / Compétences

According to the Constitution of the Republic of Bulgaria the State is responsible for the protection of the national cultural and historical heritage.

- The Ministry of Culture manages, coordinates and controls the implementation of the State policy in the field of the movable and immovable cultural and historical heritage through its units:
  - o The *National Institute for Monuments of Culture* – as for the immovable cultural heritage;
  - o The *National Centre for Museums, Galleries and Fine Arts* – as for the movable cultural heritage;
- The Ministry of Regional Development and Public Works implements the State policy on development of the territory and coordinates the activities of the central and territorial bodies in this field;
- The Ministry of Environment and Waters and its regional bodies (The Directorate for National Parks and the Regional Inspectorates for Environment and Waters) pursue and implement the management and control in legally protected territories;
- The Ministry of Interior, through the sector 'Crimes related to cultural and historical assets', by the Directorate of the National 'Police' Office provides the protection against thefts and illegal traffic of works of art;
- The Ministry of Finance, through the agency 'Customs' controls the traffic of works of art and of cultural and historical assets. The Ministry also provides funds for research and protection of all assets discovered during building works;
- The Ministry of Economy provides the conditions for development of cultural tourism;

- The Bulgarian Academy of Science, together with its '*Institute of Archaeology and Museum*', '*Institute for Science of Art*' and '*Centre for Science of Architecture*', has a considerable contribution to the research of the cultural heritage and takes part in the system for its protection;
- The State Museums and Galleries by the Ministry of Culture participate in the system for the protection of the cultural and historical heritage. The National Museum of History is responsible for the implementation of the State policy in the field of the survey, the research, the protection and the conservation of valuable movable historic items;
- The regional governors carry out the management and supervision of all activities related to the investigation, research and protection of the monuments of culture at regional level, the latter being implemented by the regional historical museums;
- The municipal administration executes all activities related to the protection, promotion and use of the heritage in the frames of the main directorates – for building and architecture, for education and culture, for economic and social activities. In some municipalities with a great concentration of monuments of culture specialised structures responsible for the management and protection of the monuments are set, like in Sofia ('Ancient Sofia', 'Ancient Plovdiv', 'Ancient Nessebar').

According to the legal regulations in Bulgaria – the Monuments of Culture and Museums Act and the Regulations of the Ministry of Culture – the division of competences in this field, including also the archaeological heritage, is implemented mainly along the line immovable-movable assets.

This means that the legal regulations for the field of heritage in general also apply to the protection of the archaeological heritage. Depending on whether the archaeological monuments are movable or immovable, the care and responsibility are taken by the respective bodies, competent in each specific field.

Along with that however, a special set of regulations, mechanisms and competences also exists, bearing in mind the specific characteristic of the archaeological heritage and all activities related to its research, protection and preservation.

The Constitution of the Republic of Bulgaria, adopted in 1991, enacts the following:

"The ores and minerals, [...] the natural and archaeological reserves, set by the Law, are exclusively State property."

The Rules for conducting of archaeological field excavations in the Republic of Bulgaria, developed by the Ministry of Culture, determine that research is authorised by the Interdepartmental Council of the Institute of Archaeology and Museum and is coordinated and controlled by the same institute. The Regulations set in details all requirements and procedures related to this activity.

The automated information system 'Archaeological map of Bulgaria' is maintained by the Institute of Archaeology and Museum and the National Institute for Monuments of Culture. In that system is collected, processed and kept the information for the archaeological sites in Bulgaria.

The Register of the Museum Collections and The Register of the National Museum Fund are maintained by the National Centre for Museums, Galleries and Fine Arts. All movable archaeological monuments are as well included in these registers.

## **2. Protection regimes / Régimes de protection**

The Law for the monuments of culture and museums and the specific Regulations of the Ministry of Culture do not consider the archaeological heritage separately from the other types of heritage (architectural, art, historical, etc.). In this sense the main line of demarcation lies between the movable and immovable monuments. Various mechanisms and procedures for their legal protection are being set. In the frames of each of the two main groups various regimes are possible, depending mainly on the cultural and historical value of the monument, e.g. on its category.

### Immovable monuments of culture

Protection regimes of the immovable monuments (including the archaeological ones) are obligatory element by the declaration of the monuments. The regime for each monument includes determination of the surrounding territory (boundaries of the monument and its protection zone) and directions for protection of the monument and its environment.

The strictness of the regime depends on the category of the monument. The categories are as follows:

- Monuments of world importance;
- Monuments of national importance;
- Monuments of local importance;
- Monuments of ensemble importance;
- Monuments for information.

The categories 'monuments of world importance' and 'monuments of national importance' provide the highest degree of protection. Minimum interventions are accepted in monuments 'of local importance'. A higher degree of intervention is accepted in 'monuments of ensemble importance' and 'monuments for information'.

A group of monuments with a homogeneous structure and with a high cultural and historical value (the categories 'world importance' and 'national importance') can be granted a 'reserve status', where a higher degree of protection is provided.

The immovable monuments that go beyond the boundaries of the towns and villages are under the regime of protected natural environment as 'protected natural sites and monuments'.

The specific characteristics of the archaeological monuments are considered in the Rules and Regulations for the development of the territories (of the Ministry of Regional development and public works), that provide four regimes for development and operation (admissible types of activities) of the various types of territories, according to the type, location and value of the archaeological assets.

### Movable monuments of culture

The legal regime of the movable monuments sets mainly the issues related to their protection, ownership, movement and making of inventory. The law obliges all owners of movable monuments of culture to maintain them in a good state, to provide free access to them for employees of the specialised state and municipal bodies and to inform these bodies about damages on the monuments or illegal actions against them.

All finds, discovered by the archaeological excavations or by constructional and agricultural activities are considered State ownership. The people who have found or discovered historical remains, are obliged to inform the closest museums in a week time. The concealed monuments of culture are confiscated for the benefit of the State.

The conditions for the export of movable monuments from the territory of the State are set in the 2004 Regulations of the Council of Ministers, developed in conformity with the requirements of the European Union in this field. Unfortunately, in the Regulations does exist some incompleteness by the determination of some subjects, criteria and procedures, which questions its effective operation.

In cases of mismanagement, impossibility for good maintenance or closing down of a museum collection or a museum, the Ministry of Culture can order the transfer of movable monuments from one fund to another, within the frames of the system of State, municipal or departmental museum collections or museums.

The movable monuments of culture belonging to the category 'national importance' are included in the National Museum Fund.

## **3. Excavations / Fouilles**

The Rules for conducting of archaeological field excavations in the Republic of Bulgaria settle in details all aspects of that issue. Permits for field research are issued by the Council of Field Research of the Institute of Archaeology and Museum with the participation of representatives of the Ministry of Culture and its units for movable and immovable heritage. The permits are valid within the current legal year. They are issued only to professional archaeologists with a university education in archaeology or to people specialised in the field of archaeology, with biennial practical specialisation as ground research workers.

The proposals for field research - planned or emergency - are presented by professional archaeologists, licensed by the Institute of Archaeology and Museum. Initiators could be the research workers themselves or other parties concerned. A working programme and a letter of authorisation signed by the owner of the land where the site is located are enclosed to the proposals.

The archaeologist, to whom the permit for field research has been issued, gets the statute of 'scientific leader of the ground research' and takes responsibility for the scientific and methodological level of the research, for the implementation of the research programme, including the publication of the results, and for the integrity and state of the archaeological site during the research.

#### 4. Definitions / Définitions

According to the Rules for conducting of archaeological field excavations in the Republic of Bulgaria, as *archaeological sites* are considered all movable and immovable material traces of human activity in the past, in the earth strata, on their surface, on dry or in aqua-land.

The distinction between immovable and movable monuments of culture is set by the legislator regardless of their type (archaeological, architectural, art, historical etc.): immovable cultural and historical heritage is the unity of authentic material evidences of human presence and activity, being an integral part of the environment, in which or for the sake of which it is created, as well as all movable assets to which they permanently belong.

Movable monuments of culture are transportable works of human activity, illustrating and documenting the material and spiritual culture which have scientific and/or artistic value.

#### 5. Inventories / Inventaires

The inventory of the archaeological heritage is set by the Regulations for the development, use and management of the automated information system 'Archaeological map of Bulgaria'. The primary data carriers, registration maps and diskettes, provided by the research workers, are registered and kept in such conditions, ensuring the official secret and regulated access to them.

New buildings, within the boundaries and protection zones of immovable monuments of culture, could be executed only with a special permit, issued by the National Institute for Monuments of Culture and only under the control and supervision of the latter. According to the Law for development of the territory, the projects for development schemes of the protected territories with cultural and historical heritage are also authorised with written statements by the National Institute for Monuments of Culture.

#### 6. Protection procedure / Procédure de protection

The Monuments of Culture and Museums Act introduces the term *monument of culture* as a legal statute of protection, under which were set until recent times: the immovable monuments of culture (listed and declared) and the movable monuments in the museums and the museum collections. In order to spread the protection further to the newly found assets, since the beginning of 2005 the legislator has enacted that the statute of immovable monuments of culture attain:

"All archaeological sites, constructions and memorial places with the decorative and artistic ornamentation belonging to them on the territory and in the aquatoria of the Republic of Bulgaria."

The procedure for assignment of the status 'monument of culture' to the sites of the immovable cultural and historical heritage includes:

- Identification, investigation, localisation and description. Development of an identification map by the National Institute for Monuments of Culture according to set information and documentation standards;
- Declaring by the National Institute for Monuments of Culture of the identified assets by the determination of primary characteristic of the type, primary category and provisional protection regime. The declared monuments are set under provisional law protection. In case of an emergency situation, this procedure is speeded up;

- Final complex evaluation of the cultural and historical value and public significance of the declared monuments on the basis of set criteria for authenticity, degree of preservation, scientific and art value, interaction with the environment, interaction with society. For declared monuments with a high degree of evaluation, the National Institute for Monuments of Culture develops a proposal for approval, while the rest are set free of their provisional protection;
- Approval, promulgation and registration. The proposals of the National Institute for Monuments of Culture for obtaining the status 'monument of culture' are ratified by the Minister of Culture. The proposals for monuments of culture in the 'reserve status' are ratified by the Council of Ministers, after the proposal of both the Minister of Culture and the Minister of Regional Development and Public Works. The lists of the approved monuments of culture are promulgated in the 'State newspaper' and registered in the National register for immovable monuments of culture, managed and maintained by the National Institute for Monuments of Culture.

#### 7. Legal consequences / Conséquences juridiques

The consequences for the monuments of culture obtaining law protection are related to the following items provided by the law:

- Obligations of the owners and the ones using the monuments regarding their preservation and maintenance, as well as the regime of their use and access (specialised and public);
- Obligations of the local and central authorities regarding the control on the state of the monuments and the intervention in the monuments and their surrounding environment;
- Sanctions in cases of infringement of the set obligations;
- Tax concessions;
- Specific decrees for financing of activities related to the preservation of the monuments.

Unfortunately, in spite of the numerous amendments to the law in force, adopted in 1969, there are a number of contradictions and omissions in the administrative control on its observation, provoking serious concerns among professionals and society.

#### 8. Movable heritage / Patrimoine mobilier

As already mentioned in the answer to question 2, the law enacts that all monuments of culture, found during archaeological excavations, during the execution of whatever type of work or by chance, are considered as State property and obligatory they should be given in its possession.

In case the owners of movable monuments of culture transfer their property rights on them to another person, the law obliges them within three days to inform the museum, where the monuments are declared or registered, and to give the address of the person, to whom the ownership has been transferred. The owners of private collections or separate cultural assets cannot give them as presents, sell them, exchange them and bequeath them to foreign citizens or foreigners without the special permit of the Ministry of Culture.

## 9. Goods found by chance / Trouvailles fortuites

People who discovered or found monuments of culture, are obliged to inform the local municipality or the near-by museums within a week about the findings. People who delivered the movable monuments of culture or important information concerning the latter to the museums, are rewarded according to the rule established by the Minister of Culture. Concealed monuments of culture are confiscated for the benefit of the State.

If, during the execution of any construction, development or agricultural works findings are discovered that indicate characteristic features of monuments of culture, the above works are temporarily stopped. The owners and managers of the building site are obliged to take respective measures for the protection of the finding and to inform immediately the municipality or the near-by museum. The bodies responsible for the investigation, research and protection of the monuments of culture are obliged within a month to inform the owners of the property and the managers of the building site, whether the finding is a real monument of culture and to give instructions for the measures that should be taken for its research and protection.

The Ministry of Finance provides funding for the research and protection of the monuments of culture, found during the building works, when the available funding for the site is insufficient and extra funding is required.

If the owner of the building site is a physical person, the funds are provided by the municipality.

## 10. Financial support / Soutien financier

Still the public authorities are the main actors in the field of heritage preservation, and the archaeological sites included. At present the responsibility for the investigation, documentation, conservation, monitoring and maintenance of archaeological sites belongs predominantly to the State. One thing that is true is that the public sector is becoming less capable to pay the heritage bill, it is already searching for new funding mechanisms and schemes designed to encourage private ventures and sponsorships. Regarding some of the archaeological sites the State may sign concession contacts with private legal entities. They are supposed to use part of the income for maintaining the monument in a good state.

The financial sources from the public sector are:

- At the central level:
  - o The republican budget;
  - o The budget of the Ministry of Culture;
  - o The budget of the Ministry of Finance;
  - o The Department of Ecclesiastical Matters with the Council of Ministers budget;
  - o The National Culture Fund, a legal body financed under an off-budget account;
- At the regional and local level:
  - o Annual targeted subsidy from the Ministry of Culture. The Minister of Culture concludes contracts with municipalities for the carrying out of clearly specified activities on certain archaeological sites;
  - o Municipal budgets, which are adopted every year by the municipal councils.

## 11. Link with other legislations / Lien avec d'autres législations

As already mentioned, the listed and declared monuments (including the archaeological ones) are under the protection of the Monuments of Culture and Museums Act, by setting specific regimes for their protection – territorial scope and directions for recommendable, possible and inadmissible intervention on the monument and its environment, including also the use of the land. The control on the observation of these instructions is executed by the National Institute for Monuments of Culture, that obligatory authorises all kinds of intervention concerning the monument or its environment.

At the same time, however, these issues are neglected in a number of regulations in the new Law for Development of the Territory. This is considered as a serious threat, as there is an article in this, confirming its priority among the other laws, concerning issues related to the development of the territory.

## 12. International conventions / Conventions internationales

The Republic of Bulgaria has ratified the main international conventions in the field of protection of the cultural heritage. According to article 5, paragraph 4 of the Constitution of the Republic of Bulgaria, adopted in 1991, the latter are part of the internal rights of the country:<sup>45</sup>

- Convention on Protection of the Cultural Valuable Sites and Objects in case of Armed Conflict, UNESCO, 1954 (Ratified in 1956);
- Convention for the protection of the world cultural and natural heritage, UNESCO, 1972 (Ratified in 1974);
- Convention of La Valetta on protection of the European archaeological heritage, Council of Europe, 1969 (Ratified in 1991).

## 13. Implementation and protection policy / Mise en pratique et politique de protection

The present regulations in the field of the heritage were set 36 years ago, in a social, political and economic context absolutely different from the present one. In the last 15 years the regulations are constantly amended, in order to fit to the new conditions, and each amendment is directed towards palliative substitution of a separate fragment of the legal framework, unfortunately, without contributing to its entire updating and improvement as a whole.

Still, though being old-fashioned, inadequate and incomplete, the present regulations could provide a better protection of the archaeological heritage, if they were strictly applied. Unfortunately, a number of other serious problems do exist, causing extra difficulties during the activities related to the protection of the heritage. Some of the more essential of them are:

- Problems related to the structure of the system for the protection of the cultural and historical heritage – contradictory, strongly centralised, but lacking effective legal power and sufficient funds, as well as professional personnel;
- Problems related to the maintenance and use of the monuments of culture – caused mainly by some regulations of the Law for the State property and the Law for the concessions, creating a possible risk for the protection of the monument and control on it.

<sup>45</sup> State Newspaper, issue 56, 1991.

The final conclusion that could be made is that it is necessary to formulate the leading principles and to build an entire new philosophy concerning the cultural heritage, which will be the basis for the creation of modern regulations of this activity, as well as for the updating and development of the system for its implementation.

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN CHILE LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE AU CHILI

Amaya IRARRAZAVAL, ICLAFI Chile

### 1. Compétences / Competences

L'autorité compétente est le *Consejo de Monumentos Nacionales* (CMN), intégré par des membres désignés par la Ley n° 17.288 sobre Monumentos Nacionales.<sup>46</sup> Elle veille à la protection du patrimoine en général et du patrimoine archéologique en particulier.

### 2. Régimes de protection / Protection regimes

Non, il n'existe pas de régime spécifique pour la protection du patrimoine archéologique.

### 3. Fouilles / Excavations

Les fouilles archéologiques sont réglementées par le CMN à travers de el Reglamento de la Ley n° 17.288, sobre excavaciones y/o prospecciones arqueológicas, antropológicas y paleontológicas.<sup>47</sup>

Ce règlement impose des restrictions aux fouilles. Des permis sont seulement octroyés à des professionnels ayant fini leurs études, avec un projet de recherche bien fondé et avec un financement garanti. De même, le règlement inclut la protection du patrimoine, établit le lieu où les biens seront étudiés et l'endroit où seront gardés les restes.

### 4. Définitions / Definitions

La Ley sobre Monumentos Nacionales date de 1970. À ce moment-là la notion 'patrimoine' n'avait pas encore été utilisée très courant.

Le premier article de la loi fournit une définition de 'monuments nationaux' (*monumentos nacionales*):

"Les monuments nationaux qui sont sous la protection et tutelle de l'Etat sont les lieux, ruines, constructions, et objets de caractère historique ou artistique; les cimetières, objets enterrés ou restes des aborigènes, les pièces ou objets anthropo-archéologiques, paléontologiques ou de formation naturelle, qui existent sur ou sous la superficie du territoire national, ou sur la plateforme sous-marine de ses eaux juridiques et dont la conservation est intéressante pour l'histoire, l'art ou la science; les sanctuaires naturelles (réserves); les monuments, statues, colonnes, pyramides, fontaines, plaques, couronnes, institutions et en somme, les objets qui sont destinés à se conserver dans un lieu publique, de caractère commémoratif. Leur tutelle et protection seront exercées par el Consejo de Monumentos Nacionales, selon la façon indiquée par la loi."

<sup>46</sup> Promulguée le 4 février 1970.

<sup>47</sup> Promulgué le 28 mars 1990.



L'article ne fait que énumérer les restes. Il n'y a pas de distinction entre des biens meubles et des biens immeubles.

### **5. Inventaires / Inventories**

Le CMN conserve une liste à jour des endroits et sites qui ont des monuments nationaux. Mais ils n'ont pas d'inventaire des biens meubles du pays. Chaque musée a la mission de conserver un inventaire de leurs collections.

La Dirección de Bibliotecas, Archivos y Museos développe un projet avec une base de données de toutes les collections patrimoniales que conserve l'institution. Ce projet n'a pas encore été terminé.

Par le fait de figurer dans des inventaires, les pièces archéologiques sont automatiquement sous protection de la loi. Donc elles sont protégées contre toute manipulation ou destruction.

### **6. Procédure de protection / Protection procédure**

Selon cette loi et ces normes, toute personne qui trouve un bien archéologique doit prévenir le CMN. Les trouvailles produites pendant une fouille autorisée par ce conseil, suivent les normes établies par le Règlement de fouilles mentionné auparavant.

Il existe des visiteurs spéciaux de monuments nationaux, dans chaque région du pays, et ce sont eux qui ont la mission d'inspecter les trouvailles d'urgence et adopter les mesures qui correspondent.

### **7. Conséquences juridiques / Legal consequences**

Les conséquences juridiques de la protection sont prévues dans la Ley n° 20.021, que modifie la Ley n° 17.288 sobre Monumentos Nacionales, con el objeto de crear una nueva figura penal y sustituir la unidad en que se expresan sus multas.<sup>48</sup>

Cette loi s'applique pendant tout le processus de protection.

### **8. Patrimoine mobilier / Movable heritage**

La normative de la loi fait référence aux procédures qui doivent se mettre en place pour les biens meubles découverts pendant les fouilles et indique une destination spécifique pour eux.

Voir aussi la réponse à la question 6.

<sup>48</sup> Promulguée le 30 mai 2005. Publiée dans le Diario Oficial de 14 juin 2005.

### **9. Trouvailles fortuites / Goods found by chance**

La personne qui découvre fortuitement un bien archéologique doit prévenir le CMN de cette trouvaille. Le propriétaire du terrain doit permettre l'accès des visiteurs des monuments et doit éviter que d'autres personnes puissent abîmer le monument

Voir aussi la réponse à la question 6.

### **10. Soutien financier / Financial Support**

Le CMN n'a pas de financement pour soutenir des fouilles, des travaux de consolidation ou de restauration du patrimoine archéologique. Il ne fait pas non plus ces travaux, le CMN les laisse entre les mains des archéologues et des professionnels de la conservation, qui doivent obtenir le financement nécessaire.

Voir aussi la réponse à la question 13.

### **11. Lien avec d'autres législations / Link with other legislations**

La Ley sobre Monumentos Nacionales est en relation avec d'autres lois et règlements:

- Constitución Política de la República;
- Ley Orgánica Constitucional sobre Gobierno y Administración Regional;
- Ley Indígena;
- Ley de Bases del Medio Ambiente;
- Decreto n° 95, Reglamento del SEIA;
- Ley y Ordenanza General de Urbanismo y Construcciones.

### **12. Conventions internationales / International conventions**

Le Chili a ratifié quelques unes, pas toutes. Sans doute, ces conventions ont influencé le cadre juridique national. Le CMN a publié quelles sont ces conventions.

### **13. Mise en pratique et politique de protection / Implementation and protection policy**

Le CMN ne fait pas de travaux de conservation, de consolidation ou de restauration des biens immeubles, malgré le fait que selon la loi, ces actions lui appartiennent en exclusivité.

Ainsi, les fouilles archéologiques et d'autres travaux de conservation et de mise en valeur du patrimoine archéologique dépendent des initiatives des archéologues et/ou des conservateurs de monuments, qui doivent chercher le financement nécessaire par eux-mêmes, et qui doivent obtenir le permis du CMN pour le faire. Comme le CMN est très stricte pour donner ce genre d'autorisations, la mise en pratique de la législation est encore plus difficile.

Avec ce système on arrive à intervenir dans un nombre très réduit de sites archéologiques, ceci demeurant dans la capacité spécifique des professionnels qui exécutent ces tâches et dans les permis que le CMN est prêt à donner.

Le nombre de biens qui sont finalement sous protection, la plupart des sites archéologiques situés à l'intérieur de parcs et réserves naturelles.

Au Chili il n'existe pas un suivi régulier des sites archéologiques, afin d'évaluer périodiquement leur état de conservation.

## 1. Competences / Compétences

As a general rule, the *Ministry of Culture* and the *Colombian Institute for History and Anthropology* (ICANH) are the governmental institutions responsible for the protection and preservation of the Nation's Archaeological Heritage. This is complemented by the coordinated action of local authorities and ethnic communities.

According to the Laws 163 and 397 the ICANH has the following functions:

- Authorizing archaeological explorations or excavations;
- Keeping a record of the goods that constitute the Archaeological Heritage;
- Preparing Legal Statements regarding the goods that constitute the Archaeological Heritage;
- Determining, scientifically and technically, which are the sites that could hold archaeological goods or at the vicinity of archaeological areas, and preparing special protection plans for those goods and areas, in coordination with local and national entities and authorities;
- Answering requests by Environmental Entities responsible for approving environmental licenses affecting areas declared as Archaeological Heritage;
- Preparing Legal Statements regarding the administration of goods belonging to the Archaeological Heritage at the municipal, district and departmental level;
- Authorizing the borrowing of goods belonging to the Archaeological Heritage, among the public entities;
- Receiving and approving requests for demolition, restoration, removal or any other intervention of goods belonging to the Archaeological Heritage, as well as supervising them;
- Supervising all matters connected with requests for Environmental Licenses, and giving the certifications defined by the Culture Law;
- Authorizing the temporary exportation of goods belonging to the Archaeological Heritage, to be exhibited or studied scientifically, provided a positive concept by the Heritage Director in the Ministry of Culture;
- Imposing economical sanctions;
- Dictating seizure measures upon goods belonging to the Archaeological Heritage.

## 2. Protection regimes / Régimes de protection

The Archaeological Heritage protection legislation is established in articles 63 and 72 of our Political Constitution (1991). They establish that the goods constituting the Archaeological Heritage belong to the Nation. Therefore, they cannot be sold or commercialized, they cannot be acquired by domain prescription, and its owner, the Nation, can retrieve them anytime. They cannot be subject of seizure by any individual. By the same token, they cannot be the subject of warranties.

These mandates were included in article 202 of the Political Constitution of 1886 (which lasted until 1991), where the property of the 'underground' was entitled to the Nation.

Law 103 of 1931 declared of public utility all monuments and archaeological monuments in San Agustín, Pitalito, Alto Magdalena, as well as any other site of the Nation, and also prohibited the selling and exporting of tombs and its contents, statues, stones, tools, handicrafts and any other object that could be subject to analysis in archaeological or anthropological research. All of them were declared belonging to the National Monument of Magdalena and San Agustín.

Furthermore, in 1959, Law 163 declared as Historical and Artistic National Heritage all monuments and pre-Hispanic tombs and objects of especial interest for the study of past cultures or civilizations, or paleontological studies, be them preserved at ground level or below. This law also exempted those goods of being subject to civil law. In other words, it exempted them from domain acquisition in the absence of a known owner.

Other laws that followed Law 163 were: Law 9 of 1989, Law 47 of 1993, Law 388 of 1997 and Law 397 of 1997, that created the Ministry of Culture.

### 3. Excavations / Fouilles

In fact, excavations are controlled by authorities as stated in a decree (N° 833 of 22 April 2002) entitled "Authorization of excavations, explorations or any other intervention of archaeological type".

According to article 10, no act of exploration or excavation related to goods belonging to the Archaeological Heritage, could be done at the national level, without previous authorization from the ICANH.

All activities of exploration, excavation or intervention of goods belonging to the Archaeological Heritage, in areas occupied by Indian communities, could be done with authorization from such communities and the corresponding authority. There are proceedings defined for such consultations.

According to article 11, the archaeological exploration and excavation could be authorized for cultural or scientific research, for purposes of preserving the archaeological context or others contemplated in the law. Those activities must be done by accredited archeology professionals.

The ICANH will determine by a general legal statement, all prerequisites to authorize such activities, as well as the approved intervention forms and the information required by the institute.

Article 12 relates to the finding of goods belonging to the Archaeological Heritage during archaeological exploration or excavation. When goods belonging to the Archaeological Heritage are found during archaeological exploration or excavation, articles 8 and 9 should apply. However, the exploration and excavation activity can proceed with the previous authorization of the ICANH.

Article 13 states that all material activities over archaeological influence zones must be approved by the corresponding authority, under supervision of archeology professionals.

### 4. Definitions / Définitions

Law 397, also known as 'Culture's Law', defines *archaeological heritage* as: all goods originated in ancient cultures or belonging to the colonial age, as well as human remains of those cultures. By the same token, all geological or paleontological elements, related to the origin of humans and its history, belong to archaeological heritage.

It could also include all goods representing the cultural and traditional identity of existing Indian communities, so designated by the Ministry of Culture through the ICANH, in coordination with such communities.

Any person finding archaeological goods should call the attention of civil or police authorities, whom have to give notice to the Ministry of Culture in the following 24 hours.

The Ministry of Culture is in charge of determining, scientifically and technically, which are the sites that could hold archaeological goods or at the vicinity of archaeological areas, and prepare special protection plans for those goods and areas, in coordination with local and national entities and authorities.

### 5. Inventories / Inventaires

The Registry of Goods belonging to Archaeological Heritage is as follows established in title III of Decree N° 833:

#### "Article 14. Registry of Goods belonging to Archaeological Heritage

The ICANH is in charge of registering Goods belonging to Archaeological Heritage, for purposes of inventory, catalog and cultural information. This registry is to be updated and is part of the National Cultural Heritage Registry administered by the Ministry of Culture.

The ICANH will rule, according to the National Cultural Heritage Registry, all required requisites, elements, forms and other attributes, for an adequate registry. It will register, by its own initiative or by request of possessors of goods belonging to Archaeological Heritage.

#### Article 15. Registry Terms for Goods belonging to Archaeological Heritage

It is established that one year after the publication of this decree, all bearers of Goods belonging to Archaeological Heritage must register them with the ICANH. By this registry, tenants could continue bearing those goods. All others that have registered goods, prior to this decree, cannot continue holding them."

### 6. Protection procedure / Procédure de protection

As for protection procedures, our legislation provides the following:

#### "Article 115. Rules for antiques, used objects and pledges.

All Antiques Stores, Plate and Gold jewelry stores and Stores selling used goods, should hold registered bills of purchased as well as sold goods, to be shown to police authorities, at their request. If those objects have been produced by whoever sells them, they should produce bills for raw materials. When imported, they should have all due documents of import and nationalization.

#### Article 123. Protection of Historical Monuments and artistic places.

Police should protect without restriction all Historical Monuments and artistic places.

#### Article 124. Police is in charge of preventing damage to Public Usage Goods.

Our Supreme Court has said that in urgent cases "there is a provision for accepting a verbal command when protecting the Nation's Cultural Heritage. All bearers of Goods belonging to Archaeological Heritage, in the process of registry, should clarify to the ICANH how and when they came into their

hands, in order to establish if a fine has to be imposed. Those goods will remain in custody in the ICANH, at least while examined. This is no arbitrary procedure, because they belong to the Nation's Cultural Heritage, so it's not strange for the State to protect and defend them."

### 7. Legal consequences / Conséquences juridiques

In accordance with the constitutional mandate, article 15 of Law 397 establishes a set of faults to be sanctioned either with disciplinary sanctions or with stricter penalties, regarding damage, destruction or appropriation of archaeological goods, as follows:

"Article 15. Regarding faults against Nation's Cultural Heritage.

Anybody responsible for damaging the Nation's Cultural Heritage will be liable to:

1-If the fault is punitive due to damage or destruction of the Nation's Cultural Heritage, according to the Criminal Law it must be denounced by Criminal Indictment and if flagrant, police authorities should detain people responsible for the unlawful action. In addition, economical sanctions could be imposed.

2-If the fault consists of destruction or alteration with permission, sanctions should be imposed according to article 66 of Law 9, increased with 100%.

3-If the fault consists of mobilization without permission of a Archaeological Good, a fine of 50 times the minimum monthly wage should be imposed.

4-If the fault consists of excavation or exploration of Archaeological Goods without permission, a fine of 200 to 400 times the minimum monthly wage should be imposed.

5-If the fault is committed by a public servant, it will be considered 'grave' as said in article 25 of Law 200.

The Ministry of Culture, or whoever it delegates, can impose and execute the economical sanctions established by Law. Federal government by means of the Ministry of Culture, as well as local authorities, are conferred with police authority to impose and execute sanctions, according to the law."

On the other hand, article 58 of Decree 522 establishes detention from one to eight months to:

- Whoever appropriates stranded Archaeological Goods, without abiding by law.
- Whoever appropriates Archaeological Goods by mistake or chance.

### 8. Movable heritage / Patrimoine mobilier

The Decree 833 of 2002 establishes the following:

"Article 7. Finding of Archaeological Movable Goods.

The finding of Archaeological Heritage Good is not considered treasure finding, discovery or invention.

Article 8. Information of unexpected finding of Archaeological Heritage Goods.

Whoever finds Archaeological Heritage Goods must immediately inform civil or police authorities, which in turn must inform within 24 hours the Ministry of Culture. (This information could be given by the finder directly to the ICANH). Then ICANH should be informed in order to conduct technical studies and take administrative action according to law. This activities could either be delegated to local authorities, institutions or specialized professionals, or performed by the ICANH.

Activities originating the unexpected finding must be immediately stopped. If necessary, the Public Force can intervene."

### 9. Goods found by chance / Trouvailles fortuites

The Decree 833 of 2002 establishes the following:

"Article 9. Putting Archaeological Heritage Goods at the disposition of the ICANH.

Whoever finds by chance goods belonging to Archaeological Heritage, and still holds them, must immediately put them at the disposition of the ICANH for its registry.

Once registered, the ICANH will decide, based on the goods' characteristics and the archaeological information available, if it is to be given back to the finder and holder to be voluntarily maintained or given to specialized institutions, for their preservation."

### 10. Financial support / Soutien financier

According to our constitution, only the Ministry of Culture and the ICANH are authorized to perform or delegate excavation and exploration of Archaeological Heritage Goods. Due to this regulation, those activities can only proceed with public funds. Both the Ministry and the ICANH have and approved budget, but due to scarce resources, these activities have to be limited by prioritization and be performed over long periods of time.

### 11. Link with other legislations / Lien avec d'autres législations

As explained before, Colombia's legislation is very protective of its Archaeological Heritage, establishing prevalence of the preservation measures over other legislation like urbanism. In this realm, circumstances like casual findings in the process of regular construction are subject to interruption, to allow proper disposition of Archaeological Heritage Goods or modification of urbanism in order to protect them. In all cases protection prevails over other related legislation.

### 12. International conventions / Conventions Internationales

Colombia has signed numerous international treaties to protect its Archaeological Heritage:

- The Organization of American States has a Treaty to Protect Movable Heritage, to which Colombia has adhered by means of Law 14 of 1936. Although the country is not considered a Member-State, due to adherence, it's in full compliance;
- The Roerich Pact to protect Artistic Institutions and Historical Monuments, approved by Law 26 of 1936;
- The Convention to Protect Natural and Cultural World Heritage subscribed in Paris on 23 November 1972 was adhered by Colombia through Law 45 of 1983;
- Colombia's Law 63 of 1986 approved the adherence to the "Convention adopting measures to prohibit illicit, importing, exporting and property transfer of Cultural Goods", signed in Paris on 17 November 1970;
- A treaty between Colombia and Peru has been signed in Bogotá on 24 May 1969, aimed to: "protect, preserve and retrieve Historical, Cultural and Archaeological Goods." It was approved by Law 16 of 1992;
- The Andean Council of Foreign Ministries approved Decision 460 regarding the Protection and Recuperation of Cultural Goods belonging to Andean Community Archaeological, Historical, Ethnological and Artistic Heritage;
- An agreement has been signed in Bogotá on 17 December 1996 between Colombia and Ecuador, in order to "Recuperate and Return Stolen Cultural Goods". It was approved by Law 587 of 2000.

### 13. Implementation and protection policy / Mise en pratique et politique de protection

Colombia's Government by means of its Ministry of Culture and local authorities are given Police Authority to impose and execute measures, fines and all other sanctions established by law, according to the circumstances.<sup>49</sup>

<sup>49</sup> Decree 1355 of 1970, Police National Code en article 15 of Law 397 Culture's General Law.

THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN FINLAND  
LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN FINLANDE

*Satu-Kaarina VIRTALA, ICLAFI Finland*  
*In collaboration with Marianne SCHAUMAN-LÖNNQVIST*

### 1. Competences / Compétences

The *National Board of Antiquities* is the authority which is responsible for the heritage protection in general, as well as for the archaeological heritage. The National Board of Antiquities has delegated this authority also to five provincial museums. The competence comprises movable as well as immovable archaeological heritage. The National Board of Antiquities is attached to the Ministry of Education.

### 2. Protection regimes / Régimes de protection

All ancient monuments and sites in Finland are protected under the provisions of the Antiquities Act which was issued in 1963. It was passed in constitutional order, which makes it a strong law. So, according to the Act, all antiquarian cultural heritage is automatically protected. The Act also defines the principles concerning ancient sites from prehistoric and historical times as well as shipwrecks.

### 3. Excavations / Fouilles

The National Board of Antiquities issues excavation licenses to qualified archaeologists (minimum Master degree and qualified experience of excavation work). The license is issued for a specific site and for a limited period. The license application has to be supplemented with a project plan and the funding has to be secured. The excavation is supervised by the National Board of Antiquities. The treatment of the finds has to be carried out in a museum or other public facility suitable for the work and secure for the finds.

The Board also grants permits for the study of underwater relics. Permits for so called non-intrusive fieldwork that leaves the sites untouched can be granted to people who do not have archaeological qualifications. Permits for research and excavations that interfere with the site can only be granted to a person with sufficient archaeological competence to carry out fieldwork and related post-excavation work and who has the ability to conserve the artefacts. Systematic and extensive photography requiring specialist equipment is considered the study of underwater relics and is subject to official permission.

### 4. Definitions / Définitions

According to the present research, prehistoric settlement began after the end of the last Ice Age, as habitable land rose out of the Proto-Baltic about 11 thousand years ago. Only one site predating the last Ice Age has been found, namely the Wolf Cave in the western part of Finland. The pre-historic area ended in western Finland around 1150 AD and in the eastern and northern parts of the country ca. 1300 AD.

Under the Antiquities Act "fixed antiquities are protected as reminders of Finland's past settlements and history." The act refers to both prehistoric and historic objects. The most recent conservation measures concern defence works from World War II.

The Antiquities Act lists the types of ancient monuments, which are fixed monuments, also subsoil and under water ones. They are e.g. mounds of earth and stone, cairns, circles and other settings of stones, pre-Christian graves, cemeteries, stones with inscriptions, rock art, ground markings, traces of grinding or hammering, mines and hunting pits, sacrificial springs, trees and stones, fixed natural objects associated with old traditions, tales or significant historic events. There is no specific age given to the monuments, only that they ought to be abandoned. Ship wrecks more than hundred years old are also defined as fixed ancient monuments.

Movable objects (tools, weapons etc) of which the owner is not known and which can be expected to be at least a hundred years old, are counted as movable heritage and ought to be submitted to the National Board of Antiquities. The excavated goods are also submitted to the National Board of Antiquities.

### 5. Inventories / Inventaires

The National Board of Antiquities keeps an inventory of all the ancient monuments. A monument registered in the inventory is always protected by the law and hence taken into consideration in the planning process and in issuing building permits. Either the monument is of the category never to be touched and no permit issued or the building permit can be issued after due rescue excavation of the monument.

Good results have been achieved in the compilation of inventories of areas dominated by agriculture using intensive survey methods, especially field walking. In this way, more ancient sites have come under protection.

At present, the inventory comprises 17,500 ancient monuments.

### 6. Protection procedure / Procédure de protection

As all monuments are automatically protected there is actually no specific procedure. When a new monument is found an information letter is sent to the landowner and the monument is added to the inventory.

In the planning of public works or in the preparation of urban plans or zone plans it should be checked whether they will concern ancient monuments. In this case the National Board of Antiquities must be informed of it without delay so that the Board can arrange negotiations. The landowner concerned shall be heard in these negotiations.

If a fixed archaeological relic is found in excavation work, the work must be discontinued and the National Board of Antiquities is to be informed of the matter.

The wrecks of ships and other vessels discovered in the sea or inland waters, which can be considered to have sunk over a hundred years ago, or parts of them, are officially protected and they belong to the State. Most of them are wrecks of boats and ships, but there are also

some underwater defences, pontoon structures and old moorings. Discoveries of log boats in small lakes are reported every year.

Recently an interesting lawsuit about sea rescue of a wreck of a Dutch sailing ship called 'Vrouw Maria' was pending. She has a reputation of a treasure ship because her cargo consisted of art treasures bought by Russian aristocrats and Catharine the Great. Among the works of art were for example Dutch paintings from the 17<sup>th</sup> century. A part of the cargo was salvaged soon after the shipwreck, but the majority of it went down with the ship in 1771. A group of divers, who located the ship, insisted that they had a right to rescue the ship according to the maritime law regulations. The decision of the Court of Appeal was that the wreck belongs to the State, which hence can prohibit all rescue attempts. The Supreme Court denied an appeal against the decision.

### **7. Legal consequences / Conséquences juridiques**

Ancient monuments include an area of land necessary for the preservation of the monument and for providing a sufficient space around it in view of its nature and significance. This area is called 'protective area'.

If there is no specially confirmed protective area for the monument, the protective area is two metres wide from the visible perimeter of the monument.

If a protective area considerably limits the use of the property concerned or a part of it, the owner is entitled to compensation from State funds.

If an ancient monument is an undue encumbrance or impediment in relation to its significance, a regional environmental centre may permit such actions that are otherwise forbidden after hearing the National Board of Antiquities. Such permission usually includes conditions.

Owners as well as third persons ought to apply always for a permit when works concern an ancient monument.

Violations of the Antiquities Act are punished by fines and by forfeiting the rights relating to the find.

### **8. Movable heritage / Patrimoine mobilier**

All movable goods ought to be submitted to the National Board of Antiquities, which can by application deposit items in a museum.

If movable goods are discovered in a bog or deep in the ground, or if the location in question indicates the existence of an ancient monument, such as a dwelling-site or a burial ground, the find must immediately be reported to the National Board of Antiquities.

If items are redeemed, a reasonable compensation shall be paid from State funds. If an item is found within a known ancient monument, it belongs to the State without compensation.

The finder of a coin, weapon, tool, ornament, vessel, transport, equipment, or the like, of which the owner is not known and which can be expected to be at least a hundred years old,

shall immediately submit the object in question to the National Board of Antiquities in the condition it was found. The National Board is entitled to redeem objects. If an object is redeemed, a reasonable compensation shall be paid to the finder.

### **9. Goods found by chance / Trouvailles fortuites**

See the answer to question 8.

### **10. Financial support / Soutien financier**

According to the law, when a public or considerable private development work concerns an ancient monument insofar as an investigation of the monument is required, the party responsible for the development ought to defray the costs, unless this requirement is considered unreasonable under the prevailing circumstances. In cases of small scale private works, excavations are carried out funded by the National Board of Antiquities. The Ministry of Labour raises funds for excavations in areas of high unemployment.

### **11. Link with other legislations / Lien avec d'autres législations**

The Act of Land Use and Building takes the ancient monuments in consideration and refers to The Antiquities Act.

### **12. International conventions / Conventions internationales**

Finland has ratified the following international conventions in the field of archaeological heritage:

- UNESCO World Heritage Convention, 1987;
- European Convention on the Protection of the Archaeological Heritage, 1994.

The Finnish legislation meets the conventions fully.

### **13. Implementation and protection policy / Mise en pratique et politique de protection**

The oldest directives concerning antiquities are from 1666, when the Swedish queen Hedvig Eleonora issued a decree which also concerned the protection of Finnish historic monuments.

Finland has been implementing existing legal rules since 1884. There is a real policy towards the protection. The National Board of Antiquities holds the responsibility for the cultural heritage. The inventory of ancient monuments comprises 17,500 ancient monuments.

The land use is supervised from the aspect of heritage protection, as the National Board of Antiquities is one of the authorities taking part in the planning processes. According to the Land Use and Building Act, when a land use plan is drawn up, approved or ratified, the provisions of the Antiquities Act shall be observed.

### General introduction / Introduction générale

In Germany, the academic preoccupation with antiquities concealed in the ground started in the 19<sup>th</sup> century. The first monument conservation laws taking care of archaeological monuments also came into force in individual German regions in the last third of the 19<sup>th</sup> and at the beginning of the 20<sup>th</sup> centuries. Especially in the last third of the 20<sup>th</sup> century new physical and chemical processes revolutionised methods of archaeological prospection. This together with totally new approaches, such as aerial photo archaeology, has led to an enormous increase in the number of monuments known until then. The threat to archaeological monuments caused by increasingly technicised agriculture and forestry and the great consumption of land for infrastructural measures (road and rail track construction), town rehabilitation and industrial settlements after the Second World War as well as more recently after the German reunification are the reason why nowadays in most cases emergency excavations need to be carried out. Recently, archaeologists in Germany have made findings of international importance, e.g. the outstanding discovery of early Celtic princes' graves and residences, leading to completely new knowledge about the history of the early Celts in Central Europe.

Apart from the authorities responsible for archaeological monument protection in the 16 German *Länder* archaeological research in Germany is not only supported by university institutes, museums and other research institutions, such as the Römisch-Germanische Kommission in Frankfurt/Main, but also by a great number of associations and private persons.

First information about the legal framework for archaeological monument conservation in Germany as well as about the protection of archaeological monuments can be found in the answers to the following questions. A comprehensive overview of the standard of archaeology in Germany and the latest successes is given in the catalogue to the exhibition "Menschen, Zeiten, Räume - Archäologie in Deutschland", which was shown in Bonn and Berlin in 2003.<sup>50</sup>

### 1. Competences / Compétences

According to its constitution, Germany has a federal structure. Besides the federal government controlled by the federal parliament, there are 16 States each with their own executive and legislative power and institutions. Thus each State has its own however similar administrative structures.

Answering this questionnaire, the State of Thuringia is taken as an example. Unless otherwise stated, regulations and structures of Thuringia are explained.

<sup>50</sup> W. MENGHIN and D. PLANCK (eds.), *Menschen, Zeiten, Räume - Archäologie in Deutschland*, Stuttgart, 2002.

Administration has a three tiered structure. On top there is the Ministry of Culture as the supreme heritage protection authority. Below the ministry there is the higher protection authority (Landesverwaltungsamt) and subordinated to it the lower protection authorities on the level of the counties and bigger cities. Besides these authorities which are entitled to issue rulings, the Thuringian State Office for the Preservation of Monuments and the Thuringian State Office for Archaeology are governmental expert authorities subordinated to the Ministry of Culture involved in all procedures concerning cultural heritage.

### 2. Protection regimes / Régimes de protection

The competence for culture including cultural heritage lies with the Federal States. All 16 German States have proper laws for the protection and conservation of monuments which are more or less similar in their content. All these laws protect both built up monuments like historical buildings as well as archaeological monuments and finds.

### 3. Excavations / Fouilles

Both for the search of and for the excavation of archaeological monuments a permit by the protection authorities is necessary. Permission is also needed for excavation work with other purposes than looking for archaeological finds if the property is likely to contain archaeological remains. Specific conditions dependent on the circumstances of the case can be imposed with the granting of a permit.

### 4. Definitions / Définitions

Archaeological heritage is defined as movable and immovable monuments which are or were hidden in the ground giving testimony to human culture (archaeological monuments) or animal or plant life (paleontological monuments).

### 5. Inventories / Inventaires

Archaeological heritage is inventoried. Inventories contain a geographical description of the archaeological site and the knowledge about it resulting from archaeological research. The purely scientific inventoring has no direct legal consequences but is of course a prerequisite for the protection procedure (see the answer to question 6).

### 6. Protection procedure / Procédure de protection

As to the listing of monuments including archaeological monuments which is necessary for the protection of cultural heritage, there are two legal systems in force in Germany depending on the law of the State where the monument is situated.

In the declarative system the application of the monument protection law to an object follows directly from the existence of the characteristics that meet the legal definition of monument. This means that every object that fulfils the blanket clause of the legal definition is protected by law, regardless of whether this object has already been listed in a monument register or not. In case of listing the owner merely receives a notification by the authorities which cannot be contested. However, as soon as the owner of a monument is burdened by any administrative measure that results from the monument character of the object concerned, the

owner can appeal the monument character together with the other administrative measure before an administrative court.

In the constitutive system a monument is subject to the legal protection provisions only with the formal registration of the monument in a monument list. As an encumbering administrative action the registration can be appealed as such before an administrative court.

### **7. Legal consequences / Conséquences juridiques**

The owners of monuments are obligated to care for these monuments, they need special permits for alterations etc; they are obligated to let the authorities inspect the monument and if possible make it accessible to the public; they are entitled to receive financial support. Authorities have to take the monumental quality into account in all other relevant planning and permission procedures.

### **8. Movable heritage / Patrimoine mobilier**

Movable archaeological finds whose original owner cannot be traced anymore, become State property when found. They are usually given into the custody of a museum.

### **9. Goods found by chance / Trouvailles fortuites**

The finder, the owner of the land where the good was found and the person responsible for the work during which the find was made are obligated to report the find to the authorities. The place where the good was found and the find itself are to be kept unchanged for up to a week to allow the authorities to do research on the finding place.

### **10. Financial support / Soutien financier**

Depending on the financial situation there is basically the possibility of receiving grants both from the State and sometimes from local authorities for excavation, restoration and conservation works. Also income tax relief is possible by allowing higher tax deductions than usual for work done in favour of a monument.

### **11. Link with other legislations / Lien avec d'autres législations**

In all procedures based on building and planning law including legislation on urbanism the interests of monument protection and conservation have to be taken into account not only in general but with each protected archaeological and other monument.

### **12. International conventions / Conventions internationales**

Germany is a party to the European Convention on the Protection of Archaeological Heritage (revised) – the Malta Convention – and to the UNESCO World Heritage Convention.

As national legislation met the demands of these international conventions, they did not directly influence the national legal framework.

### **13. Implementation and protection policy / Mise en pratique et politique de protection**

The laws are implemented. Problems can arise from illegally working archaeological enthusiasts and/or criminals especially those working with metal detectors as well as from sometimes diverging economic and protection interests. Efforts are made to inform and educate police and custom officials on the regulations protecting archaeological heritage.



Athina CHRISTOFIDOU, ICLAFI Greece

### Introduction générale / General introduction

La Constitution Hellénique de 1975 (article 24) impose à l'Etat de protéger l'environnement culturel et de prendre toutes mesures préventives ou répressives nécessaires pour sa sauvegarde. En ce qui concerne la protection des monuments, elle prévoit des mesures limitées du droit de propriété, moyennant une indemnité des propriétaires.

Les dispositions de la Loi 3028/2002 "pour la protection des Antiquités et en général du Patrimoine Culturel", le patrimoine culturel consiste en monuments anciens (datés avant 1830), monuments plus récents (datés après 1830), sites archéologiques, sites historiques et biens culturels immatériels. Le patrimoine archéologique est donc protégé en tant que monument ancien ou site archéologique.

Le Ministère de la Culture est l'organisme principal de protection de l'ensemble des biens culturels de la Grèce, immeubles, objets mobiliers et biens immatériels. Pour la protection des monuments, au sein du Ministère de la Culture il y a des Directions Centrales à Athènes et un réseau de 86 services régionaux, qui se partagent la responsabilité de la protection du patrimoine culturel Grec selon des critères chronologiques et topographiques. Les services chargés du patrimoine culturel ne dépendent d'aucun degré d'administration locale, ils sont directement du Ministère de la Culture. Il existe aussi des Conseils des Monuments, qui ont un rôle consultatif au niveau local pour toutes les questions qui concernent les monuments dans la région. Au niveau central il y a deux Conseils, qui ont aussi un rôle consultatif pour le Ministère de la Culture: le Conseil Archéologique Central, pour les monuments anciens, et le Conseil Central des Monuments Plus Récents, pour les biens postérieurs à 1830.

En plus de son rôle au Ministère de la Culture et en application de l'article 4 du Code de l'Urbanisme, le Ministère de l'Environnement, de l'Aménagement du Territoire et des Travaux Publics a la responsabilité d'une partie du patrimoine architectural. Dans ce cadre, il protège un grand nombre d'ensembles architecturaux et de sites, ainsi que de certains monuments ayant une valeur historique, urbaine, architecturale, traditionnelle et esthétique. Il est chargé de sauvegarder des éléments du milieu bâti, comme ceux de l'équipement d'urbanisme ou d'un immeuble avec ou sans construction.

Le Centre de Préservation du Patrimoine du Mont Athos, personne morale de droit public créée par le Ministère de la Macédoine et de la Thrace, est chargé de la protection des monuments du Mont Athos, tandis que le Ministère de la Mer Egée contribue à la sauvegarde des villages traditionnels de cette région maritime.

### 1. Compétences / Competences

La protection du patrimoine en général est assurée par le Ministère de la Culture. Au sein du Ministère de la Culture il y a des Directions Centrales à Athènes et un réseau de services régionaux étendu sur tout le pays.

Pour l'organisation des services du Ministère de la Culture, les biens culturels sont divisés en trois grandes périodes historiques:

- Les biens de la préhistoire et de l'antiquité;
- Les biens paléochrétiens, byzantins et post-byzantins jusqu'à la fondation du nouvel Etat Hellénique, à 1830;
- Les biens postérieurs à 1830.

Les services qui s'occupent des biens de la première et la deuxième période se sont, aussi, chargés de la protection du patrimoine archéologique. Il s'agit de:

- La Direction des Antiquités Préhistoriques et Classiques;
- La Direction des Antiquités Byzantines et Post-byzantines;
- La Direction des Musées, des Expositions et des Programmes Educatifs;
- La Direction de Conservation des Monuments Anciens et Plus Récents;
- La Direction des Expropriations;
- Le Secrétariat du Conseil Archéologique Central;
- Le Centre de la Pierre;
- La Direction de Restauration des Monuments Anciens;
- La Direction de Restauration des Monuments Byzantins et Post-byzantins;
- La Direction de Topographie, de Photogrammétrie et du Cadastre;
- La Direction de Recherche;
- La Direction des Archives Nationales des Monuments, qui est responsable de l'inventaire du patrimoine.

Au niveau local, la responsabilité de la protection du Patrimoine Archéologique est répartie, selon des critères chronologiques et topographiques, dans les 84 services régionaux du Ministère de la Culture, qui sont:

- Les 39 Inspections des Antiquités Préhistoriques et Classiques;
- Les 28 Inspections des Antiquités Byzantines;
- L'inspection des Antiquités Sous-marines;
- L'inspection des Antiquaires et des Collections Privées d'Antiquités;
- L'inspection Paléanthropologique et Spéléologique du Sud de la Grèce;
- L'inspection Paléanthropologique et Spéléologique du Nord de la Grèce;
- Les 13 Services des Monuments Plus Récents et des Travaux Techniques, qui s'occupent de la conservation des biens patrimoniaux.

## 2. Régimes de protection / Protection Regimes

Le patrimoine archéologique est protégé par la Loi 3028/2002 "pour la protection des Antiquités et en général du Patrimoine Culturel"<sup>51</sup>. D'après les dispositions de cette loi le patrimoine culturel consiste en monuments anciens (biens immeubles et meubles datés avant 1830), monuments plus récents (biens immeubles et meubles datés après 1830), sites archéologiques, sites historiques et biens culturels immatériels. Le patrimoine archéologique est donc protégé en tant que monument ancien ou site archéologique.

## 3. Fouilles / Excavations

Les fouilles sont contrôlées par les services compétents du Ministère de la Culture et elles sont effectuées par ceux-ci, par les Facultés d' Archéologie ou par la Société Archéologique de Grèce, organisme non spéculatif, fondé en 1837, qui a pour objet de coopérer à la recherche, à l'inventaire, à l'entretien, à la restauration et à l'étude des monuments et des antiquités. Son financement provient de ses ressources propres -exploitation d'immeubles, contributions privées - et de subventions de l'Etat. Les Écoles ou les Instituts Archéologiques étrangers installés en Grèce (il y en a 17) réalisent aussi des fouilles. Chaque année, ces derniers peuvent conduire trois fouilles ou d'autres recherches archéologiques et elles peuvent aussi en effectuer trois en collaboration avec les services Grecs chargés d'Archéologie.

Le permis de fouille est accordé par le Ministre de la Culture après consultation du Conseil Archéologique Central, à condition que:

- Le futur fouilleur dépose un exposé sur la situation et l'étendue de l'espace qui sera fouillé, sur la contribution de la recherche proposée à la connaissance historique et sur la nécessité de procéder à la méthode de fouille;
- L'organisme, qui entreprendra la fouille, soit digne de foi;
- La fouille soit dirigée par un archéologue qui possède une expérience de fouille de cinq ans, au moins, et qui a publié au moins deux études concernant des fouilles ou des trouvailles de fouille;
- Il existe une équipe expérimentée et multidisciplinaire;
- Le budget et les moyens matériels soient suffisants;
- Le programme de fouille comprenne, aussi, la conservation, l'étude et la publication des trouvailles;
- Une fouille exécutée par un organisme n'appartenant pas au Ministère de la Culture, soit surveillée par un archéologue du service compétent, qui possède une expérience de fouille de trois ans, au moins.

La durée de la fouille est déterminée par le permis cité ci-dessus; elle ne peut pas dépasser cinq ans. Sa prolongation exige un permis nouveau.

<sup>51</sup> Traduction officielle en anglais au site électronique du Ministère de la Culture, [www.culture.gr](http://www.culture.gr).

La personne qui dirige une fouille est obligée de publier les résultats des recherches dans des délais fixés par la loi:

- La première présentation doit être parue dans un délai de deux ans après le commencement de la fouille. Elle doit comprendre une liste des biens meubles trouvés, aussi que le relevé des vestiges immeubles;
- L'étude finale doit être publiée dans cinq années après la fin de la fouille.

## 4. Définitions / Definitions

Le patrimoine archéologique consiste en monuments anciens (immeubles et meubles) et sites archéologiques.

On considère comme *monuments anciens* tous les biens culturels des époques préhistoriques, antiques, byzantines et post-byzantines datés jusqu'en 1830, y compris les grottes et les restes paléontologiques qui portent des indices de l'existence humaine.

Par *sites archéologiques* on entend des étendues sur la terre, sous la mer, dans des lacs ou des fleuves, qui contiennent des monuments anciens ou qui présentent des indices de leur existence, aussi que des étendues qui étaient des ensembles monumentaux, urbains ou funéraires, depuis l'Antiquité jusqu'en 1830. Les sites archéologiques comprennent aussi l'environnement libre nécessaire entre les monuments conservés, leur permettant de s'inscrire dans une composition d'une unité historique, esthétique et fonctionnelle.

## 5. Inventaires / Inventories

La Direction des Archives Nationales des Monuments au Ministère de la Culture est responsable de l'inventaire du patrimoine, elle a créé et elle 'alimente':

- Les Archives Nationales des Monuments informatisées, 'Polemon';
- Le catalogue permanent des sites archéologiques, des sites historiques et des monuments classés;
- L'index des monuments, qui comprend 30.000 inscriptions avec une brève description et des notices bibliographiques;
- Le vocabulaire national des termes du patrimoine culturel, 'Pollux';
- Les Archives historiques du service Archéologique informatisées.

## 6. Procédure de protection / Protection procedure

Les monuments anciens immeubles, c'est à dire les monuments datant d'avant 1830, sont protégés par la Loi 3028/2002, sans qu'il soit exigé de publication d'acte d'administration quel qu'il soit.

Les sites archéologiques sont classés et délimités par décision du Ministre de la Culture, d'après les données de la recherche archéologique sur le terrain et surtout des trouvailles

rendant probable l'existence de monuments. La décision ministérielle paraît après l'avis du Conseil Central Archéologique et elle est publiée au Journal Officiel avec un plan topographique.

### **7. Conséquences juridiques / Legal consequences**

Chaque intervention portant sur un monument immeuble ou un site archéologique est soumise à contrôle. Aux abords d'un monument ou d'un site archéologique tout ouvrage et toute activité, qui peut l'affecter directement ou indirectement, est interdit. La disposition ci-dessus donne à l'Administration la possibilité de contrôler les nouvelles constructions, aussi que toute sorte d'activité, dans une assez grande étendue autour des monuments et des sites archéologiques.

Le service compétent central ou régional du Ministère de la Culture donne l'autorisation des travaux ci-dessus, après consultation du Conseil des Monuments. L'autorisation paraît avant le permis de construire et ses éléments sont inscrits sur le permis sous peine d'annulation.

En cas d'urgence et afin d'éviter un danger immédiat et grave, l'exécution des travaux de conservation sans l'autorisation prévue par la loi est possible, à condition que ces travaux ne modifient pas les éléments structuraux et morphologiques du monument et que le service soit informé immédiatement.

Les interventions portant sur un monument immeuble, un site archéologique ou sur l'espace environnant qui sont soumises à contrôle, sont:

- La conservation, la consolidation, la reconstitution, la restauration;
- La formation de l'espace environnant;
- La réorganisation ou le changement de l'usage;
- La restauration des sculptures, des peintures murales ou d'autres éléments décoratifs faisant partie intégrante d'un monument immeuble;
- La mise en place d'une toiture de protection (en cas de ruines archéologiques);
- L'enfouissement (dans le cas de ruines découvertes après des fouilles);
- Le déplacement de tout ou partie d'un monument;
- Le prélèvement des sculptures, des peintures murales, des mosaïques ou d'autres éléments d'un monument immeuble qui sont indissociables, lorsqu'on estime que c'est absolument nécessaire pour leur sauvegarde matérielle;
- La démolition totale ou partielle. Cela concerne un monument délabré, dont la conservation, dans son ensemble ou en partie, est estimée impossible par un Comité de cinq personnes;
- Les activités de construction ou tout autre travail exécuté aux abords, comme l'exploitation d'une carrière, l'acquisition de matériaux de construction, les opérations de recherche de mines, l'exploitation des mines, la délimitation des zones d'extraction à ciel ouvert, l'installation d'industries, d'artisanat ou d'entreprises commerciales, la mise en place d'installations de télécommunication ou d'autres activités de ce type ;

- La réalisation de tout ouvrage sur des bâtiments existants, dans les espaces libres privés et dans les espaces communs.

Même la culture de la terre, l'élevage et la chasse sont soumises à contrôle, aussi que la pêche, le mouillage, les activités sous-marines et l'exécution de tout sorte de travail portuaire, en cas de sites archéologiques maritimes.

### **8. Patrimoine mobilier / Movable heritage**

Les biens meubles découverts pendant des fouilles sont transportés au plus proche musée archéologique de l'Etat ou dans un dépôt convenable surveillé par le service compétent du Ministère de la Culture. Des monuments anciens meubles, ceux qui sont datés jusqu'en 1453, aussi que les postérieurs qui proviennent des fouilles ou qui sont détachés des monuments immeubles, sont protégés par la loi, sans qu'il soit exigé de publication d'acte d'administration quel qu'il soit. L'Etat Grec est le propriétaire des biens meubles découverts pendant des fouilles et en général il est le propriétaire de tous les biens culturels datés avant 1453. Une personne physique ou légale peut devenir possesseur d'un de ces biens après décision du Ministre de la Culture.

### **9. Trouvailles fortuites / Goods found by chance**

Toute personne qui découvre un monument ancien inconnu doit le déclarer sans retard à la plus proche autorité archéologique, policière ou portuaire. La déclaration doit préciser l'emplacement exact du monument et tout autre détail utile. La loi prévoit une récompense pécuniaire, dont la valeur est fixée en fonction de l'importance du monument et de la contribution de celui qui le déclare à sa découverte et à sa sauvegarde.

### **10. Soutien financier / Financial Support**

Les fouilles sont financées par le Ministère de la Culture ou par les organismes qui les entreprennent (voir la réponse à la question 3). En ce qui concerne les fouilles de sauvetage, qui sont nécessaires pour l'exécution d'un ouvrage technique public ou privé d'un budget supérieur à 587.000 €, elles sont financées par le maître de l'ouvrage et effectuées par le service compétent du Ministère de la Culture. Le financement couvre aussi le coût de conservation, d'étude et de publication des découvertes. Dans le cas de travaux d'un budget moins élevé, le maître de l'ouvrage peut financer les fouilles de sauvetage, à condition qu'il dépose une demande et qu'une décision en rapport soit publiée par le Ministère de la Culture.

L'Etat Grec finance les travaux de consolidation, de maintien ou de restauration des monuments anciens qui lui appartiennent et qui sont nombreux, étant donné que tous les biens immeubles jusqu'en 1453, aussi que les postérieurs, qui se sont trouvés pendant des fouilles ou d'autres recherches archéologiques, appartiennent à l'Etat.

Une grande partie du patrimoine (monuments anciens après 1453 et monuments plus récents) appartient aux propriétaires privés. Il s'agit surtout des immeubles d'habitation, dont le financement des travaux est presque exclusivement à la charge de leurs propriétaires. Ceux-ci sont obligés de s'occuper de la réalisation immédiate des travaux de conservation, de consolidation ou de protection d'un monument délabré sous l'inspection du service compétent. S'ils n'agissent pas, le service peut prendre les mesures nécessaires et leur imputer la totalité ou une partie de la dépense adéquate.

Le secteur public ou l'administration locale sont obligés de couvrir la totalité ou une partie des dépenses ci-dessus lorsque:

- Il s'agit d'un monument qui sera ouvert au public;
- Son propriétaire ou possesseur n'est pas responsable des dommages subis par le monument;
- La situation économique du propriétaire ou du possesseur du monument ne lui permet pas de payer cette dépense.

Pour les travaux de conservation, de consolidation et de protection, les propriétaires des immeubles peuvent emprunter aux banques à des taux avantageux. De plus, la Loi 3028/2002 prévoit la publication d'un décret présidentiel concernant les subventions, les prestations ou d'autres aides économiques aux propriétaires ou aux possesseurs d'immeubles qui ont été classés comme monuments.

Un régime spécial sur le plan fiscal existe pour les immeubles qui se trouvent dans la zone de protection d'un monument, d'un site archéologique ou d'un site historique, à laquelle la construction de nouveaux bâtiments est interdite: 50% de la valeur de ces immeubles est exonéré d'impôt.

Le 15% des taux des prêts pour des travaux de restauration, conservation ou mis en valeur d'un immeuble protégé, est soustrait du montant de l'impôt sur le revenu imposable de son propriétaire.

#### **11. Lien avec d'autres législations / Link with other legislations**

La Loi 3028/2002 place la protection des monuments, des sites archéologiques et des sites historiques parmi les objectifs de l'aménagement du territoire, de l'urbanisme et du développement économique. Egalement, la Loi 2742/1999 "sur les projets d'aménagement" comprend la protection du patrimoine culturel parmi les objectifs de l'aménagement du territoire. Plus spécifiquement, la Loi 1337/1983 "sur l'extension des plans d'urbanisme et le développement urbain" interdit l'extension d'un espace urbain, quand elle est contraire aux règles de la protection de l'environnement naturel et culturel.

En outre, la délimitation des zones de protection à l'intérieur des sites archéologiques et aux abords des monuments est possible, selon les dispositions de la Loi 3028/2002. Il s'agit de deux types de zones, zone A et zone B:

- A la zone de protection A la construction est interdite, à l'exception de nouveaux bâtiments ou de l'extension des bâtiments existants, qui sont nécessaires pour la mise en valeur ou l'utilisation des monuments ou des sites. Dans ce cas on exige une décision justifiée du Ministre de la Culture, après avis du Conseil des Monuments compétent;
- A la zone de protection B un régime spécial est en vigueur concernant les clauses de construction, l'occupation des sols et les activités permises, après décision commune du Ministre de la Culture et du Ministre de l'Environnement, de l'Aménagement du Territoire et des Travaux Publics.

Il faut aussi souligner que l'autorisation du Ministère de la Culture pour chaque intervention portant sur un monument immeuble ou sur ses abords, ainsi que pour tout ouvrage et toute activité dans un site archéologique, paraît avant et constitue la condition préalable à la publication du permis de construire.

#### **12. Conventions internationales / International conventions**

La Grèce a ratifié les conventions internationales suivantes, qui ont bien sur influencé le cadre juridique national:

- Convention Culturelle Européenne, Paris, le 19 décembre 1954 (Décret 4194/1961);
- Convention concernant les mesures à prendre pour la prohibition et l'empêchement de l'importation, de l'exportation et de la transmission de propriété illicite des biens culturels, Paris, le 17 novembre 1970 (Loi 1103/1980);
- Convention pour la protection des biens culturels en cas de guerre, La Haie, le 14 mai 1954 (Loi 1114/1981);
- Convention concernant la protection du patrimoine mondial, culturel et naturel, Paris, le 23 novembre 1972 (Loi 1126/1981);
- Convention Européenne pour la protection du Patrimoine Archéologique, Londres, le 6 mai 1969 (Loi 1127/1981);
- Convention pour la sauvegarde du Patrimoine Architectural de l'Europe, Grenade, le 3 octobre 1985 (Loi 2039/1992);
- Convention Européenne pour la protection du Patrimoine Archéologique (révisée), La Valette, le 16 janvier 1992 (Loi 3378/2005).

#### **13. Mise en pratique et politique de protection / Implementation and protection policy**

A mon avis, la législation existante est très sévère et elle assure la protection du patrimoine archéologique. Ce n'est pas facile de calculer le nombre des biens archéologiques protégés, parce que tous les biens immeubles datés jusqu'en 1830, sont protégés par la loi, sans qu'il soit exigé de publication d'acte d'administration quel qu'il soit, et en même temps la terre grecque cache un grand parti du patrimoine archéologique du pays, qui n'a pas encore vu le jour. Les services compétents du Ministère de la Culture protègent non seulement les biens visibles, mais aussi les vestiges archéologiques qui se trouvent dans la terre. A ce but ils font des fouilles de sauvetage et contrôlent la construction des bâtiments à l'intérieur des vastes régions, qui présentent des indices d'existence des antiquités sous le sol.

Il faut souligner qu'en Grèce le 'Service Archéologique' a une longue histoire (il a été fondé à la décennie de 1830) et il est respecté par l'opinion commune et les autres services du domaine public.

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN ISRAEL LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN ISRAËL

*Gideon KOREN, ICLAFI Israel*

### General introduction / Introduction générale

Handling Antiquities in Israel is governed by two main laws:

- The Israel Antiquities Authority Law (1978) establishing the functions and the authority of a national statutory institution in charge of the protection of Antiquities and Antiquities Sites in Israel;
- The Israel Antiquities Law (1989), regarding the practical aspects involved with Antiquities, such as: the rights and duties of those who discover Antiquities on their property, the various limitations on any transfer of, or commerce with, Antiquities, and other authorities and duties of Israel regarding Antiquities.

Additionally, there exists another national statutory institution in Israel called The Israel Nature and Parks Authority [established by The National Parks, Nature Reserve, National Sites and Commemoration Sites Law (1998)] which is the competent authority for, among other things, the preservation of heritage, nature reserves and national parks.

Hence, it seems that the statutory framework in Israel does not properly cover, and is lacking any real protection of Antiquities Sites. The laws' protection is given only to specific sites which fall into the laws' limited definitions. Other sites of archaeological or historical importance are not entitled to any protection and there is no statutory framework or national institution regulating such sites' protection, even if these sites are of the kind of archaeological heritage or preservation sites.

The protection and care that the Law provides to Antiquities is absolute to such extent that according to the Antiquities Law, any antique that is discovered during an excavation shall be considered State property.

In light of the extent of protection given to Antiquities, national parks and nature reserve, there is a real urge to provide adequate protection also to Archaeological and Heritage Sites, currently excluded from an appropriate protection by the relevant laws.

The Israel Antiquities Authority has been provided with unprecedented powers as part of its duty to protect Antiquities, and may prevail over some fundamental civil rights such as personal property rights and freedom of occupation right.

For example, the Authority is authorized to expropriate any land, for excavation, preservation or research purposes. Furthermore, if a person discovers an Antique, while performing construction activities on his land, he must notify the Authority and stop the activities, unless the Authority has given him permission to continue the activities. The Authority is entitled to order such person to stop the activities completely or to determine the terms for continuing the activities. A person who suffers a loss due to such order or terms set forth by the Authority is entitled to compensation.

Additionally, in some cases, the Director of the Authority is authorized to demand from any person to deliver his antique to the Authority, for a limited period. Moreover, in a situation when an antique is defined as a 'National Antique', the Director is authorized to demand that the antique will be sold to the State, regardless of the owner's other wishes or rights in the matter.

Furthermore, the Authority is authorized to declare any place as an 'Antique Site' and such declaration means that this place is under stringent restrictions and prohibitions of any construction activities, such as building, paving, installing infrastructure, drilling, planting, mining or burial. This is not an exhaustive list as the Minister of Education, Culture and Sports is entitled to demand that his approval must be obtained before any other action pertaining to the site is started.

The statutory framework governing the Antiquities field, as mentioned above, includes many additional areas, such as issuing of licenses for excavations, regulation regarding antiquities collectors, trading with antiquities and aspects of transfer of antiquities into and out of Israel.

In conclusion, the Antiquities, National Parks and Nature Reserves are being protected and governed by a statutory framework through national institutions, but the rest of the archaeological and historical sites in Israel are lacking any similar protection or any national institution's supervision whatsoever. This felt deficiency calls for other various bodies and associations to fill this 'void' in any efficient way they may.

### 1. Competences / Compétences

The *Israel Antiquities Authority*, which was established under The Israel Antiquities Authority Law (1978), is the competent authority for heritage protection. This authority is responsible of the protection of 'Antiques', which is defined by the Israel Antiquities Authority Law as one of the following:

- Any manmade object made before 1,700 A.D.;
- Any manmade object made after 1,700 A.D, that has a historic value and is declared as an antique by the Minister of Education, Culture and Sport;
- Zoologist and botanical remnants, from before 1,300 A.D.

In addition to Antiques, the Israel Antiquities Authority Law provides that a site may be declared an Antique Site and as such can be expropriated or that a site may be expropriated for the purposes of excavation and restoration even if it isn't declared an Antique Site.

Prior to the enactment of this law in 1978, the relevant law was the Antiquities Ordinance, which was enacted during the British Mandate. The Ordinance also provided protection for archaeological sites, which were called Historical Sites. The Israel Antiquities Authority Law explicitly incorporated the Historical Sites.

Other entities that act in the heritage protection area are:

- The *Council for Archaeology*, established by The Israel Antiquities Authority Law. The main role of the Council is to advise The Israel Antiquities Authority and The Minister of Education, Culture and Sport on issues relating to archaeology and antiquities;
- The *Israel Nature and Parks Authority*, established by The National Parks, Nature Reserve, National Sites and Commemoration Sites Law (1998) (hereinafter: National

Parks Law). This Authority is responsible for, among other things, the preservation of heritage, natural monuments and national parks.

### 2. Protection regimes / Régimes de protection

A specific legal regime for the protection of archaeological heritage is prescribed under the Israel Antiquities Law (1989) and the Israel Antiquities Authority Law (1978). This regime is at the national level.

The National Parks Law contains regimes as well. However, The National Parks Law is subject to The Israel Antiquities Law (1989). Therefore, although it contains a large number of regulations with respect to national parks, these regulations are in addition to the protection provided by the Israel Antiquities Law (1989). As such, one cannot use this legal protection tool as an alternative to The Israel Antiquities Law (1989).

The Israel Antiquities Authority Law (1978) also affords vast protections to sites as well as to the surrounding areas of the site that were declared to be Antique Sites under the Law. Any actions require prior written approval by the Israel Antiquities Authority.

### 3. Excavations / Fouilles

The Israel Antiquities Authority controls excavations. The main inspection requirements according to the Israel Antiquities Law (1989) are as follows:

- A license from the Authority is required for any excavation. The license shall contain the specific terms regarding the performance of the excavation;
- Among the considerations to be taken into account when deciding whether to grant a license, are the financial and scientific abilities of the applicant;
- The license shall state the borders of the territory, in which the excavation shall be permitted;
- The obligations of a licensee include, among others ensuring the safety of the workers and visitors at the excavation site, enclosing the excavation site and ensuring the preservation of the Antiquities in the site;
- At least once a year, the licensee shall deliver a detailed report of the excavation works including any Antiques that were discovered to the Authority;
- The Authority is entitled to revoke the license at any time, or to determine new terms for the license;
- Any Antique that was discovered during the excavation, shall be considered State property.

### 4. Definitions / Définitions

As stated in the answer to question 1, archaeological heritage can either be a site declared to be an Antique Site in accordance with the Israel Antiquities Authority Law (1978) or a Historical Site under the Antiquities Ordinance.

*Antiques* are defined as one of the following:

- Any manmade object made before 1,700 A.D.;
- Any manmade object made after 1,700 A.D, that has a historic value and is declared as an antique by the Minister of Education, Culture and Sport;
- Zoologist and botanical remnants, from before 1,300 A.D.

## 5. Inventories / Inventaires

The following is a list of databases for archaeological heritage.

If a site is declared an Antique Site, then it must be listed as such in:

- The Public Records;
- The Land Register;
- With the Local and District Zoning and Planning Committees.

Information included in these three databases carries with it a legal effect.

The Israel Antiquities Authority runs three additional information databases:

- The Israel Antiquities Authority Library, which contains an extensive collection of advertisements in the archaeology field and excavation reports;
- The Authority Archive, which contains information about Antique Sites, excavations and surveys in the archaeology field;
- The Authority's Publications. The Authority publicizes scientific studies and other information in the archaeology field.

These databases do not have any legal impact and any information contained within the databases carry no legal effect. Regarding a building permit, as previously stated, any construction work in a territory that contains Antiques requires permission from The Authority.

## 6. Protection procedure / Procédure de protection

The main arrangement that is established by the Antiques Law is as follows:

- Any immovable Antique that has been discovered within the State of Israel including the land in which the Antique was found, is automatically considered to be State property, and The Israel Antiquities Authority is authorized to demand that the finder delivers the Antique to it. This also refers to objects considered to be historical under the Antiques Ordinance;
- Any person who discovers an Antique due to an unlicensed excavation, shall notify the Israel Antiquities Authority within 15 days of the discovery;
- Any person who discovers an antique while performing construction activities, shall notify the Authority and stop the activities for a period of 15 days from the date of delivery of the notice, unless the Authority has given him permission to continue the activities within 15 days from the notice delivery, The Authority is entitled to order such a person to stop the activities completely or to determine the terms for continuing the activities. A person who has suffered a loss due to such order or terms set forth by the Authority is entitled to compensation;
- Any person who wishes to perform an excavation in order to discover Antiques, shall file a request for an appropriate license from the Authority. The excavation shall be performed in accordance with the license terms. After granting the license, the Authority shall supervise the excavation. The Authority is entitled to revoke the license at any time;
- Any person who wishes to trade in Antiques, shall file a request for the appropriate license from the Authority. The trading shall be done in accordance with the license terms. The Authority is entitled to revoke the license at any time;

- Any removal of an Antique outside the State of Israel requires prior permission from the Authority or from the Minister;
- Any place that has been declared an 'Antique Site' is under stringent restrictions (mainly regarding construction activities);
- The Minister of Education, Culture and Sports, is authorized to expropriate any Antique Site for preservation or research purposes, or any other land in order to excavate it;
- In instances where an individual has violated the rights granted to him regarding construction or related activities on an Antique Site, the Authority shall be entitled to take the necessary steps to return the site to its original condition and to require the transgressor to pay for the costs.

The arrangement mentioned above is broad enough and contains provisions to protect archaeological heritage in emergency/urgent situations. In addition, The National Parks Law establishes the principle of 'Rescue Excavations', defining them as excavations undertaken by the Antiquities Authority or those authorized by it, to perform rescue excavations in order to save or prevent harm to an Antique Site or Archaeological Heritage.

## 7. Legal consequences / Conséquences juridiques

As stated above, every Antique and the site in which it is located, automatically becomes State property. The Minister of Education, Culture and Sport shall be entitled to expropriate any sites that the Authority has declared to be an Antique Site or any land that in his opinion, requires excavation.

The Zoning and Planning Law provides that any and all construction, building, paving, demolition, etc. shall only be done with the prior approval of the Local Zoning and Planning Committee or the Local Licensing Authority. In addition, the existence of Archaeological Sites must be taken into consideration in the process of deciding the contours of the land. The Israel Antiquities Law (1989) explicitly states that the Zoning and Planning Law must be adhered to.

Furthermore, it provides a list of actions that require the prior approval and authorization from the Israel Antiquities Authority if one wishes to undertake any actions on Antique Sites, such as: building, paving, installing infrastructure, drilling, quarrying, planting, ploughing, mining or burial. In addition, one requires the prior authorization to place any debris or garbage on any Antique Site or its surrounding boundaries. This is not an exhaustive list as the Minister is entitled to require his approval for any other action pertaining to the site.

Sites that are considered to be holy or religious have more safeguards built into the Law and require more approvals and authorizations prior to the commencement of any actions on the Site. The Authority shall not authorize any of the actions mentioned above without the prior approval from both the Minister of Religious Affairs as well as the Justice Minister.

There are no easements, tax benefits, or maintenance duties imposed on Antique Sites.

The rules and regulations referred to in this question are in effect during the protection procedure.

## 8. Movable heritage / Patrimoine mobilier

There is no specific destination for movable objects discovered during an excavation.

While there is no specific arrangement to protect this property, they are subject to the arrangements mentioned above. With regard to property rights, as previously stated, any Antique discovered in Israel after 1978 under The Israel Antiquities Law (1978), or prior under the authority of the Antiquities Ordinance, automatically becomes State property. There is an obligation to provide the government with any movable objects.

Any person who wishes to trade in Antiques, shall file a request for the appropriate license from the Authority. The license shall state the place of business and the expiration date of the license. The trading shall be done in accordance with the license terms and the Authority is entitled to revoke the license at any time upon any violation of the license terms. A trader may only deal with another trader or someone who has authorization to trade from the Authority.

One may not export an Antique unless he has approval from the Minister.

The Authority may declare that a particular artefact has national value and demand that it is sold to the State. Should that demand not be made, the owner of the artefact is entitled to sell it provided he submits a report containing his name and address as well as the buyer's or transferee's name.

One who sold an Antique artefact illegally is not entitled to use the defence that he was not aware that it was an Antique.

A collector of Antiques must submit a report containing details of the Antiques to the Educational and Cultural Committee of the Knesset.

## 9. Goods found by chance / Trouvailles fortuites

Any person who discovers an antique while not in the course of a licensed excavation, shall notify the Authority within 15 days of the discovery.

Any person who discovers an antique while performing construction activities shall notify the Authority and stop the activities for a period of 15 days from the date of delivery of the notice, unless the Authority has given him permission to continue the activities.

Within 15 days from the notice delivery, the Authority shall be entitled to order such person to stop the activities completely or to determine the terms for the continuation the activities. A person who has suffered a loss due to such order or terms set forth by the Authority is entitled to compensation.

## 10. Financial support / Soutien financier

Public Authorities finance all preservation works from the development budget that they receive. The Authority is no exception to that rule. It finances some of the archaeological excavations that in their opinion are done for the purpose of development, construction, infrastructure, etc. The Israel Nature and Parks Authority finances a small part of the preservation works from its maintenance budget.

Antique sites are exempt from paying the municipal taxes, as long as the land is maintained for both public and non-profit purposes.

Universities execute many excavations for academic research purposes. These excavations are financed by the Universities' funds or donations. Public authorities that initiate development construction or infrastructure activities finance those excavations out of their respective development budgets.

Another category of excavations are those excavations for the purpose to enhance tourism. The excavations are accompanied by preservation and intensive restoration. They are financed by a number of government offices as well as development companies or companies with similar purposes to those of development companies.

Although local authorities are not required to maintain and preserve archaeological sites, they do however have the authority to do so on sites that fall within their jurisdiction.

## 11. Link with other legislations / Lien avec d'autres législations

Regulations within other legislations dealing with the use of soil pertaining to Archaeological Sites or Antiques:

- The Law of Zoning and Planning establishes that the design for the contour of the country must take into account the rules concerning the preservation of Antiques;
- The Water Law establishes that if during the building of a water plant an Antique site is damaged, permission to continue the project for the design must be obtained from the Minister of Education, Culture, and Sport;
- Every Antique receives the same protection that coastal environment receives under the Law for the Preservations of the Coastal Environment. The purpose of the law is to protect and preserve the coastal environment;
- The National Parks Law provides a list of specific activities that The Israel Nature and Parks Authority wishes to undertake in an Antique Site must be coordinated with the Israel Antiquities Authority;
- The Local Authorities Law (Sewage) establishes that sewage systems in sites protected under The Israel Antiquities Authority Law (1978) and under the Antiquities Ordinance must be authorized by the Minister of Education, Culture and Sport;
- The Petroleum Law prohibits a license holder from drilling and searching for petroleum within 100 meters from a site protected under The Israel Antiquities Authority Law (1978);
- The Mine Ordinance establishes that a person who received authorization to mine shall not be entitled to mine in a Historic Site unless he has received authorization to do so from The Israel Antiquities Authority;
- The Law for Encouragement for the Removal of Dilapidated Buildings establishes an exemption from paying Purchase Tax for 5 years for land on which a building that had a dilapidated building was destroyed. This exemption does not apply to Antique Sites;
- The Law for Construction and Excavation of Rehabilitation Areas establishes that with regard to building and excavating of areas that were declared rehabilitation areas, it is prohibited to destroy Antique Sites during the process of construction and excavation unless permission is obtained from the Minister of Education, Culture and Sport;



- The Drainage and Protection from Floods Law establishes that any project erecting a or any scheme for the erection of Drainage Plant that will damage a site protected under The Israel Antiquities Authority Law (1978) and the Antiquities Ordinance must be authorized by the Minister of Education, Culture and Sport.

## 12. International conventions / Conventions internationales

The State of Israel is a signatory to the following treaties:

- The Hague Treaty, in matters relating to the preservation of cultural objects during wartime, 1954;
- The Paris Treaty that relates to the preservation of natural resources and cultural on the international level, 1972;
- The Paris Treaty that prohibits the importing, exporting, and selling of cultural objects, 1970;
- The UNESCO recommendations for the preservation of cultural resources, 1978;
- The Geneva Protocol for the protection and preservation of antique sites 1982.

Although these treaties have not been mentioned in the laws of the State of Israel, they have been referred to by the Israeli courts and have influenced court decisions.

## 13. Implementation and protection policy / Mise en pratique et politique de protection

Both the Israel Antiquities Authority and the Israel Antiquities Authority Law (1978) itself provide vast protections and safeguard to archaeological heritage in Israel. As a governmental organisation, the Authority's activities are monitored by several government ministries and institutions thereby ensuring the Authority's continual protection, preservation and safeguarding of archaeological heritage. As stated earlier there is a separate budget set aside for the preservation of archaeological heritage. However, Israel contains a vast array of heritage and antiques and the budget afforded to the Authority is not sufficient to protect all the sites and antiques within its borders. Many sites have yet to be declared Archaeological Sites or Antiques Sites because that would require the Authority to manage and protect the property, which is simply not within its budget. With regard to sites that have been declared Antiques Sites, since the budget does not permit for full maintenance and restoration, the Authority follows a list of priorities with regard to its activities.

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN ITALY LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN ITALIE

Massimo CARCIONE, ICLAFI Italy

### Introduction générale / General introduction

La protection du patrimoine archéologique d'Italie, concerne une partie très importante de l'immense patrimoine culturel dont le pays porte *la responsabilité*: je tiens beaucoup à souligner ce terme, qu'il faut remarquer dans l'esprit de la Convention UNESCO de 1972 sur le Patrimoine Mondial.

Se limitant donc aux 41 sites qui sont aujourd'hui inscrits dans la Liste du Patrimoine Mondial, il suffit de rappeler - à titre d'exemple de l'immensité du patrimoine archéologique italien, meuble et immeuble - les 11 inscriptions, très souvent relatives à des biens multiples:

- Les biens culturels de l'âge préhistorique: Val Camonica, Pantalica, Sassi di Matera;
- Les biens culturels de l'époque grecque: Vallée des Templi di Agrigento, Paestum et Velia, Syracuse (et Musées Archéologiques Nationaux liés);
- Les biens culturels de la période étrusque: Nécropoles de Cerveteri et Tarquinia (avec le Musée Archéologique National de Tarquinia);
- Bien sûr, et surtout, les immenses sites monumentaux de l'âge romain: Villa Adriana de Tivoli, Pompei et Ercolano, Villa del Casale de Piazza Armerina, Arena de Verona, et naturellement l'ensemble innombrable de ruines et monuments de la même Ville de Rome, *Caput mundi* (avec ses nombreux Musées Nationaux, mais aussi les Musées Vaticani du Saint-Siège et Capitolini de la Municipalité);
- Mais il ne faut pas oublier les sites archéologiques du Moyen Age, tels que Ravenna ou Aquileia, et plusieurs autres moins connus.

Au delà des sites enregistrés dans la Liste et des Musées nationaux (et non), annexés aux sites mêmes, il est aussi correcte de citer les très nombreux biens archéologiques, musées et collections pas (encore) inscrits, parmi lesquels je me limite seulement à souligner - pour en remarquer l'importance - le Musée Egyptien de Torino, qui est considéré comme une des collections les plus importantes de la civilisation de l'Egypte ancien dans le monde entier: même s'il pourrait être considéré de quelque sorte comme un annexe historique des Résidences de la Maison Royale de Savoie qui se trouvent au centre de la ville, tout autour du Palais Royal (où se trouve d'ailleurs un autre Musée Archéologique national).

Nous sommes donc très riches en Patrimoine archéologique, mais on a aussi bon nombre de fouilles illégales, vols, pièces archéologiques fausses, dommages aux restes à cause des travaux, manque d'entretien des ruines, pollution, tourisme trop concentré, etc., ce qui rend nos biens culturels toujours en danger, et la législation de protection chaque jour mise à l'épreuve.

Tout d'abord il faut dire que - malgré cela - la législation de protection des biens archéologiques est un argument pas trop considéré par la doctrine juridique italienne, peut-être car :

- Il n'existe pas de loi spécifique sur les biens et sites archéologiques, contrairement à la Grèce ou à d'autres Pays ayant une situation semblable à la nôtre; il n'y a donc que quelques normes à l'intérieur du Code des Biens culturels; ces normes-ci sont relatives

seulement aux recherches, et sont restées absolument inaltérées depuis très longtemps: elles n'ont point changé malgré la réforme qui a caractérisée notre secteur depuis 1993. Ca veut dire, par conséquent, qu'il s'agit de normes pas trop à jour, face au progrès technique, au développement et aux organisations criminelles d'aujourd'hui;

- La législation italienne s'occupe surtout de la protection des biens culturels des privés, basé sur l'idée que les biens culturels de l'État sont en tout cas et sans doute protégés (ce qui est tout à fait à démontrer,...);
- Pour la réformer, il faudrait donc mettre en discussion l'un des tabous les plus sacrés et inattaquables parmi nos règles juridiques de protection des biens culturels, c'est à dire la propriété publique des biens archéologiques: un principe qui, à bien voir, n'a pas trop de fondements, sauf la *diuturnitas* et le manque d'objections, au moins jusqu'à aujourd'hui. Par contre, dans plusieurs pays ce principe n'existe pas, ce qui n'empêche naturellement point à cette catégorie de biens culturels d'être protégée autant et aussi bien que les autres.

## 1. Compétences / Competences

Les autorités compétentes en matière de protection du patrimoine en général sont:

- Au niveau national: le Ministère des Biens et des Activités culturelles avec ses institutions nationales pour la restauration: *ICR, IPL, Opificio delle Pietre Dure di Firenze*, etc. et pour le catalogue (*ICCD*);
- Au niveau régional: *les Directions Régionales du Ministère*;
- Au niveau régional ou sub-régional: '*Sovrintendenze*' d'un secteur (art, architecture, archives, archéologie), bureaux périphériques du Ministère;
- Seulement la protection des livres et des documents anciens est gérée par une *Sovrintendenza* de la Région (administration autonome).

En matière de protection du patrimoine archéologique il existe donc un réseau de Sovrintendenza aux biens archéologiques, qui font partie du Ministère, avec des tâches d'autorisation, contrôle et inspection, mais aussi de recherche et gestion directe sur les sites, les musées et les fouilles; malheureusement elles ne jouissent pas trop d'autonomie administrative et financière (bien davantage sur le plan scientifique), avec la seule exception de celle de Pompei à titre expérimental.

Même les nombreux musées archéologiques nationaux sont directement gérés par la Sovrintendenza de leur zone, comme bureaux sans une véritable autonomie en tant qu'institutions culturelles.

Les Administrations régionales, provinciales et locales peuvent supporter (même au niveau financier) l'activité du Ministère et des Sovrintendenze, surtout pour la restauration et la mise en valeur des sites, des musées et des restes.

Il existe enfin un nombre d'associations et institutions culturelles sans but lucratif qui travaillent à côté de l'administration publique, parfois sur la base d'ententes ou de conventions mais normalement de façon autonome; parmi celles-ci il faut bien sûr citer les Écoles archéologiques étrangères, dont le travail a été fondamental surtout au 19<sup>ième</sup> siècle.

En cas de calamité il faut enfin ajouter:

- Le Département de la Protection Civile (Gouvernement), en général assez peu spécialisé sur la protection des biens culturels;
- Les Bureaux de Protection Civile des Administrations régionales, provinciales et locales, normalement non spécialisés;
- Les Associations de bénévoles, très peu nombreux et pas trop spécialisés sauf quelques rares exceptions.

Il existe deux différents services spécifiques qui s'occupent au même niveau de la protection du patrimoine archéologique national face aux vols et fouilles illégales, agissant en tant que Police 'militaire' très spécialisée et coordonnée (dans la mesure où cela est possible) par le Ministère des Biens culturels:

- Comando Tutela Beni culturali dei Carabinieri;
- Nucleo Tutela Patrimonio Archeologico della Guardia di Finanza.

Les résultats sont assez positifs pour ce qui concerne la poursuite des voleurs et la recherche et le recouvrement sur le marché illégal, mais insuffisants au niveau de la prévention: d'ailleurs les sanctions prévues par la loi italienne pour ce genre de crime sont trop faibles et rarement appliquées.

## 2. Régimes de protection / Protection Regimes

La Constitution de la République Italienne se limite dans sa première partie (article 9,2) à déclarer que l'Italie "protège le paysage et le patrimoine artistique et historique de la Nation", ne considérant pour le reste (articles 116-118) que la catégorie des biens culturels en général.

Le régime juridique spécifique pour la protection du patrimoine archéologique est prévu au niveau national dès la Loi fondamentale n° 1089 de 1939, et même avant, en considérant que les principes de nos normes de protection remontent, tous ou presque, à la législation pré-unitaire de l'État Pontificio (XIX siècle).

Aujourd'hui nous avons le nouveau Code des Biens Culturels (Decreto Lgs. n° 42 du 2004), en particulier le Titre I - Capo VI pour les recherches et Titre II - Capo I pour la mise en valeur, les institutions culturelles, les services additionnels, etc.

Cependant, même si cela pourra paraître impossible, le Règlement exécutif est encore aujourd'hui celui de l'ancienne législation du début du 10<sup>ième</sup> siècle! (Décret Royal n° 363 du 1913, articles 83 et 103-106)

Il est aussi possible d'employer les différentes lois au niveau régional pour la mise en valeur (standards, fonds, formation et soutien technique, etc.) qui considèrent les sites aussi en tant que écomusées, parcs archéologiques, itinéraires thématiques liés aux musées archéologiques, arguments et matériel pour des expositions, etc.

Les nouvelles lois ont prévu et encouragent depuis quelques années la possibilité d'établir des ententes de collaboration et coordination (entente de programme, convention, protocole d'entente, etc.) parmi les administrations intéressées à tout niveau, et aussi avec les écoles, les universités, les associations et les autres privés concernés.

Bien que facultative, cette modalité va devenir de plus en plus habituelle, grâce aussi à la disponibilité et collaboration du personnel des Sovrintendenze, avec des résultats de plus en plus positifs.

Tout bien archéologique, en général, est aussi protégé en tant que bien culturel tout court.

### 3. Fouilles / Excavations

Les fouilles sont contrôlées par le Ministère des Biens Culturels – Sovrintendenza aux biens archéologiques de la zone, qui normalement conduit directement les fouilles. A cause du manque de personnel spécialisé et de fonds, les recherches sont pourtant assez limitées, et encore davantage la publication des résultats qui restent souvent et longtemps inconnus.

Il est prévu la possibilité d'une spécifique concession de recherche (article 89 du Code) à d'autres institutions culturelles publiques ou privées (ou bien aux privés tout court) pour une période et à des conditions scientifiques bien déterminées, toujours sous le contrôle direct de l'Etat.

Ce qu'il faut peut-être remarquer à ce propos, est le fait que toute autre institution – que ce soit l'université, ou bien une école archéologique étrangère, autant qu'une petite association locale n'importe laquelle - est considérée par la loi exactement au même niveau formel, sans aucun standard préfixé d'évaluation.

Tout cela a suscité pas mal de problèmes et de discussions à propos des limites à la liberté de recherche et d'étude en général, et notamment par rapport au droit de l'autre sujet publique influent et reconnu par la Constitution italienne, le plus souvent marginalisé par les Sovrintendenze, c'est à dire l'université.

Il n'y avait en Italie, pas même dans le dernier Code, une réglementation explicite pour le cas de découverte pendant des travaux publiques ou privés (recherches et fouilles qui peuvent sans doute être programmés auparavant), qui résultaient pourtant réglés tout à fait comme les découvertes fortuites et dont les frais restent presque toujours à la charge des sujets impliqués: il a fallu la Loi n° 205 du 25 juin 2005 pour remédier à cette défaillance.

### 4. Définitions / Definitions

Le *patrimoine archéologique* est défini comme choses immeubles et meubles qui présentent un intérêt (...) archéologique très important (...), y compris les choses qui intéressent la paléontologie, la préhistoire et les civilisations primitives (article 10 du Code).

Il y a aussi d'autres définitions pour les sites archéologiques (article 101 du Code):

- Une *zone archéologique* est un site caractérisé par la présence de restes de nature fossile, ou d'ouvrages ou structures préhistoriques ou d'époque ancienne;
- Un *parc archéologique* est une zone territoriale caractérisée par d'importantes évidences archéologiques et par la présence en même temps de valeurs historiques et du paysage, équipée comme musée en plein air.

On pourrait dire, donc, que par la loi italienne l'archéologie 'industrielle' n'est pas trop considérée, et cela ne doit pas surprendre si encore aujourd'hui il y a parfois quelques limites et difficultés de considération face à l'archéologie du Moyen Âge!

### 5. Inventaires / Inventories

Il existe un inventaire ministériel des biens culturels en général, et donc aussi du patrimoine archéologique - pas encore complet au niveau national - soit sur fiches de papier, soit sur ordinateur (avec le système de catalogage reconnu par l'ICCD), avec une remarquable base de données scientifiques, mais moins d'indications utiles sur la protection, surtout préventive en cas de risque ou danger.

Les administrations régionales et locales devraient, de leur côté, en coordonner et soutenir l'effort, afin de compléter le plus tôt possible le catalogage: mais malheureusement le système est très compliqué et coûteux, face à l'énorme quantité de choses à cataloguer; en plus il existe encore pas mal de problèmes pour coordonner le travail et fixer les priorités.

Le seul fait de la registration sur l'inventaire, néanmoins, ne provoque pas de conséquences juridiques.

### 6. Procédure de protection / Protection procedure

La protection est liée au fait que tout bien archéologique, trouvé dans le sous-sol ou sur le fond de la mer, en Italie appartient automatiquement à l'Etat (bien Demaniale – article 91 du Code et articles 822 - 826 du Code Civil); cela vaut aussi pour les autres biens archéologiques, sauf des cas particuliers et très limités où ils appartiennent depuis très longtemps à des municipalités, associations culturelles, etc. (musées et collections d'intérêt local). Malgré cette règle, il arrive très souvent de voir de nombreux objets archéologiques ou trouvailles dans les maisons privées, sans aucune autorisation, et non seulement chez des voleurs ou des *tombaroli* (comme on a nommé ceux qui font des fouilles illicites dans les anciennes nécropoles), mais aussi bien dans plusieurs maisons de campagne près des zones archéologiques, par exemple de la Toscana ou du haut Lazio (l'ancienne Etruria).

En général, pour les biens culturels de propriété privée de n'importe quelle catégorie, il est prévu une procédure administrative de 'déclaration' de l'intérêt culturel du bien par le Ministère, et ensuite d'autorisation pour tout genre d'activité qui puisse l'endommager (au moment d'une demande de permis de bâtir, modifier, restaurer, aussi bien que pour l'exportation, etc.).

Tout travail ou restauration concernant les biens culturels en général doit donc être autorisé d'avance par le Ministère, même s'il est conduit par une Administration publique (autre administration de l'Etat ou de la Région, Province, Municipalité, etc.).

Par contre, la procédure de protection d'un bien archéologique immeuble est toujours et strictement liée au fait même que tout bien archéologique appartient *ipso facto* - et donc sans aucune nécessité de déclaration - au Demanio, faisant partie des collections de l'Etat avec la seule exception possible d'une évaluation négative de son importance historique et scientifique de la part du Ministère.

Néanmoins, d'après cette évaluation, assez subjective, il est aussi prévu de laisser tout de suite l'objet au propriétaire du terrain, aussi bien que de le détruire: ce qui semble être un cas assez singulier de passage de propriété ou bien de perte d'un bien public, après une simple décision technique, tout scientifique et pondérée que ce soit.

Il n'existe pas de procédure d'urgence exprès pour les biens archéologiques. Pour les biens culturels en général il y a - aussi bien pour le propriétaire privé que pour les Sovrintendenze - la possibilité d'adopter des mesures d'urgence pour la protection préventive des biens culturels en cas de danger ou de travaux mal conduits ou non autorisés (articles 27 - 28 du Code).

### 7. Conséquences juridiques / Legal consequences

Les conséquences juridiques de la protection d'un bien archéologique, au delà de ce qu'on a déjà dit concernant la propriété de l'État, sont:

- La possibilité d'occupation ou d'expropriation par l'État des terrains concernés par les fouilles (avec une indemnité pour le propriétaire);
- La nécessité d'autorisation ou concession pour effectuer tout travail, surtout les fouilles;
- L'interdiction totale de vente ou d'exportation;
- Les servitudes d'accès pour les visiteurs (normalement sur la base d'une convention) ou par raison d'étude.

### 8. Patrimoine mobilier / Movable heritage

Les biens meubles découverts pendant des fouilles sont normalement conservés dans les musées archéologiques nationaux, mais il est aussi possible de les abriter et les exposer dans un musée local (s'il existe), sur la demande des administrations locales.

Il n'y a pas de système de protection spécifique pour ces biens, sauf qu'ils deviennent eux aussi de propriété de l'Etat.

### 9. Trouvailles fortuites / Goods found by chance

En cas de découverte fortuite, on est obligé de faire une communication dans un délai de 24 heures à la Sovrintendenza ou bien au Maire ou à la Police (article 90 du Code). Entre-temps celui qui a trouvé le bien archéologique doit le conserver sous sa responsabilité, si possible sans le déplacer du lieu de découverte.

Les récompenses pour ceux qui ont trouvé les biens archéologiques par hasard - autant qu'à la suite de recherche autorisée - sont réglés par l'article 92 du Code (à condition qu'il ne s'agisse pas de recherche sur la propriété d'un autre sujet sans autorisation).

### 10. Soutien financier / Financial Support

Les autorités publiques supportent les fouilles et les autres travaux en faveur du patrimoine archéologique:

- Au niveau national, avec le budget du Ministère, qui a été beaucoup augmenté depuis quelques années, avec les fonds des tickets d'entrée (qui auparavant étaient très peu chers, ou même l'entrée était gratuite), de la concession aux privés des services additionnels des musées et sites (bookshop, cafeteria et restaurant, visites guidées, etc.) qui n'existaient pas avant 1993, et aussi d'une nouvelle loterie nationale;

- Au niveau de Région, Province et Municipalité, avec les budgets de ces mêmes administrations locales, pour lesquelles compte encore plus (aussi au niveau *politique*) la mise en place d'ententes avec l'État;
- Il est aussi prévu la possibilité de sponsoring de la part des banques et des privés, avec des bénéficiaires au niveau fiscal.

En plus, le Ministre des Biens Culturels a beaucoup augmenté son influence depuis son entrée dans le 'Comité Interministériel pour la Programmation économique' du Gouvernement, responsable des politiques de développement, des grands travaux publics, des fonds de l'U.E., etc.

Malgré tout cela, les fonds pour l'archéologie sont toujours insuffisants, surtout car (considérant la dimension du problème en Italie) les ressources déjà assez limitées en général, sont plutôt attirées par les restaurations et les expositions relatives aux monuments et aux musées historiques et d'art (aussi contemporaine).

### 11. Lien avec d'autres législations / Link with other legislations

Le fait qu'un terrain, un site ou un bâtiment a été protégé comme patrimoine archéologique, entraîne beaucoup de limites au niveau d'emploi du sol, sur la base d'un très intense contrôle de l'activité privée (par exemple pour les bâtiments les plus proches, les activités de commerce à l'intérieur du site, les panneaux de publicités, etc.).

La législation urbanistique locale et régionale limite l'emploi du sol, naturellement soit pour ce qui concerne les travaux publics, autant que pour ceux des privés.

### 12. Conventions internationales / International conventions

L'Italie a ratifié les conventions internationales suivantes, concernant directement ou indirectement le patrimoine archéologique:

- La Convention UNESCO de la Haye du 1954 et I Protocole;
- La Convention UNESCO de Paris 1970;
- La Convention UNESCO de Paris 1972;
- La Convention du Conseil d'Europe de Londres 1969.

La Convention du Conseil d'Europe révisée à La Valletta (Malta) en 1992 a été signée par l'Italie mais pas encore ratifiée, tout comme le II Protocole de la Haye du 1999.

Le législateur du Code a voulu citer explicitement la Convention UNIDROIT de Rome 1995 et la Convention UNESCO de Paris 2001, malgré le fait que - jusqu'à aujourd'hui - elles n'ont pas été ratifiées (articles 87 et 94).

Ces conventions ont influencé relativement le cadre juridique national, d'un côté car beaucoup de leurs principes existaient déjà dans la législation italienne (qui les a souvent inspirés), de l'autre car beaucoup d'États - et l'Italie parmi eux - ont la tendance de distinguer et séparer la législation internationale de la nationale, malgré le fait que la ratification devrait intégrer (et non seulement à titre formel) l'une dans l'autre.

### 13. Mise en pratique et politique de protection / Implementation and protection policy

Mes impressions au sujet de la mise en pratique de la législation existante en matière de protection du patrimoine archéologique sont, tout considéré, assez négatives. Face à l'énorme quantité de sites, monuments, ruines et trouvailles, et malgré des normes – au moins au niveau théorique – très sévères et rigides, tout le monde sait que le patrimoine archéologique italien est toujours en danger, soumis à des fouilles illicites et à des exportations illégales vers les pays un peu trop favorables au 'libre marché' des biens culturels et des œuvres d'art (tels que États Unis, Japon, etc.).

Pour ce qui concerne la protection contre les dommages suite aux travaux privés et publics, il faudra privilégier l'entente et la collaboration préventive, au lieu ou à côté de l'activité de contrôle et de répression de l'État, presque impossible et qui ne donne aucun encouragement: ou, pour mieux dire, risque trop souvent de décourager la dénonciation des découvertes, si non de déterminer la démolition des restes trouvés de crainte de subir l'intervention du Ministère (et l'arrêt des travaux). Il n'est pas si rare de trouver une attitude semblable même de la part d'autres administrations publiques et parfois aussi du Gouvernement, face (ou plutôt avec l'alibi) aux intérêts considérés prioritaires du développement social ou économique.

Un dernier problème, très grave, est le nombre extrêmement limité et le manque d'une suffisante formation, considération et reconnaissance – surtout sur le plan concret, juridique et économique – pour les professionnels qui travaillent dans la culture, dont l'archéologie est malgré tout l'un des domaines les moins considérés par rapport aux arts et à l'architecture. Ce genre de problème va augmenter quand on passe de l'administration de l'État aux différentes administrations locales, où l'on trouve presque partout plutôt des experts et des collaborateurs extérieurs à côté des administrateurs qui décident, et bien plus rarement des Directeurs ou responsables des musées et des sites; cela peut expliquer aussi combien de difficultés ils ont eu jusqu'à aujourd'hui en Italie à s'imposer au niveau national ICOMOS et ICOM.

À côté de tout ça, il faut ajouter qu'un véritable contrôle sur le terrain (notamment loin des villes) n'existe presque pas du tout; pour améliorer ce service essentiel une concrète possibilité pourrait être de confier cette tâche aux associations qualifiées de bénévoles (Italia Nostra, Legambiente, Archeoclub, d'autres associations pour la protection des B.C., etc.), avec un mandat formel sous la forme – déjà prévue depuis le début du siècle passé, mais désormais très peu appliquée, inexplicablement, par le Ministère – de l'attribution aux responsables de la fonction de Inspecteur honoraire.

Ces activités pourraient être soutenues et coordonnées, en Italie comme le monde entier, par les 'Comités Nationaux du Bouclier Bleu', et à niveau international par l'ICBS – the International Committee of the Blue Shield.

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN JAPAN LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE AU JAPON

Toshi KONO, ICLAFI JAPAN

### 1. Competences / Compétences

The following authorities are in charge of the protection of archaeological cultural property.

#### National level

- Immovable cultural property such as shell mounds, ancient burial mounds, ancient capital ruins and former residences: *Agency for Cultural Affairs, Department of Cultural Property, Section for Monuments*;<sup>52</sup>
- Movable cultural property such as archaeological material: *Department of Cultural Property, Section for Art and Literature.*

#### Local level

Board of Education in each prefecture

### 2. Protection regimes / Régimes de protection

#### National level

- The Law for Protection of Cultural Property (cited as 'the Law' below);
- The Regulation to Implement the Law for Protection of Cultural Property.

#### Local level

Ordinance in each prefecture

A double protection under the Law is possible. Suppose that a temple is designated as 'Historic Site'. A particular building of this temple could be designated as an important cultural property. The area of this temple could also be designated as a cultural landscape.

### 3. Excavations / Fouilles

Excavations are regulated by articles 92 – 108 of the Law.

Excavation in construction work in an area "known as an area which contains buried cultural property" shall be reported to the Commissioner of the Agency for Cultural Affairs 60 days prior to the construction work. It should be authorized by the Board of Education in each prefecture.

<sup>52</sup> Webpage of the Agency for Cultural Affairs: [http://www.bunka.go.jp/english/pdf/04\\_04-47-64p.pdf](http://www.bunka.go.jp/english/pdf/04_04-47-64p.pdf) (in English).

#### 4. Definitions / Définitions

Article 2-1 of the Law defines *cultural property*, which includes 'tangible cultural property', 'intangible cultural property', 'tangible and intangible folk cultural property', 'monuments', 'cultural scenery', and 'group of historic building'.

If excavated goods are tangible cultural products that have a high historic or artistic value, or archaeological or historic material that have a high academic value, they are 'tangible cultural property'. 'Important tangible property' can be designated as 'important cultural property' or 'national treasure'.

Immovables such as shell mounds, ancient burial mounds, ancient capital ruins, former residences are called *monuments*. 'Important monuments' can be designated as 'historic sites' or 'special historic sites'.

#### 5. Inventories / Inventaires

An inventory of archaeological heritage is edited in each prefecture. Each prefecture manages the inventory. This inventory includes the information on the name of the heritage, the genre of the heritage, the coverage, the era.

Inclusion of a land in such an inventory leads to a particular legal effect: if a land is included in an inventory, the area would be considered as an area with unexcavated archaeological remains. Therefore excavation in this area must be reported to the commissioner of the Agency for Cultural Affairs prior to construction work.

#### 6. Protection procedure / Procédure de protection

The Minister of Education and Science can designate excavated goods with a high historic or artistic value as 'important tangible cultural property', based upon the recommendation of the Council of Art (an advisory organ of Minister of Education and Science).

After excavation, also a land can be designated as 'historic site' or 'special historic site' by the Minister of Education and Science, based upon the decision of the Council of Art. If this land is not important as archaeological heritage, no such designation is made. Only preserving the information on this land is made (in this case, the archaeological heritage will be lost) or construction plan may be changed to preserve the heritage.

Also on the municipality level, municipalities may designate certain archaeological heritage through their ordinances. In the case of emergency, for the purpose of research, the development could be stopped and the Board of Education may temporarily designate it as 'historic site' or 'special historic site'.

#### 7. Legal consequences / Conséquences juridiques

Once a land is designated as a 'historic site' or a 'special historic site', to change the current situation of the land needs the permission of the Minister of Education and Science. Rights of third parties are not affected. Usually the Government purchases the land. Through the process of the protection under the Law, although not a legal consequence, the awareness of the public on the protection of heritage can be raised.

#### 8. Movable heritage / Patrimoine mobilier

When some items are found in the process of excavation, they belong to the owner of the land (50%) and the person who discovered (50%). If the owner is not identifiable, it should be reported to the police department in charge of this area. The police department should further notify the Board of Education. If no owner is identified after 6 months, they belong to the prefecture. The Board of Education should evaluate these items. If the Board deems excavated items as 'cultural property', these items could be designated as 'Important cultural property' and well protected.

In the practice, before excavation work, the owner of the land is requested to abandon his ownership.

#### 9. Goods found by chance / Trouvailles fortuites

See the answer to question 8.

#### 10. Financial support / Soutien financier

Public funding: subsidies from the Agency for Cultural Affairs, prefecture, municipalities in the case of excavation in individuals' properties or excavation for research purpose.

In the case of excavation in the process of development, the costs of excavation must be borne by the developer.

#### 11. Link with other legislations / Lien avec d'autres législations

If an area is "known as an area which contains buried cultural property", development could be restricted.

#### 12. International conventions / Conventions internationales

Japan has ratified the Convention for the Protection of World Cultural and Natural Heritage. This fact has almost no impact on the practice in Japan.

#### 13. Implementation and protection policy / Mise en pratique et politique de protection

There are currently 1495 'historic sites' and 161 'special historic sites'.

The Law is not applicable to ancient tombs, which the Agency for Imperial Household is in charge of, including 740 imperial tombs. However in certain cases, moat is deemed as an area "known as an area which contains buried cultural property". Thus development can be restricted. Or moat could be designated as 'historic site' and the protection under the Law could be provided. These ancient tombs managed by the Agency of Imperial Household have never been excavated. The Agency still rejects the idea that the imperial tombs be treated as 'archaeological' sites.

**THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN MEXICO  
LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE AU MEXIQUE**

*José Ernesto BECERIL MIRÓ, ICLAFI Mexico*

*Roberto NÚÑEZ ARRATIA, ICLAFI Mexico*

**General introduction / Introduction générale**

Mexico has an extraordinary, rich, vast and plural archaeological heritage. Specialists indicate that there are more than 200,000 archaeological sites, including traces that bear witness of the civilizations that populated the country during the pre-Hispanic period.

The Mexican archaeological heritage includes rock paintings, buildings, monuments, cities, pyramids, houses, burials, production areas and investigations about the activities of human societies from the antiquity to nowadays.

There is a specific legal regime for the protection of archaeological heritage. It is established in the Federal Law on the Archaeological, Artistic and Historical Monuments and Zonings (LFMZ) and the Rules of the Federal Law on the Archaeological, Artistic and Historical Monuments and Zones (RLFMZ).

The LFMZ defines the Mexican archaeological heritage as follows:

- The movables and immovable goods that are a product of the cultures located on national territory before the establishment of the Hispanic culture, including human remains, vegetal and animal traces related to those cultures, and
- The zonings of archaeological monuments that are the areas that include several immovable archaeological monuments and areas where the existence of immovable archaeological monuments is presumed.

The LFMZ automatically grants protection to the movable and immovable archaeological monuments, except in case of monuments with paleontological value, where a declaration issued by the President of the Republic is required. Archaeological zonings also have to be declared as such by the President.

Once the archaeological monument or zoning is determined as part of the archaeological heritage, the law establishes a regime of protection based in the following issues:

- The creation of a Public Registry of Archaeological Monuments and Zonings, managed by INAH;
- The prohibition of private property, commerce and exportation of archaeological monuments;
- The limitation to the conservation and restoration works, archaeological research and reproduction of monuments with commercial purposes through the previous obtaining of a permit issued by INAH;
- The establishment of criminal penalties in the case of illegal property, archaeological excavation without permission, illegal commerce and exportation, and destruction of archaeological monuments.

Archaeological goods discovered during an excavation must be studied or deposited in laboratories, package houses, museums, collections and similar places. In the case of the

casual finding of archaeological monuments, the finder has the obligation to notify the municipal authorities about the discovery or to deliver the monument to the municipal authorities.

The most important links of the archaeological heritage legislation with other legislations are the following: Urbanism Legislation, Tourism Legislation, Environmental Law, International Trade Legislation and General Law of National Goods.

Mexico has signed a number of international conventions and treaties related to the protection of archaeological heritage.

Respect to the current situation of the archaeology in Mexico, we recognize the labour of INAH in favour of our archaeological heritage. However, it is necessary to reinforce the coordination between the federal and local governments, to reinforce the coordination between the federal agencies, to reinforce the links between public and social organizations, to increase the budget granted to the cultural institutions, to establish financial measures in favour of conservation projects and to propose the necessary amendments to the federal law.

**1. Competences / Compétences**

The following federal authorities are competent for the protection of cultural heritage:

- The President of the Republic;
- The *Ministry of Education* (Secretaría de Educación Pública, hereafter SEP);
- The *National Council for Culture and Arts* (Consejo Nacional para la Cultura y las Artes, hereafter CONACULTA);
- The *National Institute for Anthropology and History* (Instituto Nacional de Antropología e Historia, hereafter INAH);
- The *National Institute for Fine Arts and Literature* (Instituto Nacional de Bellas Artes y Literatura, hereafter INBA).

INAH is competent for the protection of archaeological heritage. Its faculties are limited to the protection, conservation, restoration and collection of historical and archaeological monuments and zonings.<sup>53</sup>

Its mission is to:

- Apply the laws, rules and other legal dispositions related to the protection of the cultural heritage;
- Carry out scientific investigations;
- Grant authorizations, permissions and direct the activities on restorations and conservation of archaeological monuments;
- Realize exploration and research activities with conservation and scientific purposes;
- Identify, investigate, collect and project the immovable and movable monuments in relation with the traditions of the different communities of the country;
- Manage the Public Registry of Archaeological Monuments and elaborate the catalogue of archaeological monuments;
- Establish and manage museums and libraries specialized in archaeological heritage;
- Authorize, control and evaluate the explorations and study of archaeological monuments by foreign scientific missions;

<sup>53</sup> Article 44 of the LFMZ and article 14 of the RLFMZ.

- Realize the necessary procedures, in order to collect the archaeological goods located abroad.<sup>54</sup>

In order to determine which authority is responsible in a specific area, the archaeological value is deemed more important than the historical value. The historical value itself is deemed more important than the artistic value.<sup>55</sup>

No difference is being made between the movable and the immovable archaeological heritage. The same rules do apply.

## 2. Protection regimes / Régimes de protection

There is a specific legal regime for the protection of archaeological heritage. There are two main legal instruments: the Federal Law on the Archaeological, Artistic and Historical Monuments and Zonings (Ley Federal sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas<sup>56</sup>, hereafter LFMZ), published in the Official Newspaper of the Federation on 6 May 1972, and the Rules (Reglamento de la Ley Federal sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas<sup>57</sup>, hereafter RLFMZ), published in the Official Newspaper of the Federation on 8 December 1975.

It is also possible to use other legal instruments in order to protect archaeological heritage (e.g. the protection as part of a landscape). However, we must recognize that these instruments are limited.

The LFMZ automatically grants protection to the movable and immovable archaeological monuments, except in case of monuments with paleontological value, where a declaration issued by the President of the Republic is required. Archaeological zonings also have to be declared as such by the President.

It is important to indicate that, in accordance to the law, the declarations of monuments and sites have to include a specific technical regulation for the monument or area in order to protect their cultural values. However, the reality is that the federal authorities do not include this technical regulation, reducing their role as specialized instrument of protection.

## 3. Excavations / Fouilles

Excavations are controlled by the LFMZ. The activities destined to discover and explore archaeological monuments can only be carried out by INAH or by scientific institutions after previous authorization issued by INAH.<sup>58</sup>

The *Archaeology Council* (Consejo de Arqueología), an advisory institution being part of INAH, analyzes studies and emits resolutions about archaeological investigation projects out of scientific interest and archaeological investigation projects derived from public or private works of natural causes.

<sup>54</sup> Article 2 of the amended Organic Law of INAH.

<sup>55</sup> Article 46 of the LFMZ.

<sup>56</sup> 28 April 1972, *Official Newspaper of the Federation* of 6 May 1972.

<sup>57</sup> 20 September 1975, *Official Newspaper of the Federation* of 8 December 1975.

<sup>58</sup> Article 30 of the LFMZ.

The Archaeology Council's Rules establishes the requirements archaeological research projects have to meet in order to be authorized. The Regulation also determines the duties of the archaeologist that is responsible for carrying out the project. An authorization for an archaeological research project is valid for a period from three months to one year.

## 4. Definitions / Définitions

Are to be considered as *archaeological monuments*:

"The movable and immovable goods that are a product of the cultures located on national territory before the establishment of the Hispanic culture, including human remains, vegetable and animal traces related to those cultures."<sup>59</sup>

*Zones of archaeological monuments* are defined as:

"Areas that include several immovable archaeological monuments and areas where the existence of immovable archaeological monuments is presumed."<sup>60</sup>

## 5. Inventories / Inventaires

For the protection and the conservation of movable and immovable archaeological monuments, zonings of archaeological monuments and archaeological sites, it is necessary to recognize, identify and file them. That's why there are inventories of the archaeological heritage in Mexico.

INAH has been created in 1939<sup>61</sup>. Nevertheless, the institute was only given the task to design and promote the Catalogue of Archaeological Monuments and Sites and the Archaeological Atlas of the Republic in 1986. INAH also manages the Public Registry of Archaeological and Historical Monuments and Zonings.<sup>62</sup> In this office, INAH maintains the Catalogue with the information required for the filling of a monument in the Public Registry.

According to the Project on Registration and Inventories of Archaeological Sites, INAH had filed 30,093 archaeological settlements in 1994. Specialists indicate that this number is only a small part of the archaeological remains in Mexico. Therefore we can presume that the number of archaeological monuments will increase.

The registration format of archaeological pieces and their formats of control contain the following information: 'able to file' and 'not able to file' pieces subject to a previous opinion of a archaeologist appointed by the Registry office, the number of pieces, the kind of object, the material, the current status. Only the authentic pieces will be filed.

The basic information report of each piece will include the following specifications:

- Kind of object;
- Generic name of the object;
- Picture;
- Measures;
- Photography;

<sup>59</sup> Article 28 of the LFMZ.

<sup>60</sup> Article 39 of the LFMZ.

<sup>61</sup> Organic Law of 31 December 1938, *Official Newspaper of the Federation* of 3 February, 1939.

<sup>62</sup> Amended Organic Law of 9 December 1985, *Official Newspaper of the Federation* of 13 January 1986.



- Materials;
- Culture, style or linguistic group;
- Period;
- Geographical origin;
- Form;
- Conservation Status.

One of the legal consequences of the inscription in the catalogue and filing of a movable archaeological monument is that public and private persons will have the opportunity to apply for a use concession in order to allow them to have the archaeological monuments in their possession.<sup>63</sup>

#### 6. Protection procedure / Procédure de protection

The LFMZ automatically grants protection to the movable and immovable archaeological monuments, except in case of monuments with paleontological value, where a declaration issued by the President of the Republic is required. Archaeological zonings also have to be declared as such by the President.

The Mexican law does not include a specific procedure in case of urgent need.

Once the archaeological monument or zoning is determined as a part of the archaeological heritage, the law establishes a regime of protection based in the following issues:

- The creation of a Public Registry of Archaeological Monuments and Zonings, managed by INAH. All archaeological monuments and declarations of archaeological zonings must be filed in this registry;
- The prohibition of private property, commerce and exportation of archaeological monuments, except in the case of exportation for exhibitions abroad and donations and exchanges with foreign academic institutions;
- The limitation to the conservation and restoration works, archaeological research and reproduction of monuments with commercial purposes through the previous obtaining of a permit issued by INAH;
- The establishment of criminal penalties in the case of: i) Illegal property of archaeological monuments, ii) Archaeological exploration without permission, iii) Reproduction and exhibition of archaeological monuments without permission, iv) Illegal commerce and exportation of archaeological monuments and v) Destruction of monuments.

#### 7. Legal consequences / Conséquences juridiques

The Mexican law establishes the following legal consequences for protected archaeological monuments and zonings:

- Archaeological monuments are property of the Nation. They are inalienable and imprescriptible. Therefore, private persons and corporations cannot own them;
- INAH can grant a special concession for the tenants of movable archaeological goods who will be responsible of the conservation and restoration of the monument. It is important to indicate that this concession only authorizes the possession of the archaeological monument but does not create property rights;

<sup>63</sup> RLFMZ.- Article 10,11,12 and 13.

- In case of owners of lands located in an archaeological site, the legal protection is only applicable to the archaeological monument and not to the entire land. However, all kinds of constructive works in an archaeological site have to be authorized by INAH;
- The constructive works made in adjoining lands of an archaeological monument have to be authorized by INAH;
- All kinds of civil associations dedicated to the protection of an archaeological area have to obtain an authorization granted by INAH.

#### 8. Movable heritage / Patrimoine mobilier

According to the Archaeology Council's Regulation archaeological goods discovered during an excavation must be studied or deposited in laboratories, package houses, museums, collections and similar places.<sup>64</sup>

Authorities, corporations and private persons must not use archaeological monuments in activities different from their nature or aims.

The LFMZ contains the following dispositions related to the protection of the movable archaeological heritage, as the followings:

- The exportation of archaeological monuments is prohibited, except for exchanges or gifts to foreign governments or scientific institutes, with the agreement of the President;<sup>65</sup>
- INAH promotes the recovery of archaeological monuments of great value located abroad;<sup>66</sup>
- An authorization granted by INAH is required for the reproduction of archaeological monuments;<sup>67</sup>
- An authorization granted by INAH is required for the transportation, exhibition and reproduction of archaeological monuments;<sup>68</sup>
- The finder of an archaeological monument has to notify immediately the closest authority of his discovery. The authority issues a certification of this notice and notifies INAH within the following 24 hours;<sup>69</sup>
- The works destined to discover and explore archaeological monuments can only be carried out by INAH or by scientific institutions after previous authorization issued by INAH. If such an institution realizes the works without authorization, realizes the works incurring in a breach of the granted authorization or takes illegally archaeological monuments, INAH can suspend the works;<sup>70</sup>
- The illegal possession and the realization of any sale or transference of ownership of movable archaeological monuments is considered as a felony. Also, the following deeds are considered as a felony: to take a movable archaeological monument without permission from the person that can dispose of it and the tentative to export an archaeological monument;<sup>71</sup>

<sup>64</sup> Articles 1, 2 and 4 of the Rules of the Archaeology Council of 2 June 1994.

<sup>65</sup> Article 16 of the LFMZ.

<sup>66</sup> Article 16 of the LFMZ.

<sup>67</sup> Article 17 of the LFMZ.

<sup>68</sup> Article 29 of the LFMZ.

<sup>69</sup> Article 29 of the LFMZ.

<sup>70</sup> Articles 30 and 32 of the LFMZ.

<sup>71</sup> Articles 49,50,51 and 52 of the LFMZ.

All movable archaeological monuments are property of the Nation. INAH can emit a use concession to public agencies, public corporations, private corporations and persons that have the possession of one or more monuments, the tenant of the monument being obligated to present the application and the monument.

The use concession will be personal and intransferable and it will have an undefined duration, the beneficiaries being obligated to protect, conserve and restore the archaeological monument. If the beneficiary does not fulfil this obligation, INAH can revoke the concession.

#### **9. Goods found by chance / Trouvailles fortuites**

In the case of the casual finding of archaeological monuments, the finder has the obligation to notify the municipal authorities about the discovery or to deliver the monument to the municipal authorities.

The municipal authorities have the obligation to: i) issue an act certifying the notification of the discovery or the delivery of the archaeological monument; ii) to notify about this discovery to INAH within the following 24 hours.

The law does not establish additional duties to tenants in an archaeological area.

#### **10. Financial support / Soutien financier**

As we explained in other points, the competent authorities for the realization of works of excavation, consolidation, conservation and restoration are INAH and the scientific institutions. INAH has its own patrimony formed by (i) the amounts indicated in the Federal Budget, (ii) additional amounts granted by public and private Mexican and foreign entities, (iii) income derived from the sale of books, publications, cds, pictures, movies, posters, etc. and (iv) income derived from trusts, royalties, fees for concessions and authorizations.<sup>72</sup>

Subsidies are issued by the President of the Republic in the beginning of his period of six years, in accordance to the National Plan of Development. The Federal Government establishes a budget for the protection and conservation of the cultural heritage. This budget is managed by CONACULTA, INAH e INBA.

The federal budget defines the subsidies as the resources determined by the federal government in order to promote the development of high priority activities.

In 2006, the annual budget for INAH is of 2,074 million pesos (193,832,000 dollars). The budget for the conservation of archaeological monuments and sites is the amount of 543 million pesos approximately (50,750,000 dollars), that represent a major subsidy in comparison with the grants for the conservation of historical centres.

As for tax incentives, the Organic Law indicates that there is a tax exemption for the acquisition of archaeological goods made with persons, institutions or foreign governments.

An important number of archaeological projects realized in Mexico (13%) is financed and carried out by other countries that invest in this kind of projects an annual amount of 800,000

<sup>72</sup> Article 3 of the Revised Organic Law.

to 1,000,000 dollars. The archaeological projects made in United States of America (by universities such as Yale, Harvard, Rochester, Arizona State or Pennsylvania), France (by institutions as France Centre of Mexican and Central American Studies - CEMAC), Canada and Italy offer the advantage to have their own financing sources. These projects are authorized and supervised annually by INAH. As a consequence, it is necessary to present them before the Archaeology Council indicating the name of the archaeologist responsible for the project, the institution responsible and the budget including the sources of the financing.

These investigations help improving our knowledge of the pre-Hispanic cultures and the methodologies used by Mexican specialists.

#### **11. Link with other legislations / Lien avec d'autres législations**

The most important links with other legislations are the following:

##### Urbanism Legislation

The General Law of Human Settlements establishes that one of its objectives is the conservation of the Cultural Heritage. The Law establishes that the protection of cultural zonings must be a specific matter in the urban development programs. The municipal authorities, through the municipal programs of urban development, have to establish uses of soil and restrictions to the construction works in congruence with the protection of the cultural heritage. The Law promotes the creation of civil organisms dedicated to the preservation of the cultural heritage in human settlements.

##### Tourism Legislation

The Federal Law of Tourism establishes that one its objectives is the protection of the national cultural heritage. The archaeological sites and museums are considered as services for the tourist. The Law grants the Tourism Ministry the faculty to declare zonings of high-priority tourist development in accordance with their archaeological relevance. These zonings can be part of financial projects in order to develop their tourist potential.

##### Environmental Law

The General Law of the Ecological Balance and the Environmental Protection establishes the creation of Protected Natural Areas, declared by the Ministry of Environment, Natural Resources and Fishing. The Law establishes different categories in accordance with the specific characteristics of these areas. It also indicates that the environmental authorities have the faculty to protect a specific natural area if it has cultural values or is an adjacent zoning of an archaeological area.

##### International Trade Legislation

The Foreign Commerce Law grants the President of the Republic the faculty to issue specific measures of international trade in order to prevent the exportation of goods with archaeological value.

## General Law of National Goods

Archaeological goods and monuments being national property, the General Law of National Goods establishes conditions about the management of the national property. In this case, the law orders to the different federal authorities and agencies to obtain the previous authorization issued by INAH in any construction and restoration works in national goods with historical or archaeological value.

In Mexico, there is no mechanism in order to assure the immediate creation of a measure in respect with the regulation of the use of soil when a specific area has been declared an archaeological site. However, the local urban legislation in the majority of the States establishes that the archaeological areas are considered as 'conservation areas'. As a consequence of this legal status the construction of new buildings and the development of economical activities in these areas is not permitted. The delimitation of a conservation area is included in the Urban Development Programs issued by the State Government and the Municipal Authorities.

### **12. International conventions / Conventions internationales**

The international conventions and treaties related to the protection of archaeological heritage ratified by Mexico are the following:

#### UNESCO conventions

- Convention for the Protection of Cultural Property in Event of Armed Conflict;
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property;
- Convention Concerning the Protection of the World Cultural and Natural Heritage.

#### Other Multinational Treaties

- Treaty on the Protection of Artistic and Scientific Institutions and Historical Monuments (Roerich Pact);
- Treaty on the Protection of Movable Property of Historical Value.

#### iii) Bilateral Treaties

- Mexico has ratified treaties on collection and restitution of archaeological monuments with the United States of America, Peru, Guatemala, El Salvador and Belize;
- Mexico has ratified treaty on cooperation related to museums and Archaeology with Canada and Belize.

The LFMZ establishes that international treaties will be applied auxiliary in case of omission of the Law.

### **13. Implementation and protection policy / Mise en pratique et politique de protection**

The LFMZ has been surpassed for the social, cultural, economical and political development of Mexico during the last 30 years. This law has important omissions, deficiencies and old concepts. For those reasons its application is considered as not adequate.

In consequence, a revision of the LFMZ is necessary, especially concerning the objectives of the law, the social participation, the coordination, the collaboration with governments of

States and municipalities, the relationship with other legal dispositions, and definitions in order to adopt the concept cultural goods, that is the relevance, the value, the notability, the archaeological, historical, artistic, paleontological, scientific, and technologic interest that they have without take in consideration the period of time when they was created, situation not included in the current legislation on cultural property.

In our opinion, the most important issues for the improvement of the archaeological heritage are the following:

- To review and update the concept of the Archaeological Heritage, in order to include the archaeological goods and sites not considered in the law (e.g. underwater heritage, cultural landscapes, etc.);
- To improve the content of the declarations of monuments and zonings through the including of a effective technical regulation for the declared site or monument;
- To amend LFMZ in order to create new legal instruments for the protection of the archaeological heritage, such as the management plans or the studies about the cultural impact to be applied in public and private projects;
- To reinforce the activities of the Catalogue and Public Registry of Archaeological Monuments and Zonings;
- To reinforce the links between the archaeological heritage legislation and other legislations (urban development, tourism, environmental protection, etc.), in order to provide a complete conservation action;
- To increase the educational activities in order to reinforce the social conscience about the importance to protect the archaeological heritage.

THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN THE  
NETHERLANDS  
LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE AUX PAYS-BAS

Leonard DE WIT, ICLAFI The Netherlands  
In collaboration with Gerda DE BRUIJN

### General introduction / Introduction générale

Dutch archaeology has changed rapidly over the last ten years. In the early 1990s archaeological research and excavations were entirely a government affair. There was insufficient capacity to meet the demand for rescue archaeology. Archaeological values were barely taken into account in planning procedures, if at all. Things have changed since then. With the advent of the Convention for the Protection of the Archaeological Heritage (Valletta, 1992), much more attention is being paid to this field of heritage management.

Today essential assessment studies are almost always carried out in advance of disruptive spatial developments. In accordance with the Valletta Convention, developers are required to pay for any necessary excavations.

The other side of this development has been the introduction of a competitive market. A substantial proportion of assessments and excavations are now carried out by private enterprises. Remarkably, all this has been achieved without any major changes to Dutch law. The Valletta Convention has been implemented using existing legal procedures, with the Spatial Planning Act proving particularly useful in this respect.

A new law for the protection of the archaeological heritage is expected to come into force in 2007. The legislation will more or less be a codification of the practice that has grown up over the years.

### 1. Competences / Compétences

The *State Secretary for Culture* is competent for heritage protection, including the archaeological heritage. However, the Ministry is not solely competent, as the Dutch system is one of shared responsibilities. As a result, municipalities and regional authorities also have the option of regulating the protection of monuments and sites under local or provincial regulations. The *National Service for Archaeological Heritage*, known by the Dutch acronym ROB, manages the Nation's archaeological heritage on behalf of the State Secretary.

### 2. Protection regimes / Régimes de protection

The Monuments and Historic Buildings Act 1988 contains national regulations on the protection of monuments and sites. It provides for the listing of 'protected monuments' in an official register. The register includes both historic buildings and archaeological sites.

In terms of archaeology it also sets out:

- A prohibition on unauthorised excavations with the aim of collecting antiquities representing archaeological information, anywhere in the country. Authorisation can only be given to government or academic institutions;

- An obligation to report any fortuitous discovery;
- A prohibition on damaging or destroying protected monuments.

In addition to this, the municipalities and regional authorities may regulate the protection of monuments and sites under local or provincial regulations.

Spatial planning instruments at central, regional and local level also provide important instruments for protecting the cultural heritage.

Other legal instruments include environmental impact assessment, whereby the cultural environment is one of the objects screened, and legislation governing the exploitation of natural resources, which include the possibility of laying down instructions concerning archaeology.

### 3. Excavations / Fouilles

The Monuments and Historic Buildings Act 1988 prohibits activities involving excavation and intended to locate or examine monuments.

Excavations may not be undertaken without the written permission of the State Secretary for Culture. A permit can be issued to a government service, an institute of higher education or a municipality. In anticipation of an amendment to the Monuments and Historic Buildings Act 1988 (implementing the Valetta Convention), since 2002 commercial parties have also been able to obtain a permission to excavate. (This is referred to as the 'interim policy'.)

Permission to excavate can be granted for a limited period (generally two years) or indefinitely, and is subject to a number of conditions:

- An obligation to report the start and results of an excavation and to draw up a basic report;
- An obligation to preserve and deposit any discoveries;
- Under the interim policy, excavations must be undertaken in accordance with the standards of the archaeological profession (the Dutch Archaeological Quality Standard, or KNA). For example, a project scenario must be drawn up before the start of the excavation. The project outline states the research questions and objectives of the work to be carried out on the site and sets out the ensuing requirements.

Finally, a State Inspectorate for Archaeology has been created to monitor what goes on in practice (field inspections) and to report to the State Secretary when correction is needed.

### 4. Definitions / Définitions

The Monuments and Historic Buildings Act 1988 defines *monuments* as:

"1. All objects constructed at least fifty years ago which are of public interest in view of their beauty, academic significance or cultural and historic value."

*Archaeological monuments* are defined as:

"Sites which are of public interest in view of the presence of objects such as referred to at 1."

## 5. Inventories / Inventaires

The twelve Archaeological Monument Maps (AMKs) provide an overview of all known archaeological sites worth preserving in each province. The map is intended to be used as an instrument for the management and protection of archaeological information which has been preserved in the soil. The map can be used to take account of archaeological values in spatial planning decisions, for example in relation to earth removal, soil clean-up and residential developments.

Predictions of the presence of archaeological items are shown on the Indicative Map of Archaeological Values (IKAW). These predictions are made on the basis of the notion that, in the Netherlands, the potential for occupation was determined largely by the original landscape.

The IKAW is a complement to the Archaeological Monument Maps. It is continually updated in response to new insights and data. In the context of spatial planning, the IKAW can be used during the planning process to estimate the scale of any archaeological investigations and to formulate policy (local or otherwise) on the archaeological preservation and restoration of monuments and sites.

Although the AMK and IKAW have no direct legal consequences, an indication of archaeological monuments or values implies an obligation to take these monuments/values into consideration in the planning process.

The Archaeology Report 2002 reviews the state of archaeology in the Netherlands. It starts with an introductory examination of archaeology and the archaeological heritage, followed by an assessment of three themes which are important for the archaeological preservation and restoration of monuments and sites: the current situation, planned developments and the future. This report can be accessed via the ROB website, [www.archis.nl](http://www.archis.nl) (go to English content).

## 6. Protection procedure / Procédure de protection

The Monuments and Historic Buildings Act 1988 (sections 3-10) sets out the procedure for designating protected monuments.

The State Secretary for Culture can designate archaeological sites as protected monuments, either at the request of interested parties, or on his own initiative. The only archaeological sites which are legally protected under the Monuments and Historic Buildings Act 1988 are those deemed to be of major archaeological importance. The identification of sites worthy of such protection is based on an assessment using criteria such as intrinsic value, degree of preservation, rarity, visibility and aesthetic quality.

Before the State Secretary makes a decision, however, he consults the municipal council. If the monument is located outside a built-up area he must also consult the Provincial Executive.

All interested parties, such as landowners or the holders of any other rights to use the land, and the party applying for protected status, must be notified by letter of the proposed designation of the site. Their views on the designation must then be heard by the municipal council. The municipal council then produces a recommendation in which the views of these

interested parties are taken into account. This recommendation must be issued within five months. The Provincial Executive must issue its recommendation within four months.

Following the recommendation, the State Secretary asks the Cultural Council for advice and takes a final decision on designation of the site within ten months. If the site is awarded the status of protected monument, the State Secretary notifies the municipality, the Provincial Executive and the landowners, and the designation is made public. The decision can be appealed in court.

The monument is then entered in the national register of listed monuments which is maintained by the Netherlands Department for Conservation (RDMZ). The municipality is sent a copy of the registration.

The Monuments and Historic Buildings Act 1988 allows the State Secretary for Culture to temporarily halt a development to allow archaeological research. This power is very rarely used, however, as all the costs must be born by the State (section 49).

## 7. Legal consequences / Conséquences juridiques

Anyone who wishes to alter, demolish or move any part of a protected monument or a monument in a current procedure must apply for written permission.

This is stipulated in section 11 of the Monuments and Historic Buildings Act 1988, which states that:

- “1. It is prohibited to damage or destroy a protected monument.
2. It is prohibited, without written permission, or contrary to the conditions of a permit:
  - a. to demolish, disturb, move or in any way change a protected monument;
  - b. to restore, use or allow a protected monument to be used in such a way as to mar its appearance or to endanger it in any way.”

In practice, the National Service for Archaeological Heritage adheres to a policy whereby, depending on the characteristics of the archaeological monument and the daily use of the site, specified actions can be considered non-disturbing and exempt from the obligation to apply for a permit. One example might be the construction of a small garden shed.

## 8. Movable heritage / Patrimoine mobilier

Section 43 of the Monuments and Historic Buildings Act 1988 states that movable artefacts found during excavations for which no-one can prove title of ownership shall be the property of the State. However movable artefacts which have found by a municipality during legal excavations and for which no-one can prove title of ownership become the property of the municipality. The owner of the land on which the movable artefacts have been found is entitled to receive an amount equal to half the value of those artefacts from their owner. Legal claims in the matter of compensation can be brought before a civil court.

The Netherlands therefore has a system of state, provincial and municipal repositories. Most of the movable artefacts found during excavations are currently deposited in a provincial repository and ownership is transferred to the provincial authorities.

A bill is currently before Parliament to amend the Monuments and Historic Buildings Act 1988. Section 50 of the bill will replace the above-mentioned section, introducing significant changes in the matter of ownership. In general, nobody is able prove title of ownership. It is therefore regarded as fair that provincial authorities be designated the owner of movable artefacts found during excavations on its territory. In some situations municipalities will be able to acquire ownership, on condition that they have an archaeological repository recognized by the provincial authorities. The amendment will probably take effect in 2006.

As a last resort, the State will be entitled to ownership of movable artefacts found outside municipal boundaries and of movable artefacts which have been found during the underwater excavation of ships.

Section 52 of the bill states that the Minister of Education, Culture and Science may decide that a movable artefact can be placed in the custody of a museum. Any such decision must be taken by the Minister within six months of the notification of the completion of an excavation.

#### **9. Goods found by chance / Trouvailles fortuites**

Section 47 of the Monuments and Historic Buildings Act 1988 states that any person who finds anything that he may reasonably expect to be an artefact, other than during an excavation, must report the find within three days. The matter must be reported to the mayor of the municipality in which the find was made, or, if the find was made outside the boundary of a municipality, to the Minister of Education, Culture and Science. The mayor then immediately informs the Director of the National Service for Archaeological Heritage (ROB).

The rightful claimants to any such movable artefact are obliged to keep or make the monument available for scientific research for six months from the date of the report referred to in the previous section.

Section 13 of Book 5 of the Civil Code applies to the matter of ownership of such finds. It states that the finder and the owner of the land are equally entitled to the find.

#### **10. Financial support / Soutien financier**

##### Financing excavations

In accordance with the Valetta Convention, property developers are liable for the costs of any necessary archaeological work. As a result of this system developers are likely try and avoid excavations, thus achieving the government's aim of conservation in situ.

In cases where it is not possible to avoid disturbing the heritage and the costs of excavation are excessive, developers can apply for a contribution towards the costs from a State fund.

##### Financing maintenance measures

In the Netherlands a distinction is drawn between monuments registered by the state and those registered by local authorities. Among national (state-listed) monuments, there is a difference between archaeological sites and historic buildings. Measures for the consolidation, maintenance or restoration of archaeological sites/monuments are excluded from subsidy and do not benefit from tax provisions. The distinction between national and local monuments is

especially important in respect of the differences in legal protection and eligibility for subsidies. The maintenance of locally-listed monuments is a local affair.

Obviously, the ideal is to have a central (national) policy for the maintenance of archaeological sites. As in many other countries, archaeological monuments used for agricultural purposes are deteriorating particularly rapidly. Archaeological monuments which are situated in areas owned by other governmental organisations or nature conservation organisations are much better off. The National Service for Archaeological Heritage (ROB) has made long-term agreements with such these organisations regarding the maintenance of the archaeological heritage.

#### **11. Link with other legislations / Lien avec d'autres législations**

When an archaeological site is listed as a national monument, any activity that may disturb the soil requires a permit from the State Secretary for Culture. Such permits are not easily acquired. The policy is one of maintaining archaeological values in situ.

Archaeological sites which are not listed can be protected under the Spatial Planning Act. All municipalities must produce land use plans. In general terms, a land use plan consists of a map dividing the territory into different zones. Each zone may include areas designated for agriculture, housing, industry, water, recreation, nature etc. An accompanying document describes the current land use and the activities which may and may not take place in each zone. In addition, the document outlines activities requiring a permit.

Permits are granted by the municipal authorities. They can only grant a permit if the activity for which the application is made is consistent with the land use plan.

National and provincial authorities influence local land use plans, as they have the power to test them against their own policies. This includes archaeological considerations. If archaeological sites are known or expected within a given land use plan, this must be specified in the document. It is not enough, however, merely to enter the sites on the zoning scheme map. The national and provincial authorities also require that archaeological sites receive some sort of protection within the land use plan. This may take the form of:

- A restriction on certain activities and/or
- An obligation for archaeological research to take place before a permit is issued.

If the municipality fails to ensure that sites are protected, the land use plan will not be approved by the provincial authority. Provincial approval is necessary to give the land use plan legal status.

#### **12. International conventions / Conventions internationales**

Though the Kingdom of the Netherlands has signed the Council of Europe Convention on the Protection of the Archaeological Heritage (Valetta, 1992), it has not yet ratified it. Ratification will take place after the necessary changes to Dutch legislation have come into force.

A bill is currently before Parliament to amend the Monuments and Historic Buildings Act 1988. In essence, the bill regulates two matters:

- In planning procedures, the parties will be obliged to identify and take into account any archaeological values. Developers will be obliged to arrange any necessary excavations;
- Excavations can be contracted out within a competitive market. A quality control system is thus needed. Control of this system is in the hands of the National Archaeological Inspectorate (RIA).

The RIA is an independent body which reports directly to the State Secretary for Culture. Its main task is to ensure compliance with the provisions of the Monuments and Historic Buildings Act of 1988 pertaining to archaeological monuments, excavations and artefacts. The RIA was founded in November 2001 as a result of the introduction of a free market system, to implement the Malta Convention in Dutch legislation. The RIA is part of a newly created system of quality assurance. This system includes a privately organised part, another part governed by legislation (the new Monuments and Historic Buildings Act, excavation permits) and a supervisor. The privately organised part consists of a professional register, a certification system and a Quality Standard (KNA), which guarantees a basic standard for all archaeological work.

The RIA also has the task of inspecting the 1500 national archaeological monuments, though this is not its main priority.

### 13. Implementation and protection policy / Mise en pratique et politique de protection

#### Strengths of the Dutch system

- The integration of archaeology at all levels of government;
- The way archaeological values are integrated into planning procedures;
- The introduction of a quality control system which is inspected by the National Archaeological Inspectorate;
- The existence of a web-based central information system managed by the National Service for Archaeological Heritage (ROB);
- The money which is generated to carry out the necessary archaeological work (read: excavations).

#### Weaknesses of the Dutch system

- There is no proper policy (and no funding) for the maintenance of archaeological monuments and sites;
- The introduction of a competitive market system has put the quality of archaeological investigations under pressure.

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN PERU LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE AU PÉROU

*Alberto MARTORELL CARREÑO, ICLAFI Peru*

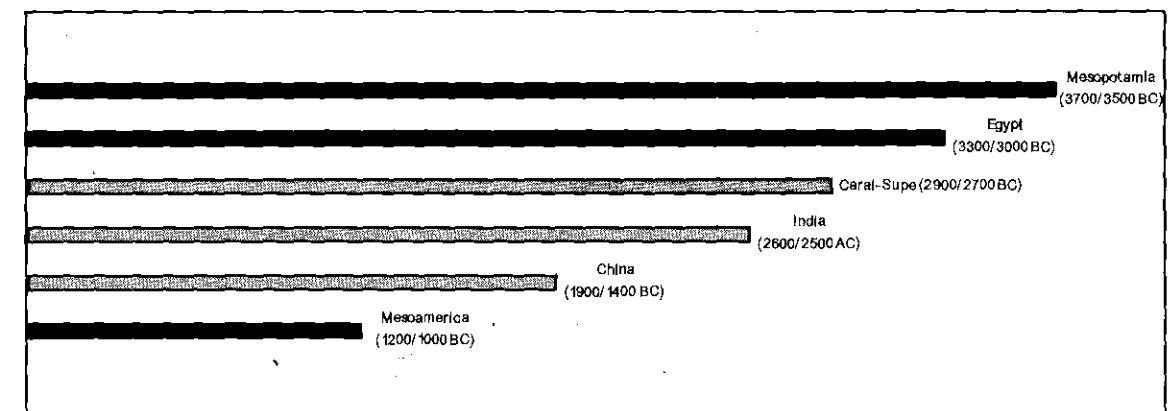
### General introduction / Introduction générale

Peru is one of the six territories where ancient societies developed conditions to change their life style so as to generate civilization, an organizational level of State and the creation of settlements so complex that they can be qualified as cities. Those territories are Mesopotamia, Egypt, India, Peru, China and Mesoamerica.

We will not discuss the origin of civilizations: we just make these references to understand both the meaning of 'archaeology' for the Peruvian identity, history and civilization, and the complexity of an effective protection of archaeological goods.

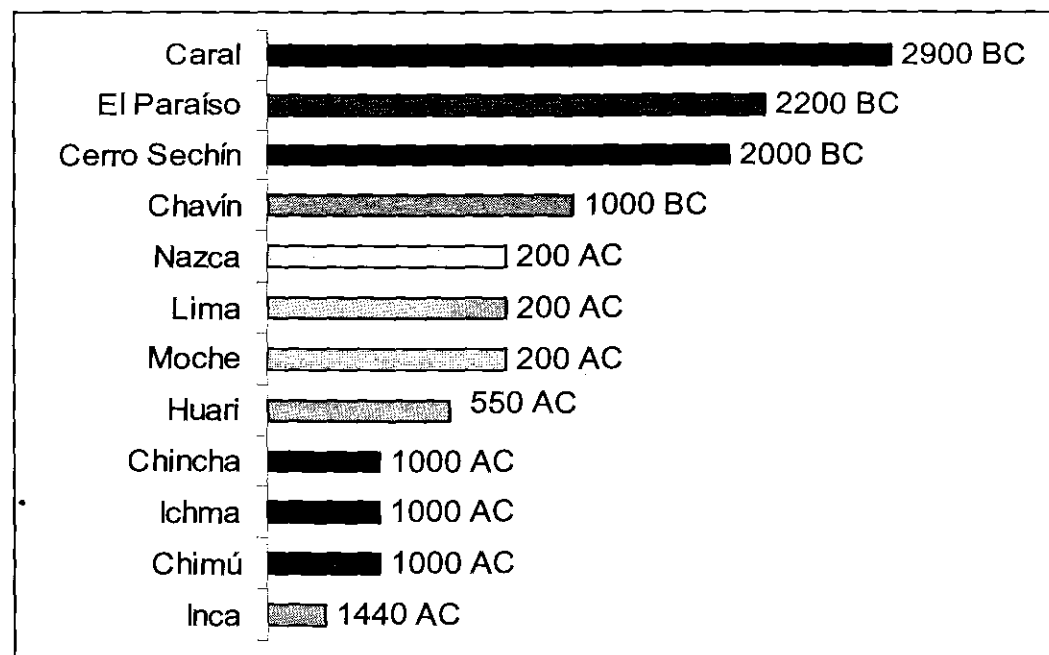
The best known period of Pre-Hispanic Peruvian history is that of the Incas Empire. Nevertheless, Peruvian history comprehends many other cultures that must be necessarily studied by archaeological techniques. In fact: the Incas period corresponds more or less to the last 100 years of history previous to the Spanish conquest. (i.e. more or less from 1400 to 1500 AC). However, scientific discoveries made by Project Caral - the most important archaeological project currently working in Peru - demonstrate that civilization history in Peru began more than 3,000 years before the Christian era.

The next comparative graphic gives us an idea of the importance of such antiquity in the world history:



*Source: Shady, 2004*

The next graphic contains a vision of the different civilizations developed in Peruvian territory. Taking into account that most of them have reached a high level of development, it is easy to understand the importance and extension of material remains existing in Peruvian territory.



Source: Shady, 2004

It is necessary to take into account not just the considerable quantity of cultures, as the graphic shows, but also its level of development. The Caral culture, the oldest one, had a very complex organizational system. It's not only the Peruvian most antique civilization; it's the oldest civilization on the American continent. Its capital city was the Sacred City of Caral, located 182 km north of Lima. Its core zone has 32 public structures and several residential complexes. The unearthed extension reaches 66 ha.

Just to give some other outstanding examples, we can make reference to the famous complex of Huaca Rajada, where was unearthed the tomb of the Lord of Sipan, considered the world most important archaeological discovery of the end of the 20th century. Among other famous Peruvian archaeological sites, we can quote the World Heritage Sites of the Lines and Hieroglyphs of Nasca and Pampas de Jumana; the Rio Abiseo National Park (with more than 36 archaeological sites uncovered); the city of Chan Chan, capital city of the Chimor Kingdom; the archaeological site of Chavin; and, of course, the Historical Sanctuary of Machu Picchu and the city of Cusco.

Nevertheless it is just a little part of the archaeological remains, most of them remain undiscovered. Archaeologists make reference to more than 100,000 archaeological sites. That considerable heritage (as we will explain in the answers to specific questions formulated by the organizers) is not well protected. Many factors affect in a very serious extension its preservation. One of the most important negative factors is archaeological looting. The international black market of works of art generates a permanent demand for archaeological goods. Therefore it is permanently promoting illegal activity. It implies the plundering of especially valuable objects, being the main consequence of the destruction of archaeological sites themselves and the impossibility of developing comprehensive researching works that would conduce as to understand the history of oldest Peruvian cultures.

The above referred problem should be a matter of reflection and work of ICLAFI as a group of professionals specialized on legal issues. In my opinion there is a necessity for developing programs facing jointly against illegal traffic and sites destruction in the cases they are part of

the same trouble. For example, it should be necessary to promote that ICOMOS and ICOM, as the two main international institutions working on cultural heritage, develop a joint program to fight not just against illegal traffic of cultural assets but against the destruction of many important archaeological and historical sites around the world. In fact, we have made reference just to the Peruvian case. Nevertheless, it must be taken into account that it is a problem affecting many other countries around the world. In general, those are the less developed countries in Latin America, Asia, Africa and East Europe.

### 1. Competences / Compétences

The institution in charge of protecting the Peruvian Heritage in general (including the movable and immovable heritage and the tangible and intangible heritage) is the *National Institute of Culture (INC)*. The organization and the functions of INC are established by the Supreme Decree 017-2003-ED. The Institute is both responsible for the promotion and development of cultural expressions and for cultural heritage researching, preservation, conservation, restoration, diffusion and promotion.

INC was created in 1971. It has been subject to many reforms and re-organization processes because of its lack of institutional capacity to fulfil its functions. From 1971 to our days the situation of Peruvian heritage has not really improved. INC's last re-organization was approved by the above quoted Supreme Decree 017-2003-ED. It is chaired by a National Director. Reporting directly to the National Direction there are two general directions: the Direction of Management and the General Direction for Cultural Promotion and Diffusion.

The Direction of Management constitutes practically a parallel first level of general authority, duplicating real functions of the National Director. It makes that the current organization of INC is not clear enough.

The Direction of Management is divided into six directions. Three of them are related to cultural heritage. Those are the Direction of Cultural Heritage Record and Study, the Direction of Heritage Defence, and the Direction of Museums and Heritage Management. Another direction that should be mentioned is the Direction of Heritage of the Humanity.<sup>73 74</sup>

The specific organs in charge of functions related to the preservation of archaeological goods are:

- *Direction of Archaeology*: responsible for identifying, registering and studying the immovable archaeological heritage. Its main duties are: to elaborate and approve the annual archaeological plan; to propose and design the general policy of researching; to promote conservation of immovable archaeological heritage; to coordinate related activities in the entire country.

This direction is divided into three sub-directions:

- Sub-Direction of research and registry;
- Sub-Direction of supervision and expertise evaluations;
- Sub-Direction of immovable archaeological heritage conservation and heritage.

<sup>73</sup> From the administrative theory point of view, there is an organizational problem. It is clear that the third level corresponds to 'sub-directions'. But even in the fourth level the officer in charge is identified as Director.

<sup>74</sup> It is necessary to make a precision: technically, the right title of the Direction should be 'Direction of Peruvian World Heritage Sites'. The expression 'Heritage of Humanity' is not considered adequate when talking of sites inscribed on the World Heritage List.



- *Direction of Heritage Defence*: in charge of coordinating the measures to protect, defend, recover and repatriate (movable and immovable) cultural goods. It includes not just archaeological, but also historical and artistic goods. Another function of the Direction of Heritage Defence is related to the increasing public awareness. It is also responsible for defining and carrying on policy to fight against the illegal traffic of cultural assets.

This direction is divided into three sub-directions:

- o Sub-Direction of cadastral register and recovery;
  - o Sub-Direction of citizen participation;
  - o Sub-Direction of legal defence of the cultural heritage.
- *Direction of Museums and Heritage Management*: in charge of the general management of the movable heritage, including the archaeological movable heritage. Its main goal is the conservation and the management of cultural goods belonging to the national museums. It also coordinates actions with private museums and collectors and provides measures to promote its participation in preservationist works. The Direction of Museums and heritage management is in charge of the National Register of Movable Assets. The Register has been created by Law 28296 (dating from 22 July 2004). The system established by this Law is not clear enough and maintains one of the first problems of Peruvian heritage.<sup>75</sup>
  - *Direction of Heritage of Humanity*. As we mentioned in the general introduction to this document, Peruvian World Heritage includes important archaeological sites. The accomplishment of international compromises assumed by Peru as a Member State of all international conventions related to archaeological goods is assumed by this direction.

## 2. Protection regimes / Régimes de protection

There is a specific legal regime for the protection of archaeological heritage. It is part of the general regime for the protection of the 'Cultural Heritage of the Nation'. The current system has been established by Law 28296, promulgated on 22 July 2004. It declares of social

<sup>75</sup> Law 28296 establishes a recording system that in our point of view is harmful to the value of conservation. It creates public records under the auspices of the National Institute of Culture, the National Library and the National Archive. Public authorities shall inscribe on them cultural goods declared as cultural heritage of the nation. Nevertheless, it does not establish the obligation of private individuals to register artefacts under their possession within a fixed term. By this way, it promotes a progressive and permanent registration system for new acquisitions made by private persons. The obligation to inscribe goods is only established in two cases. First, in the case of goods belonging to collections legally recognized. The owner of those collections shall inscribe goods that are part of it. The second case is the obligation to inscribe newly acquired cultural goods. Those who request registration are required to prove their rights over the artefacts in their possession. The law establishes a presumption of illegal origin of the good, and if the requester does not prove his/her title, property rights will be assumed by the State.

Being realistic, difficulties to prove the legal origin have as a consequence that the 'presumption of illegal origin' is not really applicable. Those affirming to have property rights are able to claim judicially its recognition. Proving the legal origin of the artefacts is very difficult and there is not a clear rule on the means of proof. INC will surely be compelled to accept registration and recognize rights in any case.

Article 49.1. of the Law establishes an economical penalization to the owner or possessor that doesn't comply with the inscription obligation. However, possible economical penalties are not a guarantee taking into account the benefices that the illegal commercialization of cultural assets usually generates.

interest and public necessity the identification, register, inventory, declaration, protection, restoration, researching, conservation, valorisation, diffusion, and recovery of the Cultural Heritage of the Nation.

The Criminal Code contains a chapter penalizing crime actions against cultural heritage. It penalizes unauthorized archaeological excavations, the destruction, alteration and illegal traffic of archaeological heritage assets.

Law 28296 applies to Peruvian heritage in general. Archaeological monuments, archaeological landscapes and other types of goods are considered in the Supreme Decree 004-2000-ED, containing the 'Rules for archaeological researching'.

## 3. Excavations / Fouilles

Archaeological scientific researching is regulated by the Supreme Decree 004-2000-ED. Article 5 of that Decree declares that archaeological researching works are considered of social and scientific interest in Peru. INC is in charge of regulating and promoting it.

According to article 6 of the Decree, there are three classes of archaeological works:

- Projects of archaeological researching: motivated by scientific interest;
- Projects of archaeological evaluation: to evaluate the situation of archaeological remains that should be affected by public or private works, or natural events;
- Emergency projects: by necessity due to human or natural unexpected events.

To realize archaeological works in Peru, it is necessary to be inscribed on the National Register of Archaeologists. To be inscribed on the Register it is necessary to have the professional title of Archaeologist or an equivalent.

Archaeological researching works can be realized on the initiative of juridical or natural persons, nationals or foreigners. The requestor has to ask INC for authorization. He/she shall present:

- The archaeological project, specifying the goals and objectives, the planning of field and laboratory researching works to be done, the operative methodology and technical guidelines to be applied, the material and economic resources and the measures for the diffusion of the results;
- A curriculum vitae and the registration number on the National Register of Archaeologists;
- In the case of foreign researchers, the embassy of the country of origin shall officially present the candidate.

Archaeological evaluation works can be realized exclusively by specialized Peruvian institutions or individual Peruvian archaeologists. It shall be directed by an archaeologist inscribed in the National Register of Archaeologists. Authorization or denegation is made by Resolution of INC National Direction, in consult with the National Technical Commission on Archaeology. This Commission is an adviser entity of INC. Archaeological works are supervised by INC. He/she shall present:

- The archaeological evaluation project, specifying the goals and objectives, the planning of field and laboratory researching works to be done, the operative methodology and technical guidelines to be applied and the material and economic resources;

- A curriculum vitae and registration number on the National Register of Archaeologists.

Juridical persons have to be scientific institutions, integrated by specialists in archaeology (and other sciences, if necessary). Archaeological projects realized by foreign researchers have to be co-directed by a highly qualified Peruvian archaeologist.

#### 4. Definitions / Définitions

Cultural heritage in Peru is defined by Law 28296 in the article ii of its Preliminary Title. Cultural heritage of the Nation is a category integrated by goods expressly declared. Can be declared as belonging to the *Cultural Heritage of the Nation*:

“Any manifestation of human activity – material or immaterial – as to its paleontological, archaeological, architectural, historical, artistic, military, social, anthropological, traditional, religious, ethnological, scientific, technological or intellectual importance, value and meaning.”

Article iii of the Preliminary Title establishes the presumption that any good that meets those criteria, is effectively part of the Cultural Heritage of the Nation. This presumption implies the application of the entire protection system and applies unless INC provides a declaration specifying that a good does not belong to the protected category.

Article 2 of Title I of Law 28296 divides the goods belonging to the Cultural Heritage of the Nation into two categories:

- **Immovable goods:** This category includes buildings, infrastructural works, environments, monumental complexes, historical centres and any other construction or evidence of human living and activity in urban or rural areas. Its protection includes landscape environment and underwater areas.
- **Movable goods:** The legal text includes a very detailed enumeration of classes of movable goods that belong to the Cultural Heritage of the Nation. On archaeological and related issues, it comprises:
  - o All goods resulting of archaeological discoveries.
  - o Items separated from artistic or historical goods and archaeological sites.
  - o Underwater cultural goods in Peruvian territory.
  - o Goods related to the history or to the life of significant personalities.

The enumeration includes artistic items, religious items, and other classes of goods like those of bibliographical or documentary interest.

*Archaeological heritage* in Peru is defined by Article 1 of the Supreme Decree 004-2000-ED. It includes the following categories:

- *Pre-Hispanic archaeological monuments:* All remains of human activity dating from the Pre-Hispanic period, being it superficial, buried or underwater remains. Pre-Hispanic heritage is classified in the next categories:
  - o Monumental archaeological zones: those implying its physical and environmental preservation in relation to its urban integral value, or its special documental value, or by the monuments or complexes contained by it;
  - o Archaeological sites: all sites containing evidences of human activities, above the ground or buried;
  - o Zones of archaeological reserve: zones to be preserved in view of the possible application of future archaeological techniques;

- o Individual archaeological items: sites containing isolated archaeological evidences;
  - o Archaeological landscapes: areas resulting of the work of man or the combined work of man and nature, with special importance as to its archaeological, historic, esthetical, ethnographical or anthropological values.
- *Historical monuments*, dating from colonial or republican periods.

#### 5. Inventories / Inventaires

Inventories of cultural goods in Peru are neither complete nor well documented. The huge quantity of immovable and movable heritage goods is one of the explanations for this situation. Nevertheless, it should be said that the main reason is economical. To carry on complete and careful inventories is very expensive for a country facing economical basic necessities.

Article 14 of Law 28296 establishes as a general obligation of INC to take forward the inventory of goods belonging to the Cultural Heritage of the Nation.

Article 15 of this legislative text creates the Computerized National Register of Goods belonging to the Cultural Heritage of the Nation. Its goal is to organize a general system of preservation, centralizing the information of data concerning such goods for its identification and register.

Article 16 establishes the registers forming part of the said National Register. The three registers of interest from the archaeological point of view are:

- National Register of Immovable heritage property. All immovable properties belonging to the Cultural Heritage of the Nation shall be registered on it, independently if they are under public or private property system;
- National Register of Movable Goods belonging to the Cultural Heritage of the Nation;
- National Register of Public and Private Museums.

Event though it is not directly related to archaeological goods, it results interesting to mention the National Register of Natural or Juridical persons dedicated to the commercialization of cultural goods. Controlling the commercialization of cultural goods is a way to control the illicit traffic of protected heritage goods.

Law 28296 has been criticized by archaeologists and other conservationist professionals for its tendency to recognize private property rights on archaeological goods. In our opinion, Law 28296 is not clear enough in the defence of public rights on the so-called ‘Cultural Heritage of the Nation’.

When a good is declared a part of the Cultural Heritage of the Nation, it has to be inscribed immediately. INC opens a file and provides a Certificate of Register. When the good is under private property, the certificate will grant the proprietary the legal benefices established by law.

The main consequence of the registration of cultural goods is the full application of the legal protection system established by Law 28296 and the related legal texts. The system is explained in different items of this document.

In addition, Law 27721 (14 May 2000) declares of public interest and national necessity the inventory, creation of cadastral register, researching, conservation, protection and diffusion of archaeological heritage.

## **6. Protection procedure / Procédure de protection**

Law 28296 defines a general and extensive concept of cultural heritage of the Nation. Like the former Law 24047, it specifies that the condition of cultural heritage will be expressly declared. 'Cultural goods' not declared are protected by the presumption that they belong to the Cultural Heritage of the Nation. Notwithstanding, it does not establish clearly the criteria to enforce the presumption or to revoke it.

Declaration or, in its case, presumption, implies the application of the protection system. INC is responsible for the declaration and control of archaeological movable and immovable goods and its conservation. Goods belonging to the Cultural Heritage of the Nation are protected by the State and under the legislative protection system.

The main characteristics of the system are the following.

### The property system (article 6.1. Law 28296)

All immovable heritage properties of pre-Hispanic origin, discovered or not, are property of the State. Nevertheless, when pre-Hispanic goods stay over a private terrain, private propriety rights will be respected. In all cases, management of the immovable heritage goods is made by the State.

Notwithstanding, there is a contradiction in the legal text. In effect, Article 5 of the same Law 28296 declares that private property rights already recognized before of its promulgation continue being valid.

Private ownership rights over immovable pre-Hispanic goods comprising a unique property with new buildings attached to them are recognized. This disposal is easy to understand in cases like those in Cusco, where most of colonial buildings were built over Inca's walls and buildings. We are not just talking of churches like Santo Domingo (constructed over the Koricancha or 'Temple of the Sun'). It was also the situation of many of the Spanish founders' houses. In those cases it is clear that, from the beginning, those buildings have been private, and it is necessary to recognize acquired rights over them. However, this possibility must be strictly limited to such kind of 'historical private rights'. If it is not clearly limited, it could comprise "any new work made over archaeological remains", generating that valuable cultural objects would be lost to the heritage.

In all cases, the owners of real property where an archaeological good is situated are obligated to inscribe it and to take measures for its conservation.

Immovable heritage goods from periods different to the pre-Hispanic one can be under the public or the private property regime. The owner of such classes of goods shall fulfil the disposals of Law 28296.

The transfer of property rights is allowed within the Peruvian territory. Nevertheless, transactions shall be reported to INC. The State has a preferential right to buy the property.

Article 11 of Law 28296 declares of public necessity the expropriation of goods in danger of destruction or in bad conservation conditions. It also declares the public necessity of expropriation of real estate containing archaeological goods, in the extension necessary for its conservation and management.

### Protective measures for the immovable heritage (Article 22 Law 28296)

- New constructions, remodeling works, restorations, enlargement works, conditioning works, demolitions and any other work to be made in immovable goods that affect cultural heritage goods must be previously authorized by INC. Building permits served without such initial condition are null and void;
- INC is legally empowered to restrain illegal works and to order the demolition of them. Costs are to be paid by the one responsible for the works;
- If it is proved that illegal works have generated damages or caused the destruction of protected cultural goods, INC shall issue a complaint to the responsible for committing that criminal offence of Law.

### Coordination of the protective measures with other authorities

- Regional and Local Governments have the obligation to facilitate and co-operate with INC in scientific researching, restoration and conservation projects;
- Local Governments shall provide the necessary administrative measures to guarantee protection, conservation and diffusion of the values of protected cultural goods;
- Local authorities shall create plans and programs to protect, preserve and diffuse the values of the protected cultural goods in their respective jurisdictions;
- By-Laws, resolutions and agreements related to protected cultural goods require the previous mandatory favorable opinion of INC.

### Relocation of illegal invaders of real estate containing pre-Hispanic cultural goods

INC shall coordinate with the corresponding authorities the relocation of squatters affecting immovable goods containing pre-Hispanic cultural goods.

### Concessions

Previous authorization of INC for concessions to be made over land or aquatic areas containing protected heritage goods is mandatory. Violation of this disposal makes the process null and void.

### Administrative sanctions

Article 49 of Law 28296 establishes a number of administrative sanctions that apply to the responsible of committing offenses against legal protective measures:

- Fine by omission of registering Cultural Heritage of the Nation goods in the corresponding Registry;
- Fine, seizure or forfeit of cultural protected goods suffering damage because a negligent behavior of the proprietary;
- Fine, seizure or forfeit of movable protected cultural heritage by tentative of illegal exportation;

- Fine by promoting or realizing unauthorized archaeological excavations;
- Fine to the responsible to cause damage to protected cultural goods.

### **7. Legal consequences / Conséquences juridiques**

Some of the issues contained in this question have already been analyzed in the answer to question 6.

Article 20 of Law 28296 establishes restrictions to be applied to property rights on protected cultural goods:

- Prohibition of dividing accessory goods integrating a unique cultural movable or immovable protected heritage good;
- Prohibition to affect, rebuilt, modify or to restore totally or partially movable or immovable protected cultural goods without the previous mandatory authorization of INC.

Article 21 of Law 28296 establishes that private property rights over cultural goods belonging to the Cultural Heritage of the Nation are limited by public interest reasons. The main limitations are:

- To facilitate the inspection of the state of conservation of the good to INC officials;
- To facilitate access to researchers accredited and authorized by INC;
- To facilitate all necessary documentation (i.e. historical documentation, titles and others) for scientific research;
- To permit restoration, reconstruction or revalorization of movable or immovable goods if necessary for its conservation.

It is necessary to add a system of public access, under clearly limited conditions. It should apply at least in the cases of the most important cultural goods under the private property regime. In the opposite case, it does not make sense to declare a good as 'Cultural Heritage of the Nation'. There has to be a way to permit that citizens enjoy its heritage.

### **8. Movable heritage / Patrimoine mobilier**

Article 60 of the Supreme Decree 004-2000-ED disposes that all the material goods obtained as result of archaeological works realized during an archaeological project shall be transferred by the responsible of the project to the museum or institution previously indicated by INC. An accession-list by triplicate will be served. It must be taken into account that all the archaeological goods discovered as a result of archaeological works are under the public property system.

### **9. Goods found by chance / Trouvailles fortuites**

Article 18 of Law 28296 establishes that any fortuitous discoverer of cultural goods belonging to the Cultural Heritage of the Nation or protected by the presumption of belonging to it shall be immediately reported to INC. INC shall take necessary measures to guarantee its preservation.

Being protected by the presumption of belonging to the Cultural Heritage of the Nation, those goods discovered fortuitously are protected by the legal regimen applicable to such category of goods. Protection shall fully apply unless INC declares that the goods affected do not fulfil

the requirements to be qualified as Cultural Heritage of the Nation. In those cases INC will serve a negative certification.

### **10. Financial support / Soutien financier**

Theoretically, INC is responsible for financing heritage conservation applying its annual budget. The economical reality in Peru is quite different. Normally public grants are not enough to cover neither the basic administrative necessities of INC, nor the necessary works to protect Peruvian heritage. Even World Heritage Sites are not duly protected.

Most of the tax incentives to promote heritage preservation have been derogated in 1996. Law 28296 establishes tax incentives only in the case of local taxes.

- Taxes on real property are not applicable to immovable protected cultural goods previously declared as belonging to the Cultural Heritage of the Nation;
- Taxes on transfers of property are not applicable to transfers of cultural protected goods made by public institutions in favour of INC.

Nowadays it is under debate a government bill to re-establish a most complete system of tax incentives. Hopefully it will be approved.

### **11. Link with other legislations / Lien avec d'autres législations**

Any kind of concession that should affect land or aquatic areas containing protected cultural goods shall be previously approved by INC. It includes authorization of urban projects, mining projects, agricultural projects and any other kind of activity that should affect archaeological sites.

### **12. International conventions / Conventions internationales**

Peru is a Member State of all the international conventions on cultural heritage protection promoted by UNESCO, OAS and UNIDROIT.

Law 28296 makes express reference to the International Conventions as texts of legal value to be applied in Peruvian heritage preservation.

### **13. Implementation and protection policy / Mise en pratique et politique de protection**

Preservation of cultural heritage in Peru is continuously facing many serious troubles. Law 28296 represents a positive step for the Peruvian heritage conservation. Nevertheless it contains serious lacks and contradictions that archaeologists and other specialist have denounced as the result of the influence of collectors. As no clear period of time has been established for registrations made by private possessors of cultural goods, illegal excavation continues without control. That doesn't mean that limiting registration is the ideal solution. But it surely is a basic measure to fight against it.

Another issue seriously damaging archaeological sites is the illegal occupation of lands. Even being illegal, in real terms many invasions are to be tacitly approved by authorities because they do not take any corrective measure.

In general terms, it is not possible to affirm that Peru counts with a policy designed to protect cultural heritage goods. Heritage is not understood as a development factor. Despite of the positive efforts made by the current administration of INC, that is necessary to recognize, even the most important and famous place, Machu Picchu, is victim of its own success as a tourist attraction. Archaeological goods are to be assumed as a resource for authentic development, especially because of its location along all the national territory. It is a way of promoting local development in specially isolated and poor areas.

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN POLAND LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN POLOGNE

Wojciech KOWALSKI, ICLAFI Poland

### 1. Competences / Compétences

According to article 89 of the 2003 Law on the Protection and Care of Monuments there is one unilateral state service responsible for the protection of cultural heritage as a whole, including movable and immovable archaeological heritage. Its competence covers also underwater archaeological heritage. There are two basic levels of these authorities, the first is the *Minister of Culture and National Heritage* (in his name acts his deputy as General Conservator of Monuments), the second level is the *Regional Conservator of Monuments*. Regional conservators have their special deputies responsible only for archaeological heritage.

### 2. Protection regimes / Régimes de protection

There is no special regime for the protection of archaeological heritage in Poland. Only in the case of underwater heritage we could talk about different legal instruments due to the specific character of this heritage.

### 3. Excavations / Fouilles

Excavations are controlled by regional conservators of monuments. Such activities should be authorised by them. Permission is obtainable after several requirements have been met, e.g. the staff is properly qualified, they have to produce a full programme of excavations, guarantees for finance, etc.

### 4. Definitions / Définitions

Section 4 of article 3 of the 2003 Law provides a definition of an archaeological monument:

“An immovable monument, located on land, underground or underwater, which is a remain of human existence and activity, consisting of cultural levels, and all objects or their traces situated in them, as well as a movable monument, which is this object.”

### 5. Inventories / Inventaires

There are two registers of archaeological monuments. The first one covers all archaeological settlements (sites), even not yet searched at all. Registration of sites in this register does not involve legal consequences; its aim is only to give information. Currently it contains circa 400,000 items. The second register is called inventory of archaeological monuments, it contains currently 7,390 immovable monuments. Registration in this inventory has full legal consequences. Movable archaeological objects are normally registered in inventories of museums or other scientific institutions.

### 6. Protection procedure / Procédure de protection

### 7. Legal consequences / Conséquences juridiques

## 8. Movable heritage / Patrimoine mobilier

Articles 32 and following of the 2003 Law make a difference between finds and discoveries, which are incidental, and objects discovered in the course of archaeological excavations. All archaeological monuments are property of the State Treasury (art. 35). After being reported on particular find or discovery, the regional conservator of monuments is to decide which museum will get this object to its collections.

## 9. Goods found by chance / Trouvailles fortuites

In all cases, finders or discoverers are obliged to report their respective finds or discoveries to regional conservators of monuments or other official authorities. Depending on the situation they are also obliged to undertake proper further steps, e.g. to stop works that can be dangerous to other archaeological objects that can be excavated. Incidental finders or discoverers may be given a reward if they obeyed these requirements.

## 10. Financial support / Soutien financier

All these projects can be supported by public authorities.

## 11. Link with other legislations / Lien avec d'autres législations

The fact that an archaeological monument is given legal protection has its consequences in other fields of legislation, for example on space planning. Projects of all space plans are to be consulted with regional conservators of monuments.

## 12. International conventions / Conventions internationales

Poland is a party to the La Valetta European Archaeological Convention.

## 13. Implementation and protection policy / Mise en pratique et politique de protection

# THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN ROMANIA LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN ROUMANIE

*Sergiu NISTOR, ICLAFI Romania*

## 1. Competences / Compétences

The responsible authority in charge with the protection of the cultural heritage is the *Ministry of Culture and Religious Affairs (MoC&C)*.

In respect to the protection of the archaeological heritage, the MoC&C established a professional body - the *National Commission for Archaeology (NCA)*, composed of 21 members - and a central administrative structure - the *Archaeological Service*, composed of 3 specialists - establishing as well in the 42 County Directorates for Culture, National Heritage and Religious Affairs 1 or 2 positions in the scheme for local specialists in archaeology.

No special distinction is made between the movable and immovable archaeological heritage in respect to both the professional bodies and the administrative services.

## 2. Protection regimes / Régimes de protection

There is a special protection regime for the archaeological heritage, established by Governmental Ordinance 43/2000<sup>76</sup> (GO 43/2000), even though the protection of architectural monuments and the protection of the movable artefacts overlaps the provisions of the protection of the archaeological heritage.

There is a consistent possibility to have an archaeological site protected partly as a historical monument, being the beneficiary of an archaeological protection for its unfinished scientific research and also having some of the discovered artefacts protected as movable heritage.

## 3. Excavations / Fouilles

Excavations are controlled by the MoC&C both in respect to the qualification of the personnel and in respect to the programming and organization of the work. A permit is issued by the National Commission for Archaeology in order to start the excavation. The responsible of the archaeological research is also responsible for the indemnity (if any) to be paid to the owner.

## 4. Definitions / Définitions

Article 2 of GO 43/2000 provides a definition of the *archaeological heritage*:

“Archaeological heritage signifies the assemblage of archaeological assets made up of:  
1. the archaeological sites classified in the List comprising the over ground, underground or underwater historic monuments containing archaeological vestiges, such as: structures, constructions, groups of buildings as well as the lands with located archaeological potential, declared according to the law;

<sup>76</sup> Governmental Ordinance 43-2000 regarding the archaeological heritage protection and the declaration of archaeological sites as areas of national interest, approved with changes and completions by the Law n° 378/2001.

2. the movable assets, objects or traces of human activities, together with the lands where they were uncovered.”

## 5. Inventories / Inventaires

According to article 2 of GO 43/2000, there are several types of registered archaeological areas which lead to a certain form of protection (temporary or permanent):

- *An area of known and researched archaeological heritage:* the land where as a result of archaeological research, archaeological heritage assets were found;
- *An archaeological site declared an area of national interest:* the area of priority archaeological interest established over the territory of the territorial administrative unit comprising those archaeological sites whose scientific research, protection and presentation is of exceptional importance for the national history and culture by the material evidence, movable or immovable assets, that are part of or proposed for belonging to the category of ‘Treasure of movable national cultural heritage’ or, respectively, are part of or proposed for being included in the category of historical monuments on the World Heritage List.
- *An area of located archaeological heritage:* the land delimited according to the law, where archaeological researches are to be conducted on the basis of the information or scientific studies attesting the underground or underwater existence of archaeological heritage assets, likely to belong to the national cultural heritage.

Until the conclusion of the archaeological research, the taking of adequate protection measures, and the presentation of the archaeological finds, the archaeological or historic sites protection areas established according to the law are at the same time areas of located archaeological potential;

- *An area of archaeological potential uncovered by chance:* the land delimited according to the law, where the existence of archaeological heritage assets are uncovered by chance, as a result of human activities, other than the archaeological research, such as: construction works, geological survey works, including remote detection, agricultural works, as well as other underground or underwater researches; The area of archaeological heritage uncovered by chance is delimited around the place of the chance archaeological find, over the entire land ensuring the protection necessary for the archaeological research.

## 6. Protection procedure / Procédure de protection

Article 4 (1) of GO 43/2000 states the following:

“The archaeological heritage assets can belong to the national cultural heritage, and can be classified and protected as movable national cultural heritage properties or as historic monuments, according to the law.”

Basically this means that the definitive protection of the archaeological finds is granted through the protection of either historical monuments or movable heritage.

The protection of the archaeological heritage assets and lands signifies taking those scientific, managing and technical measures likely to preserve the vestiges uncovered by chance or as a result of archaeological research until the classifying of those assets or until the conclusion of the archaeological research, by establishing obligations for the owners, managers or holders of other real rights over the lands that hold or held those archaeological heritage assets, as well as by controlling or forbidding human activities, including those previously authorized.

- The archaeological perimeters enjoy temporary protection until decision is made upon either their status as protected movables or monuments, or after scientific research is completed, being discharged of the archaeological burden. The procedure of investigation, listing or discharge is regulated and monitored by the MoC&C and professionally conducted by the NAC;
- The discoveries of archaeological vestiges or movable assets belonging to the movable national cultural heritage category, realized as a result of archaeological researches, are notified to the holder of the research authorization from the decentralized public services of the Ministry of Culture and Religious Affairs, in accordance with the archaeological excavations regulations;
- The finder or the owner/manager of the land where the chance archaeological find occurred is obliged to notify the occurrence to the town mayor, 72 hours from the uncovering;
- The discharge of archaeological burden of an area is certified by a certificate issued by the Ministry of Culture and Religious Affairs, following consultation from the National Archaeology Commission;
- The areas of located archaeological heritage delimited and established according to the law, benefit from the protection ensured to the protected areas, as well as from the specific protection measures laid down in the present ordinance;
- When areas of archaeological heritage uncovered by chance are introduced, from the time of the uncovering of archaeological assets, in order to study and research the protection regulations, on a temporary basis, over a period no longer than 12 months, the protection policies for the archaeological assets and archaeological potential areas;
- The physical and juridical persons holding and/or trading metal detectors are obliged to obtain first the authorization of the police inspectorate of the county in question, of the General Police Division of the city of Bucharest, on whose territory they live or, if the case, are located, in order to be registered by these authorities;
- The use of metal detectors in archaeological sites, in the areas of priority archaeological interest and in the areas of located archaeological heritage, is allowed only on the basis of an authorization already issued by the Ministry of Culture and Religious Affairs;
- Until the discharge of archaeological burden the land under research is protected as archaeological site, according to the law;
- The construction or removal works performed in the areas of located archaeological heritage are authorized only on the basis of and in accordance with the authorization from the Ministry of Culture and Religious Affairs;
- In the case of areas of archaeological heritage uncovered by chance, until the discharge of archaeological burden, the building permit is cancelled, or, where applicable, the town mayor orders the interruption of all activity, in accordance with the authorization from the decentralized public services of the Ministry of Culture and Religious Affairs and the archaeological surveillance and excavation regulations come into force;
- The National Office for Cadastre, Survey and Mapping, the subordinated offices, and, where applicable, the offices for agricultural cadastre and the agricultural land organization have the obligation to include the areas of located archaeological heritage, on the basis of a list comprising the located archaeological heritage areas, in the cadastre plans and topographical maps;
- The areas of located archaeological heritage are also included in the relevant cadastre of the natural and artificial protected areas.

## **7. Legal consequences / Conséquences juridiques**

If an archaeological good is protected as a historical monument, the consequences are the same as for an architectural structure protected as such: any person intending to carry out works inside or in the vicinity of the site is obliged to ask and receive a permit from the central or the local services of the MoC&C. The owner of such an archaeological site is exempted from the local building and land tax and can receive funding for the conservation work to be carried out on the site. The owner of the land where archaeological research is carried out, is entitled to indemnities in respect to the farming revenue not obtained on the particular land. The archaeologist has the obligation to restore the state of the land after the completion of the excavations.

If the archaeological good is a movable, the owner of the land where that artefact was discovered has to announce the mayor within 72 hours and hand out the artefact discovered to the local authority of the MoC&C within 3 days, so proper investigations can start. If the archaeological goods are listed in the National Cultural Heritage, the owner of the land where the object was discovered is entitled to receive a price of up to 45/100 of the market value of the item.

## **8. Movable heritage / Patrimoine mobilier**

Movables discovered during excavation are subject to a listing procedure in order to assess whether there are reasons to list them in the National Cultural Heritage. All items discovered through excavations are public property and are administrated by either the museum or the public entity that financed the excavation or, in cases where these entities fail to provide proper conservation environment for the artefacts, by the county museums. The National Commission for Museums and Collection decides in these cases.

## **9. Goods found by chance / Trouvailles fortuites**

Movables discovered by chance are regulated both by GO 43/2000 and Law 182/2000 on the National Cultural Heritage. Contradictions are to be seen between the delays considered by these two laws: discovered through excavations, the movables are to be announced to the local mayor and handed over to the local services of the MoC&C within 72 hours (GO 43/2000), whereas Law 182/2000 specifies the delays as such: 48 hours to announce the local mayor, 48 hours to announce the local services of the MoC&C and 10 days until the hand out.

Both GO 43/2000 and Law 182/2000 consider the discoveries belonging to the public property. Law 182/2000 provides a delay of 18 months for a price of up to 45/100 of the value of the good to be paid to the person who discovered the artefact. The value is to be estimated by experts and funds, the price to be paid is provided by the local county museum or the museum who received the artefact.

## **10. Financial support / Soutien financier**

Excavations performed by public entities are financed through State subsidies (200,000 euros/year, including the funds for first stage conservation on site). Restoration and consolidation are subject to financing through the National Restoration Program, mainly

established by the National Historic Monuments Commission (some 200,000 euros per archaeological conservation / year).

The restoration of movables of archaeological origin listed in the National Cultural Heritage is subject to subsidies as for any other movable in this category.

Tax incentives do not apply for the archaeological research. Sponsoring archaeological excavation is nevertheless subject to tax deduction as any other sponsoring.

## **11. Link with other legislations / Lien avec d'autres législations**

If a certain area is designated as an area of located archaeological heritage, the area benefits from the protection ensured to the protected areas throughout the urban and territorial planning procedures. Some 5,600 sites are registered in the National Archaeological Register, comprising the locations where archaeological research was carried out and discoveries were made.

As there are six archaeological sites listed in the UNESCO World Heritage List, some provisions of the 1972 UNESCO World Heritage Convention also apply. Since 2000, Romania has passed a Governmental Ordinance (GO 47/2000) providing special protection to the monuments on the World Heritage List.

## **12. International conventions / Conventions internationales**

Romania has ratified both the London 1969 and the La Valletta 1992 revised Convention (1994). The ratifying of those conventions led to the promotion of GO 43/2000 and influenced heavily the legal text.

## **13. Implementation and protection policy / Mise en pratique et politique de protection**

Assessing the implementation of the legal rules concerning the protection of archaeological heritage lies upon the analysis of:

- The provision of appropriate services and operators with qualified personal: the central service of the MoC&C employs only 3 archaeologists, and the county services an extra of approximate 30. There are no archaeological services in the town or city halls in the country. The local expertise relies solely upon the local or county museums. The National Archaeologists Register counts for some 520 archaeologists;
- The provision of appropriate funds for research, excavation and conservation: funds for scientific excavations are more or less fit to the capacity of research (300 sites/year), whereas shortage marks the financing of conservation. (The salvation research leading to the clearance of the land for redevelopment counts for some 250 excavations /year);
- The promotion of the archaeological heritage as a local resource for the sustainable development and of a cultural tourism: there are only a few examples of integration of the archaeological heritage in the town or city planning strategies (e.g. Cluj-Napoca, Bucharest). The rural sites count for the majority of the destinations for the cultural tourism. In many cases the archaeological value of the site is regarded as an unfortunate burden for the development (e.g. Histria, Rosia Montana).



THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN SRI LANKA  
LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE AU SRI LANKA

Prashantha B. MANDAWALA, ICLAFI Sri Lanka

**1. Competences / Compétences**

The *Department of Archaeology* is the main institution responsible for the protection of archaeological heritage in Sri Lanka. It deals with all types of archaeological heritage, including movable and immovable heritage.

Apart from the Department of Archaeology, the *Department of National Museums* is also responsible for the protection of movable archaeological heritage.

The *Central Cultural Fund*, a semi governmental organisation, is also competent for the protection of archaeological heritage, but deals specially with the areas and sites that the Department of Archaeology has assigned to protect.

**2. Protection regimes / Régimes de protection**

In Sri Lanka, the responsibility to protect the archaeological heritage – both the movable and the immovable heritage – lies with the central government. The Department of Archaeology is empowered with the Antiquities Ordinance and Department of National Museums is empowered with the National Museums Act to deal with the archaeological heritage. The Central Cultural Fund also has been created by an act, but is only empowered to protect the archaeological heritage on the licences provided by the Department of Archaeology.

**3. Excavations / Fouilles**

According to the Antiquities Ordinance, all excavations which are carried out for the purpose of discovering antiquities whether on land belonging to a person or otherwise should be carried out under the authority of a licence issued by the Director General of Archaeology who is the head of the Department of Archaeology. The application for a licence should be made to the Director General, stating the full and accurate description of the land on which it is proposed to carry out the excavation, the nature and existence of the proposed excavations and other particulars such as the time period, the financial capabilities, the persons involved and their qualifications, etc. But the law still doesn't provide a specific time and the qualification of staff and has allowed the Director General to decide on them.

**4. Definitions / Définitions**

According to the Antiquities (Amendment) Act, n° 24 of 1998, the *archaeological heritage* is defined as follows:

"Archaeological heritage means that part of the material heritage of mankind in respect of which archaeological methods provide primary information and includes all vestiges of human existence and 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."

**5. Inventories / Inventaires**

The Department of Archaeology through its documentation and research unit headed by a Director prepares and updates a *Sites and Monument Record (SMR)* which is gazetted from time to time for legal purposes. It generally contains the location (address, province, district, and local authority), details of owner, extent of land, type, period, condition, building materials used for construction, survey plans, ground plans, elevations, sections, details, photographs, etc.

According to the Antiquities Ordinance:

"The Minister by order in writing [can] declare that any specific monument which has existed or it believed to have existed for a period of not less than a hundred years shall be deemed to be an Ancient Monument."

It is important to note that the Ordinance even provides the Minister the authority to declare that any tree growing in Crown land or any other land is of historical or archaeological importance necessary to preserve or protect also as an Ancient Monument.

Apart from this declaration, if it appears to the Minister that any Ancient Monument situated on any land other than Crown land is in danger of destruction or removal, or damage from neglect or injudicious treatment, such monument could be declared a Protected Monument by an order publish in the Gazette.

All works of restoration, repair, alterations or additions in connection with Ancient Monuments owned by the government will only be carried out by the Department of Archaeology or by the Government Agent or by the District Secretary or Divisional Secretary or by any possessed pf special expertise and resources. If the works have been carried out by anyone other than an officer of the Archaeological Department, the works are subject to the supervision of the Director General or any person approved by him for the purpose.

All works of restoration, repair, alterations or additions in connection with Protected Monuments will only be carried out by the authority and in accordance with the conditions of a permit issued by the Director General of Archaeology or with an agreement entered with him. All works are subject to the supervision of the Director General or any person approved by him for the purpose.

**6. Protection procedure / Procédure de protection**

Usually the documentation and research unit of the department through its regional offices carries out surveys from time to time in order to identify the immovable properties that should be protected under the provision of the Ordinance. The survey is named SMR surveys for which mainly archaeological undergraduates are employed during their vacations.

Once all survey reports are received, each entry will be assessed by the officers of the section and a summary is prepared. This will be scrutinised by the Director of the section and the identified sites and monuments will be visited before it is finalised. The final list will be then handed over to the Director General and with his observations it is forwarded to the Minister for the publication in the Gazette as Ancient Monuments.

If any Ancient Monument is to be gazetted as a Protected Monument, the Director General of Archaeology should inform the Minister in writing his intentions and the Minister in turn should write to the owner of such ancient monument of his intention and request the owner to submit any objections before a specific date. All objections will be studied by the Director General and should be transmitted to the Minister together with the report. The Minister is empowered by the Ordinance to consider all objections and could investigate them before a final decision is taken.

But it is important to note that under the provision of the Act, any building which has existed or it believed to have existed for a period of not less than a hundred years could be gazetted as an Ancient Monument in case of an urgent need using the physical boundaries.

#### **7. Legal consequences / Conséquences juridiques**

Any person who wilfully destroys, injures, defaces or tempers with any Protected Monument or Ancient Monument, will be guilty of an offence and will notwithstanding anything to the contrary in any other written law, be liable on conviction after summary trial before a Magistrate to a fine not less than fifty thousand rupees (500 US \$) and not more than five hundred thousand rupees (5,000 US \$), or to imprisonment of either description for a term not less than two years and not exceeding five years, or both such fine and imprisonment.

Any person who carries out works of restoration, repair, alterations or additions in connection with a Protected Monument without the authority and in accordance with the conditions of a permit issued by the Director General of Archaeology or with an agreement entered with him, who breaches any conditions laid out by the Director General or who doesn't allow to supervise the works by the Director General or any person approved by him for the purpose, will be guilty of an offence and will notwithstanding anything to the contrary in any other written law, be liable on conviction after summary trial before a Magistrate to a fine not less than fifty thousand rupees (500 US \$) and not more than five hundred thousand rupees (5,000 US \$), or to imprisonment of either description for a term not less than two years and not exceeding five years, or both such fine and imprisonment.

#### **8. Movable heritage / Patrimoine mobilier**

The destiny reserved for movable goods discovered during exactions is not clearly mentioned in the Ordinance.

But it is clearly stated that all undiscovered antiquities other than Ancient Monuments whether lying on or hidden beneath the surface of the ground or in any river or lake or within the territorial sea of Sri Lanka shall be deemed to be the absolute property of the Crown.

As such all movable goods discovered during excavations will be the property of the Department of Archaeology which are being exhibited and protected in the regional or site museums owned by the Department and some are being handed over to the National Museums Department.

The only property right stated in the Ordinance is that if the Director General of Archaeology does not consider any discovered antiquity should be retained by the Crown, that antiquity will be the property of the finder or the owner of the land which has to be settled by the two.

But if the Director General decides to retain the antiquity, the Crown has to pay half of the market value of the antiquity to the finder and half to the owner of the land and if the finder and owner are the same, the entire market value has to be paid to such person. But if the antiquity is found on Crown land by any person other than the Director General or by any person acting under his authority, half of the market value will be paid to the finder.

#### **9. Goods found by chance / Trouvailles fortuites**

Every person who discovers any antiquity otherwise than under the authority of a licence to excavate, should report the discovery to the nearest peace officer (Police Officer or a Headman of a village appointed by the Government Agent to perform police duties) and deliver the antiquity. The peace officer issues a receipt and has to report the discovery within seven days to the Director General.

#### **10. Financial support / Soutien financier**

In Sri Lanka, the protection, consolidation, maintenance or restoration works of archaeological heritage have been the responsibility of the government. The government provides annual financial assistance to the Department of Archaeology and to the Department of National Museums. The Central Cultural Fund obtains its financial resources from the entrance fees from the visitors who visit the archaeological heritage under their supervision.

Works related to the protected monuments are generally handled by the owner under a permit issued by the Director General. But in Sri Lanka, as most of the protected monuments are of a religious nature, the works related to them are also carried out by the Department from the financial resources provided by the government. The Ordinance provides the Director General with the power to carry out such works. The owner is obliged to permit the Director General or any person acting under him to carry out such works and to enter into his property.

Unfortunately subsidies, premiums, tax incentives for the owners of the archaeological heritage are yet to be materialised in Sri Lanka.

#### **11. Link with other legislations / Lien avec d'autres législations**

There are three major legislations which are being directly affected as a result the protection of a land, an area and a building as archaeological heritage:

- Town and Country Planning Ordinance;
- Urban Development Authority Act;
- Flora and Fauna Conservation Act

But the officers who are dealing with the protection of the archaeological heritage have been able to have a dialog with the officers in the Government entities responsible for the implementation of the above laws and have obtained protection of the identified archaeological heritage even through the above legislations. The Town and Country Planning Department has declared a number of Sacred Cities during the preparation of national physical plans to the country, while the Urban Development Authority has also declared a number of sacred areas while preparing the development plans for urban areas. The Wild Life and Forest Conservation Department has also declared a number of Archaeological Sites as protected areas under their legislations.

## 12. International conventions / Conventions internationales

Sri Lanka has ratified all international conventions in the field of archaeological heritage. In keeping with these conventions the national legal frame work has been amended. The most recent amendment effected was the amendment to the Antiquities Ordinance in 2000 to accommodate the recommendation of a given period or of minimum age instead of before a certain date in protecting archaeological heritage. The principle act provided the date for the declaration of an Ancient Monument as prior to 1 January 1850, which was amended as the existence for over a period of a hundred years.

On the other hand, after the declaration of sites as World Heritage Sites two acts have been passed by the Parliament as Galle Heritage Foundation and Sigiriya Heritage Foundation mainly to look after the interests pertaining to World Heritage Sites of Sigiriya Rock and the Water Gardens and the Ancient Dutch Fortifications of Galle.

## 13. Implementation and protection policy / Mise en pratique et politique de protection

Although Sri Lanka has a good legal framework for the protection of archaeological heritage, quite a number of lapses have been identified. Out of which the main problem is the power vested with the Minister to decide what kind of heritage has to be protected. Throughout the legislations it is stated that the decision of the Minister is final and conclusive. Mainly in the case of providing permits for the exactions for the purpose of discovering antiquities, the Minister could overrule the decision of the Director General and authorise the permit for exactions. It is same in the case of declaration of Ancient Monuments and Protected Monuments. In the case of providing the licence for the export of antiquities, the Minister also has the final decision.

On the other hand, there are no specific regulations for the protection of World Heritage Sites.

One other major lapse is the lack of active legislation to register the movable archaeological heritages which are under the custody of private individuals and entities.

As such the Minister has appointed a committee to suggest amendments to the Ordinance. We have studied the situation in depth and have already prepared a new legislation aiming the speedy protection of the country's archaeological heritage - both movable and immovable.

## THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN SWEDEN LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE EN SUÈDE

*Thomas ADLERCREUTZ, ICLAFI Sweden*

### General introduction / Introduction générale

Sweden is an oblong country making up most of the Scandinavian Peninsula. Its northernmost part is well above the polar circle with spots of permafrost and – in summertime – generous sunshine around the clock. The southern part enjoys the same climate as Central Europe. Due to this most Swedes live below the geographic mid-line of the country, but it was not always so. Swedish nature was created out of ice; the last glacial period, ending ca. 12000 BC, carved out the landscape, erasing all signs of a previous inhabitation (in Finland cave finds reputedly date back some 50.000 – 60.000 years). But when the country emerged from under receding ice cap, it was just as cold and barren everywhere, and hunters/gatherers came from both the south and the north, leaving traces from ca. 9000 BC in both ends of the country.

The ice continued to have a lasting impression even after it had vanished. Riddled of the weight, land rose in relation to the sea level and even today in the North one meter is gained per century. This means that Stone and Bronze Age settlements are to be found well above the contemporary shoreline. Bronze and Iron Age finds clarify that there was exchange with Central Europe and the Mediterranean area. The Age of Migrations (ca. 500 – 700 AD) can be seen primarily in many hilltop fortifications and occasional splendid burials. The Age of Vikings (ca. 700 – 1000 AD) brought an increase in the exchange with other cultures, evidencing trade routes eastwards as far as Samarkand. Almost annually rich hoards of precious metals are found in the Baltic Isle of Gotland.

When Germanic tribes had entered the country is not known with certainty, but runic inscriptions would put the date back to at least the Roman Iron Age. A common Germanic language, Old Norse, was used in present day Norway, Sweden and Denmark into the 12<sup>th</sup> century. Well before then the three countries had started to drift apart politically, with several attempts at reunifying them. The Middle Age started at the end of the first millennium with the erection of towns and organised trade posts, the gradual acceptance of Christianity and the building of a multitude of churches, a unitary kingdom replacing a rule of chieftains ('small kings') and the establishment of a feudal system serving the king with armed forces. Feudal and dynastic conflicts continued to mar the unitary kingdom till the end of the Middle Age, which in Sweden is dated to 1521. This year put a stop to Pan-Nordic dynastic aspirations with the ousting of the Danish king by his young Swedish opponent Gustavus Eriksson Vasa. The Vasa dynasty apexed the following century with the Swedish intervention in the Thirty Years' War by Gustavus' grandson Gustavus Adolphus, and the incorporation of Baltic and North German provinces. The riches incurred by this enlargement facilitated the erection of cities, fortifications, naval ports and many palaces and fine country houses. A century later most of these territorial gains were lost, and finally Finland – which from the early Middle Age had been settled by Swedish farmers, fishermen and crusaders and had become an integral part of the realm – was lost to Russia in 1809. Swedish legislation, culture and language survived into the Grand Duchy of Finland and again at Finnish independence in 1917.

In the North, a native and linguistic minority, the Sami, remain with their traditional trade, reindeer herding, and leave rather different archaeological traces

### 1. Competences / Compétences

Sweden is constitutionally a unitary state, with basically only two tiers of government: national and local. The national government exerts its authority through central and regional agencies. The cultural heritage has always been a responsibility primarily for the national government. The *Ministry of Culture and Education* runs the overall policymaking, but implementation of policies, including decisions on individual applications and grants are issues divided between the central government agency, i.e. the *National Heritage Board*, and the twenty-one *County Administrations*. The National Heritage Board has an overall task of monitoring the County Administrations.

Gradually local governments (their actual number is 290) have become engaged in and entrusted with legal responsibilities, particularly with regard to the architectural values of the built environment, but with regard to matters involving the archaeological heritage so far only on a consultative basis.

### 2. Protection regimes / Régimes de protection

The statutory framework for protection of heritage values consists of several acts of Parliament, supplemented by government regulations. The main statutory instrument is the Cultural Monuments (etc.) Act (SFS 1988:950). This act covers ancient monuments and sites of an archaeological nature, as well as listed historic buildings, ecclesiastical buildings and their inventory, and cultural objects (export/restitution).

The Environmental Code (SFS 1998:808) - in force as of 1999 - proclaims as one of its aims the protection and care of a valuable natural and cultural environment. It provides inter alia for the establishment of cultural reserves.

The Planning and Building Act (SFS 1987:10) provides legal tools for the local governments in looking after cultural values. This act contains rules as to how the cultural heritage should be identified and safeguarded in planning procedures and in the screening and determination of planning and building applications.

### 3. Excavations / Fouilles

As will be dealt with below, all physical interference with archaeological monuments and sites needs permission from the County Administration. If permission is granted, it will almost invariably be on condition that the applicant pays for an archaeological investigation and/or limited or full-scale excavation of the site, performed by a qualified archaeological institution appointed by the County Administration. This institution most often appointed is the rescue archaeology branch of the National Heritage Board, which has a staff of 150 archaeologists (This branch may become an incorporated company in the near future in order to avoid confusion as to executive and monitoring functions of the Board). Furthermore, regional heritage museum perform investigation and/or excavation. Some universities also provide services within rescue archaeology. In addition, there are also a few private companies active in the field. In larger digs several actors may be involved.

The monitoring of rescue archaeology is a responsibility for the County Administration (which thus may be controlling its own controller). A general condition for rescue archaeology is that all assignments should be concluded by a report submitted to the County Administration with a detailed account of how works proceeded, what finds and other observations were made, and a scientific analysis. (The reporting has turned out to be a sometimes weak spot of the system).

### 4. Definitions / Définitions

The scope of protection afforded by the Cultural Monuments (etc.) Act is laid out in Section 1 of Chapter 2:

"Ancient remains are protected under this Act.

Ancient remains are the following traces of human activity in past ages, having resulted from use in previous times and having been permanently abandoned

1. graves, funeral buildings and burial grounds, and also churchyards and other cemeteries,
2. raised stones and also stones and rock bases with inscriptions, symbols, marks and pictures, as well as other carvings or paintings,
3. crosses and memorials,
4. places of assembly for the administration of justice, cult activities, commerce and other common purposes,
5. remains of homes, settlements and workplaces and cultural layers resulting from the use of such homes or places, and similarly remains from working life and economic activity,
6. ruins of fortresses, castles, monasteries, church buildings and defence works, and also of other remarkable buildings and building works,
7. routes and bridges, harbour facilities, beacons, road markings, navigation marks and similar transport arrangements, as well as boundary markings and labyrinths,
8. shipwrecks, if at least one hundred years have presumably elapsed since the ship was wrecked.

Ancient remains also include natural formations associated with ancient customs, legends or noteworthy historic events, as well as traces of ancient popular cults."

To conclude, protection is afforded such physical remains of human activity which have been permanently abandoned and furthermore belong to one of the enumerated categories 1 – 8. Another category - natural formations - is laid out in the last paragraph of the section, and it has an intangible element in so far that a 'story' should be associated with the formation. Protection follows directly by law, i.e. no administrative decision will normally be issued in order to identify what is protected.

It should be noted that elements that in some countries would be protected as cultural heritage, e.g. geomorphic or paleontological remains, are not protected under the Cultural Monuments (etc.) Act. Such vestiges may be protected specially by decisions on nature reserves under the Environmental Code.

In Section 2 of Chapter 2 it is further stated:

"An ancient monument includes a large enough area of ground or on the seabed to preserve the remains and to afford them adequate scope with regard to their nature and significance. This area is to be termed an ancient monuments area."

This protected area is normally not delimited in advance, but may be so by an order of the County Administration.

The definition of *ancient finds* is to be found in Section 3 of Chapter 2:

"[O]bjects which have no owner when found and which:

1. are discovered in or near an ancient monument and are connected with it, or
2. are found in other circumstances and are presumably at least one hundred years old."

The legal consequences for the two categories are quite different, which will be dealt with in the answer to question 8.

### 5. Inventories / Inventaires

As of the late 16th century, records show that the Kings of Sweden entertained an interest in ancient remains. In 1599 royal instructions were issued for a fact finding tour around the land in order to document stones with runic inscriptions. This mission was followed by others, and in a memorandum of 1630 the scope of the inventorying was widened to comprise many elements of what we today think is the cultural heritage. The clergy and land surveyors collected and reported much information which remains instrumental in the annals of Swedish history.

A new concerted effort to bring together knowledge on archaeological remains started in 1937, when Parliament provided resources for a nation-wide inventory, a project which has been going on ever since. The knowledge is compiled at the register of ancient remains kept at the National Heritage Board with copies at each County Administration. To date the register contains information on some 400,000 sites, comprising approximately 1,000,000 individual remains. The register is open to the public. It is also in process of being digitalised, which will eventually make public access easy.

This register covers maritime vestiges found on terra firma. But what is firm ground? Rivers may have changed course, old harbours may have been filled in and landslides may have covered up what was once visible. In the case of Sweden, one needs to take into consideration the tectonic process still at work of land emerging out of the sea after the last ice age. As of Neolithic times about one fifth of the present surface of the country has risen from underwater. Where the vessels of yesterday found a resting place or one time harbour installations crumbled may today be a building site, in which archaeologists find maritime debris of scientific importance.

To some extent, it is also the other way around. In the southernmost part of Sweden and in the Danish straits, the sea has submerged remains of Neolithic settlements.

The most comprehensive register of the underwater heritage is kept at the National Maritime Museum in Stockholm. This register is the result of both archival and underwater research. It contains approximately 2,500 known protected wrecks. It also contains published notices and other excerpts from the press on averages from the 18th century and onwards. In addition it contains excerpts as of 1745 from the reports of the diving companies which operated as State authorised monopolies until 1831, when their reports also ceased. There are some 3,500 entries under this part of the register. Furthermore there are excerpts from maritime inquiries. In its totality the register has notes on almost every known wreck, not just in the Swedish territorial sea, lakes and rivers, but also from adjacent waters. When the territorial seabed was thoroughly scanned in the 1980s and 90s in search of suspected foreign submarine activities, knowledge of wrecks also grew considerably. The knowledge on each wreck varies, of

course, a great deal. Some entries can be classified as qualified guesswork. As to knowledge of the most famous wreck of them all, the *Vasa*, it is assembled in a museum of its own.

The records of the National Maritime Museum are also in the process of being accessible in a database.

### 6. Protection procedure / Procédure de protection

Under Section 10 of Chapter 2 of the Cultural Monuments (etc.) Act all development projects should be preceded by investigation as to the existence of ancient remains. If remains may be affected, it is mandatory to consult with the County Administration. In addition, if in the course of works an ancient remain is discovered, the work is to be immediately suspended and the discovery reported to the County Administration.

Section 11 of Chapter 2 furthermore holds that:

"If a special investigation is needed to find out whether ancient remains are affected by development involving the use of a considerable area of land, the cost of the investigation shall be borne by the developer. Development of this kind includes, for example, the construction of a highway, a large private road, a railway, an airfield, an energy supply facility, a large water project and particularly extensive construction for purposes of housing, industry or commerce.

Decisions on special investigations shall be made by the County Administration. The County Administration shall in its decision state who is to carry out the investigation. The Public Procurement Act (1992:1528) does not apply in these circumstances. The County Administration shall ensure that the investigation meets good scientific standards and is executed at a cost that is not higher than is prompted by the circumstances."

Under Section 12 of Chapter 2 all interference with ancient monuments shall be subject to permission by the County Administration. Such permission may not be granted, "unless the monument causes a hindrance or inconvenience out of all reasonable proportion to its significance," but:

"In the case of the owner of a shipwreck or of an ancient find belonging to a shipwreck, permission may be granted unless there are special reasons to the contrary.

If any person other than the owner of the land or water area or the owner of the shipwreck applies for permission the application is to be refused if the owner objects to the measure and if there are no particular reasons why the application should be allowed."

Decisions of the County Administration can be appealed to an administrative court of law, except decisions on compensation which can be contested in a real property court of law.

### 7. Legal consequences / Conséquences juridiques

The fundament for legal protection of the archaeological heritage is laid down in Section 6 of Chapter 2:

"It is prohibited, without permission under this Chapter, to displace, remove, excavate, cover or, by building development, planting or in any other way, to alter or damage an ancient remain."

As stated above, anyone with the intent of taking measures which might interfere physically with an ancient remain, including its surrounding area, must consult with the County Administration. The consultation is, of course, important because it allows the County

Administration to give advice as to how interference can be minimised, or perhaps avoided altogether. The County Administration will depend on the register of ancient remains and field inspection for insight into what measures will be appropriate to recommend. Sometimes existing knowledge will not be sufficient. Then the County Administration may order a special investigation, which in the case of larger development projects the developer will have to pay for.

If interference cannot be avoided, the developer will need to apply for permission from the County Administration. If the application is refused, the developer will not be eligible for any compensation, except in one case (Section 15).

- “Any person refused permission under Section 12 with reference to an ancient monument which, when discovered, was completely unknown and without visible sign above ground, is entitled to reasonable compensation out of public funds if the ancient monument causes him substantial hindrance or inconvenience.”

If permission is to be granted the County Administration may make reasonable stipulations for special measures to record the ancient remains (i.e. archaeological investigation/excavation), to conserve ancient finds or to preserve the remains (Section 13). The costs for such measures are to be borne by the developer. In certain cases, however, the developer is exempt from this responsibility (Section 14). This applies when costs:

1. relate to previously unknown ancient remains,
2. substantially exceed the amount indicated by the County Administration in its decision for permission
3. refer to a preliminary archaeological investigation, if the County Administration does not grant permission for interference,
4. refer to an archaeological investigation, and it transpires that no ancient remains are affected by the project.”

The Cultural Monuments (etc.) Act furthermore entails the following with regard to ancient remains.

Section 7 of Chapter 2 gives the National Heritage Board and the County Administration access to ancient remains in order to take measures for their care.

Section 8 of Chapter 2 empowers the National Heritage Board and the County Administration to “examine ancient remains, salvage a shipwreck being an ancient monument and investigate a place where ancient finds have been discovered.” It further provides that “[i]f a shipwreck constituting an ancient monument and having no owner is salvaged, it shall accrue to the State.”

Section 9 of Chapter 2 further empowers the County Administration to issue ordinances for the protection of an ancient remain. This also applies to:

- “A place where ancient finds have been discovered, if this can be done without causing any significant inconvenience. An ordinance may apply until the place has been investigated as provided in Section 8. Ordinances may also be issued for the use of land in the vicinity of an area which under Section 2 belongs to the ancient monument, provided that this does not significantly impede current use of the land.”

Of importance to the protection of both ancient remains and ancient finds are the following provisions.

In Sections 18 – 20 is laid down a general ban on the use of metal detectors in Sweden, not just on archaeological sites but everywhere, unless provisions exempting certain usages conducted by authorities apply, or an individual permission has been issued by the County Administration.

Section 21 places under a penalty of fines or a maximum of six months' imprisonment deliberate and negligent offences against the protective rules for ancient monuments and ancient finds. In aggravated cases with intent imprisonment may be imposed up to four years.

Under Section 22 measures of enforcement can be imposed upon offenders against the protective provisions in order to rectify unauthorised infringements.

Section 22 a makes it possible to forfeit ancient finds which do not already accrue to the State, the value or proceeds of such finds, and metal detectors and other equipment used in offences, or the value of such equipment.

Section 23 empowers the County Administration to order its provisions to apply pending final determination of the matter.

Sections 24 and 25 have procedural rules on appeal and judicial review of decisions. Depending on the matter, the Government, an administrative court of law or a real property court of law is competent to try appeals or review.

## **8. Movable heritage / Patrimoine mobilier**

Here is reiterated that there are two legal categories of protected archaeological movables. Ancient finds are objects which have no owner when found and which have been:

1. Discovered in or near an ancient monument and are connected with it, or
2. Found in other circumstances and are presumably at least one hundred years old.

Ancient finds under 1. accrue to the State. Other ancient finds accrue to the finder. He or she is, however, under Section 4 of Chapter 2 duty-bound to invite the State to redeem the find, if it:

- “Contains objects partly or wholly of gold, silver, copper, bronze or any other copper alloy, or if the find consists of two or more objects which were presumably deposited together.”

Anybody who discovers ancient finds which accrue to the State or must be offered for redemption, has to report to the County Administration or certain other authorities. Finds belonging to shipwrecks can be reported to the Coastguard Service. Upon request the finder must surrender the object in return for a receipt, and state where, when and how the find was discovered (Section 5).

Decisions to redeem ancient finds are taken by the National Heritage Board. Payment shall be assessed at an amount which is reasonable with regard to the nature of the find. For objects of precious metals payment must not be less than the value of the metal by weight, augmented by one-eighth. In addition a special finder's reward may be paid (Section 16).

The National Heritage Board may transfer ancient finds to museums, which undertake to care for them in the future. This also applies to shipwrecks (Section 17). If the museum is a non-State entity, then ownership is also considered as being transferred from the State.

As outlined above, non-compliance with the duty to report ancient finds is a criminal offence, of a kind – however – which will be beyond the statutes of limitation after two years. An interesting question is whether the State's right to redeem ancient finds will also be time-barred. Although no court verdict exists to prove or disprove the point, it is the opinion of this author that statutes of limitation do apply, but not the two year penal prescription, but instead the general civil law provision for claims, which is at ten years from the origin of the claim.

Sweden, ratified the 1982 United Nations Convention on the Law of the Sea in 1996. Of interest here are the parts of the convention which apply to the Area, particularly article 149. The concept of the Area goes back to a UN General Assembly Resolution of 1970, which declared the seabed and the subsoil thereof beyond national jurisdiction (in the case of Sweden outside twelve nautical miles) to be 'the common heritage of mankind'. Article 149 obliges the State parties to preserve and dispose of all objects of an archaeological and historical nature found in the Area with particular regard to preferential rights of States or countries of origin. Although Sweden is far from the deep-sea beds constituting the Area certain provisions have been added to the Cultural Monuments (etc.) Act in order to implement Sweden's duties under article 149.

Section 4 has been amended to stipulate that ancient finds and wrecks discovered in the Area and salvaged by Swedish vessels or taken to Sweden accrue to the State, if presumably at least one hundred years have elapsed since the ship was wrecked. Furthermore, Section 17 has been supplemented with a paragraph to the effect that the National Heritage Board may assign State rights to salvaged wrecks to museums undertaking their care for the future.

### 9. Goods found by chance / *Trouvailles fortuites*

Under Swedish civil law, finds in general are treated somewhat differently depending on whether made on land or in water. In both cases wilfully discarded objects (*res derelicta*) become ownerless, and free for anyone to take possession of (provided the object is to be legally held, unlike e.g. unlicensed arms or drugs). Objects which have been lost inadvertently or by accident do not lose their owners; ownership is not considered to be time limited. Such objects, if found on land, have to be reported by the finder to the police under provisions of the Act on Finds. If no owner turns up within certain time limits, then the goods accrue to the finder, provided he pays police procedural costs.

A landowner generally has no right to ownerless goods found on his property, the exception being objects found immured or timbered into a house or dug into the ground or otherwise concealed. Finds of this nature are to be shared equally between finder and the owner of the house.

Under the Act concerning Certain Finds from the Waters the same principles also apply to goods found in lakes, rivers, canals, harbours, bays and incisions and other water areas between islands, bordering on the territorial sea. Finds which have to be reported include deserted vessels, shipwrecks, tools and goods from vessels, regardless of taken from the bed, the shore or found floating. One difference in relation to what applies to finds on land is that the police have to put on public notice reported finds from the waters. Finds claimed are

returned to the owner subject to payment of costs for publication, care of the object and a salvor's reward. Finds not claimed become property of the salvor upon payment of police costs.

Neither the Act on Finds, nor the Act concerning Certain Finds from the Waters is applicable to ancient finds, as defined in the Cultural Monuments (etc.) Act. Somewhat paradoxically, this might mean that an ancient find becomes property of the finder more quickly than if the time limit requirements of the two first mentioned acts are to be met.

Another aspect of civil law that should be considered with respect to finds is the provisions of the Act on Acquisition of Movable Objects in Good Faith. Whereas ownership in principle does not become void when an object has been lost, the opposite occurs if an object has been transferred to a person who acquires *bona fide*. Title passes regardless of whether the transferor was lawfully in possession of it. By good faith is meant that the acquiring party in all probability ought not to have suspected that the unlawful transferor lacked title, taking into account what kind of property that was offered, the circumstances under which it was offered and other circumstances. The former owner, however, has a right to reclaim the object within three months of when he came to know, or ought to have known, from whom to recover, on condition he reimburses the acquiring party his costs.

One novelty in Swedish law is that as of 1 July 2003 *bona fide* acquisition of stolen or forcibly taken goods is not possible. Ownership remains with the original owner, unless he fails to reclaim the goods within six months from knowledge or presumed knowledge of whom the holder is. The holder is not entitled to any compensation from the owner, but may seek redress from the previous holder. However, anyone who has held a stolen or forcibly taken object for ten consecutive years in good faith (without grounds for suspecting lack of title) does acquire legal title.

Ancient finds are not exempted from this legislation. As a breach of the provisions prohibiting unlicensed excavation is not legally equated with a theft, the general rule on extinction of ownership through *bona fide* acquisition will prevail. If the State wishes to secure an ancient find thus transferred, it will have to negotiate a settlement.

Whether the acquiring party would pass the good faith test, is, of course, a question in itself. As there is legal trade in many objects of an archaeological origin, the prospects of making a *bona fide* acquisition stick are not slim.

A case where no good faith could be presumed is the following. In 1991 the Norwegian Museum for Defence History received an anonymous offer to buy two bronze cannons. Accompanying photographs showed the cannons bearing the monogram of Christian II (King of Denmark 1513-1523, of Sweden 1520-1521). These cannons had presumably been taken as prize and subsequently mounted on a Swedish man-of-war, foundered in the 1520s at an unknown location. Another later theory is that the cannons had remained on a Danish war ship till it foundered in 1566 off the Swedish island of Gotland in the Baltic. The offer to the museum was thought to have been made from Sweden, but at the time the police could find neither cannons nor anyone to whom they could be firmly linked. In 1996, however, indications showed that these two cannons were located in a port on the Swedish west coast. They were not found there, but two years later the police arrested a man who in his car had newspaper articles on the cannons and the earlier investigations. In a barn belonging to this man two cannons were found which could be identified as the ones previously offered for

sale. The man was charged and convicted for having kept and concealed ancient finds, which should have been reported to the State. The circumstances were considered to be aggravating and he received a suspended sentence combined with a heavy fine. The cannons were declared forfeited to the State.

The case is rather straightforward and shows that the legislation properly applied works well. However, more disconcerting is the fact that a third cannon, belonging to the same series was returned to the person from whom it had been impounded, following a decision not to bring charges against him. The suspect claimed that he had found the cannon before 1989 and consequently before the date when ancient finds of bronze had been reinstated as being redeemable by the State.

In another case a man was charged with having violated the Cultural Monuments (etc) Act in that he had taken a bronze ship's bell from a ship wrecked in Swedish waters in 1884. This crime was considered to have fallen beyond the statutes of limitation applicable to ancient finds, but the action nevertheless fell within the bounds of illegitimate disposition under the Penal Code and judged as such not time barred. The defendant was at the same time charged with having taken off another wreck two ship's bells not old enough to be protected as ancient finds. He was convicted on both charges (but on the second count just for one of the bells) to a heavy fine. The first bell was declared forfeited to the State, and the second was awarded to the relevant insurance company.

Especially when cannons have been salvaged from an old shipwreck, it is safe to assume that the wreck itself must have been damaged in the process. This, of course, is also a crime. However, investigation of a crime of that nature is much more difficult. First, as illustrated in the case of the cannons, it may not be sufficiently known what and where the wreck is. If outside of Swedish territorial waters, and not found the Area in the sense of the Convention on the Law of the Sea, it is doubtful whether Swedish jurisdiction applies at all (It might, but the complications bar further discussion here).

If beyond penal action, there still might be civil law questions to consider. The first one would typically be: who has a title? Even a 100 years old shipwreck may have an owner, who has not relinquished his right to hull and cargo; that owner might be an insurance company. Ownership makes the special provision regarding salvage applicable. The wreck may be that of State vessel. Then questions of immunity come into the picture.

#### **10. Financial support / Soutien financier**

The Swedish government in fiscal 2004 allotted SEK 256 million (approx. EUR 28,5 million) to grants for the care and protection of the cultural heritage. Of that sum SEK 74.1 million were spent on archaeologically related projects. Viewed over a four years' period the percentage in relation to other purposes such as historic buildings and cultural landscapes had been rising.

The distribution of grants follows rules laid down in a Government Regulation on Grants for the Cultural Heritage (SFS 1993:379). Grants may be given for three archaeological purposes. Firstly, grants can be directed to measures for the care and restoration of ancient monuments and remains, and related works such as fencing and tree-felling (SEK 22.1 million). Local farmers and landowners are often contracted for such measures. Secondly, grants may cover costs for archaeological investigation and excavation necessitated by new housing projects

(SEK 15.4 million). These grants are restricted to projects where certain requirements are met, such as the ancient remain being invisible above ground, and a lack of an alternative location. Thirdly, developers and landowners may get grants for archaeological measures necessitated by compelling circumstances, such as the rehabilitation of faulty sewage systems (SEK 3.9 million).

Decisions on grants are in most cases taken by the County Administrations, operating within frames allotted to them by the National Heritage Board. The central agency reserves some 10 - 15 percent of the sum total for remains under its own management and other central activities.

No tax deductions or subventions are available. In property taxation, however, some provisions take note of the possibility that costly upkeep and other impediments to the continued use of property may affect the assessed value, and should thus be taken in consideration.

#### **11. Link with other legislations / Lien avec d'autres législations**

The Cultural Monuments (etc.) Act is unique in Swedish land use legislation in that it is not linked to other provisions governing land use, notably the two most comprehensive acts: the Environmental Code and the Planning and Building Act, see the answer to question 2 above. The practical implication of this is that a permission given under the Cultural Monuments Act will not formally be a prerequisite for a decision made under either of the two other acts. As the material stipulations under each of the acts may overlap one or more of the other – both the Environmental Code and the Planning and Building Acts have provision for protection of heritage interests - one decision may influence another taken under the other acts, but it will not bar application of them. To be more specific: anyone who has received e.g. planning permission from a local government for development within an area with ancient remains, will also be obliged to apply for permission from the County Administration for interference in that area. If the County Administration refuses to give permission, then the planning permission still has legal force, but must not be implemented.

Another practical example can be fetched from the Environmental Code. This code has definitions of so-called national interests, and stipulations on areas where such interests have to be respected. The Cultural Heritage is among the national interests, and many large areas throughout the country have been set aside as being nationally important. The Planning and Building Act is linked to these definitions and area determinations, so that no planning or building permission should be given which runs contrary to them. The Cultural Monuments Act, however, does not depend on the Environmental Code classification of national interests. If, e.g. permission has been given under the Environmental Code for a project which has been deemed acceptable in consideration of the national interests involved, then the County Administration (which also has an important role in the interpretation of what is a national interest) may still make its formally independent judgement and refuse permission to interfere with an ancient remain.

The lack of linkage has caused surprisingly little practical controversy and confusion, but is still every now and then a source of misunderstanding and irritation. In the long run this problem may be considered detrimental to the rule of law in land use management. Proposals for a more cohesive order are in all probability on their way.



## 12. International conventions / Conventions internationales

Sweden is a party to all major international treaties regarding protection and regulation of the Cultural Heritage, save the following: the second protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1985 European Council Convention on Offences relating to Cultural Property (still only signed by six States, and ratified by no-one), the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (proposal for accession on its way), the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (no interest) and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (too new).

## 13. Implementation and protection policy / Mise en pratique et politique de protection

The Swedish Parliament has on several occasions confirmed statements on Cultural Heritage Policies, but only in very broad terms, such as that the heritage should be available to everyone, etc. It is of little use here to make further reference to these policy statements.

The Cultural Heritage generally thrives best not so much by being promoted, but by simply being protected. This is, of course, the primary object of any legal regulation. However, protection does not depend just on a decision-making process, and legal tools available to say no to harmful projects. Monitoring is probably equally important. A great deal could be said as to a lack of resources for a careful scrutiny of what happens in the fields and forests of this sparsely populated country, and also the built-up areas are hard to survey with the manpower and techniques available. Ancient remains are in general harder to safeguard against unwanted intrusion than buildings. Metal detectors can be used at night, and it may long before someone even notices the little holes in the ground signifying that a piece of metal worth taking away has been unearthed.

Saying no to development is, of course, the sharpest form of protection, but overriding interests may often prompt another answer: yes, but on condition... There are two forceful elements in Swedish law that makes this answer quite viable. The first is the large scope of what is being protected, and thus subject to deliberation. The *ipso lege* system places the responsibility of finding out whether a site is protected or not on the developer or landowner. This can be done without too much trouble through the comprehensive ancient remains register. The onus to consult with the County Administration further clarifies what can and cannot be done, before any formal trial of an application gets on route. Often the developer finds that he will profit from avoiding ancient remains. This comes out of the second strength built into the system: the provision that the developer should pay for whatever archaeological measures are deemed necessary by the County Administration in order to either save as much as possible of the remains or document what is being destroyed and conserve the finds.

This cost-responsibility on part of the developer has one prerequisite: that there are rescue archaeologists available to do the job. Manpower does not seem to be a problem here; to study archaeology is popular and there are more archaeologists than archaeology as things now stand. The organisation of rescue archaeology perhaps leaves something more to be desired, especially when that more tedious part of the work, the reporting, has to be finished, but on the whole the system seems to be functional. The costs may perhaps seem high, but the archaeological work gets done and development can proceed.

What kind of development will get permission? Infrastructure almost always, but only after long consultation and deliberation, not just with regard to archaeological issues but to overall environmental and planning concerns. Individual new buildings or installations more seldom; there are almost always alternative locations where interference can be avoided or minimised. Alterations/extensions to existing buildings will be more often favoured, because the alternatives simply may be harder to find. When it comes to agriculture or forestry there is a great deal of leniency, provided the soil is not disturbed beneath the usual measure for ploughing, tree-felling and plantation. Topsoil preparation on ancient remains, however, is a more difficult issue, and may be refused.

**THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN THE UNITED KINGDOM**  
**LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE AU ROYAUME-UNI**

*Christopher YOUNG, ICLAFI United Kingdom*

**General introduction / Introduction générale**

This questionnaire has been filled in from the perspective of a heritage manager, rather than a lawyer, who has dealt primarily with the immovable heritage on land. The response does not cover to any great extent either marine or movable heritage. It relates primarily to the situation in England. Responsibility for the historic environment, including archaeology, in Scotland, Wales and Northern Ireland, rests with the devolved administrations. In Scotland and Wales, the position is broadly similar to that in England. In Northern Ireland there are significant differences. The answers to the specific questions are introduced by a more general description of the wider legal and policy context within which archaeological sites in England are protected, and also a brief survey of forthcoming changes currently under discussion.

Our current system, described below, is an old one combining two separate strands of protection. The first of these is the protection of specific monuments through a system of designation. The series of Ancient Monuments Acts began in 1882 and have been periodically updated and strengthened, culminating most recently in the Ancient Monuments and Archaeological Areas Act of 1979. Its application is managed at the national level and consent is required for most works to a protected site. It is effective in protecting individual sites from most threats except for agriculture and neglect.

All archaeological sites are also protected through the general system of land-use planning, established under a series of Town and Country Planning Acts from 1947 onwards. This system is run largely by local authorities. Each authority has to produce a spatial plan for its area which sets policies for development. Most development proposals need planning consent from the local authority which should grant or withhold consent according to the policies contained in the local plan. There is a system of appeal to the Deputy Prime Minister against refusal of consent for development. He can also, under certain conditions, call in applications for decision by him rather than the local authority. In all cases dealt with centrally there will be a public inquiry at which both supporters and opponents of a proposal can put their case.

The government advises local authorities and others on how the planning system should be applied through Planning Policy Guidance (PPG). PPG16 advises local authorities on how to protect archaeology through the general planning system. Its starting point is that all archaeology of national importance, whether scheduled or not, should, if possible, be preserved *in situ*. Where preservation is not possible, the principle has developed that the developer should pay for any necessary archaeology, as an example of 'polluter pays'. Local authorities maintain Sites and Monuments Records as support for this system.

The system described above covers, broadly, archaeological sites, ruins and similar historic structures lacking a beneficial use. Historic buildings in use are protected by a parallel system. Historic buildings are designated ('listed') nationally and government provides guidance to local authorities as to how they should protect listed buildings. Most applications for consent will be dealt with by the local authority. There is a further designation system of Conservation

Areas operated locally to protect areas in towns and villages. There are also registers of Historic Parks and Gardens and of Battlefields.

Some elements common to many other countries are missing. Archaeological artefacts are not automatically owned by the State and there is no licensing system for archaeological excavations. This system reflects common law legal traditions and respect for property rights. There has been comparatively little direct influence from international conventions joined by the UK.

The system as we now have it is, therefore, old, made up of a number of elements and has grown somewhat haphazardly over the years. It is best at protecting individual places and less good at protecting areas. Combined with this, a number of other factors have brought us to the cusp of major changes in the legal system for conserving the historic environment in England. These include:

- A recognition that archaeology is essentially a method of study of humanity's material remains and, therefore, that archaeological sites and the use of archaeological techniques are not confined below ground;
- Recognition that the historic environment is holistic; certainly in England, the whole landscape has been modified by humanity. This has led conceptually from dealing with monuments to dealing with entire landscapes;
- In turn, this means that conservation of the historic environment is about management of change since it is also the environment in which people live and make their living. Consequently there are enormous pressures for change to which the historic environment has to adapt without losing its significance;
- Increasingly government sees the worth of historic places not just in their historic value but also as something which must be used sustainably for the social and economic benefits of society today and in the future.

To manage a site in these circumstances it is not enough to say just that it is important. We have to know why it is important and so be able to say what are its significant values in order to identify what changes are acceptable without damage to those values. This means looking at the site as a whole and without making artificial distinctions according to a particular designation system. (cfr. the Burra Charter for the best-known example of this approach).

The UK government is currently considering changes to the designation system in England and Wales which would take account of the factors outlined above. The principal features of the new system are proposed as:

- A single register of historic assets, including archaeological sites, historic buildings, historic parks and gardens, battlefields and, for the first time, World Heritage Sites;
- A single system of consents for all works to entities on the register, possibly with more delegation to local authorities;
- The possibility of legal management agreements for complex sites, or for big estates in single ownership, which would cover routine operations which might now need specific consent.

The new law would need to be supplemented in due course by a variety of guidance.

Hopefully, therefore, in five years time we will have a new system and guidance. For the time-being, however, the questionnaire describes the current system for protecting archaeological sites.

## 1. Competences / Compétences

The management of archaeological heritage is integrated with the care of the historic environment as a whole. Overall the *Department for Culture Media and Sport* (DCMS) is responsible for all matters to do with the conservation of archaeology both moveable and immovable. Its executive functions are largely delegated to *English Heritage* for immovable archaeology, and the *Museums Libraries and Archives Council* for movable artefacts. Both are Non-Departmental Public Bodies at arms length from government but responsible to the Department for their actions and receiving the bulk of their funding from the Department.

The national public service providing advice on immovable archaeology is English Heritage. English Heritage is the government's official advisor on such issues and also offers advice to local authorities and owners on the management and protection of archaeological sites. It provides statutory advice on applications to do work to protected archaeological sites and can also give grants for management and protection. It also manages a large number of archaeological sites directly.

Other government departments are also involved, notably the Office of the Deputy Prime Minister (ODPM) which is responsible for the operation of the spatial planning system and the Department for Food, Environment and Rural Affairs (DEFRA) which is responsible for the countryside as well as for the natural environment.

Local authorities also have responsibilities for the protection of immovable archaeological heritage through operation of the local spatial planning system.

## 2. Protection regimes / Régimes de protection

Archaeological sites including monuments are designated (scheduled) under the Ancient Monuments and Archaeological Areas Act 1979. Not all sites of national importance will be protected in this way.

Any works to scheduled monuments (as designated sites are known) require consent from DCMS advised by English Heritage, although certain works (most notably continued arable cultivation) are effectively exempted through what are known as 'class consents'.

Archaeological sites are also protected through the spatial planning system. Government guidance on the protection of archaeology is contained in Policy Planning Guidance Note 16 (PPG16). This says that the desirability of preserving an ancient monument and its setting, whether scheduled or unscheduled, is a material consideration in deciding whether to grant consent for development. Archaeological sites of national importance should if possible be preserved *in situ*.

Local authorities include policies to protect archaeology in their local plans and can insert archaeological conditions (such as prior excavation) into planning consents for development. These policies apply to all archaeological sites in a particular local authority area. Seeking advice from English Heritage on applications affecting protected archaeological sites is normal.

## 3. Excavations / Fouilles

There is no licensing system as such. Excavations on scheduled monuments require consent and are therefore controlled. Excavations required as a consequence of planned development will be authorised and controlled by local authorities. In either case, the issues set out in the question should be covered.

The small number of excavations outside these two categories (e.g. research excavations on unscheduled sites) requires no consent from anyone except the landowner.

## 4. Definitions / Définitions

Increasingly the approach is to regard archaeology as being the study of humanity through its material remains above and below ground and the policy is to try to treat the historic environment as a whole and holistically.

## 5. Inventories / Inventaires

National records of archaeological sites are maintained in the *National Monuments Record*, part of English Heritage. The whole of the country is also covered by local-authority based Sites and Monuments Records which contain details of archaeological sites in local authority areas. While no controls flow directly from such records, they are used extensively by local authority planners when dealing with applications for consent for development.

## 6. Protection procedure / Procédure de protection

Scheduling sites is carried out by DCMS on the advice of English Heritage. Until recently English Heritage has been implementing the Monuments Protection programme which was a systematic survey of the country's archaeological resource to identify sites worthy of statutory protection. This has more than doubled the number of designated sites over the last 20 years but has been currently suspended since we are to move to an integrated Heritage Register covering archaeological sites, monuments, buildings, historic parks and gardens, battlefields and World Heritage Sites.

It is possible to schedule sites in an emergency, but this can be problematic since compensation can be payable if a planning consent has already been granted.

## 7. Legal consequences / Conséquences juridiques

Once a site is scheduled, consent is needed for most interventions (see the answer to question 2). If there are outstanding consents for development granted before the site is protected, compensation may be payable if these cannot be carried out. There is no obligation on owners to maintain a scheduled ancient monument. All sites should be inspected at least every three years by a member of the English Heritage staff. There is not currently a system of interim protection while designation is being processed, but introduction of such a system is contemplated under the proposals for new legislation.

## **8. Movable heritage / Patrimoine mobilier**

Movable artefacts belong to the landowner unless they are defined as treasure (gold, silver, some other materials). If so the State may under some circumstances be able to claim them as treasure trove. In planned excavations every effort is made to persuade owners to agree to deposit of finds in an approved museum.

## **9. Goods found by chance / Trouvailles fortuites**

Movable artefacts belong to the landowner unless they are defined as treasure (gold, silver, some other materials). If so the State may under some circumstances be able to claim them as treasure trove. The finder should report finds to the landowner and, if likely to be treasure trove, to the authorities.

There is a voluntary Portable Antiquities System, backed by the government, to encourage finders of objects (particularly through the use of metal detectors) to report finds to the authorities. This is done through a network of liaison officers based in local museums.

## **10. Financial support / Soutien financier**

A large number of archaeological sites, including monuments, are maintained directly by English Heritage on behalf of the State. Many local authorities also manage archaeological sites. English Heritage can also grant-aid excavations, the repair of monuments and the management of archaeological sites. English Heritage can also carry out excavations directly itself. Most excavations necessitated by development are paid for by the developer.

One of the objectives of Environmental Stewardship, the agricultural support system funded by DEFRA, is the conservation of the historic environment. DEFRA has committed substantial funds on 10 year agreements for the protection of archaeological sites, particularly for the reversion of archaeological sites from arable to pasture.

The biggest source of public financial support for archaeology is the Heritage Lottery Fund which has committed very substantial sums to the conservation and display of archaeological sites over the last 10 years.

## **11. Link with other legislations / Lien avec d'autres législations**

Yes. Scheduling as an ancient monument requires consent for almost all works to a site. In many cases consent for development would also be required under the spatial planning system.

## **12. International conventions / Conventions internationales**

The UK has ratified the following international conventions:

- The UNESCO Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done in Paris on 14 November 1970;
- The UNESCO Convention concerning the Protection of World Cultural and Natural Heritage, done in Paris on 16 November 1972;

- The Council of Europe Convention on the Protection of the Archaeological Heritage, done in La Valletta on 16 January 1992.

It has also adopted the EC Directives on the prevention of illicit trade which have the effect of law. Some legislation has been enacted to support the implementation of the 1970 UNESCO Convention. So far both the World Heritage Convention and the Valletta Convention have been implemented through existing legislation and government policy.

## **13. Implementation and protection policy / Mise en pratique et politique de protection**

The existing system is implemented and there are clear policies for protection of the historic environment. There are still major gaps in cover, particularly for the protection of archaeological sites under arable cultivation and legislation generally is directed towards the protection of specific places rather than archaeological landscapes. It is proposed to introduce new integrated legislation for the protection of the historic environment within the next few years.

THE PROTECTION OF ARCHAEOLOGICAL HERITAGE IN THE UNITED STATES OF AMERICA  
LA PROTECTION DU PATRIMOINE ARCHÉOLOGIQUE AUX ÉTATS-UNIS D'AMÉRIQUE

James K. REAP, ICLAFI United States of America

**General introduction / Introduction générale**

Archaeological sites were among the first heritage resources in the United States to receive legal protection. The ancient ruins of Native American civilizations captured the imagination of Americans who saw the need to preserve these remnants of vanished or vanishing cultures.

However, the concept of private property rights was and remains strong in the United States. Early efforts were therefore directed toward protecting archaeological resources on public land. The legal scheme included protective measures, a permitting process and standards for excavation, the disposition of found artefacts, and penalties for vandalism and looting.

The clear division of powers among national, State and local governments has also shaped the legal framework for protecting archaeological resources.

Federal law addresses the Nation's international obligations under treaties such as the World Heritage Convention and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property, the protection of archaeological sites on land owned by the national government or held on behalf of Native American tribes, the consideration of archaeological resources on both public and private land in federally licensed and funded projects, and prevention of trafficking in illicit goods across State lines.

As the middle level of government, States partner with the federal government in implementation of some of its programs, protect resources directly, and authorize local governments to protect archaeological resources. Like the federal government, States protect archaeological sites on State-owned land, regulate excavation of those sites, and include consideration of archaeological resources in planning for State-funded projects. States also regulate directly certain other resources such as cemeteries and the graves and grave goods of Native Americans and abandoned shipwrecks within their territorial waters. Both federal and State programs provide grants for archaeological investigation and protection.

As authorized by the State, local governments have the ability to designate heritage properties and districts for protection and grant or deny permits to demolish or alter such properties. Archaeological properties are included as protected resources by a number, though not all, local governments that regulate heritage properties.

All three levels of government also use their taxing power to provide incentives for the preservation of cultural properties, including archaeological ones.

Finally, American law provides several tools for the private (non-governmental) protection of archaeological resources. Among these are easements or covenants that are means through which a property owner may voluntarily, by gift or for compensation, agree to protect

resources on his or her property or forgo development options that may threaten the resource. These restrictions apply to the property itself and bind both the current and successive owners.

To effectively protect archaeological resources in the United States it is necessary to both understand and utilize the protective measures available at Federal, State and local levels and through private law devices. While this makes for a complex system, it can provide effective protection for vulnerable resources within the American context of private property ownership.

**1. Competences / Compétences**

Federal Level

The *National Park Service*, part of the U.S. Department of the Interior, is the primary federal agency concerned with archaeological heritage protection. Their primary focus is on archaeological resources on lands controlled by the department, but they are also responsible for developing standards and guidance for other federal agencies and the States. They are also responsible for coordinating with the States and for promoting archaeological heritage protection among local governments and the private sector.

Under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) (see the answer to question 2), all federal agencies have responsibilities for archaeological sites located on lands under their control that are eligible for listing in the National Register of Historic Places. Additionally, they have responsibilities under these acts to review or to consider the impact of federally licensed or funded projects of archaeological resources located on State and private lands...

State Level

The *State Historic Preservation Offices*, partners of the federal government under the provisions of the NHPA, have the responsibility to participate in the environmental review process for federal projects affecting National Register eligible properties. In addition, most State Historic Preservation Offices have responsibilities under State laws protecting archaeological resources. Many had established positions of the 'State archaeologist'.

Local Level

Some local governments have assigned responsibility for the protection of archaeological resources within their jurisdiction to the local historic preservation commissions or planning agencies.

**2. Protection regimes / Régimes de protection**

The primary laws governing archaeological resources are:<sup>77</sup>

- Archaeological Resources Protection Act of 1979 (16 U.S.C. §§ 470aa-mm): principal federal law protecting archaeological resources on all federal and Indian lands. It establishes a permit application process for the excavation and removal of

<sup>77</sup> Julia H. Miller, *A Layperson's Guide to Historic Preservation Law*, National Trust for Historic Preservation.

archaeological resources located on these lands. Provides for the imposition of civil and criminal penalties for specific violations;

- Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§ 469-469c-2): provides for the preservation of historical and archaeological data that might otherwise be irreparably lost through alterations to the terrain resulting from federal agency construction-related activities. Upon notification by a federal agency that significant resources may be irreparably lost, the Secretary of the Interior must conduct a survey, preserve data, and consult with others regarding ownership and appropriate repository for items recovered;
- Historic Sites Act of 1935 (16 U.S.C. §§ 461-467): establishes a national policy for the preservation of historic American sites, buildings, objects and antiquities of national significance, delegating specific powers and responsibilities to the Secretary of the Interior in the implementation of that policy. Also authorizes the imposition of a \$500 fine plus costs for violations of any rules promulgated under the act;
- Antiquities Act of 1906 (16 U.S.C. §§ 431-433): imposes criminal sanctions for the destruction of historic or prehistoric sites on federally owned or controlled land without a permit;
- National Historic Preservation Act of 1966, as amended (16 U.S.C. § 470 et. Seq.): prohibits federal undertakings (such as the funding, licensing or permitting of activities) affecting properties eligible for listing in the National Register, including archaeological sites, without first consulting with the State historic preservation officer and, in some cases, the Advisory Council on Historic Preservation;
- National Environmental Policy Act (42 U.S.C. §§ 4321-4347): requires environmental impact statement for all major federal actions significantly affecting the quality of the human environment, including archaeological resources;
- Department of Transportation Act of 1966 (49 U.S.C. § 303): prohibits federal approval or funding of transportation projects that require the 'use' of any historic site, including archaeological sites, unless there is "no feasible and prudent alternative to the project," and the project includes "all possible planning to minimize harm to the project";
- Abandoned Shipwreck Act of 1987 (43 U.S.C. § 2101 et. seq.): asserts title to abandoned shipwrecks within U.S. territorial waters and then transfers ownership to the State in whose submerged lands the shipwreck is located to facilitate the protection of historic shipwrecks;
- Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. §§ 3001-3013): provides for repatriation of Native American human skeletal material and related sacred items and objects of cultural patrimony. Also allows for the imposition of criminal penalties for the illegal trafficking in human remains and burial items;
- State archaeological protection laws: regulate private and/or public actions affecting archaeological resources on State (and in some cases on private) lands;
- State historic preservation and environmental laws: require State agencies to consider the impact of proposed governmental actions on archaeological resources;
- Historic preservation ordinances, comprehensive plans, site plan review and subdivision laws.

Some local laws protect archaeological resources in addition to historic and other cultural properties, particularly when archaeological resources are found within designated landmark property (monument) or locally designated historic district.

### 3. Excavations / Fouilles

Generally, excavation is controlled only on public property.

Federal laws and regulations do specify who may conduct excavations and under what conditions. The Archaeological Resources Protection Act specified, for example:

"A permit may be issued pursuant to an application under subsection (a) of this section if the Federal land manager determines, pursuant to uniform regulations under this Act, that:

- (1) the applicant is qualified, to carry out the permitted activity,
- (2) the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest,
- (3) the archaeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution, and
- (4) the activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.<sup>78</sup>

State programs have similar provisions related to excavations on State-owned lands.

Local governments generally do not regulate archaeological investigations on property the own or control. However, these governments can control any activities that affect archaeological resources on listed properties or within listed districts within their jurisdictions under local historic preservation ordinances. (see the answer to question 2, above)

### 4. Definitions / Définitions

While the *archaeological heritage* may be defined somewhat differently in the laws of the various States, the federal Archaeological Resources Protection Act (ARPA), 16 U.S.C. 470bb Section 2 provides the key definition on the federal level:

"The term 'archaeological resource' means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Non-fossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age."

### 5. Inventories / Inventaires

Most States maintain an inventory of known archaeological sites within its jurisdiction. These lists are not generally open to the public to prevent individuals from looting listed sites. Individuals or agencies desiring access to these listings must demonstrate a need for the information contained in the inventory. A similar inventory system operates on the federal level and the information is also confidential unless the requestor demonstrates a legitimate need for the information.

<sup>78</sup> 16 U.S.C. 470cc(b).

If archaeological resources are listed in the National Register of Historic Places or are determined eligible for listing, any federally licensed or funded project that affects those resources must be reviewed under federal environmental laws. Similar provisions apply at the State level in most States regarding State licensed or funded projects that are on the National Register or a corresponding State register.

#### **6. Protection procedure / Procédure de protection**

Legal protection for the archaeological heritage is accomplished through federal law in two ways.

First, an archaeological site may be nominated to the National Register of Historic Places in the same way as any historic building or district is nominated. The nomination must contain a thorough description of the property and demonstrate its significance. Listed properties enjoy the protection of federal environmental laws (e.g. NEPA and NHPA). Many States utilize the National Register process for identifying significant properties and/or maintain a separate State register.

Second, if a federally licensed or funded project is proposed and a survey of the impact area demonstrates the existence of an archaeological site, procedures under NHPA call for a determination of whether the property is eligible for listing in the National Register. If it is determined eligible, the same protection applies as for listed properties. A similar system is in place in most States involving State licensed or funded projects.

#### **7. Legal consequences / Conséquences juridiques**

Federal environmental laws only provide for a public environmental review that takes into account all positive and negative aspects of federally licensed and funded projects affecting protected resources. These laws do not prohibit the destruction of properties, but simply mandate a thorough assessment. The final decision is left up to responsible agency. The process does, however, include the possibility of abandoning the project or mitigating it through a consultation process and memorandum of agreement. Failure on the part of a public agency to comply with these laws and regulations can open the agency to a lawsuit by an affected member of the public or a public or private organization.

On the local level, regulations can require a permit process, prohibit the destruction of the property, and require affirmative maintenance by the owners. Generally the owner is not entitled to compensation. Should the owner violate the provisions of the law he could be subject to fines or imprisonment, or both.

#### **8. Movable heritage / Patrimoine mobilier**

Archaeological protection laws generally specify certain institutions as the repository for archaeological resources found on public land. The following provision, for example, allows the Secretary of the Interior to promulgate regulations for this purpose:

"The exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands pursuant to this Act."<sup>79</sup>

<sup>79</sup> 16 U.S.C. 470dd.

Similar provisions exist in State law.

Artefacts on private land remain the property of the landowner.

#### **9. Goods found by chance / Trouvailles fortuites**

If the find is on private land, the issue is generally only between the finder and the property owner (if they are not one and the same). There is no public right to a find on private land. [However, there are a number of laws regarding human burials that do impose strict duties on the finder and landowner in regard to human remains and grave goods.] Some local governments regulate actions taken in regard to immovable remains on private land if the property on which they are found is protected under a local ordinance.

#### **10. Financial support / Soutien financier**

There are both Federal and State grants for archaeological investigation and preservation of archaeological remains, both moveable and immovable. Tax incentives are available to individuals and corporations that donate resources to a governmental agency or a non-governmental organization such as a museum. If a private owner grants an easement protecting an archaeological site to a governmental agency or a NGO, he or she will receive a one-time income tax deduction for the value of the easement and a yearly reduction in property taxes that reflect the decrease in value of the property after the easement is donated.

#### **11. Link with other legislations / Lien avec d'autres législations**

See the federal environmental laws discussed above (e.g. NEPA and NHPA). In a local government context, there may be consequences for the issuance of building permits, rezoning, development, etc.

#### **12. International conventions / Conventions internationales**

The United States ratified the World Heritage Convention. Among the sites in the United States listed in the World Heritage List are several in which archaeological resources are a primary component and others where archaeological resources are a significant factor.

#### **13. Implementation and protection policy / Mise en pratique et politique de protection**

In general, except for properties of great significance (Mesa Verde, for example, which is a nationally owned and protected site listed in the World Heritage List), archaeological resources in the United States receive less attention than buildings or districts. While the preservation of buildings and districts is often seen as economic development, archaeological resources are rarely viewed in this way.

The basic framework for protection exists, however, and it is unlikely that with the emphasis on property rights in the United States that this will be expanded on the national or State levels. At the local level, on the other hand, there appears to be an increasing number of jurisdictions that are extending protection to archaeological resources found on private property. This is the area of most promise for archaeological resource protection, but it will require significant education to persuade decision makers of its public benefit.

### General introduction / Introduction Générale

La Constitución de la República Oriental del Uruguay declara en su artículo 34:

“Toda la riqueza artística o histórica del país sea quien fuere su dueño, constituye el tesoro cultural de la Nación; estará bajo la salvaguardia del Estado y la Ley establecerá lo que se estime oportuno para su defensa.”

En materia patrimonial, las disposiciones de la Ley 14.040 prevén un estatuto en donde se declara, protege y fomenta aquellos bienes declarados Patrimonio Cultural. Se prevé una serie de medidas tendientes a restringir el derecho de propiedad y eventualmente conceder una indemnización a los particulares según sea el caso. La Comisión de Patrimonio tiene a su cargo la preservación de los sitios arqueológicos así como elementos petrográficos y pictográficos del mismo origen. La ley prohíbe la salida del país de piezas o material arqueológico o paleontológico, salvo el caso de autorizar una salida temporaria estableciendo la fecha de su reintegro al país y bajo una garantía a satisfacción de la Comisión respecto al fiel cumplimiento del Plazo.

La Comisión de Patrimonio funciona dentro de la órbita del Ministerio de Educación y Cultura.

Asimismo, a través de la Ley 17.234 que establece en el país un Sistema Nacional de Áreas Naturales Protegidas, que funciona en la órbita del Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente. Se trata de normas de Orden Público.

Uno de los objetivos específicos de la ley es: “Proteger los objetos, sitios y estructuras culturales, históricas y arqueológicas, con fines de conocimiento público o de investigación científica.”

#### 1. Competences / Compétences

La Protección del Patrimonio en general es competencia del Ministerio de Educación y Cultura y especialmente de la *Comisión del Patrimonio Cultural de la Nación*.

Dentro de esta Comisión existe un Departamento de Patrimonio Arquitectónico, Urbanístico y Paisajístico y específicamente un *Departamento de Patrimonio Arqueológico*. Funciona, asimismo, el Taller de Restauración.

A nivel de los gobiernos locales, la Ley Orgánica Municipal otorga potestades suficientes que permiten desarrollar instrumentos legales para la protección del patrimonio histórico local o departamental.

La ley que da nacimiento al Sistema Nacional de Áreas Naturales Protegidas establece que el Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente constituirá una Comisión Nacional Asesora de Áreas Protegidas, integrada por delegados del Poder

Ejecutivo, del Congreso Nacional de Intendentes, de la Universidad de la República, de la Administración Nacional de Educación Pública, de las organizaciones representativas de los productores rurales y de las organizaciones no gubernamentales ambientalistas.

La Comisión Nacional Asesora de Áreas Protegidas tendrá iniciativa y asesorará al Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente y por su intermedio al Poder Ejecutivo en todo lo relativo a la política de áreas naturales protegidas a nivel nacional, así como en la aplicación y cumplimiento de la ley.

El Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente constituirá, con relación a cada área natural protegida, una Comisión Asesora específica, en la que estarán representados el Poder Ejecutivo, los propietarios de predios privados incorporados al área, los pobladores radicados dentro del área, las autoridades locales y las organizaciones no gubernamentales ambientalistas con actividad vinculada al área.

El Poder Ejecutivo fijará la política nacional referida a las áreas naturales protegidas, como parte de la política nacional ambiental, correspondiendo al Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente la formulación, ejecución, supervisión y evaluación de los planes nacionales referidos a las áreas naturales protegidas, a través de la Dirección Nacional de Medio Ambiente.

La administración de las áreas naturales protegidas que el Poder Ejecutivo determine, a propuesta del Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente, podrá estar a cargo de otros organismos o personas públicas o privadas.

Cuando se resuelva adjudicar la administración de un área natural protegida se tendrá en cuenta para la contratación las condiciones técnicas y capacidades de administración de los interesados, correspondiendo que la actuación del adjudicatario sea realizada en calidad de concesionario de un servicio público.

El Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente, a propuesta de la Dirección Nacional de Medio Ambiente, establecerá las pautas y planes generales correspondientes para cada categoría de áreas naturales protegidas y para la región adyacente. Los administradores de áreas naturales protegidas, dentro del primer año de su gestión, deberán presentar al Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente, para su aprobación, los planes de manejo particulares que se propongan ejecutar en el área, de conformidad con las pautas y planes generales correspondientes a la categoría.

Residualmente debe aclararse la Ley 17.234, reconoce que existen áreas naturales protegidas y monumentos históricos nacionales que actualmente se encuentran bajo custodia, responsabilidad, manejo y administración del Ministerio de Defensa Nacional, permaneciendo éstos en su órbita manteniendo una relación de coordinación e interacción con el Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente.

Asimismo cabe mencionar la existencia del Decreto-Ley 14.343 sobre ‘cascos hundidos’ y sus decretos reglamentarios: los buques de valor patrimonial hundidos en el mar pasan a ser propiedad del Estado. Aquí se prevé la intervención de la Prefectura Nacional Naval, además de la actividad de la Comisión de Patrimonio.



## 2. Protection regimes / Régimes de protection

La Ley 14.040 establece que la Comisión de Patrimonio Cultural tendrá a su cargo la preservación de los sitios arqueológicos y establece lineamientos generales para su abordaje. Hay serias legales carencias en cuanto a todo lo referente al Patrimonio Subacuático (insuficientemente enmarcado por el mencionado Decreto-Ley 14.343 y sus decretos reglamentarios). También a través de la ley de Sistemas de Áreas Nacionales Protegidas, se puede abordar la protección del Patrimonio Arqueológico.

## 3. Excavations / Fouilles

La ley prevé que las excavaciones sean autorizadas y controladas por la Comisión de Patrimonio. El artículo 14 de la Ley 14.040 establece que siempre se requerirá la autorización de la Comisión para toda exploración y prospección de los sitios. Debe ser acordada para cada caso y se extenderá exclusivamente a un solo yacimiento y por un plazo determinado, debiendo ser ejecutada de acuerdo a directivas precisas y bajo la dirección de personal especializado designado por la Comisión.

Si en el curso de los trabajos de movilización de terrenos se descubriera algún sitio arqueológico, dichos trabajos deben ser suspendidos y notificados a la Comisión. Estos trabajos serán recomenzados una vez tomadas las medidas de preservación específicas necesarias.

El mismo régimen se establece para los yacimientos paleontológicos.

Asimismo el Decreto 536/72 de 1 de agosto de 1972 a través de los artículos 6, 7, 8 y 9 establece los requisitos de las solicitudes de los permisos para realizar exploraciones y prospecciones, los que deben sujetarse a específicas normas de investigación y trabajo científico.

## 4. Definitions / Définitions

La Ley 14.040 no ha definido expresamente el patrimonio arqueológico; tampoco ha sido definido por cualquier otra ley.

No obstante se cuando se hace referencia a la preservación de los sitios arqueológicos se ejemplifica y se expresa que en el artículo 14:

“La Comisión tendrá a su cargo la preservación de los sitios arqueológicos como paraderos, túmulos, vichaderos y tumbas indígenas, así como los elementos petrográficos y pictográficos del mismo origen”.

Por tanto, la ley refiere a los elementos arqueológicos provenientes de los primeros pobladores del suelo de la actual República; anteriores a la llegada de los europeos al continente. La ley prácticamente ignora la arqueología y la paleontología subacuática.

La arqueología subacuática no tiene un estatuto claro ni específico, lo que trae aparejado problemas y conflictos con ‘buscadores de tesoros’.

## 5. Inventories / Inventaires

La Comisión tiene entre sus cometidos la realización, mantenimiento y actualización del Inventario del Patrimonio.

La información contenida es sumamente detallada y la consecuencia jurídica es la afectación del bien mediante una serie de servidumbres que en cada caso resultan impuestas por la calidad, característica y finalidades del bien.<sup>80</sup>

La Comisión comunica a los Gobiernos Departamentales los bienes inmuebles que hayan sido o sean declarados monumentos históricos, sin perjuicio de la propia competencia de los referidos Gobiernos Departamentales para llevar adelante declaraciones o acciones patrimoniales.

## 6. Protection procedure / Procédure de protection

No existe un procedimiento específico. El artículo 5 de la ley 14.040 expresa lo siguiente:

“Podrán ser declarados monumentos históricos, los bienes muebles o inmuebles vinculados a acontecimientos relevantes, a la evolución histórica nacional, a personales notables de vida del país o a lo que sea representativo de la cultural de una época nacional.”

Esta previsión debe ser leída en concordancia con el artículo 14 que comete a la Comisión todo lo referente a los sitios arqueológicos.

Si bien no existe un procedimiento específico de urgencia, la Comisión, en el caso que vea una amenaza, puede directamente y rápidamente recomendar la declaración de Bien Patrimonial por parte del poder Ejecutivo ya que uno de sus cometidos es Asesorar al Poder Ejecutivo en el señalamiento de los bienes a declararse monumentos históricos.

El Decreto 536-72 establece en su artículo 4.:

“Las propuestas para que un bien inmueble sea declarado monumento histórico deberán ser acompañadas de una memoria histórico descriptiva del edificio, ilustrada con planos y fotografías.”

Este criterio se extiende analógicamente a los sitios arqueológicos.

## 7. Legal consequences / Conséquences juridiques

La protección de un bien arqueológico somete al objeto y a los sujetos al control por parte del Estado.

Se establece un estatuto de abordaje, con suficientes especificaciones que permitan el control de las actividades y del trabajo que se efectúe.

Las piezas (bienes muebles) de carácter arqueológico o paleontológico extraídas por los trabajos realizados por particulares e instituciones privadas u oficiales, serán propiedad del Estado el que, por decisión del Poder Ejecutivo, les dará el destino que considere más adecuado. Que prohibida la salida del país de los bienes arqueológicos encontrados, salvo una autorización expresa de ‘salida temporaria’, claramente acotada en el tiempo.

<sup>80</sup> Artículo 8 de la Ley 14.040.

La ley establece que es de Interés General su protección, por lo tanto, eventualmente el sitio arqueológico puede ser objeto de expropiación por parte del Estado.

Los sitios arqueológicos son uno de los objetivos de protección del Sistema Nacional de Áreas Naturales Protegidas.

Se entiende por Sistema Nacional de Áreas Naturales Protegidas: el conjunto de áreas naturales del territorio nacional, continentales, insulares o marinas, representativas de los ecosistemas del país, que por sus valores ambientales, históricos, culturales o paisajísticos singulares, merezcan ser preservados como patrimonio de la Nación, aun cuando las mismas hubieran sido transformadas parcialmente por el hombre.

La creación del Sistema Nacional de Áreas Naturales Protegidas tiene por objeto armonizar los criterios de planificación y manejo de las áreas a proteger, bajo categorías determinadas, con una regulación única que fije las pautas de ordenamiento.

Son de orden público las disposiciones legales relativas a la preservación, conservación, manejo y administración de las áreas naturales protegidas.

#### **8. Movable heritage / Patrimoine mobilier**

En el artículo 9 del Decreto 536/72 se establece que las piezas de carácter arqueológico o paleontológico extraídas por los trabajos realizados por particulares e instituciones privadas u oficiales, serán propiedad del Estado el que, por decisión del poder Ejecutivo, les dará el destino que considere más adecuado.

#### **9. Goods found by chance / Trouvailles fortuites**

Todo bien arqueológico pertenece al Estado y es deber de la persona que fortuitamente lo encuentra informar a las oficinas de Protección de Patrimonio correspondientes.

#### **10. Financial support / Soutien financier**

La Comisión de Patrimonio tiene un Fondo Especial que resulta escaso y reducido. La Ley 17.234 también prevé la existencia de un Fondo de Áreas Protegidas, el que es administrado por el Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente.

#### **11. Link with other legislations / Lien avec d'autres législations**

Obviamente, la existencia de un sitio arqueológico necesariamente debe compatibilizarse con las previsiones urbanísticas y de planeamiento territorial.

Por las características del país, los sitios arqueológicos se encuentran en áreas rurales o en áreas subacuáticas.

Por tanto, la ley de Áreas Naturales Protegidas une la cuestión a la planificación ambiental del territorio; específicamente una de las Categorías de definición y manejo prevista en el artículo 3 es el de 'sitio de protección' (definido como "aquellas áreas relativamente pequeñas

que poseen valor crítico dado que entre otras; contienen manifestaciones geológicas, geomorfológicas o arqueológicas relevantes)".

En el Uruguay no hay una ley general de Ordenamiento del Territorio; aún los abordajes son sectorizados. No obstante en aquellos departamentos en donde existe un Plan Director, el manejo del suelo en donde se encuentra el patrimonio arqueológico se encuentra contemplado, los gobiernos departamentales también pueden incorporar áreas de conservación o de reserva al Sistema Nacional de Áreas Naturales Protegidas.

El tratamiento del patrimonio arqueológico debe compatibilizarse con cuerpos ordenados de leyes que tienen incidencia sobre la actividad territorial como por ejemplo: el código de Minería; el código de Aguas, el Código Rural, la Ley Forestal, ley de utilización del suelo rural (en el sentido de usos productivos).

#### **12. International conventions / Conventions internationales**

- Por Ley de 9 de marzo de 1989, se ratificó la Convention concernant la protection du patrimoine mondial, culturel et naturel, Paris, 23 de Noviembre de 1972.
- Por Ley 17.047 se aprobó el Protocolo de Integración Cultural del MERCOSUR.
- Por Ley 17.381 se aprueban los estatutos del ICROM de 21 Octubre 1993: Centro Internacional de Estudios para la Conservación y la Restauración de bienes culturales

#### **13. Implementation and protection policy / Mise en pratique et politique de protection**

Desde mi punto de vista, existe un acercamiento al tema, pero siempre puede profundizarse más. El Uruguay debe establecer mejores mecanismos de protección en todo lo atinente a la Arqueología Subacuática. Por otra parte en los últimos años se ha venido dando un crecimiento en la conciencia de la ciudadanía acerca del valor de los sitios arqueológicos que hablan de los primeros pobladores de estas tierras; existe curiosidad y respeto en la gente común; por tanto, a pesar de carencias presupuestales del Estado, la actividad arqueológica es en general altamente valorada por la sociedad civil.

ANNUAL CONFERENCE BRUSSELS 23 – 26 NOVEMBER 2005

**PROGRAM**

*Wednesday 23-11-05*

**19.30**

Welcome dinner

*Thursday 24-11-05*

**9.00 – 9.10**

Brief introduction to the theme of the colloquium: the protection of archaeological heritage  
James REAP, President ICLAFI

**9.10 – 9.40**

The protection of archaeological heritage: international and European legal context  
Jean Louis LUXEN, Honorary Secretary General of ICOMOS

**9.40 – 10.00**

The protection of archaeological heritage in Australia  
Graeme WIFFEN

**10.00 – 10.20**

The protection of archaeological heritage in the United States  
James REAP

**10.20 – 10.40**

The protection of archaeological heritage in Colombia  
Claudia FADUL

**10.40 – 11.00**

Break

**11.00 – 11.20**

The protection of archaeological heritage in Peru  
Alberto MARTORELL

**11.20 – 11.40**

The protection of archaeological heritage in Israel  
Gidéon KOREN

**11.40 – 12.00**

The protection of archaeological heritage in Greece  
Athina CHRISTOFIDOU

**12.00 – 12.20**

The protection of archaeological heritage in the United Kingdom  
Christopher YOUNG

**12.20 – 13.15**

Discussion

**13.15 – 14.15**

Lunch

**14.15**

Excursion to the archaeological site of Ename

**18.00**

Drink and dinner in Ename

**21.00**

Back to the hotel

*Friday 25-11-05*

**9.00 – 9.20**

The protection of archaeological heritage in Germany  
Werner VON TRÜTSCHLER

**9.20 – 9.40**

The protection of archaeological heritage in Finland  
Satu-Kaarina VIRTALA

**9.40 – 10.00**

The protection of archaeological heritage in Sweden  
Thomas ADLERKREUZ

**10.00 – 10.20**

The protection of archaeological heritage in Bulgaria  
Hristina STANEVA

**10.20 – 10.40**

The protection of archaeological heritage in Romania  
Sergiu NISTOR

**10.40 – 11.00**

Break

**11.00 – 11.20**

The protection of archaeological heritage in Italy  
Massimo CARCIONE

**11.20 – 11.40**

The protection of archaeological heritage in The Netherlands  
Leonard DE WIT

**11.40 – 12.00**

The protection of archaeological heritage in Poland  
Wojciech KOWALSKI

**12.00 – 12.30**

The protection of archaeological heritage in the three Belgian Regions  
Anne Mie DRAYE and Stéphane DEMETER

**12.30 – 13.15**

Discussion

**14.15**

Visit of the Archéoforum in Liège

**19.30**

Dinner in Brussels

*Saturday 26-11-05*

**9.00 – 9.30**

Final report

**9.30 – 10.30**

Discussion

**10.30 – 11.00**

Break

**11.00 – 13.00**

Statutory reunion of the Committee

**13.00 – 14.15**

Lunch

**14.30 – 17.00**

Visit of the underground city, Brussels

**19.00**

Closing dinner

RÉUNION ANNUELLE BRUXELLES 23 – 26 NOVEMBRE 2005

**PROGRAMME**

*Mercredi 23-11-05*

**19.31**

Dîner d'accueil

*Judi 24-11-05*

**9.00 – 9.10**

Introduction au thème du colloque: la protection du patrimoine archéologique  
James REAP, Président ICLAFI

**9.10 – 9.40**

La protection du patrimoine archéologique: contexte juridique international et européen  
Jean Louis LUXEN, Secrétaire Général d'Honneur d'ICOMOS

**9.40 – 10.00**

La protection du patrimoine archéologique en Australie  
Graeme WIFFEN

**10.00 – 10.20**

La protection du patrimoine archéologique aux États-Unis  
James REAP

**10.20 – 10.40**

La protection du patrimoine archéologique en Colombie  
Claudia FADUL

**10.40 – 11.00**

Pause

**11.00 – 11.20**

La protection du patrimoine archéologique au Pérou  
Alberto MARTORELL

**11.20 – 11.40**

La protection du patrimoine archéologique en Israël  
Gidéon KOREN

**11.40 – 12.00**

La protection du patrimoine archéologique en Grèce  
Athina CHRISTOFIDOU

**12.00 – 12.20**

La protection du patrimoine archéologique au Royaume Uni  
Christopher YOUNG

**12.20 – 13.15**

Débats

**13.15 – 14.15**

Lunch

**14.15**

Excursion vers le site archéologique d'Ename

**18.00**

Réception et dîner à Ename

**21.00**

Retour à l'hôtel

*Vendredi 25-11-05*

**9.00 – 9.20**

La protection du patrimoine archéologique en Allemagne  
Werner VON TRÜTSCHLER

**9.20 – 9.40**

La protection du patrimoine archéologique en Finlande  
Satu-Kaarina VIRTALA

**9.40 – 10.00**

La protection du patrimoine archéologique en Suède  
Thomas ADLERKREUZ

**10.00 – 10.20**

La protection du patrimoine archéologique en Bulgarie  
Hristina STANEVA

**10.20 – 10.40**

La protection du patrimoine archéologique en Roumanie  
Sergiu NISTOR

**10.40 – 11.00**

Pause

**11.00 – 11.20**

La protection du patrimoine archéologique en Italie  
Massimo CARCIONE

**11.20 – 11.40**

La protection du patrimoine archéologique aux Pays-Bas  
Leonard DE WIT

**11.40 – 12.00**

La protection du patrimoine archéologique en Pologne  
Wojciech KOWALSKI

**12.00 – 12.30**

La protection du patrimoine archéologique dans les trois régions belges  
Anne Mie DRAYE and Stéphane DEMETER

**12.30 – 13.15**

Débats

**14.15**

Visite de l'Archéoforum à Liège

**19.30**

Dîner à Bruxelles

*Samedi 26-11-05*

**9.00 – 9.30**

Rapport de synthèse

**9.30 – 10.30**

Débats

**10.30 – 11.00**

Pause

**11.00 – 13.00**

Réunion statutaire du Comité

**13.00 – 14.15**

Lunch

**14.30 – 17.00**

Visite de la ville souterraine à Bruxelles

**19.00**

Dîner de clôture



INTERNATIONAL COMMITTEE ON LEGAL, ADMINISTRATIVE  
AND FINANCIAL ISSUES

Report of the Annual Conference  
Brussels, 23 - 26 November 2005

1. Presence list

LEGAL COMMITTEE

James Reap (United States of America, president)  
Graeme Wiffen (Australia)  
Claudia Fadul (Colombia)  
Alberto Martorell (Peru)  
Gideon Koren (Israel)  
Athina Christofidou (Greece)  
Christopher Young (United Kingdom)  
Werner Von Truezschler (Germany)  
Satu-Kaarina Virtala (Finland)  
Thomas Adlerkreuz (Sweden)  
Hristina Staneva (Bulgaria)  
Sergiu Nistor (Romania)  
Massimo Carcione (Italy)  
Leonard de Wit (The Netherlands)  
Wojciech Kowalski (Poland)  
Anne Mie Draye (Belgium)

INVITEES / OBSERVERS

Mr. J.L. Luxen (Belgium, Honorary Secretary General ICOMOS)  
Mr. S. Demeter, Ms. De Graeve (Monuments and Sites Direction of the Brussels-Capital Region)  
Ms. Van Marcke (Cabinet of Emir Kir, Secretary of State of the Brussels-Capital Region competent for Monuments and Sites)  
Mr. Y. Hollevoet (Monuments and Sites Division of the Flemish Region)  
Mr. I. Luybaert (General coordinator VCM)  
Ms. De Bruijn, (The Netherlands, Rijksdienst voor Monumentenzorg).

2. Context

The International Scientific Committee on Legal, Administrative and Financial Issues (ICLAFI), founded in 1997, is one of twenty international working groups of the International Council on Monuments and Sites. Its objective is to promote international cooperation in the identification, study and solution of legal, administrative and financial issues in connection with the protection, maintenance and conservation of the immovable heritage.

By organising an Annual Conference, dedicated to a specific theme, the Legal Committee tries to achieve that objective. The members of the Committee act in turn as host of this conference.

In 2005 Belgium received the members of the Committee: the Annual Conference took place in Brussels from 23 to 26 November. Theme of the conference was the protection of the archaeological heritage.

3. The theme: Protection of the Archaeological Heritage

In order to prepare the Annual Conference, the members of the Legal Committee had to fill in in advance a questionnaire relating to the protection of the archaeological heritage

The questionnaires were filled in by all the members present at the Annual Conference, and by some members who for several reason were not able to attend. The members of Chile, Japan, Mexico and Sri Lanka were in that situation.

At the Annual Conference, the participating members gave a short presentation of the actual system of protection of the archaeological heritage in their country, based on the questionnaire they had filled in. The presentations were preceded by an introduction concerning the international treaties, resolutions, recommendations, etc. relating to the protection of the archaeological heritage, brought by Mr. J.L. Luxen.

The following themes were discussed in the questionnaires:

- Which authorities are competent for heritage protection in general, and more specifically for the protection of archaeological heritage?
- Is there a specific legal regime for the protection of archaeological heritage? At what level? Even if there is a specific legal regime for the protection of archaeological heritage, does it remain possible to use e.g. other legal protection tools (protection as a monument, part of a landscape...) in order to protect archaeological heritage? If there is no specific legal system in order to protect archaeological heritage, is such protection possible under a more general protection system?
- Are excavations controlled by public authorities? What conditions are eventually imposed?
- In which way is archaeological heritage being defined? If necessary, make a difference between movable and immovable heritage.
- Are there inventories of archaeological heritage? If so, what information do they contain? Do they have legal consequences?
- Describe the procedure that leads to the legal protection of (immovable) archaeological heritage. Is there a specific procedure in case of urgent need?
- What are the legal consequences of the protection of an archaeological good, for

owners and third persons? Are those consequences already valid during the protection procedure?

- Which destiny is reserved for movable goods, discovered during excavations? Is there a specific destination foreseen? Is there a specific protection system for those goods? What about property rights?
- Are there legal prescriptions in case of the finding, out of the context of an official excavation, of goods supposed to have an archaeological value? What are the duties of the finder and the owner of the land?
- Do public authorities support in one way or another: excavations, consolidation, maintenance or restoration works of archaeological heritage? Are there subsidies, premiums, tax incentives, etc.?
- Does the fact that a piece of land, an area, a building was protected as archaeological heritage, have consequences within the context of other legislations dealing with the use of soil? Are there e.g. consequences towards legislation on urbanism?
- Did your country ratify international conventions in the field of archaeological heritage? Did they influence the national legal framework?
- What are your impressions about the implementation of the existing legal rules concerning the protection of archaeological heritage? Is there a real policy towards protection? Are there many objects protected? Is there any control?

#### **4. Guided visites**

Several guided visits were organised for the participating members of the Legal Committee. All visits were related to the theme of the Annual Conference, the protection of the archaeological heritage. More specifically the activities included:

- A visit to the archaeological site of Ename.
- A visit to the Archéoforum in Liege.
- A visit to the archaeological site of the former palace of Brussels on the Coudenberg.

Representatives from the authorities competent for the protection of the archaeological heritage in the different regions received the participants in order to provide them with the necessary information.

#### **5. Support to the organisation of the Annual Conference**

The Annual Conference was made possible through the support of the Ministers competent for the protection of the archaeological heritage in the Brussels-Capital Region, the Flemish Region and the Walloon Region.

As for the Brussels-Capital Region, support was also provided by the Minister competent for External Affairs. Icomos Vlaanderen - Brussel vzw and Icomos Wallonie - Bruxelles asbl also contributed to the organisation of the Annual Conference.

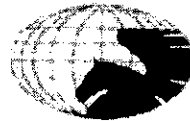
The support was not only of financial nature, but also concerned the use of a conference room, the organisation of a guided visit and a reception afterwards, etc.

#### **6. Publication**

At present, a publication is being prepared. That publication shall comment on the protection of the archaeological heritage in several countries, based on the answers to the questionnaires the members of the Legal Committee filled in. The questionnaires shall be published entirely, preceded by a short introduction for every country.

*Prof. Dr. A.M. Draye*  
*Belgian Representative Legal Committee*





**Compte rendu de la réunion annuelle  
Bruxelles, 23-26 novembre 2005**

**1. Liste de présence**

COMITE LEGISLATIF

James Reap (États Unis, président)  
Graeme Wiffen (Australie)  
Claudia Fadul (Colombie)  
Alberto Martorell (Peru)  
Gideon Koren (Israël)  
Christopher Young (Royaume Uni)  
Werner von Trueschler (Allemagne)  
Satu-Kaarina Virtala (Finlande)  
Thomas Adlerkreuz (Suède)  
Hristina Staneva (Bulgarie)  
Sergiu Nistor (Roumanie)  
Massimo Carcione (Italie)  
Leonard de Wit (Pays-Bas)  
Wojciech Kowalski (Pologne)  
Anne Mie Draye (Belgique)

INVITÉS / OBSERVATEURS

Mr. J.L.Luxen (Belgique, secrétaire général d'honneur de ICOMOS)  
Mr. S. Demeter, Mme. De Graeve (Direction des Monuments et Sites de la Région de Bruxelles-Capitale)  
Mme. Van Marcke (Cabinet de Emir Kir, Ministre compétent pour les monuments et sites)  
Mr. Y. Hollevoet (Division des Monuments et Sites de la Région flamande)  
Mr. I. Luybaert (Coordinateur général du VCM)  
Mme G. de Bruijn (Pays-Bas, Rijksdienst voor Monumentenzorg)

**2. Contexte**

Au sein d'ICOMOS fonctionnent une vingtaine de comités scientifiques dont le Comité pour les Questions de Droit, d'Administration et de Finances. Le but de ce Comité Législatif, qui a été créé en 1997, est de stimuler une collaboration internationale et d'entamer un dialogue concernant les aspects juridiques de la protection du patrimoine immobilier.

Le Comité Législatif tente de réaliser ses objectifs e.a. par l'organisation d'une réunion annuelle, dévouée à un thème bien défini. Pour cette réunion, les membres du Comité fonctionnent à tour de rôle comme hôtes.

En 2005, la Belgique a reçu les membres du Comité: la réunion annuelle a eu lieu à Bruxelles du 23 jusqu'au 26 novembre 2005. Elle a été consacrée à la protection du patrimoine archéologique.

**3. Le thème de la protection du patrimoine archéologique**

Comme la tradition le veut au sein du Comité Législatif, la réunion fût préparé par le biais d'un questionnaire sur la protection du patrimoine archéologique, qui a été envoyé bien auparavant aux membres du Comité.

Les questionnaires ont été remplis par tous les membres qui ont participé à la réunion, en plus par quelques membres qui, pour des raisons diverses, n'ont pas pu assister. Il s'agit des représentants du Chili, du Japon, du Mexique et du Sri Lanka.

Pendant la réunion, les membres présents ont donné, sur base de leur questionnaire, une brève présentation du système de protection actuellement en vigueur dans leur pays. Ces présentations ont été précédées par une introduction de Monsieur J.L.Luxen, se rapportant aux conventions internationales, résolutions, recommandations, etc. sur la protection du patrimoine archéologique.

Dans les questionnaires, les thèmes suivants ont été traités:

- Les autorités compétentes en matière de protection du patrimoine, et plus spécifiquement en matière de patrimoine archéologique.
- Les régimes juridiques de protection du patrimoine archéologique; les possibilités de protéger ce patrimoine par le biais de réglementations plus générales (protection de monuments, sites, etc.)
- L'exécution de fouilles : réglementation, conditions imposées aux chercheurs, etc.
- La définition du patrimoine archéologique, différence entre patrimoine mobilier et patrimoine immobilier.
- L'existence d'inventaires du patrimoine archéologique, contenu et conséquences juridiques.
- La procédure de protection du patrimoine archéologique, l'existence d'une procédure d'urgence.
- Les conséquences juridiques de la protection (provisoire) d'un bien archéologique.
- Le sort des biens archéologiques mobiliers trouvés lors d'une fouille : droit de propriété et système de protection.
- La réglementation concernant les trouvailles fortuites, conséquences pour le propriétaire du terrain et pour les tiers, droit de propriété.

- Primes et avantages fiscaux pour l'exécution de fouilles, le maintien et la restauration du patrimoine archéologique.
- La relation entre la législation sur la protection du patrimoine et les autres législations ayant trait à l'usage du sol, entre autres la législation en matière d'urbanisme.
- La ratification de conventions en matière de protection du patrimoine archéologique.
- L'implémentation de la législation sur la protection du patrimoine archéologique, systèmes de contrôle.

#### 4. Visites guidées

Plusieurs visites guidées ont été organisées pour les membres du Comité qui participaient à la réunion. Toutes ces visites se rapportaient au thème de la réunion annuelle, c'est à dire la protection du patrimoine archéologique. Il s'agissait de:

- Une visite au site archéologique de Ename;
- Une visite à l'Archéoforum de Liège;
- Une visite au site archéologique du palais de Bruxelles au Coudenberg.

Les représentants des trois Régions ont accueilli les participants aux différents endroits en vue de fournir les informations nécessaires.

#### 5. Soutien à l'organisation de la réunion annuelle

L'organisation de la réunion annuelle a été rendue possible grâce au soutien des Ministres compétents pour le patrimoine dans la Région de Bruxelles-Capitale, la Région Flamande et la Région Wallonne.

Le lieu de la réunion étant situé dans la Région de Bruxelles-Capitale, un soutien supplémentaire a été attribué par le Ministre compétent pour les relations extérieures. Icomos Vlaanderen VZW et Icomos Wallonie ASBL ont également soutenu l'initiative.

Le soutien était d'ordre divers: soutien financier mais également l'usage de locaux, l'organisation d'une visite guidée avec réception,...

#### 6. Publication

En ce moment, une publication est en voie de préparation: elle contiendra des informations sur la protection du patrimoine archéologique dans les différents pays, et sera basée sur une synthèse des réponses aux questionnaires. Les questionnaires seront publiés intégralement, précédés d'une note introductive pour chaque pays.

*Prof. Dr. Anne Mie Draye*  
Représentante belge au Comité Législatif

## INTERNATIONAL COUNCIL ON MONUMENTS AND SITES



### INTERNATIONAL COMMITTEE ON LEGAL, ADMINISTRATIVE AND FINANCIAL ISSUES

Verslag van de jaarvergadering  
Brussel, 23 - 26 november 2005

#### 1. Aanwezigheidslijst

##### COMITE WETGEVING

James Reap (Verenigde Staten, voorzitter)  
Graeme Wiffen (Australië)  
Claudia Fadul (Colombia)  
Alberto Martorell (Peru)  
Gideon Koren (Israël)  
Athina Christofidou (Griekenland)  
Christopher Young (Verenigd Koninkrijk)  
Werner Von Truezschler (Duitsland)  
Satu-Kaarina Virtala (Finland)  
Thomas Adlerkreuz (Zweden)  
Hristina Staneva (Bulgarije)  
Sergiu Nistor (Roemenië)  
Massimo Carcione (Italië)  
Leonard de Wit (Nederland)  
Wojciech Kowalski (Polen)  
Anne Mie Draye (België)

##### GENODIGDEN / WAARNEMERS

De Heer J.L. Luxen (België, eresecretaris-generaal ICOMOS)  
De Heer S. Demeter, Mevr. De Graeve (Bestuur voor Monumentenzorg van het Brussels Hoofdstedelijk Gewest)  
Mevrouw Van Marcke (Kabinet van Minister E. Kir, bevoegd voor Monumentenzorg)  
De Heer Y. Hollevoet (Administratie Monumenten en Landschappen van het Vlaams Gewest)  
De Heer I. Luypaert (Algemeen coördinator VCM)  
Mevrouw G. De Bruijn, (Nederland, Rijksdienst voor Monumentenzorg).

## 2. Situering

Binnen ICOMOS fungeren een twintigtal wetenschappelijke comités, waaronder ook een 'Comité Wetgeving'. De doelstelling van dit 'Committee on Legal, Administrative and Financial Issues', dat werd opgericht in 1997, bestaat erin een internationale samenwerking en dialoog op gang te brengen over de juridische aspecten van het behoud van het onroerend erfgoed.

Het Comité Wetgeving tracht zijn doelstellingen te realiseren door o.m. een jaarvergadering te organiseren, die gewijd wordt aan een welbepaald thema. Hiervoor treden de leden van het Comité beurtelings op als gastheer.

In 2005 was België aan de beurt: van 23 tot 26 november vond in Brussel de jaarvergadering plaats. Als thema werd geopteerd voor de bescherming van het archeologisch erfgoed.

## 3. Behandeling van het thema

Zoals de traditie binnen het Comité Wetgeving het wil, werd de jaarvergadering voorbereid aan de hand van vragenlijsten over het thema archeologie, die ruim vooraf aan de leden van het Comité werden toegestuurd.

De vragenlijsten werden ingevuld door alle leden die aan de jaarvergadering deelnamen, en bijkomend door een aantal leden die door omstandigheden niet aanwezig konden zijn. Het ging hier om de vertegenwoordigers van Chili, Japan, Mexico en Sri Lanka.

Aan alle deelnemers werd aan het begin van de jaarvergadering een documentatiemap bezorgd met kopij van alle ingevulde vragenlijsten.

Tijdens de jaarvergadering gaven de aanwezige leden, uitgaande van de vooraf ingevulde vragenlijst, een korte beschrijving van de actuele beschermingsregeling in hun eigen land en legden hierbij eigen accenten.

De uiteenzettingen volgden op een inleiding over de internationale verdragen, de resoluties, de aanbevelingen, enz. met betrekking tot de archeologische monumentenzorg, die verzorgd werd door de Heer J.L. Luxen.

Concreet werden in de diverse vragenlijsten volgende thema's behandeld:

- Welke instanties zijn bevoegd voor de bescherming van het erfgoed in het algemeen, en - meer specifiek - voor de bescherming van het archeologisch erfgoed?
- Bestaat er een specifieke regelgeving voor de bescherming van het archeologisch erfgoed? Indien ja, kan het archeologisch erfgoed *ook* via een andere beschermingsregeling (monumenten, landschappen, etc.) beschermd worden? Indien neen, kan het archeologisch erfgoed dan via een andere beschermingsregeling beschermd worden?
- Is het uitvoeren van opgravingen gereguleerd door de overheid? Welke voorwaarden worden er opgelegd?
- Hoe wordt het archeologisch erfgoed gedefinieerd? Maak - indien nodig - een onderscheid tussen roerend en onroerend archeologisch erfgoed.
- Bestaan er inventarissen van het archeologisch erfgoed? Welke informatie bevatten ze? Welke rechtsgevolgen hebben die inventarissen?

- Beschrijf de procedure voor de bescherming van archeologisch erfgoed. Bestaat er een bijzondere procedure ingeval er sprake is van een dringende noodzakelijkheid?
- Welke rechtsgevolgen heeft de bescherming van een archeologisch goed voor de eigenaar en voor derden? Gelden die rechtsgevolgen ook al tijdens de beschermingsprocedure?
- Welke bestemming krijgen roerende goederen die bij opgravingen ontdekt worden? Bestaat er een specifiek beschermingssysteem voor dergelijke goederen? Wat met het eigendomsrecht van dergelijke goederen?
- Bestaat er een specifieke regeling voor toevalsvondsten? Welke verplichtingen hebben de vinder en de eigenaar van de grond waar de vondst plaatsvond?
- Verleent de overheid enige financiële steun voor het uitvoeren van opgravingen en voor de instandhouding, het onderhoud en het herstel van archeologisch erfgoed? Zijn er subsidies, premies, fiscale tegemoetkomingen?
- Welke verhouding bestaat er tussen de bescherming van archeologisch erfgoed en eventuele andere regelgevingen die betrekking hebben op het gebruik van de bodem? Zijn er gevolgen voor de regelgeving betreffende de ruimtelijke ordening?
- Welke internationale verdragen en overeenkomsten heeft uw land geratificeerd? Hebben ze een invloed gehad op de eigen regelgeving?
- Wordt de regelgeving inzake de bescherming van het archeologisch erfgoed naar behoren geïmplementeerd? Bestaat er een volwaardig beschermingsbeleid? Is er een vorm van controle?

## 4. Geleide bezoeken

Voor de aanwezige leden van het Comité Wetgeving werden tevens een aantal geleide bezoeken georganiseerd. Zij hadden alle betrekking op het thema van de jaarvergadering, met name de bescherming van het archeologisch erfgoed. Het ging meer bepaald om:

- Een bezoek aan de archeologische site van Ename.
- Een bezoek aan het Archéoforum van Luik.
- Een bezoek aan de archeologische site van het voormalige paleis van Brussel op de Coudenberg.

Ter plaatse verstrekten de vertegenwoordigers van de overheden bevoegd voor archeologische monumentenzorg in de diverse gewesten, de nodige informatie.

## 5. Steun aan de organisatie van de jaarvergadering

De jaarvergadering werd mogelijk gemaakt door de steun van de ministers die bevoegd zijn voor monumentenzorg binnen het Brussels Hoofdstedelijk Gewest, het Vlaams Gewest en het Waals Gewest.

Voor wat het Brussels Hoofdstedelijk Gewest aangaat, werd tevens steun verleend door de minister, bevoegd voor Externe Betrekkingen. Ook Icomos Vlaanderen - Brussel vzw en Icomos Wallonie - Bruxelles asbl steunden de organisatie van de jaarvergadering.

De steun was niet alleen van financiële aard, maar betrof ook het ter beschikking stellen van een vergaderlokaal, het aanbieden van een geleid bezoek en een aansluitende receptie, enz.

## 6. Publicatie

Momenteel wordt een publicatie voorbereid, waarbij de bescherming van het archeologisch erfgoed in de diverse landen wordt toegelicht. Dit zal gebeuren aan de hand van een synthese van de antwoorden op de gestelde onderzoeksvragen, die rechtsvergelijkend zal worden uitgebouwd. De ingevulde vragenlijsten zullen, samen met een korte situeringsnota voor elk land, mee worden gepubliceerd.

*Prof. Dr. A.M. Draye*  
*Belgisch vertegenwoordigster Comité Wetgeving*