

ARTICLES

SPOLIATION, CULTURAL PROPERTY, AND JAPAN

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1. INTRODUCTION

The trade in illicit or stolen art and antiquities has recently been estimated to range from \$100 million to \$4 billion annually.¹ For several decades the attention of the West has been drawn to the spoliation of arts and culture by the Third Reich and the means, both public and private, through which appropriated objects wrenched from victims of war might be repatriated.² Among other theatres of significant interest have been the theft of cultural objects from Central and South America,³ the illegal removal of art from Mediterranean countries such as Italy, Greece, and others,⁴ and in the less distant past the plight of cultural property in Iraq.⁵ During times of armed conflict, there have been occasional shifts in interest to Africa, Asia, and the Middle East; however, recently and more frequently, world events have drawn attention to the treatment of cultural property in the East.⁶

¹ Thomas K. Grose, *Stealing History*, U.S. NEWS & WORLD REP., June 19, 2006, at 40–41.

² In 1999 a gathering was held in Tokyo entitled “International Citizen’s Forum on Japanese War Atrocities and Redress.” See, e.g., Paul Gordon Schalow, *Japan’s War Responsibility and the Pan-Asian Movement for Redress and Compensation: An Overview*, 18 E. ASIA: AN INT’L Q. 7, 9 (2000) (“Very much on the minds of the audience and speakers at the Forum was the example of Nazi Germany. Here was a state that between 1939–45 slaughtered approximately 11 million or more people Immediately after the war Germany’s new government had been held accountable by the world for Nazi crimes Nazi leaders were tried and imprisoned or executed, a system of compensation for survivors was implemented, government leaders made sincere public apologies, and by the 1980’s justice was felt to have been served. The question was raised repeatedly at the Forum, ‘Why cannot Japan respond to Asia similarly?’”).

³ See, e.g., *United States v. McClain*, 593 F.2d 658, 659 (5th Cir. 1979) (describing defendants’ convictions under 18 U.S.C. §§ 371, 2314, and 2315 on the theory that the pre-Colombian artifacts with which they dealt were not stolen in the conventional sense, but were stolen because Mexico has declared itself the owner of all pre-Colombian artifacts found within Mexico); *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974) (describing the prosecution of defendants for the theft of pre-Columbian artifacts in violation of a Guatemalan law that ascribes ownership to Guatemala of all pre-Columbian artifacts found in the nation).

⁴ See, e.g., Povoledo, *Photographs*, *infra* note 9 (describing the marble griffins from the Getty collection).

⁵ See, e.g., Ronald K. Noble, Secretary General of INTERPOL, Meeting on Cultural Property Looting in Iraq (May 6, 2003).

⁶ See, e.g., Schalow, *supra* note 2, at 7–8 (“The Nanjing Massacre and the sexual slavery of ‘Comfort Women’ (*ianfu*) have received extensive coverage in both the academic and popular presses in recent years, but the actual scope of the movement for redress and compensation is growing bigger and more complex

One of the unlikely catalyzing events that has drawn our Western eyes eastward and drawn diverse communities of interest together derives from the current prosecutions in Italy of Robert Hecht, a prominent member of the family that founded the department store chain that bears his surname, and Marion True, a former antiquities curator of the Los Angeles based J. Paul Getty Museum, on charges that they conspired to receive and trade in cultural properties stolen from tombs and archaeological sites in Italy.⁷ The details of this story began to unfold in 1995 when an investigation into claims of art theft led Italian police to a warehouse in Geneva operated by a dealer in antiquities by the name of Giacomo Medici. Inside the warehouse, detectives found a treasure trove of purloined art and antiquities as well as a host of documents and photographs. The evidence seized was ultimately employed by Italian prosecutors to secure a conviction against Medici in 2005 on the charge of illegally exporting cultural objects

with every passing year. Besides the Nanjing Massacre and sexual slavery, Asian victims are suing for justice for: the forced relocation to Japan of Chinese and Korean slave laborers who toiled under brutal conditions . . . ; bombing of civilian targets . . . ; the extermination of villages . . . ; the illegal use of biological and chemical weapons . . . ; the vivisection and murder of human subjects for purposes of medical education and experimentation; . . . the systematic looting of hundreds of thousands of irreplaceable books . . . ; and the plundering of Asia's wealth, including gold, cash, and art objects which were removed to Japan.”).

The issue of the “Comfort Women” has continued to be raised by Korea, and it is symbolic of the emotional and political content of the discussions between the countries as well as the continuing course of recriminations of Japan by Korea, both North and South. Various Japanese Prime Ministers, including past Prime Minister Shinzo Abe, have in fact addressed the issue, however, any remarks that have been made have generally been deemed inadequate. In addition, episodes such as the admitted abductions by North Korea of Japanese citizens during the 1970s and 80s in order that they may be trained as spies has also frustrated any dialogue between Japan and Korea. See Hisane Masaki, ‘Comfort Women’ and the *Abductee Issue*, OHMYNEWS, Mar. 8, 2007, http://english.ohmynews.com/articleview/article_view.asp?menu=c10400&no=349083&rel_no=1 (discussing North Korean and global frustration at Japan’s inadequate acknowledgement of its use of “comfort women” before and during World War II, as well as tension between Japan and North Korea related to the latter nation’s abduction of seventeen Japanese nationals).

⁷ The trial began in November of 2005 and will likely last well into 2007. The Italian court that has jurisdiction over the trial met only episodically as is the custom in Italy.

from Italy.⁸ Some of that same evidence is now being utilized in the case against Hecht and True.⁹

Testimony at the current trial suggested the existence of a much larger network of illicit activity that went beyond Europe and to Japan, and investigators expanded their focus of inquiry to include the questionable dealings of another antiquities trader, Gianfranco Becchina of Sicily. While Mr. Becchina has not been formally charged, he is, according to the chief prosecutor Paolo Ferri, under

⁸ Among other charges, Medici was convicted in 2005 of the illegal export of antiquities from Italy. See Grose, *supra* note 1, at 43. See also Kazuki Matsuura, *Records Tie Japan to Art Theft*, YOMIURI SHIMBUN (Japan), Jan. 16, 2007, at 2 (stating that Medici, a business rival of Gianfranco Becchina, was initially arrested in 1997 on charges of illegally dealing in art and antiquities and sentenced to ten years in prison).

⁹ One of the photographs introduced into evidence on May 30, 2006 in the Hecht/True trial depicted Medici standing at the Getty Villa with a pair of fourth century marble griffins Italy claims to have been removed illegally from the country. Another photo showed the griffins encrusted with soil, wrapped in newspaper, and lying in the trunk of an automobile. The griffins are currently part of the Getty collection and on view at the Villa which houses a collection of Greek, Etruscan, and Roman objects. Italy has requested the return of the griffins along with numerous other kraters, amphorae, and other objects it claims to have been illegally removed. The Getty purported to have purchased the griffins from Maurice Templesman in 1985, and the sale was allegedly brokered by Robin Symes of London. The alleged link between the griffins and other Italian cultural treasures was made by Salvatore, a member of Italy's Art Theft Squad. Officers from the Squad were examining contents of the Civic Museum in Foggia, Italy and came upon certain funerary objects that had been stored there after recovery in 1978 from Savino Berardi, an alleged *tombaroli* (tomb raider). Mr. Morando said,

[T]he investigators realized that the vessels were made of Parian marble, a rare, semi-translucent white stone quarried in ancient times on the Greek island of Paros. They bore faint traces of polychromatic decoration in specks of red, light blue and pink.

... [T]he type of marble and its decoration prompted a leading expert, the archaeologist Angelo Bottin, to link them directly to the much-better-known griffins at the Getty Villa.

Elisabetta Povoledo, *Photographs of Getty Griffins in Car Trunk Shown at Rome Trial*, N.Y. TIMES, June 1, 2006, at E3 [hereinafter Povoledo, *Photographs*].

Considering the many claims for the repatriation of cultural treasures one might ask by what right Italy as opposed to Greece claims the griffins? This is one of the most difficult issues that must be addressed when considering ownership of cultural objects, i.e., who has the necessary and appropriate connection to an object such that they can make a legitimate claim. For a discussion of this and related issues, see generally Geoffrey R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT'L. & COMP. L.J. 283, 283-362 (2006) (discussing the "various historical and contemporary influences that have affected the legal definitions of cultural and intellectual property in Japan and the United States").

investigation,¹⁰ and he is expected to go on trial in the near future.¹¹ This new avenue of inquiry was precipitated by the testimony at the Hecht/True trial of Giuseppe Putrino, an officer with the Italian Art Theft Squad. In court Putrino described several raids in 2005 including those of a warehouse, owned by Becchina, which was located in Basel, Switzerland, the offices of Palladion Ancient and Fine Art in Basel operated by Ursula Becchina, wife of Gianfranco,¹² and the Becchina home in Castelvetro, Sicily.¹³ During these events, approximately 10,000 photographs of items claimed to have been illegally excavated in or illicitly removed from Italy¹⁴ and Greece¹⁵ were confiscated, and

¹⁰ In 1999 and pursuant to the Mutual Assistance Treaty, Italy made a request of the United States for the return of a krater executed by the renowned Italian painter, Asteas. The krater was in the collection of the Getty Museum, which had purchased the krater from Gianfranco Becchina in or about 1983 for \$275,000. Pursuant to a consent decree between the Getty Museum and Italian authorities that was brokered by the U.S. Attorneys' Office, in 2005 the museum voluntarily surrendered possession of the krater. For example, the U.S. Immigration and Customs Enforcement agency reported:

A 2,300-year-old vase that was allegedly smuggled out of Italy and ended up in the Getty Museum's antiquities collection arrived in Rome this week, capping a joint effort by Italian authorities, the United State's [sic?] Attorney's Office, and U.S. Immigration and Customs Enforcement (ICE) to return the artefact to its original home

. . . [The krater had] an appraised value of approximately \$350,000. According to the forfeiture complaint filed in the case, the vase was unearthed by a labourer doing maintenance work on Italy's canals during the 1970's. Initially offered a price of one million lire, the worker told Italian authorities he ultimately traded the artefact to a notorious Italian antiquities trafficker in exchange for a pig. In 1978, according to the forfeiture complaint, a former Getty curator saw the krater in Switzerland where it was held by a private owner and two years later arranged for the Museum to bring it to the United State on loan. After three years, the Getty formally purchased the artefact from European art dealer, Gianfranco Becchina

News Release, U.S. Immigration and Customs Enforcement Agency, *Vase Seized by ICE From Getty Museum Returned to Italy* (Nov. 10, 2005), available at <http://www.ice.gov/pi/news/newsreleases/articles/051110losangeles.htm>.

¹¹ Grose, *supra* note 1.

¹² Elisabetta Povoledo, *Focus in Getty Trial Shifts to a Sicilian Antiquities Dealer*, N.Y. TIMES, Apr. 27, 2006, at E3 [hereinafter Povoledo, *Focus*].

¹³ *Id.*

¹⁴ Matsuura, *supra* note 9.

¹⁵ In December 2006, the Getty Museum agreed to return a fourth century BCE wreath and a sixth century BCE kore (statue of a woman) that were allegedly illegally excavated in and removed from Greece. The return was with the help of Italian authorities. The wreath is believed to have been executed by the craftsman who forged the royal wreath of Philip of Macedonia, father of Alexander the

approximately 200 bundles of receipts, faxes, invoices, and letters were seized. Some of these items allegedly link Becchina¹⁶ to American and Japanese museums,¹⁷ collectors, or dealers.¹⁸

For example, one receipt found among the proceeds of the raids documented an April 1991 transaction between Becchina and a Japanese art dealer based in London. Although the art dealer disclaims any contact with Becchina since 1989,¹⁹ Italian prosecutors purport to have photographic evidence seized in the Becchina raids that depict items the dealer allegedly purchased for the Miho Museum,²⁰ a private institution located in Koka, Shiga Prefecture in Western Japan.²¹ Among the approximately fifty illicit articles believed to be in the possession of the museum are sculptures and frescoes allegedly from ancient Rome.²² In response to the claims of Italy, Hiroaki Katayama, the Chief

great. A middleman allegedly attempted to sell the wreath to Gianfranco Becchina; however, he declined to purchase the object. Italian investigators uncovered photographs of the wreath among the items confiscated in the raid on premises controlled by Becchina, and turned the information over to Greek officials. In July of 2006 the Getty also returned a large stele and a marble relief from the Island of Thassos to Greece. See Anthee Carassava, *Greeks Hail Getty Museum's Pledge to Return Treasures*, N.Y. TIMES, Dec. 12, 2006, at E1 (describing efforts by European authorities to negotiate with the Getty Museum for the return of illegally removed artifacts).

¹⁶ Mr. Becchina was claimed to have once been a major supplier of objects to the Getty, however, the relationship allegedly degenerated, according to Putrino, following the discovery that a marble kouros (naked youth) he sold to the Getty in 1983 for \$10 million had been a fake.

¹⁷ According to news sources, the Italian government has asked six U.S. museums, including the Getty and the Metropolitan Museum of Art in New York, to return approximately 100 objects claimed to have been illegally taken from the country. The Getty alone was asked for forty-seven objects. As of January, 2007 the Getty had agree to return twenty-six. In declining to return the remaining objects, it has asserted that the evidence, to date, of the other twenty does not place the legitimate provenance of the objects in question. Kazuki Matsuura, *Italy Wants Japanese Museums to Return "Stolen" Items*, YOMIURI SHIMBUN (Japan), Jan. 12, 2007.

¹⁸ *Id.* See also Povoledo, *Photographs*, *supra* note 9 (describing how dealers would have been willing to purchase the Getty griffins).

¹⁹ Matsuura, *supra* note 17.

²⁰ The Miho Museum is a private institution generally housing objects owned by private individuals. Miho Museum, <http://www.miho.or.jp/english/index.htm> (last visited Feb. 27, 2008).

²¹ Matsuura, *supra* note 17.

²² Justin McCurry, *Italy to Ask Japan For Return of 'Looted' Antiques*, GUARDIAN NEWS, Jan. 11, 2007, available at <http://www.guardian.co.uk/world/2007/jan/11/italy.japan> ("About 50 of the missing treasures, including a sculpture and fresco painting, are being kept at the Miho museum . . .").

Curator of the museum, recently stated that the museum neither possesses the number of items from the Roman period that is claimed to be in its collection nor does he believe that the collection includes anything that was illegally excavated.²³ Notwithstanding these protestations, Italian officials assert that they will soon formulate an official request directed to Japan for the return of over 100 cultural or artistic objects they believe were stolen from their country and which are currently in Japan.²⁴ In summing up the testimony, prosecutor Paolo Ferri characterized the tangled web of intrigue: "This was one big swamp where many swam and many others came to drink"²⁵

A second world condition which, perhaps serendipitously, has drawn Eastern eyes westward to meet our gaze, is the shared interest in the plight of Afghanistan and the countries of the Middle East.²⁶ In this regard, Ikuo Hirayama,²⁷ President of the Tokyo University of fine Arts and Music and President of the Japanese National Commission for UNESCO stated:

Afghanistan is located at the crossroads of Eastern and Western culture and history The Buddhist culture of India went north and encountered Persian culture and even Greek Hellenism coming from the west directly through the reign of Alexander the Great. In the east over the Pamir

²³ Hisane Masaki, *Japan Still a Cultural Looter?*, OHMYNEWS, Jan. 15, 2007, http://english.ohmynews.com/articleview/article_view.asp?menu=c10400&no=339994&rel_no=1.

²⁴ *Id.* For a recent news story reporting recent activities with respect to the return to Italy of cultural properties from a New York collector and an October 2007 agreement for return with Princeton University, see *Generous New York Dealer Returns Italian Artefacts*, LIFEIN ITALY, Nov. 7, 2007, <http://www.lifeinitaly.com/news/news-detailed.asp?newsid=7243>.

²⁵ Povoledo, *Focus*, *supra* note 12.

²⁶ See, e.g., U.N. EDUC., SCI AND CULTURAL ORG. [UNESCO], AFGHANISTAN: A NATION AT THE CROSSROADS 38–63 (2002), available at <http://unesdoc.unesco.org/images/0012/001278/127885e.pdf> (a UNESCO report on Afghanistan that exemplifies interest in Afghanistan). See also The UNESCO/Japan Funds-in-Trust, www.unesco.emb-japan.go.jp/htm/mofaworld.htm (last visited Apr. 5, 2008).

²⁷ Hirayama is also a famous Japanese painter, head of the Council for the Promotion of International Cooperation on Cultural Properties, a U.N. Goodwill Ambassador, and President of the Japan-China Friendship Association. For a brief biography see UNESCO, *Unesco Celebrity Advocates Ikuo Hirayama*, http://portal.unesco.org/en/ev.php-URL_ID=8311&URL_DO=DO_TOPIC&URL_SECTION=201.html. See also, Furuya Keiji Tsushin: "Bunka Isan Kokusai Kyoryoku Ho" ga Seiritsu [Keiji Furuya Internet Announcement: "Act on the Promotion of International Cooperation Regarding Cultural Heritage" Passed the Diet], June 16, 2006, www.furuya-keiji.jp/2006/06/post_26.html.

and Tianshan mountains lies China. When I look at the cultural heritage of Afghanistan, I feel that we share the same cultural DNA²⁸

During two recent periods, Afghanistan has been the victim of savage attacks upon its cultural heritage. The first followed the invasion of the Soviet Union in 1979; the second began in 1996 under the rule of the Taliban. In an interview in 2002, Abdullah Wassay Ferozi, the Director General of the Afghanistan Center of Archaeology, stated: "The destruction has lasted more than twenty-two years. The looting and then the Taliban. They totally destroyed everything they could, all the objects which introduced the previous Afghanistan history."²⁹

It is now estimated that the greatest proportion of destruction in Afghanistan, perhaps up to seventy-five percent, occurred between 1992 and 2002. A credible symbol of the grave losses that were suffered by the country during that period is the decimation of the two great Buddhas at Bamiyan. Believed to have been created between the fourth and fifth centuries CE the Buddhas, fifty-five and thirty-eight meters high respectively, were first documented in 632 CE by Hiyuan Tsang, a visiting Chinese monk. Each had been placed in a niche approximately 2,590 meters above sea level in the northern cliffs of the Hindu Kush Mountains to the west of Kabul in central Afghanistan. The site is also the home to approximately 700 caves and was considered a major Buddhist center during the second to eighth centuries CE.³⁰ A most unusual feature of the statues and one of particular note in the context of this article purports to have been that although the features were classically Eastern, the figures were draped in Greek robes. This has been interpreted to represent a fusion of the influences of East and West.³¹

The effect of Taliban rule on these very important cultural properties was first felt in September 1998. Initially, the spotlights that illuminated the statues were extinguished by the ruling group; however, within several days, the head of the smaller Buddha was demolished by explosive projectiles that were intentionally fired at

²⁸ Yukiko Kishinami, *Afghan Art in Safekeeping*, YOMIURI SHIMBUN (Japan), Aug. 24, 2002, at 13.

²⁹ Tom Squitieri, *Afghanistan's Monumental Destruction*, U.S.A. TODAY, Mar. 14, 2002, at 10D.

³⁰ The UNESCO/Japan Funds in Trust, *supra* note 26.

³¹ Squitieri, *supra* note 29.

the statue causing damage to both its robes, as well as frescoes that were located nearby.³²

On February 26, 2001, Taliban leader Mulla Mohammed Omar issued an edict stating that all ancient monuments, including the Buddhas and other related cave carvings, must be destroyed. The objects were considered idolatrous by the Taliban and an offense to Islam.³³ The destruction proceeded notwithstanding offers by institutions, such as the New York Metropolitan Museum of Art, to purchase some of the property or pay for its removal and despite the appeals to the Taliban by representatives of Japan, Pakistan, Sri Lanka, Qatar, and India, as well as by UNESCO Goodwill Ambassador Ikuo Hirayama and a group of museum curators from such countries as the United States, the United Kingdom, and France. On March 3, a Taliban spokesman issued a statement that soldiers had used explosives to demolish the heads and legs of the giant statues the day before. Taliban Foreign Minister Wakil Ahmed Muttawakil noted that between March 5 and 7, demolition was suspended in observance of Eid al-Adha, a Muslim Festival; however, it resumed on March 8. As the cultural crisis continued, the UN Security Council attempted to intervene. On March 6, it issued a presidential statement condemning the edict, and on March 9, a unanimous resolution of the U.N. General Assembly was adopted that urged the Taliban to reconsider its actions. By March 8, Muttawaki deemed the decision to destroy the relics "irreversible,"³⁴ and on March 27, Japanese media provided photographic evidence that the statues had been destroyed.³⁵

This Article will examine the role that has and is being played by Japan in responding to the challenges presented by the growing trade in stolen cultural property, art, and artifacts; consider the historical contexts in which Japan has been involved in the claimed misappropriation of cultural treasures, particularly those of Korea;

³² *Id.*

³³ See, e.g., Kosaku Maeda, ASAHI NEWS SERVICE (Japan), May 23, 2003 (discussing the looting and theft of cultural artifacts in Afghanistan and the Middle East).

³⁴ *Afghanistan: Taliban Orders Destruction of Statues*, FACTS ON FILE WORLD NEWS DIG., Mar. 26, 2001, at A2.

³⁵ See UNESCO/Japan Funds in Trust, *supra* note 26 (stating that Mr. Koichiro Matsuura called the destruction a crime against culture); see also The Ministry of Foreign Affairs of Japan, *Issues Relating to the Taliban's Edict to Destroy Statues*, Mar. 21, 2001, http://www.mofa.go.jp/region/middle_e/afghanistan/taliban0103.html (detailing the situation and response to the Taliban's edict to destroy cultural effects).

analyze the legal conditions, structures, and developments in Japan, Korea, and other select countries relevant to the preservation and considered repatriation of cultural objects; and finally, compare the legal principles reflected in the mission to those that abide in the United States and that address similar policies and considerations.

2. THE PROTECTION OF CULTURAL PROPERTY: CONTEMPORARY INVOLVEMENT OF JAPAN

Japan itself has been deemed the victim of misappropriation of many of its cultural assets.³⁶ However, in the global marketplace of antiquities, the country has frequently been characterized as being a safe haven for stolen artifacts³⁷ from other locales. Much of this can be attributed to three factors: (1) Japan's perceived concentration of discretionary wealth and an assumption that the flow of illicit cultural assets is usually in the direction of locations where interested and capable buyers can be found; (2) its position as a long-standing and significant political and economic force in the world community; and perhaps most importantly, (3) the view that the country's laws and its treatment of bona fide purchaser are sympathetic to cleansing title to objects that possess questionable provenance.

This unfortunate reputation has often served to precipitate an aggressive response from countries and citizens that have felt the loss of cultural objects and frequently exacerbates the already deplorable state of multinational affairs in the cultural property

³⁶ See, e.g., *Art Suspect Seen as Part of Network*, YOMIURI SHIMBUN (Japan), Feb. 26, 2007, at 2 [hereinafter *Art Suspect*] (stating that as of October 2006, the Cultural Affairs Agency responsible for administering the 1950 Law for the Protection of Cultural Properties indicated that fifty-two pieces of art designated as cultural assets of national importance, including eight objects designated as national treasures, are missing in Japan).

³⁷ See *Global Effort Should Be Mounted for Recovery*, ASAHI NEWS SERVICE (Japan), Apr. 22, 2003 (stating that Japan is a "significant market" for stolen artifacts); see also, Kosaku Maeda, *supra* note 33 (noting the revision on Japan's Civil Code) and discussed *infra* at Section 5.2.4.3.2 in which the two year statute of limitations for claims for the return of cultural property was, in 2002, extended to ten years; Donald MacIntyre, *A Legacy Lost*, TIME, Jan. 28, 2002, available at <http://www.time.com/time/arts/article/0,8599,197704,00.html> (discussing the return of important stone statues to Korea from Japan); Eiji Yamamori, *Smuggler's Blues: Japan will Sign a Convention to Return Stolen*, ASAHI NEWS SERVICE (Japan), Nov. 22, 2002 (discussing Japan's previous lack of action and its reputation for harboring stolen objects); and Hisane Masaki, *supra* note 23 (indicating that many objects inside a Japanese museums may be smuggled cultural goods from other countries).

community.³⁸ For example, three Buddhist scriptures that had been designated as important cultural assets of Japan, including one entitled Dai Hannya Kyo, along with 493 written copies, were stolen from Ankokuji Temple in Nagasaki on July 23, 1994. The objects surfaced in Korea in 1998. However, upon asking the Korean government for assistance in repatriating the items, Japan was informed that the scripture had been designated a Korean National Treasure in 1995, and since the last owner had been a bona fide purchaser, the item would not be returned.³⁹ In addition, the Korean statute of limitations apposite to the claim of recovery expired on July 22, 2001.⁴⁰

In what is claimed by Japanese officials to be related events, a number of tenth to fourteenth century Korean Buddhist paintings were stolen in 2005 and 2006 from temples located in Aichi and Fukui Prefectures, Japan. Kim Jae Chil, a 48-year-old Korean man, is currently on trial in Japan for the thefts. In addition, Kim is accused of attempting to arrange for the ransom of another Korean Buddhist painting in 2005, also a designated important cultural asset of Japan, that had been stolen from Kakurinji Temple in Hyogo Prefecture in July 2002.⁴¹ While Kim alone is being formally charged in the thefts, he is suspected of being only a part of a broader network of persons dealing in stolen artifacts.

Consistent with the notion of a syndicate being involved in the international theft of cultural property, the prosecutor's office in Seoul has been assembling a case against two brothers and an acquaintance, who are thought to have conspired to break into temples in Osaka and Aichi Prefectures in Japan. Prosecutors believe that the group has stolen a total of forty-seven cultural objects valued at approximately 300 million yen from temples in

³⁸ The theft of cultural property is not, however, only an international problem. Japan is also a frequent victim of thefts. For example, in January 2003, Japan's oldest Hinomaru (Rising Sun) flag (a designated important cultural property) was stolen along with fifty other priceless works of art from the Imperial Palace (Hori Family home) in Nishiyoshino (Anou) Nara Prefecture. The flag was thought to have been used during the Nambokucho Period (1336-1392) by the army of Emperor Go-Daigo. *14th Century Rising Sun Flag Snaffled in Historic Raid*, MAINICHI DAILY NEWS (Japan), Jan. 19, 2003.

³⁹ *Art Suspect*, *supra* note 36.

⁴⁰ See, e.g., *Japan: Investigation into Stolen Scriptures Expires*, KYODO NEWS SERVICE, July 22, 2001 (stating that the statute of limitations on the 1994 theft expires July 22, 2001).

⁴¹ See *Art Suspect*, *supra* note 36 (reporting that Kim Jae Chil is being charged in connection with the theft).

these Japanese prefectures. The group is also suspected of having ties to Kim Jae Chil, as well as being instrumental in the burglary of the Kakurinji Temple in July 2002, during which eight Buddhist works of art were taken, including a hanging scroll of the Amida Triad dating to Korea's Goryeo period (918–1392).⁴²

In April 2003, the Hyogo Prefectural Police arrested the younger of the two brothers under investigation in Seoul and seized seven of the purloined items. These articles were returned to the temple; however, the scroll of the Amida triad was not recovered. Further investigation has disclosed that the scroll was illicitly taken to South Korea, where it sold to a dealer for 110 million won (110.5 million yen, approximately 106,000 USD), later resold to a South Korean businessman for 400 million won, and eventually donated to a temple in Daegu.⁴³ Representatives of Kakurinji Temple travelled to Seoul in November of 2004 to request the prosecutor's assistance in repatriation of the scroll; however, notwithstanding the claims of the temple, it is unlikely that they will meet with any success in Korea. Article 249 of the Korean Civil Code would award actual legal title to the scroll to the last bona fide purchaser,⁴⁴ who in this case, presumably is the businessman from South Korea.

Of considerable contextual note, and perhaps of greater social import, are the comments made by the thieves when apprehended and the significant divergence of public opinion with respect to the proper disposition of the case. One of the suspects stated that, having read that many Buddhist objects from the Goryeo Period (918–1392) had been illegally removed to Japan by the invasion of Hideyoshi, his and his colleagues' motive in taking the objects was

⁴² See Hisane Masaki, *Janus-faced Japan: Is the Country a Cultural 'Guardian' or 'Looter'?*, OHMYNEWS, Aug. 17, 2006, http://english.ohmynews.com/articleview/article_view.asp?menu=c10400&no=311744&rel_no=1 [hereinafter *Janus-faced Japan*] (explaining that there may be approximately 130 paintings of the Amida Buddha from the Goryeo Period—of this number, thirteen are located in South Korea, and it is suspected that 106 are in Japanese temples).

⁴³ *Stolen Art: Who is the Rightful Owner of Works Looted Centuries*, ASAHI SHIMBUN (Japan), Dec. 2, 2004 [hereinafter *Stolen Art*] (detailing the journey and possible destinations of the stolen scroll).

⁴⁴ Lee Sun-young, *Stolen Treasure Returned Home*, KOREA HERALD, Nov. 9, 2004, available at <http://www.buddhistchannel.tv/index.php?id=4,139,0,0,1,0> (quoting experts and prosecutors: “[I]t is unlikely that the painting will be returned to Japan since none of the last few owners appear to have been aware they were buying something that was stolen” and that the artifact should remain in Korea).

to take cultural artifacts looted by Japan back to their country.⁴⁵ As a consequence, the members of the group are, reportedly, widely held in Korea as patriots who have corrected a centuries-old wrong committed by Japanese invaders.⁴⁶ Temple officials, however, are said to be dismayed by this attitude and view those under investigation as simply greedy thieves with a galling lack of respect for institutions set up to spread good will.⁴⁷

3. WHO IS THE RIGHTFUL OWNER OF CULTURAL PROPERTY? THE POLITICAL CONTEXT IN THE EAST

To properly analyze assertions of misappropriation, it is necessary to focus on several seminal considerations. These include the means by which the property came to be reposed in the country having actual possession of the object, the subject matter that is deemed to be cultural property, the social and anthropological characteristics of the claimant, and the political, philosophical, and moral context of the claim.

Perhaps the great majority of the claims that have arisen concerning the alleged misappropriation of property by Japan have been made by Korea and China.⁴⁸ In this context, there are a number of usual means by which cultural articles from these and other countries have allegedly come to be present in Japan.⁴⁹ They include:

⁴⁵ *Id.*; see also *Janus-faced Japan*, *supra* note 42 (stating that the "Koreans insisted they were on a mission to reclaim pieces of Korean history" that the Japanese stole).

⁴⁶ *Janus-faced Japan*, *supra* note 42.

⁴⁷ *Id.* Evidence exists that, in fact, the temple that had preceded Kakurinji had been founded by a priest who had come from Korea during the Goguryeo Period and that the Amida scroll, in particular, was in the possession of the temple approximately 100 years prior to the Japanese invasion. *Stolen Art*, *supra* note 43.

⁴⁸ See, e.g., *Treasure Hunt*, BEIJING REV. 2005, available at www.bjreview.cn/EN/06-25-e/china-4.htm (discussing the occurrence of overseas treasure hunting by Chinese collectors in Japan); Ma Guihua, *Return of Lost Relics a Must*, CHINA DAILY, Jan. 31, 2003 (stating that China has lost many cultural artifacts to Japan); and Consulate General of the People's Republic of China, *Cultural Relics on Their Way Home*, Nov. 19, 2003, available at <http://houston.china-consulate.org/eng/nv/t52847.htm> (stating that some relics are finding their way to Chinese museums).

⁴⁹ Suvendrini Kakuchi, *Many Korean Works of Art Looted by Japan Still Missing*, INTER PRESS SERVICE, Dec. 28, 2005 ("Surveys . . . show that while many of the items were looted, there were others that were also bought by Japanese through proper channels or excavated during colonization, which makes it difficult to demand their return.").

(1) Personnel affiliated with Japanese forces appropriated the objects in the course of armed conflict and either brought the objects with them upon their return home or forwarded them to persons in Japan, often the emperor or another influential individual, as a symbol of Japanese faith and dominance.

(2) Individuals brought indigenous objects with them when they immigrated to Japan.

(3) Business persons or visitors purchased objects on the open market and in the ordinary course of commercial trade from or when they were in a foreign location, and either had the articles sent to Japan or brought the objects with them upon their return to the country.

(4) Cultural objects were given or sent as a gesture of international goodwill to diplomats, ambassadors, government officials, business persons or others by those who were, in the locale from which they were exported, perceived domestically as the rightful owners of the objects.⁵⁰

(5) Cultural objects were illegally or illicitly taken from the rightful possessors or owners and taken or sent to Japan.

(6) Objects were excavated during periods of colonization or political occupation, often by academic institutions or other cultural research groups, and exported to Japan; or

(7) Cultural objects were exported, perhaps improperly on some occasions, from a country either by those who were deemed the rightful owners/possessors of the objects or by others who had misappropriated the objects, and the articles found their way to Japan.

A second factor, however, is the often disparate, imprecise, and diverse way in which cultural property is defined within the countries, as well as through the various national and international documents that address this issue. This is often a significant impediment to definitively assessing the legitimacy of the avenue of acquisition. For example, the range of items that Korea claims to have been misappropriated by Japan is extremely broad. While some include such late sixteenth century acquisitions as the Korean

⁵⁰ An interesting example of this symbolic and ceremonial tradition was the gift from Japanese Ambassador So Yoshitomo to the Korean ambassador of a gun to convey the threatening message that should Korea fail to cooperate with the ambitions of Toyotomi Hideyoshi, force would be used. *See, e.g., infra* note 83 and accompanying text; *see generally*, STEPHEN TURNBULL, SAMURAI INVASION 34–35, app. 3 at 241 (2002) (describing the ceremonial exchange of gifts and listing the “heads of Namwŏn”).

stone lantern brought to Japan by Kuroda Nagamasa, which currently stands in the Daitokuji Temple in Kyoto, and a stone from the Namdaemun Gate of Seoul that was acquired by Hosokawa Tadaoki and is now used as a garden feature, others, more macabre, include 100,000 noses and ears sliced off of Koreans by Japanese Samurai during the Imjin War of the late sixteenth century, which are buried in the Mimizuka mound in Kyoto.⁵¹

Third, the problem of repatriation is often exacerbated by transcultural, multi-community, and esoteric considerations such as whom in fact or in law is to be considered the rightful owner of cultural property; and the resolution of this issue is particularly

⁵¹ *Id.* See, e.g., Barbara Demick, *Pilfered Monument Back in Korea, a Century Later*, L.A. TIMES, Mar. 13, 2006, at A3 (stating that the Bukgwan Victory Monument was finally returned to South Korea from Japan); TURNBULL, *supra* note 50 (citing Chosen ki in 1933 ZOKU GUNSHO RUIJU KANSEIKAI 287-88 [hereinafter ZGR] which states that documentation of the taking of heads, ears, and noses as a show of accomplishment in battle was very important); see also TURNBULL, *supra* note 50, at 230 (stating that Okochi Hidemoto, a warrior during the Imjin War, reported in his balance sheet that 160,000 Japanese troops had gone to Korea during the War and 185,738 Korean and 29,014 Chinese heads had been taken); *Motoyama Buzen no kami Yasumasa oyako senko oboegaki*, 1933 ZGR 391 as cited in TURNBULL, *supra* note 50, at 250 (quoting Motoyama Yasuma stated: "Men and Women, down to newborn infants, all were wiped out, none was left alive. Their noses were sliced off and pickled in salt.").

Japan is also currently confronting domestic issues similar to concerns expressed in the United States with respect to the treatment of indigenous peoples. In the United States it was found that museums, including the Smithsonian, were in possession of human remains of Native Americans that had been gathered for anthropological study. The return and protection of such remains in the U.S. was the subject of The Native American Graves Protection and Repatriation Act (NAGPRA). In Japan, remains of an indigenous group known as the Ainu along with associated funerary objects were the subject of similar collection and study. While many academic institutions and museums contain such remains and objects, perhaps one of the largest was reposed at Hokkaido University. The collection, assembled in the 1930's by then-Professor of Anatomy Sakuzaemon Kodama, contained over 1,004 Ainu skulls and other skeletal remains. Negotiation between Hokkaido University and the Ainu Association of Hokkaido (AAH) were commenced in 1987 concerning the custody and repatriation of the remains. As of 2002, thirty-five remains have been repatriated, and according to the university, the remaining 969 remains are available for reclamation by proper representatives. The issue of the location of 7,000 related funerary objects is still being addressed. It is believed that most were in the collection of Kodama, and upon his death they either passed to the Hakodate City Museum, the Ainu Museum in Shiraoi, or into the private hands of descendants of Kodama. Some rumors persist that the objects are in a secret collection at the university. The AAH continues to press the cause and has, in fact, issued a request to institutions in Europe and the United States for return of Ainu remains it believes are reposed in those countries. See, e.g., Tomek Bogdanowicz, *Skeletons in the Academic Closet*, JAPAN TIMES, Nov. 17, 2002 (discussing Professor Kodama's collection of Ainu skulls).

difficult if no identifiable living individual has actually suffered its direct personal loss. In such circumstances the issue of representation arises, and in that context the question might be, who is to be considered the proper person or group to succeed to the interest?⁵² Is it a descendant of the individual or group from which the object was derived, or when neither the creator nor lineal representative is clearly identifiable, might it be that person or group who can best be considered the “cultural heir” of the peoples who created the item?

In comparing the available international agreements, there is no single directive as to whom, precisely, errant property is to be repatriated, and the relevant documents can in general be grossly divided into two groups that represent varying perspectives. The first, including the UNESCO Convention on Illicit Art and International Institute for the Unification of Private Law (“UNIDROIT”) present a bias favoring a conclusion that cultural property is part of, and necessarily attached to, a particular location or group. To the contrary, the second group represented by The Hague Convention, the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, and certain of Japan’s recent enactments take a significantly different and more general view that culture and its proprietary by-products are to be considered the common heritage of mankind.

In the context of the Japanese-Korean disputes in this area, the issue takes on an unusual caste as a result of what has been considered a rather unusual anthropological view propounded by Japan as to the monoethnic⁵³ relationship between the Japanese and Korean peoples. To begin, Japan espouses a general precept that, with the exceptions of the Ainu of Hokkaido⁵⁴ and the

⁵² This is a very significant issue in the context of claims by Korea and China for the return of cultural properties from Japan, as part of Japan’s anthropological and political perspective during its colonization of the Korean Peninsula was that it was merely occupying lands to which it was the rightful racial/ethnic descendent. See *infra* note 62 and accompanying text.

⁵³ See Stephen Murphy-Shigematsu, *Multiethnic Japan and the Monoethnic Myth*, 18 MELUS 63, 66 (1993) (detailing assimilation policies favored by Japanese political leaders who believed Japan should be a monoethnic society (*tan’itsu minzoku kokka*)).

⁵⁴ See, e.g., David L. Howell, *Ainu Ethnicity and the Boundaries of the Modern Japanese State*, 1994 PAST & PRESENT 69 (using changes in the ethnic identity of Ainu during the Tokugawa period, 1600–1860, to illustrate how Japanese homogeneity is a product of history).

Ryukyuan of Okinawa and other Ryukyu islands,⁵⁵ its population is biologically and culturally homogenous.

The evidence as to the origin of the Japanese people is, however, conflicting and in many ways confusing. The archaeological information⁵⁶ seems to suggest four possibilities. They include:

(1) That the Japanese evolved from ice-age inhabitants who migrated over land bridges that connected the islands with the mainland prior to 20,000 BCE;

(2) That they are descended from non-Korean Asian nomads who passed through the Korean Peninsula to conquer Japan in the fourth century BCE;

(3) That they are descended from Korean immigrants who arrived in the islands around 400 BCE and who brought with them the agricultural techniques for cultivating rice; and

(4) That the modern Japanese are a mixture of the aforementioned groups.⁵⁷

What does appear particularly credible, however, is that Japan has suffered invasion by outsiders only twice in its long history, once by Korea or Korean-related persons in the third to fourth century BCE and once by the United States in 1945.⁵⁸

In light of this information, who then is the rightful heir of the lands and culture of Japan and Korea? Confronted with the evidence of anthropological origin⁵⁹ and with the fact that people

⁵⁵ Murphy-Shigematsu, *supra* note 53.

⁵⁶ See Jared Diamond, *Japanese Roots*, 19 DISCOVER MAG. (June 1998), available at <http://discovermagazine.com/1998/jun/japaneseroots1455/?searchterm=japanese%20roots> (explaining and analyzing the anthropological issue and consequences of the attempt to link Japanese racial and political origins to China and Manchuria through use of these artifacts).

⁵⁷ *Id.*

⁵⁸ See, e.g., Diamond *supra* note 56. See generally Richard Hooker, *Ancient Japan*, <http://www.wsu.edu/~dee/ANCJAPAN/ANCJAPAN.HTM> (last visited Mar. 4, 2008) (providing a comprehensive learning module, paying particular attention to interactions between Japanese and other cultures in the ancient period).

⁵⁹ Discussing the anthropological origin of the Japanese people, Nobayashi states:

The purpose of physical anthropology is to investigate the morphology and physiological phenomena of human beings, to know the variations of them among each group and then to discuss the process of changing of human beings or each population in the past present and future. Physical anthropology in Japan has progressed in line with this purpose and pursued a concrete issue. It is the origin of the Japanese race. When they refer to themselves, Japanese use various terms: *Nihon-jin* (the

and material culture passed between the Korean peninsula and the Japanese islands at various times, including during both the period of 300 – 700 CE and during the Imjin War in the last decade of the sixteenth century, Japan's interpretation was that it conquered Korea and brought the influence of that peninsula to the islands of Japan.⁶⁰ To the contrary, however, historical perspective seems to be that Korea conquered Japan and that the Japanese Imperial Family is, in fact, of Korean descent.⁶¹ The ultimate political and cultural significance of the debate in this case rests, however, in the position of Japan that when it annexed the Korean peninsula in 1910, the event was celebrated as "the restoration of the legitimate arrangement of antiquity."⁶² Thus, Japan considered itself the heir to all that had theretofore been improperly considered within the province of their unfortunate and undeveloped kinfolk of the mainland. To the contrary, however, some have viewed Japan's interpretation as less than sincere and a mere rationalization. As stated by one Korean author, Hyung Il Pai:

During the colonial period, Korean remains and relics were promoted by Japanese bureaucrats, intellectuals and

people of Japan), *Nihon-minzoku* (the *minzoku* of Nihon), *Wa-jin* (the people of Wa), *Yamato-minzoku* (the *minzoku* of Yamato), etc. All these terms seem to include the nuance of the Japanese as a homogenous race.

Atsushi Nobayashi, *Physical Anthropology in Wartime Japan*, in *WARTIME JAPANESE ANTHROPOLOGY IN ASIA AND THE PACIFIC* 143 (Akitoshi Shimizu & Jan van Bremen eds., 2003).

⁶⁰ Analyzing Japan's military policy, Murphy-Shigematsu states:

Present-day leaders, most notably former Prime Minister Nakasone, continue to endorse the theory that a strong and dominant Japan is generated from a clear identity as a monoethnic people with a special spirituality and culture. Nakasone's intellectual mentor was the nationalist philosopher Watsuji Tetsuro, who believed that Japan's military aggression was part of a destiny imposed upon the nation, much like nineteenth-century "manifest destiny" philosophy of the United States

Murphy-Shigematsu, *supra* note 53, at 65. See also Kirsten Refsing, *In Japan, But Not of Japan*, in *ETHNICITY IN ASIA* 48 (Colin Mackerras ed., 2003) (describing different groups that "are in, but not of, Japanese society").

⁶¹ See Diamond, *supra* note 56 (discussing various theories of the origin of the Japanese).

⁶² *Id.* See also Howell, *supra* note 54, at 69 ("Japanese homogeneity is very much a product of history, a political construct that emerged during the process of state formation and re-formation in the Tokugawa (1600–1868) and Meiji (1868–1912) periods."); *id.* at 92 (describing the state's assertion of sovereignty consistent with Western standards of international law over both Hokkaido and Ryukyu during the Meiji period and its redefinition of the populations as ethnic Japanese).

educators as the most crucial “scientific” and “historical” evidence for linking Japan’s racial and state origins to the Chinese continent and Manchuria. In this way, archaeological and art-historical data were used to demarcate “Japanese” homelands, thus supporting the then-popular racial hypothesis which traced the common ancestral origins of the Korean/Japanese races (*Nissen dosoron*) in Manchuria. This racial theory provided the intellectual justification for Japanese empire-building in northeast Asia at the turn of the century. Consequently, in the post-war period, Japanese archaeologists have been vilified not only for their “imperialistically” biased interpretations of the Korean past but for using their archaeological knowledge systematically to loot the Korean peninsula.⁶³

Consistent with Japan’s policies, however, and notwithstanding the formal language of annexation in treaty documents, Korea was not viewed by Japan as a possession nor was it, within the Japanese psyche, internally perceived as a colony; rather, it was a mere legitimate geographic extension of the Japanese state. Representing and reinforcing this pervading ideology, Japan adopted a policy of assimilation⁶⁴ upon taking

⁶³ Hyung Il Pai, *Nationalism and Preserving Korea’s Buried Past: The Office of Cultural Properties and Archaeological Heritage Management in South Korea*, 73 ANTIQUITY 619, 619 n.1 (1999).

⁶⁴ Discussing Japan’s policy of assimilation:

Physical anthropologists continued to pursue (sic) the origin of the Japanese race. The interest of physical anthropology, however, was also a very important issue to governing colonial areas. When Japan governed its colonial areas, especially under the *kominka* (Japanization) policy in the 1930s and 1940s, it needed the proper means for governing others. It was true that the model of the formation of the Japanese race, which physical anthropology had formulated, supported formation of colonial ideology for governing colonial areas.

Shiro Sasaki, *Anthropological Studies of the Indigenous Peoples in Sakhalin in Pre-Wartime and Wartime Japan*, in WARTIME JAPANESE ANTHROPOLOGY IN ASIA AND THE PACIFIC, *supra* note 60, at 151.

Many conclude that Japan is multiethnic; however, others, including the prominent writer Akiba Takashi, believe that the Koreans are much more closely related to the Japanese than any other group. This view was employed to support the colonial ideology of assimilation. “Akiba gave a particular twist to the idea of Japanese-Korean integration. He rejected narrow nationalism (*minzokushugi*) and distinguished between race (*jinsu*) and people or nation (*minzuko*). A nation does not have to consist of a racially homogenous group.” Boudewijn Walraven, *The*

over the seat of power on the Korean peninsula. As part of that program, it encouraged the intermarriage of Japanese and Koreans, constricted the use of the Korean language and promoted the use of Japanese, passed laws requiring Koreans to take Japanese names, and generally suppressed distraction or dissent directed against Japanese policies.⁶⁵ As a complement to this program and to better understand the Korean people, much attention was given by the Japanese to the study and documentation of Korean folklore and folkways,⁶⁶ customs, ceramics, and other forms of cultural property.⁶⁷ As a corollary, the view of Japan as well as much of the greater international community at that time was that Korea was in great need of the guidance and cultivating hand of Japan. Even Koreans seemed to have accepted this view, at least with respect to the goals of industrialization and modernization.⁶⁸

Thus, and to the extent that this perspective has any purchase, either politically or anthropologically, the determination of the rightful heir of much cultural property in Asia has proven to be very difficult to resolve.

Finally, due to the complexity of the considerations and the relative dearth of available and effective principles for settling these kinds of disputes, it is not unusual in this context for claims of current entitlement to be founded upon situational moral or serendipitous contemporary social or political biases rather than

Natives Next-door: Ethnology in Colonial Korea, in ANTHROPOLOGY AND COLONIALISM IN ASIA AND OCEANIA 228 (Jan van Bremen & Akitoshi Shimizu eds., 1999).

⁶⁵ See generally RICHARD KIM, *LOST NAMES: SCENES FROM A BOYHOOD IN JAPANESE-OCCUPIED KOREA* (1988) (describing the plight of families during the Japanese occupation); Diamond, *supra* note 56.

⁶⁶ It was important for the Japanese to study Korean folklore:

In the midst of indiscriminate oppression and censorship toward the end of the colonial period, it became indeed much more difficult to deal with politically sensitive issues. It is perhaps due to this repressive political atmosphere that we find increasing emphasis on history in the folklore studies of this period. For instance, if specific folklore items were studied as elements to explain a more holistic concept of culture, national character, or "mind" in the earlier studies, the main focus was now placed upon their origins, history and typology without much consideration for the social and political contexts in which they were practiced.

Okpyo Moon, *Korean Anthropology, A Search for New Paradigms, in ASIAN ANTHROPOLOGY 120 (Jan van Bremen, Eyal Ben-Ari & Syed Farid Alatas, eds. 2005).* See generally Walraven, *supra* note 64.

⁶⁷ See *infra* note 158 (describing the creation of agencies to study and document Korean cultural objects).

⁶⁸ Walraven, *supra* note 64.

upon substantive legal principles. Often party claimants elect to overlook the extant historical political realities when the object in question was appropriated and rely instead upon highly charged and emotional appeals. Consequently, when legal arguments have been exhausted, claimants will often resort to highly charged and emotional appeals and will call upon more abstract, philosophical premises such as fairness or justice. For example, as stated by You Hong-June of South Korea's Cultural Heritage Administration:

We believe there are over 100,000 items still in Japan. Under international law, the Japanese [government has] no responsibility for items in the hands of ordinary citizens, but we believe there is a moral responsibility [to return the objects to Korea].⁶⁹

As a result, the determination of actual "ownership" of cultural assets is often a difficult, if not impossible, task. Such is part of the challenge facing countries like Japan. Let us now turn our attention to the concerns of Korea.

4. THE JAPANESE-KOREAN CONFLICT

There are two predominant periods during which it is believed that significant numbers of important cultural properties of Korea found their way to Japan. The first was during the several invasions of the Korean peninsula by Japan at the end of the sixteenth century; the second commenced during the late nineteenth century and continued until the conclusion of the period of colonization of Korea by Japan in 1945.⁷⁰ In order to

⁶⁹ Demick, *supra* note 51. The number of objects claimed to be in Japan varies greatly. See Lee Sun-young, *supra* note 44 (explaining that in 2004 the Korean Heritage Administration claimed that more than 34,000 objects remained in Japan).

⁷⁰ Individuals in Japan support their possession by drawing an analogy to the historical position of Western countries such as Great Britain. As stated by Teikan Kimura, Head Priest of Rinshoji Temple in Toyota, Aichi Prefecture, "The British Museum also owns artworks taken from former colonies Will those countries also ask that all the art be returned? I hope they (South Koreans) understand that we have taken great care of these works for centuries." *Stolen Art*, *supra* note 43. It is also posited that French and British museums are filled with booty collected from numerous countries including Japan, China and Korea. For a good review of the collection activities of the British Museum, see KIM SLOAN, ENLIGHTENMENT: DISCOVERING THE WORLD IN THE EIGHTEENTH CENTURY (2003). Consistent with these collection policies, Japanese assert that in many cases they merely rediscovered and preserved ancient artifacts which Koreans had long forgotten. As noted by Professor of Art Fusatoshi Fujikawa of Keizai University, "The

truly understand Korea's position with respect to its assertions of the spoliation of cultural property, it is necessary to have, at the least, a general acquaintance with the events of the relevant periods.

4.1. *Japanese Invasions of Korea – 1592–1598*

For 10,000 li the waving battle-flags
darken the sky.
With a great roar the cries of the soldiers
seem to lift heaven and earth.

Higher than mountains, the bones
pile up in the fields.
Vast cities, great towns
become the burrows of wolves and foxes.⁷¹

South Korean Cultural Properties Administration officials have claimed that many works⁷² from the Goryeo Period⁷³ were brought

Koreans keep accusing Japan of stealing but the Japanese think they did something good. They think they should be thanked." Kakuchi, *supra* note 49. This argument is fully consistent with many proffered by the British Museum with respect to the Parthenon Marbles, and it should be noted that similar arguments were articulated in the nineteenth century as British Parliament debated the purchase of the marbles from Lord Elgin. See Frank Herrmann, *Lord Elgin's Rescue of the Sculptures from the Parthenon*, in *THE ENGLISH AS COLLECTORS* 154 (Frank Herrmann ed., 1972) (describing Lord Elgin's art discoveries in the Parthenon). See also Sir Henry Ellis, *THE ELGIN AND PHIGALEIAN MARBLES* 156 (1846) (depicting Lord Elgin's findings).

⁷¹ PAK NO-GYE, *SONG OF GREAT PEACE* (1598) available at <http://koreanhistoryproject.org/Ket/C12/E1205.htm>.

⁷² The Goryeo Dynasty is best known for its fine celadon pottery, carved Buddhist scriptures known as Tripitaka Koreana, and the invention by Chwe Yun-yi in Korea of the first metal based moveable type printing in approximately 1234. The Jikji, claimed to be the oldest moveable metal print book, was produced in Korea in approximately 1377. See generally KI-BAIK LEE, *A NEW HISTORY OF KOREA* (Edward W. Wagner & Edward J. Shultz trans., 1984); KEITH PRATT, *EVERLASTING FLOWER, A HISTORY OF KOREA* (2006); ROGER TENNANT, *A HISTORY OF KOREA* (1996); *KOREAN HISTORY: DISCOVERY OF ITS CHARACTERISTICS AND DEVELOPMENTS* (Korean National Commission for UNESCO ed., 2004).

⁷³ The Goryeo Period is also referred to, at times, as the Koryeo Dynasty. Goguryeo, Baekje, and Silla, commonly known as the Three Kingdoms of Korea, occupied the Korean peninsula and portions of northeastern China from approximately the first century BCE until the year 668 CE. In 668, following the defeat of Goguryeo by Silla, a unified Silla emerged. Eventually, unified Silla weakened and two new kingdoms, Taebong (Hu-goguryeo) and Baekje (Hubaekje), were created by two rebel leaders, Gung Ye and Gyeon Hwon, respectively. Wanggeon, a lord of Songak (currently Gaesong), initially joined the

back to Japan by those who accompanied Toyotomi Hideyoshi on the invasion of the Korean⁷⁴ Peninsula.⁷⁵ This incursion, actually a composite of two separate insurgencies, took place during the Joseon Dynasty⁷⁶ and has generally come to be known as the Seven Year War.

Following the establishment of the Kingdom of Great Joseon there was little internal civil unrest on the Korean Peninsula except for raids by the Jurchens,⁷⁷ a nomadic tribe from the northern border. In addition, while occasional armed conflicts erupted with Japan and other neighboring countries, certain moderating considerations provided general stability within the area. So, for example, while Korea and China had experienced a long history of

Kingdom of Taebong, but in 918 he overthrew its founder, Gung Ye, and established Goryeo. In 935 the Kingdom of Goryeo annexed Silla and defeated Hubaekje, and the Goryeo Dynasty was formally born. See PRATT, *supra* note 72 at 59-84.

⁷⁴ The English name "Korea" is derived from the name of the Goryeo Dynasty.

⁷⁵ See *Stolen Art*, *supra* note 42 ("South Korean Cultural Properties Administration officials believe that Japan has many works from the Goryeo Period-either brought back by looters who accompanied Toyotomi Hideyoshi on his first attempted invasion of the Korean Peninsula in 1592 or brought to Japan by Koreans.").

⁷⁶ Following a coup d'état by General Yi Seonggye of the Jeonju clan, the Joseon Dynasty was formed in 1392 in the city of Gaegyeong (contemporary Gaeseong). Also, at times, referenced as the Choson or Yi Dynasty, the Joseon Dynasty lasted for over five centuries and ended with the Japanese annexation of Korea in 1910. In 1393, the capital was relocated to Hanseong (contemporary Seoul) and the Kingdom of Great Joseon was officially formed and Monarch Seonggye (King Taejo) assumed the throne. The kingdom's geographic boundaries expanded northward to the Yalu and Tumen rivers and incorporated the territory governed by the Jurchens, a tribe that inhabited Manchuria and what is now northern Korea. See generally LEE, *supra* note 72; PRATT, *supra* note 72; TENNANT, *supra* note 72; KOREAN HISTORY, *supra* note 72.

⁷⁷ In 1586, the nomadic tribes of Manchuria were united by Nurhaci, a leader of the Jianzhou Jurchens, one of the three subgroups of Jurchens, and in 1616, the Jin Dynasty (to become known as the Manchu State) was established in that region. In 1618, Nurhaci issued a script known as The Seven Grievances against the Ming Dynasty of China, and armed conflict ensued. In 1635, the Manchu prevailed over the combined forces of the Ming Chinese, the Koreans, and Yehes, and the Ming Dynasty was vanquished. In 1636, Nurhaci's son reorganized the Manchus and the Mongolian, Korean, and Chinese affiliates into a new resulting political unit called Qing and named the national group "The Manchu." See generally Pei Huang, *New Light on the Origins of the Manchus*, 50 HARV. J. ASIATIC STUD. 239 (1990) (explicating the ancestry of the Manchus). The Qing Empire ruled China until 1912, at which time it was replaced, through the Xinhai Revolution, by the Republic of China. See generally sources cited *supra* note 72.

mutual aggression,⁷⁸ they also shared common interests in the traditions of Confucianism, in national defense against the Jurchens and the Woukou, and in commerce. Consequently, positive diplomatic relations between Korea and the Ming Dynasty of China developed. The same was also generally true of Japanese-Korean relations. Although often engaged in political disagreement with countries of the region,⁷⁹ Japan also shared an interest in a positive commercial environment, and as a result, it established and maintained viable and formal trade relations with Korea.

The use of armed conflict was a convenient and usual device for the settlement of a myriad of disputes of the day, and although historians tend to classify aggression along convenient geopolitical lines, it was frequent that the faces of the forces were often of combined nationality. Furthermore, it was not unusual for countries to cooperate with one another to confront the threat of mercenaries. So, for example, the Asiatic region was, in the 15th and 16th centuries, troubled by raids of stateless groups that came to be known as Woukou. Although literally translated as “Japanese pirates,” the gangs were, in fact, often composed of Chinese soldiers and merchants, Japanese *ronin*⁸⁰ and merchants,

⁷⁸ In 1231, the Mongols invaded Korea and following nearly three decades of discord, Korea relented. In 1258, Korea signed a peace treaty with the Mongolian Yuan Dynasty. Kublai Khan became the Emperor of China in 1260 and the capital was established at Beijing in 1264. During the aggression of 1232, the original Tripitaka Koreana, a collection of Buddhist scriptures, was destroyed; however, it was ordered to be recreated in 1236. The carving of the approximately 80,000 wood blocks took about fifteen years to complete. See generally KI-BAIK LEE, *supra* note 72. See also U.N. Educational, Scientific, and Cultural Organization (“UNESCO”), World Heritage, Haesina Temple Janggyeong Panjeon, available at http://whc.unesco.org/pg.cfm?cid=31&id_site=737 (describing the Haeinsa Temple Janggyeong Panjeon, the Depositories for the *Tripitaka Koreana* Woodblocks).

⁷⁹ Japan had to defend itself from the invasions of its ambitious neighbors on numerous occasions. For example, in 1274, a Mongolian fleet, peopled by approximately 15,000 Mongol and Chinese soldiers and an estimated 8,000 Korean warriors, attacked and captured the Japanese islands of Tsushima and Iki. The fleet then proceeded to Hakata Bay near Dazaifu, the then capital of Kyushu, Japan. After suffering heavy casualties and the complications of weather, it was repulsed by Japanese forces. The conflict continued until 1281 at which time the Japanese routed the invaders. See GEORGE SANSOM, *A HISTORY OF JAPAN TO 1334* at 442–44 (1958).

⁸⁰ *Ronin*, literally translated as “wave man,” were a class of roving samurai who were not officially attached to a particular *daimyo* or master. They were often viewed as disreputable rogues. G.B. SANSOM, *JAPAN: A SHORT CULTURAL HISTORY* 201, 356, 496 (1962) [hereinafter SANSOM, *SHORT CULTURAL HISTORY*]; GEORGE

Korean sailors and Portuguese seafarers, traders, and missionaries.⁸¹ The cadre frequently sailed from the Japanese islands of Tsushima and Iki, and their sorties often penetrated deep into Korea.⁸² At the request of the Goryeo King, the *Muromachi Shogunate* of Japan attempted to suppress the pirates. Unfortunately, it met with little success, and in 1389 and 1419, Korea unilaterally invaded the island of Tsushima.⁸³

The effects of the Woukou raids were also felt in mainland China, and although the group retained their nominal Japanese attribution, it is believed that by the mid-16th century, the majority were, in fact, Chinese. Between 1523 and 1588, the level of violence at the hands of the pirates escalated, and approximately 66 raids were made on China by the Woukou. In 1585, through might of hand, the famous (or infamous) Toyotomi Hideyoshi rose to become the *Kanpaku*, i.e., the Regent of Japan.⁸⁴ He agreed to collaborate with the Ming Dynasty to address the Woukou threat,⁸⁵ and with the help of the Japanese, the raiding was eventually reduced. The union was to have a profound effect on the future of Japanese-Korean relations. Two Japanese regulations are said to have contributed significantly not only to suppressing the Woukou but also to stabilizing the political environment in Japan. The first,

SANSOM, A HISTORY OF JAPAN 1334-1615 at 332, 398 (1961) [hereinafter SANSOM, JAPAN 1334-1615].

⁸¹ See generally TURNBULL, *supra* note 50, at 26-30.

⁸² The decline of the Goryeo Dynasty has been attributed, in part, to the effects of the Woukou raids. The events also provided a vehicle through which General Yi Seonggye, the founder of the Joseon Dynasty, was able to rise to prominence. See *id.* The Woukou were also known as *Wakō* (pirates) in Japanese. See SANSOM, JAPAN 1334-1615, *supra* note 80, at 177-180, 266-70 (describing the *Wakō*).

⁸³ Joseon officials had asked the Ashikaga Shogunate and its deputy in Kyushu to suppress the pirate attacks. However, little positive response was forthcoming. Pirates from Tsushima invaded Ming China in 1419, and on their way, they raided the provinces of Chungcheong and Hwanghae in Korea. Former King Taejong, still a military advisor, ultimately declared war on Tsushima in June of 1419, stating that the island belonged to the Gyeongsang Province of Korea. The ruling clan in Tsushima surrendered in September 1419, and a treaty was negotiated. See generally sources cited *supra* note 72.

⁸⁴ In fact, in 1591, Hideyoshi resigned from this post and assumed the position of Taiko, which would permit him to lead his armed forces in battle. He appointed his nephew, Hidetsugu, as his successor. See TURNBULL, *supra* note 50, at 232.

⁸⁵ See WILLIAM CARAWAY, KOREA IN THE EYE OF THE TIGER, ch. 12, <http://koreanhistoryproject.org/Ket/TOC1.htm> (detailing the military activities of Toyotomi Hideyoshi).

issued in 1588 and popularly referenced as the Sword Hunt, abolished sword ownership by Japanese peasants.⁸⁶ It also effected a formal division between those involved in agricultural activities from those who were members of the developing professional armies. The second, known as the Separation Edict of 1591, permitted *daimyo* to secure written oaths from those who desired to be sailors and further distinguished between the classes of laborer and samurai. This latter law also provided that should a *daimyo* fail to secure the oath of the seafarer not to engage in piracy, the fief of the *daimyo* was open to forfeiture.

During the resulting period of forced political stability in Japan, Hideyoshi's⁸⁷ ambitions were cultivated, and he was eventually moved to send ambassadors to the court of Joseon Dynasty to request permission for Japanese troops to pass, unimpeded, through the Korean peninsula on their way to China.

The conqueror of Japan did not simply rest on his laurels. Instead, he fell prey to the Alexandrian desire for more worlds to conquer, and in East Asia that meant China. In the spring of 1586, Toyotomi Hideyoshi, the *Taiko-sama*, conqueror of Japan, first expressed his dream of a great Oriental Empire ruled by a Japanese sovereign to the Jesuit Vice-Provincial Gaspar Coelho. His plan

⁸⁶ See SANSOM, *JAPAN 1334–1615*, *supra* note 80, at 331. See also CARL STEENSTRUP, *A HISTORY OF LAW IN JAPAN UNTIL 1868*, at 104 (2d ed. 1996) (discussing the disarmament of farmers and warriors).

⁸⁷ Initially known as Kinoshita Tokichiro, Hideyoshi was of humble origins. He was born the son of a common foot soldier who had been in the service of the father of Oda Nobunaga, and he possessed no formal family name. At a young age he became a stable boy for the Shogun Ashikaga Yoahoaki, and eventually fell into a life of crime. Meanwhile, Oda Nobunaga rose to prominence as a political leader in Japan, and the Shogun felt threatened and made an attempt to curtail Oda's influence. In 1558, Hideyoshi joined the army of Daimyo Oda Nobunaga and proved to be an asset to the Daimyo in his efforts to gain power. The Shogun Yoshiaki fled from Oda's forces and with the support of two of Oda's rival *daimyo*, Mori Motonari and Uesugi, took refuge in Chuhoku. Hideyoshi gained much of his reputation as a military leader by his siege of two Mori castles. Oda assumed control of Kyoto in 1576 but died in 1582 when forces led by an ally, General Akechi Mitsuhide, turned on Oda at Honnoji Temple in Kyoto. It is believed that Oda committed *seppuku* while the temple burned around him. Upon learning of the death of his commander, Hideyoshi executed an abrupt peace agreement with Mori Terumoto. Hideyoshi aspired to succeed Oda and defeated General Mitsuhide at the Battle of Yamazaki. He did not, however, have the forces to defeat *daimyo* Tokugawa Ieyasu, who was in charge of northeastern Japan. As a result, Hideyoshi established his seat of government at Osaka Castle. He desired the title of Shogun, but his lowly heritage placed the position beyond him. He was appointed *kanpaku* in 1585 by Emperor Oogimachi, and in 1586 was made *dajodaijin* (Chancellor). CARAWAY, *supra* note 85.

was to form an alliance with Joseon's King Sonjo, march northward up the Korean peninsula with Joseon troops in the vanguard, and conquer the Chinese Ming Empire "as easily as a man rolls up a mat."⁸⁸ Korea refused the overture, and in response, Hideyoshi commenced an invasion of Korea.

During this late 16th century period, there were, in fact, two discrete invasions, and both were precipitated by the aspirations of Hideyoshi to conquer Ming China. The first, often denoted the Japanese War of Imjin,⁸⁹ began in May of 1592 when Hideyoshi moved an expeditionary force of approximately 50,000 troops across the Tsushima Strait and landed on the beachhead near Busan in the south of the Joseon. The invasion force overwhelmed the ill-prepared Joseon defenders, and it advanced inland in three separate columns toward the capital in Hanseong (present-day Seoul).⁹⁰ While the main objective of the invasion was to reach the jewel of China, many sources have concluded that a subsidiary goal was to plunder cultural objects. It has been claimed that:

The Japanese deployed six special units with orders to steal books, maps, paintings, craftsmen (especially potters) and their handicrafts, people to be enslaved, precious metals, national treasures, and domestic animals. Meeting little resistance, the Japanese ravaged the civilian population. Entire villages were swept up in the raids. Japanese

⁸⁸ See *id.* at ch. 14. It has also been suggested that he disclosed his plan to Mori Terumoto at approximately the time of the Takamatsu siege. See Hideyoshi's Invasions of Korea, http://en.allexperts.com/e/h/hi/hideyoshi's_invasions_of_korea.htm.

⁸⁹ The invasion ("Imjin Waerun") began in 1592, so named because it was an Imjin year in the Korean sexagenary cycle. It is also known as the "Bunroku no Eki" in Japanese. Imjin, the 29th binary term of the cycle, is a Sino-Korean word composed of the Chinese pictogram characters of *im* (*ren* in Chinese) for water and *jin* (*chen* in Chinese) for dragon. See also SAMUEL MARTIN, YANG HA LEE & SUNG-UN CHANG, A KOREAN-ENGLISH DICTIONARY 1363 (1967) (defining *imin* as the 39th binary term of the sexagenary cycle); Don M. Lopez, *It's All in a Name*, http://www.imjinscout.com/Imjin_Name.html (explaining the etymology of *imjin* and its significance).

⁹⁰ The three forces were commanded by Japanese Generals Kuroda Nagamasa, Konishi Yukinaga, and Kato Kiyomasa. Kuroda's troops moved through the western provinces and over the Chupungnyeong Ridge, Konishi moved up the center of Gyeongsang Province through the Oryong Pass, and Kato moved north from Busan to Gyeongju and joined Konishi near Cheongju. See CARAWAY, *supra* note 85.

merchants sold some of their loot to Portuguese merchants anchored offshore and took the rest to Japan.⁹¹

News of the advancing Japanese forces reached the Yi Court in Hanseong, and King Seonjo fled the capital city and proceeded north through Gaeseong to Pyongyang. No attempt was reportedly made by the governing forces to defend the capital, and the citizens of Hanseong expressed their outrage at the evacuation by looting and burning warehouses, armories and government buildings. It is speculated that much cultural property was, on this occasion, actually lost at the hands of the citizens themselves. In fact, when the Japanese forces entered Hanseong, they met little or no resistance, and it was reported that they found the city and its cultural and political resources in ruin.⁹²

After securing the capital, the Japanese forces proceeded northward, but met determined resistance near the Imjin River. The battle at that location lasted for three days during which time King Seonjo retreated to the Korean/Chinese border city of Uiju located on the Yalu River. Under tremendous pressure from advancing forces, Seonjo dispatched envoys to Beijing to beseech Ming China for help. While the Japanese General Kornishi captured the city of Pyongyang and remained there awaiting resupply, Japanese General Kato marched eastward, crossed the Tuman River and entered Manchuria (northeastern China). There he met heavy Jurchen resistance and was made to withdraw back into Korea. This incursion was, in fact, the only time that Japanese forces actually entered China on this campaign.

Ming China responded to the Korean plea for assistance in July 1592 by sending a modest 5,000 troops to Korea. Proceeding southward toward Pyongyang, the forces met General Kornishi, but were decimated in a single night's conflict.

Meanwhile, Korea's irregular forces, composed predominantly of citizens and Buddhist monks, met with some success at resistance. In fact, they have been widely credited with ultimately playing a critical role in quelling the ground threat of Japan. A decisive battle, and one that possesses much cultural significance, was fought at Gilju in northern Korea in January 1593. There,

⁹¹ *Id.*

⁹² It is also said that angry mobs destroyed the buildings that contained the census documents and slave registries, thus freeing many slaves. *Id.*

insurgency leader Jeong Mun-bu⁹³ defeated formidable ground forces led by General Kato.⁹⁴

While the Japanese had experienced considerable success on land, they were not generally victorious on the seas. Much of the credit for Korea's eventual triumph over the Japanese is attributed to Admiral Yi Sun-sin. This was due not only to his knowledge of tactics and strategies but also to his insight into the design of ships known as *geobukseon* or "turtle ships."⁹⁵ By employing these fast and maneuverable ships, Yi effectively neutralized the Japanese fleet. Except for the brief and unsuccessful sortie into China by General Kato, Hideyoshi's northernmost forces remained in Pyongyang awaiting re-supply. In a series of battles culminating in the Battle of Hansen Island,⁹⁶ Admiral Yi eventually controlled the sea lanes to the Yellow Sea, and effectively terminated re-supply of the Japanese troops in the north of Korea.⁹⁷

In the winter of 1593, Ming China sent military troops to Korea to assist the indigenous army. The combined forces successfully drove the Japanese out of Pyongyang, and in February of that year,

⁹³ Jeon Mun-bu was also known as Chong Mun-pu.

⁹⁴ See TURNBULL, *supra* note 50, at 133. A memorial consisting of a two-meter tall stone sculpture known as the Bukgwandaecheopbi was erected in 1707 to commemorate the efforts of Jeong Mun-bu. It was removed from North Korea in 1905 during the Japanese occupation of Korea and taken to the Yasukuni Shrine in Tokyo. See *Janus-Faced Japan*, *supra* note 42 (giving a brief account of the statue's history).

⁹⁵ Although modified in hull design to permit for faster speeds and often possessing a greater number of oar positions, vessels used in battle during the 16th century were similar to those constructed by merchants. A general tactic in battle was to board an opponent's vessel and engage the crew in hand-to-hand assault combat. The *kobukso* design for warships attempts to counter that technique and purports to have originally been introduced in 1419 in raids against pirates. It is essentially a flat-bottomed vessel approximately 100 feet in length, possessing a 25-foot beam and two masts. Yi allegedly introduced the concept of positioning an iron plate roof over the deck to repel arrows, cannon and persons attempting to board. As an offensive attack ship it was fitted with 13 cannons on the rowing deck. A distinctive serpent head was reposed on the bow. See CARAWAY, *supra* note 85; TURNBULL, *supra* note 50, at 243-44.

⁹⁶ The battle commenced on August 14, 1592 near the island of Handando. Korean forces destroyed more than fifty-nine Japanese ships and killed approximately 9,000 Japanese soldiers. See SAMUEL HAWLEY, *THE IMJIN WAR: JAPAN'S SIXTEENTH-CENTURY INVASION OF KOREA AND ATTEMPT TO CONQUER CHINA* 236 (2005) (noting that the Koreans destroyed fifty-nine Japanese ships and stating that "[a]s for the number of Japanese dead," the Koreans "inflicted" "heavy losses"). See also NANJUNG ILGI: *WAR DIARY OF ADMIRAL YI SUN-SIN* 3-9 (Pow-Key Sohn ed., Ha Tae-Hung trans. 1977) (providing daily accounts of the battle by the key Admiral in the campaign).

⁹⁷ See LEE, *supra* note 72, at 214.

Chinese General Li Rusong attacked the rear of Japan's army and destroyed its food supplies. This initiative precipitated General Kornishi's further withdrawal from Seoul. It has been reported that retreating Japanese troops burned much of the capital including the Gyeongbok and Changdeok Palaces,⁹⁸ and that much cultural property was consequently lost or plundered. By summer of that year and with the exception of a small residual force in Busan, the Japanese army was essentially expelled from Joseon.

In 1594 peace negotiations were opened, and reciprocal envoys were dispatched. Due to what was either a considerable misunderstanding of the political reality by both sides or an ill-conceived deception by one party or the other,⁹⁹ negotiations broke down, and in 1596, hostilities resumed.¹⁰⁰

⁹⁸ CARAWAY, *supra* note 85.

⁹⁹ It is reported that Ming Emperor Shen Tsung assumed that Hideyoshi considered himself to have been defeated in the war and was prepared to submit to China's tributary system of foreign relations. As a result, an offer was made to recognize Hideyoshi as King of Japan, which would formally enable him to engage in trade with the Ming Dynasty. It has also been opined that Hideyoshi either believed that China was ready to submit to his rule and accept him as emperor or in the alternative was enraged by the apparent slight of the Emperor of Japan in response to the offer to make Hideyoshi king. As a consequence, Japan issued demands that China subjugate itself to Japan. The four demands were: (1) a daughter of the Ming Emperor was to be sent to Japan to become the wife of the emperor; (2) normal trade relations between Japan and China were to be reinstated; (3) the southern provinces of Korea were to be ceded to Japan; and (4) a Ming prince and other officials were to be sent to Japan as hostages. *See id.*

¹⁰⁰ Aware of the key role played by Admiral Yi and Korea's naval forces in the defeat of the first Japanese invasion, the Japanese sent an agent to the Yi Court with false intelligence to the effect that General Kato would mount an assault on a specific day at a specific location along the coast. The Yi government accepted the information as true and ordered Admiral Yi to intercept the invaders. Admiral Yi reportedly thought better of the information and refused. *See TURNBULL, supra* note 50, at 182-83.

Admiral Yi had originally been favored in his appointment as commander of naval forces by the Namin faction from the south of Korea and later the Dong-in faction of the East. The Seo-in faction of the western provinces favored Won Gyun (also "Won Gyun"), a commander of one of the Jeolla district naval stations. As a result of his refusal to proceed against Kato, Yi was relieved of his command and jailed in 1597 by King Seonjo. Admiral Won Gyun was appointed his replacement. Won Gyun proved to be less than competent and in August of 1597, the Japanese engaged the Korean fleet in the Chilcheollyang strait. Due to myriad tactical errors by Won Gyun, the Korean navy suffered a devastating defeat with 157 Korean ships reportedly sunk. Thereafter, Admiral Yi was reappointed head of the Korean navy. He defeated General Konishi and recaptured control of the Korean seas at the Battle of Myeongnyang, and the Japanese navy was routed. *See ILGI, supra* note 96, at 313 ("At this tragic sight, all other enemy vessels, being disheartened, gave up the right and fled far away and did not return to attack any more."); *TURNBULL, supra* note 50, at 202.

Japan's second expeditionary force of approximately 150,000 soldiers landed in Gyeongsang Province. The initial land objective was the Jeolla Province in southwestern Korea. However, due to the resolve of the Korean forces and the fact that China responded immediately by sending over 40,000 troops to the region, the Japanese were thwarted. The invaders were forced to secure their positions, and it was at this time in late 1596 that Japanese officers were reported to have sent pickle barrels containing 38,000 Korean ears to Kyoto to reinforce the faith in Japanese military prowess. The ears remain in the *Mimizuka*, or "Mound of Ears," in Kyoto. By late 1597, news of the defeat of General Kornishi at the Battle of Myeongnyang reached General Kato, and in retaliation, he resolved to burn Kyeongju, the former capital of the Silla Kingdom. In the course of the offensive, the Bulguksa Temple, a prominent place of Korean Buddhism, was destroyed.

The Japanese withdrew south to Ulsan, and there in January 1598, the Japanese and Chinese forces met in a massive battle. Following extensive Japanese losses, exacerbated by lack of provisions, the defenders were finally able to repulse the Chinese offensive. The spring of that year saw renewed and intensified involvement of Chinese forces in the effort, and although the tide of battle frequently changed, the Japanese were essentially held to coastal positions in the southern, southeastern, and central regions of the peninsula.

On September 18, Hideyoshi suddenly died, and the Council of Five Regents that succeeded him in power decided to formally end the Korean offensive. The decree for withdrawal of Japanese forces was transmitted in October, and by the early winter of 1598 removal had formally commenced. Concerned with the volatile politics of the Yi Court and desiring one final victory, Admiral Yi Sun-sin engaged the retreating Japanese fleet in Jinhae Bay off of Noryang Point in the Tsushima Strait on December 16, 1598. Both sides suffered heavy losses, and Admiral Yi was killed while defending General Chen Lin's flagship.

The extended conflict's effect upon Korea and its infrastructure was tremendous. Invading and defending forces depleted grain supplies and despoiled fields and farms. Many cities were burned by invaders or by disgruntled citizens, and much tangible cultural property was victimized. However, perhaps the greatest casualty was the loss of considerable human capital of Korea; it has been estimated that between fifty and sixty thousand captives were taken to Japan by their captors. As a result, much of the cultural

property that was ultimately removed to Japan took the form of intangible indigenous knowledge reposed in the minds of the artists and skilled craftsmen, potters and celadonware ceramicists¹⁰¹ and others taken to Japan to develop and expand Japanese arts.¹⁰²

Influential Japanese *daimyo*, many of whom were devotees of the coveted tea ceremony, sponsored the building of kilns and the development of ceramic production to be staffed by Korean immigrants. For example, Nabeshima Naoshige, conqueror of southern Hamgyeong, Korea, established a kiln in Imari. It is at that location, in 1616, that a Korean potter, Yi Sam-pyeong, is reported to have discovered the unique clay that eventually led to the production of the famous porcelain of Japan. In addition, Shimazu brought several Korean potters with him upon his return to Satsuma. These craftsmen are, in fact, the forefathers of the famous contemporary pottery kilns of that area of Japan. In general, much of the expansion of the ceramic crafts for which Japan has become so famous appears to coincide with the arrival of Korean potters following the Bunroku and Keichō military campaigns (1592-98) (collectively, the Imjin War). Furthermore, the cultivation of this budding industry was actively encouraged by the reallocation of political domains under the new Tokugawa government.¹⁰³

¹⁰¹ Celadon is a family of transparent, crackle glazes. Although the actual colors may vary, the most prized are often found in hues of green-blue or grey. The glaze is frequently found on a ground of porcelain or white stoneware. At times, small pieces of diffusely colored glass are inlaid in the primary or base vessel and then carved to produce a unique effect. The Korean method was developed and refined during the tenth and eleventh centuries and found its way to Japan in the sixteenth century. See generally sources cited *supra* note 70.

¹⁰² It has been reported that prior to the invasion, Hideyoshi hired two famous Korean potters to manufacture roof tiles for the Palace of Jurakutei. Under the direction of renowned tea *iemoto* Sen Rikyu, these craftsmen were inspired to develop the *raku* style of tea bowl often used in the famed Japanese tea ceremony. See TURNBULL, *supra* note 50, at 231.

¹⁰³ See Louise Allison Cort, *A Tosa Potter in Edo*, in THE ARTIST AS PROFESSIONAL IN JAPAN 103, 104 (Melinda Takeuchi ed., 2004) (“Widespread *daimyo* engagement in the sponsorship of ceramic production coincided with the arrival of Korean potters in Japan in the aftermath of the Bunroku and Keichō military campaigns (1592-98) [collectively the Imjin War] and was encouraged by the reallocation of domains under the new Tokugawa government.”).

4.2. *The Late Nineteenth Century and Continuing Through Japan's Colonization of Korea from 1910 to 1945*

The second period of significance to the claimed movement of cultural properties from Korea to Japan commenced in the late 19th century. The 19th and early 20th centuries were punctuated by a perception that Korea was the uncut gem of the East, and Japan, China and Russia competed vigorously for its economic and strategic value. During the 1860s, the Meiji Restoration had opened Japan to many of the influences of the West, but Japan's ambition to become a world power had cost the country much of its advantage in its trade relations with many of the powerful countries of the world. As part of the effort to restore greater balance in general trade relations and to effect a partial remedy for the "unequal" treaties that the country had been forced to enter into in order to gain the favor and cooperation of many Western nations, Japan sent envoys to Korea in an attempt to extend its influence over the resource-rich country. These incipient advances were rebuffed as the Daewongun¹⁰⁴ of Korea held many of the new "Western" perspectives assimilated by Japan in open contempt.¹⁰⁵ In a considered response, the Japanese reportedly seized upon the strategy that the United States had successfully employed on July 9, 1853 when it sent Commodore Perry and the Black Ships into Edo Bay. Additionally, in 1875 Japan dispatched a warship and troops to a fort on Ganghwa.¹⁰⁶ Japan rationalized this assertive action by claiming that Korean forces had launched an unprovoked attack on Japanese vessels. Later, under the guise of reconciliation, Japan followed the aggression by sending an emissary, Kuroda Kiyotaka, to Korea to negotiate a peaceful resolution to the conflict.¹⁰⁷ In February 1876, Japan and Korea formally signed the Treaty of Ganghwa, which granted certain concessions to Japan that it had not been able to secure diplomatically, namely, extraterritorial rights and the opening of three ports of trade in Korea. The treaty also significantly emphasized the political autonomy of Korea and asserted its freedom from the political

¹⁰⁴ The Daewongun was the father of King Gojong and served as regent from 1865 to 1873. See MICHAEL J. SETH, *A CONCISE HISTORY OF KOREA FROM THE NEOLITHIC PERIOD THROUGH THE NINETEENTH CENTURY* 221 (2006) (giving a historical account of reforms under the Taewön'gun).

¹⁰⁵ See TENNANT, *supra* note 72, at 207.

¹⁰⁶ See SETH, *supra* note 104, at 223 (providing an account of reforms under the Taewön'gun).

¹⁰⁷ See TENNANT, *supra* note 72, at 209.

influences of China.¹⁰⁸ However, the statements in the treaty did not quell or adequately reflect the state of unrest extant in the region. In the several years that followed, armed conflict arose first between Japan and the Qing Dynasty of China and later between Japan and Russia, as each attempted to secure its national influence over the Far East in general, and over Korea in particular.

4.2.1. *Japan, Korea, and China: The Sino-Japanese War 1894–95*

Until the Treaty of Ganghwa, Korea was considered a tributary of the Qing Dynasty of China. Following the treaty, however, the country purported to be independent, at least in the eyes of Japan.¹⁰⁹ To the contrary, China, not a party to the treaty, did not capitulate to this view, and it continued to assert considerable influence over the country. For example, on the Korean domestic front, the ancient bonds with China remained of considerable importance to the conservative elements of society, and the abiding historical relationship between the countries served as a means by which to pragmatically temper, if not stifle, the influence of the Japanese. Simultaneously, however, the progressives in Korea professed to be proponents of change and modernization, and they looked to Japan for assistance in advancing their interests.¹¹⁰ It happened that while King Gojong¹¹¹ of Korea (son of the Taewŏn'gun) favored modernization and the development of closer ties with the West, he was also a political moderate and heavily influenced by Huang Zunxian, councilor to the Chinese legation in Tokyo. Consequently, the end result was that he acceded to the approach taken by China rather than that taken by Japan, and efforts at improvement of the country's political and economic posture under his reign were largely founded upon reforms being employed in China.

¹⁰⁸ See *id.* at 208. Until the Treaty of Ganghwa, Korea was considered a tributary of the Qing Dynasty of China. Following the First Sino-Japanese War in 1895, the Treaty of Shimonoseki was signed between China and Japan. It recognized the "full and complete independence and autonomy of Korea." Following the treaty, Korea was no longer considered to be a tributary state of China.

¹⁰⁹ Article 1 of the treaty recognized Korea as an autonomous state with sovereign power. See BRUCE CUMINGS, *RESTORATION, REFORM, REVOLUTION IN KOREA'S PLACE IN THE SUN* 102 (2005) ("Article 1 recognized Korea as an 'autonomous' (*chaju*) state with sovereign rights the same as Japan's . . .").

¹¹⁰ TENNANT, *supra* note 72, at 209.

¹¹¹ In some documents referred to as King Kojong.

Contemporaneously and as previously referenced, however, the Daewongun,¹¹² father to the King, held the West in general, and Japan in particular, in unequivocal contempt.¹¹³ The father had, in fact, been forced out of power in 1872 by his son, and in the decade that followed his ouster, he lay in wait and patiently made plans for a coup through which he might regain his imperial seat. He eventually seized an opportunity to affect his strategy, and in 1882 he led a group of disgruntled soldiers in an attack on the Japanese legation. Although the assault did not directly achieve the goal of deposing the King, it did result in the burning of the Japanese diplomatic compound and the introduction of instability into the area. As a result of the Taewöngun's attack, the Japanese minister, Hannabusa Yoshitada, was forced to flee to Nagasaki with the assistance of a British survey vessel. The Japanese perceived this event as an opportunity to further press their cause, and they responded immediately by sending a flotilla of ships to Incheon. The Chinese intervened by sending four ships and 4,500 men to the location, and the Japanese assault was forestalled.¹¹⁴ Negotiations ensued, and with the counsel of the Chinese, Korea made reparations to Japan as compensation for its losses. In addition, and in accord with the resulting Treaty of Incheon (Jemulpo), the Japanese were also granted formal permission to thereafter station a company of soldiers in Korea to protect their legation.

¹¹² The Taewöngun assumed power in 1864 and was deposed in 1872 at age fifty.

The basic goals of the Taewöngun were to preserve the country and the dynasty by removing the superficial causes of peasant discontent (bureaucratic corruption, illicit taxation, official usury), restoring the throne to earlier levels, increasing the central government's control over financial resources, eliminating subversive and heterodox doctrines, and building up military strength by traditional means.

JAMES B. PALAIS, *POLITICS AND POLICY IN TRADITIONAL KOREA* 3 (Harv. Univ. Press 1991) (1975).

¹¹³ See, e.g., CUMINGS, *supra* note 109, at 100 ("The Taewöngun had a simple foreign policy: no treaties, no trade, no Catholics, no West, and no Japan. He viewed Japan's progressive reforms as yet more evidence of how far it had fallen from the way, how little the island people really understood the virtues of a Sinic world order.").

¹¹⁴ TENNANT, *supra* note 72, at 207.

Episodic confrontations continued between the countries,¹¹⁵ and in order to lend some stability to the fragile state of affairs in the region, China and Japan formally agreed in April 1885 to the terms of the Convention of Tientsin. Signed by Li Hung-chang and Ito Hirobumi, the agreement posited that: (1) there would be a mutual and simultaneous withdrawal of Japanese and Chinese forces from Korea; (2) neither Japan nor China would send instructors to Korea to train its military; and (3) neither Japan nor China would further reintroduce troops into Korea without notifying the other party.

All was not stable on the domestic front. The peasants of Korea had, for decades, borne tremendous burdens due to droughts, the loss of Korean family fisheries to Japanese companies, a growing scarcity of staple foods such as rice as a result of their being redirected to Japanese markets, and the rising burden of domestic taxation. Peasant protests and demonstrations had become commonplace in many of the provinces, particularly in the rice growing area of Jeolla. Eventually, in 1884, Donghak¹¹⁶ representatives traveled to Seoul to appeal to King Gojong for relief, but their pleas went unheeded. Rebellion broke out in Kobu when Jeon Bong-jun,¹¹⁷ a village teacher, and a group of approximately 1,000 followers seized a local county office, demolished a reservoir that the locals had been forced to build, liberated grain from local storehouses, and distributed the spoils to local starving peasants. The uprising accelerated and spread throughout the southwest region of the country, and the rebels captured the capital city of Jeonju in May 1894.

King Gojong met with little success in suppressing the rebellion with Korean troops, and on June 1, 1894, he requested the military assistance of the Chinese. On June 6, in accordance with the terms of the Convention of Tientsin, Li Hung-chang informed Japan of China's intention to send forces to Korea, and in June 1894 approximately 3,000 Chinese troops entered the city of Gongju on

¹¹⁵ For an excellent political discussion of then current events, see CUMINGS, *supra* note 109, at 107-15 (describing Korea's "phase of fitful Westernization [that] was constantly thwarted by reactionary scholars and officials").

¹¹⁶ *Donghak*, a doctrine that was given content by Choi Chae-wu in 1850, was the title given to a grass roots peasant movement that had begun in the 1860s. Its slogan was "Drive out the Japanese dwarfs and the Western barbarians, and praise righteousness." *Id.* at 115 (quoting TAKASHI HATADA, *A HISTORY OF KOREA* 100 (Warren W. Smith, Jr. & Benjamin H. Hazard trans., 1969)).

¹¹⁷ Jeon Bong-jun's father was executed in an earlier and similar uprising. See TENNANT, *supra* note 72, at 223.

the Asan Gulf. Shortly thereafter, and in response to the military action of China, a Japanese battalion landed at Incheon.

Meanwhile, with the assistance of the Chinese, the immediate threat of peasant rebellion was quickly quelled, and the rebels signed a peace agreement with the Korean government on June 11. On June 16, the Chinese approached Japan proposing a mutual withdrawal of forces, but on the same day, Mutsu Munemitsu, the Japanese Minister of Foreign Affairs, informed Wang Fengzao, the Chinese Ambassador to Japan, that instead of withdrawing, Japan had decided to send reinforcements to Korea to protect its interests. In July, Japanese soldiers took control of the Korean Imperial Palace, seized King Gojong, and as a symbol of their prerogative, installed the Daewongun in a nominal position of power. However, it was a pyrrhic victory for Daewongun, for without consultation with either him or the King, a new interim government that was exclusively under the control of Japan was immediately formed. The Advisory Council, as the governmental structure came to be known, drafted a new constitution for Korea that explicitly severed ties with China and established a State Council, which was comprised of a Prime Minister and a seven-member cabinet.¹¹⁸

On August 1, 1894, war was officially declared between Japan and China. The majority of the armed conflict occurred on Korean soil, and within a few short months, China was driven from the Korean Peninsula. Thereafter, fighting moved briefly into China, and the final significant land battle occurred at Port Arthur on November 21. The New York World newspaper reported an alleged massacre of approximately 18,000 Chinese civilians at the hands of the Japanese; however, the reports were later discredited by the New York Times.¹¹⁹ The final naval battle of the war occurred on January 1, 1895 at Weihaiwei, during which the Chinese Navy was soundly defeated.

¹¹⁸ *Id.* at 225.

¹¹⁹ See Daniel C. Kane, *Each of Us in His Own Way: Factors Behind Conflicting Accounts of a Massacre at Port Arthur*, 31 JOURNALISM HIST., 23-33 (2005). See generally JAMES CREELMAN, ON THE GREAT HIGHWAY, THE WANDERINGS AND ADVENTURES OF A SPECIAL CORRESPONDENT (Cardinal Book 1998) (1901); JAMES ALLAN, UNDER THE DRAGON FLAG (1898); Frederic Villiers, *The Truth About Port Arthur*, 160 THE N. AM. REV. 325 (1895), available at <http://cdl.library.cornell.edu/cgi-bin/moa/pageviewer?frames=1&coll=moa&view=50&root=%2Fmoa%2Fnora%2Fnora0160%2F&tif=00337.TIF&cite=http%3A%2F%2Fcdl.library.cornell.edu%2Fcgi-bin%2Fmoa%2Fmoa-cgi%3Fnotisid%3DABQ7578-0160-41>.

Contemporaneously, a new uprising of the Donghak that had been fomented in Jeolla and Chungcheong was quickly suppressed by the Japanese. Jeon Bong-jun, the leader of the Donghak of Jeolla, was captured, taken to Seoul, and executed.

In April 1895, China and Japan signed the Treaty of Shimonoseki,¹²⁰ in which China agreed to remain out of Korea. The treaty also ceded the Liaodong Peninsula and the Islands of Taiwan and Pescadores to Japan. Japanese domination of the area was becoming secure, and it was evident to the world community that Japan was rapidly becoming the power to deal with regarding any issue affecting the region.

4.2.2. *The Japanese Protectorate and Japanese Colonization of Korea*

Fearing the growing influence of Japan upon the Korean State, Empress Myeongseong¹²¹ had, in a series of diplomatic efforts, made attempts to forge stronger diplomatic relations first with China and later with Russia. Due to the direct threat to stability that she posed to Japan, she was assassinated, allegedly by Japanese agents, in 1895, in Gyeongbok Palace.¹²² In separate conflicts, Japan had defeated China¹²³ and later defeated Russia.¹²⁴

¹²⁰ See Treaty of Shimonoseki, Japan-China, Apr. 17, 1895, translated in <http://www.taiwandocuments.org/shimonoseki01.htm>.

¹²¹ Also known as Queen Min.

¹²² According to authorities, a plot to kill the Queen was formulated by the then new Japanese minister to Korea, Miura Goro:

In October 1895 a Japanese guard unit went to meet the [D]aewŏn'gun outside the West Gate of Seoul, to escort him back to Kyongbok [Gyeongbok] Palace. A Korean "training unit" accompanied this retinue, and when it reached the palace the Japanese and Korean soldiers fought their way into the palace, grabbed Queen Min before she could run away, and stabbed her in the chest. They then dragged her out to the garden, doused her with kerosene and lit a match, hoping to destroy the evidence of their foul deed.

Japan denied any involvement, but American and Russian advisers had been in the palace and witnessed the murder. Much later, documents came to light showing Miura had plotted every aspect of the murder with Japanese thugs, who had quietly joined the procession as it entered the palace grounds. After wide international protest, Tokyo punished some of the miscreants and got on with the reform program.

CUMINGS, *supra* note 109, at 121. See also TENNANT, *supra* note 72, at 227.

¹²³ See AllExperts.com, Treaty of Shimonoseki, http://en.allexperts.com/e/t/tr/treaty_of_simonoseki.htm ("The [Shimonoseki] treaty ended the First Sino-Japanese War of 1894-1895 as a clear victory for Japan.").

In July 1905, and in recognition of the state of affairs existing in Korea, the Taft-Katsura Agreement was concluded between William Howard Taft of the United States and Prime Minister Katsura Taro of Japan. Founded upon diplomatic notes that had been exchanged between President Roosevelt and Japanese representatives, the Agreement confirmed that the occupation by Japan of the Korean peninsula was acknowledged by the international community to be preferred, secure, and in many instances necessary. Specifically, and in accord with the Agreement, the United States would not question the Japanese protectorate that was to be established over Korea, and reciprocally, Japan would not question America's interest and activity in the Philippines.¹²⁵

A statement attributed to Theodore Roosevelt confirmed the necessary control of the peninsula by Japan. It read:

To be sure, by treaty it was solemnly covenanted that Korea should remain independent. But Korea itself was helpless to enforce the treaty, and it was out of the question to suppose that any other nation, with no interests of its own at stake, would do for the Koreans what they were utterly unable to do for themselves . . . Korea has shown its utter inability to stand by itself.¹²⁶

Prime Minister Ito Hirobumi travelled to Seoul, and the formal Eulsa¹²⁷ Treaty¹²⁸ was signed on November 17, 1905.¹²⁹ It was

¹²⁴ The peace treaty for the Japanese-Russo War was signed in 1905. It was brokered by Theodore Roosevelt at a conference at Portsmouth, New Hampshire. Roosevelt won the Nobel Peace Prize for his efforts in this regard. CUMINGS, *supra* note 109, at 141-42.

¹²⁵ *Id.* at 142.

¹²⁶ The statement is attributed to Theodore Roosevelt. AllExperts.com, Korea Under Japanese Rule, http://en.allexperts.com/e/k/ko/korea_under_japanese_rule.htm (last visited Feb. 28, 2008).

¹²⁷ Eulsa is the 42nd year of the Sexagenary Cycle and the year in which the treaty was signed. See Eulsa Treaty, TripAtlas.com, http://www.tripatlas.com/Eulsa_Treaty (describing the history and circumstances of the Eulsa Treaty).

¹²⁸ On June 23, 2005, both South and North Korea declared the Treaty null and void. *Id.*

¹²⁹ It is reported that Ito entered the palace with Japanese troops and, surrounded by soldiers, Emperor Gojong and his chief ministers were, over a two day period, intimidated and importuned to sign the agreement. The Emperor refused to sign as was required in order for the treaty to be effective under extant Korean law; however, five other ministers did sign. They were Lee Wan-Yong, Minister of Education, Lee Geun Taek, Minister of the Army, Lee Ji-Yong,

through this treaty that the Japanese protectorate over Korea was formally established. According to the treaty, Korea would cede its foreign relations to Japan and place control of its internal affairs into the hands of the Resident General who would be aided by twelve Commissioners. The Commissioners would serve as advisors to the three treaty ports, and to the governors of Seoul and the eight provinces.¹³⁰

While Emperor Gojong made numerous independent attempts to publicly discredit the treaty and bring the plight of Korea to the attention of the international community, they proved futile. For example, in June of 1907, the King surreptitiously sent representatives to The Hague to bring the problem of Korea's loss of self-determinacy to the attention of the international delegates that were assembled there.¹³¹ These envoys met with little success, however, and Japan responded by removing Gojong from the throne and replacing him with a puppet, his son, Seonjong.¹³²

Terauchi Masatake, the minister of the Army of Japan, assumed the position of the Resident General of Korea in July 1910. On August 22nd of that year, the Japan-Korea Annexation Treaty was signed by Masatake and Lee Wan-Yong, the then-Prime Minister of Korea.¹³³ Like his predecessor, Emperor Gojong, then-Emperor Yeonghui also refused to formally acknowledge the treaty, and it was that lack of formal ratification that called the legality of the Annexation Treaty into question under international standards.¹³⁴

Minister of the Interior, Park Je-Sun, Minister of Foreign and Korean Affairs, and Kwon Jung Hyun, Minister of Agriculture. Prime Minister Han Kyun Sol also refused to sign. CUMINGS, *supra* note 109, 139-48. See also TENNANT, *supra* note 72, at 236-37.

¹³⁰ TENNANT, *supra* note 72, at 236.

¹³¹ *Id.* at 239. See also CUMINGS, *supra* note 109, at 145 ("[I]n 1907 [Gojong] dispatched three Koreans to the Second Hague Peace Convention . . .").

¹³² Seonjong was the last Emperor of the Yi (Joseon) Dynasty that had commenced in 1392.

¹³³ Lee Wan-Yong assumed the office of Prime Minister at the time that Gojong was removed (abdicated) and apparently he is the former Minister of Agriculture who in 1905 had also signed the Eulsa Treaty. In 1909, a mob burned his house and, in December of that year, he was stabbed in an assassination attempt. CUMINGS, *supra* note 109, at 145.

¹³⁴ The 1965 Treaty of Basic Relations Between South Korea and Japan states, "It is confirmed that all treaties or agreements concluded between the Empire of Japan and the Empire of Korea on or before August 22, 1910 are already null and void." See *infra* Appendix 1 (text of treaty in Japanese and English).

Seonjong formally surrendered the throne on August 29, and Korea forthwith became a colony of Japan.¹³⁵

Japan is said to have had a free hand in virtually every aspect of Korean life, both private and public, and like any other international and cultural experience, there is a diversity of opinion as to the consequences. As aptly stated by Bruce Cumings:

This colonial experience was intense and bitter and shaped postwar Korea deeply. It brought development and underdevelopment, agrarian growth and deepened tenancy, industrialization and extraordinary dislocation, political mobilization and deactivation; it spawned a new role for the central state, new sets of Korean political leaders, communism and nationalism, armed resistance and treacherous collaboration; above all it left deep fissures and conflicts that have gnawed at the Korean soul ever since.

....

Among Koreans today, North and South, the mere mention of the idea that Japan somehow "modernized" Korea calls forth indignant denials, raw emotions, and the sense of mayhem having just been, or about to be, committed. For the foreigner even the most extensive cataloging of Japanese atrocities will pale beside the barest suggestion of anything positive and lasting that might have emerged from the colonial period. Koreans have always thought that the benefits of this growth went entirely to Japan and that Korea would have developed rapidly without Japanese help anyway. Meanwhile on a sojourn in Taiwan . . . a scholar found nostalgia for the Japanese era at every turn So, if we find that Japan brought modern facilities to its colonies, do we place them on the ledger of colonialism, or of modernization? The Korean answer is "colonialism," and the Japanese and Taiwanese answer is "modernization."¹³⁶

¹³⁵ CUMINGS, *supra* note 109, at 145.

¹³⁶ *Id.*, at 148-49.

4.2.2.1. *The Plight of Cultural Property During Colonization*

There is considerable evidence that certain cultural assets of Korea were adversely affected by the presence of Japan during the period of colonization. The following are discrete examples: (1) The Bukgwandaecheopbi, a 187 centimeter high (sixty-six cm. wide and thirteen cm. deep) Joseon-era stone monument erected in 1707 to commemorate the defeat in 1593 of Japanese forces by Hamgyeong Provincial Volunteers led by General Jeong Mun-bu was seized by the Japanese following the Russo-Japanese War in 1905, taken to Tokyo, and presented to the Japanese Emperor.¹³⁷ The monument remained in the Yasukuni Shrine in Tokyo until its return to North Korea in March 2006.¹³⁸ (2) In 1916, in order to construct buildings for the Japanese colonial government offices, forces tore down a number of structures on the grounds of the Gyeongbok Palace. While the Kunjongjun (the court house) was spared, the Hungrye Gateway was among the objects razed. Constructed during the Joseon Dynasty (1392-1910), the subject gate was one of three located in front of the king's court house and ceremonially used by visitors in the course of a formal audience with the king. The gate was restored in 2001.¹³⁹ (3) If one visits the Kyoto National Museum, one might pause in a pavilion on its grounds that is supported by four stone pillars, each being two meters high. The pillars have their origin from the front of royal tombs in Korea and historically symbolized the power of Korean kings interred there.¹⁴⁰

During this same period of occupation, governmental officials were often known to have seized the opportunity to amass large collections of cultural objects. Following are certain examples of this action: (1) Upon the death of Ito Hirobumi, the first Governor General of Korea, over 1,000 pieces of celadon were found in his collection, and the third Governor General, Terauchi Masataka, reportedly accumulated 1,855 works of calligraphy, 432 books, and

¹³⁷ Other select objects were given to the Emperor including rare celadon ceramics removed from the tombs of noblemen of the Goryeo Dynasty. MacIntyre, *supra* note 37.

¹³⁸ The monument was returned following negotiations with South Korea and later transported to North Korea where it was placed back on its original pedestal. *See infra* Section 5.2.8 (describing return of the monument to Korea).

¹³⁹ Zeno Park, *Restoration of Old Palace Gate Means Return of National Pride*, AGENCE FRANCE PRESSE (Oct. 28, 2001).

¹⁴⁰ MacIntyre, *supra* note 37.

2,000 pieces of celadon pottery.¹⁴¹ (2) In 1913, Terauchi removed 760 volumes¹⁴² of the Annals of the Joseon Dynasty (Joseonwangjosillok - The Truthful Records of the Joseon Dynasty) and sent them to Japan. The books had chronicled the daily activity of the 472 year Dynasty. They were originally placed in the Tokyo University library; however, all but 74 volumes were lost in the Great Kanto Earthquake of 1923. In 1932 twenty-seven of the volumes were given to Keijo Imperial University, the predecessor of Seoul National University.¹⁴³ The remainder was returned to Korea in 2006.¹⁴⁴ The books had been designated Korean National Treasure number 151 in 1973 and became a UNESCO World Heritage Property in 1997. (3) In 1922, the then-Governor General of Korea obtained the Uigwe records that chronicled certain rituals and administrative events of the Joseon Dynasty and donated them to the Japanese Court. The subjects of the documents included details of the funeral of the Dynasty's last empress, Myeongseong, who had allegedly been assassinated by the Japanese in 1895. In March 2006, Korea requested that UNESCO include the documents on the World Heritage List. The volumes are currently in the Imperial Household Library in Tokyo, and a mission of Buddhist monks from Woljeong Temple in Gangwon Province and Bongseon Temple in Gyeonggi Province are joining forces to seek their return.¹⁴⁵

¹⁴¹ *Id.* The Terauchi collection has ended up at the Yamaguchi Women's University.

¹⁴² There is some confusion as to the original number of volumes. Some sources suggest that there were originally 1,707 volumes or 1,188 books. *E.g., Seoul to Designate Joseon Dynasty Court Journals National Treasure*, YONHAP NEWS AGENCY (July 19, 2006).

¹⁴³ The books of the Joseon Dynasty had been disbursed to four temples in various rural locales during the Hideyoshi Invasions in order that they might be protected from loss; these particular volumes had been removed to Mt. Odae. Through the efforts of a Buddhist organization that had taken care of the books at Mount Odae, Pyeongchang in Gangwon Province and thanks to the generosity of Tokyo University, the remainder were returned to the university in July 2006. *Japanese School Agrees to Return Korean Royal Texts to Seoul University*, FIN. TIMES, May 30, 2006.

¹⁴⁴ It has been noted that France possesses 297 Korean ritual texts that had been taken by French Naval Forces in 1866. They had been removed from the Joseon Kingdom royal archive (Oe-gyujanggak). They are reposed at the French National Archives in Paris, and while the late French president Francois Mitterand had indicated in 1993 that the books would be returned, no action has been taken. *Looted Historical Record Returns Home to Korea at Last*, YONHAP NEWS AGENCY, June 1, 2006.

¹⁴⁵ *S. Korean Buddhists Push for Return of Historical Royal Records from Japan's Imperial Court*, YONHAP NEWS AGENCY, Sept. 15, 2006.

Finally, businessmen who moved to Korea to take advantage of the myriad of economic opportunities available to the Japanese also took advantage of the opportunity to assemble collections of Korean objects. For example: (1) Takenosuke Ogura, the head of the Japanese Electric Power Company in Korea in 1903 accumulated nearly 1,100 objects including celadon vases, bronze Buddhas, and a gold crown removed from the grave of a late fifth or early sixth century king of the Gaya Dynasty.¹⁴⁶ The collection is now reposed in the Tokyo National Museum.¹⁴⁷ (2) Seven centuries-old grey granite statues of a warrior, four children, and sixty-four Korean scholars, removed from Korea during colonization, had until recently been in the distinguished collection of Mamoru Kusaka.¹⁴⁸ These were recently returned to Korea.

4.2.2.2. *Efforts to Inventory and Protect Cultural Property During Colonization*

It is of significant note that during the period of colonization Japan did initiate the first documented efforts to actually identify and catalogue Korean objects of cultural property.¹⁴⁹ A series of Korean laws and regulations were promulgated founded upon principles articulated in Japanese Meiji and early Taisho period laws that were directed towards preserving the cultural heritage of Japan.¹⁵⁰ These laws and regulations included: (1) Lost and Stolen

¹⁴⁶ Kakuchi, *supra* note 49.

¹⁴⁷ Toyonobu Tani, the head curator of the museum, disclaims knowledge of any Korean claims for repatriation of the objects and has stated: "We take very good care of the artifacts so they can be used for academic purposes by Japanese people and by Koreans and Chinese." MacIntyre, *supra* note 35.

¹⁴⁸ In July 2001, Kusaka voluntarily returned and donated these objects to a grateful Sejung Antique Stone Museum in Yongin, South Korea. *Id.*

¹⁴⁹ See MacIntyre, *supra* note 37 (Kyoichi Arimitsu, reportedly one of the few surviving participants in the early stages of the Japanese effort to investigate Korean cultural properties. According to Arimitsu, the Japanese sent scholars to Korea to itemize cultural properties, and they helped compile a fifteen volume series of books on the subject of cultural property in Korea); see generally, Walter Edwards, *Japanese Archaeology and Cultural Property Management: Prewar Ideology and Postwar Legacies*, in *A COMPANION TO THE ANTHROPOLOGY OF JAPAN* 36 (Jennifer Robertson ed., 2005) (describing the evolution of Japanese archeological policies in relation to social and political context).

¹⁵⁰ See Park Younbok, Dir. Gyeongju National Museum, Republic of Korea, Cultural Property Forum: The Export Policies of China, South Korea, and Japan, Asia Society (Apr. 9, 2003), <http://www.asiasource.org/culturalheritage/culturalproperty.cfm> (providing a transcript of conference panel discussions including representatives of cultural institutions in Japan, Korea and China,

Antiquities (1909), (2) Temples and Shrines Protection Laws (1911), (3) Preservation of Stone and Metal Inscriptions (1916), (4) The Committee on the Investigation of Korean Antiquities (1916),¹⁵¹ (5) Regulations for the Preservation of Korea's Remains and Relics (1916), (6) Chosen Sotokufu Museum Laws (1924).¹⁵²

The legal statements had three formal goals:¹⁵³

1. To place within government control the identification, accounting, storage and movement of state registered cultural properties;
2. The generation of revenue for the preservation and protection of architectural and monumental cultural objects, in situ, through ticket sales from those who desired to view them;
3. The promotion of archaeological prospecting in order that additional sites or objects of cultural interest might be registered.

It has been suggested that the Korean laws were actually designed to discourage individual ownership of cultural objects and that the result of this cumbersome and complex system was private persons yielding their ownership and possession of most significant cultural items to the government or governmental institutions.¹⁵⁴

addressing basic principles and organizations of cultural property protection in the three countries).

¹⁵¹ This law established the administrative mechanism through which the cultural property laws were carried out.

¹⁵² CHŌSEN SŌTOKUFU 1924: 215-30.

¹⁵³ As a result of these theories, Japan's natural territory has been deemed to include Korea as well as parts of China. The anthropological theory of the period as proposed by the Japanese was that the Japanese and Korean races were of common origin, and thus there was logic in Japan assuming control of the Korean peninsula. See Diamond, *supra* note 56. See also JAPAN: ANCIENT CULTURES (1994), http://ancienthistory.about.com/library/bl/bl_japanancientcultures.htm (citing LIBRARY OF CONGRESS FEDERAL RESEARCH DIVISION, JAPAN: A COUNTRY STUDY (Ronald E. Dolan & Robert L. Worden eds., 1994) (1992)) (discussing early Korean migration to Japan between 300 BCE and 250 CE and the earliest written records on Japan as coming from Chinese sources circa 57 CE); Pai, *supra* note 63. See generally Hooker, *supra* note 58; see Howell, *supra* note 54; Murphy-Shigematsu, *supra* note 53 at 64; MacIntyre, *supra*, note 37 (quoting a professor Korean literature at Waseda University in Tokyo as saying, "What the Japanese wanted to stress was that the Japanese and Korean roots are the same and that Korea became less prosperous only after it parted ways with Japan.").

¹⁵⁴ See Pai, *supra* note 61, at 619 (arguing that the bureaucratic laws, "which ruled that all discoveries, changes, investigations and transportation of state

In the years that followed the creation of the Committee for the Investigation of Korean Antiquities, numerous missions, in fact, carried out excavations of locations such as the Leland Tombs dating to the Han Dynasty (second century), the Goguryeo painted tombs near Pyongyang, and remains of Baekje near Buyeo, Silla near Gyeongju, and Gaya near Gimhae from the third century Three Kingdom Kofun period.

Following Korea's independence from Japan in 1945, the administration of cultural property was formally divided between the North and the South. Consistent with the plan, the Office of Cultural Properties (Munhwajae Gwalliguk) was formally created in South Korea and the department was charged with the task of administering the tasks of protecting Korean culture within its jurisdiction.¹⁵⁵ In particular, the Office was to assume the responsibility of promulgating proper laws for the protection of cultural properties, receiving applications for registration of the properties, selecting and ranking national treasures and other cultural objects and sites,¹⁵⁶ overseeing the use of funds for the preservation and conservation of cultural properties, and marketing reproductions and facsimiles of the objects. As stated by the director of the Office in its official journal, "the goal of the office and its promulgation of cultural preservation laws and regulations is to preserve, manage, and reconstruct our cultural properties so as to hold on to our most precious ancestral heritage and keep them with us for eternity."¹⁵⁷ North Korea has also established similar organizations to protect its cultural properties.¹⁵⁸

properties be submitted on exact forms to the local police," were meant to deter individual ownership).

¹⁵⁵ *Id.* at 620-21.

¹⁵⁶ In the context of this article, it is interesting to note that the Office has proposed the identification and ranking of six "centres of culture" (*munhwa-gwon*). See *id.* at 624-25 (listing five of these six "centres of culture" ranked in descending order of importance as follows: national monuments, lifestyles and subsistence strategies, technological and scientific achievements, holy site or sacred places, and sites of myths or legends).

¹⁵⁷ *Id.* at 620 (citing the 1965 directive and adding that "[t]he 'spirit of Korean Independence' . . . is the most-often quoted criterion used to determine which objects and monuments should represent the Korean past").

¹⁵⁸ North Korea (DPRK) has paid particular attention to the Goguryeo Tombs, primarily preserved by the Korean Cultural Preservation Center. Other agencies include the National Bureau for Management of Cultural Properties and the Hamhung National Research Institute of the Democratic People's Republic of Korea. UNESCO, Second Training Workshop on the Conservation of the

Let us now turn our attention to the contemporary activities of Japan with respect to items of cultural interest and observe how cultural perspectives and changing political and economic influences have affected several of their laws and policies, both domestic and international.

5. JAPAN'S LAWS PROTECTING CULTURAL PROPERTY

5.1. General Domestic Structure

In 1950, Japan passed the domestic Law for the Protection of Cultural Properties,¹⁵⁹ "[i]nitially promulgated on May 30, 1950, it

Goguryeo Mural Paintings, http://portal.unesco.org/culture/en/ev.php-URL_ID=26748&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Apr. 11, 2008) (describing the Workshop's main objective as being "to improve and strengthen national capacity, especially human resources at the Korean Cultural Preservation Centre in the Democratic People's Republic of Korea, with a view to establishing a multi-disciplinary team in charge of coordinating conservation of the tombs"). The tombs were made a world cultural heritage site on Oct. 20, 2001. See North Korea Books, Goryeo Museum, <http://www.north-korea-books.com/servlet/the-259/GORYEO-MUSEUM/Detail> (last visited Apr. 4, 2008) (describing the Goryeo Museum as an organization dedicated to protecting cultural objects, both tangible and intangible, of the Goryeo Dynasty, 935-1392 BCE, located in the building of Sonngyungwan which was the central institute of education during the Goryeo Dynasty). The Cultural Relics Publishing House in Pyongyang, North Korea has published some books which introduce North Korean cultural relics, such as the Goryeo Museum and the Bohyeon Temple in Mt. Myohyang. See generally North Korea Books, <http://www.north-korea-books.com/>.

¹⁵⁹ Bunkazai Hogo Hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950, available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=25&H_NO_TYPE=2&H_NO_NO=214&H_FILE_NAME=S25HO214&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1, translated in Independent Administrative Institution, National Research Institute for Cultural Properties, <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html> (stating its purpose to preserve and utilize cultural properties in an effort at furthering Japanese culture); see generally BARBARA E. THORNBURY, THE FOLK PERFORMING ARTS: TRADITIONAL CULTURE IN CONTEMPORARY JAPAN 55-56 (1997) (noting that "[s]ince passage of the Cultural Properties Protection Law (*Bunkazai Hogohō*) in 1950, the word "cultural property" (*bunkazai*) has come to be frequently encountered in a range of places and circumstances: at historical sites, in museums, in the pages of programs distributed at folk performing arts events. Designation as *Bunkazai* signifies official recognition of cultural importance, with selections being made at the national, prefectural, and local government levels on the recommendation of committees of scholars and specialists. *Bunkazai* are the focus of official efforts to protect and conserve Japan's cultural heritage. The law, as it stands now, identifies five major classes of cultural properties. They are: tangible cultural properties (*yūkei bunkazai*), which include paintings and sculptures; intangible cultural properties (*mukei bunkazai*), comprising theater, music, and applied arts; folk cultural properties (*minzoku bunkazai*), among which

became effective on August 29, 1950.”¹⁶⁰ Through this legislation, “Japan possesses one of the most complete systems for the promotion of culture and the protection of indigenous cultural property extant in the world community,¹⁶¹ and it has been heralded as a model for domestic regulation.”¹⁶² This was not, however, the first attempt to protect cultural properties in Japan. In fact, the national government began designating fine arts and crafts as cultural properties in 1897 pursuant to the Law for the Preservation of Ancient Shrines and Temples.¹⁶³ Additionally, the Fundamental Law for the Promotion of Culture and Arts was enacted on November 30, 2001¹⁶⁴ for the purpose of providing a more comprehensive mechanism for promoting culture and the arts in Japan.¹⁶⁵ The basic measures contained within the new Law

are the folk performing arts; monuments (*kinenbutsu*), a broad category that includes manmade and natural sites as well as plants and animals; and traditional building groups (*dentôteki kenzōbutsugun*). On the national level, the provisions of the law are carried out by the Agency for Cultural Affairs within the Ministry of Education. The agency works with the Council for the Protection of Cultural Properties and the committees that annually select the nationally designated important cultural properties in each category). See also *Cultural Properties Law*, in 2 KODANSHA ENCYCLOPEDIA OF JAPAN 52–53 (1st ed., 1983) (describing the five broad groups into which the 1950 Law divides cultural properties).

¹⁶⁰ Geoffrey R. Scott, *The Cultural Property Laws of Japan: Social, Political, and Legal Influences*, 12 PAC. RIM L. & POL’Y J. 315 (2003) (detailing the development of the 1950 Law and its complex history including the influence of the Occupation of Japan by Allied Forces following the end of World War II).

¹⁶¹ Scott, *supra* note 9, at 312 (citing Halina Nieć, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L.J. 1089, 1106 (1976)).

¹⁶² Scott, *supra* note 9 (citing Scott, *supra* note 160).

¹⁶³ Scott, *supra* note 9, at 313.

¹⁶⁴ See Ministry of Education, Culture, Sports, Science and Technology [“MEXT”], Culture: Toward the Realization of an Emotionally Enriched Society Through Culture, http://www.mext.go.jp/english/org/f_culture.htm (last visited Apr. 12, 2008) (a website including a factual discussion of the law, enforced beginning on December 7, 2001).

¹⁶⁵ One of the ways that Japan has promoted the preservation of important cultural properties is through providing certain national tax advantages to individuals who support the basic policies. For example, beginning in 1970, a transfer of land that has been designated an important cultural property, historical site, place of scenic beauty, or natural monument has been awarded a income tax special deduction of up to Yen 20 million. Beginning in 1972, the transfer of an important cultural property (moveable property or a building) to the national or local government or to a specified independent administrative institution, such as a qualified museum, is exempt from income tax. Also beginning in 1972, the transfer of certain cultural property to similar groups also results in a reduction of capital gains tax on the transfer. Beginning in 1984, the inheritance tax attributed to passing an important cultural property was provided a deduction of 60% of the

include the enhancement of cultural facilities, and the protection and use of copyrights and neighboring rights.

Under the 1950 Law and its amendments,¹⁶⁶ the national government may select and officially designate¹⁶⁷ Japan's most significant cultural treasures. The act of designation imposes restrictions upon the conservation and use of such tangible objects, including their acquisition, protection, maintenance, alterations, repairs, and exportation.¹⁶⁸ The selection, designation, and registration of specific cultural properties is made upon the recommendation of an advisory panel labeled the Council for Cultural Affairs and carried out by the Ministry of Education, Culture, Sports, Science, and Technology ("MEXT") through the Agency for Cultural Affairs.¹⁶⁹

Actual designation of "important cultural properties" and "national treasures" is founded upon an informed judgment as to the contribution a particular object makes to Japan's deep cultural history. Rigorous criteria¹⁷⁰ are applied in assessing the relative contribution of an object and for considering the selection of objects for inclusion on the registry. These include:

1. Objects from various historical periods considered important in the cultural history of Japan which showed excellence in their production;
2. Objects that are considered especially significant as historical materials in the history of painting and sculpture of Japan;

assessed value. Beginning in 1998, certain enrolled artwork could be accepted as payment in kind of certain inheritance tax due and owing.

¹⁶⁶ Bunkazai Hogo Hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950, available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=25&H_NO_TYPE=2&H_NO_NO=214&H_FILE_NAME=S25HO214&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1, translated in Independent Administrative Institution, National Research Institute for Cultural Properties, <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html>.

¹⁶⁷ *Id.* art. 27-56 (discussing important cultural properties, including designation, custody, protection, opening to the public, investigation, and miscellaneous provisions).

¹⁶⁸ *Id.* art. 34-2-47.

¹⁶⁹ Agency for Cultural Affairs, <http://www.bunka.go.jp/english/index.html> (last visited Apr. 12, 2008).

¹⁷⁰ Yoshiaki Shimizu, *Japan in American Museums: But Which Japan?*, 83 ART BULLETIN 123, 131 (2001).

3. Objects that display outstanding features (predominantly idiosyncrasies) in terms of subject matter, aesthetic quality, condition, and technique;
4. Objects that exhibit stylistic features attributable to a unique author or authors, schools, or geographic regions;
5. Objects of foreign production having significant bearing on Japanese cultural history (such as Chinese painting)¹⁷¹

In addition to this fundamental recognition, objects that are first classified as "important cultural properties" may also be considered for classification as a "national treasure" if they "are of especially high value from the viewpoint of world culture and which are the matchless treasures of the nation."¹⁷² As of April 2004, and as reported in the census report of the ministry of Culture, 10,120 tangible objects had been selected and designated as cultural properties, and of this number, 853 are also considered "national treasures." In 1975, the 1950 Law was amended to include the category of "groups of historic buildings." As of 2004, sixty-two districts in fifty-six municipalities had been classified as "important preservation districts" and 10,867 structures had been designated as historic buildings.¹⁷³

5.2. Japan and Significant International Efforts

During the occupation of Japan by Allied forces pursuant to the Potsdam Convention of 1945, little affirmative attention was given to repatriation of objects that had been removed by Japan from other countries. Rather, the concern was in stabilizing the political and cultural conditions of the country itself.¹⁷⁴ In a news broadcast

¹⁷¹ *Id.* at 131.

¹⁷² Bunkazai Hogo Hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950, art. 2(5)(2) available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=25&H_NO_TYPE=2&H_NO_NO=214&H_FILE_NAME=S25HO214&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1, translated in Independent Administrative Institution, National Research Institute for Cultural Properties, <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html>.

¹⁷³ Scott, *supra* note 9, at 313.

¹⁷⁴ See Scott, *supra* note 160, at 352-54 (describing detailed Allied policies toward Japanese cultural objects which apparently did not consider objects being taken by Japan).

in May 1944, General Douglas MacArthur, Supreme Commander of Allied Powers (SCAP), opined:

I am in most serious disagreement even with the minority view on the replacement of cultural property lost or destroyed as a result of military action and occupation. . . . [such a position would] embitter the Japanese people toward us and render Japan vulnerable to ideological pressure and [be] a fertile field for subversive action.¹⁷⁵

5.2.1. 1965 Japan-Korea Treaty of Basic Relations

The two decades following Korea's 1945 liberation¹⁷⁶ from Japanese control were punctuated by recriminations¹⁷⁷ and

¹⁷⁵ MacIntyre, *supra* note 37.

¹⁷⁶ September 2, 1945, in the form of the Potsdam Proclamation. See, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, REPORT OF SURRENDER AND OCCUPATION OF JAPAN (1946), available at <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA438971&Location=U28&doc=GetTRDoc.pdf> (describing the Allied efforts in Japan as well as a history of the political issues in a recently unclassified report from the Commander in Chief of the U.S. Pacific Fleet).

¹⁷⁷ Recriminations continue to this day, particularly with respect to the return of cultural assets and the treatment of the "comfort women" during the period of colonization.

The U.S. House of Representatives International Relations Committee criticized the Japanese imperialists' crime perpetrated against "comfort women" during the Pacific War, on Sept. 13. The Committee also adopted a unanimous resolution asking for the Japanese government's apology and promise not to repeat such an inhumane act. The resolution is now waiting for the historical voting for passage at the House of Representatives' plenary session.

The resolution says that the Japanese military took young women in other Asian countries by force to use them as sex slaves for their servicemen engaged in the war, pointing out that it was the most serious case of slave trade in the 20th century. It also criticizes the fact that history textbooks used in Japanese schools attempt to hide such an inhumane crime perpetrated by Japan during World War II, asking the Japanese government to accept responsibility concerning the issue of comfort women and educate the country's youth based on historic facts. . . .

. . . The Japanese government and the country's rightist politicians are making all possible efforts to block the passage of the resolution in the House, as expected. The Japanese government has denied its responsibility in the issue and its political leaders have even tried to deny the existence of comfort women, making themselves the target of international criticism.

Japan Cornered Over Sex Slavery, KOREA HERALD, Apr. 26, 2007. Cf. *Action Must Follow Words*, KOREA HERALD, Apr. 30, 2007, (discussing Japanese apologies on the issue. "In an interview with Newsweek magazine last week, Japanese Prime

significant enmity.¹⁷⁸ During the 1950s, South Korean President Syngman Rhee adopted a hostile posture in its relations with Japan, and the country even refused to seek Japan's assistance during the Korean Conflict.¹⁷⁹ Allegedly tired of hearing claims of injustice that had occurred during colonial times, Japanese representatives, including Premier Yoshida Shigeru, refused to meet with Korean representatives.¹⁸⁰ Following a military coup in Korea led by General Park Chung-Hee in 1961, perspectives began to change, and Korea began to aggressively pursue industrialization based upon the export-led model employed by Japan.¹⁸¹ Park was reportedly eager for Japan's economic assistance in their efforts,¹⁸² and in 1965, largely in response to the urging of the United States to bridge the considerable gap of disagreement in relations between South Korea and Japan, the two

Minister Shinzo Abe, on the question of Japanese military's sex slavery during World War II, said, 'As prime minister of Japan I need to apologize to them.'").

¹⁷⁸ See VICTOR D. CHA, *ALIGNMENT DESPITE ANTAGONISM: THE UNITED STATES-KOREA-JAPAN SECURITY TRIANGLE* 11 (1999) (describing Japan as replacing the United States as South Korea's "most critical source of trade and capital," resulting in chronic Korean trade deficits which Koreans blamed on Japan's protectionist policies).

¹⁷⁹ See MARK E. MANYIN, *NORTH KOREA-JAPAN RELATIONS: THE NORMALIZATION TALKS AND THE COMPENSATION/REPARATIONS ISSUE* 1-6 (Congressional Research Service, 2001), available at http://www.fcnl.org/pdfs/01june13_nkjapan.pdf (detailing how a formally raised possibility that Japan would provide North Korea an economic assistance package was discussed at bilateral meetings between the nations held Aug. 21-24, 2000, and how North Korea failed to respond to the offer).

¹⁸⁰ CHA, *supra* note 178, at 11.

¹⁸¹ MANYIN, *supra* note 179, at 5.

¹⁸² The activities were not viewed favorably in much of Korea, but were rather characterized as continued support of imperialistic Japan. During the treaty negotiations, protests, sit-ins, and rioting were common, much of it by students, and Ambassador Samuel Berger noted that Park's government was at risk of collapsing "through public turmoil, coup or internal divisions." Kil J. Yi, *In Search of a Panacea: Japan-Korea Rapprochement and America's "Far Eastern Problems,"* 71 PAC. HIST. REV. 633, 651 (2002) (describing a widely held view that the talks were nothing more than an attempt to revive Japan's suzerainty over Korea.). A comment in the newspaper *Hanguk Ilbo* on Jan. 5, 1965 stated:

Now, the Koreans are worried that history may repeat itself once again. Don't we Koreans see the U.S. again trying to turn Korea over to Japan? Will Koreans trust the U.S. any longer? . . . We can say one thing: 'Never call in a robber to drive out a burglar.'

J. Mark Mobius, *The Japan-Korea Normalization Process and Korean Anti-Americanism*, 6 *ASIAN SURVEY* 241, 241 (1966).

countries signed the Japan-Korea Treaty of Basic Relations.¹⁸³ It is important to note that the agreement contained no reference to an apology by Japan for claimed atrocities, and the terms were generally characterized as providing assistance to South Korea in its efforts to modernize. The specific terms of the agreement, however, not only addressed economic considerations,¹⁸⁴ but also purported to consider the issue of the status of cultural assets claimed to have been taken from Korea to Japan during the colonial period.¹⁸⁵ In accord with the treaty, the economic

¹⁸³ A copy, in Japanese, of the general treaty, and the various Agreements, protocols, concords, document exchanges, correspondences and colloquy records can be found at: <http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/indices/JPKR/index.html> (unverified translation available at http://en.wikisource.org/wiki/Treaty_on_Basic_Relations_between_Japan_and_the_Republic_of_Korea). An English translation of the Agreement Concerning Cultural Property and Exchange can be found *infra* Appendix 1.

The treaty was signed on August 22, 1965. It included one Treaty on Basic Relationship between Japan and Republic of Korea, four Agreements (concerning fishery, property claims and economic cooperation, the legal status of Korea and the treatment of Koreans residing in Japan, and cultural property and exchange), two protocols, five concords, nine document exchanges, two correspondences and two colloquy records. The agreement had what has been referenced as two primary philosophical pillars:

The first was Japan's recognition of the legitimacy of South Korea, which translated into indirectly denying the legality of North Korea. This recognition placed a barrier against rapprochement between Tokyo and communist capitals: As the leftists in Japan feared, Japan had cast "her lot irrevocably with America." The second pillar was the settlement of the "Problems Concerning Property and Claims and Economic Cooperation"

Yi, *supra* note 177, at 656 (citations omitted). See also Victor D. Cha, *Hate, Power, and Identity in Japan-Korea Security: Towards a Synthetic Material-Ideational Analytical Framework*, 54 AUSTL. J. OF INT'L AFF. 309 (2000) (describing current Japan-Korea relations and arguing that while "historical antagonism and enmity" serve as the foundation of this bilateral relationship, positive transformation is possible).

¹⁸⁴ Manyin details the components of the Japanese settlement:

As part of the final settlement, Japan agreed to provide South Korea with a total sum of \$800 million, which consisted of: a) an outright grant of \$300 million, to be distributed over a 10-year period; b) a \$200 million loan to be distributed over a 10-year period and repaid over a 20-year period at 3.5% interest; c) \$300 million in private credits over a 10-year period from Japanese banks and financial institutions.

Manyin, *supra* note 179, at 5 (citations omitted).

¹⁸⁵ The Agreement on Cultural Property and Exchange (also referenced as the Agreement on Art Objects and Cultural Cooperation) considered the status of objects allegedly misappropriated by Japan during the period of colonization. See *Trends and Topics: The Tempestuous Treaty*, 13 JAPAN QUARTERLY 4 (1966). For a translation of the Agreement, see Appendix I.

assistance provided by Japan was to be consideration for Korea abandoning any claims it might have for the retrieval of cultural assets as well as other activities during the colonial period.¹⁸⁶ To many Koreans, the agreement was a “sellout”: some political parties boycotted the ratification of the activities in the National Assembly, protests erupted in Korea, and Park imposed martial law to quiet the country.¹⁸⁷

Reports indicate that Japan did, however, “return” 1,321¹⁸⁸ cultural objects at the time the agreement was signed, including celadon porcelain and old documents.¹⁸⁹ Researchers believe, however, that numerous Korean cultural objects including the fifteenth-century painting *Mongyudowondo* (Dream of Playing in a Peach Orchard), numerous Buddhist statues, and other objects remain in Japan¹⁹⁰ and Korea has been seeking repatriation of the objects through numerous vehicles. Japan, on the other hand, has taken the legal position that the original transfer of cultural objects to Japan was lawful, and the 1965 treaty concluded discussions concerning the return of any cultural objects removed prior to and during the colonial period. As recently summarized by Daisuke Matsunaga in the context of sending certain cultural objects to Korea, a deputy press secretary for Japan’s Ministry of Foreign Affairs stated: “We agree to disagree over the nature of the returns [O]ur position is that it is out of friendship and goodwill, we are giving things back.”¹⁹¹

5.2.2. *The Japanese UNESCO Funds in Trust for the Preservation of World Cultural Heritage*

Japan has, however, developed an impressive record in the area of protecting and preserving cultural heritage, both at home and in the international arena. On May 4, 1988, Prime Minister Noboru Takeshita announced the International Cooperative Initiative of Japan at Lord Mayor’s luncheon held in London. The

¹⁸⁶ Cf. *South Korea to Continue to Discuss Diplomatic Solutions for Japanese Crimes*, YONHAP NEWS AGENCY (S. Korea), Aug. 26, 2005 (detailing the ongoing talks regarding compensations for the Japanese enslavement of Korean women.).

¹⁸⁷ Manyin, *supra* note 179, at 5.

¹⁸⁸ The actual number of objects has varied. MacIntyre indicates that 1,326 objects were returned including 852 books and 438 pieces of pottery. MacIntyre, *supra* note 37.

¹⁸⁹ Yamamori, *supra* note 37.

¹⁹⁰ See Kakuchi, *supra* note 49.

¹⁹¹ MacIntyre, *supra* note 37.

initiative was designed primarily to showcase the efforts of Japan in numerous and diverse sectors, and contained three pillars:

1. Strengthening the concept of "cooperation for peace through non-military means;"
2. Strengthening international cultural exchange; and
3. Providing development assistance to third world countries.¹⁹²

As part of this program in 1989, Japan created the Japanese Funds in Trust Program under the auspices of UNESCO. The purpose of the fund is to support cultural property restoration, preservation, and conservations around the world. By 2004, the total contribution to the fund had been \$50 million, and the fund had supported restoration and conservation activities in Angkor, Cambodia; the stabilization and restoration activities at Bamiyan in Afghanistan; and a non-exhaustive list of other projects around the world.¹⁹³

Consistent with the terms of the Fund, in August 2000, Japan joined with South Korea to give North Korea \$100,000 to register a group of Goguryeo tombs located near Pyongyang on the World Heritage list.¹⁹⁴

¹⁹² See *Outline of Statements Made by Japan's Prime Minister Noburo Takeshita at Lord Mayor's Luncheon*, BUSINESS WIRE, May 13, 1988 (describing the efforts of Japan to strengthen cooperative relations with Europe).

¹⁹³ See UNESCO, Japanese Funds-in-Trust for the Preservation of World Culture, http://portal.unesco.org/culture/en/ev.php-URL_ID=2210&URL_DO=DO_TOPIC&URL_SECTION=201.html (detailing a non-exhaustive list of Japanese-funded projects throughout the world.) (last visited Apr. 13, 2008).

¹⁹⁴ See *Japan, South Korea to Provide Cash for North Korea Heritage Listing*, KYODO NEWS SERVICE, Aug. 15, 2000. This and other activities have been viewed as part of a course of action through which Japan has been making efforts to normalize relations with North Korea. It was also deemed part of a mutual strategy, termed a need for "liquidation of the past," to mask mutual demands. The events of the 1970s and 1980s, during which it is claimed that Korea kidnapped Japanese citizens, cloud the discussions, as does North and South Korea's apparent need for recriminations for past offenses committed against their populations. In the talks, North Korea, seemed to want an apology from Japan for the events of the colonization, further compensation for cultural assets claimed to have been looted, and legal status granted to North Koreans resident in Japan. See F. J. Khergamvala, *Japan Mending Ties With N. Korea*, HINDU, Aug. 26, 2000, available at <http://www.hinduonnet.com/2000/08/26/stories/03260004.htm> (briefly describing the efforts by the Japanese government to compensate North Korea for the Japanese occupation).

All cases of vandalism and looting of cultural properties committed by Japan in Korea in the past were the worst crimes against civilization and

5.2.3. *UNESCO Convention Concerning the Protection of the World Culture and Natural Heritage*

A convention of significant import in the international protection of culture is The UNESCO Convention Concerning the Protection of the World Culture and Natural Heritage. It was adopted in 1972, the United States ratified the Convention in 1973, and Japan acceded to its terms in 1992. Initial interest in the treaty was precipitated by concerns over the building of the Aswan High Dam in Egypt in 1959, the construction of which would have purportedly led to the complete and permanent loss of the

humanity which could be committed only by the most despicable, cruel and barbarous aggressors and imperialists.

....

All Koreans in the North and the South and overseas should wage a more vigorous struggle to retrieve the looted cultural properties from foreign forces, aware that it is an important task facing the nation to defend its dignity and sovereignty and preserve its history, culture and national character.

The US imperialists plundered Korea of many cultural treasures. They and the Japanese reactionaries should clearly understand the will of the Korean nation, apologize for their aggression and plunder perpetrated in Korea and unconditionally return all of the looted cultural treasures, the commentary demands.

North Korean Paper Urges Japan Apology for "Cultural Vandalism," BBC MONITORING ASIA PACIFIC, (trans. KCNA) July 6, 2006.

[D]ue to the Japanese imperialists' brigandish annexation of territory and colonial fascist rule, the Korean people suffered immeasurable misfortune and pain and Korea was far removed from modern civilization

....

. . . [A]t least 200,000 Korean women were taken away as "comfort women" for the imperial Japanese army and forced to provide sex to it During their occupation of Korea the Japanese imperialists savagely plundered it of its rich resources and indiscriminately vandalized and looted its precious cultural treasures.

Not content with this, they took away even brass bowls and brass spoons and chopsticks used by families of Korea, to say nothing of brass candlesticks and brass wine cups on tables used during memorial services and ornamental hairpins of women. The Japanese imperialists had long kept an eye to the cultural treasures of Korea. So as soon as they occupied it, they came to Korea like a pack of wolves and ruthlessly looted those treasures and shipped them to Japan to make them their own properties.

North Korean Article on "Shuddering Atrocities" Committed by Japan, NORTH KOREAN NEWS AGENCY, Aug. 29, 2004.

culturally important Abu Simbel Temples. At the specific request of Egypt and the Sudan, UNESCO undertook a campaign to safeguard the cultural heritage of the area. This effort resulted in the eventual dismantling and removal of the Abu Simbel and Philae temples. As a consequence of this attention, sentiment to protect other valuable cultural assets from what might be considered the ravaging consequences of advancing technology awakened in the conscience of the world community. The original idea to link the preservation of cultural and natural heritage was reportedly born at a 1965 White House Conference in the United States where a proposal was proffered to protect "the world's superb natural and scenic areas and historic sites for the present and the future of the entire world citizenry."¹⁹⁵ This theme was carried forward by the International Union for the Conservation of Nature and was contained in a 1968 proposal by its members.¹⁹⁶ The two documents were eventually merged into the Convention.

5.2.4. *Customs and the Control of Exports and Imports*

5.2.4.1. *The Development of General Japanese Customs Practice*

During the period of Japanese isolation that commenced around 1639 with the expulsion of Europeans from Japan and continued until the mid-nineteenth century, Japan's external relations and trade had generally been limited to China and the Netherlands, and the port that had been predominantly used for these limited purposes was located in Nagasaki.¹⁹⁷ Under pressure from Commodore Perry, Japan signed a "Treaty of Peace and

¹⁹⁵ U.N. Educ., Scientific, and Cultural Org., World Heritage Ctr., Brief History (quoting Comm. on Natural Res., White House Conference on Int'l Cooperation), <http://whc.unesco.org/pg.cfm?cid=169> (last visited Apr. 5, 2008).

¹⁹⁶ See *id.* (describing the history of the preservation of cultural heritage).

¹⁹⁷ Ieyasu, the first Shogun of the Tokugawa Era assumed power in 1603. The Shogunate banned Christianity in 1612, and because it had proved difficult to separate commerce from spiritual activity, all Europeans, except the Dutch, were expelled from Japan in 1639. This commenced approximately 200 years of isolation of Japan from the West. SANSOM, *Japan: A Short Cultural History*, *supra* note 79, at 396-97; Scott, *The Cultural Property Laws of Japan: Social, Political and Legal Influences*, *supra* note 160, 319-21 (describing steps Japan took to isolate itself from the West in the sixteenth and seventeenth centuries, with the exception of the Dutch in the port of Nagasaki); see also Japan Ministry of Finance, Customs and Tariff Bureau, History of Japan Customs, http://www.customs.go.jp/english/zeikan/history_e.htm (last visited Apr. 13, 2008) (describing the history of Japanese customs beginning with the Tokugawa Shogunate).

Amity" between the Emperor of Japan and the United States in 1854, and in accord, the ports of Shimoda and Hakodate were opened. In the years that followed, the Treaty of Commerce with the United States was signed,¹⁹⁸ as were similar treaties with the Netherlands, Russia, the United Kingdom and France. As a consequence of this progressive activity, the additional ports of Nagasaki, Yokohama, Hyogo, Osaka and Niigata were opened to international trade.

Each of the original treaties addressed the subject of tariffs; however, amendments to the agreements in 1866, which were essentially forced upon Japan as a condition of continued commerce, resulted in a reduction in the rates for importation of goods to a modest five percent *ad valorem*. This change placed considerable economic stress on Japan, and during the early and middle years of the Meiji period, a dominant diplomatic goal was to negotiate more favorable terms of trade with other countries. A direct consequence of this situation was a felt need of Japan to open commerce with countries in its region such as Korea.¹⁹⁹

During the years following the Sino-Japanese and Russo-Japanese wars, the Japanese trade initiative greatly expanded. In 1894, Japan concluded a new Treaty of Commerce and Navigation with the United Kingdom that revised and improved the theretofore oppressive tariff structures resulting in improved trade relations with other countries. In or about 1898, Japan's customs laws were again codified to reflect the new treaty obligations. In 1899, a new cadre of intellectual property laws was also promulgated, as required by the various treaties, and in 1911, Japan signed the Treaty of Commerce and Navigation with the United States, achieving a degree of customs autonomy.²⁰⁰

Trade and the Japanese economy continued to improve from the Taisho era (1912) through the economic boom occasioned by World War I, to the early Showa era (1930); during this period the customs system was again reorganized. Beginning in 1931, however, international trade in Japan began to feel the adverse

¹⁹⁸ See Scott, *The Cultural Property Laws of Japan: Social, Political and Legal Influences*, *supra* note 160, at 322-24 (chronicling American diplomatic relations with Japan in the 1850's).

¹⁹⁹ See SETH, *supra* note 104, at 222-23 (discussing Japan's motives in composing a plan to exploit its proximity and relationship with Korea). In some ways, the attitude that Japan displayed toward Korea was a reflection of the attitude that certain Western nations displayed to Japan.

²⁰⁰ See HIROSHI ODA, *JAPANESE LAW* (2d ed. 1999).

affects of events in Asia such as the Manchurian Incident of 1931, the North China Incident of 1939, and the growing hostilities in Europe. In 1939, and as a result of Japanese aggression in China, the United States renounced the 1911 Treaty with Japan. In 1940, President Roosevelt imposed a partial embargo on gasoline and scrap metal, both of which were required by Japan in its then current military effort in Asia. Japan responded by accelerating aggressions in northern China, and the U.S. again responded by adding additional subjects to the list of the embargoed items. The cycle of reciprocal retaliation continued, and in July 1941, Japan expanded its aggressions into southern China. On July 25 the United States froze all Japanese assets located in the U.S. and on August 1, it imposed a complete oil embargo on Japan.²⁰¹ Finally, on November 26, 1941, in what is referenced as the "Hull Note," the U.S. demanded that Japan withdraw from its alliance with Germany and Italy and remove its forces from China and Indo-China. Most particularly, Japan feared the loss of national security if it should capitulate to American demands: it believed that withdrawal from Manchuria would jeopardize its interests in Korea, a country it had colonized with the support of the international community. Believing that it had no political choice, Japan attacked Pearl Harbor on December 7, 1941. Thereafter, Japan's trade was effectively limited to Southern Asia, and as a result, customs activities ceased to function entirely in 1943.²⁰²

The Second World War in the Asian Theatre was concluded with the Potsdam Declaration of 1945. To initiate reconstruction and re-education, the Allied forces recommended five major reforms, including the democratization of the economy.²⁰³ In 1946 and the years of occupation that followed, the customs service was reconstituted under the influence of the West. In 1949, a new Foreign Exchange and Foreign Trade Control Law²⁰⁴ was

²⁰¹ See generally ROBERT SMITH THOMPSON, EMPIRES ON THE PACIFIC: WORLD WAR II AND THE STRUGGLE FOR THE MASTERY OF ASIA 75–98 (2001) (describing how escalated economic sanctions paved the way for the Pearl Harbor attacks); Yuichi Arima, *The Way to Pearl Harbor: US vs Japan* (Dec. 2003), <http://www.american.edu/TED/ice/japan-oil.htm> (last visited Apr. 5, 2008) (comprehensively detailing the conflict and negotiations between the U.S. and Japan leading up to the war).

²⁰² Japan Ministry of Finance, *supra* note 197.

²⁰³ See ODA, *supra* note 200, at 29.

²⁰⁴ Gaikoku Kawase oyobi Gaikoku Boeki Ho [Foreign Exchange and Foreign Trade Control Law], Law. No. 228 of 1949, translated in <http://www.cas.go.jp/>

promulgated that was designed to stabilize Japan's currency and to promote the development of its economy. Eventually, in 1951, Japan signed the Peace Treaty with Allied nations, and the occupation was officially terminated.

In the greater global arena, Japan in 1955 acceded to the General Agreement of Tariffs and Trade, and in 1961, it undertook a comprehensive review of its tariff structure and adopted the Customs Cooperation Council Nomenclature ("CCCN") and its classification structure.²⁰⁵ Japan also acceded to the Nomenclature Convention of the Customs Cooperation Council ("CCC") in 1966 and to the Valuation Convention ("CCCV") in 1972.²⁰⁶

Trade continued to flourish for Japan between 1973 and 1979, and various agreements were concluded which were consistent with the Tokyo Round of the Multilateral Trade Negotiations. Consistent with these new obligations, Japan withdrew from the CCCV in 1980,²⁰⁷ and substantially amended the Foreign Exchange and Trade Control Law ("FETCL"). The amended law stated that foreign exchange, foreign trade, and capital transactions, were to be essentially free of regulation, and it was this change that is said to have laid the foundation for the internationalization of Japan's economy.²⁰⁸

In the years that followed, numerous disputes arose regarding Japan's export practices, particularly in the areas of automobiles, textiles, steel, and semi-conductors, and the structure of its entire economic system came under question. Claims were made that Japan had maintained a competitive edge only by relying upon unfair trade practices.²⁰⁹ In 1988, the International Convention on Harmonized Commodity Description and Coding System²¹⁰ came into force in Japan,²¹¹ and in March of that year, Japan withdrew

jp/seisaku/hourei/data/FTA.pdf (unofficial translation by the Japanese government).

²⁰⁵ Japan Ministry of Finance, *supra* note 197.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See ODA, *supra* note 200, at 31.

²⁰⁹ See ODA, *supra* note 200, at 31-32 (describing criticisms of allegedly unfair Japanese trade practices in the 1970s and 1980s).

²¹⁰ Tariff Heading 9700 is essentially the same as the U.S. version referenced *infra* note 210. One interesting exception is that it lacks Section 9706 Antiquities of an Age Exceeding One Hundred Years, available at <http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0800C97.pdf>.

²¹¹ Japan Ministry of Finance, *supra* note 197. The United States also ratified the International Convention on the Harmonized Commodity Description and

from the CCCN.²¹² The United States and Japan engaged in the Structural Impediments Initiatives ("SII") talks in 1989 and 1990, which led to the promulgation of various additional "corrective" Laws.²¹³ As a result of other substantial complaints in the world community that Japan was inhibiting certain countries from entering Japan's domestic economy, the Japanese government launched a program of deregulation in 1995. One of the most heavily regulated areas was that of financial investment and foreign trade. As a result, the FETCL was again amended in 1997, and to reflect the substantive changes, the word "control" was cosmetically eliminated from its title. The current Japanese law on customs and trade covers the following subjects: "(1) payments, (2) capital transactions, (3) direct outward investment, (4) service trade, (5) direct inward investment, and (6) foreign trade."²¹⁴ It is

Coding System, and as of 1988 objects are classified according to the Harmonized Tariff Schedule. United States International Trade Commission [USITC], Tariff Information Center, <http://www.usitc.gov/tata/index.htm> (last visited Apr. 13, 2008). Art and antiquities are addressed in Section XXI, Chapter 97, Works of Art, Collectors' Pieces and Antiques, and usually are admitted free of duty. USITC, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2008) REVISION 1, ch. 97, available at <http://www.usitc.gov/tata/hts/bychapter/index.htm>. Prior to 1988, the Tariff Act of 1930 applied, and that act was amended in 1959 to simplify the classification of objects as works of art. The U.S. is also a signatory to various treaties and conventions which specifically consider treatment of cultural property.

In the Harmonized Tariff Schedule of the United States (HTS), chapters 1 through 97 cover all goods in trade and incorporate in the tariff nomenclature the internationally adopted Harmonized Commodity Description and Coding System through the 6-digit level of product description. Subordinate 8-digit product subdivisions, either enacted by Congress or proclaimed by the President, allow more narrowly applicable duty rates; 10-digit administrative statistical reporting numbers provide data of national interest. Chapters 98 and 99 contain special U.S. classifications and temporary rate provisions, respectively. The HTS replaced the Tariff Schedules of the United States (TSUS) effective January 1, 1989.

Asia Pacific Economic Cooperation, United States of America Economy Information, <http://www.apectariff.org/tdb.cgi/FF3235/coldefus.htm> (last visited Apr. 13, 2008).

²¹² Japan Ministry of Finance, *supra* note 197.

²¹³ See Joint Report on Structural Impediments Initiative, U.S.-Japan, June 28, 1990, available at <http://www.mac.doc.gov/japan/market-opening/SII%20Joint%20Report.pdf> (providing the final report on the SII talks, documenting a commitment by both countries to reduce their respective external imbalances, complemented by economic policy coordination efforts, with the hope that their actions lead to more efficient, open, and competitive markets).

²¹⁴ ODA, *supra* note 200, at 437-38.

FETCL that is implicated in the import and export constraints imposed by the various cultural property laws of Japan.

5.2.4.2. *Specific Customs Controls Imposed upon Cultural Properties – Domestic Law*

In order to effectively secure the cultural property located in Japan, Article 44 of the 1950 Law prohibits the export of tangible cultural property that has been designated as important or as a “national treasure.”²¹⁵ If a person desires to export designated cultural property, he or she must seek the permission of the Commissioner of the Agency for Cultural Affairs. The Agency will consider such a request in accord with its ordinance. In addition, any person desiring to sell or assign an important cultural property or an important folk-cultural property has an obligation to notify the Commissioner of the Agency for Cultural Affairs and provide certain specified information, including the sale price. In the latter event, and within thirty days of the notification, the Commissioner may purchase the object for Japan for the agreed upon price.²¹⁶ As a matter of custom, museum curators and art dealers refrain from trade in registered objects without having first approached the Agency for advice and consent.²¹⁷

If an individual fails to give notice under Article 46 of an intention to sell or transfer, he or she may be subject to a civil fine.²¹⁸ In addition, should any person attempt to export an item of

²¹⁵ Bunkazai Hogo Hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950, art. 44, available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=25&H_NO_TYPE=2&H_NO_NO=214&H_FILE_NAME=S25HO214&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1, translated in Independent Administrative Institution, National Research Institute for Cultural Properties, <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html>.

²¹⁶ *Id.* arts. 44, 46.

²¹⁷ See Washizuka Hiromitsu, Dir., Nara Nat’l Museum, Remarks, Republic of Korea, Cultural Property Forum: The Export Policies of China, South Korea, and Japan, Asia Society, at 6 (Apr. 9, 2003), <http://www.asiasource.org/culturalheritage/culturalproperty.cfm> (providing a transcript of conference panel discussions including representatives of cultural institutions in Japan, Korea and China, addressing basic principles and organizations of cultural property protection in the three countries).

²¹⁸ Bunkazai Hogo Hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950, art. 10, available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=25&H_NO_TYPE=2&H_NO_NO=214&H_FILE_NAME

cultural property in contravention of Article 44, he or she may be subject to imprisonment or fine.²¹⁹ However, there is no record of any prosecutions for violation of Article 44.²²⁰

5.2.4.3. *Import Controls – The UNESCO Convention*

In 1970, the General Conference of UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.²²¹ As of November 2007, there were 115 countries that had either ratified or accepted the UNESCO Convention; ten of which had also presented notifications of succession. The United States accepted it in February of 1983 and Japan accepted in September of 2002.²²²

One of the features of the 1970 UNESCO convention that has proved particularly troublesome to potential signatories is the treatment of bona fide purchasers of stolen cultural objects. Article 7(b)(ii) provides that a State requesting return of an illegally or

ME=S25HO214&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1, translated in Independent Administrative Institution, National Research Institute for Cultural Properties, <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html> (stipulating that any person who has failed to make an offer of sale to the State, transfers the property to a party other than the State, or has made false statements in the offer of sale is subject to a fine).

²¹⁹ *Id.* art. 106 (stipulating that any person who exports cultural property without permission from the Commissioner of the Agency for Cultural Affairs may be subject to imprisonment or fine).

²²⁰ See Interview with Mr. Sato, Hiroshi Hashida, a Unit Chief at the Agency for Cultural Affairs, Traditional Culture Division, and Shegeyuki Miyato of the Nat'l Inst. for Cultural Props., in Tokyo, Japan (July 26, 2005) (notes on file with author). See also Washizuka Hiromitsu, Remarks, *supra* note 217, at 11.

²²¹ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, available at <http://unesdoc.unesco.org/images/0011/001140/114046e.pdf#page=130> [hereinafter UNESCO Cultural Property Convention].

²²² See UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Ratification list, Nov. 14, 1970, <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E> (last visited Apr. 10, 2008) (listing ratifications to the convention). The United States promulgated implementing legislation in 1983, Pub. L. No. 97-446, 96 Stat. 2329, and amended it in 1987, Pub. L. No. 100-204, 101 Stat. 1331. Japan accepted the Convention in September 2002 and promulgated implementing legislation on December 9 of that year. See Law Concerning Controls on the Illicit Export and Import of Cultural Property, available at www.bunka.go.jp/english/law.html (setting forth measures to ensure implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property) [hereinafter Japan Implementing Legislation].

illicitly misappropriated cultural property must “pay just compensation to an innocent purchaser or to a person who has valid title”²²³ Unfortunately, disparate national policies, founded upon cultural dispositions which relate to defining ownership and the stability of title to property for commercial purposes, lack the uniformity of perspective required to carry out this charge. One of the most significant legal determinants found to resonate within the private disputes and legal accommodations in this subject area has been the disparate treatment of bona fide purchasers under private law regimes in certain civil law countries such as Japan²²⁴ and Switzerland,²²⁵ and that of select common law countries such as the United States. In general, civil law countries

²²³ UNESCO Cultural Property Convention, *supra* note 221, art. 7(b)(ii). Compare with the Protocol for the Protection of Cultural Property in the Event of Armed Conflict [the Hague Protocol], art. 1, para. 4, May 4, 1954, 249 U.N.T.S. 215, which provides that a contracting party whose duty it is to prevent the export of cultural property from a territory that it occupies, “shall pay an indemnity to the holders in good faith of any cultural property which has been returned”

²²⁴ See discussion of Japan’s Civil Code *infra* note 243.

²²⁵ The risk of loss in civil law countries is generally upon the owner of goods transferred to a BFP. Article 3 of the Swiss Civil Code, for example, states: “(1) Good faith is presumed when it is a legal condition for the existence or the effect of a right. (2) No one can claim being in good faith if it is incompatible with the attention that he should have shown in the given circumstances.” Schweizerisches Zivilgesetzbuch [ZGB], Code civil Suisse [Cc], Codice civile swizzero [Cc] [Civil Code] Dec. 10, 1907, SR 210, RS 210, art. 3 (Switz.), *quoted in* Barbara Hoffman, *Introduction to Parts II and III: Cultural Rights, Cultural Property, and International Trade*, in ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 90 n.8 (Barbara Hoffman ed., 2006) (citing the Swiss Civil Code as support for the observation that most civil law systems grant protection to the good faith possessor).

As a consequence of this view of bona fide purchasers, Switzerland has been noted as a haven for stolen cultural objects. Thus, the court in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg* had to address the conflict of law claim raised by the defendants that Swiss law applied and gave them title to the mosaics in question. 917 F.2d 278, 286–87 (7th Cir. 1990).

Effective in June 2005 the International Transfer of Cultural Property/Cultural Property Transfer Act deems importation of cultural property into Switzerland illegal only if it violates the terms of a bilateral treaty. Property is illegally imported if it is deemed of significant importance to the heritage of the country from which it was exported. Under the UNIDROIT Convention, a BFP possessor is entitled to retain possession, however, until he has received compensation. See Michele Kunitz, Comment, *Switzerland & the International Trade in Art and Antiquities*, 21 NW. J. INT’L L. & BUS. 519, 531 (2001) (discussing Switzerland’s role in the illicit antiquities trade and possible ramifications from Swiss law in this area). See also Korea’s Civil Code Section 249 (stating, consistent with the civil law tradition, that “[s]omeone who has acquired (personal) property in good faith without fault becomes the rightful owner of that property even if the transferor is not the rightful owner of the property”) (translation on file with author).

more readily recognize repose in a bona fide purchaser. To put it simply, possession often equals title. On the other hand, a fundamental principle of common law generally holds that no one can acquire good title from a thief.²²⁶

These differences have created what has been deemed a significant transactional loophole in certain civil law countries through which illegal traffickers could pass misappropriated cultural property.²²⁷ States seem discomfited by attempts to effect public law decisions to repatriate property to countries from which it was illicitly removed at the expense of private law principles.²²⁸ In 1984, and in recognition of this important subject, UNESCO asked UNIDROIT to address the issue. The final text of the resulting document, The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, was adopted in Rome at the Diplomatic Conference on June 24, 1995, and it entered into force on January 7, 1998.²²⁹ There are currently twenty-nine contracting parties, however, neither the United States nor Japan are among the members.²³⁰

²²⁶ An exception to this can be found in the operation of Statutes of Limitation and/or Statutes of Repose. See *O'Keeffe v. Snyder*, 416 A.2d 862, 867 (N.J. 1980) (noting that if property was stolen, proof of theft would advance the original owner's right to possession, absent expiration of the statute of limitations). See also WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 145 (1st ed. 1765-69) (describing remedies to personal property); U.C.C. §§ 1-301; 1-201(32), (33) and § 2-403(1) (granting a good faith purchaser good title, even when the transferor had voidable title) and U.C.C. § 2-403(2) (permitting the merchant to transfer title to a bona fide purchaser if the person from whom the goods was wrongfully appropriated entrusted the goods to the merchant knowing that the merchant dealt in the sale of such items).

²²⁷ See, e.g., Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, 1 UNIFORM L. REV. 59, 67 (1996), available at <http://unesdoc.unesco.org/images/0010/001050/105002E.pdf#search='unesco%20unidroit> (noting that under Article 2279 of the French Civil Code, a bonafide purchaser does not have to return property after a period of three years, while the Italian Civil Code grants this status immediately).

²²⁸ See, e.g., *id.* at 60 (noting that a 1985 draft of the Convention on Offenses Relating to Works of Art originally included a provision that one could gain restitution of a work if it had been criminally misappropriated except where a third party had acquired an interest in the work in good faith).

²²⁹ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted on June 24, 1995, 34 I.L.M. 1322, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>.

²³⁰ See generally <http://www.unidroit.org/english/implement/i-95.pdf> (last visited Apr. 10, 2008) (listing the contracting parties, including Greece, which became the most recent contracting party on July 19, 2007).

The general definitions of cultural property in the both the UNESCO and the UNIDROIT conventions were intentionally kept compatible²³¹ to provide assurance to members of the UNESCO Convention that it would continue to be effective. Furthermore, the categories of property deemed cultural and thus covered by the conventions are essentially identical.²³² Unlike UNESCO, however, UNIDROIT is largely dependent upon private rather than governmental action. Consequently, and in contrast to UNESCO, it contains no direction that the property be designated as cultural property by a government party to be covered,²³³ nor is any "connections test" articulated.

UNIDROIT does address the issue of the bona fide purchase of stolen cultural property, and a decision was made by its drafters to condition restitution of cultural property upon payment of fair and

²³¹ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 228, arts. 1–2, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm> (applying international claims to restitution of stolen cultural objects and the return of illegally exported cultural objects, and defining cultural objects, which include objects of "importance for archaeology, prehistory, literature, art, or science").

²³² It is interesting to note that the definition of cultural property in the Hague Protocol is more general. The 1954 Hague Convention again addressed the plight of cultural property during armed conflict and for the first time included a definition of the term. It states in Article 1(a) that cultural property includes:

[M]ovable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 1(a), May 4, 1954, 249 U.N.T.S. 215. The Convention also expanded coverage from prior agreements to all armed conflict not just declared wars, and it also created an international register of Cultural Properties Under Special Protection. It requires signatory parties to protect cultural property within their own territories as well as in territories of other signatories from pillage and theft, and among other acts, it expressly prohibits the seizure of such properties as trophies. As a concession to nationalism, military necessity is made an exception to the obligations of the treaty. *See also id.* art. 1(b)-(c) (defining "cultural property," irrespective of ownership, to include buildings such as museums, libraries, archives, and centers containing monuments).

²³³ *See* UNESCO Cultural Property Convention, *supra* note 221, art. 1 (defining "cultural property" as property which has been "specifically designated" by a State).

reasonable compensation by the victim to the successive holder.²³⁴ As a result, the convention continues to reflect a cultural bias in favor of a civil law tradition. Consequently, and notwithstanding its noble goals, certain civil law and common law countries including Japan and the United States have not yet chosen to become signatories.

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was, however, ratified by the Japanese diet in June 2002, and implementing legislation was passed on December 9 of that year.²³⁵ This watershed was heralded by then UNESCO Director-General Koichiro Matsuura as an important step in protecting cultural property in the world community.²³⁶ The legislation effectuates select aspects of the Convention²³⁷ that constrain both the importation and exportation of cultural property but only insofar as that property has been stolen.²³⁸ Of extremely important note, however, is that the law has only prospective effect. It does not apply to property lost or stolen prior to promulgation of the law,²³⁹ and consequently, claims of spoliation that occurred in prior decades, much less prior centuries, are not remediable through the Convention.

²³⁴ The UNIDROIT Convention provides procedures for the victim's restitution to the good faith possessor. See *supra* note 220, art. 4 (providing procedures for the victim's restitution to the good faith possessor). See *infra* note 238 (describing the treatment of bonafide purchasers in the United States and Japan, in contrast to treatment under the UNIDROIT Convention).

²³⁵ Japan Implementing Legislation, *supra* note 222.

²³⁶ Press Release, U.N. Educational, Scientific and Cultural Organization, UNESCO Calls for Universal Ratification of the 1970 Convention, Following the Example Set by Key Art Market Countries, No. 2002-60 (Sept. 9, 2002), available at <http://www.unesco.org/bpi/eng/unescopress/2002/02-64e.shtml> ("The ratification of countries like Great Britain, Japan, and Switzerland is fundamental, given their leading role on the world art market. I would further call on all States to follow these examples and ratify, in turn, this essential text," declared Mr Matsuura. "The example of Afghanistan reminds us that each work of art contains part of a nation's soul and that the renaissance of a country also requires the restitution of its stolen art.").

²³⁷ The sections implemented by Japan are generally the same as those implemented by the United States.

²³⁸ See UNESCO Cultural Property Convention, *supra* note 221, art. 7 (requiring parties to take action to constrain the importation and exportation of stolen cultural property, including taking appropriate steps to recover and return cultural property at the request of the state of origin in return for just compensation).

²³⁹ Japan Implementing Legislation, *supra* note 222, Supplementary Provisions, paras. 2-3.

Article 2 of the enabling legislation defines cultural property to include not only domestic cultural property but also, in accord with UNESCO Convention requirements, property that has been affirmatively designated by any country requesting restitution prior to the claim or return having been submitted to Japan.²⁴⁰ The Convention requirement seems properly suited to protecting cultural objects illegally or illicitly taken from those rare countries, like Japan, that have promulgated legislation that specifically provides for a relevant form of designation.²⁴¹ The requirement also means that a country that does not provide for an official and qualifying registry or one that fails to keep its registry complete and up to date may have considerable difficulty in gaining the cooperation of Japan for the return of cultural objects. To reinforce the point, Section 2 of Article 2 of the implementing legislation defines domestic cultural property by not only making specific reference to the enumerated classes found in the Convention, but also, conjunctively, by requiring that such property be designated as important cultural property pursuant to Japan's 1950 law.

Requests for the return of stolen property by foreign governments and consistent with Article 7(b)(i) of the Convention are to be directed to the Japan's Minister of Foreign Affairs who, thereafter, has the responsibility to notify the Minister of Education, Culture, Sports, Science and Technology ("MEXT"). MEXT is also the agency charged with administration of Japan's domestic laws for the protection and promotion of cultural properties write large. MEXT must, after consultation with the Minister of Economy, Trade and Industry, designate the specific foreign cultural property that is the subject of the claim in accord with the procedure to be found in the appropriate MEXT Ordinance. The ordinances anticipated by the Act are not general

²⁴⁰ *Id.* art. 2 (including in the term "cultural property" items that a State "has designated in accordance with Article 1" of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property).

²⁴¹ Bunkazai Hogo Hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950, art. 27-29, available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=25&H_NO_TYPE=2&H_NO_NO=214&H_FILE_NAME=S25HO214&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1, translated in Independent Administrative Institution, National Research Institute for Cultural Properties, <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html> (setting forth rules for the designation, the announcement, notice and issuance of the certificate of designation, and annulment of the designation).

statements of procedures by which requests are handled; rather they are informational and specifically tailored to the details of each individual claim. At this time, there has only been one claim for restitution made under the Act,²⁴² and thus, a single ordinance has been promulgated.²⁴³ The ordinance addresses a request by Turkey for the recovery of a black leather bible with a silver cover and two silver crosses stolen from the Dyerburc/Cyriac Ancient Virgin Mary Church made by that country on January 7, 2003.

The listing is intended to implicate the customs service of Japan with the intended consequence that the importation of the specified property would be restricted. The legislative vehicle for this purpose, as specifically referenced in Article 4 of the implementing legislation, is Article 53 of the Foreign Exchange and Foreign Trade Law.²⁴⁴ That law states:

The importer has an obligation to obtain import authorization. Import authorization is imposed upon them for the purpose of healthy development of foreign trade and domestic economy, contribution of international peace, and also to implement the cabinet approval in Article 10, paragraph 1.²⁴⁵

²⁴² It is anticipated that Italy will present a second formal claim. See Masaki, *supra* note 23 (describing allegations by the Italian government that Japan's museums contain smuggled Roman antiques).

²⁴³ See *infra* app. 4 (describing two books stolen in Turkey which were requested in an ordinance).

It establishes an ordinance to appoint a Specified Foreign Country's Cultural Property which is prescribed to Article 3 Clause 2 of the law about a regulation concerning an illegal import and export of cultural property as follows to enforce the law about a regulation related to such as illegal import and export of cultural property.

Minister of Education, Culture, Sports, Science and Technology appoints the following articles as the property which is prescribed to Article 3 Clause 2 of the law concerning a regulation related to such as illegal import and export of cultural property. This ordinance takes effect on a day of the promulgation.

See <http://law.e-gov.go.jp/cgi-bin/stsearch.cgi> (translation on file with the author).

²⁴⁴ Gaikoku Kawase oyobi Gaikoku Boeki Kanri Ho [Foreign Exchange and Foreign Trade Control Law], Law. No. 228 of 1949, *translated in* <http://www.cas.go.jp/jp/seisaku/hourei/data/FTA.pdf> (unofficial translation by Japanese government).

²⁴⁵ *Id.* art. 52. For a literal translation, see Legal Name List, <http://www11.ocn.ne.jp/~jesco/contents1.html#Top> (last visited Apr. 13, 2008).

In general, this provision effectuates the general import clearance procedures that are required in Japan. In addition, procedures specified in Article 52 of the Foreign Exchange and Foreign Trade Law require that an individual desiring to import goods properly declare them, pay any appropriate customs duty and apply to the Director General (*Zeikan-chou*) for a grant of permission to enter the goods (*yunyu-kyoka*). Thereafter, the authorization for importation must be received from the Ministry of Economy, Trade and Industry as mandated by Article 4, Paragraph 1, Item 1 and Article 9 of the Cabinet Order on Import Trade Control.²⁴⁶ This requirement applies to all articles that possess an import quota and upon which special requirements are imposed.²⁴⁷

Article 5 of the Law addresses the importation by foreign nations of Japanese domestic cultural property that is lost or stolen as defined in Article 33 of Japan's 1950 Law for the Protection of Cultural Property.²⁴⁸ It provides a procedure by which administrators are to forward claims for repatriation of such property to other party members of the UNESCO Convention. In accord with Article 5, MEXT is to announce the loss in the Official Gazette so as to provide notice to the public in addition to giving specific notice to the Minister of foreign Affairs. Upon receiving the notice, the latter Minister is to immediately notify relevant foreign governments.

²⁴⁶ Other goods that possess import quotas include narcotics and related controlled substances, weapons, and goods covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("Washington Convention"), the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Stockholm Convention on Persistent Organic Pollutants.

²⁴⁷ For a graphic flowchart of import trade control, see Cabinet Office of Japan, available at <http://www5.cao.go.jp/otodb/english/houseido/image/08010-1.pdf> (describing the different stages of import controls products undergo in Japan).

²⁴⁸ Bunkazai Hogo Hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950, art. 56-12, 73-2, 75, available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=25&H_NO_TYPE=2&H_NO_NO=214&H_FILE_NAME=S25HO214&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1, translated in Independent Administrative Institution, National Research Institute for Cultural Properties, <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html> (enumerating relevant custody provisions for stolen and lost articles).

5.2.4.3.1. *Stolen Objects and Bona Fide Purchasers*

As previously indicated, many civil law countries, as a matter of private law, provide special protection to individuals who purchase moveable property in good faith, and Japan is counted among that number.²⁴⁹ This is in contradistinction to the general treatment of such purchasers in the United States²⁵⁰ and other

²⁴⁹ See Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43, 56-7 (1987) (explaining the variety in legal systems regarding the treatment of the good-faith purchaser of stolen property and the civil law perspective of France). It should be noted that in Japan and in the years following 1868, much of its legal system was modeled after those of France and Germany. See also ODA, *supra* note 200 at 26-29. For a discussion of this history, see, Scott, *The Cultural Property Laws of Japan: Social, Political, and Legal Influences*, *supra* note 160.

²⁵⁰ As a general rule, a thief cannot, in the United States, obtain good title to property he has stolen nor can he pass good title to a bona fide purchaser. See, N.J.S.A. 12A:2-403(1) (noting that the Uniform Commercial Code might, in some circumstances, permit the transfer of title to a bona fide purchaser from a merchant in the goods if the person from whom it was wrongfully appropriated entrusted the goods to the merchant knowing that he dealt in the sale of such items); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*, 917 F.2d 278, 289 (7th Cir. 1990) (outlining exceptions to this general premise found in application of certain affirmative defenses against claims made in replevin for the return of property); *O'Keeffe v. Snyder*, 416 A.2d 862, 867 (N.J. 1980) (repeating the principle that a thief cannot transfer good title to others regardless of their good faith and ignorance of the theft). See generally BLACKSTONE, *supra* note 226. Exception may also be found in actions for damages in conversion that result from the wrongful taking. These generally take the form of a limitation on time for making a claim, a statute of repose or adverse possession, the latter two supporting interests in the stability of title. See RESTATEMENT (FIRST) OF PROP. § 220 CMT C. (1936) (describing statutes declaring the adverse possessor to be the legal owner.).

The application of these principles has been affected by the development of such considerations as the ability of the person harmed to discover when the theft took place.

To avoid harsh results from the mechanical application of the statute, the courts have developed a concept known as the discovery rule. The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of the cause of action. The rule is, essentially, a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from strict adherence to a rule by which the action accrues on the date of the theft.

O'Keeffe v. Snyder, 416 A.2d 862, 869 (N.J. 1980) (citation omitted).

The standard in New York is different and does not rely upon due diligence. Instead, the inquiry is whether the individual has made a formal demand for the return of the property which has been refused; See *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y. 1991) (holding that until demand for

common law countries. The applicable law in Japan relating to title of goods purchased in good faith is found, generally, at Articles 192-194 of the Civil Code.²⁵¹ Article 192 provides that if an

return is made and refused, possession of stolen property by a good-faith purchaser for value is not wrongful). What is most important to note, however, is that the United States, unlike Japan, has been reluctant to protect the interests of a bona fide purchaser in these contexts.

In a very cryptic statement that generally explains the position of U.S. courts with respect to those who are in receipt of stolen cultural properties, the court in *Autocephalous Greek-Orthodox Church of Cypress v. Goldberg* stated:

As Byron's poem laments, war can reduce our grandest and most sacred temples to mere "fragments of stone." Only the lowest of scoundrels attempt to reap personal gain from this collective loss. Those who plundered the churches and monuments of war-torn Cyprus, hoarded their relics away, and are now smuggling and selling them for large sums, are just such blackguards. The Republic of Cyprus, with diligent effort and the help of friends like Dr. True, has been able to locate several of these stolen antiquities; items of vast cultural, religious (and, as this case demonstrates, monetary) value. Among such finds are the pieces of the Kanakaria mosaic at issue in this case. Unfortunately, when these mosaics surfaced they were in the hands not of the most guilty parties, but of Peg Goldberg and her gallery. Correctly applying Indiana law, the district court determined that Goldberg must return the mosaics to their rightful owner: the Church of Cyprus. Goldberg's tireless attacks have not established reversible error in that determination, and thus, for the reasons discussed above, the district court's judgment is AFFIRMED.

Lest this result seem too harsh, we should note that those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means by which to protect themselves. Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more than make a few last-minute phone calls. As testified to at trial, in a transaction like this, "All the red flags are up, all the red lights are on, all the sirens are blaring." (quoting testimony of Dr. Vikan). In such cases, dealers can (and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like. If Goldberg would have pursued such methods, perhaps she would have discovered in time what she has now discovered too late: the Church has a valid, superior and enforceable claim to these Byzantine treasures, which therefore must be returned to it.

Autocephalous Greek-Orthodox Church of Cypress v. Goldberg, 917 F.2d 278, 293-4 (7th Cir. 1990).

²⁵¹ There are two additional laws similar in substance to Civil Code Sections 192-94. See, e.g., *Shichiya Eigyo Ho* [Pawnshop Business Act], Act No. 158 of 1950, available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=25&H_NO_TYPE=2&H_NO_NO=158&H_FILE_NAME=S25HO158&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1; *Kobutsu Eigyo Ho* [Antique Business Act],

individual openly, peaceably and with no notice of an outstanding and opposing claim, exercises control over a moveable object²⁵² through possession and intends thereby to claim a right of title to it, that individual will be deemed to have immediately acquired an interest in the property so long as he has acted in good faith and without negligence.²⁵³ Thus, the required elements under the law are:

The object must be a chattel;

The object must be acquired in a valid transaction and otherwise free of transactional defects;

The Seller and Claimant are in actual possession of the chattel;

The Seller does not actually possess authority to dispose of the chattel; and

The Claimant's possession is peaceful, open and without negligence.

In accord with Section 1 of Article 181 of the Civil Code of Japan, there is a consequent statutory presumption of ownership if a person exercises reasonable care in the purchase of an item, including an item of cultural property, and he genuinely believes himself to be the owner of that property. In addition, the transaction is, in these circumstances, deemed open, and as a result, the possessor acquires immediate title to the item. This condition is true notwithstanding that the object may, in fact, be lost or stolen.

The law reflects a policy favoring the stability of title, particularly in the normal course of commerce; is supportive of the view that actual possession of a moveable is the most reasonable

Act No. 108 of 1949, art. 20, available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=3&H_NAME=&H_NAME_YOMI=%82%a0&H_NO_GENGO=S&H_NO_YEAR=24&H_NO_TYPE=2&H_NO_NO=108&H_FILE_NAME=S24HO108&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1. See also Kobutsu Eigyo Ho Shiko Kisoku [Regulation Implementing Antique Business Act], Regulation of National Public Safety Commission No. 10 of Sept. 20, 1995, available at <http://law.e-gov.go.jp/htmldata/H07/H07F30301000010.html> (explaining the antique business enforcement rules).

²⁵² In general, the object must be one that is not generally subject to any law requiring specific registration (for example, an automobile, boat or aircraft) and the transfer of ownership of which is by emblem of title rather than by a transfer of possession. See ODA, *supra* note 200, at 156-58 (providing an example demonstrating how movables can be acquired through immediate acquisition).

²⁵³ See, MINPŌ [Civil Code], art.192, translated in <http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf> (stating, "If a person as peaceably and openly commenced to possess a moveable, acting bona fide and without negligence, he shall immediately acquire the right which he purports to exercise over such moveable").

and usual way of manifesting a claim of ownership in it, and that the reasonable expectations of an individual in possession should be protected under the law. Since the terms and policies of the articles seem clear, few courts have provided interpretation of their terms.

Courts have on a limited number of occasions been called upon to consider the meaning of the terms “openly and peaceably.” For example, the Tokyo High Court²⁵⁴ considered the claim of an aggrieved purchaser who removed goods from the office of the seller who he felt had failed to comply with the terms of a vending agreement. The Court concluded since the removal was not specifically authorized by the transfer agreement, the purchase was not considered to have been acquired peaceably. In addition, in an Osaka District Court Decision,²⁵⁵ it was deemed that removal of goods at midnight from a seller’s factory was not considered open.

In addition, actual physical delivery and consequent physical possession of the chattel have been deemed imperative to a legitimate claim of ownership under the Article. For example, Japan’s Supreme Court²⁵⁶ considered a case in which a seller (“S”) signed a contract of sale of chattel with purchaser (“X”), and purchaser X was given the key to the warehouse in which the object was housed. The object was not, however, reduced to actual physical possession, and due to a legal deficiency, the contract of sale between S and X was considered invalid. X proceeded to sign a contract of sale for the chattel with purchaser (“Y”) after which he returned the key to the warehouse to the original seller S. The original seller S then sold transferred the chattel to purchaser (“Z”). An action filed by X against Z was dismissed due to the invalidity of the contract of sale and lack of possession as required by Article 192.

Article 193 of the Civil Code addresses the situation under which a claim for restitution is made by a former owner who either lost the property or from whom it was wrongfully taken. In accordance with the Article, an individual in such a situation may seek recovery of the item within a two-year period,²⁵⁷ and he is, in

²⁵⁴ *Izamu Shoko Corp. et al. v. Kato et al.*, 28 HANREI-HYORON 889 (Tokyo App. Ct., May 6, 1939); *see generally* ODA, *supra* note 200.

²⁵⁵ *Tsugami Shoji Corp. v. Omi Sangyo Corp.*, 347 HANREI-JIHO 46 (Osaka D. Ct., Jan. 24, 1962); *see generally* ODA, *supra* note 200.

²⁵⁶ *Mimura v. Koyo Corp.*, 14 MINSHŪ 168 (Sup. Ct., Feb. 11, 1960).

²⁵⁷ *See* MINPŌ [Civil Code], art. 193, *translated in* <http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf> (stating that “[i]f in the

general, entitled to return of the property without the payment of any consideration to the good faith purchaser.

This general provision is, however, qualified by Article 194, which addresses commercial transactions involving public sales or merchants as opposed to sales between private individuals. Article 194 conditions return of the property upon reimbursement²⁵⁸ to the bona fide purchaser of the price that was paid for the object.²⁵⁹ This appears to be founded upon policies favoring stability of title much like that found in the Uniform Commercial Code.²⁶⁰ An exception to the requirement of reimbursement, however, can be found in Article 22 of the Antique Business Law. This Article states that if a good that has been lost or stolen is found to be among the inventory of a "used goods dealer," a victim of a theft or a loser can request recovery without having to pay compensation even though the purchaser might have been in good faith and bona fide. In such a circumstance, a person from whom property has been stolen has one year during which to make a claim for restitution. A question may arise in such a situation, however, as to the definition of a used good dealer and whether an art dealer who resells goods acquired from others would qualify under the exception. This issue has yet to be addressed in Japan.

5.2.4.3.2. *Bona Fides Under The Law Concerning Controls on the Illicit Export and Import of Cultural Property*

Article 6 of the Law Concerning Controls on the Illicit Export and Import of Cultural Property makes certain limited and qualified alterations to Articles 192, 193 and 194 of the Civil

case mentioned in the preceding Article the thing possessed is a stolen or lost article, the injured party or the loser may recover the article from the possessor within two years from the time when the article was stolen or lost").

²⁵⁸ France also requires that compensation be paid to good faith purchasers. See C. CIV. art. 2279. Until 1994, the United Kingdom, a common law jurisdiction had a rule that gave title to a buyer of goods who purchased at an open market. This was repealed by Sale of Goods Act (Amendment) 1994.

²⁵⁹ See MINPŌ [Civil Code], art. 194, translated in <http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf> (stating, "If the possessor of a thing stolen or lost has bought it bona fide at a sale by auction, in a public market or from a trader selling things of the same kind, the injured party or the loser cannot recover the thing unless he reimburses the possessor for the price paid therefor.").

²⁶⁰ N.Y. U.C.C. LAW §2-403 (2007) (providing New York power to transfer, good faith purchase of goods, and entrusting provisions, all of which support a stability of title policy).

Code.²⁶¹ With respect to specified foreign cultural property as defined in the law, the usual two year period provided in Section 193 of Japan's Civil Code during which an action can be commenced for the recovery of specified foreign cultural property is extended to a total of 10 years. This extension is limited, however, only to a situation when the foreign property claimed under the law was specified *prior* to importation into Japan. In addition, and consistent with Article 194 of the Civil Code, in order to obtain the return of an object, a victim must reimburse the possessor. The extent of reimbursement is limited to the price actually paid for the object and does not include any appreciation in value.²⁶² As a consequence of Article 6, property that was stolen or misappropriated in the remote past is beyond the reach of the statute.

5.2.5. *The Law on the Promotion of International Cooperation Regarding Cultural Heritage - 2006*

Japanese painter Ikuo Hirayama, known for his considerable attempts to support international efforts to preserve world heritage, recently catalyzed a bipartisan group of legislators in Japan to introduce a bill designed to promote international cooperation in protecting cultural heritage in the spirit that it is the common property of all mankind. The statute, promulgated on June 23, 2006, is formally titled *The Law on the Promotion of International Cooperation Regarding Cultural Heritage*.²⁶³ A copy of a translation of the law is included as Appendix 2.²⁶⁴ The law is designed to contribute to the continuing effort of Japan as it promotes cultural property interests and to permit the country to

²⁶¹ MINPŌ [Civil Code], art. 6, 192-94, translated in <http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf> (unofficial translation by Japanese government).

²⁶² It may be interesting to note that the issue of the specific level of compensation has been on import to many common law countries as they have both considered and, in some cases, selectively implemented the UNESCO and/or the UNIDROIT Conventions.

²⁶³ *Kaigai no Bunka Isan no Hogo ni Kakawaru Kokusaitekina Kyoryoku no Suishin ni Kansuru Horitsu* [Act on the Promotion of International Cooperation Regarding Cultural Heritage], Act No. 97 of 2006.

²⁶⁴ A copy of the law in Japanese can be found at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=1&H_NAME=%8a%43%8a%4f%82%cc%95%b6%89%bb%88%e2%8e%59&H_NAME_YOMI=%82%a0&H_NO_GENGO=H&H_NO_YE AR=&H_NO_TYPE=2&H_NO_NO=&H_FILE_NAME=H18HO097&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1.

assume a leading role in protecting world cultural treasures. This effort is fully consistent with those commenced in 1989 by the establishment by Japan of the UNESCO/Japanese Trust Fund for the Preservation of World Cultural Heritage.²⁶⁵ Japan has recently expressed concern that its ability to respond properly to legitimate demands of the world community has been limited in certain theatres, such as in Iraq and Afghanistan, due to the provisions of the Japanese constitution that limit military involvement to self defense forces.²⁶⁶ The recent law is an attempt to continue to expand Japanese positive influence in the arena of world affairs. Based upon the law, an administrative organization has been established to aid in carrying out the mission of the statute; the organization has been named the Japan Consortium for International Cooperation in Cultural Heritage.²⁶⁷

5.2.6. *A Cultural Understanding with Italy – 2007*

On March 19, 2007, a Memorandum of Understanding was reported to have been signed by the Deputy Prime Minister and Minister of Cultural Heritage Francesco Rutelli of Italy and the Minister of Education, Science, and Technology Bunmei Ibuki of Japan, addressing joint efforts with respect to the preservation of cultural heritage.²⁶⁸ This follows closely upon discussions held late

²⁶⁵ For a description of the fund, see UNESCO, Japanese Funds-in-Trust for the Preservation of World Cultural Heritage, available at http://portal.unesco.org/culture/en/ev.php-URL_ID=2210&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Apr. 10, 2008) (explaining that the purpose of the Fund is to preserve the tangible cultural heritage such as historic monuments and archaeological remains of great value).

²⁶⁶ See Furuya Keiji Tsushin: Sekai no Bunka Isan Shufuku, Hogo ni Nihon ga Yakuwari wo Hatasu tameni[Keiji Furuya Internet Announcement: For Japan to Play a Leadership Role in Restoration and Protection of Cultural Heritages in the World], Mar. 13, 2006, http://www.furuya-keiji.jp/2006/03/post_17.html (last visited Apr. 10, 2008).

²⁶⁷ See generally UNESCO/Japan Funds-in-Trust, *supra* note 26.

²⁶⁸ In fact, it appears that the actual Memorandum of Understanding was not signed, but instead a binding "Agreed Minute" was signed that looks forward to an actual Memorandum of Understanding. In order to follow the progress of the agreement, contact was made with the Ministry of Cultural Heritage in Italy. After a conversation with one of the secretaries of the Legislative Office of the Ministry, on April 4, 2007, a missive was sent to the Head of the Legislative Office of the Ministry. This was followed up by a telephone call to the Research, Innovation and Organization Department of the Ministry, whose webpage hosts the Memorandum signed with China. On April 13, 2007, an email communication was transmitted to the Head of the International Relations Office, asking her if there was any possibility to receive the text of the agreement. It was described that there was difficulty in obtaining a copy of the agreement since they are

last year between the two governments.²⁶⁹ This memorandum is part of a multinational effort mounted by Italy, Japan, and China to jointly promote cooperation in protecting and preserving the world's cultural heritage and to strengthen the collaboration in the areas of cultural heritage protection and administration of galleries and museums.²⁷⁰ An additional and pragmatic goal is to ease the exchange of experts and foster mutual knowledge and cultural understanding.²⁷¹

Pursuant to this general mission, on January 20, 2006, Italy signed a Memorandum of Understanding with China that provided for the establishment of a center for the protection of cultural heritage, which will be located in Beijing. The goals of the specific relationship with China are to promote the exchange of information relating to the restoration and preservation of cultural heritage in the two countries; provide a means by which Italian technologies in these areas can be made available and applied to works in China; and promote the preservation of cultural properties in the larger world community. Through these efforts, Italy hopes that it will become a "point of reference" among restorers and conservators of important works of art, murals, and artifacts that are in jeopardy. A copy of the translation of the

considered secret and are made available only after some months from the date of the signing.

On April 20, 2007, another telephone call was made to the Research, Innovation and Organization Office. On April, 23, 2007, a responsive memo was received from a representative of the director that indicated that despite the good intentions of the Italian and Japanese Ministers during the meeting in Tokyo to sign a Memorandum of Understanding—as stated on the website—the two Ministers signed an "agreed minute" instead. This agreement is intended to bind the two countries on many issues, and will most probably be the basis for a proper memorandum of understanding to be signed in the future. To date, such an actual memorandum remains secrete; it will become available to the general public several months following the actual signing.

²⁶⁹ See Press Release, Ministry of Cultural Heritage, Second Bilateral Meeting of Italian and Japanese Experts in Order to Foster the Cooperation in the Area of Cultural Heritage (Nov. 11, 2006), available at <http://www.beniculturali.it/sala/dettaglio-comunicato.asp?nd=ss,cs&Id=2313&ricerca=1&titolo=&giorno=01&mese=11&anno=2006&cat> (translation on file with author) (describing the meeting between Italy and Japan aimed at preserving world cultural heritage).

²⁷⁰ See Research, Innovation, Organization Department of the Ministry of Cultural Heritage, *Cooperazione nella protezione del patrimonio culturale* (title translates to "Cooperation for the Protection of Cultural Heritage, Bilateral Agreements for the Cooperation in the Protection of Cultural Heritage"), <http://www.rio.beniculturali.it/index.php?it/128/cooperazione-nella-protezione-del-patrimonio-culturale> (last visited Mar. 13, 2008).

²⁷¹ *Id.*

document, from Chinese and Italian, is attached as Appendix 3 to this article.²⁷²

5.2.7. *HAGUE Convention – Japan's Movement to Become a Signatory*

In 1862, Henry W. Halleck, General-in-Chief of the Union Armies consulted Columbia Law Professor Francis Lieber and asked him to help draft a code for the conduct of war. The Lieber Code was adopted as General Order No. 100 in 1863. Contained in the code were the first formal statements in the United States concerning the treatment of cultural property during times of war. Sections 34 through 36 addressed the issue and stated:

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property . . . but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precise instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

²⁷² *Id.* It is also the information of the author that it is intended that the agreement between Japan and Italy will take a form very much like that of the Italy/China agreement.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.²⁷³

The code attempted to require that both attacker and defender secure cultural property against unavoidable injury.

The deferential and respectful philosophy toward cultural property contained in the Lieber Code found international support and was included in the Hague Conventions of 1899²⁷⁴ and 1907²⁷⁵ to which the major world parties acceded. For example, Article 56 of Hague 1899 states that “[a]ll seizures of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, [are] prohibited.”²⁷⁶

Unfortunately, the Conventions did not pass the test of World War I during which the Rheims Cathedral was bombed and the library at Louvain, France was burned. Following the defeat of Germany, the issue of the protection of cultural property was addressed in the Treaty of Peace between the Allied and Associated Powers and Germany known as the Treaty of Versailles.²⁷⁷ Article 245 of the Treaty of Versailles, for example, required Germany to return all property of historical significance that it had stolen. The United States was not a signatory to the Treaty, but it did sign The Treaty of Berlin.²⁷⁸ Both treaties contained provisions whereby Germany accepted responsibilities for damage it had caused. Ultimately, 25,433 claims were filed and 7,025 awards were made.²⁷⁹

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict²⁸⁰ came into force in August 1956

²⁷³ LEON FRIEDMAN, *THE LAW OF WAR* 158 (1972) (citing the Lieber Code).

²⁷⁴ Convention with Certain Powers Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1903), T.S. No. 403.

²⁷⁵ Convention with Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

²⁷⁶ Convention with Certain Powers Respecting the Laws and Customs of War on Land, *supra* note 274.

²⁷⁷ Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 112 British and Foreign State Papers 1, 1919 U.S.T. LEXIS 7, 2 Bevans 43.

²⁷⁸ Treaty of Berlin, U.S.-Ger., Nov. 21, 1921, 42 Stat. 1939.

²⁷⁹ LEONARD P. DUBOFF, SHERRI BURR & MICHAEL D. MURRAY, *ART LAW* 46 (2004).

²⁸⁰ Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict (May 14, 1954), available at <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf>.

and was signed by Japan in May 1954. Notwithstanding and as of January 2007, although 116 countries have signed the convention, it has not been ratified by Japan, nor has it been ratified by other significant countries including the United States,²⁸¹ Great Britain, and South Korea.

The Convention²⁸² addressed the plight of cultural property during armed conflict and for the first time included a definition of the term. It stated that cultural property included:

(M)ovable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.²⁸³

The Convention expanded coverage to all armed conflict not just declared wars, and it also created an international register of Cultural Properties under Special Protection.²⁸⁴ It requires signatory parties to protect cultural property within their own territories as well as in territories of other signatories from pillage and theft,²⁸⁵ and among other acts, it expressly prohibits the seizure of such properties as trophies.²⁸⁶ As a concession to nationalism,

²⁸¹ While not a signatory, each U.S. military service branch is required to have rules that comply with the general law of war. It is the general proposition of the United States that while it is not obligated to comply with the detailed administrative terms of the 1954 Convention, it does comply with the custom and spirit of the international community in protecting cultural property. OPERATIONAL LAW HANDBOOK, DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, AFO 110-34, (John Rawcliffe ed., 2007), available at <http://www.fas.org/irp/doddir/army/law2007.pdf>.

²⁸² Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 232.

²⁸³ *Id.* art. 1(a)-(c) (defining "cultural property" to cover buildings intended to preserve or exhibit cultural property such as museums, among others, and centers containing monuments).

²⁸⁴ *Id.* art. 12.

²⁸⁵ *Id.* art. 3-4 (mandating respect for cultural property among the contracting parties by prohibiting or preventing any theft, vandalism, or misappropriation of cultural property and refraining from any use of the property for protection purposes in the event of an armed conflict).

²⁸⁶ *Id.* art. 14 (granting protected cultural property and its transport immunity from seizure, capture, and prize).

military necessity is made an exception to the obligations of the treaty.²⁸⁷

The U.S. and a number of its allies, including Japan, have reportedly declined to sign the convention because of concerns that they might not be able to carry out their obligations to protect cultural property near military targets as required by the First Protocol, particularly in the event of the use of nuclear devices. As a result of a new protection charter set out in the Second Protocol approved in 1999, however, Japan is now considering ratification of the treaty. It has reported that Japan now believes that the Cultural Affairs Agency of Japan now possesses the power to order or advise keepers of cultural property on means by which to protect the property in the event of attack. This is a part of its initiative in and commitment to the subject of protecting world cultural heritage. Reports in February 2007 also indicate that the government is on the brink of introducing legislation that will prohibit the importation of cultural properties from occupied areas.²⁸⁸

5.2.8. *General Efforts at Repatriation by Japan*

In recent years Japan, its institutions, and its people have made significant efforts to return objects, claimed to have been removed illicitly, to various countries of origin. As previously mentioned, in 1965, on the occasion of the Japan-South Korea Normalization Treaty through which Japan and South Korea resumed diplomatic relations, over 1,500 objects, including porcelains and documents, were repatriated. Recently, the Japan-DPPRK Pyongyang

²⁸⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 232, art. 4. See generally John Merryman, *Two Ways of Thinking About Cultural Property*, 80 A.J.I.L. 831, 841-842 (1987) (stating that “despite its deference to military necessity, Hague 1954 expresses several important propositions affecting the international law of cultural property. One is the cosmopolitan notion of a general interest in cultural property—“the cultural heritage of all mankind”—, apart from any national interest. A second is that cultural property has special importance, justifying special legal measures to ensure its preservation. Another is the notion of individual responsibility for offenses against cultural property. The fourth is the principle that jurisdiction to try offenses against cultural property is not limited to the government of the offender.” (internal citations omitted)).

²⁸⁸ See, e.g., *Government to Ratify International Convention to Save Cultural Assets in War*, YOMIURI SHIMBUN (Japan), Feb. 4, 2007 (indicating that Japan will ratify the Convention for the Protection of Cultural Property in the Event of Armed Conflicts).

Declaration, flowing from discussions between Prime Minister Koizumi Junichiro and North Korea's Kim Jong II, explicitly referenced "the issue of cultural property, and made repatriation a continuing topic of diplomatic concern.²⁸⁹ As described above, there have been numerous occasions when Japanese have voluntarily and charitably given property to Korea that they believe would best be located there. The donations have not only been of discrete and precious objects such as the tomes of the Goryo Dynasty recently given to Seoul National University, but they have also been of more mundane objects of cultural interest. So, for example, in 1987 a businessman gave one-half of his collection of Korean roof tiles to the Korean National Museum in Seoul.²⁹⁰

Perhaps for many Japanese, Koreans, and the world community, the most significant recent cultural repatriation was that of the Bukgwandaechepbi, the stone monument commemorative of the defeat of Hideyoshi's forces during the Imjin War by volunteers of the Hamgyeong Province. Initially and in or about 1978, Korean scholar, Choi Seo-myeon stumbled upon newspaper references in which a Korean monk noted that he had seen it at the Yasakuni Shrine in Tokyo. After what is reported as a lengthy search, Choi found the stone. The Yasakuni shrine, itself, has been the object of some controversy as one of its purposes is as a memorial to honor Japanese war dead, including some who were convicted of war crimes following World War II. Since Japan did not have diplomatic relations with North Korea, South Korea intervened in the discussions considering the return of the object. Agreement was finally reached, and the relic was shipped to South Korea on October 20, 2005. The Japanese official who turned over the object expressed the hope that the action would "promote friendship between Japanese and Korean People."²⁹¹ An agreement between the two Koreas permitted the stone to remain on display in the South for six months, following which it was

²⁸⁹ As previously referenced, the Cultural Properties Administration of Korea is reported to believe that at least 34,157 objects of Korean origin remain in Japan, and claims that many of them were removed during Japan's Imperial period. Brad Glosserman, *Japan Slams the Door on Stolen Artwork*, JAPAN TIMES ONLINE, Dec. 4, 2002, available at <http://search.japantimes.co.jp/cgi-bin/eo20021204bg.html> ("There are more than 1,000 Korean artifacts at the Tokyo National Museum, more than 800 at the Osaka City Museum of Ceramics and more than 2,100 books in the Kyoto University Library.").

²⁹⁰ See Kakuchi, *supra* note 49.

²⁹¹ See Demick, *supra* note 51.

transported to the border city of Gaeseong at which a ceremony for its transfer from South to North Korea took place. About 150 South and north Korean officials were in attendance. The relic continued its journey northward to its destination in North Hamgyeong Province. During preparation for the restoration activities, the original foundation of the monument was uncovered, and on March 23, 2006, a ceremony was held during which the monument was replaced on its original site on a low hill in Rimmyong-ri of Kim Chaek City. After the ceremony, the object was registered as National Treasure of the DPRK Number 193.²⁹²

The significant social and political purchase of the event is attributed to the close cooperation required of the governments and institutions of Japan and South and North Korea in order to affect the return of the monument to its place of origin. As stated by Yoo Hong-joon, the head of South Korea's Cultural Properties Administration, "The return of Bukgwandaechepbi also means efforts to heal our painful injuries from the shared past of Korea and Japan."²⁹³ During the handover ceremony at Gaeseong, Yoo stated, "On this occasion, I propose a meeting between the cultural authorities of the two Koreas in order to expand exchange and cooperation in the cultural sector."²⁹⁴

The experience has, indeed, led to expanded collaboration between North and South Korea through reciprocal agreements for the exchange and exhibition of myriad cultural items. For example, in May 2006, ninety historical treasures from North Korea were loaned to the South for a six month's exhibition in Seoul and Daegu. The objects included an 11th century bronze statue of Taejo Wanggeon that was excavated in 1993 from the tomb of the founder of the Goryeo Dynasty and a bird shaped bone flute harkening from about 2000 BCE²⁹⁵

The Ministry of Education in China has also expressed concern over the presence of Chinese objects in Japan. It has opined that there are likely more than 3.6 million Chinese rare books, works of

²⁹² See *Ancient Monument Restored in North Korea*, NORTH KOREAN NEWS AGENCY, Mar. 23, 2006, available at http://english.kbs.co.kr/news/newsview_sub.php?menu=5&key=2006032330 (stating that the monument is registered as a national treasure).

²⁹³ *Looted Stone Monument Returns From Japan After 100 Years*, YONYAP NEWS AGENCY (South Korea), Oct. 21, 2005.

²⁹⁴ *S. Korea Returns 18th Century War Memorial to North Korea*, YONHAP NEWS AGENCY (South Korea), Mar. 2, 2006.

²⁹⁵ See *Treasures From North*, KOREA HERALD, May 10, 2006 (describing the expanding cultural exchanges between the Koreas).

calligraphy paintings, and other objects of cultural or ethnographic significance reposed in Japan.²⁹⁶

6. CONCLUSION

In the final analysis, there is little doubt that indigenous claims for repatriation of cultural objects possess considerable emotional purchase and political appeal, particularly within the geographic boundaries in which they were created or by those who relate to the nationality of the creator. However, historical events, geopolitical principles, varying definitions or conceptions as to that which is to be considered cultural property, and the implications of often disparate cultural and anthropological considerations will continue to challenge and frustrate attempts to develop a uniform, legitimate, international legal response to what is a significant world problem. Although singular, episodic, and isolated resolution of individual claims, as founded upon legal principles or fortuitous political events, may be forthcoming, actual progress in this arena is likely only when individual nations commence to develop viable and vibrant policies, sensitive to multi-disciplinary considerations, through which they might address cultural property concerns. It appears that Japan has commenced just such a journey. One can only hope that its efforts, to date, are representative of its dedication to a broader and continuing course of conduct, and that other nations of the world will not only take cognizance of the commendable efforts of Japan and Korea, but will also follow their lead.

²⁹⁶ *Id.*

APPENDIX 1. AGREEMENT CONCERNING CULTURAL PROPERTY AND
EXCHANGE ²⁹⁷

『日本與世界』

戰後日本政治 國際關係

東京大学東洋文化研究所 田中明彦研究室

【文件名稱】日本與南韓關係之各個協定，有關於文化資產以及文化協力，日本與韓國之間的協定

TREATY BETWEEN JAPAN AND SOUTH KOREA CONCERNING
CULTURAL PROPERTIES AND COOPERATION

【地點】東京

【日期】1965年6月22日

【出處】日本外交主要文件・年表(2)，600~601頁，外交部條約局「條約集・昭和40年(西元1965年)(兩國之間的條約)」

【備考】

【全文】

²⁹⁷ Translated from Japanese. Complete translation on file with author. Archive of Japanese Governmental Documents by Akihiko Tanaka, Professor of International Relations at the University of Tokyo Institute of Oriental Culture, available at <http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/JPKR/19650622.TMJ.html> (translated from Japanese into Mandarin and English). The author would like to extend his appreciation to Chia-Wen Lee, attorney from Taiwan, for her assistance with this translation. While every effort is made to ensure the accuracy of this translation, due to the complexities of language translation, portions may be incorrect. The Author, therefore, accepts full responsibility for the accuracy and reliability of all translated material.

For a good summary of comments on Japanese-Korean relations, see MINISTRY OF FOREIGN AFFAIRS OF JAPAN, JAPAN-REPUBLIC OF KOREA RELATIONS (Feb. 2008), <http://www.mofa.go.jp/region/asia-paci/korea/index.html> (last visited Apr. 6, 2008).

日本與韓國，鑑於兩國在文化上的歷史關係，希望對於兩國的學術和文化的發展以及研究有所貢獻，因此協定了以下條約。

In the light of the historical relationship in culture between two countries, Japan and South Korea agree to the following treaty, in order to contribute to the academic, cultural development and research in both countries.

第一條

日本政府與南韓政府，為了增進兩國之間民間的文化關係，將儘可能給於協助。

Article I

The government of Japan and of South Korea shall provide any possible assistance to improve the private cultural relationship between two countries.

第二條

日本政府，在此協定的效力產生之後的六個月以內，將把附屬文件上揭示的文化資產依照雙方政府彼此認同的手續下交給韓國政府。

Article II

Within six months after the validation of this Treaty, the government of Japan shall, pursuant to the approved procedures, deliver the cultural properties listed in the enclosed document

第三條

日本政府與南韓政府，為了提供對方國國民對於其各自的美術館、博物館、圖書館所保有的其他學術以及關於文化資產的設施之研究機會，將儘可能提供方便。

Article III

The government of Japan and South Korea shall provide any possible convenience for the other nationals in research on the academic and cultural properties in its own art museums, museums and libraries.

第四條

此協定將無條件受批准。批准書將儘可能迅速在首爾做交換。
此協定在批准書交換當天始生效。

Article IV

This Treaty shall be unconditionally validated. The instrument of validation shall be promptly exchanged in Seoul. This Treaty shall become effective on the date of the exchange of the instrument of validation.

以上做為依據，署名是受各自的政府合理的委託下簽署此協定

In accordance with the above, the signature is under the reasonable authorization from each government to sign this treaty.

1965年6月22日於東京，
將一致的正文做成日文和韓文兩種正文。

On June 22, 1965, the original context was made both in Japanese and in Korean.

日本代表 椎名悅三郎 高杉普一 南韓代表 李東元 金東祚

Japanese Representatives

Etsusaburo Shiina
Shinichi Takasugi

South Korean Representatives
Dong Won

Lee
Kim Dong Jo

APPENDIX 2. THE LAW REGARDING THE PROMOTION OF
INTERNATIONAL COOPERATION REGARDING THE PROTECTION OF THE
CULTURAL HERITAGE OF A FOREIGN COUNTRY²⁹⁸

The Law Regarding the Promotion of International
Cooperation Regarding the Protection of the Cultural Heritage of a
Foreign Country
(Law No. 97 of June 23, 2006)

(The purpose)

Article 1

This law is related to the promotion regarding an international cooperation (it is called "cultural heritage international cooperation" below) regarding the protection of the cultural heritage of a foreign country and also for cultural heritage that may be damaged, disappear, decline, was destroyed or has these possibilities, and to determine the basic principles and announce the responsibility of country etc., along with determining the basis of the policy regarding the promotion of cultural heritage international cooperation, this law intends to promote cultural heritage international cooperation, and this law also contributes to the improvement of the international position of our country a/the purpose, beside it contributes to the development of the various culture in the world.

(The basic principles)

Article 2

1) About the cultural heritage international cooperation: in view of that a/the cultural heritage is a common precious property of all mankind, to make the most of the knowledge, technology, experience etc. that has accumulated in Japan, and to permit Japan to accept the role of leadership in the international society and actively contribute to the development of the various culture in the world, he cooperation shall be carried out in order to cultivating of

²⁹⁸ Complete translation on file with author. The author wishes to express his deep appreciation to Hideo Yoshida of the Japanese Patent Office, Tokyo for his assistance with this translation. While every effort is made to ensure the accuracy of this translation, due to the complexities of language translation, portions may be incorrect. The Author, therefore, accepts full responsibility for the accuracy and reliability of all translated material.

the knowledge that Japan respects different cultures and promotes international mutual understanding in the area.

2) Considering the importance of the diversity of a/the culture is important, international cultural heritage cooperation must be carried out through the voluntary effort of the government and related organization of the foreign country in which the cultural heritages exist.

3) The policy regarding the promotion of international cultural heritage cooperation is to be carried out in consideration of the basic principles of the organic culture art promotion act (Heisei 13, the 148th law).

(The responsibility of a country)

Article 3

A Country must follow the basic principles of the preceding article and assume the responsibility of setting the policy regarding the promotion of cultural heritage international cooperation and of carrying it out.

(The responsibility etc. of the education research organization)

Article 4

1) A University and other education research organizations regarding cultural heritage international cooperation (below called "the education research organization") should make an effort to cultivate personnel capable of voluntarily and actively conducting the research and defusing the knowledge needed for cultural heritage international cooperation.

2) An educational research organization should try hard to provide security and proper treatment of a/the researcher and of upgrading and improving an/the education research institution so that the duties and the workplace environment of the researcher and engineer working in cultural heritage international cooperation becomes an importance, a suitable, and attractive experience.

3) In order to carry out the policy of the Act and the policy regarding the promotion of cultural heritage international cooperation an/the education research organization and Country must provide respect of independence of a researcher and the research in the education research organization.

(The measure etc. on finance)

Article 5

Government shall try hard to take the measures to provide necessary financial support to carry out the policy regarding the promotion of cultural heritage international cooperation and the other measures.

(The basic policy)

Article 6

1) The Minister of Education, Culture, Sports, Science and Technology and also the Minister of Foreign Affairs (below, it is called as "the basic policy") must determine a basic policy regarding the promotion of cultural heritage international cooperation to promote cultural heritage international cooperation.

2) Such a basic policy shall determine the basic things to promote cultural heritage international cooperation and the other necessary things.

3) The Minister of Education, Culture, Sports, Science and Technology and also the Minister of Foreign Affairs will also consult with the manager of related administrative departments, when they set or change the basic policy.

4) When the Minister of Education, Culture, Sports, Science and Technology and also the Minister of Foreign Affairs determine or change the basic policy, they shall announce that activity without any delay.

(The strength of coordination)

Article 7

Considering that effective promotion of the cultural heritage international cooperation is promoted by the cooperation between a Country and the independent administrative corporation regarding cultural heritage international cooperation (the independent administrative corporation which is prescribed in the Heisei 11 Law 103 Article 2 Paragraph 1—independent administrative corporation general rules), education research organization, private enterprise etc. by mutual coordination, and the Nation shall make policy needed for the strength of the coordination between these organizations.

(The mutual close coordination of a/the relation administrative organ)

Article 8

All measures needed for appropriate promotion of the cultural heritage international cooperation must be carried out under the mutual close coordination of a/the relation administrative organ.

(The support to the education research organization and also private enterprise)

Article 9

Nation shall affect necessary policy to support the activity of an/the education research organization and of private enterprise regarding cultural heritage international cooperation.

(The security etc. of a/the capable man)

Article 10

Nation shall take the policy needed for the improvement of the security, training and also disposition of the individuals trained in or who has the specialized knowledge regarding the protection of a/the cultural heritage and of the independent administrative corporation, education research organization, private enterprise etc. regarding cultural heritage international cooperation in order to promote close mutual coordination cooperation in international cultural heritage cooperation.

(The policy for international cooperation)

Article 11

The Nation shall try hard to take a necessary and appropriate policy and the exchange of the information with related organization or international organizations or the government of the foreign country, consistent with any treaty etc. regarding the protection of the cultural heritage and to promote cultural heritage international cooperation under international cooperation.

(The collection, tidying and also utilization of the information of the interior and exterior of the country)

Article 12

Nation shall take the collection of the information from without and within the country regarding cultural heritage international cooperation, so that necessary cultural heritage international cooperation is carried out appropriately and effectively.

(The reflection of the opinion)

Article 13

Nation shall upgrade systems and set other policy to make possible the communication of the opinion of the person concerned with cultural heritage preservation, reconstruction etc. in cultural heritage international cooperation consistent with the policy of the country, to contribute to the proper plan and also enforcement of the policy regarding the promotion of cultural heritage international cooperation.

(The increase of the understanding and also interest of the nations)

Article 14

Nation shall promote public education and public relations regarding cultural heritage international cooperation and the other necessary policies to deepen the understanding and interest of the nations regarding the importance of the role that the researcher and also engineer accomplish in cultural heritage international cooperation and also cultural heritage international cooperation.

Additional rule

This law implements it from the day of proclamation.

APPENDIX 3. MEMORANDUM OF UNDERSTANDING:
COOPERATION FOR THE PROTECTION OF CULTURAL
HERITAGE BETWEEN THE MINISTRY OF CULTURAL
HERITAGE OF THE ITALIAN REPUBLIC AND THE
ADMINISTRATION FOR CULTURAL HERITAGE OF THE
CHINESE PEOPLE'S REPUBLIC.²⁹⁹

With a view to the richness of their respective cultural heritages and to the good relations between the two countries in the field of the protection of the cultural heritage, the Ministry of Cultural Heritage of the Italian Republic and the Administration for Cultural Heritage of the Chinese People's Republic, are now determined to strengthen their collaboration in the areas of protection of cultural heritage and museum administration. They also hope to facilitate the exchange of experts and the bilateral cooperation in those areas in order to strengthen mutual knowledge and comprehension. Further to the desires expressed during the meeting between the Italian Minister of the Cultural Heritage and the Director of the State Administration for the Cultural Heritage of the Chinese People's Republic, these two parties, on June 2005, have reached the following agreement:

Article 1

1. The two parties decided to establish a combined Italian-Chinese Work Group (Work Group) for the protection of the Cultural heritage, which will guide and coordinate the collaboration between Italy and China in the areas of the protection of the cultural heritage and the administration of the museums. In order to coordinate, plan and organize the activities of the Work Group the two Countries have chosen the following departments:

Italy: Research, Innovation and Organization Department of the Ministry of Cultural Heritage.

Chinese People's Republic: Foreign Relations Department of the State Administration for the Cultural Heritage.

²⁹⁹ Complete translation on file with author. The author wishes to thank Gianluca Gentili of the University of Florence and the University of Sienna, Italy for his assistance with the translation. While every effort is made to ensure the accuracy of this translation, due to the complexities of language translation, portions may be incorrect. The Author, therefore, accepts full responsibility for the accuracy and reliability of all translated material.

2. Task of the Work Group:

1) The Work Group, according to the decision take by the National Departments, will identify the programs of exchange and collaboration of common interest.

2) The Work Group will then further define the collaboration and exchange proposals, including visits to the respective administrative Departments, conferences, relations between the agencies involved in the areas touched by the cooperation; the Work Group will then foster the exchange of information and the organization of scientific meetings and exhibitions.

3) The Work Group will provide information, and guide about the exchange and cooperation programs, and, at stated times, will draw official reports about the activities and developments made.

4) The Work Group, in long-term perspective, will coordinate the activities of the respective Departments and the other organizations and administrative bodies involved in the areas which fall under this Memorandum and will suggest and promote related projects and events.

3. Members of the Work Group:

Chiefs of the Work Group will be the Head of the Research, Innovation and Organization Department of the Italian Ministry of Cultural Heritage and the General Director of the Foreign Relations Department of the Chinese State Administration for the Cultural Heritage.

Other Italian members: 1 officer in charge for international relations (the head of the Office for international Relations at the Research, Innovation and Organization Department); the General Director of the Technological Research Department of the Ministry of Cultural Heritage; 1 liaison officer chosen among the officers of the Research, Innovation and Organization Department.

Other Chinese members: 1 officer among those working at the Foreign Affairs Office in the Chinese State Administration for Cultural Heritage; the Director or the International Relations office of the Same administrative body; 1 liaison officer chosen among those working at the Foreign Relations Department of the Chinese State Administration for Cultural Heritage.

The two respective liaison officers will coordinate and take care about the communications between the two parties inside the

Work Group. Timely communication must be given in any change in the person working as a liaison officer of both the parties.

The Work Group should meet at least once a year, one time in Rome and one in Beijing, with a calendar decided by both parties, in order to revise the programs of exchange and collaboration and plan the future activities of the Work Group. A final document should be drafted as a result of the meeting.

Article 2

The two countries have decided to collaborate in the following areas:

1) Fight against the theft, smuggling and any kind of illicit transaction involving works of art.

2) The two parties will coordinate their effort in developing modern rules and regulations protecting their cultural heritage, especially through the exchange of information and support given to their respective Parliaments in the process of drafting these rules.

3) Aerial Archaeology: the parties will identify common projects in which the Italian knowledge in the field of aerial archaeology will be used to protect Chinese historical sites, during the development and building of infrastructures on the Chinese territory.

4) Computerization of the records, documents and files regarding cultural heritage.

5) Protection of works of art made of paper and oil paintings.

6) The parties will cooperate during the activities of resaturation regarding the Hall of Supreme (Highest?) Harmony in the Forbidden City and those regarding the Great Wall of China at Badaling.

Article 3

The present Memorandum of Understanding will be in effect for a period of five years. If none of the two parties will give notice to the other party, at least six month before the expiration date of the MoU, of its will to terminate this kind of agreement, the agreement will be automatically renewed for five more years.

Signed in Beijing on January 20, 2006, in two parts, with respectively Italian and Chinese language, having the same meaning and effect.

State Administration of
Cultural Heritage for the
Chinese People's Republic

Shan Jixiang

Ministry of Cultural Heritage
of the Italian Republic

Rocco Buttiglione

APPENDIX 4. 9/29/2003 THE 43RD MEXT ORDINANCE

Country	Republic of Turkey	Republic of Turkey
Kind	Bible (Manuscript of a bible)	Craftwork (Cross Silverwork)
Name	-	-
Institution	Dyberburc/Criac ancient Virgin Mary Church	Dyberburc/Criac ancient Virgin Mary Church
Owner	-	-
Date article was stolen	1/7/2003	1/7/2003
Feature	One book. 43 × 31 × 8 centimeters. Page 466. It is covered with black leather. A silver board of 43 × 29 centimeters is fitted in the surface. Crucified Jesus Christ is described in the center with Saint Maria with the Virgin Mary standing in his both sides. For the edge, a believer of God whom there is with an evangel and King is drawn on the four corners with relief. A silver board is attached to a book with a nail.	Two. Each one of them is 27 × 13 centimeters, both. Maria and an angel are drawn on one side of one cross. Crucified Jesus Christ is drawn on another side. 4 apostles and 4 red stones are drawn on a part of each arm of a cross. On another cross, crucified Jesus Christ and a red stone are drawn on only one side.
Date of appointment	9/29/2003	9/29/2003
<p>Recitals:</p> <p>1. The name of a country to advocate in the first row is a name of the country where the institution, where cultural property which is appointed as Specified Foreign Country's Property were stolen, is located (It means an institution to prescribe to Article 7 (b) (i) of Treaty relating to the means to prohibit and prevent the moving of illegal import and the export of cultural Property and the ownership).</p> <p>2. The second row contains cultural property appointed as Specified Foreign Country's Cultural Properties of a picture, a sculpture, an industrial art object, a book trace, classical books, ancient documents, an archaeology document, history document, etc.</p>		

3. A name to advocate in the third row of cultural property appointed as Foreign Country's property. An institution advocating it in the fourth column is an institution to be prescribed at No 1 of this recital where cultural property is appointed as Specified Foreign Country's Cultural Property were stolen.
5. An owner advocating it in the fifth row is an owner of cultural property appointed as Foreign Cultural Property.
6. The time of theft to advocate in the sixth row is the time that cultural property, which is appointed as Specified Foreign Country's Cultural Properties, were stolen from an institution which is prescribed at the first recite.
7. In the seventh column is a future of color, dimensions, weight, materials, shape, and others of Cultural Properties which is appointed as Specified Foreign Country's Cultural Property.
8. A date of appointment to advocate in the eighth row is the date appointed as Foreign Cultural Property.