



Protection of Cultural Property Under International Law and the Laws of Selected Foreign Nations

International Law • Afghanistan • Argentina
Australia • Belize • Botswana • Brazil • Burma • Canada
Chile • People's Republic of China • Colombia • Cuba
Czech Republic • Egypt • European Union • Germany
Ghana • Greece • Haiti • Honduras • India • Iran • Israel
Italy • Japan • Kenya • Republic of Korea • Kuwait
Malaysia • Mexico • Netherlands • New Zealand • Nigeria
Peru • Sweden • Taiwan • Tanzania • Thailand • Turkey
United Kingdom • Vietnam • Zambia

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COMPARATIVE ANALYSIS

Introduction

This analysis is devoted to foreign legislation and international law protecting cultural property. The legislation surveyed exists in countries of Africa and the Middle East, Asia and the Pacific Realm or Far East, Europe and North America and Latin America and reflects the significance of this form of property.¹ The proliferation of bilateral, regional and international arrangements that also deal with cultural property also attest to its importance. At both the international and national levels, an interactive process is evident.

Cultural property is examined in terms of its nature and significance; definition; establishment of ownership; regulation of traffic in this form of property; repatriation in cases where it has been removed abroad; and other laws or other protection of cultural property, for example, in times of war. This last category involves bilateral, regional and international protection of cultural property.

Foreign legislation

Nature and significance of cultural property

For laws in the African countries, of **Botswana, Ghana, Kenya, Nigeria, Tanzania, and Zambia**, the nature and significance of cultural property is reflected in the better preservation, protection and control of artifacts, antiques, ancient sites, relics, other objects of aesthetic, archaeological, historical and scientific value or interest.

Countries in the Middle East are beneficiaries of long histories of existing antiquities and other forms of cultural property of human civilizations. These include **Afghanistan** with its pre-historic culture; the remnants of Pharaonic, Greek, Roman, Christian, Coptic and Islamic civilizations in **Egypt**; similar strands of history found in **Iran**; and the crucible of Judeo-Christian culture in **Israel**, sufficiently chronicled in both the Old and New Testaments of the Bible. **Turkey** is cognizant of the importance of the preservation and protection of cultural property, considering it is also a beneficiary of more than a hundred different civilizations that lived on what is now Turkish soil.

In Asia, the cultural property patterns closely resemble those of the Middle East. In **Burma**, for example, the impact of Buddhism as the religion of the country also reveals its influence in the cultural heritage and other forms of cultural property of the Burmese people, extending back to the 6th century B.C. As a result, most of the cultural property in **Burma** is religious in nature. This includes both movable and immovable property such as pagodas. Non-religious antiquities also exist and include gemstones, gold, silver objects, vessels and tapestries. **China** is a repository of a 5,000 year civilization. More than any other surveyed country, **China** reports a staggering number of about 350,000 sites of cultural interest.

¹ The jurisdictions surveyed include: Afghanistan, Argentina, Australia, Belize, Botswana, Brazil, Burma, Canada, Chile, China, Colombia, Cuba, the Czech Republic, Egypt, Germany, Ghana, Greece, Haiti, Honduras, India, Iran, Israel, Italy, Japan, Kenya, Korea, Kuwait, Malaysia, Mexico, the Netherlands, New Zealand, Nigeria, Peru, Sweden, Taiwan, Tanzania, Thailand, Turkey, the United Kingdom, Vietnam, Zambia and studies on International Law and the European Union.

India's regulation and control of cultural property is to preserve and protect. The law preserves Indian art objects made of both metal and stone. Due to their wide aesthetic appeal, Indian objects are of potential and actual piracy as well as other forms of misappropriation. The Constitution of **India** also stipulates that the State is under an obligation to protect India's art. **Japan** is the only jurisdiction among the surveyed countries that expressly uses the term *cultural property* in its Cultural Property Protection Law of 1950, a term that was later adopted in the laws of other nations and international agreements.

This influence is especially felt in the **Republic of Korea** with whom **Japan** enjoys a bilateral treaty.² In **Malaysia**, the nature of cultural property is premised on a cultural heritage handed down by ancient rulers who founded the kingdoms of the area. Cultural influences include Hinduism and Buddhism from India and later Islam. Cultural property in **New Zealand** cannot be separated from the culture and history of its indigenous peoples. Almost 10% of the population of New Zealand of 3.5 million people are descendants of Maoris who migrated to New Zealand long before the British arrived. Highlights of such Maori cultural treasures include carvings, music, dance, rock-drawing and tattooing and wood carvings.

In **Taiwan**, the Law for the Preservation of Cultural Property or Ancient Objects requires the preservation and protection of cultural property as one method of glorifying Chinese culture. In **Vietnam**, both the Constitutions of 1981 and 1992 attest to the nature and significance of cultural property. Both Constitutions contain provisions protecting and preserving cultural property in **Vietnam**. Similarly, the laws of **Thailand** reflect the nature and significance of antiquities and ancient relics. **Australia** is home to a wealth of cultural heritage that includes prehistoric burial sites and Aboriginal middens.

Nine jurisdictions in Europe and North America including the European Union have been surveyed in this report. In Europe, these include the **Czech Republic, Germany, Greece, Italy, the Netherlands, Sweden**, and the **United Kingdom**. In the **Czech Republic**, cultural property is reflected in the wealth of artistic and historical castles and palaces as well as huge collections of paintings, sculptures and relics. In **Germany**, cultural property is intrinsically tied to its history more especially the periods between the First and Second World War. Immediately following the First World War, the Treaty of Versailles³ required **Germany** as the aggressor to repatriate and/or compensate nations and individuals for looted and destroyed art. In the course of the Second World War, **Germany** was both a cultural aggressor and victim of illicit removal of works of art. The whole history of **Germany** during the World War II in matters of cultural property is one that has given rise to voluminous norms of private and public international law with respect to restitution of property and property rights.

In **Greece**, both the Constitution and statutory law reflect the nature and significance of cultural property. This country has sought to protect its cultural property since 1832 when Greece attained its independence from Turkey. The Constitution in particular requires that special legislation be exclusively devoted to matters of cultural property, for example, to determine ownership and other related matters. The nature and significance of cultural property in **Italy** is traced to the preunification period. The importance of the protection and preservation of cultural property and cultural heritage is further recognized in the 1948 Constitution as a fundamental principle of this instrument. The **Netherlands** is a nation with a cultural history that goes back to the 17th Century and beyond. However, it was not until the 1900s that regimes regulating control, preservation and protection of various forms of cultural property crystallized. The Netherlands was also impacted by the ravages of World War II and its loss of different forms of cultural

² The Agreement on Cultural Property and Cooperation Between the Republic of Korea and Japan, Treaty No. 181, Dec. 18, 1965.

³ 2 BEVANS 43, arts. 245-247.

property. In **Sweden**, the nature and significance of cultural property is reflected in the state protection of this form of property traced back to 1630 when the monarchy of the day established a royal office dealing with antiquities. Legislative history is evident in Sweden rendering cultural property a matter of concern for the country. **Britain** enjoys extensive public and private collections of works of art and other forms of cultural property. This array of cultural property is both foreign and domestic reflecting prior British world dominance. With its diminishing world fortunes so does the inflow of items of cultural property. In addition cultural property in Britain was similarly and adversely affected by World War II. Consequently, antiques, relics, artifacts and other works of art could not be exported without a rigorously enforced export permit system.

To the **European Union**, the concern with respect to cultural property is prevention and protection from theft. In a region where approximately 60,000 items of art and other forms of cultural property are misappropriated or fraudulently converted every year, the challenge for the Union has been to balance the interests of its *source membership* to that of its *market members*. This is especially important in light of the fact that most of the Union Members are not parties to UNESCO and European Conventions on offenses relating to cultural property.

Nine countries have been surveyed in the Americas. These include **Argentina, Belize, Canada, Chile, Colombia, Cuba, Haiti, Mexico and Peru**. The most distinctive features of legislation on cultural property in this region is that, other than **Belize**, all the constitutions of these countries contain provisions on the sanctity of cultural property that demand its preservation and protection. The Constitution of **Argentina** includes provisions on the protection of cultural property. This recognition is especially striking when it is considered that the constitutional provisions on cultural property are an integral part of guaranteed rights of the people of Argentina.

In **Belize**, the country appears to contain more ruins of ancient Mayan cities than any other nation in this hemisphere, perhaps with the exception of **Guatemala**. Most of these cultural treasures in **Belize** continue to be buried deep in the ground, and they are susceptible to plunder and illicit excavations. The origin of **Canadian** cultural property is derived from a combination of French, English, other migrant peoples and that of the indigenous peoples of Canada. Eskimo art and also Indian artifacts from burial grounds and other ceremonial sites constitute some of the wealth of Canada in cultural property. This is important because less than 10% of the land in Canada has been developed.

In **Colombia**, the nature and significance of cultural property is also reflected in its Constitution which requires the state to promote culture and other similar activities through education. Consequently, an Institute of Colombian Culture was established to respond to this mandate. In **Cuba**, the Constitution of 1976 declared that the state defends the identity of its culture and oversees the conservation of the nation's heritage and its artistic and historical resources. **Haiti** has put monuments, ruins, sites that reflect African beliefs as well as other archaeological, historical, cultural and architectural treasures of the country under state protection. These are important to its national heritage. **Mexico** is endowed with a long history of various civilizations that have been traced back to 3,000 B.C. These include the Olmec, Toltec, Maya and Aztec. The country enjoys 15,000 documented and registered archaeological sites, eight of which are classified as world heritage. Seven of them pertain to archaeological zones reflecting past Indian cultures. Other areas and finds in Mexico reflect the nature and significance of cultural property.

Definition

None of the African countries support a definition of the term of *cultural property* like that found in the Japanese and Korean laws examined below. Rather as is customary of international and regional

conventions on the subject, the African statutes catalogue forms of cultural property that are deemed to be so. Generally, countries in the Middle East define *cultural property* to include any antiquity as a movable or immovable object of historical, scientific, religious, artistic, cultural or literary value as in **Egypt** or any such object encompassing these elements before 1700 or geological or botanical remains before 1300 in **Israel**. In **Kuwait** an antiquity or relic is protected if it was produced or affected by human agency 40 or more years ago. **Turkey** has three categories in its definition of cultural property. These include movable and immovable cultural properties on the surface or underground or submerged of prehistoric or historic periods that exhibit scientific, cultural, religious or artistic values or interest. The second category relates to natural properties on the surface, underground or submerged in water of prehistoric and historic periods that manifest special features or beauty or are rare finds. Finally, sites of cities or remnants thereof that are products of various civilizations of Turkey.

In the Far East, *cultural property* in **Australia** encompasses cultural heritage of Aborigines, ethnological, archaeological, historical, literary, artistic, scientific or technological value. Also covered by this definition are forms of cultural property recovered from Australian soil, inland waters, the coastal sea, the seabed or sub-soil or beneath the sea. **Burma's** definition of *cultural property* is similar to those found in the African and Middle Eastern countries. The term *cultural property* is not part of its definition. It, however, defines categories of cultural property such as objects of archaeological, historic, artistic, ethnological interest. Invariably such items incorporate fossil remains of man or animal, any site or ruin or any item designated as an antiquity by the President of Burma.

In **China**, *cultural property* is better known as cultural relics. Cultural relics of historical, artistic and scientific value are categorized in five broad categories, namely, sites of ancient cultures such as ancient tombs, ancient architectural structures, cave temples and stone carvings; buildings and memorial objects; valuable works of art and handicrafts of varying historical periods; important revolutionary documents, manuscripts and ancient books or material of historic, artistic or scientific value; and material objects that reflect the social system. A number of statutes govern matters of cultural property in **India**. These measures are consistent with evolving international regimes on this subject.

Japan appears to have been the first country to utilize the term *cultural property*. It defines *cultural property* in five categories: tangible cultural property such as buildings, sculptures and the like; intangible cultural property such as art; folk cultural property which pertains to manners and customs of food, clothing and housing and religious faiths, etc.; monuments which include ancient tombs and sites of palaces, etc.; and groups of historic buildings or structures.

Malaysian federal law defines *cultural property* in the same manner as that found in other former British colonies and dependencies around the world and other members of the British Commonwealth of Nations. Consequently, the Antiquities Act of 1976 refers to the term *antiquity* rather than cultural property.

New Zealand defines *antiquities* and *artifacts* in the form of chattels of national, historical, scientific or artistic importance; works of art, ships and wrecks of more than 60 years as well as Maori artifacts made before 1902. In **Taiwan**, *cultural property* is defined in five classifications that cover antiques and relics; historical sites such as ancient architecture; ethnic art; objects relating to folk customs and livelihood and natural cultural scenic spots and sites. All must have historical, cultural or artistic value. This definition is identical to that found in Japanese and Korean laws. **Thailand** defines cultural property in the context of historical monuments, antiques and objects of art. Historical monuments constitute immovable property features that exhibit artistic, historical or archaeological interest. Antiques are all movable property whether in their natural state or affected by human agency which reflect artistic, historical or archaeological value and objects of art which must be recognized to show a significant artistic value. **Vietnam** defines *historical and*

cultural property as buildings, monuments, places, articles, documents and works of historical, scientific or artistic interest or of other similar cultural value. These areas are further classified into six additional categories.

In the **Czech Republic**, *cultural property* refers to movable and immovable items or collections as long as they pertain to history of the society, art, technology, science and other areas of human endeavor. The definition also includes architectural works, works of personalities or events of history and culture as well museums, galleries and archival pieces. **Germany** does not contain a statutory definition of the term *cultural property*. An item is considered a form of cultural property if it is registered as such in a state register by an administrative act of the German state (*Länder*) where the property is situated. In turn, state registers give rise to a national register under the auspices of the Federal Government.

The laws of **Greece** define cultural property to cover movable and immovable, tangible and intangible objects of architecture, sculpture, graphic art or art in general, monuments and other items included in the traditional categories of cultural property seen in other surveyed countries. Similarly, the **Italian** Law of 1939 provides the traditional definition of items both movable and immovable that are of artistic, cultural, historic, archaeological and cultural value. The term *cultural property* itself is not a feature of Italian law.

Similarly, the **Netherlands** does not have a single definition of cultural property. Each applicable law on the subject prescriptively sets the scope of objects that are deemed integral in its characterization of cultural property. In **Sweden**, the Law on Cultural Heritage of 1988 includes in its definition three broad categories that cover ancient remains, both movable and immovable, or remnants of old or ancient human activities that are abandoned permanently. The second category is historic monuments which includes buildings of historical and cultural significance. Church buildings, church sites, etc., are also a part of the third category.

The definition of cultural property in **Britain** is similar to that of its former colonies and dependencies. Regulations of the **European Union** and regimes from transnational organizations such as the Commonwealth of Nations guides one as to what constitutes cultural property in the **United Kingdom**.

In the Americas, **Canada** does not have a specific definition of the term *cultural property*. It regulates this form of property by placing items of artifacts, relics, etc., on a Cultural Property Export List. Thereafter, the Law then prohibits any unauthorized export transactions for any item found on the List. Cultural property in **Argentina** is covered by a variety of laws. These laws do not contain a specific definition of cultural property. Included are objects relating to museums, historical and archaeological sites, movable and immovable assets and sites, monuments, documents and other items of historical and cultural interest.

Belize covers structures, buildings and transformed natural objects that are in excess of 100 years in age. Other items must be at least 150 years old. In **Chile** and **Columbia**, cultural property includes sites, constructions, objects of historic or artistic character, prehistoric Indian tombs, cemeteries, anthropological, paleontological, archaeological and ecclesiastic pieces. Cultural property in **Cuba** includes national and local monuments, natural sites and other sites affected by human agency, archaeological, urban and historic sites. **Haiti** includes both movable and immovable items of historic or artistic value as cultural property. **Mexico** also recognizes movable and immovable forms of cultural property which in this country alludes to monuments of archaeological, artistic and historic value or interest. **Peru** defines *cultural property* in terms of movable and immovable as well as tangible and intangible items and assets that exhibit artistic, scientific, historic or technical importance.

Establishment of ownership of cultural property

Ownership of cultural property in the African countries is by and large vested in the government or the State, though reversionary interests are possible for private owners.

All cultural property in the countries of the Middle East is vested in the State. As in Africa, however, a residual and reversionary interest is reposed in the individual subject to the overall protection of government control. In **Israel**, this is achieved by a waiver mechanism secured from appropriate authorities. Under **Egyptian** Law, religious endowments (*waqf*) are exempted from this ubiquitous control of cultural property by the government. Furthermore, such private reversionary or residual interest is possible if the property was secured before the operational date of the Law of 1983 but is held according to the provisions of this Law. The third class possible under private ownership of residual or reversionary interest in Egypt is when such property is authorized to be so held under the provisions of the Law of 1983 and subject to the terms and conditions imposed by the government. **Kuwait** recognizes a limited right to private ownership of cultural property on the surface of the land owned by an individual. It is limited because the owner enjoys ownership only if it has not been compulsorily acquired under the authority of the Law of 1960. This right is also limited because it is confined to surface items of cultural property. Under license or other forms of authority, a movable relic can be privately owned in Kuwait, but this right is subject to specific terms and conditions. In **Turkey**, with few exceptions, antiquities and other forms of cultural property belong to the State with ubiquitous preemptive rights.

In all the surveyed countries of Asia and the Pacific Rim, ultimate ownership and control of all forms of cultural property is vested in the State or the crown as the case may be. However, there are exceptions and also varying degrees of interest in ownership of cultural property. Under the Law in **Burma**, ownership does not automatically vest in the State. Pursuant to the Antiquities Act of 1957, private ownership is set up in such a way as to cater to the exigencies of both individual and joint ownership of facets of cultural property. But the State retains the right of compulsory purchase of any such item. **Chinese** law also entertains state, collective and individual ownership of cultural property. Under the Inheritance Law of China, cultural objects may be inherited. Nonetheless, the ubiquitous presence of the State in all matters of cultural property whether owned under a reversionary interest to individuals or vested in the state is evident.

In **India**, the law recognizes private and individual ownership of cultural property. Other than religious objects, an exclusive right of preemption is vested in the State in all matters of cultural property. In **Japan**, the Law permits both private and public ownership of cultural property. But, irrespective of the type of ownership, the national government of Japan provides an umbrella protection over all cultural property. The **Korean** Law is similar to the Japanese Law and permits both public and private ownership of cultural property. The control over all forms of this property by the government is also the same as in Japan. In **Malaysia**, all cultural property is vested in the government. However, a reversionary interest is possible to an individual as a trustee or manager.

New Zealand espouses a right of private ownership especially as this right pertains to the Maori artifacts and other forms of cultural property. **Taiwan** also adheres to principles of public and private ownership of cultural property. Control, however, is vested in the government as in most of the countries surveyed in this report. Public and private ownership is available in **Thailand**. But the government determines the terms and conditions upon which such ownership prevails. The overwhelming presence of the State in all matters of cultural property severely limits the enjoyment of any recognized private right of ownership. In **Vietnam**, the State typically enjoys the majority right in all forms of cultural property. Though private and collective ownership is recognized, even this aspect of cultural property is legally under the protection of the Government of Vietnam.

Ownership in the **Czech Republic** is both public and private, while **German** ownership of cultural property is governed by the CIVIL CODE in a manner similar to that of any other private property. In **Greece** all antiquities and other forms of cultural property are the domain of the State with ubiquitous preemptive rights. A *sui generis* ownership includes a right to transfer them and an obligation to preserve them. **Italian** law recognizes both public and private ownership of cultural property as does the **Netherlands, Sweden**, and the **United Kingdom** and by implication the **European Union**.

Canada recognizes both public and private ownership of cultural property. In **Argentina**, the State is paramount in the ownership of cultural property. Such property if it is vested in a private individual is subject to expropriation for reasons of public interest. Therefore, while private ownership is recognized, it is a limited right that can be vitiated or superseded by a state interest at any time based on public interest considerations. In **Belize**, all ancient monuments and antiques, wherever they are located, are absolutely vested in the crown or the State. **Chile** recognizes both public and private ownership as appears to be the case in Colombia, while all cultural property is vested in the state in **Cuba**. **Haiti, Mexico** and **Peru** entertain both public and private ownership.

Regulation of traffic in cultural property

In the African countries, licensing mechanisms under these laws ensure regulation of traffic in cultural property but also function as a tool to control excavations, searches, digs or probes for antiquities or relics. **Egypt, Israel** and **Kuwait** have instituted permit systems as a means of regulating traffic in cultural property in a manner similar to those used by the African countries. Some form of a license or permit is required to deal in matters of cultural property. Similarly, a permit is also required in **Afghanistan**. Dealers or traders must be registered, because no one can participate in a cultural property business without registering. **Iran** also functions under a permit system.

In **Kuwait**, penal sanctions provide additional protection for cultural property. Offenses include damage, disfigurement or imitation of any form of cultural property. Furthermore, to carry out any operations such as probes, searches, exploration, excavations without a license constitutes an offense. In the same way, penalties are imposed for smuggling, stealing and other forms of malfeasance under **Egyptian law**. These are consistent with legislative measures. **Afghanistan** requires punishment of all persons who destroy cultural property and other forms of the national heritage.

Israel employs a very detailed regime concerning the protection of cultural property. In addition to penal sanctions for violating the provisions of law, other protection for cultural property is divided into three broad categories of excavation, collections and museums of antiquities, and the protection of antiquity sites. **Turkey** also utilizes a licensing mechanism for one to engage in the business involving cultural or natural properties. The permit and registration systems for casual and exhibit type transactions is an added form of control in regulating traffic in cultural properties in Turkey.

All the countries of the Far East employ either a permit, licensing, registration or a certificate system to regulate and control traffic in objects and other forms of cultural property. In **Australia**, the *Control List* is a prevalent feature in regulating traffic in artifacts. The *List* contains items that cannot be exported without a certificate or permit from a requisite authority.

In **Burma**, a permit is required to export any form of cultural property. Curios, however, can be exported using the certificate system following an inspection by the proper authorities. Penalties are also

decreed for anyone who contravenes the law. **China** exports a huge number of cultural relics every year through its state-run cultural relics centers. The law in China makes a distinction between items that are subject to import and export controls and those other items that an individual may import or export through ordinary customs entry and exit points such as airports. Penal sanctions accompany violations. The primary focus of the Law in **India** is the control and regulation of the export trade in antiquities, relics and art treasures as well as to prevent smuggling and other forms of malfeasance. Sanctions are prescribed for anyone who circumvents the Law. A registration mechanism is also utilized to record antiquities as another form of control of traffic in cultural property. Offices to register such artifacts, relics and other artistic treasures are available at various points of entry and exit in India. A license is required to deal in such of property.

Under the **Japanese** Law, the export and import of cultural property as a national treasure is prohibited. However, the responsible authority may give permission or other special permits dictated by necessity and other considerations of international cultural exchange or any other peculiar circumstances. That the right of preemption of the government supersedes any other right of the individual to deal in matters of cultural property in Japan. Penal sanctions for those who violate the law are imposed. **Korea** operates under a permit system to regulate traffic in cultural property. Any such transactions are subject either to general or specific conditions imposed by the authorities. No national treasure can be exported or transported without government permission.

In **Malaysia**, a license is required to export any artifacts. Penalties are mandated for infringement of the law. **New Zealand** demands a license for auctioneers and dealers in cultural property. Dealers must also be registered. Taiwan prohibits exports of cultural property abroad. However, cultural exchange exports for purposes of exhibits and information are possible under a permit system. A registration regime of all forms of cultural property is in place in **Thailand**. A license must be obtained to deal in items of cultural property whether by sales or exhibition. Similarly, a license must be secured to export an item of cultural property. **Vietnam** functions under a special license system to regulate traffic in items of cultural property. By and large, antiques and other artifacts are considered prohibited goods for export. It is also necessary for local owners to share information with the proper authorities concerning any cultural property in their possession.

All the surveyed countries are primarily concerned with the regulation and control of traffic in cultural property in addition to its preservation and protection. The countries of Europe and North America are no exception as their laws also aim at the control of exports and effectively manage trade in cultural property.

In the **Czech Republic**, a certificate and licensing mechanism is used to control exports, and a permit system is needed to allow exhibits of cultural property abroad. In **Germany**, the registration system is reinforced by a permit mechanism to control such exports. **Greece** allows free imports of items of cultural property as long as they are declared to the appropriate authorities. However, Greece prohibits exports of state-owned cultural property, except for exhibit purposes and for specific periods of time, while a permit is required to export private cultural property. Similarly, one must obtain prior permission to export cultural property in **Italy** whether public or private. The State enjoys overwhelming rights of preemption in this area. By the same token, some form of official approval is necessary to transact in cultural property in the **Netherlands**. The fact that a list of items of cultural property is maintained means no transactions of such property can take place without the knowledge and involvement of official authority consistent with this law.

Ancient remains found in **Sweden** belong to the State, and no transactions are permitted involving this type of cultural property. Ancient remains found elsewhere belong to those who find them. A notice of their finds to designated officials suffices. Sweden also requires a license to export both Swedish and

foreign-made cultural property. The **United Kingdom** employs a permit system for the export of cultural property. A complimentary return of items of cultural heritage is envisaged by the Commonwealth *Scheme* by one Commonwealth country to another where such items were removed contrary to its laws.⁴ There is no prohibition on imports. The **European Union** requires an export license for all cultural goods outside the customs territory of the Union.

As its title reads, the scheme of the **Canadian** law, is to control traffic of this form of property through the Cultural Property Export and Import Control Act by means of a permit system. The *List* of items of cultural property also affords added protection in the control of traffic in this form of property.

To regulate and control traffic in cultural property, a permit system is in place in **Argentina** for both imports and exports. In **Belize**, a licensing mechanism is utilized to regulate traffic in cultural property for both internal and export transactions. Similarly, **Chile** requires special permission from the President or appropriate authority to export cultural property classified as movable historical monuments. Permission from the State must also be sought to probe or excavate for items of cultural property. **Colombian** law also demands that prior authority be secured for the export and import of items of cultural property. The law on this subject is consistent with the position of the Organization of American States under the 1935 Treaty on the protection of movable historic property. A centralized record of cultural property provides additional protection from illicit trafficking. Concerning maritime-related artifacts, the government has authority to conclude administrative and historic exploration contracts. Permits or concessions must be granted by the government for such exploratory activities to take place.

Cuba prohibits exports of cultural property listed in the *National and Local Monuments Register*. However, the National Monuments Commission may grant permission to exhibit an item abroad even if it is on the *Register*. A certificate is then issued which must be presented to customs officials indicating that the item will only be out of the country temporarily. **Haiti** also outlaws the export of cultural property listed as cultural patrimony. Other forms of cultural property in this country appear tradable by their respective owners subject to rules on notification, export and import trade. A permit and registration system is used in **Mexico** to regulate traffic in cultural property. Furthermore, violation of provisions of applicable law merits penalties and other prescribed sanctions. Severe criminal sanctions including long-term prison sentences are imposed on those who circumvent the law. Peru prohibits the export of cultural property except under a permit for exhibit purposes.

Other protection of cultural property, for example, in time of war

All the countries surveyed in this report impose penalties for violations of their laws on cultural property. These sanctions function as other protections afforded to cultural property. Invariably, none of these laws reflect provisions protecting cultural property for example in times of war.⁵ The laws of **Australia, India, Japan, Korea, New Zealand** and **Taiwan** do not contain provisions regarding other forms of protection of cultural property. However, **China**, as well as other countries in this region, have stiff penalties and other sanctions for violation of the laws relating to cultural property; for example, in the case of theft, smuggling, burglary, sabotage and profiteering. All the surveyed European and North American

⁴ 19 COMMONWEALTH L. BULL., No. 4, 2015 (Oct. 1993).

⁵ The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, 249 UNTS 240. Burma, Egypt and Mexico are original parties to this Convention. Other parties include China, Germany, Greece, Iran, Israel, Italy, Kuwait, Malaysia, the Netherlands, Thailand, Turkey. Vietnam is not a party to this Convention.

jurisdictions impose penalties for violation of laws relating to cultural and natural properties. These serve as caveats against exploitation of these national treasures by unscrupulous dealers and other characters of doubtful repute. Penal sanctions are another form of protection. Furthermore, regional and to a limited extent international regimes in **Germany, Greece and Turkey** provide additional protection of cultural property in times of war. **Cuba and Mexico** have signed bilateral, regional and international regimes as other forms of protecting their cultural property. A series of bilateral arrangements exist between Mexico and the United States. These facilitate the protection of Mexico's cultural property. NAFTA in particular has the potential to impact on trade in cultural property between member countries. Presently, however, this instrument does not deal with this issue.

Repatriation of cultural property removed abroad

The repatriation of cultural property removed abroad is by and large governed by bilateral, regional and international arrangements. For countries in Africa and the Middle East, only the **Tanzanian** law contains a provision for the return of such cultural property. However, such return appears dependent on prior existing bilateral, regional or international arrangements between Tanzania and the affected country or entity. Those African countries that are members of the Commonwealth of Nations are also governed by the *Scheme of 1993*. With respect to the repatriation of cultural property removed abroad, in the Far East the governments of **Burma and Thailand** attended the Diplomatic Conference for the Adoption of the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects held in Rome, Italy, in June of 1995.⁶ This Convention aims at a reduction of illicit traffic in cultural objects. **China** has no specific legal provisions on repatriation and may rely on international instruments to which it is a party. There appears to be no particular provision in **Indian** law that deals with repatriation. However, India pursues legal actions against individuals and other entities in cases of established and proven misappropriation or other forms of fraudulent conversions of Indian cultural property abroad.

Japan and Korea are united in a bilateral agreement that deals with the return of cultural property removed abroad, especially Korean cultural property removed by Japan during its occupation of the former from 1910-1945. A list of items scheduled for return was made part of the Agreement. **Malaysia** has no specific provision in its laws on repatriation; but, as part of the Commonwealth of Nations, **Burma** formed part of the Communique issued at the conclusion of the Commonwealth Law Ministers Meeting held in Mauritius in 1993 which included the text of the *Scheme* adopted at this Meeting. The *Scheme* regulates the return by one Commonwealth country to another of an item of cultural heritage found within its jurisdiction following export from one country to the other circumventing its laws. **New Zealand** has no provisions on repatriation in its laws, though practice appears to indicate that the government and the Maoris are involved in the recovery of cultural property removed abroad, especially Maori cultural artifacts. Wide powers also exist under **Taiwanese** law for the government to mount a repatriation exercise for cultural property removed abroad. Vietnam is not a party to the Hague Convention of 1954 nor a participant in the UNIDROIT Convention of 1995. There appears to be no provision in its national laws on repatriation.

Among the European and North American countries, the **Czech Republic** Law of 1987, in article 20, recognized the repatriation of cultural property removed abroad consistent with international conventions on this point. The Czech Republic is also a party to the 1970 UNESCO Convention. **Germany** is a special case in the repatriation of cultural property. It had previously declined to participate in any international instruments that demand the return of cultural property removed from any particular territory. However,

⁶ 34 I.L.M. 1322 (1995). Most of the countries covered by this Report, including representatives from relevant regional and international organizations, a total of 70 states, 8 observer states and 14 non-government organizations attended the Conference.

with the European Union Directive on the return of cultural objects, future repatriation may be handed differently. For property removed during and following World War II, bilateral arrangements are employed to settle specific claims concerning the removal of cultural property.

Greece relies on international conventions for the repatriation of cultural property removed abroad, and Greece is a party to the international instruments that facilitate this process. The case of the *Parthenon or Elgin Marbles*, between Greece and the United Kingdom, is but one example of how Greece attempts repatriation of its cultural property removed abroad. Other cases appear to be handled in bilateral arrangements on a case-by-case basis, for example the return of cultural artifacts to Greece by the United States. **Italy** hopes to benefit from the EU Directive on the return of cultural objects unlawfully removed from its territory. However, the Directive only applies to such property removed on or subsequent to January 1, 1993. **Turkey** has also lost numerous objects of its cultural and natural heritage. These are predominantly found in the so-called market countries of Western Europe. However, Turkey has faced difficulties in its attempts to recover such items from these nations because, by and large, most of them are not members of the international conventions which demand repatriation of such property removed abroad. Limited success has been registered in the recovery of some property such as *Lydian Hoard* which was returned to Turkey by the Metropolitan Museum of Art in New York. Turkey also hopes to benefit from the draft UNIDROIT Convention of 1995 for the return of stolen or illegally exported cultural property.

Britain hopes to address the issue of repatriation based on the recently concluded Commonwealth *Scheme*. However, the *Scheme* is limited in scope and does not extend to other non-Commonwealth countries of Europe and other parts of the world. The *Scheme* also requires that when a Commonwealth country of export is aware of the location of an object of cultural property covered by this *Scheme*, it may request assistance for its recovery from the country where the object is located. The EU Directive provides a detailed regime for the repatriation of cultural objects by the Member States. The Members are required to adopt national legislation, other executive or administrative instruments that execute and implement the tenor and spirit of the Directive. Such legislative measures must comply with the provisions of the Directive. Since 1971, **Canada** has had a program that provides assistance to museums to repatriate items of cultural property. The program is successful and has helped in the return of native cultural property to Canada which previously was held in Germany. The Law also contains a mechanism that facilitates the repatriation of cultural property removed abroad. In 1991, **Peru** established specific funds that deal with the return of Peruvian cultural property from abroad. **Cuba** has enacted additional measures to protect and preserve its cultural property.

Other laws establishing and/or protecting cultural property

Other national laws that establish and/or protect cultural heritage in the surveyed African countries invariably extend to wildlife or fauna conservation statutes that protect wildlife and trophies produced from them. Also relevant is legislation that prescribes, establishes and supports museums, monuments and archives. In the laws of these countries, as in international conventions, an item of cultural property is a relic or an antique if it was produced by a human agency over a specific number of years in the past, usually over a hundred years old, except in **Nigeria** where the cutoff date is before 1918.

In **Israel**, the law alludes to Israel's heritage. All the Far Eastern countries surveyed in this report indicate that there may be other national laws establishing and/or protecting cultural heritage. These are contained in the cultural property laws themselves, as in **Burma, India and Vietnam**, or a chronicle of other related legislation that supplement the principal laws, as in **Australia, Japan, Korea, and Taiwan**. Other laws protecting and/or establishing cultural property exist in a number of **Australian** laws. The laws on museums, galleries and archives in the **Czech Republic** constitute supplementary regimes on this point.

German law is reinforced by the 1954 Hague Convention. **Turkish** law is in the form of constitutional provisions, and other laws constitute additional measures enacted to protect and preserve cultural and natural properties in this country. In the **United Kingdom** there are examples of other laws.

International law

International conventions

There are four primary international instruments that reflect the nature, significance and definition of *cultural property* in international law. These are the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, better known as the Hague Convention;⁷ the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, also known as the UNESCO Convention of 1970;⁸ the Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972, another UNESCO Convention of 1972;⁹ and the recently concluded International Institute for the Unification of Private Law (UNIDROIT) Convention on the International Return of Stolen or Illegally Exported Cultural Objects of June 24, 1995.¹⁰ Supplemental to this main regime are various United Nations protocols and resolutions that deal with the protection of cultural property such as the 1977 Protocols to the 1949 Geneva Conventions. Other international conventions such as the United Nations Convention on the Law of the Sea of 1982, effective 1994,¹¹ also allude to international efforts to protect cultural property that lies in the seabed.

Regional and bilateral arrangements

Complimentary to this body of international law are regional, sub-regional and bilateral arrangements on the protection of cultural property, for example those in existence between Japan and Korea, Mexico and the United States, etc. Important among regional arrangements protecting cultural property are the European Cultural Convention of 1954;¹² the European Convention on the Protection of the Archaeological Heritage of 1969,¹³ superseded by the European Convention on the Protection of the Archaeological Heritage, 1992 (revised); the European Convention on Offenses Relating to Cultural Property of 1985;¹⁴ the Convention for

⁷ 249 UNTS 240.

⁸ 823 UNTS 231. Afghanistan, Botswana, Ghana and Vietnam are not parties to this Convention.

⁹ 27 UST 37; TIAS 8226. Botswana and Ghana are not parties to this Convention.

¹⁰ 34 I.L.M. 1326 (1995). Vietnam did not attend the Conference.

¹¹ 21 I.L.M. 1245 (1982); *see further*, Statutes of the International Center for the Study of the Preservation and Restoration of Cultural Property, 1956, rev., 1964 & 1969; 22 UST 19; TIAS 7038.

¹² 218 UNTS 140 (1955).

¹³ 738 UNTS 227 (1969); 8 ILM 736 (1969).

¹⁴ 119 ETS 1985; 35 ILM 44 (1985).

the Protection of the Architectural Heritage of Europe of 1985;¹⁵ and an unsigned Draft European Convention on the Protection of the Underwater Cultural Heritage of 1985.

The Pan-American Union, the predecessor organization to the Organization of American States (OAS) pioneered the process of regional arrangements to deal with matters of cultural property. This effort culminated in the Treaty on the Protection of Movable Property of Historic Value, also known as the Roerich Pact of 1935.¹⁶ A year later the Pan-American Treaty followed and its scope includes protection of movable cultural property of historical significance. In 1976, the OAS adopted the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations, also known as the San Salvador Convention.¹⁷ The Nordic countries are united by the Nordic Cultural Agreement of 1971.

In the Far East and the Pacific Rim, the members of the Asian and Pacific Council (APC)¹⁸ entered into an Agreement to Create a Cultural and Social Center to Protect the Cultural Heritage of Its Member States in 1968. For Britain, its colonies and dependencies, the Commonwealth of Nations under the aegis of the Commonwealth Law Meeting held in Mauritius in 1993 included the text of the *Scheme*.

While there are no specific regional instruments governing cultural property in Africa and the Middle East, there are general mechanisms in Africa that address this issue. However, bilateral and other transnational peace agreements exist between Israel and Egypt and between Israel, Egypt and Jordan that also deal with cultural property. The Charter of the Organization of African States of 1963,¹⁹ in articles 2 and 20 (2) of this instrument, allude to the preservation and cooperation in matters of cultural property. In addition, other regional organizations, both governmental and non-governmental, also exist that are devoted to the preservation and protection of cultural property in Africa. These include the African Cultural Institute (ACI) established to encourage cultural cooperation among the Member States.²⁰ The other is the Organization of Museums, Monuments and Sites of Africa (OMMSA), a non-governmental organization also devoted to matters of cultural property in Africa.²¹ In addition, the African Charter on Human and Peoples Rights of 1981²² also deals with respect, preservation and protection of cultural heritage of Africans as part of their identity.²³ Those African countries that are part of the Commonwealth benefit from the *Scheme*.

¹⁵ 121 ETS(1985).

¹⁶ Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, 1935, 49 Stat. 3267; TS 899; 3 BEVANS 254; 167 LNTS 279; The Convention Concerning Artistic Exhibitions, 1936, 51 Stat. 206; TS 929; 3 BEVANS 383, 188 LNTS 151; The Convention Providing for the Creation of the Inter-American Indian Institute, 1940, 56 Stat. 1303; TS 978; 3 BEVANS 661.

¹⁷ 15 ILM 1350 (1976).

¹⁸ Consisting of Australia, Japan, South Korea, Malaysia, New Zealand, the Philippines, Taiwan, Thailand and South Vietnam.

¹⁹ 479 UNTS(1963).

²⁰ *See generally*, K. Jote, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 173-174 (1994).

²¹ *Id.*

²² 21 ILM 59 (1982).

²³ THE WASHINGTON POST A18 (Jan. 2, 1996) and THE WASHINGTON POST A1 & A15 (Feb. 7, 1996) reports on artifacts looting

Ownership of cultural property is within the purview of national legislation. However, international law requires respect for the sovereignty of other nations in these matters. Invariably, the majority of the conventions also address the specific aspects of illicit movement of cultural property to regulate its traffic. The 1970 UNESCO Convention; the 1995 UNIDROIT Convention; the European Convention of 1985, and the Scheme of the Commonwealth of 1993 highlight and address problems relating to theft and illicit traffic in cultural property. Repatriation, on the other hand, is an emerging issue of international law, and it has always been a component of private property laws especially of European nations, Canada, United States and Mexico. As an emerging issue of international law, repatriation has been incorporated into various international and regional conventions examined above. Bilateral arrangements seem to work when it comes to repatriation. For **Japan** and **Korea**, this issue has been addressed by a bilateral agreement of 1965.²⁴ This instrument requires **Japan** to turn over to the Republic of Korea art objects or other forms of cultural property removed from Korea during the Japanese occupation of that country from 1910 to 1945. Individual cases of repatriation such as the return of the *Carolingian Manuscript* from the United States to Germany; the unsuccessful case of the *Parthenon or Elgin Marbles* between Greece and the United Kingdom; the return of artifacts to Greece by the United States; and the return to Turkey of *Lydian Hoard* from the Metropolitan Museum of Art in New York are just some few examples of repatriation utilizing both bilateral and multilateral arrangements under international law.

International law also deals with issues of restitution to victims who have lost cultural property. In particular, the Protocol to the 1954 Hague Convention that applies during armed conflicts requires that states parties must return the cultural property following cessation of hostilities. The UNESCO Convention of 1970 requires restitution in peace times. International conventions appear to make a distinction between restitution due because of a stolen cultural object and the return of an illegally exported cultural artifact or other form of cultural property. States pursue different methods to secure lost or stolen cultural objects either under a bilateral arrangement between two states or entities in the case of Japan and Korea or Mexico and the United States; under a regional or sub-regional arrangement as in the European Union under the Directive or in the Commonwealth under the *Scheme*; under multilateral arrangements utilizing the international conventions or through non-governmental organizations directly between museums and other such organizations. The cases of *Attorney General of New Zealand v. Ortiz* and the *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg* have, among others, been cited to illustrate how national courts deal with questions of public ownership of cultural property and its return to the country of origin as part of the country's cultural heritage.

Conclusion

Cultural property is one of the basic elements of civilization and national cultures. Its value can only be truly appreciated when complete and up-to-date information is available that sets forth its origin, history, traditional setting and its current status and condition. The interchange of cultural property among nations for scientific, cultural and educational purposes enhances knowledge of civilization. This interchange also enriches the cultural life of all peoples. In addition, it inspires mutual respect and appreciation among nations. It is important for every state to safeguard against damage and other forms of vandalism and to avoid, protect and prevent thefts, misappropriation, clandestine excavations and illicit exports. To avert these dangers, a

of ancient Mali as well as the struggle of the new democratic government of South Africa to repatriate remains and other African trophies from British museums and scientific research institutions held since 1810.

²⁴ Treaty No. 29 of Dec. 18, 1965 (Engl. Text) 10 JAPANESE ANN. OF INT'L L. 309 (1966); *see also* Supra note 2.

nation needs to be aware and actively and continuously engaged in the preservation and protection of its cultural heritage and that of other nations. Generally, national laws surveyed in this report have addressed themselves to these aspects.

The illicit import, export and transfer of cultural property constitutes one of the continuing obstacles to the understanding between nations on this issue. These factors also contribute to the degradation of the worldwide cultural property environment. Since nations do not live in a vacuum but as integral components of the community of nations, it is important for the international community to promote and safeguard cultural property under the aegis of regional and international instruments of control. National laws provide the legislative framework upon which bilateral and multilateral arrangements can be enunciated and enforced.

All international, regional and bilateral conventions together with the national laws aim at the protection of cultural property both as national treasures and also as a fundamental component of civilization and global human heritage. As a result, the definition of *cultural property* under international law is broader compared to that found in most of the national laws. In some other cases such as Japan, for example, it is evident that the use of this term in its legislation has influenced the terminology used in both national and international law. To this extent, the relationship between cultural property under the national laws and international law is symbiotic, each facilitating the growth and development of the other. Thus, rules exist at both levels for the protection of cultural property in times of both war and peace. At the local level, focus is much more on the latter than the former. Indeed, even at the international level itself, the majority of the conventions are concerned with the protection and preservation of cultural property at all times but more especially during peace time.

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INTERNATIONAL LAW

Nature and significance of cultural property

The significance of cultural property as "a basic element of civilization and national culture"²⁵ and its interchange among countries for scientific, cultural and educational purposes has been acknowledged in a number of legal instruments prepared under the aegis of UNESCO (United Nations Educational, Scientific and Cultural Organization), an intergovernmental organization dedicated, among other things, to the preservation of the world's cultural heritage.²⁶ As the Preamble of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property²⁷ asserts:

...[the interchange] increases the knowledge of the civilization of man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.

Moreover, the 1995 adopted UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects further attests to the:

...fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilization.²⁸

The concept of mankind's cultural heritage as cultural property that transcends the interests of nations or individuals was embodied for the first time in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Convention asserts that "cultural property belonging to any people whatsoever" belongs to "the cultural heritage of mankind."²⁹ Ensuing international legal instruments such as the 1972 UNESCO Convention of the World Cultural and Natural Heritage also embrace the concept of cultural property that forms part of the "world heritage of mankind."³⁰

²⁵ See Recommendation Concerning the International Exchange of Cultural Property, ¶ 1, adopted by the General Conference on Nov. 26, 1976, in CONVENTIONS AND RECOMMENDATIONS OF UNESCO CONCERNING THE PROTECTION OF CULTURAL HERITAGE (1983).

²⁶ Art. 1, ¶ 2(c), of the Constitution of UNESCO states that one of its functions is to "assure the conservation and protection of the world's cultural heritage and to this effect recommend to nations to adopt the necessary international convention."

²⁷ *Supra* note 1, 823 UNTS 231; 10 ILM 271 (1971).

²⁸ Done at Rome, June 24, 1995, 34 I.L.M. 1322 (1995).

²⁹ Preamble of the Convention, ¶ 2, 249 UNTS 240-88.

³⁰ 1037 UNTS 1972.

Definition of *cultural property*

During the 19th century, the traditional definition of *cultural property*, which comprised movables as well as immovables of cultural significance, was expanded to include prehistoric and important historic remains. Currently, the term *cultural heritage* is preferred since it includes intangible heritage, such as crafts, folklore, and skills which also warrant protection.³¹

Cultural property and *cultural heritage* are both terms which have been used in UN and UNESCO Conventions and Recommendations.³² The term *cultural property* was used for the first time in a legal document in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.³³ Similarly, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property uses the same term. On the other hand, the 1972 UNESCO Convention on the World Cultural and Natural Heritage uses the term *cultural heritage*. Its Preamble refers to "the existing international conventions, recommendations and resolutions concerning cultural and natural property," whereas the rest of the text refers to *cultural heritage*.³⁴

Each legal instrument has used a different definition for its purposes.³⁵ The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property³⁶ provides one of the most frequently mentioned definitions of *cultural property*, which is defined as follows:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of the science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of natural importance; (c) products of archaeological excavations...; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; objects of ethnological interest; (g) property of artistic interest, such as (i) pictures, paintings and drawings...; (ii) works of statuary art and sculpture; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books...; (i) postage, revenue and similar stamps...; (j) archives...; (k) articles of furniture more than one hundred years old and musical instruments.

³¹ P. J. O'Keefe & L. V. Prott, *Cultural Property*, I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 890 (1992).

³² A. Strati, THE PROTECTION OF UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA 7 (1995).

³³ L. V. Prott, & P. J. O'Keefe *Cultural Heritage or Cultural Property*, 2 INT. J. CUL. PR. No. 1, 307, 318 (1992-1993).

³⁴ Preamble, ¶ 5, of the Convention.

³⁵ Strati, *supra* note 8.

³⁶ *Supra* note 1.

The 1970 Convention introduced the term *cultural heritage* in article 4³⁷ which includes:

- cultural property created by the individual or collective genius of a country's nationals or stateless residents;
- cultural property found within the national territory;
- cultural property acquired by archaeological, ethnological or national science missions with official permission;
- cultural property received in a freely agreed exchange; and
- cultural property acquired by gift or legal purchase and secured with the consent of the country of origin.

The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage,³⁸ as its title indicates, shifted to the term *cultural heritage*. It also narrowed the scope of cultural property to be protected through the establishment of the World Heritage List, which identified particular objects to be protected.

The concept of *regional cultural property* as cultural property of nations of a certain geographical area that share similar historical and archaeological links can be discerned in Europe and in the American States.³⁹ In the former, both the Council of Europe and the European Union have advanced the concept of *European cultural heritage*; while in the latter, the Organization of the American States aims to protect the cultural heritage of the American nations.⁴⁰ The 1985 Convention of the Council of Europe for the Protection of the Architectural Heritage of Europe explicitly emphasizes that "the architectural heritage constitutes an irreplaceable expression of the richness and diversity of Europe's cultural heritage."⁴¹ The Treaty on European Union, in article 128(1), stipulates that while respecting the national and regional diversity of the Member States, "the Community shall contribute to the flowering of the cultures of the Member States" and shall bring "the common cultural heritage to the fore."⁴² Furthermore, paragraph 2 states that the Community shall act to encourage cooperation between Member States in different areas including "the conservation and safeguarding of cultural heritage of European significance."

³⁷ For a further discussion regarding these two terms used in the same convention, see K. Jote, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 204, 205 (1994).

³⁸ 27 UST 37; 11 ILM 1358.

³⁹ Strati, *supra* note 8, at 9; see also Prott & O'Keefe, *supra* note 9.

⁴⁰ 15 ILM 1350 (1976).

⁴¹ ETSNo. 121.

⁴² Council of European Communities, Treaty on European Union 42 (1992).

Protection of cultural property

At the international level, a number of conventions and recommendations exist which lay down the rules that States are expected to follow either at war or peace to ensure the protection of cultural property. Under the aegis of UNESCO, three major conventions have been adopted:

- the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;
- the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and
- the 1972 World Heritage Convention.

In 1995, the International Institute for the Unification of Private Law (UNIDROIT) adopted the Convention on the International Return of Stolen or Illegally Exported Cultural Objects. On a regional level, a number of agreements have been concluded in Europe and the Americas. A good number of States have also resorted to bilateral agreements to protect cultural property. These include the Cultural Agreement between Brazil and Spain, the Cultural Convention between the United Kingdom and Spain and the 1970 Treaty of Cooperation Between the United States and Mexico Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties (Mexican Treaty).⁴³ Lastly, at the national level, UNESCO through a series of recommendations, has elaborated on the standards and the principles that States should follow to effectively protect the cultural property within their own territory.⁴⁴

International protection of cultural property in time of war

The first efforts to protect cultural property culminated in international treaties prohibiting the destruction and removal of art objects during times of war.⁴⁵ The 1954 Hague Convention for the Protection

⁴³ 22 UST 494; TIAS No. 7088.

⁴⁴ UNESCO's recommendations, whether of a national or international character, contain norms which are not subject to ratification but which the Member States are invited to apply. Recommendations possess great authority since they are adopted by the General Conference. Some of the most significant UNESCO Recommendations are the following: Recommendation on International Principles Applicable to Archaeological Excavations (1956); Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone (1960); Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites (1962); Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (1964); Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968); Recommendation Concerning the Protection at National Level of the Cultural and Natural Heritage (1972); Recommendation Concerning the International Exchange of Cultural Property (1976); Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas (1976); Recommendation for the Protection of Movable Cultural Property (1978); Recommendation for the Safeguarding and Preservation of Moving Images (1980); and Recommendation on the Safeguarding of the Traditional Culture and Folklore.

⁴⁵ For instance, the Lieber Code adopted in the United States in 1863 stated that cultural property was not to be "seized, sold given away, wantonly destroyed, damaged, or privately appropriated until such time as a peace treaty determined the ultimate ownership of the property." The Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land also encompassed a series of provisions intended to safeguard cultural property during war. In 1935, the Washington Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (the Roerich Pact) was signed [A. Roberts & R. Guelff, DOCUMENTS ON THE LAWS OF WAR 339 (1989)].

of Cultural Property in the Event of Armed Conflict with its Protocol and Regulations for its execution was adopted following the extensive destruction that cultural heritage suffered during World War II. It lays down rules on the protection of movable and immovable cultural property during war.⁴⁶

The Convention distinguishes between *general protection* afforded to all cultural objects enumerated in article 1 and *special protection* granted to a limited number of refuges and centers of great significance in article 8. Member States have dual legal obligations to safeguard and to protect cultural property.⁴⁷ The former includes any measures that the Member States must undertake during peace time in order to protect the cultural property which is located within their territory against the predictable consequences that an armed conflict may have on cultural property. The latter arises in armed conflict and encompasses the obligation to abstain from endangering the cultural property by using it for purposes which are likely to expose it to destruction and refrain from any act of hostility against such property.⁴⁸

The Convention grants special protection only to a limited number of refuges which are used to provide shelter to cultural property in case of armed conflict and centers which contain monuments or other immovable property of great significance.⁴⁹ Such refuges and centers qualify to be entered in the *International Register of Cultural Property Under Special Protection* which is under the administration of UNESCO. Upon entry in this Register, cultural property is immune from any act of hostility.⁵⁰ The contracting States are obliged to mark cultural property with a distinctive emblem. Immunity is withdrawn from cultural property in case of unavoidable military necessity and if the State uses the cultural property for military purposes.⁵¹

Thus far, the 1954 Convention has not enjoyed universal ratification. The United States has not signed it. The Department of State explained that "the major difficulty is that adherence to the Convention would seriously limit the options of the United States in the event of nuclear war or even in some cases of conventional bombardment."⁵²

The Protocol prohibits the Contracting States from exporting cultural property from territories under their occupation and urges Member States to take all necessary measures to prevent the exportation of such property.⁵³ If a cultural object is exported from an occupied territory, it must be returned to the competent

⁴⁶ *Id.*

⁴⁷ The difference between these two forms of protection is that the respect of cultural property may be waived in case of *military necessity*.

⁴⁸ Art. 4, ¶ 1, of the Convention.

⁴⁹ Art. 8, ¶ 1, of the 1954 Convention.

⁵⁰ *Id.* art. 9.

⁵¹ *Id.* art. 11, ¶¶ 1 & 2.

⁵² R. W. Mastalir, *A Proposal for Protecting the "Cultural and Property" Aspects of Cultural Property under International Law* 16 *FORDHAM INT. L.J.* 1033, 1048 (1992-1993).

⁵³ Art. 1 of the Protocol.

authorities of the territory concerned at the end of the hostilities.⁵⁴ Furthermore, the Protocol states that cultural property removed from an occupied territory shall not be used as war reparations.

1977 Protocols to the 1949 Geneva Conventions

Article 53 of Protocol I and article 16 of Protocol II prohibit any act of hostility against works of art or places of worship which constitute the cultural or spiritual heritage of people, any use of such objects to support military efforts or subject such objects to reprisals.⁵⁵

It has been asserted that since the principle of special protection of cultural property in time of war has been established for a long time and has been generally accepted by States and has been reaffirmed by the 1977 Protocols of the 1949 Geneva Conventions, it may be considered as a part of customary international law.⁵⁶

International protection of cultural property in peacetime

The Convention Concerning the Protection of the World Cultural and Natural Heritage⁵⁷ is also known as the World Heritage Convention (1972).⁵⁸ The scope of the Convention encompasses the protection of cultural monuments and sites and extends its protection to the natural heritage as well. In order to fall within the scope of this Convention, cultural and natural property must be of outstanding universal value from the point of view of history, art, science, aesthetics, anthropology, conservation, ethnology or natural beauty. It falls within the domain of the State Parties to identify and draw up an inventory of their heritage of outstanding value so that it can be under the protection of this Convention.

The World Heritage Committee which was established by this Convention designates the items based on inventories submitted by the States that are included in the World Heritage List.

The Convention established the World Heritage Fund which is financed by contributions from signatory Member States on the basis of a percentage of their yearly dues to UNESCO. The funds are used to provide advice and financial assistance for the preservation of sites of cultural significance.

The United Nations Convention on the Law of the Sea (1982) which entered into force on November 16, 1994,⁵⁹ contains two clauses in regard to the protection of cultural property lying on the seabed. Briefly, article 149 states that all archaeological or historical objects found in the deep seabed shall be preserved for the benefit of mankind. Particular regard is to be paid to the preferential rights of the country of origin, or

⁵⁴ *Id.* art. 2.

⁵⁵ Roberts & Guelff, *supra* note 21, at 417 & 456.

⁵⁶ *Id.* at 339.

⁵⁷ The Convention came into force on Dec. 17, 1975; 11 ILM 1972, 1358; 1037 UNTS 151.

⁵⁸ This is the most widely accepted Convention and almost two thirds of the 163 UNESCO Member States are parties [Jote, *supra* note 13, at 245].

⁵⁹ ETS No. 143.

cultural origin or of historical and archaeological origin. Article 303 establishes rules for the protection of objects found in the international zone beyond the limit of a State's jurisdiction.

Regional protection

Council of Europe

The European Cultural Convention (1954)⁶⁰

The Convention calls each contracting State to consider the objects of European cultural significance in its territory as an integral part of the common cultural heritage of Europe and to take appropriate measures to safeguard them. Moreover, each party shall undertake to promote cultural activities of European interest and to facilitate the movement and exchange of persons and objects of cultural value. Each member is obliged to implement policies to protect its own cultural heritage.

The European Convention on the Protection of the Archaeological Heritage (1992) (revised)⁶¹

This Convention replaces the 1969 European Convention on the Protection of the Archaeological Heritage,⁶² the scope of which was limited to the protection of monuments, groups of buildings and sites. The revised Convention aims to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study.

The European Convention on Offenses Relating to Cultural Property (1985)⁶³

The members of the Council of Europe signatory to this Convention in "recognizing their common responsibility and solidarity in the protection of the European cultural heritage" agreed to take all necessary measures to prevent and punish offenses against cultural property.

⁶⁰ 218 UNTS 140 (1955).

⁶¹ ETS No. 143.

⁶² 738 UNTS 227 (1969); 8 ILM 736 (1969).

⁶³ 119 ETS 1985; 35 ILM 44 (1985).

Convention for the Protection of the Architectural Heritage of Europe (1985)⁶⁴

The scope of this Convention is the protection of architectural heritage "which constitutes an irreplaceable expression of the richness and diversity of Europe's cultural heritage, bears inestimable witness to our past and is a common heritage of all Europeans." The architectural heritage comprises monuments, groups of buildings and sites. States Parties undertake a variety of obligations such as identification of the properties to be protected, the adoption of statutory measures to protect such properties and financial support for maintaining and restoring them.

Draft European Convention on the Protection of the Underwater Cultural Heritage (1985)⁶⁵

Under the definition of this Convention, underwater cultural property includes "all remains and objects and any other traces of human existence located entirely or in part in the sea, lakes, rivers, canals...or recovered from any such environment" which are at least 100 years old. The Convention establishes a number of obligations for the States Parties to protect, document and conserve underwater cultural property. It also provides special rules to control traffic and to curb illicit circulation in such property.⁶⁶

The Nordic Countries

In 1971, the Nordic Cultural Agreement was adopted by the Nordic Council.⁶⁷ It urges the Member States to cooperate at the inter-Nordic and international level in the cultural field. It specifies areas of cooperation with a special emphasis in the fields of archives, museums and libraries.

The Organization of the American States (OAS)

The American States were pioneers in protecting cultural property. In 1935 a regional agreement, the Washington Treaty (also known as the Roerich Pact), was signed by 21 American States. It grants protection to immovable cultural property during wartime.⁶⁸ A year later, the Pan American Treaty followed, and its scope includes the protection of movable cultural property of historical significance. The Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (1976), also known as the San Salvador Convention, was adopted.⁶⁹ It aims to identify, register, protect and safeguard that property which makes up the cultural heritage of the American nations, to prevent illegal exportation or importation of cultural property and to promote cooperation among the American States. The General Secretariat of the OAS is responsible for ensuring the enforcement of the Convention, to establish an Inter-American Registry of Cultural Property and to promote the exchange of cultural property among the parties.

⁶⁴ 121 ETS(1985).

⁶⁵ The final draft was sent to the Committee of Ministers of the Council of Europe in Mar. 1985 for approval. However, due to Turkey's objection concerning the territorial scope of application, it has not yet been opened for signature [Strati, *supra* note 8, at 87].

⁶⁶ *Id.* at 88.

⁶⁷ Jote, *supra* note 13, at 181.

⁶⁸ Roberts & Guelff, *supra* note 21.

⁶⁹ 15 ILM 1350. Seven countries are parties to the Convention, the United States is not yet a party.

Establishment of ownership of cultural property

Ownership issues involving cultural property fall within the domain of the national legislation of the States.⁷⁰ Respect for the sovereign right of each State on regulating ownership is reflected in a number of conventions, such as the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (1976).⁷¹ It emphasizes that regulations on the ownership of cultural property and its transfer within the territory of each State shall be governed by domestic legislation. Moreover, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage in its call to the Member States to cooperate in protecting the world heritage clearly states that it:

fully respects the sovereignty of the state on whose territory the cultural and natural heritage is situated; and without prejudice to property rights provided by national legislation.⁷²

Regulation of traffic in cultural property

The illicit movement of cultural property, that is movement in violation of a country's import, export or transfer of ownership regulations, has been characterized as one of the most serious problems of cultural property. Art theft in particular has become a problem of tremendous dimensions.⁷³ There is an international network of art dealers which specializes in the laundering of stolen artifacts. *Art laundering* has been described as the process by which a seller of stolen or *dirty* art makes it clean by selling it in a country in which legislation conveys good title to a bona fide purchaser of stolen art.⁷⁴

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which is the first global agreement that was adopted in an attempt to control the trade of illicitly acquired cultural property, specifically recognizes that:

the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin.

The Convention imposes a number of national and international duties on the Member States to prevent illegal trafficking of cultural property. Nationally, the Member States are required to set up national

⁷⁰ The Preliminary Report of the Director-General of UNESCO on the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations recommends that the ownership questions be left undisturbed. Its ¶ 24, reads:

Any recommendation cutting across the property laws in force in each State would meet with strong opposition and that therefore it was best to leave States completely free to adopt whatever principle they thought preferable [Strati, *supra* note 8, at 100].

⁷¹ Art. 7 of the Convention.

⁷² Art. 5 of the Convention.

⁷³ Worldwide, 45,000 to 53,000 art thefts occur annually. Only about 10% of all stolen art is ever recovered [K. T. Burke, INTERNATIONAL TRANSFERS OF STOLEN CULTURAL PROPERTY, 13 LOY. I.A. INT'L. COMP. L.J. 427 (1990)].

⁷⁴ S. F. Grover, *Discovery in Art Replevin Actions* 70 TEX. L.REV. 1431, 1441 (1992).

services, to prepare laws and regulations with the purpose to protect the cultural property of each State, and to introduce an export certificate system. Internationally, under article 9 of the Convention, States Parties are required "to participate in an international effort to determine and carry out" control of the import and export and international commerce of cultural property, to establish a fund for the protection of cultural heritage, and to become signatory to a bilateral or multilateral agreements on restitution of cultural property.

Article 3 of the UNESCO Convention declares the import, export and transfer of ownership of cultural property effected by States Parties contrary to its provisions to be illegal.⁷⁵ Article 6 of the Convention introduces an authorization certificate that must accompany all exported items of cultural property. Any export of cultural property without this certificate is prohibited. The United States was against this clause because it imposed a heavy commitment on exporting nations to perform luggage checking. Unfortunately, the Convention did not introduce a corresponding import control system which would ensure the more effective protection for cultural property.⁷⁶

Articles 7 and 9 are the core of the Convention and contain its most substantive provisions. Article 7(b) deals with the issue of stolen property and requires the parties to prohibit the import of cultural property stolen from museums, or religious or public monuments or similar institutions and to take appropriate steps to recover and return such property.⁷⁷

This particular article has been criticized because it confines its import prohibitions to a limited category of cultural property. In order to exercise the import ban, the cultural property must have been stolen "from a museum or a religious or secular public monument or similar institution." Moreover, the cultural property must be "documented as appertaining to the inventory of that institution." If one of these conditions is not met, a State Party has no obligation to recover and return the illegally exported cultural property.⁷⁸

In spite of the fact that the Convention has been ratified by more than eighty states, which to a large extent are source or exporting States, its effectiveness on the issues of illicit traffic and restitution has been insignificant for a number of reasons.⁷⁹ Of the large importing countries, only Australia, Canada and United States⁸⁰ have become parties to the Convention. Certain *art market* States have not ratified the

⁷⁵ The legislative history of this article indicates that the participatory States disagreed with its wording. One argument was that it would interfere in the domestic domain of other states by obliging the importing State to impose the law of the exporting State [Jote, *supra* note 13, 207].

⁷⁶ *Id.* at 210.

⁷⁷ It specifically reads as follows:

The States Parties to this Convention undertake: (i) to prohibit the import of cultural property stolen from a museum or secular public monument or similar institution in another State Party to this Convention...provided that such property is documented as appertaining to the inventory of that institution.

⁷⁸ Burke, *supra* note 49, at 437.

⁷⁹ 34 ILM 1322 (1995).

⁸⁰ The United States reserved the right to determine whether or not to impose export controls over cultural property and under the understanding that it does not alter property rights under the laws of the states [M. N. Leich, *Contemporary Practice of the United*

Convention because the obligations contained in the Convention would place an undue burden upon their customs authorities. Others argued that it would be difficult to oblige a bona fide purchaser of a cultural object to return it to a requesting State even if the latter provides compensation. Most Members of the European Union are not signatories to the UNESCO Convention.

The practical difficulty seen to implementing the measures which are called for in the [UNESCO] Convention to supplement the export controls of other countries is primarily that there are no ways of distinguishing at the point of importation goods which have infringed the laws or export controls of other countries.⁸¹

The Convention also places an undue burden on source countries which are often less developed and have scarce financial resources.⁸² A number of countries may lack the financial means to prepare the inventories as provided for in article 7(b)(i).

Two additional agreements that have a bearing on the export and import of the cultural heritage are the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (1976); and the European Convention on Offenses Relating to Cultural Property (1985).⁸³ The former to a large extent has been ineffective, since the United States, as a major *art market* in the area, has not yet become a party,⁸⁴ and the latter Convention is not yet in force.

Repatriation of cultural property

Removal of cultural property from its source country - which may occur either under abnormal situations, such as war, occupation, colonization or during peace through theft or in violation of export regulations - has in turn raised the issue of whether or not cultural property should be returned to the source countries.⁸⁵ The repatriation question, a very controversial and complex issue, entails a number of secondary issues, such as appropriate definition,⁸⁶ time limitations, compensation of the bona fide possessor and the like.

Two opposing and competing views have been advanced surrounding the right to cultural heritage: cultural nationalism versus cultural internationalism.⁸⁷ For the so-called source nations, the protection and

States Relating to International Law, 76 AM. J. INT'L. L. 611 (1982).

⁸¹ Interim Report on the Movement of Objects of Cultural Interest in the Context of the Single Market, Eur. Parl. Doc., as quoted in T. J. Nicholas, *EEC Measures on the Treatment of National Treasures*, 16 LOY. L.A. INT'L & COMP. L.J. 127, 141, (1993).

⁸² Mastalir, *supra* note 28, at 1033 & 1054.

⁸³ 25 ILM 44 (1986).

⁸⁴ P. J. O'Keefe, *Export/Import Laws - Problems of Drafting and Implementation*, INTERNATIONAL SALE OF WORKS OF ART 61, 72 (1990).

⁸⁵ For an elaborate description of restitution in the context of war, see Jote, *supra* note 13, at 261.

⁸⁶ For a discussion of the terms "restitution" or "return", see Jote, *supra* note 13, at 261.

⁸⁷ Merryman, *Two Ways about Thinking of Cultural Property*; see also, D. N. Thomason, *Rolling Back History: The United*

repatriation of cultural property is a human rights issue.⁸⁸ For acquiring nations,⁸⁹ it is a property question.⁹⁰ Cultural nationalists argue that cultural property should remain within the nation since it defines a people and their society and constitutes a link with their past. On the other end of the spectrum, cultural internationalists, while recognizing the significance cultural property holds for a specific country, contend that cultural property is part of a common heritage of mankind. Thus, based on this idea, cultural property may be removed from the country of origin, be accessible to other nations and serve as *missionary art*.⁹¹

Repatriation has long been included in the agenda of the United Nations. The discussions, which have been initiated mainly by developing nations that have experienced frequent incidents of looting and plundering of cultural property, have led to the adoption of several General Assembly resolutions. Beginning in 1973, the General Assembly adopted a series of resolutions calling for the restitution of cultural property. The recently adopted Resolution No. 48/15 of 1993 on the Return or Restitution of Cultural Property to the Countries of Origin also reaffirmed:

that the restitution to a country of its objets d'art, monuments, museum pieces, archives, manuscripts, documents and any other cultural or artistic treasures contributes to the strengthening of international cooperation and to the preservation and flowering of universal cultural values through fruitful cooperation between developed and developing countries.⁹²

Nations General Assembly and the Right to Cultural Property, 22 J.INT'L. 47, 95 (No. 1, 1990).

⁸⁸ See Universal Declaration of Human Rights, arts. 1, 27; art. 1 of the International Covenant on Civil and Political Rights; and art. 1 of the International Covenant on Economic, Social and Cultural Rights stating that all people have the right of self-determination, which has political, economic, social and cultural aspects.

⁸⁹ The battle between the right of art-poor nations to incorporate and the art-rich nations to recovery began with elitism. M. F. Lindsay, *The Recovery of Cultural Artifacts: The Legacy of Our Archaeological Heritage*, 22 J.INT'L. 165, 181 (No. 1, 1990).

⁹⁰ R. W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L. L.J. 1033, 1058 (No. 16, 1992-1993).

⁹¹ Merryman, *supra* note 63: The distinction between these two schools of thought has also been reflected in the Conventions. The 1970 UNESCO Convention on the Protection of Cultural Property explicitly espouses a nationalist stance. The Convention, while it acknowledges the significance of interchange of cultural property, states that:

cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.

On the other end of the spectrum, the 1954 Hague Convention and the World Heritage Convention, as its title indicates, espouse the international culturalism stance. The Hague Convention proclaims that:

damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world...and that the preservation of the cultural heritage is of great importance for all peoples of the world and that is importance that this heritage should receive international protection.

⁹² 47 YEARBOOK OF THE UNITED NATIONS 1027 (1993).

Under the aegis of UNESCO, the first global instrument to deal with the issue of restitution of cultural property to victim countries was adopted. This is the Protocol to the 1954 Hague Convention which applies during armed conflict and requires States Parties to "return at the end of hostilities cultural property that is removed from the occupied territory." The Protocol does not apply retroactively. Thus, restitution cases arising before its adoption are outside its scope.⁹³

In 1978, UNESCO established an Intergovernmental Committee which is responsible for cultural property issues. In 1985, discussions on restitution led to the adoption of a Standard Form Concerning Requests for the Return or Restitution of Cultural Objects. The requesting State must submit the completed form to the Committee Secretariat in Paris which in turn forwards this to the requested country. The latter has to respond within a year of receiving the request. Since the adoption of this form, several countries have submitted requests, including Greece (for the return of the Elgin Marbles), Iran, Turkey, and Ecuador.⁹⁴

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁹⁵ deals specifically with the issue of restitution in peace time.

The obligation of the contracting States to ensure the return of illegally exported cultural objects to countries of origin was limited to a great extent by article 7.⁹⁶ The duty to recover cultural property applies only to cultural property that has left countries of origin due to "theft from museums, religious or secular or public monuments or from similar institutions." Thus, the Convention does not apply in instances involving the recovery of objects from privately owned institutions, or objects which have been illegally exported other than through theft.

The Convention protects bona fide purchasers by requiring in article 7(b)(ii) that "a requesting state...pay just compensation⁹⁷ to an innocent purchaser or to a person who has valid title to that property."⁹⁸ This particular provision has been used as an argument by a number of countries for not ratifying the Convention. These countries claim that their domestic legislation was incompatible with the protection of bona fide purchasers.⁹⁹ The developing countries have been dissatisfied with the requirements it imposes upon claimant countries since, according to article 7(b)ii, claimant countries should:

⁹³ Jote, *supra* note 13, at 304.

⁹⁴ *Id.*

⁹⁵ 10 ILM 289 (1971), arts 7, 13 & 15.

⁹⁶ M. Evans, *The International Protection of Cultural Property - The UNIDROIT Response*, 10TH COMMONWEALTH CONFERENCE 657 (1994).

⁹⁷ On the other hand, the European Convention avoids the issue of compensation by requiring that "restitution should be subject to the law of the requested state."

⁹⁸ When in early 1980s the UNESCO Secretariat convened a meeting to review the function of the Convention, art. 7 was among the most criticized provisions, *see* Evans, *supra* note 72, at 654.

⁹⁹ Burke, *supra* note 49, at 439.

prepare inventories to establish the validity of claims to be made; pay compensation to the bona fide owner; make claims through diplomatic channels; pay all expenses related to the return or recovery; furnish evidence of the claims and the expenses thereto.

Article 13 of the Convention requires that States Parties undertake to:

- cooperate in facilitating the earliest possible restitution of the illicitly exported item to its owner;
- admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;
- recognize the right of each state to declare certain cultural property as inalienable and thus not subject to exportation; and
- facilitate recovery of such property to the country where it has been exported.

Article 15 of the Convention allows States Parties to conclude special agreements or to implement agreements already concluded with regard to the restitution of cultural property.

The OAS Convention also includes provisions on restitution. It provides that all cultural property illegally exported is recoverable. This Convention goes a step further in comparison to the UNESCO Convention. The OAS Convention expressly prescribes that "the ownership rights of each state over its cultural patrimony and any action taken to recover the objects which constitute that patrimony shall not be subject to prescription," in contrast to the UNESCO Convention which is silent on this issue.

While the UNESCO Convention was an important first attempt at the international level to curb the illicit traffic in cultural objects and to facilitate their recovery and return, the latter two issues along with compensation proved to be its "Achilles's heel," because its scope of application was limited to stolen cultural property. It also failed to resolve conflict of law issues involving bona fide purchasers and title.¹⁰⁰ Thus, in the 1980s, UNESCO invited the International Institute for the Unification of Private Law "UNIDROIT" to draft another treaty, which came into being on June 24, 1995.

The Convention on Stolen or Illegally Exported Cultural Objects¹⁰¹ deals with the restitution and return of stolen or illegally exported cultural objects. It aims, as does the 1970 UNESCO Convention, to decrease illicit traffic in cultural objects. However, in comparison to earlier conventions, it has expanded the rights on the basis of which return of cultural objects can be requested and has broadened the scope of objects under its protection.¹⁰² The Convention's preambular and operative provisions, due mainly to requests from the United States, Canada and Australia, recognize the detrimental effect of illicit trade to the cultural heritage of national, tribal, indigenous and other communities.¹⁰³

¹⁰⁰ Nicholos, *supra* note 57, at 146.

¹⁰¹ Done at Rome, June 24, 1995. The Convention was approved by 37 States, five were against and seventeen states abstained, including the United States; 34 ILM 1322 (1995).

¹⁰² *Id.*

¹⁰³ *Id.*

The Convention applies to claims of an international character for the restitution of stolen cultural objects, and the return of cultural objects illegally exported from the territory of a contracting State.

Its first part (arts. 3-4) deals with restitution of stolen objects, and its provisions apply to both public and private claims. Its second part on the return of illegally exported cultural objects deals only with public claims.

Restitution of a stolen cultural object

The Convention defines a *stolen object* as a thing that "has been unlawfully excavated or lawfully excavated but unlawfully retained."¹⁰⁴

Under the Convention there is no bona fide acquisition of stolen property. Article 3, ¶ 1, explicitly states that "the possessor of a cultural object which has been stolen shall return it." The Convention provides for a fair and just compensation at the time of restitution to the bona fide possessor of a stolen object provided that he "neither knew nor ought reasonably to have known that the object was stolen and can prove that he exercised due diligence when acquiring the object."¹⁰⁵ It also provides a number of criteria to determine whether a possessor exercised due diligence, such as looking into the character of the parties, the price paid or whether the possessor took any steps to consult any register of stolen cultural property.¹⁰⁶

Restitution claims are subject to prescription which commences within a period of three years from the time when the claimant had knowledge of the location of the object as well as of the identity of its possessor and in any case within a period of fifty years from the time of the theft.¹⁰⁷

Return of illegally exported cultural objects

A contracting State may request the return of a cultural object illegally exported from the territory or legally exported for exhibition or other purposes but not returned.

The Convention in its requirement to return cultural property exported in violation of the national laws of the exporting country calls for indirect enforcement of foreign export laws.¹⁰⁸ In that respect, it

¹⁰⁴ Art. 3, ¶ 2, of the Convention.

¹⁰⁵ *Id.* art. 4, ¶ 1.

¹⁰⁶ *Id.* art. 4, ¶ 4.

¹⁰⁷ *Id.* art. 3, ¶ 3.

¹⁰⁸ The United States was unsuccessful in seeking an option for Member States which have become parties to the 1970 Convention not to enforce the rules of the Convention calling for application of foreign export law. See H. S. Burman, *Introductory Note on International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, *supra* note 77, at 1322.

drastically departs from the 1970 Convention which failed to enforce foreign export rules "by equating violations of export law to violations of import law."¹⁰⁹

The requesting State must establish the following two points:

- that a cultural object has been removed in violation of its export law of cultural objects for the purpose of protecting its cultural heritage; and
- that removal of the object affects one or more of the following interests:
 - a) its physical preservation;
 - b) its integrity;
 - c) the preservation of information of a scientific or historical character;
 - d) the traditional or ritual use of the object by a tribal or indigenous community; or the object is of significant cultural importance.¹¹⁰

Restitution cases

States have, in general, utilized diplomatic channels in their attempts to retrieve lost or stolen cultural objects as the reports of the Secretary General of the United Nations explain regarding the return or restitution of cultural property to the respective country of origin.¹¹¹ On numerous occasions, disputes involving cultural objects are being settled at a non-governmental level on the basis of good will among museum authorities. Other more controversial cases are pursued through UNESCO's Committee on Restitution.¹¹² However, resort to these channels has not always resulted in the return of cultural property to the country of origin, as the case of the *Parthenon Marbles* or *Elgin Marbles* has shown. This is the classic example of a very controversial and much debated restitution case that has not been resolved.¹¹³

On the other hand, the recent return of cultural artifacts to the Greek Government by the United States represents a successful example of cultural objects returning to their country of origin. The objects were illegally exported and were offered for sale by a New York art dealer. The out-of-court settlement included return of the objects to the Greek Government and a charitable tax deduction that covered the dealer's costs.¹¹⁴

¹⁰⁹ Jote, *supra* note 13, at 296.

¹¹⁰ Art. 5, ¶ 3, of the Convention.

¹¹¹ M. C. Bourlogiannis & V. Morris, *International Decisions, Autocephalous Greek-Orthodox Church of Cyprus v. Golberg & Feldman Fine Arts*, 86 AM. J. INT'L. L. 128, 133 (1992).

¹¹² Prott & O'Keefe, *supra* note 9, at 891.

¹¹³ For historical background and an analysis of the historical, moral and legal arguments put forward by both parties, see C. Hitchens, *The Elgin Marbles: Should They be Returned to Greece* (1988); see also, Jote, *supra* note 13.

¹¹⁴ WASHINGTON POST (Feb. 1, 1996), at 1.

In other instances, foreign governments or private individuals resort to judicial remedies to recover stolen cultural property. The courts in transnational civil actions to recover stolen cultural property are confronted with a number of issues such as determination of applicable law, proof of foreign law, establishment of the lawful claimant and who can release cultural property to the possession of another, settlement of damages and the like.¹¹⁵

Attorney-General of New Zealand v. Ortiz; and the *Autocephalous Greek-Orthodox Church of Cyprus v. Golberg* illustrate how national courts deal with issues involving public ownership of cultural property and its return to the country of origin where the objects are part of the country's cultural heritage. While the first decision represents an unfortunate example of restitution, the latter provided an effective judicial remedy to a foreign government. In this case, Cyprus sought to recover stolen cultural property. It also demonstrated that good title to stolen cultural property may never be acquired unless the original owner shows no interest in reclaiming his property or a long period of time has elapsed.¹¹⁶

The New Zealand case involved the illegal export of Maori wood carvings from New Zealand. These were subsequently sold to a private art collector.¹¹⁷ The government of New Zealand sought to obtain return in the English courts. The New Zealand Government based its claim on its law on Historic Articles Act of 1962 which bans the removal of a national historic object without a license and subjects the object to forfeiture if discovered. The English courts applying the above law held that the Government had not obtained ownership of the carvings under its own law. If the New Zealand Law provided for the automatic forfeiture of an historic article illegally exported from New Zealand, then New Zealand could have recovered this article in any country. However, based on England's view of the territorial theory of sovereignty, New Zealand could not obtain ownership in England.

The Cyprus case was decided in 1989.¹¹⁸ In this case, the court determined the issue of whether the Autocephalous Greek-Orthodox Church of Cyprus or the defendant, Golberg, an Indianapolis art dealer, would be granted possession of four Byzantine mosaics which were removed from the ceiling of the Kanakaria Church in Northern Cyprus in 1979. Golberg bought the mosaics from a dealer in Switzerland. In considering the replevin action, the court acknowledged the historical, cultural, and religious significance of the mosaics to the Republic of Cyprus. On the question of standing, the district court concluded that the Republic of Cyprus had "a legally cognizable interest in the mosaics sufficient to confer standing."

The court subsequently had to decide which substantive law was applicable, the laws of Indiana or Switzerland. By comparing the Indiana and Swiss choice of law rules, it held that the substantive law which had the "most significant relationship" to the cause of action should apply. The court did not apply Swiss law because the mosaics were placed in the free port in the airport of Geneva for only four days until they were transferred to the United States. According to Indiana law, since a thief does not acquire title of stolen item, he cannot transfer a good title; thus a bona fide purchaser does not acquire title of a stolen property. On the other hand, under Swiss law, a bona fide purchaser acquires title to stolen property. Since Golberg

¹¹⁵ Burke, *supra* note 49, at 450; *see also*, Mastalir *supra* note 28, at 1043.

¹¹⁶ Q. Byrne-Sutton, *The Golberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects*, 1 INT'L. J. CULT. PROP. 151, 166 (1992).

¹¹⁷ *Attorney-General of New Zealand v. Ortiz*, 2 W.L.R. 809 (H.L. 1983), add's 2 Q.B. 349 (Eng. C.A. 1982).

¹¹⁸ The District Court's judgment was made on Aug. 3, 1989 (717 F. Supp. 1374). The appeal judgment on Oct. 24, 1990.

failed to sufficiently investigate before she proceeded with the purchase, the purchase was not made in good faith. In this manner, the court ordered the restitution of the mosaics to Cyprus.

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AFGHANISTAN

Nature and significance of cultural property

Afghanistan has a long history of civilization dating back to the pre-historic culture which was largely neglected by the archaeologists, partly because of the richness of historic finds, partly because of the relative lack of interest of European and American scholars in Central Asia. Extensive excavations in Afghanistan's southern province of Sistan uncovered a series of Chalcolithic (Copper and Bronze Ages) occupational levels dating from the fourth to the first millennia B.C. Pertinent is a reference to the Iron Age heritage of Afghanistan and nomadic relics and material culture which is symbolized by artistic, political, religious, and social achievements of both Eastern and Western civilizations. It must be pointed out that nomads have always been an important feature on the Afghan cultural landscape. Finds from the nomadic Iron Age include several excellent bronze, trilobate projectile points, bracelets and bracelet fragments, rings, and earrings.¹¹⁹

Afghanistan, like its eastern neighbor, Iran, was the target of world conquerors, Alexander the Great, Arabs, and Mongols and received cultural influences from each of them, enriching the great cultural abundance of this land.

Definition of *cultural property*

The first Law for the Protection of Antiquities of Afghanistan was passed in 1958. Its first article describes the nature of cultural property and then subjects them all to export control. The Law states that the State has a right of preemption over goods for which an export permit is being sought.

Sale and purchase is permitted for antiquities which have been registered under the Law and are possessed by individuals; trade in unregistered antiquities is prohibited.¹²⁰

Regulation of traffic in cultural property

Anyone wishing to sell any antiquity in his possession must first notify the Directorate-General of Museums and Preservation of Antiquities.¹²¹

Antiquities being exported from Afghanistan without permission will be confiscated from their exporters. This ban includes diplomats and consuls.¹²²

¹¹⁹ L. Dupree, *AFGHANISTAN 255-343* (Princeton University Press, 1973).

¹²⁰ *Id.* art. 63.

¹²¹ *Id.* art. 75.

¹²² *Id.* art. 94.

For trading in an unregistered antiquity, the penalty is a fine amounting to the value of the article.¹²³ According to article 94, for the sale of an antiquity without permission, the penalty is a fine equalling the value of that article.¹²⁴

Article 344 of the CRIMINAL CODE of Afghanistan of 1976, as amended, refers to the punishment of the persons who destroy cultural and historic property of the country. This article provides for imprisonment from one to five years for and a fine of not less than 12,000 and not more than 60,000 *Afghani* (unit of currency) for persons committing the crime of destruction of cultural and historic property. The CODE provides for registration of historic and cultural property with the Ministry of Culture and Education of Afghanistan.

Other laws establishing and/or protecting cultural heritage

Afghanistan has signed the Convention Concerning the Protection of the World Cultural and Natural Heritage, Done at Paris November 23, 1972. This Convention entered into force for Afghanistan on December 17, 1975.

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¹²³ *Id.* art. 95.

¹²⁴ L. V. Prott, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (UNESCO, 1987).

95-1377

ARGENTINA**Nature and significance of cultural property**

Until recently, Argentina was the only country in the region whose CONSTITUTION did not expressly protect cultural property.¹²⁵ It was not until the 1994 NATIONAL CONSTITUTION¹²⁶ was enacted that such protection was included among the constitutional rights and guarantees.¹²⁷ It requires the authorities to provide protection for Argentina's cultural patrimony. It assigns the Federal Government the responsibility of protecting such property and leaves the provinces in charge of the complementary regulations.¹²⁸

Definition of *cultural property*

Cultural property is defined as the history and culture that a society creates over the years throughout its development revealed in its art, literary works, buildings, monuments, etc. These objects relate to the Nation's identity and allow future generations to reach and know the Nation's roots and thus preserve its traditions.¹²⁹

Legislation on cultural property

Argentina lacks a unified legislative body of cultural property laws. Instead, a number of laws and regulations covering different subjects are found throughout its legislation.¹³⁰

For instance, Law No. 12,665 of 1940 created the National Commission on Museums and Historic Sites and Monuments. It established the legal status of assets, sites, monuments, immovables and documents of historic or artistic interest that belong to the Nation, provinces, municipalities and private individuals, by restricting the right of ownership and imposing the possibility of the expropriation of such things for reasons of public interest.¹³¹

The National Commission is the enforcement authority on museums, monuments and national historic sites. Its supervisory functions are performed together with the local authorities on museums, monuments and historic sites in the provinces and municipalities. The Commission controls and preserves these assets according to the cultural policy set by the National Cultural Secretary through the National

¹²⁵ E. Harvey, DERECHO CULTURAL LATINOAMERICANO 196 (Buenos Aires, Editorial Depalma, 1992).

¹²⁶ CONSTITUCION DE LA NACION ARGENTINA, BOLETIN OFICIAL (B.O.) Aug. 23, 1994.

¹²⁷ *Id.* art. 41, ¶ 2.

¹²⁸ *Id.* art. 41, ¶ 3.

¹²⁹ R. Dromi & E. Menem, LA CONSTITUCION REFORMADA 140 (Buenos Aires, Ediciones Ciudad Argentina, 1994).

¹³⁰ Harvey, *supra* note 1, at 199.

¹³¹ *Id.*

Directorate of Museums.¹³² Historic movables and documents may not leave Argentina, be sold or disposed of without the authorization of the National Commission.¹³³

According to Decree No. 84,005 of February 7, 1941, regulating Law No. 12,665, in addition to the custody, preservation and restoration of historic-artistic assets under its competence, the National Commission has the task of keeping a Registry thereof. It classifies historic monuments, sites, and buildings. The National Commission also provides information to the general population about Argentina's historic property through exhibitions, dissertations, illustrations and conferences.¹³⁴

Establishment of ownership of cultural property

Restrictions in private ownership are based on the socio-cultural function of cultural property, which also includes historic documents and historic-artistic movable assets.¹³⁵

Law No. 15,930 regulates the National General Archives. This agency within the jurisdiction of the Interior Ministry is in charge of keeping and preserving official and private documents assigned to it for conservation and promotion. Its institutional objective is the promotion of information on Argentine history.¹³⁶

A special legal regime exists for *historic documents*. The ownership of such are restricted when in private hands. Historic documents including those:

- issued by official authorities in the original version, draft or copies, of at least thirty years of age;
- maps, plans, geographic and maritime charts of at least fifty years of age;
- drawings, paintings and photographs of the country or its personalities;
- private letters, diaries, memoirs, autobiographies, notes relevant for historic knowledge;
- prints the preservation of which is relevant for historic purposes; and
- documents of foreign origin the preservation of which is relevant to Argentine history.¹³⁷

¹³² Harvey, *supra* note 1, at 200.

¹³³ *Id.*

¹³⁴ *Id.*, at 201.

¹³⁵ *Id.*

¹³⁶ *Id.*, at 203.

¹³⁷ *Id.*

Law No. 23,820¹³⁸ expanded the role of the National General Archives to include the recovery of films and television documents. To this end, all TV stations are directed to provide the Archives with a copy of all programs aired by the station. The Archives keeps those programs with a historic value.¹³⁹

Decree No. 1,063 of 1982¹⁴⁰ established a special regime for real estate belonging to the Nation, if it has a historic, artistic or architectonic value. This property may not be sold or disposed of without the authorization of the National Commission on Museums and Historic Sites and Monuments.

Law No. 17,711 of 1968 enacted the most comprehensive amendment to the CIVIL CODE. It provides that ruins and archeological and paleontologic sites of scientific interest belong to the public provincial domain, unless such are located in the Federal Capital or National Territory.¹⁴¹

Regulation of traffic in cultural property

The import and export of art objects is governed by Decree-Law No. 9,002 of October 9, 1963, and Decree No. 159 of July 24, 1973, as amended. These statutes provide for tax and customs exemptions for imports of art objects.¹⁴²

Conclusion

In addition to the lack of unification in cultural property laws, there is a lack of financial support and assistance for the preservation of such property. Until recently, the administration of the cultural property system was handled by *ad honorem* staff. Several bills to amend the existing conditions have been submitted for congressional consideration, but no action has been taken to date. So far, cultural property in Argentina has received no preferential treatment or active initiatives by the Executive.¹⁴³

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¹³⁸ B.O. Oct. 8, 1990.

¹³⁹ Harvey, *supra* note 1, at 204.

¹⁴⁰ B.O. June 3, 1982.

¹⁴¹ Harvey, *supra* note 1, at 205.

¹⁴² *Id.*, at 206.

¹⁴³ *Id.*, at 207.

96-1377

AUSTRALIA

Nature and significance of cultural property¹⁴⁴

Australia's cultural heritage is rich and considerably predates the modern settlement of the continent. Archeological sites evidencing its occupation for some 30,000 years range from prehistoric burial sites to Aboriginal middens. Remains also exist of visits to the northern coast of Australia by people from the islands which are now Indonesia. The continent abounds in Aboriginal rock art and there are many examples of carved trees still found standing on location.

The arrival of Europeans created other archeological sites. There are many shipwrecks from the days of the Dutch East India Company and European art work and furniture has been imported for more than 200 years. Artifacts from the industrial revolution which have gone out of use have become heritage items evidencing past methods of production and ways of life.

Australia continues to have an indigenous population, the Aborigines, who exist along with the European and the newly arrived Asian migrants. In protecting the cultural heritage of the country, aboriginal material has received special treatment because of the greater scope of its loss. Until recently, control of national heritage properties was exercised by the state and territories. For example, New South Wales included the preservation of Aboriginal relics in the National Parks and Wildlife Act 1974 and pre-1900 relics of settlement came under the Heritage Act 1977. The Commonwealth (federal) Government only restricted the export of certain objects of cultural heritage under the Customs (Prohibited Export) Regulations.

Under the Commonwealth Government's external affairs power, legislation specifically relating to cultural property was enacted in the 1980s to implement two Unesco agreements, the *Convention concerning the Protection of the World Cultural and Natural Heritage* 1972 and the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970. The World Heritage Properties Conservation Act 1983 provides for the identification of property for protection or conservation. The Protection of Movable Cultural Heritage Act 1986 controls the export and import from Australia of items of cultural heritage.

Another Commonwealth statute, the Historic Shipwrecks Act 1976, makes it an offense to dispose of a historic shipwreck or to remove it from Australian waters. Articles recovered from a shipwreck which are in the possession or custody of a person may be required to be preserved and access provided.

Definition of *cultural property*

Movable cultural heritage refers to the following categories of objects that are "of importance to Australia...for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons:"

- those recovered from Australian soil, inland waters, the coastal sea, the seabed or subsoil beneath the sea;

¹⁴⁴ Based on P. J. O'Keefe, *The Protection of Cultural Heritage*, in AUSTRALIAN LAW AND LEGAL THINKING BETWEEN THE DECADES 345-364 (1990).

- objects relating to the Aboriginal race of Australia;
- ethnographic art or ethnography;
- military objects;
- decorative art;
- fine art;
- objects of scientific or technological interest; and
- books, records, documents or photographs, graphic, film or television material or sound recordings.¹⁴⁵

Regulations issued under the Act specify in detail, including age and value, the objects which are placed on the control list.¹⁴⁶ The list is divided into two classes, Class A objects which are not to be exported without a certificate, and Class B objects which require a certificate or permit for export. Applications for export of objects requiring a permit are referred to the National Cultural Heritage Committee.

Regulation of traffic in cultural property

Export permits for objects on the control list are referred by the Committee to one or more expert examiners who consider an object's importance to Australia as provided in § 7(1) of the Act and recommend against the grant of a permit if "its loss to Australia would significantly diminish the cultural heritage of Australia."¹⁴⁷ If an item on the control list is exported without obtaining a permit or certificate, the object is forfeited.¹⁴⁸ A person knowingly exporting a protected object without a permit commits a criminal offense and on conviction is liable to a fine not exceeding A\$100,000 (A\$200,000 for a body corporate).

The statute was challenged in *Waterhouse v. Minister for the Arts and Territories* on grounds that the refusal of an export permit for a painting constituted a taking of property in breach of the Australian Constitution. The Federal Court held that the refusal to export did not result in the acquisition of the object by the government as the owner remained free to retain, enjoy, display, or sell the painting, subject to the requirement of an export permit.

Recently the General Administrative Appeals Tribunal also upheld the decision under the 1986 Act not to allow the export of a railway engine that had been imported into Australia in 1895. The use of the engines was instrumental in bringing to an end the use of certain laborers in the Queensland sugar industry which development removed an obstacle to the admission of the state into the Commonwealth. The Tribunal

¹⁴⁵ Protection of Movable Cultural Heritage Act 1986, No. 11, § 7.

¹⁴⁶ Protection of Movable Cultural Heritage Regulations (Amendment), S.R. 1988, No. 194, Sched. Pt. 1 - Pt. XIII.

¹⁴⁷ § 10(6)(b).

¹⁴⁸ § 9.

held that the association of the engine with the sugar industry and its impact on the social and economic fabric of the country meant that it should not be exported.¹⁴⁹

Re J. B. Hawkins Antiques and Minister for Communication and the Arts concerned a refusal to export an English painting which had been brought to Australia for resale. The painting, a view of Sydney around 1800, was considered to have major historic and artistic significance for Australia and accordingly the Administrative Appeals Tribunal upheld a prohibition against its export.¹⁵⁰ In *Re Blake and Brain and Minister for Communications and the Arts*, an export license for an aircraft was refused on the ground that it represented aircraft used in civil aviation immediately after World War II. The Tribunal overturned the decision stating that not every object of importance to the history or culture of Australia is prohibited from export. "It must be shown that the loss of the object would significantly diminish the heritage of Australia".¹⁵¹

Other protection for cultural property (e.g., in time of war)

The 1954 Hague Convention on the protection of cultural property during armed conflicts.¹⁵²

Repatriation of cultural property removed abroad

Section 14 of the 1986 Act makes it unlawful to import into Australia an object which is protected in a foreign country and whose export is prohibited by the country. An unlawfully imported object is subject to forfeiture and the person knowingly importing the object is liable on conviction to a fine not exceeding A\$100,000 (A\$200,000 for a corporation) or imprisonment for up to five years or both. Section 41 allows the government of the country concerned to request the return of the forfeited object.

Other laws establishing and/or protecting cultural heritage

A Commonwealth statute, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, preserves and protects from injury or desecration areas and objects that are "of particular significance to Aboriginals in accordance with Aboriginal tradition."¹⁵³ An object is taken to be injured or desecrated if "it is used or treated in a manner inconsistent with Aboriginal tradition."¹⁵⁴ A minister may make a declaration for the preservation or protection of particular objects which are under threat of injury or desecration.¹⁵⁵

¹⁴⁹ AUSTRALIAN ADMINISTRATIVE LAW BULLETIN, ¶ 3842 (Mar. 1995).

¹⁵⁰ *Id.* ¶ 4033 (Oct. 1995).

¹⁵¹ *Id.*

¹⁵² The topic is also discussed in L. V. Prott, REPATRIATION OF CULTURAL PROPERTY 229-240 (University of British Columbia, Special Issue, 1995).

¹⁵³ § 4.

¹⁵⁴ § 3(2).

¹⁵⁵ § 12.

Another Commonwealth statute, the Aboriginal and Torres Strait Islander Commission Act 1989, requires the Commission to protect cultural material considered sacred or otherwise significant by Aboriginal persons.¹⁵⁶

The following are examples of state statutes protecting aboriginal sites and property. The National Parks and Wildlife Act 1974 of New South Wales makes it an offense to disturb or excavate any land for the purpose of uncovering a relic or to damage, deface or destroy a relic. In Queensland, cultural heritage is controlled by the Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987. The Aboriginal Heritage Act 1988 of South Australia grants recognition and control to Aboriginal people over their cultural property. It authorizes a minister to delegate powers to traditional owners to enable them to prosecute for breaches of the Act, including the unauthorized sale, disposal or removal of an Aboriginal object.¹⁵⁷

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¹⁵⁶ § 7(g).

¹⁵⁷ See generally *Heritage Laws*, 1 THE LAWS OF AUSTRALIA § 1.4[20] *et seq* (1994).

96-1377

BELIZE**Nature of cultural property**

The country of Belize is thought to contain the ruins of more ancient Mayan cities than any other nation except neighboring Guatemala. Most of these cities lie buried deep in overgrown jungle areas. Only a few have been extensively excavated. For this reason, it is very difficult for the Government to stop plundering by souvenir hunters or identify what articles have been illegally taken.

Cultural property

In order to begin protecting its cultural heritage, the Government of what was then the colony of British Honduras enacted an Ancient Monuments and Antiquities Act in 1972.¹⁵⁸ This statute applies to structures, buildings, and transformed natural features that are more than 100 years old and almost all types of exempted articles that are more than 150 years old.¹⁵⁹ Two types of articles that are exempted are personal jewelry and personal manuscripts.¹⁶⁰

Establishment of ownership

Section 3 of the Ancient Monuments and Antiquities Act states that "[a]ll ancient monuments and antiquities, however situate...shall absolutely vest in the Crown."¹⁶¹ This rule applies to both newly-discovered properties and properties that were privately owned before 1972. However, the Act does authorize the Minister of Trade and Industry to issue licenses allowing persons to possess antiquities or have them in their custody and control.¹⁶² Persons who discover antiquities must register their finds within 15 days. Failure to do so can result in the imposition of up to 12 months' imprisonment.¹⁶³

The Crown has 60 days to claim newly discovered properties. While the Act requires the Crown to pay *reasonable compensation*, as is agreed to or as is set by an arbitrator chosen by the Government, it also expressly states that in establishing the proper amount, the market value of an object should not be taken into consideration.¹⁶⁴ Thus, a finder will normally receive considerably less from the Government than he could from overseas collectors.

¹⁵⁸ Bel. Rev. Laws, ch. 259 (1980).

¹⁵⁹ *Id.* § 2.

¹⁶⁰ *Id.* § 3.

¹⁶¹ *Id.* § 4.

¹⁶² *Id.* § 5.

¹⁶³ *Id.* § 6.

¹⁶⁴ *Id.* § 8.

Licenses to possess or have custody of a covered object can be revoked by the Government at any time.

Separate licenses are required to export or import any part of an ancient monument or any antiquity. Violations of this requirement are punishable with up to five years' imprisonment.¹⁶⁵

Other laws

The available laws of Belize do not indicate that it has laws other than the Ancient Monuments and Antiquities Act for the preservation of cultural property. There are no provisions for the recognition of claims made by foreign states. However, property imported illegally can be seized by the Crown. The Government has discretion to decide whether seized foreign property should be returned.

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¹⁶⁵ *Id.* § 37.

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BOTSWANA

Nature and significance of cultural property

The Law governing cultural property in Botswana is primarily contained in the Monuments and Relics Act of 1970, as amended,¹⁶⁶ and the National Museum and Art Gallery Act of 1967, as amended.¹⁶⁷

The nature and significance of cultural property is reflected in the fact that these laws, especially the Monuments and Relics Act, provide for the better preservation and protection of ancient work sites, relics and other objects of aesthetic, archaeological, historical or scientific value or interest. The Law of 1967 is a specific instrument regulating the establishment and function of the National Museum and Art Gallery.

Definition of cultural property

As in various international and regional instruments as well as national laws in Commonwealth Africa that describe what constitutes aspects of cultural property, the Law of 1970 does not contain a specific definition for the term *cultural property*. However, like similar international, regional as well as national laws, the Law of 1970 itemizes those things considered to be cultural property in Botswana. These include ancient monuments, ancient work sites, excavations, monuments, national monuments and relics. The Act of 1967 on the other hand, defines museums to include craft villages as well as the National Museum and Art Gallery.

Ancient monuments cover any buildings, ruins, remaining portions of a building or ruin, stone, circles, graves, caves, rock shelters, middens, shell mounds or other work sites or things of a similar nature that are known or believed to have been erected, constructed or used before June 1, 1902. Ancient monuments do not include ancient work sites that are defined to mean any shaft, cutting tunnel or stope or any building or machinery relating to them made or used for mining purposes that was in existence before June 1, 1902.

Other forms of cultural property in Botswana include excavations, monuments, national monuments and relics. Excavations pertain to processes of digging or unearthing and any other act involved in such a process. Section 2 of the Law of 1970 defines a *monument* to include ancient monuments, any area of land that is of archaeological or historical significance or interest or contains objects of such interest, any area of land which has distinctive or beautiful scenery or a distinctive geological formation, any area of land that contains rare or distinctive or beautiful flora, any cave, rock shelter, grove of trees, old structure or other object or articles (whether natural or man made) other than a relic or aesthetic, archaeological, historical or scientific value or interest. Section 2 of the Law of 1970 also defines a *national monument* to include a monument or ancient work site which has been proclaimed a national monument under section 10 of this Law. Section 10 vests power in the responsible Minister following consultations with the Commissioner of Monuments to proclaim any monument or relic to be a national monument. Such a proclamation must be published in the GOVERNMENT GAZETTE.

¹⁶⁶ 7 LAWS OF BOTSWANA, Ch. 59:03 (rev. ed., 1974).

¹⁶⁷ 7 LAWS OF BOTSWANA, Ch. 59:01 (rev. ed., 1974).

According to section 2 of the Law of 1970, a *relic* includes any fossil, any drawings or stone or petroglyph executed in Botswana before June 1, 1902, any artifacts, implements or ornaments of archaeological, historical or scientific value made or used in Botswana before June 1, 1902, any anthropological or archaeological object taken from any ancient work sites and any treasure trove discovered in Botswana.

Establishment of ownership of cultural property

There are bodies and/or offices of the government of Botswana under the Laws of 1970 and 1967 that are crucial in the process of establishing the ownership of cultural property. The first is the Board of the National Museum and Art Gallery created under the Law of 1967 and also provided for under the Law of 1970 as amended. The second is the Inspector of Monuments and/or his representatives. The third is the Commissioner of Monuments; the fourth is the minister responsible for these matters; and the fifth is the Custodian of Monuments, Museums and Art Galleries.

The Board of the National Museum and Art Gallery is established under section 5 of the Law of 1967, as amended. It consists of a chairman and six members. The chairman serves for a term of three years unless he is a coopted member whose tenure is one year. The Board *inter-alia* advises the President of the Republic of Botswana and the responsible minister on any matter relating to the museum, monuments, relics, artifacts and other forms of cultural property. The Board also functions as a Trustee for a government Fund in the administration of funds as authorized by the minister. The Board enjoys power to alienate and dispose of assets of the Fund, acquire movable and immovable property for purposes of the National Museum and Art Gallery and other matters connected with cultural property. The Board also has power to employ staff and carry out administrative functions according to section 7 of the Law of 1967 as amended.

The inspector and his representatives report to the Commissioner any information relating to monuments, ancient work sites or relics that can be claimed as cultural property. They are also responsible for any investigations to declare any monuments, ancient work sites or relics for use as a cultural property for and on behalf of the people of Botswana. Other functions can also be assigned to the inspector by the Commissioner.

The Commissioner receives reports pertaining to cultural property. He assigns duties to inspectors. He recommends to the responsible minister actions concerning proclamations, negotiations, agreements, etc., regarding matters of cultural property. The Commissioner secures written permission and consent from the minister to undertake excavations and is also responsible to the minister for other matters related to cultural property.

The Minister can order the purchase, take, lease or loan any monument, relic, artifact, ancient work sites or other forms of cultural property. He can accept gifts or bequests of any such articles and structures and other facets of cultural property. He can authorize the preservation, protection, acquisition, repair or general maintenance of any monument, ancient work site, relic or artifact. With the agreement of the Board, the minister can give lend, sell, exchange any form of movable cultural property to any person, body or institution for purposes of administration of the provisions of the Laws of 1967 and 1970 whether within or outside Botswana. The minister exercises all his powers as an agent of the Government of Botswana.

The minister may, after consultation with the Commissioner, enter into written agreements with any owner of any national monument for its protection and/or preservation. Such agreements could extend to the maintenance, custody and duties of personnel, restrict the owner's rights to destroy, remove, alter or deface such national monument or other forms of cultural property. These agreements also ensure that public access

to these facilities, articles, etc., is assured in the interests of the general populace. Thereafter, the minister may then proclaim a particular ancient work site, monument or relic as cultural property or a national monument. This fact is published in the GOVERNMENT GAZETTE.

Thus, whenever any monument, ancient work site or relic is discovered, the responsible minister must be informed so that appropriate action may be taken to establish ownership and to preserve and protect the integrity of such cultural property. As a result, section 11 (2) of the Monuments and Relics Act of 1970, as amended, stipulates as follows:

The Minister shall have a right of action to acquire for the Republic after consultation with the Commissioner, the ownership of any national monument, ancient working or relic together with the site thereof, whether or not its discovery has been notified...upon payment to the owner thereof and to any other person having an interest therein or right thereof of a sum of money to be agreed upon as fair and reasonable compensation or failing agreement, upon payment of such sum as may be determined by the High Court on application made by the Minister.

The Law also empowers the minister to acquire access to national monuments in a similar manner, for he enjoys power to prevent such access including access or non-access to excavations and other sites.

Regulation of traffic in cultural property

Section 17 of the Law of 1970 states that no person can without the consent of the minister alter, destroy, damage, remove or do anything with any article or form of cultural property. In particular, no one without the written consent of the minister can remove or allow to be removed or move from its original site or export or allow to be exported from Botswana any article of cultural property governed by the laws of Botswana, especially the Laws of 1967 and 1970, as amended. For cultural property situated or located in tribal territories, the minister cannot give his consent unless the Tribal Land Board also concurs. Thus, sub-section (3) of section 17 requires that:

Any person who desires to remove from its original site or to export from Botswana any national monument, ancient working or relic or any part thereof shall when applying to the Minister for his consent, supply the Minister with a drawing or photograph of the national monument, ancient working or relic or part thereof in question and shall state the exact locality in which it is situated and the place to which and the purpose for which he desires to remove or export it.

Rule-making powers are vested in the minister who may issue subsidiary legislation to further regulate matters pertaining to cultural property.

Other protection provided cultural property in wartime and/or the repatriation of cultural property removed abroad

There are no provisions governing the protection of cultural property, for example, in times of war, nor concerning repatriation of cultural property removed abroad. However, the Law of 1970 contains provisions on prohibited actions that constitute offenses under this Law. Any person in violation of the laws on cultural property may in addition to any punishment of incarceration be ordered to pay fines, restoration of the article of cultural property, payment of damages because of the loss, injury, removal or destruction of any form of cultural property. The Commissioner, inspectors and custodians all have powers under the Law of 1970 to arrest anyone found in violation of the provisions of this Law. They also enjoy powers of search, seizure and forfeiture.

Other laws establishing and/or protecting cultural property

The Fauna Conservation Act of 1961, as amended,¹⁶⁸ is relevant because it provides for the conservation, protection and control of wild animals, game, trophies and flora. It is also this Law that deals with game reserves and sanctuaries, conserved and protected game, import and export of animals and trophies including government trophies. Other laws governing herbage, national parks, forests and fish protection may also be relevant.

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¹⁶⁸ 4 LAWS OF BOTSWANA, C. 38:01 (rev. ed., 1974).

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BRAZIL

Nature and significance of cultural property

The Brazilian Constitution guarantees the full exercise of cultural rights and access to sources of national culture and supports and grants incentives to glorify and foster cultural activities.¹⁶⁹

Definition of *cultural property*

The Brazilian cultural heritage includes material and immaterial goods, taken either individually or as a whole, that refer to the identity, actions and memories of the various groups that are a part of Brazilian society. These include forms of expression; modes of creating, making and doing; scientific, artistic and technological buildings and other spaces intended for artistic-cultural activities; and urban complexes and sites with historical, landscape, artistic, archeological, paleontological, ecological and scientific value.¹⁷⁰

Establishment of ownership of cultural property

The Government, with the participation of the community, promotes and protects the Brazilian cultural heritage by inventories, registries, surveillance, monument decrees, expropriation and other precautions and preservation efforts.¹⁷¹ Such activities are also the responsibility of public administration, as required by the law, to maintain governmental documents and to take measures to make them available for consultation by those who need to do so.¹⁷²

The law establishes incentives for the protection and knowledge of cultural property and values. It also protects against damage to and threats upon the cultural patrimony, and such acts are punished in accordance with the law.¹⁷³ Furthermore, all documents and sites bearing historical reminiscences of the old *quilombos*¹⁷⁴ are declared to be historical monuments.

Lastly, any citizen has the prerogative to institute a popular action seeking to annul an act injurious to the public patrimony or to the heritage of an entity in which the State participates, to administrative morality, to the environment or to historical and cultural monuments; except in a case of proven bad faith. The plaintiff

¹⁶⁹ FEDERAL CONSTITUTION OF THE REPUBLIC OF BRAZIL of Oct. 5, 1988, as amended.

¹⁷⁰ *Id.* art. 216.

¹⁷¹ *Id.* § 1.

¹⁷² *Id.* § 2.

¹⁷³ *Id.* §§ 3 & 4.

¹⁷⁴ *Id.* § 5. A *quilombo* was a hideout for fugitive black slaves.

is exempt from court costs and, if he loses, from the burden of paying the prevailing party's attorney's fees and costs.¹⁷⁵

Other protection for cultural property

In 1991, Brazil created the administrative regulations for the Fund for the Protection of Diffusion Rights (*O Fundo de Defesa de Direitos Difusos*).¹⁷⁶ One of the purposes of this administrative regulation was to provide restitution for the damages caused to the environment or individuals and to their rights of artistic, aesthetics, historical and cultural values or any other collective interests.

In 1990 Brazil enacted a law which gives autonomy to the Brazilian Institute of Cultural Patrimony (*Instituto Brasileiro Do Patrimonio Cultural*).¹⁷⁷ The purpose of this law is to promote, preserve and protect the Brazilian cultural heritage.

Regulation of traffic in cultural property

In general, Brazil prohibits the export of any cultural property that has been declared as such by the appropriate government agency. It is considered an offense to remove from the country any works of art or traditional handicrafts produced in Brazil up to the end of the monarchy. This includes not only paintings, drawings, sculptures, engravings and architectural works but also carvings, statuary, jewelry, furniture and other art and craft forms.¹⁷⁸

Repatriation of cultural property removed abroad

It is considered an offense to remove from the country comparable artifacts of Portuguese origin, which became part of the national heritage during the periods of colonial or imperial era. Further, the removal from the country of any work produced abroad during the period mentioned above representing people of Brazilian origin or connected with the history of Brazil or Brazilian customs is considered a violation. However, there are guidelines set for allowing the exit of such property from Brazil, primarily for exhibition purposes.¹⁷⁹

¹⁷⁵ *Supra* note 1, Art. 5, p. LXXIII. "E[veryone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners resident in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms...."

¹⁷⁶ *O Fundo de Defesa de Direitos Difusos* was created by Law No. 7.347 of July 24, 1985. Its regulatory Decree No. 407 was enacted on Dec. 27, 1991.

¹⁷⁷ The Brazilian Institute of Cultural Patrimony was enacted by Decree No. 99.492 of Sept. 3, 1990, based on the Law No. 8.029 of Apr. 12, 1990, related to the Secretary of Culture of the Republic of Brazil. Decree No. 99.602 of Oct. 13, 1990, was enacted to regulate the administration and structure of the Institute.

¹⁷⁸ Law No. 4845 of Nov. 19, 1995, art. 1.

¹⁷⁹ *Id.* arts. 2, 3 & 4.

Other laws establishing and/or protecting cultural property

Finally, Brazil has approved the Convention for the Protection of Cultural Assets in Case of Armed Conflicts and its Protocol signed in the Hague on May 14, 1954; entered into force with respect to Brazil on December 12, 1958. Brazil is also a signatory of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural property, signed in Paris in 1970. The instrument of ratification was deposited on February 16, 1973. The Convention entered into force with respect to Brazil on May 16, 1973.

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BURMA

Nature and significance of cultural property

The impact of Buddhism, the religion of the country, can be seen today in the form of numerous religious structures such as pagodas, as well as in the form of images of many kinds, both large and small. The famous Shwedagon Pagoda in the capital city of Rangoon was, according to legend, built in the 6th century B.C. The early kings of Burma had relations with the Indian emperor Asoka who reigned in the 3rd century B.C., and Chinese records of the 3rd century A.D. mention the people then inhabiting present-day Burma. Pagan, which was already flourishing in 849 as the capital of Burma, was the hub of a powerful kingdom whose monarchs during the next two and a half centuries constructed some thirteen thousand pagodas, temples, and monasteries on the plain surrounding the city.

The cultural property of Burma is largely religious in nature and is of great significance to the Burmese people, whether it be in the form of images and other moveable symbols of Buddhism or immovable structures such as pagodas, cave complexes, or buildings.

Other than religious antiquities or historical objects and structures, there also exists cultural property that is worthy of protection, in the form of gemstones, gold or silver objects such as jewelry or vessels, tapestries, textiles, or lacquer ware, some of which may be antique and some fairly modern but of great value. The value may be intrinsic or because of historical associations. The royal vestments of the last king of Burma, King Thibaw, were taken by the British, and included some extremely valuable and rare gems such as rubies and sapphires that were part of the king's personal jewelry. These were returned to the Government of Burma many years after the country made repeated demands after attaining independence from Britain in 1948. As a result of protracted government-to-government negotiations, some items of royal jewelry, part of the ceremonial regalia, and a throne of the king's palace, were returned and are now on display in the National Museum of Burma. Many gems, wooden carvings, lacquer ware, swords, silver and gold plates and bowls, and ivory *objets d'art* that were reported to have been stolen by the British soldiers after they defeated the Burmese troops in the early 19th century and ransacked the royal palace in Mandalay have never been returned and are now part of the estates of soldiers of the conquering army. Some descendants of the Burmese royal family have pending at the present time negotiations for the return of specific items of gold and gemstone jewelry which could be documented as having belonged to King Thibaw and have been identified as being held in Great Britain. It is also said that, from time to time, English auction houses offer jewelry set with marvelous "pigeon-blood" rubies, sapphires, and jade surface whose provenance could probably be traced to the end of the Anglo-Burmese wars, but this could not be documented.

Definition of *cultural property*

The Antiquities Act of 1957 as amended in 1962 defines an *antiquity* as meaning any object of archaeological interest, including any land on or in which any such object exists. The phrase *object of archaeological interest* is further defined as being any object of archaeological interest, including fossil remains of man or animal; any site, trace or ruin of an ancient den, habitation or working place, midden or sacred place; any ancient structure, erection, causeway, bridge, cairn, shrine, grave, tumulus, place of interment, excavation, well, water tank, artificial pool, monolith, group of stones, earth work, gateway moat or fortification and any remains of such items; any object or implement believed to have been used by early man or animal; any engraving, drawing, painting or inscription of ethnological or historical interest; any

sculpture, carving, coin, amulet, epigraph, manuscript or any other article, object or thing of metal, stone, clay, wood, textile, leather, basketware or other material, which is illustrative of life in former times; and any object or thing declared by the President of Burma to be an antiquity.¹⁸⁰

Establishment of ownership of cultural property

The ownership of cultural objects does not automatically vest in the State. The Antiquities Act contains provisions that govern how ownership is to be determined. Its § 2(v) provides that the term *owner* when applied to an antiquity includes a joint owner invested with powers of management on behalf of himself and other joint owners, and any manager or trustee exercising powers of management over the antiquity, as well as the successor in title of any such owner.¹⁸¹

The Act also makes provision for the President of Burma to accept a gift, loan, devise or bequest of an antiquity, and to accept voluntary contributions towards the cost of the maintenance of an antiquity of which he is in possession or control, or towards the purchase of an antiquity.¹⁸² Under the Act, an antiquity may also be compulsorily purchased by the State.¹⁸³

Regulation of traffic in cultural property

No cultural object can be exported without a permit granted by the President. The export or attempted export of antiquities without a permit to do so is punishable with imprisonment for up to six months, or a fine, or both imprisonment and a fine. The antiquity itself may also be confiscated.¹⁸⁴ The export of items of handicraft such as lacquer ware, tapestries, sculptures, etc., which do not fall within the definition of *antiquity* may be exported, upon production of "non-antiques" certificates which are issued upon request, and after inspection of the objects to be exported by the Archeology Department.

Other protection for cultural property, e.g., in time of war

Burma is a party to the UNESCO Convention of 1954 (the Hague Convention) for the Protection of Cultural Property in the Event of Armed Conflict. Burma has also ratified the Protocol to the Convention which prohibits the export of cultural property from occupied territory and provides for the restitution of objects that have been illegally exported.¹⁸⁵

¹⁸⁰ The Antiquities Act, OFFICIAL GAZETTE vol. 10, no. 10, pt. 3 (Mar. 9, 1957), § 2, at 72.

¹⁸¹ *Id.*

¹⁸² *Supra* note 1, § 5, at 73.

¹⁸³ *Id.* § 6.

¹⁸⁴ *Supra* note 1, § 7, at 72-73.

¹⁸⁵ 249 U.N.T.S. (1956) 240-270.

Repatriation of cultural property removed abroad

A representative of the Government of Burma attended the Diplomatic Conference for the adoption of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects held in Rome, Italy in June, 1995.¹⁸⁶ The aim of the Convention is to reduce illicit traffic in cultural objects by expanding the rights upon which return of such objects can be sought, and by widening the scope of objects subject to its provisions.

Other laws establishing and/or protecting cultural heritage

The Antiquities Act also provides for the protection of monuments that have been declared by the State to be in need of protection or preservation and ought in the public interest to be protected or preserved.¹⁸⁷ The Director of the Burma Archaeological Survey may under the provisions of the law, with the President's approval, purchase or lease such a monument. The Director may also enter into an agreement with the owner of the monument to constitute the Director the guardian of the monument, or an agreement regarding the preservation of the monument.¹⁸⁸

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¹⁸⁶ 34 INTERNATIONAL LEGAL MATERIALS 1322 (1995).

¹⁸⁷ *Supra* note 1, § 11, at 75.

¹⁸⁸ *Supra* note 1, §§ 12 & 13. at 75.

96-1377

CANADA**Nature and significance of cultural property**

In addition to the cultural property that was created in French, English, and other immigrant settlements as well as by non-aboriginal Canadians during the 19th and early 20th centuries, there are many prized artifacts in Canada that were fashioned by native persons during the pre-colonial, colonial, and post-colonial periods. Inuit or Eskimo art is sought with particular eagerness by collectors and dealers. Soapstone and bone carvings are often very expensive because they are widely admired for both their distinctiveness and beauty. Many Indian artifacts have been recovered from burial grounds and ceremonial sites, yet many more are thought to still lie buried. Even today, less than 10% of Canada's lands have been developed.

European contacts with Canada have been traced back to the Vikings who established a settlement in Newfoundland. However, little remains from that and other pre-17th century adventures.

Canada has not been involved in many disputes concerning either Canadian properties taken abroad or foreign properties brought to Canada. There are a number of reasons for this. Canada has never been occupied by any foreign nations and its own participation in foreign occupations or adventures have been limited. Also, Canada has not been extensively used as a refuge or safe haven for foreign cultural property. Consequently, the country has not been involved in many disputes concerning cultural property that was created abroad.

One advantage of not being involved in many disputes with foreign states or persons over cultural properties is that in devising a protection for cultural property law, Canada did not have to take the interests of its museums or collectors or many other complicating factors into account. That may be one reason that the law it did create is considered to be one of the most advanced pieces of cultural property legislation in the world.

Definition of *cultural property*

In 1977, Canada created its Cultural Property Export and Import Control Act.¹⁸⁹ This statute does not attempt to define the term *cultural property*. What it does, instead, is to authorize the Secretary of State to recommend the establishment of a Canadian Cultural Property Export Control List for the purpose of prohibiting unauthorized exports of items falling into one or more of the enumerated classes. To guide the Secretary of State, the Act sets out five classes of objects that *may* be included on the list. However, it also expressly excludes objects less than fifty years old and objects made by living persons.¹⁹⁰

In fulfilling his task, the Secretary of State recommended the adoption of very detailed regulations that are now published as the Canadian Cultural Property Export Control List.¹⁹¹ These regulations divide the covered objects into the following seven categories:

¹⁸⁹ R.S.C. ch. C-51 (1985), as amended.

¹⁹⁰ *Id.* § 4.

¹⁹¹ C.R.C. ch. 448 (1978), as amended.

- Objects recovered from the soil or waters of Canada;
- Objects of ethnographic art or ethnography;
- Military objects;
- Objects of decorative art;
- Objects of fine art;
- Scientific or technological objects; and
- Books, records, documents, photographic positives and negatives and sound recordings.¹⁹²

Most of these groups are subdivided and subject to their own rules and special exclusions that are in addition to the general exclusions pertaining to properties created by living persons and properties that are less than fifty years old. For example, objects of fine art are classified as:

- Drawings, prints, paintings or sculptures made by Canadian residents within or out of Canada;
- Drawings, prints, paintings, or sculptures made outside of Canada;
- Drawings, prints, paintings, or sculptures that were commissioned by a Canadian resident; and
- Other objects of art made outside of Canada.

Most of the special exclusions are in the form of monetary ceilings. For example, in the case of paintings and sculpted works made outside of Canada that were not commissioned by a Canadian resident and that do not incorporate a Canadian theme, only objects having a value in Canada of more than Can\$8,000 are included on the Export Control List.¹⁹³

The Export Control List has not been substantially amended since it was created nearly twenty years ago. Officials responsible for administering the Act believe that the regulations should be amended to broaden their coverage. One type of cultural property that is not expressly covered at present is musical instruments. It appears that instead of recommending some very specific amendments that would address this and several other particular situations, the Canadian Cultural Property Export Review Board intends to commission a comprehensive overview of the current regulations. It is expected that an entirely new set of draft regulations based on the recommendations received will be prepared for submission to the Federal Cabinet.¹⁹⁴

¹⁹² *Id.*

¹⁹³ *Id.* § 4(b).

¹⁹⁴ Information obtained from the Canadian Cultural Property Review Board on Feb. 6, 1996.

Establishment of ownership of cultural property

Canada's Cultural Property Export and Import Act does not declare all cultural property to be the property of the Crown or otherwise address ownership issues. In 1990, the Minister of Communications proposed an Archaeological Heritage Protection Act in the House of Commons, but legislation that would have declared cultural property found on lands under Federal jurisdiction to be the property of the Crown was never passed. In the absence of such legislation, determining the legal ownership of newly-discovered properties can be very difficult. Finders, occupants, landowners, and descendants of persons who created or were buried with treasures may all be able to argue that they should be recognized as holding legal title in any given case.

To avoid uncertainty in cases involving the discovery of certain objects found on Indian reservations, § 91 of the Indian Act states that:

[n]o person may, without the written consent of the Minister, acquire title to any of the following property situated on a reserve, namely:

- (a) an Indian grave house;
- (b) a carved grave pole;
- (c) a totem pole;
- (d) a carved house post; or
- (e) a rock embellished with paintings or carvings.

Anyone who violates this section is liable to imprisonment for up to three months.¹⁹⁵

The Historic Sites and Monuments Act authorizes the Minister of the Environment to "provide for the...preservation and maintenance of any historic places acquired or historic museums established" under that statute.¹⁹⁶

One reason that the Parliament has not created more extensive legislation respecting the ownership of cultural property is that, with the exception of Indian reserves and military installations, almost all lands within the provinces fall under provincial jurisdiction. Therefore, individual provinces have enacted stronger cultural property laws. For example, Newfoundland's Historic Resources Act declares all archaeological objects to the property of the provincial Crown.¹⁹⁷ Persons administering the estates of persons who died while in possession of archaeological objects must turn them over to the Government.¹⁹⁸

¹⁹⁵ Indian Act, R.S.C. ch. I-5, § 91 (1985).

¹⁹⁶ Historic Sites and Monuments Act, R.S.S. ch. H-4, § 3(e) (1985).

¹⁹⁷ 5 Newf. Rev. Stat. ch. H-4, § 11.

¹⁹⁸ *Id.*

Regulation of traffic

Canada's Cultural Property Control Act and the Regulations that have been enacted under it require individuals who wish to import or export cultural property to apply for a permit.

Export permits are generally granted immediately in the case of objects that had been imported into Canada within the preceding 35 years and that had not been exported from Canada under an export permit issued before that date.¹⁹⁹ Permits are also granted immediately in the case of objects that are to be temporarily displayed abroad.

If a permit officer believes that the object is or might be included on the Control List, the officer must refer it to an expert examiner for consideration. The expert examiner must determine whether the item is, in fact, included on the Control List. If the determination is that the object is covered, the permit office must then decide whether the object is of both outstanding significance and of such national importance that its loss would significantly diminish the national heritage.²⁰⁰ If the object is deemed to meet both of these tests, the application for a permit will be refused.

Appeals can be made to the Cultural Property Review Board. If this Board disagrees with the expert examiner's assessment or finds that it is unlikely that a public institution or authority in Canada would make a fair offer to purchase the object, it will direct an officer to issue a permit. If, however, the Board believes the making of such an offer is likely, it may establish a delay period of up to six months. If the applicant rejects a fair cash offer from a Canadian museum or authority during this period, no permit will be issued.²⁰¹ The applicant will still be able to keep the object, sell it to private parties within Canada, or reapply within two years.

As can be seen from the above, Canada's Cultural Property Review Board was essentially established to give Canadian institutions and authorities an opportunity to acquire controlled objects that would otherwise be exported at fair prices. The Board was not established to simply prohibit the export of certain types of property. The Canadian system appears to have been conceived with the goal of giving great protection to private parties, but the delay process has been said to discourage foreign purchasers.²⁰²

The Cultural Property Export Control Act also applies to foreign cultural property. Under §37(2) of the Act, it is illegal to import into Canada any foreign cultural property that has been illegally exported from a reciprocating State that has entered into a cultural property agreement with Canada. One qualification to this rule is that it only applies to property exported illegally after the reciprocating agreement has come into force. In many cases, this can be extremely difficult or impossible to prove.²⁰³

¹⁹⁹ Cultural Property Export and Import Act, R.S.C. ch C-51, § 7 (1985).

²⁰⁰ *Id.* § 11.

²⁰¹ *Id.* §§ 29-30.

²⁰² S. Z. Katz, *Penal Protection of Cultural Property: The Canadian Approach*, 2 INT'L J. OF CULTURAL PROPERTY 1 (1993).

²⁰³ *Id.* at 16-20.

The Act also authorizes the Attorney General to institute an action for the recovery of property pursuant to a request from a reciprocating State. If the court finds that the person or institution in possession of the property in Canada was a *bona fide* purchaser or has a valid title to it and was unaware that it was illegally exported, that court can order the reciprocating State to pay compensation as it considers just in the circumstances.²⁰⁴ For this reason, it has been said that:

...the Act has attempted to strike a reasonable balance between the interests of a reciprocating State in the recovery and return of cultural property and the property rights of the **bona fide** purchaser for value or a person holding a valid title to the property.²⁰⁵

Repatriation

The Canadian Government has funded a program to assist museums in repatriating items of cultural importance since 1971.²⁰⁶ This program has reportedly succeeded in repatriating many items of native cultural property, including a collection that was held in Germany.²⁰⁷

The Cultural Property Export and Import Act established a Canadian Heritage Preservation Endowment Account to be funded by gifts and bequests. Moneys credited to this account are to be used to make grants to institutions to help them purchase cultural properties that export permits have been sought for as well as Canadian cultural properties situated outside Canada.²⁰⁸ The Minister of Communications is also authorized to appropriate moneys received out of the Consolidated Revenue Funds for these purposes.²⁰⁹

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²⁰⁴ R.S.C. ch. C-51, § 37(6) (1985).

²⁰⁵ Katz, *supra* note 14, at 21.

²⁰⁶ T. Simpson, *Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand*, 18 HASTINGS INT'L AND COMP. L. REV. 212 (1994).

²⁰⁷ *Id.*

²⁰⁸ Cultural Property Export and Import Act, R.S.C. ch. C-51, § 36 (1985).

²⁰⁹ *Id.* § 35.

96-1377

CHILE**Nature and significance of cultural property**

Chilean authorities have always been concerned with the protection of their cultural patrimony. Since 1925, they engaged not only in the protection of national culture but in the promotion and preservation of national cultural expressions. This movement began after the 5th Panamerican Conference that took place in Santiago, Chile, in 1923. It recommended the adoption of appropriate legislation to protect cultural property in the Americas. Since then many laws have been passed, all of which have pursued the protection of culture.²¹⁰

The protection of national monuments falls under the competence of the Council of National Monuments created by Law No. 17288/70²¹¹ as regulated by Decree No. 484/90.²¹² It is a technical agency within the jurisdiction of the Ministry of Public Education. It is the enforcement authority in matters governed by Law No. 17288/70 related to cultural and historic property.²¹³

Definition of *cultural property*

Protected monuments include sites, ruins, buildings and objects of an historic or artistic character; Indian tombs and cemeteries; anthropological, paleontological or archaeological pieces found in the national territory, subsoil or maritime platform of territorial waters with historic, artistic and scientific interest; the so called *natural sanctuaries*; and monuments, statues, columns, pyramids, fountains, plaques, inscriptions and any other object intended to grace a public space of a memorial character.²¹⁴

Any objects declared national monuments are protected and controlled by the State through the Council of National Monuments and subject, for preservation purposes, to restrictions in their ownership rights.²¹⁵ Law No. 17288/70 classifies such objects in special categories: historic, public, archaeological, natural sanctuaries and typical zones.²¹⁶

²¹⁰ E. Harvey, *Derecho Cultural Latinoamericano* (Buenos Aires, 1992).

²¹¹ *Id.* Law No. 17288 of Feb. 4, 1970.

²¹² Decree No. 484 of Mar. 28, 1990, DIARIO OFICIAL Apr. 2, 1991.

²¹³ Harvey, *supra* note 1, at 239.

²¹⁴ *Id.* at 233.

²¹⁵ *Id.* at 234.

²¹⁶ *Id.*

Historic monuments include sites, ruins and objects of private, fiscal or municipal ownership that because of their historic or artistic character are so declared by the Council through a supreme decree or Law.²¹⁷

Establishment of ownership of cultural property

Any preservation, restoration or repair of historic monuments has to be previously authorized by the Council of National Monuments and any object found therein may not be removed without the Council's authorization. If the historic monument is an immovable and privately owned, its owner may not destroy, transform or repair without the Council's authorization, who will determine the conditions under which the repair has to be done.²¹⁸ In case a privately owned historic monument is sold, the State will have priority to buy it and will reach a fair price through the use of an expert's estimate.²¹⁹

Regulation of traffic in cultural property

The export of a movable object declared an historic monument is governed by Law No. 16441.²²⁰ It provides that only the President may authorize the export of such objects through a decree justifying the decision and requiring that they have to be kept in a public place or museum and exhibited to the public.²²¹

The expropriation of historic monuments may take place upon the Council's request or through a Law passed by Congress.²²²

The so called public monuments include statutes, columns, fountains, pyramids, plaques or any other memorial object located in a public place. These are considered national property of public use belonging to the Nation. They are not tradable unless they are released of their public character. Only the Council of National Monuments may authorize the construction of such monuments with the approval of its building plan.²²³

Administrative restrictions to preserve archaeological monuments include the prohibition for any individual or company to make archaeological, anthropological or paleontological excavations without the Council's authorization. Any violation will be punished with fines and seizure of the objects in question.²²⁴

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 235.

²²⁰ *Id.* at 233, art. 43.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 236.

²²⁴ *Id.*

Any foreign individual or company pursuing excavations needs an authorization from the Council. The individual or organization must belong to an accredited foreign scientific institution working together with a Chilean counterpart. Violations will be sanctioned with fines and seizure of the findings.²²⁵

The Museum of Natural History is the depository for objects found in archaeological digs. Foreign scientific missions will have the right to keep up to 25% of their findings.²²⁶

In order to protect the areas surrounding archaeological ruins or so declared historic monuments, they may be declared *typical zones*. As such, no new constructions or repairs may be done without the Council's authorization. Commercial advertisements, parking spaces, gas stations, or any electric or telephone cables are also restricted and subject to an authorization.²²⁷

The so called *natural sanctuaries* are special areas of natural or scientific interest that offer a unique possibility for research and study. Natural sanctuaries are also under the strict control of the Council of National Monuments. No activity which may alter the natural environment may be done in such areas. If such protected areas are located on privately owned land, the owner must report any damage thereto to the pertinent authorities.²²⁸

Conclusion

The Chilean Government has shown a great interest in its historic and cultural patrimony. It has been very active in the protection of its cultural property not only at a national level but at the regional level as well.²²⁹

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²²⁵ *Id.*

²²⁶ *Id.* at 237.

²²⁷ Harvey, *supra* note 1, at 238.

²²⁸ *Id.*

²²⁹ E. Harvey, RELACIONES CULTURALES INTERNACIONALES EN IBEROAMERICA Y EL MUNDO (Madrid, 1991).

96-1377

CHINA, PEOPLE'S REPUBLIC OF

Nature and significance of cultural property

Due to its 5,000-year civilization and traditional veneration of the past, China has a wealth of precious cultural objects. According to one survey, there are about 350,000 above-ground sites of immovable cultural relics and more than 10 million movable cultural objects held in museums.²³⁰ "Grade One" cultural relics²³¹ number more than 100,000.²³² At the State level, more than 500 sites have been designated as cultural heritage sites; at the provincial level, more than 5,000; and at the sub-provincial (county) level, more than 50,000; and as of the end of 1992, China had 1,500 museums and memorials.²³³ On July 25, 1991, UNESCO issued China a World Heritage Certificate designating certain places in China as World Heritage Sites. In April 1994, over one thousand historic and archaeological sites were selected for top national protection as well as more funding for repairs.²³⁴ China's State Council has also thus far announced three groups of 99 historical and cultural cities as receiving special protection (e.g., Beijing, Xian, Guilin); and, in April 1995, the Ministry of Construction under the State Bureau of Cultural Relics was reportedly drafting regulations governing the protection of such cities.²³⁵

China had difficulty in protecting its relics in the past. Foreign deprecation in late imperial and early Republican China, combined with government neglect, the collusion of Chinese antique dealers, and an ignorant rural populace, resulted in a large number of precious cultural relics being shipped to foreign countries without authorization and a large number of ancient structures and caves with frescoes and stone carvings being looted or destroyed.²³⁶ During the first quarter of this century, six foreigners in particular,

²³⁰ DONG YAOPENG and ZHANG JIAN, JING MIN FENLI HU GUO BAO—CHUMU JINGXIN DE WENWU ZOUSI AN (Shocking Cases of the Smuggling of Cultural Relics: How the Police and the People Are Struggling to Protect National Treasures) 1 (Beijing, Zhigong Press, 1994).

²³¹ According to art. 2, ¶2, of the Detailed Rules for Implementing the Law of the People's Republic of China on the Protection of Cultural Relics, issued on May 5, 1992, by the State Bureau of Culture, cultural relics are to be divided into valuable cultural relics and ordinary cultural relics, and the former are distinguished into grades 1, 2, and 3. See also below, the section on definition of cultural relics.

²³² DONG & YAO, *supra* note 1, at 3.

²³³ *Id.* at 2.

²³⁴ *Massive Construction, Smuggling Endanger Historical Sites: Protection Announced*, XINHUA (in English), Apr. 7, 1994, as carried in BBC SUMMARY OF WORLD BROADCASTS, Apr. 11, 1994, FE/1968/G.

²³⁵ The Ministry was also slated to issue a white paper on the protection of historical and cultural cities later in 1995. There is a National Committee for the Protection of Historic and Cultural Cities that oversees protective work nation-wide. *Legislation to Protect Historical Cities*, XINHUA (in English), Apr. 17, 1995, as carried in BBC SUMMARY OF WORLD BROADCASTS, Apr. 18, 1995, FE/2280/G (Nexis, Curnws File).

²³⁶ Hou Jukun, *Legal Construction for Protecting China's Cultural Objects*, in *Zhongguo falü nianjian 1988* (Law Year Book of China 1988) 56 (Beijing, Law Year Book of China Press, 1989).

from Sweden, Britain, Germany, France, the U.S., and Japan, "Between them...removed wall-paintings, manuscripts, sculptures and other treasures literally by the ton from the lost cities of the Silk Road" (in Chinese Turkestan).²³⁷ On the other hand, some damage was done by the natives themselves, be it Muslim religious fanatics who defaced Buddhist objects; local farmers who pulled down old ruins to enrich their fields, used fresco pigment for fertilizer and ancient beams for firewood, and irrigated desert areas whose dryness had helped to preserve old structures and artwork; or treasure-hunters.²³⁸

Preserving China's relics has become a government priority in modern China, as large-scale construction threatens historic sites and smuggling and pilfering of relics run rampant due to China's rapidly expanding economy. The Government apparently seeks to engage all Chinese citizens in the protection effort. According to a high-ranking Chinese official, State Councillor and Chinese Communist Party Politburo member Li Tieying, in statements made at the second national conference on the protection of cultural relics, held in early September 1995:

We must reform the old system in which everything is done by the government, and establish a new one in the process of developing socialistic market economy...[I]t is far from enough to rely solely on the government and relics workers, if we wish to protect the plenty of cultural relics of China.... Only by doing so [i.e., mobilizing the whole society to take part] can we fundamentally protect cultural relics from being damaged or smuggled out of the country. The whole society will be mobilized to take part in it.²³⁹

Li added that local economic and social development plans, urban and rural construction programs, and government budgets must include the protection of cultural relics; and he suggested that in relics-rich regions special relics administration committees, headed by leading local officials, be established.²⁴⁰

²³⁷ P. Hopkirk, *FOREIGN DEVILS ON THE SILK ROAD 1* (London, John Murray, 1980. 1982 rpt.).

²³⁸ *Id.* at 3-5.

²³⁹ "Relics Protection To Be the Work of the Whole of Society," *Xinhua*, Sept. 9, 1995, as carried in *BBC SUMMARY OF WORLD BROADCASTS*, Sept. 12, 1995, EE/D2406/G, Nexis (Curnws File). The first such conference was held in May 1992. The following characterization has been made of the current situation in China:

The...[PRC] is undoubtedly now the classic 'source' state: it is a developing country awakening--both at the private and governmental levels--to the economic potential of the antiquities trade; the economic significance of its relics is increasing while their cultural significance is declining; there is a huge supply in government storage and as yet unexcavated or undiscovered in tombs; grave-robbing and museum thefts occur on a massive scale; the PRC is increasingly the target of international smuggling networks (with peasants at the bottom of the period and dealers and collectors at the top); there are inadequate state resources for conservation, archaeology or protection; and there is little hope of effectively enforcing blanket export restrictions. Empirically, the lack of a free licit market has made large scale black marketeering inevitable, with attendant social problems of corruption and the devastation of sites. Many of the current problems and themes in the cultural property area generally are writ large in the PRC.

J. D. Murphy, *The Imperilment of Cultural Property in the People's Republic of China*, *UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW* 91-92 (Special Issue, 1995).

²⁴⁰ *Id.*

The PRC's first decrees on the protection of cultural relics were the Provisional Measures for Prohibiting the Export of Precious Cultural Relics and Books and the Provisional Measures on the Survey and Excavation of Ancient Cultural Ruins and Ancient Tombs, both issued by the Administration Council of the Central People's Government on May 24, 1950.²⁴¹ In July 1960, two documents were issued whose basic principles continue to be followed to this day, namely, "Certain Views on the Standards for Authenticating Cultural Objects for Export" and "Reference Criteria for Authenticating Cultural Objects for Export." However, the first comprehensive and systematic law on the preservation of cultural relics was the Provisional Regulations on the Management of Preservation of Cultural Objects (*Wenwu baohu guanli zhanxing tiaoli*), adopted by the State Council on November 17, 1960, and formally promulgated on March 4, 1961.²⁴² While laws and regulations on the protection of cultural relics continued to be promulgated into the early 1960s, with the advent of the Great Proletarian Cultural Revolution (1966-1976), legislation slowed. Relics prized by *feudal* China became the special target of this movement launched by Mao Zedong to revitalize Chinese society and consolidate his power:

The masses in effect turned upon their own cultural heritage in a manner rarely witnessed in other societies. Vast numbers of sites, regarded by the Red Guards as reactionary monuments to 'old' thinking and feudalism, were obliterated. The so-called 'house raids,' conducted on a wide scale, resulted in privately owned antiques being carried off and destroyed. Intellectuals attempted, usually in vain, to avoid Red Guard harassment by destroying their own libraries and art collections. Enormous quantities of relics were lost.²⁴³

The destruction could have been worse but for the intervention of Zhou Enlai and a few other leaders and the issuance on May 14, 1967, possibly at Zhou's instigation, of a State Council Opinion Concerning the Protection of Cultural Relics and Books in the Cultural Revolution.²⁴⁴

It has been in the aftermath of the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party held in December 1978 and the coming to power of the Deng Xiaoping regime that laws and regulations on the subject have burgeoned. More recently, given the increased urgency of protecting cultural relics in a market economy and the quantity of national and local laws and regulations that have been

²⁴¹ LEGAL AFFAIRS COMMISSION OF THE MINISTRY OF JUSTICE, *comp.*, ZHONGHUA RENMIN GONGHEGUO FAGUI MULU (1949-1982) (List of Laws and Regulations of the People's Republic of China (1949-1982)) 295 (Beijing, Legal Press, 1984). The earliest enacted items of legislation in China on the subject of cultural property are apparently the Law on the Preservation of Ancient Objects, issued on June 7, 1930, and its detailed rules of implementation, issued on July 3, 1931 [Note: p. 81 gives 1930), during the Republican period. J. D. Murphy, PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA 183 (Hong Kong, Oxford University Press, 1995).

²⁴² Law Year Book of China 1988, *supra* note 7. The Provisional Regulations were in 18 articles. For the Chinese text, see BUREAU FOR THE MANAGEMENT OF STATE CULTURAL RELIC ENTERPRISES, *comp.*, XIN ZHONGGUO WENWU FAGUI XUANBIAN (Compilation of Selected Laws and Regulations for the Protection of the Cultural Relics of New China) 44-48 (Beijing, Cultural Relics Press, 1987) (Compilation). At the same time, the State Council issued the Notification Concerning the List of Sites for Protection of Key Cultural Objects and the Directive on Strengthening the Management Work of Preserving Cultural Objects.

²⁴³ Murphy, *supra* note 12, at 48-49. In a footnote, Murphy observes that "One may compare the Cultural Revolution with the Reign of Terror in eighteenth-century France which also led to widespread destruction of sites, fine art, and cultural objects in a 'politicization of culture,' which spawned a heritage preservation movement" [Fn. 12, at 71].

²⁴⁴ *Id.* at 49-50.

issued as a result, there have even appeared special publications on the subject, e.g., *Compilation of Selected Laws and Regulations for the Protection of New China's Cultural Relics*.²⁴⁵

The Constitution of the PRC as well as the Criminal Code have specific provisions protecting cultural objects. However, the most important single law for the purpose of protecting cultural objects is the Law of the People's Republic of China on the Protection of Cultural Relics (*Zhonghua Renmin Gongheguo wenwu baohu fa*, Relics Law), adopted in November 1982. The Relics Law is in 33 articles divided among eight chapters. It covers general principles, sites to be protected, archaeological excavation, cultural relics in institutional collections, cultural relics in private collections, removal of relics from China, awards and punishments, and supplementary provisions. The Detailed Rules for implementation of the Relics Law, in eight chapters (all but the second, on cultural relic protection units, correspond to the chapter topics of the Law) and 50 articles, were issued on May 5, 1992, by the State Bureau of Cultural Relics.²⁴⁶

Definition of *cultural property*

According to a recent monograph on cultural property in the PRC:

The terminology used in the People's Republic of China is normally 'cultural relics' rather than cultural property. This no doubt reflects the fact that, notwithstanding that there can be private ownership of relics, there is also a substantial degree of state ownership and, perhaps more importantly, a very significant assertion of state control by way of 'protection.'²⁴⁷

Under the Relics Law, five categories of "cultural relics of historical, artistic, and scientific value" are to be protected by the State. They include:

- sites of ancient culture, ancient tombs, ancient architectural structures, cave temples and stone carvings that are of historical, artistic or scientific value;
- buildings, memorial sites and memorial objects related to major historical events, revolutionary movements or famous people that are highly memorable or are of great significance for education or for the preservation of historical data;
- valuable works of art and handicraft articles dating from various historical periods;
- important revolutionary documents as well as manuscripts and ancient or old books and materials, etc., that are of historical, artistic or scientific value; and

²⁴⁵ Compilation, *supra* note 13. The book, which is 331 pages long, includes 92 items of laws, regulations, circulars, etc., dealing with cultural property.

²⁴⁶ For a bilingual text, see CHINA LAWS FOR FOREIGN BUSINESS ¶ 14-600 (CCH Australia, 1989-) (loose-leaf) [hereinafter CLFB].

²⁴⁷ Murphy, *supra* note 12, at 199.

- typical material objects reflecting the social system, social production or the life of various nationalities in different historical periods.²⁴⁸

The Relics Law further provides that "The criteria and measures for the verification of cultural relics are to be formulated by the state department for cultural administration, which shall report them to the State Council for approval."²⁴⁹ Verification here means assessment and grading; "precious" cultural relics are those of the First, Second or Third Grades as established and verified by the State Bureau of Cultural Relics, as opposed to "ordinary" cultural relics, but there are apparently no clear criteria to determine a relic's grade.²⁵⁰ The Relics Law also provides that "Fossils and paleovertebrates and paleoanthropoids of scientific value shall be protected by the state in the same way as cultural relics."²⁵¹

In the Administrative Rules of the People's Republic of China on the Protection of Underwater Cultural Relics (promulgated by the State Council on October 20, 1989), there is a definition of *underwater cultural relics* as "man-made cultural relics of historic, artistic or scientific value," subsumed under the following categories:

- (1) all cultural relics originating in China, a foreign country or of unclear origin which are found in China's inland waters and territorial waters;
- (2) all cultural relics originating in China or of unclear origin found in other areas of water which are outside China's territorial waters, but under China's jurisdiction pursuant to Chinese law; and

²⁴⁸ Art. 2, ¶ 1, Law of the People's Republic of China on the Protection of Cultural Relics, adopted on Nov. 19, 1982, at the 25th Meeting of the Standing Committee of the National People's Congress and promulgated and effective the same day; articles 30 and 31 were amended on June 29, 1991. For the original text in English translation, see THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) 313-314 (Beijing, Foreign Languages Press, 1987) (LPRC). For an English translation of the amended articles, see Foreign Broadcast Information Service, DAILY REPORT: CHINA, July 2, 1991, at 28-30 (FBIS). For a bilingual version of the Detailed Rules for Implementing the Law of the People's Republic of China on the Protection of Cultural Relics, which were issued on May 5, 1992, by the State Bureau of Culture, see CLFB, *supra* note 17, at ¶ 14-600.

²⁴⁹ *Id.* art. 2, ¶ 3.

²⁵⁰ Murphy, *supra* note 12, at 86 and 59-60. He also states: "The 1987 Ministry of Culture Circular, the Ranking and Standard of Cultural Relics, purported to provide criteria, but these are very vague and general and largely adopt wording from the definition of cultural relics in the 1982 *Cultural Relics Law*. Grade One relics are those which are strong symbols of Chinese culture, and are rare. Second Grade Relics include those with 'important' historic or scientific value, but which are widely found. Otherwise, those of 'fair historic or scientific importance are included. 'Works of famous artists' also fall into this class. Relics of the Third Grade are those of lesser importance and include important relics 'with certain defects.' In practice, the grade of a relic depends upon the subjective views of a panel of the State Bureau of Cultural Relics, based upon the item's perceived historical, artistic, or scientific importance." *Id.* at 60. The Circular was issued on Feb. 3, 1987. For the Chinese text, see COMPILATION, *supra* note 13, at 318-321.

²⁵¹ *Supra* note 19, Relics Law, art. 2, ¶ 3.

- (3) all cultural relics originating in China which are found in waters outside the territorial waters of foreign countries or on the high seas.²⁵²

The Rules stipulate, however, that post-1911 underwater relics that are "not relevant to important historical incidents, revolutionary movements or famous people" are not included in the above.²⁵³ The relics described in categories (1) and (2) belong to the State; the State has the right to determine ownership of items classified under (3).²⁵⁴

Establishment of ownership of cultural property

Under Chinese law, there is provision for both State ownership and private ownership of cultural relics. However, as one recent study states, "While private property rights in cultural property exist, they are severely emasculated."²⁵⁵

State ownership

All cultural relics underground or in the inland waters or territorial seas within the boundaries of the PRC are owned by the State.²⁵⁶ Sites of ancient culture, ancient tombs, and cave temples are also State-owned; so are memorial buildings, ancient architectural structures, stone carvings, etc., designated for State protection (unless governed by other State regulations).²⁵⁷ In addition, cultural relics in collections of State organs, the armed forces, State-owned enterprises, and public institutions are owned by the State.²⁵⁸ Sales of cultural relics in museum, library, and other State-owned institutional collections is prohibited.²⁵⁹

Collective and individual ownership

Ownership of memorial buildings, ancient architectural structures, and cultural relics handed down from generation to generation that belong to collectives or individuals are to be protected by State laws. Owners of cultural relics must abide by the relevant State regulations governing their protection and control.²⁶⁰ The Law provides that cultural relics held in private collections may only be purchased by units designated by the cultural administration departments; no other unit or individual may engage in the business of

²⁵² Art. 2, ¶ 1. For a bilingual text, see CLFB, *supra* note 17, at ¶ 14-592.

²⁵³ *Id.* art. 2, ¶ 2.

²⁵⁴ *Id.* art. 3.

²⁵⁵ Murphy, *supra* note 12, at 87.

²⁵⁶ *Supra* note 19, Relics Law, art. 4, ¶ 1.

²⁵⁷ *Id.* art. 4, ¶ 2.

²⁵⁸ *Id.* art. 4, ¶ 3.

²⁵⁹ *Id.* art. 23.

²⁶⁰ *Id.* art. 5.

purchasing cultural relics.²⁶¹ The resale for profit of cultural relics held in private collections is strictly forbidden, as is their private sale to foreigners.²⁶² It may also be noted that, according to article 3 of the Inheritance Law, cultural objects may be inherited.²⁶³

Regulation of traffic in cultural property

The Constitution of the PRC provides that "The state protects sites of scenic and historical interest, valuable cultural monuments and relics and other significant items of China's historical and cultural heritage."²⁶⁴ It was reported in July 1995 that China exports between 300,000 and 400,000 cultural relics every year, via some 100 State-run cultural relics stores throughout the country and eight experimental auctioneers, and that some private markets for cultural relics under the supervision of the cultural relics administration have also been established.²⁶⁵

Deputy-Director of the State Bureau of Cultural Relics Ma Zishu has been quoted as saying that "China is suffering from serious losses of precious cultural relics, partly because of the problems that exist in the cultural relics market;" e.g., the State stores, which were previously export-oriented and also played a major role in purchasing precious relics and offering them to museums, have shifted their focus to domestic buyers, and are facing increasing costs, inefficient operations, and the drying up of sources.²⁶⁶ In addition, the cultural relics auction market is overheated. Various measures are being taken to cope with the problem. China is to hold to the legal limits established on exportation of cultural relics and improve the registration system of precious items bought by individuals. The Government has stipulated that cultural relics made before 1795 cannot be taken abroad except with special permission; that those made from 1795-1949 will only be exportable depending upon the historical, scientific, and artistic value and the number of similar relics extant; and that privately-run businesses can only sell relics made from 1911 to 1949, if they have no great historical, scientific, or artistic value.²⁶⁷ In addition, a coordinating management group comprised of

²⁶¹ *Id.* art. 24.

²⁶² *Id.* art. 25.

²⁶³ Art. 3(4) lists "cultural objects, book and reference materials." The Law was promulgated on Apr. 10, 1985, and effective as of Oct. 1, 1985. For the text in English translation, *see* 2 LPRC 1983-1986, *supra* note 19, at 169-175.

²⁶⁴ Art. 22 of the Constitution of the PRC, adopted by the National People's Congress on Dec. 4, 1982; last amended on Mar. 29, 1993. For an English translation of the article, *see* 1 LPRC, *supra* note 19, at 10. (Note: art. 22 was not among those amended in 1988 and 1993). For the Apr. 1988 amendments to articles 10 and 11, *see* insert provided by Foreign Languages Press; for the Mar. 1993 amendments to the Preamble and to articles 7, 8, 15-17, 42, and 98, *see* FBIS, Mar. 30, 1993, at 42-43.

²⁶⁵ *Inter-Agency Group Set Up To Stem 'Serious Losses of Precious Cultural Relics,'* XINHUA (in English), July 26, 1995, as carried by BBC SUMMARY OF WORLD BROADCASTS, July 29, 1995, FE/2368/G. According to the article, the State stores had sales valued at 160 million yuan in 1994, and the value of objects sold at auction almost equalled that amount.

²⁶⁶ *Id.*

²⁶⁷ *Id.* The article points out, in regard to the last measure, "but some relics, outside the limit, even some newly unearthed ones, are already circulating in the market."

personnel from the State Bureau of Cultural Relics, the State Bureau of Public Security, the State Bureau of Industry and Commerce, and the General Customs Administration of China has been set up.²⁶⁸

According to the 1982 Relics Law, it is prohibited to take out of China any cultural relics of significant historical, artistic, or scientific value, with the exception of those to be shipped abroad for exhibition with State Council approval.²⁶⁹ Any cultural relics that are to be exported or taken out of China by individuals must be declared to Customs in advance and examined by the provincial-level (also autonomous region or municipality directly under the Central Government) cultural administration department administration department designated by the State-level cultural administration department before an export certificate is granted.²⁷⁰ There are certain designated ports at which cultural relics must be shipped out. If, after examination, a cultural relic is not allowed out of the country, it may be requisitioned by the State through purchase.²⁷¹

As for the kind of items subject to export control, the Provisional Measures Prohibiting the Exportation of Precious and Valuable Art Objects, Pictures, and Books has the following list of eleven categories: remains or fossils of ancient animals or plants; remains and fossils of prehistoric man and objects used by him; buildings, models of buildings and things attached to such buildings; paintings (including early works of art, murals, and embroidered, woven, or lacquered paintings, etc. of high artistic value); sculptures (reliefs, carvings of high artistic value, statues for religious worship, fine ancient carvings of various media); inscriptions and carvings (on bones or tortoise shells of the Shang Dynasty, 16th to 11th century B.C.); imperial and official seals, tallies, and other ancient inscriptions and epigraphs on various materials; books (bamboo slips of ancient documents, books, files of high historical value, calligraphy by famous masters and rubbings from valuable carvings); coins; vehicles and garments; tools and instruments (musical as well as religious and utilitarian).²⁷² On March 1, 1993, China implemented new lists of goods prohibited or limited for import and export (replacing lists that went into force on November 1, 1987). Among the items prohibited for export are "valuable cultural relics and other cultural relics that are prohibited from being exported." Restricted exports include "ordinary cultural relics and other export products restricted by Customs."²⁷³

There are certain criteria for the kinds of cultural relics (including those passed down from former generations and those unearthed) that may be exported if special permission is granted. They are set forth in the Trial Measures for Control of the Export of Cultural Relics with Special Permission.²⁷⁴ The exportable

²⁶⁸ *Id.*

²⁶⁹ *Supra* note 19, Relics Law, art. 28.

²⁷⁰ *Id.* Relics Law, art. 27.

²⁷¹ *Id.*

²⁷² Art. 2. The Measures were issued on May 24, 1950, by the Administration Council of the Central People's Government (the precursor of the State Council). See L. V. Prott and P. J. O'Keefe, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 47 (UNESCO, 1988). The authors give a complete translation; it is somewhat abbreviated here in terms of specific items (but all the categories are given).

²⁷³ Murphy, *supra* note 12, at 196.

²⁷⁴ Approved and promulgated by the State Council on July 31, 1979. For an English translation, see Bureau of Legislative Affairs of the State Council of the People's Republic of China, *comp.*, 3 LAWS AND REGULATIONS OF THE PEOPLE'S

relics are those that are 1) replicated in large numbers and are overstocked; 2) unearthed during archaeological excavations and, after the completion of scientific research, are no longer of value for domestic preservation; 3) below the third-class as specified in the classified criteria of assessment for museums formulated by the State and that also satisfy criteria (1) and (2). It is further stipulated that in assessing those relics that are to be exported, any object whose authenticity is hard to determine right away or is in dispute will temporarily not be exported.²⁷⁵

Among the eight types of unacceptable acts involving the handling of cultural relics for which administrative sanctions may be imposed under the Relics Law is the sale of individual collections of cultural relics to foreigners, for which a fine will be imposed and the relics and unlawful income may be confiscated.²⁷⁶ Criminal penalties may be imposed for five types of activities, including, among others, embezzlement or stealing of State cultural relics, smuggling of rare and precious relics out of China or engaging in grave speculative activities involving cultural relics, and dereliction of duty by State personnel resulting in serious damage or loss of rare and precious cultural relics.²⁷⁷ If State institutions sell or give away, without authorization, cultural relics in their collection to a non-State unit or an individual, the person in charge or directly responsible will be investigated and punished for criminal responsibility under the Criminal Law provision on dereliction of duty resulting in major losses to the State.²⁷⁸ State functionaries who abuse their power by embezzling State cultural relics will be punished for graft.²⁷⁹ The Relics Law also provides that the unauthorized selling or giving away, by individuals or organizations, of rare and precious relics in their collections that are banned for export to foreigners will be treated as smuggling,²⁸⁰ and that curators who steal the relics under their care will also be severely punished.²⁸¹

REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 1810-1811 (Beijing, The China Legal System Publishing House, July 1991).

²⁷⁵ *Id.* Item 3, at 1810.

²⁷⁶ *Supra* note 19, Relics Law, art. 30, ¶1, item (7).

²⁷⁷ *Id.* art. 31, ¶1, items (1), (2) & (5).

²⁷⁸ *Id.* art. 31, ¶2. Art. 187 of the Criminal Law ("State personnel who, because of neglect of duty, cause public property or the interests of the state and the people to suffer major losses, are to be sentenced to not more than five years of fixed-term imprisonment or criminal detention"). *THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA 62* (Beijing, Foreign Languages Press, 1984) (CLCPLC). This is a bilingual publication.

²⁷⁹ *Id.* art. 31, ¶3.

²⁸⁰ *Id.* art. 31, ¶4. *See also* in particular arts. 116, 118, and 119 of the Criminal Law on smuggling. If the circumstances are serious, the smuggled items will be confiscated, a fine possibly imposed, and the smuggler will be subject to a maximum of three years of imprisonment or criminal detention and possible confiscation of property (art. 116); in the case of occupational smugglers or the ringleader of a smuggling group, the sentence imposed is to be at least three years of imprisonment but not more than ten and possible confiscation of property (art. 118). CLCPLC, at 43.

²⁸¹ *Id.* Relics Law, art. 31, ¶5.

Two articles, 173 and 174, of the Criminal Law²⁸² deal with cultural relics. Article 173 sets forth basic punishments for those who steal and export precious relics.

Whoever violates the laws and regulations on protection of cultural relics, stealing and exporting precious cultural relics, is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment, and may in addition be sentenced to a fine; when the circumstances are serious, the sentence is to be not less than ten years of fixed-term imprisonment, life imprisonment or death [as amended by the 1982 Decision, cited below] and the offender may in addition be sentenced to confiscation of property.²⁸³

The 1982 Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Seriously Undermine the Economy²⁸⁴ not only adds the death penalty to various provisions of the Criminal Law, including article 173 (as well as article 118 on smuggling and speculation and article 152 on theft), but also stipulates:

State personnel who take advantage of their office to commit the crimes listed in the preceding paragraph [the paragraph lists crimes in various articles, including article 173, and amends the punishment for serious violations to include the death penalty], when the circumstances are particularly serious, are to be given a heavier punishment in accordance with the stipulations of the preceding paragraph. State personnel referred to in this decision include personnel working in state organs of power at all levels, administrative organs at all levels, judicial organs at all levels, the armed forces, state enterprises, and state institutional organizations, and other personnel of all types who are engaged in public service according to law.²⁸⁵

As an example of a recent application of the law, in June 1995 it was reported that on May 25th, the 12 main culprits of "three extraordinarily big criminal gangs stealing and smuggling cultural relics" were sentenced to death and other culprits were sentenced to life imprisonment or lengthy prison terms, according to a Supreme People's Court announcement.²⁸⁶

²⁸² CLCPLC, *supra* note 49, at 1-110.

²⁸³ *Id.* at 59.

²⁸⁴ The Decision was adopted by the 22nd Session of the Standing Committee of the Fifth NPC on Mar. 8, 1982, for implementation as of Apr. 1, 1982. For the text, *see id.* at 228-233.

²⁸⁵ *Id.* at 230.

²⁸⁶ 'Renmin Ribao' on Combating Theft of Relics: 'No Demons Are Unbeatable', BBC SUMMARY OF WORLD BROADCASTS, June 9, 1995, FE/2325/G, Nexis (Curnws File). The article is based on excerpts from a May 26th report in RENMIN RIBAO.

Other protections for cultural property

Protection in time of war

China is a signatory to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and to its Protocol. The documents were signed by China's representative, Chen Yuan, on the date of their completion, May 14, 1954. However, China has not yet ratified the Convention.

Protection against theft, sabotage, and profiteering

With China's opening to the outside world, theft of cultural relics, as well as smuggling, have become serious problems. As one scholar noted recently, "Looting of tombs and graves has taken place on a massive scale and continues despite Beijing's efforts to contain it," complicated by the fact that "Hong Kong is an ideal conduit because of its proximity, its local expertise in Chinese antiquities, its large number of dealers and buyers and its relatively open border," as well as much more lax controls.²⁸⁷

As part of an attempt to combat the problem of pilferage, on June 29, 1991, articles 30 and 31 (already cited above) of the Relics Law were tightened with the addition of items to broaden their scope of coverage. Five new types of acts were added to the three categories of acts entailing administrative sanction originally listed under article 30, paragraph 1, and a new paragraph was added (allowing the party involved to request reconsideration of the decision or file a suit should he disagree with the penalty meted out). Article 31, on criminal responsibility, was also strengthened.

According to article 174 of the Criminal Law, "Whoever intentionally sabotages precious cultural relics or places of historic interest or scenic beauty protected by the state is to be sentenced to not more than seven years of fixed-term imprisonment or criminal detention."²⁸⁸ In 1987, the State Council issued a Notice on Further Strengthening Cultural Relics Work, which prescribed heavy penalties in cases of "criminal elements stealing cultural relics, privately digging up ancient tombs, smuggling cultural relics, and using such relics for speculation and profiteering;" "in no way should economic [administrative] punishment be given instead of criminal punishment."²⁸⁹ Soon afterwards, a joint Explanation was issued by the Supreme People's Court and the Supreme People's Procuratorate, stating, *inter alia*, that "the value or grade of the relics should be a prime factor in sentencing."²⁹⁰ If relics from a museum were stolen, the guidelines for punishment

²⁸⁷ J. Manthorpe, *Looting of China's Antiquities a Grave Problem*, CALGARY HERALD (Dec. 10, 1995), at A10. Manthorpe was quoting David Murphy, a law professor in Hong Kong, who has written a book (cited elsewhere in this report) on China's cultural property regime. Reportedly, "Hong Kong has virtually no import or export controls aimed at art and cultural property. The territory's authorities usually return smuggled antiquities they have seized to China. Otherwise the relics are regarded as 'home free' when they find their way into the hands of dealers." Moreover, "The generally low sentences meted out by Hong Kong courts, usually fines of around \$10,000, suggest that the smuggling of antiquities is regarded as a minor crime." V. Chiu, *Smugglers Robbing China of Its Heritage*, SOUTH CHINA MORNING POST (Oct. 23, 1995), at 17.

²⁸⁸ CLCPLC, *supra* note 49, at 59.

²⁸⁹ Murphy, *supra* note 12, at 110-111. The document was issued on Nov. 24, 1987. For the Chinese text, *see* 28 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO (Gazette of the State Council of the People's Republic of China) 923-931 (Dec. 15, 1987) (State Council Gazette).

²⁹⁰ Murphy, *id.* at 111. He points out that "There was apparently no consideration given to whether the accused could ever know the grade at the time of the commission of the offence; indeed, it is clear that in many cases the state itself does not

would be as follows: five years or less for Grade Three relics; five to ten years for Grade Two relics; and ten years or more for Grade One relics, with the possibility, in serious cases, of life imprisonment or the death penalty.²⁹¹ In 1988, the Supplementary Provisions Concerning the Punishment of Smuggling stipulated in article 2:

Whoever smuggles cultural relics...shall be sentenced to fixed-term imprisonment of not less than five years, and shall concurrently be sentenced to a fine or confiscation of property; if the circumstances are especially serious, the offender shall be sentenced to life imprisonment or the death penalty, and shall concurrently be sentenced to confiscation of property; if the circumstances are relatively minor, the offender shall be sentenced to fixed-term imprisonment of not more than five years, and shall concurrently be sentenced to a fine.²⁹²

The Provisions further prescribe that in cases involving State enterprises, the responsible officers will be punished as if they themselves had committed the smuggling.²⁹³

Another effort to crack down harder on relic thefts was made in 1991, in tandem with the amendment of articles on punishments in the Relics Law itself, noted above. The Supplementary Regulations Concerning Punishments for Crimes of Burglarizing Ancient Cultural Sites or Ancient Tombs were adopted by the NPC Standing Committee on June 29, 1991. They provide as follows:

He who burglarizes ancient cultural sites or ancient tombs that have historical, artistic, or scientific value shall be sentenced to imprisonment of three years or longer, but not more than 10 years, and may also be fined. If the case is relatively minor, he shall be sentenced to imprisonment or criminal detention for up to three years and may also be fined. People who have committed one of the following shall be sentenced to imprisonment for 10 years or more, life imprisonment, or death, and be fined or [have] their property confiscated:

1. He who burglarizes ancient cultural relics or ancient tombs that designated major national or provincial cultural relics;
2. Ringleaders who have burglarized ancient cultural sites or ancient tombs;
3. He who has burglarized ancient cultural sites or ancient tombs many times; and
4. He who burglarized ancient cultural sites or ancient tombs, steals their valuable relics, or seriously ravages valuable cultural relics.

know until after the 'verification' process carried out as part of the criminal investigation and prosecution."

²⁹¹ *Id.*

²⁹² 3 LPRC (1987-1989) 127 (1990). The Decision was adopted on Jan. 21, 1988, at the 24th Session of the Standing Committee of the Sixth NPC. See also Murphy, *id.* at 111-112. For the Chinese text, see 3 STATE COUNCIL GAZETTE 75-78 (Feb. 20, 1988).

²⁹³ *Id.* art. 5 of the Decision.

All cultural relics stolen from burglarized ancient cultural sites or ancient tombs shall be recovered.²⁹⁴

Rampant corruption has also become a problem in China's socialist market economy. Among the many measures enacted to cope with it are the Interim Regulations on the Administrative Sanction on Speculation and Profiteering, which characterizes the resale of cultural relics as an act of "disrupting the socialist economic order in breach of the state statutes and policies to solicit illegal profits," thus constituting an act of speculation and profiteering.²⁹⁵

Salvage

According to the Administrative Measures on Foreign Businesses Taking Part in the Salvage of Sunken Ships or Artifacts in China's Coastal Waters, "Sunken ships or boats with important military value, sunken weapons and military equipment, and sunken vessels and other objects confirmed to be historical relics are not included in items which may be salvaged by foreign businessmen."²⁹⁶

Repatriation of cultural property removed abroad

The following observation has been made about Chinese repatriation of cultural property:

It is noteworthy that there are relatively few accounts of PRC demands for restitution or repatriation of Chinese cultural property. The strategy instead seems to be to emphasize the cultural value and significance of the Chinese relics in foreign collections and to negotiate with the governments involved for technological and financial support in exchange. There have been a few instances in which the PRC government has traded duplicate pieces in its state collections for antiquities in private foreign collections.... Increasingly, foreigners, especially overseas Chinese, are using the donation of cultural property to China as a means of ingratiating themselves for business or other purposes.²⁹⁷

In recent years, there have been a few instances in which China has requested the return of a relic alleged to have been stolen from the State. In one case, "informal negotiations" were conducted to secure the return of an item from a PRC museum that was spotted in a Hong Kong exhibition. In another case, diplomatic intervention was used; in seeking the return of the relic, China, although not a party at the time,

²⁹⁴ XINHUA, June 29, 1991, as translated in FBIS, July 2, 1991, at 28.

²⁹⁵ Art. 3, ¶1, item (4). The Regulations were promulgated by the State Council on Sept. 17, 1987. For an English translation, see STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 870917 (Hong Kong, UEA Press, 1987-1989) (loose-leaf).

²⁹⁶ Art. 3, ¶2. The Measures were promulgated by the State Council on July 12, 1992. According to ¶1 of the same article, "Sunken vessels and other objects refer to various kinds of vessels and objects beneath the water's surface or under the silt of the sea bed of Chinese coastal waters, including the main bodies and equipment of sunken vessels or objects and all cargo or other things carried by them." For the English translation, see BBC SUMMARY OF WORLD BROADCASTS, Aug. 1, 1992, FE/1448/C1/1, as carried in Nexis (Curnws File). The BBC source was XINHUA (in Chinese), July 24, 1992.

²⁹⁷ Murphy, *supra* note 12, at 162-163.

expressly relied on the 1970 UNESCO Convention. A few days after the news account of the incident, the PRC acceded to the Convention.²⁹⁸

Other laws establishing and/or protecting cultural heritage

Conventions

On November 28, 1989, China acceded to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970;²⁹⁹ the Convention took effect in China on February 28, 1990.³⁰⁰

China became a party to the World Heritage Convention on December 12, 1985, effective as of March 12, 1986.³⁰¹

Chinese representatives were members of the Drafting Committee of the International Institute for Unification of Private Law ("UNIDROIT") Convention on Stolen or Illegally Exported Cultural Objects. The final draft of the UNIDROIT was completed at Rome on June 24, 1995, but it is yet unclear whether China was among the 37 states that approved the Convention.³⁰²

Selected domestic legislation³⁰³

China has issued a great number of laws and regulations relating to cultural property. Among them are the following:

- The Auction Law (now under consideration); the Guangdong Province Property Auction Regulations, effective as of March 1, 1994, are apparently a "test set of regulations governing auctions of movable and immovable property."³⁰⁴
- Regulations Governing the Protection of Historic and Cultural Cities (being drafted as of April 1995).

²⁹⁸ *Id.* at 146-147.

²⁹⁹ 823 UNTS23. The Convention was signed on Nov. 14, 1970, and went into effect on Apr. 24, 1972.

³⁰⁰ ZHONGGUO FALÜ NIANJIAN 1990 (Law Year Book of China 1990) 661 (Beijing, Law Year Book of China Press, Nov. 1990).

³⁰¹ The Convention was done at Paris on Nov. 23, 1972, and entered into force on Dec. 17, 1975 (27 UST 37; TIAS 8226). *See also* UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE (as of Jan. 1, 1995), at 446; M. Swadling, *ed.*, MASTERWORKS OF MAN & NATURE: PRESERVING OUR WORLD HERITAGE 424-428 (Patonga, Australia, Harper-Macrae Publishing Pty. Ltd., 1992).

³⁰² Five states opposed the Convention (e.g., Egypt, Greece) and 17 (including the U.S., Japan, and many Western European states) abstained. 34 I.L.M. 1322 (1995).

³⁰³ For a long list of statutory and other materials relating to cultural property, *see* the annotated chronological index provided as Appendix II in Murphy, *supra* note 12, at 183-197.

³⁰⁴ *Id.* at 197. The Regulations were adopted by the 6th Session of the Standing Committee of the Eighth Guangdong People's Congress on Jan. 18, 1994, and promulgated on Feb. 8, 1994.

- Trial Measures on the Storage of Cultural Relics in Museums (State Bureau of Cultural Relics, January 20, 1978).
- Regulations on the Work of Provincial, Municipal and Autonomous Region Museums (State Bureau of Cultural Relics, June 29, 1979).
- Trial Measures on the Sale of Cultural Relics to the Public Within the Country by Cultural Relics Shops (Ministry of Culture, June 18, 1987).
- Procedures for Financial Administration of Cultural Relics, Museum Business Units (State Bureau of Cultural Relics, January 1, 1990).
- Regulations of the PRC Governing Control Over Outward Cultural Relics Carried or Shipped by Passengers and Posted by Individuals (General Administration of Customs, February 15, 1985).
- Measures on the Administration of Export Verification for Cultural Relics (Cultural Department, February 27, 1989).
- Provisional Measures Governing the Investigation and Excavation of the Sites of Ancient Cultural Ruins and Ancient Graves and Burial Grounds (May 24, 1950).
- Trial Measures on the Regulations and the Procedures for Archaeological Work in Rural Areas (Ministry of Culture, May 10, 1984).
- Trial Measures on the Provisions for the Work of the Archaeological Research Centers in Provinces, Autonomous Regions and Municipalities (Ministry of Culture, May 19, 1986).
- Procedures for the Administration of the Fixing and Estimating of Expenses for Archaeological Investigation, Survey and Excavation (State Bureau of Cultural Relics, April 20, 1990).
- Administrative Measures of the PRC on Foreign Archaeological Work (State Bureau of Cultural Relics, February 22, 1991).
- Interim Provisions on the Use of Cultural Relics and Monuments in the Shooting of Feature Films for Motion Pictures and Television (Ministry of Culture, December 11, 1984); there is also a set of more detailed provisions issued on April 19, 1985.

There are also applicable provisions, among others, in the Customs Law (January 22, 1987) and various rules and regulations on customs; Interim Provisions on Strengthening the Administration of Publication in Co-operation With Foreign Countries (State Cultural Relics Administrative Bureau, January 15, 1981) (has sections on the right to reproduce likenesses or relics); Regulations on the Control of Gold and Silver (State Council, August 15, 1983) and their Detailed Rules for Implementation (January 1, 1984); the Mineral Resources Law (March 19, 1986); the Archives Law (September 5, 1987); the Law on

environmental Protection (December 26, 1989). Numerous circulars have been issued relating to cultural relics³⁰⁵ and there are also a large number of regulations issued at the provincial³⁰⁶ and local level.

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³⁰⁵ For example, a relatively recent one is the Circular of the State Council on a Report of the Ministry of Construction and the State Cultural Relics Administration for the Approval of the Third Batch of State-Class Famous Historical and Cultural Cities and Their Improved Protection, issued by the State Council on Jan. 4, 1994. The Report itself, dated June 10, 1993, was published in the same issue of the State Council Gazette. 1 STATE COUNCIL GAZETTE 15-16, 16-22 (Mar. 8, 1994). The Circular of the General Office of the State Council on Strengthening the Protection and Preservation of Scenic Spots and Places of Historical Interest was issued on Mar. 30, 1995. 10 STATE COUNCIL GAZETTE 390-391 (May 10, 1995).

³⁰⁶ For example, it was reported in December 1994 that Beijing (a municipality under the direct control of the central government, with the same status as a province), which has more than 80 museums, had issued three new sets of rules on the control of cultural relics, focusing on registration of museums (in the face of more applications to open private museums), duplication of famous precious relics, and museum management of cultural relics. According to an official cited in the article, Beijing has issued "a dozen sets of regulations on the protection of cultural relics since 1978 and four more new rules on the control of cultural relics will be issued." *Rules on Cultural Relics To Take Effect in Beijing*, XINHUA (in English), Dec. 6, 1994, as carried in BBC SUMMARY OF WORLD BROADCASTS, Dec. 8, 1994, FE/2173/G.

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COLOMBIA**Introduction**

Colombian legislation on cultural property has suffered from the same weaknesses and deficiencies as in other countries in the region. This was mainly due to the lack of knowledge about effective laws which are not unified in a single legislative body of rules. Permits to exploit Indian tombs are granted based on the Mining Code provisions instead of applying specific legislation. Private individuals believe that they are the sole owners of what is found on their property without any restrictions. The Government has no funding for permanent surveys of the countryside to prevent clandestine excavations. The Government lacks funding to fully and appropriately compensate for expropriations of cultural treasures in private hands, which leads to an unrestricted trade of archeological objects in the interior of the country. Finally, the Government only has a limited number of technicians who are devoted to research and exploration.³⁰⁷

These negative circumstances have worsened as a consequence of the intense illegal trafficking of cultural assets worldwide due to the increase economic value of art objects on the international market.³⁰⁸

These circumstances lead to the conclusion that a comprehensive new legislative approach in the regulation of cultural property has to be coupled with economic and financial support in order to efficiently challenge international speculation.³⁰⁹

Cultural property legislation

Law No. 163 of December 30, 1959, provides for the regulatory legal framework of cultural property in Colombia. It declared as national historic and artistic patrimony all monuments, pre-hispanic tombs and other objects, either natural or man made with special interest to the study of past civilizations and cultures, its art and history, or those relevant to paleontological research preserved on the surface or underground. Law No. 163 also declared as patrimony some colonial parts of traditional cities in Colombia and the *Sierra de Macarena*, for their scientific interest.³¹⁰

Archeological property is also regulated by Law No. 163 establishing norms that will govern the granting of licenses for exploration and excavations thereof, with the intervention of the Colombian Institute of Anthropology.³¹¹ This Law also created the Council of National Monuments under the jurisdiction of the Ministry of Education.³¹²

³⁰⁷ E. Harvey, *Derecho Cultural Latinoamericano* 224 (Buenos Aires, Depalma, 1992).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 225.

³¹¹ *Id.* at 226.

³¹² *Id.* at 227.

Under this Law, all immovables that according to the Council of National Monuments are considered of cultural value may not be repaired, reconstructed or changed without the Council's authorization with the prior submissions of the plans including the work to be done. By the same token, public memorial buildings may not be moved without the Council's consent. All staff in charge of historic immovables should report to the Council on their condition, submitting projects for reform, restoration and conservation of such objects. Regarding artistic and historic property of an ecclesiastic character, the Council has to comply with the Holy See in order to enforce its norms on the preservation of religious monuments and relics.³¹³

Law No. 163 also prohibits the export of any cultural object protected under the Law without the prior authorization of the Council. Regarding the import/export of movable antiquities, the Colombian government is bound by the provisions of the 1935 Treaty on the Protection of Movable of Historic Value.³¹⁴ Protected objects may be acquired by the Government by acquisition or expropriation. All protected objects and transference of them must be recorded in the Office of National Monuments. The illegal exportation of these objects will be punished with fines and seizure.³¹⁵

The Government may also acquire documents, such as private archives, books, manuscripts and autographs documents of national historic, scientific or literary interest, if its owner offers to sell them. They may also be expropriated through a declaration of a public need.³¹⁶

In case any protected object, movable or immovable, is donated to the State, national or municipal museums, or other cultural or scientific institutions, the donation will be exempted from the donation tax.³¹⁷

Law No. 26/86³¹⁸ established the regulatory framework of antiques and valuable items removed from shipwrecks which belong to the State, the ship and its crew, as well as all movables found inside the ship or spread throughout the maritime sole or beds of internal waters, territorial waters and the exclusive economic zone. Ownership of the remaining parts of the ship or its accessories are also governed by the provisions of Law No. 26/86.³¹⁹

The National Government is authorized under this Law to conclude administrative and historic exploration contracts, to recover or preserve such antiques and to perform complementary activities. Explorations to locate and declare an object an antique or a valuable item extracted from a shipwreck may be performed by individuals or companies, national or foreign, through a permit or a concession granted by the

³¹³ *Id.*

³¹⁴ Organization of American States, *Tratado sobre la Proteccion de Muebles de Valor Historico*, Washington D.C., Treaties Series, No. 28 in E. Harvey, *Relaciones Culturales Internacionales en Iberoamerica y el Mundo* 307 (Madrid, Tecnos, 1991).

³¹⁵ Harvey, *supra* note 1, at 228.

³¹⁶ *Id.*

³¹⁷ *Id.* at 229.

³¹⁸ Law 26 of Jan. 24, 1986, DIARIO OFICIAL Jan. 31, 1986.

³¹⁹ Harvey, *supra* note 1, at 230.

National Government. A Council composed of the Ministers of Economy, Defense and Education together with the Secretary of the Presidency and the General Manager of the Bank of the Republic will decide on the adjudication of these contracts. The Council will examine the objects recovered and will transfer those of priceless value to the custody of the Bank of the Republic or the National Navy. Such items will be considered as part of the historic patrimony. The other objects recovered will be classified and transferred to the Government and offered for sale. Funds obtained from such sales will be transferred to the national budget accounts.³²⁰

These antiques and objects from shipwrecks are frequently found in the Caribbean Sea, where the trafficking of precious metals took place during the 16th and 17th centuries. This was the case of the Spanish galleon *San Jose*. It sank off the Colombian El Rosario Islands in the Caribbean Sea 280 years ago.³²¹

In 1991, a new Constitution³²² was enacted. It established, among the essential objectives of the Colombian State, the promotion of culture³²³ through educational programs and special incentives of individuals and institutions devoted to the development and promotion of cultural activities.³²⁴ The Constitution also includes cultural rights among the protected human rights.³²⁵ It also provides that objects from the archeological patrimony of the Colombian State are non-transferrable, not subject to prescription and not attachable.³²⁶

In compliance with a Constitutional mandate, Decree No. 2128/92³²⁷ established the structure and functions of the Colombian Cultural Institute (*Instituto Colombiano de Cultura, COLCULTURA*) within the jurisdiction of the Ministry of Education. It performs as the enforcement authority of the national cultural policy. It is also responsible for the promotion, protection and preservation of cultural, archeological, historic and artistic patrimony of the State.³²⁸ To this end, the Colombian Cultural Institute will cooperate in the creation of funds for the promotion of culture and the arts.³²⁹

³²⁰ *Id.*

³²¹ *Id.* at 231.

³²² CONSTITUCION POLITICA DE COLOMBIA (Bogota, La Constitucion, 1993).

³²³ *Id.* arts. 2, 7 & 8.

³²⁴ *Id.* art. 71.

³²⁵ *Id.* art. 63.

³²⁶ *Id.*

³²⁷ Decree No. 2128 of Dec. 29, 1992, in C. R. Saenz Vargas, *LEGISLACION CULTURAL COLOMBIANA: RECOPIACION 91* (Bogota, Colcultura, 1993).

³²⁸ *Id.* art. 2.

³²⁹ Decree No. 1676 of Aug. 26, 1993, *supra* note 28, at 180, art. 1.

Conclusion

It is remarkable that the new Constitution has devoted so many provisions to the protection of cultural property. In this regard, the National Cultural Plan, 1992-1994,³³⁰ emphasizes the need to implement a codified text on cultural property that will be drafted by the Colombian Cultural Institute. The proposed code will include legislation on cultural property, cultural incentives and promotion, training and financing.³³¹ The basis for comprehensive cultural property protection is set. Now, the implementing legislation and its enforcement must follow so that the program may be a success.

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³³⁰ *Supra* note 19, at 7.

³³¹ *Id.* at 8.

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CUBA

Nature and significance of cultural property

In Cuba the State defends the identity of its culture and oversees the conservation of the nation's cultural heritage and its artistic and historical resources. The State protects the national monuments and sites notable for their natural beauty or for their recognized artistic or historical value.³³²

In 1977 Cuba enacted the Law for the Protection of Cultural Patrimony.³³³ The purpose of this Law is to identify that property which, on the account of its special relevance to archeology, prehistory, history, literature, education, art, science or culture in general, requires an appropriate means of protection. The Ministry of Culture is responsible for specifying and declaring which property should form part of Cuba's cultural heritage.³³⁴

Definition of *cultural property*

National monuments include any historic urban center and any building, site or object of an exceptional nature that deserves to be preserved on account of its cultural, historic or social significance to Cuba. Such status is declared by the National Monuments Commission.³³⁵ *Local monuments* include any building, site or object which, while not meeting the requisite conditions for being declared a national monument, nevertheless deserve to be preserved on account of their cultural, historic or social interest because of a locality which has been so declared by the National Commission.³³⁶

Also, other laws³³⁷ regarding immovables define *sites* as all those urban and rural places or areas where a significant historic, scientific, ethnologic or legendary event or development has taken place, or those that possess features of architectonic homogeneity or an unusual urban layout, as well as those where the inherent aspects of nature warrant preservation and protection.

Moreover, sites are classified as natural, archeological, urban or historical in nature. *Natural sites* are any geological, geographical or biological formations or groups thereof that are of special importance from the point of view of science, natural beauty or the joint works of man and nature. *Archeological sites*

³³² CONSTITUTION OF THE REPUBLIC OF CUBA, proclaimed on Feb. 24, 1976, as amended by the National Assembly of the People's Power at the 11th Regular Session of the Third Legislature, held on July 10, 11, and 12, 1992.

³³³ Cultural Heritage Protection Law No. 1 of Aug. 4, 1977.

³³⁴ *Id.* arts. 1 & 2.

³³⁵ The National Commission is set up under the Ministry of Culture.

³³⁶ National and Local Monuments Law No. 2 of Aug. 4, 1977, art. 1.

³³⁷ Decree No. 55 of Nov. 29, 1979; enacted the regulations for the enforcement of the National and Local Monuments Law.

are those places where the presence of features that are vestiges of the material culture and life of men in the past that deserve to be studied or preserved on account of their scientific or cultural significance. Such vestiges may be located on land, in the subsoil or beneath the water. This category, also includes wrecks on the sea floor, in rivers or in lakes. *Urban sites* include those buildings which are within the limited area of a district, town or city. These are of special significance on account of their architectural features, their environmental nature or their harmony with the landscape. *Historic sites* are those places where major events in national or local history have occurred.³³⁸

On the other hand, movables are objects which include weapons, paintings, sculptures, scientific instruments, natural formations taken out of their setting, or any other property which, on account of their exceptional cultural, historic or social significance, deserve to be preserved and protected.³³⁹

Establishment of ownership of cultural property

The protection of the national patrimony shall be provided by any legal or institutional measure including technical, constructive, restorative and other measures that help to keep monuments intact in the face of various agents that threaten the continued existence of all or part of a historic urban center, site, building or object.³⁴⁰

Once a historic urban center, site, building or object has been declared a national or local monument, it is considered to have social interest and comes under the protection and restrictions provided by the National and Local Monuments Law, its regulations and any other provisions provided by the National Monuments Commission.³⁴¹

In order to provide definitions and criteria for the protection of property listed in the National and Local Monuments Register, several levels of protection are established to which such property is subject in accord with its value, state of conservation, relationship with the environment and other factors that determine the social and cultural interest of such property.³⁴²

Regulation of traffic in cultural property

Cuba prohibits the export of property listed in the National and Local Monuments Register. However, by authorization of the National Monuments Commission, following the requisite verifications, any property listed in the National and Local Monuments Register can be exported only if it is for a limited period of time.³⁴³ To that effect it is mandatory to submit to customs officials the certificate issue by the National

³³⁸ *Id.* art. 6.

³³⁹ *Id.* art. 7.

³⁴⁰ *Id.* art. 37.

³⁴¹ *Id.* art. 38.

³⁴² *Id.* art. 39.

³⁴³ *Id.* art. 72.

Monuments Commission stating that the transfer abroad of the property in question has been authorized. The time during which it will remain outside the national territory must also be stated.³⁴⁴

Other protection for cultural property

Cuba has signed the Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954). The instruments of ratification of the Convention and the Protocol were deposited on November 26, 1957. The Convention and the Protocol entered into force with respect to Cuba on February 26, 1958. Cuba has also signed the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, Oct. 17, 1972). The instrument of ratification was deposited on January 30, 1980; and the Convention entered into force with respect to Cuba on April 30, 1980. Finally, by the Proclamation of October 19, 1981, Cuba approved the Convention for the Protection of the World's Cultural and Natural Patrimony adopted by UNESCO.

Repatriation of cultural property removed abroad

Any time a piece of property listed in the National and Local Monuments Register or a part thereof is exported, the failure to submit the certificate issued by the National Monuments Commission to customs officials will result in the property being subject to seizure by the customs authorities. The customs authorities are then authorized to place the seized property under the control of the National Monuments Commission.³⁴⁵

Other laws establishing and/or protecting cultural heritage

On November 23, 1983, Cuba adopted the Regulation to Execute the Law for the Protection of Cultural Patrimony,³⁴⁶ Law 1 of August 4, 1977. It assigned to the Minister of Culture (*Ministro de Cultura*) the power to develop and write the accompanying regulation.

This Law defines the elements that form the national cultural property and assigns to the Ministry of Culture the power to declare an object of art as part of the national patrimony. The Law also provides for a National Registry of Cultural Property and its functions; provincial registries; registration and general inventory of cultural property, as well as the protection of these treasures, transfer of ownership, importing and exporting of cultural property, the loss or destruction of a cultural treasure.³⁴⁷

In July 1985, Cuba enacted a law³⁴⁸ that established the guidelines for the development of monuments and sculptured works of art to be an everlasting part of the environment and important for the cultural formation of the Nation. In addition, it provides for the locations in which monuments and sculptured works of art may be built. The Law assigns such responsibilities to the Ministry of Culture which

³⁴⁴ *Id.*

³⁴⁵ *Id.* art. 73.

³⁴⁶ Decree No. 118 of Sept. 23, 1983.

³⁴⁷ *Id.*

³⁴⁸ Decree No. 129, OFFICIAL GAZETTE (July 23, 1985).

sets technical standards; makes considerations regarding the esthetics, historical, ideological, and educational qualities of any given project; and develops lists of projects that merit construction. Finally, this Law covers the application and other procedures for the execution, registration, and care of sculptured works of art and monuments.³⁴⁹

In 1989, Cuba adopted a resolution creating the Cuban Fund for Cultural Property.³⁵⁰ This resolution mandated to the Ministry of Culture the purchase of works by Cuban creative artists for commercialization and export of plastic and applied arts, which are subject to the regulations of the Ministry of Foreign Trade (*Ministerio de Comercio Exterior*). It also assigned to the Fund the processing of applications by state agencies, political and social organizations, and other groups to procure such pieces of art.³⁵¹

Moreover, by law³⁵² Cuba declared to be national cultural property all items found in museum collections in the national network of museums that have archeological, historical, literary, educational, artistic, scientific, and cultural value in a general meaning, as well as other items older than fifty years which are found within the national territory in possession of individuals or groups.

Finally, in 1989 Cuba categorized as a national cultural property works of plastic arts made in Cuba between the 16th and 19th centuries by Cuban and foreign artists. Also included are those objects of art made by Cuban artists born between 1900 and 1960. This law, also covers the provisions for the removal of these art works from the national territory under governmental authorization.³⁵³

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³⁴⁹ *Id.*

³⁵⁰ Resolution 48/89, enacted on Mar. 15, 1989, OFFICIAL GAZETTE (Mar. 23, 1989).

³⁵¹ *Id.*

³⁵² Resolution No. 3, enacted on Mar. 17, 1989.

³⁵³ Resolution No. 4, enacted on Mar. 17, 1989.

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CZECH REPUBLIC

Nature and significance of cultural property

The Czech Republic has an extraordinary wealth of artistic, historical and other cultural property. There are a great number of castles and palaces in the territory of the Republic and large collections of paintings, sculptures, artistic relics and art handicrafts. These memorabilia are treasures of incalculable artistic, historical and material wealth which must be preserved to future generations as a source of education and learning. For these reasons they are under the protection of the State.

Definition of *cultural property*

Cultural property refers to movable and immovable items or their collections which testify to the history of society, art, technology, science and all other branches of human life and endeavor as well as to architectonic work or to items which relate to particular personalities or events of history and culture. Items kept in museums, galleries and archives are also considered cultural property.³⁵⁴

State protection of cultural property is achieved by the application of the provisions of the Law on the State Protection of Antiquities.³⁵⁵ The designation of an item as cultural property is bestowed by the Ministry of Culture after having received an opinion of the particular district office of state administration. In addition to national cultural property there are cultural property reservations and cultural property zones. National cultural property constitutes the most important part of the nation's cultural wealth. Individual items are so designated by a decree of the Government which determines conditions for their care and protection. Cultural property reservations are formed by a complex of immovable cultural monuments and/or archeological finds and are so designated by the Government in a decree which also sets the conditions for their care and protection. Cultural property zones are areas of a settlement or of its part which contains cultural monuments, a historically important environment or a part of a landscape entity which have important cultural values. Such zones may be so designated by a decree of the Ministry of Culture after previous consultation with the particular district office of state administration. The decree also provides for conditions of their care and protection.³⁵⁶

Cultural property is registered in a Central List of Cultural Property kept by the Central Agency for the Protection of Cultural Property. The district offices of state administration keep lists of cultural property located within their areas. The Central Agency and the district offices monitor the condition of cultural property and supervise care for its maintenance and protection.³⁵⁷

³⁵⁴ Law of Mar. 30, 1987, on State Protection of Antiquities, No. 20, COLLECTION OF LAWS, as supplemented by Law of April 14, 1992, No. 242, COLLECTION OF LAWS, art. 2.

³⁵⁵ *Id.* art. 1.

³⁵⁶ *Id.* arts. 3-6.

³⁵⁷ *Id.* arts. 7 & 11.

The owner of an object of cultural property must attend at his own cost to its preservation, maintain it in good condition, and protect it against damage, disfigurement or theft. He can use it only in a manner corresponding to its cultural and political importance, historical value and technical condition. This obligation applies also to whoever uses or possesses cultural property. If the owner does not fulfill these obligations, the district office will issue a decision outlining the measures to be taken by the owner within a stipulated time for the protection of the cultural property in question. The owner is, however, on his own initiative obligated to report his concerns with respect to cultural property to the district office so that proper action can be taken. If the owner does not carry out the measures specified by the district office within the set term, the proper authorities will carry out such measures at his expense. The state acting through the district office may contribute to the cost involved in the maintenance or reconstruction.³⁵⁸

Establishment of ownership of cultural property

Cultural property may be owned by individuals, organizations, corporations or the state. The owner who transfers cultural property to another for temporary use or reconstruction must inform the transferee that the object is cultural property. If the owner intends to sell it, he must offer it for sale to the proper district office. That office will make a decision within three months with respect to movables and within six months as to immovables. If the State decides to acquire the object, the State will pay an amount according to the provisions applicable on expropriation. If the owner neglects the upkeep of cultural property and thereby compromises its preservation or if he uses it in a manner contrary to its cultural significance, its value or its technical condition, such property may be expropriated if no agreement is reached with the owner for the sale of it to the State. The State will pay compensation prescribed by the law.³⁵⁹

Regulation of traffic in cultural property

Traffic in cultural property is regulated by law.³⁶⁰ The objects controlled by the Law are both natural objects or those made by man and their collections which are important from the point of history, literature, the arts, or science. They are especially objects of botany, zoology, mineralogy, archeology, creative arts like sculptures and paintings, art handicrafts like cut glass, ceramics, objects made of precious metals, musical instruments, objects of ethnographic value, as well as those of numismatic and philatelic value. In general, such objects have to be at least fifty years old or older. The Law does not cover works of living authors. The Law applies only to objects of cultural value as defined by that Law. It does not deal with objects protected by the Law on State Protection of Antiquities³⁶¹ and objects held in museums, galleries and archives.

³⁵⁸ *Id.* arts. 9-16.

³⁵⁹ *Id.* arts. 13 & 15; Decree of the Ministry of Finance of Nov. 21, 1984, on Compensation for Expropriation, No. 122, COLLECTION OF LAWS.

³⁶⁰ Law of Mar. 23, 1994, on the Sale and Export of Objects of Cultural Value, No. 71, COLLECTION OF LAWS.

³⁶¹ *Supra* note 1.

Objects of cultural value can be exported only on the strength of a certificate issued by the proper authorities licensed by the Ministry of Culture that they are not subject to the protection of the Law. The request for certification is filed by persons who offer such objects for sale. If the authority is of the opinion that the object falls within the protection of the Law, it will deny the request and refer the matter to the Ministry of Culture. The Ministry will either issue the certificate, or it will declare the object cultural property protected by the Law on State Protection of Antiquities which cannot be exported under the provisions of the Law on the Sale and Export of Objects of Cultural Value.³⁶² The export of objects of cultural value without a certification is punishable by a fine of up to five million Crowns (1 US dollar equals about 25 Crowns).

The Law on the State Protection of Antiquities has its own provision concerning traffic in cultural property.³⁶³ Objects of cultural property may be exhibited abroad or loaned to foreign institutions or exported for other purposes only with the consent of the Ministry of Culture and in the case of objects classified as national cultural property with the consent of the Government.

With respect to objects held in museums and galleries, their export is possible only with the consent of the Ministry of Culture.³⁶⁴ As to materials held in archives, they can be exhibited abroad or loaned to foreign institutions or exported for other purposes only with the consent of the Ministry of the Interior. Those classified as national cultural property can be exhibited abroad or loaned to foreign institutions only with the consent of the Government. They cannot be exported for any other reason.³⁶⁵

Other protection for cultural property

Cultural property must be kept at a place agreed upon by the pertinent authorities. Objects of cultural property may be moved in time of peace or war only with the consent of the pertinent district office of state administration. The same applies to their removal from public display.³⁶⁶

Repatriation of cultural property removed abroad

Objects of cultural property located abroad may be repatriated.³⁶⁷ Their repatriation may be undertaken only with the consent of the pertinent authority of the foreign state where they are located.³⁶⁸

³⁶² *Supra* note 7.

³⁶³ *Supra* note 1, art. 20.

³⁶⁴ Law of July 9, 1959, on Museums and Galleries, No. 54, COLLECTION OF LAWS, as amended by Law No. 425/1990, COLLECTION OF LAWS, arts. 7 & 8.

³⁶⁵ Law of Oct. 17, 1974, on Archives, No. 97, COLLECTION OF LAWS, as amended by Law No. 343/1992, COLLECTION OF LAWS, art. 8.

³⁶⁶ *Supra* note 1, art. 18.

³⁶⁷ *Id.* art. 20.

³⁶⁸ Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. Done at Paris Nov. 14, 1970; entered into force Apr. 24, 1972; for the Czech Republic May 14, 1977. 823 UNTS 231. Announcement

Other laws establishing and/or protecting cultural heritage

In addition to the above referred to Laws on State Protection of Antiquities and the Law on the Sale and Export of Objects of Cultural Value,³⁶⁹ cultural heritage is also protected by the Laws on Museums and Galleries, and the Law on Archives.³⁷⁰

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of the Ministry of Foreign Affairs of Nov. 23, 1979, No. 15/1980, COLLECTION OF LAWS.

³⁶⁹ *Supra* notes 1 & 7.

³⁷⁰ *Supra* notes 11 & 12.

96-1377

EGYPT**Nature and significance of cultural property**

As the inheritor of a civilization dating back to the third millennium B.C. or even earlier, Egypt is blessed with rich remains of that civilization--Pharaonic, Greek, Roman, Christian Coptic, and Islamic. Its climatic and topographical conditions helped to preserve many of its antiquities. But if Egypt's geographical position made it a focal point for the meeting of cultures, it also attracted many invaders, which has certainly diversified as well as dispersed many of its movable cultural properties, most of which found its way to private collections and museums abroad.

The well-known pyramids near Cairo, the tombs in the Valley of the Kings, and the Temples of Thebes are some of the major Pharaonic edifices of ancient Egyptian civilization. But the country also has numerous ancient Coptic Christian and Muslim shrines and manuscripts dating back from the beginning of the Christian era and the coming of Islam in the 7th century.

The history of legislation for the protection of cultural property in Egypt dates back to the early 19th century and coincided with the first wave of European archaeological expeditions in the Nile Valley. It began with a ban on the export of antiquities in 1835, followed by a ban on excavations unless licensed by the authorities. In 1883 a Khedivial royal decree declared all property designated an antiquity as state property. Then in the 1920s came the first comprehensive legislation for the registration, protection and trade in antiquities. This legislation was up-dated in the 1950s, and reissued in a new comprehensive law in 1983.

Definition of *cultural property*

The Egyptian Law³⁷¹ promulgated for the protection of antiquities, defines *antiquity* as any movable or immovable property that is a "product of the various civilizations," whether artistic, scientific, literary or religious, from "pre-historic times down to a point one hundred years before the present," and which has archaeological or historical value or significance "as a relic of one of the various civilizations" which existed in the land of Egypt.³⁷²

Also deemed an antiquity is any movable or immovable property of "historical, scientific, religious, artistic, or literary value," which the Prime Minister, at the suggestion of the minister responsible for cultural affairs, so decides even though the date of the property does not fall within the time limits set forth in the preceding paragraph.³⁷³

Finally, public lands owned by the State, so deemed by order or regulation before the promulgation of the Law, and buildings registered as such are considered protected cultural properties.³⁷⁴

³⁷¹ Law No. 117 of 1983.

³⁷² *Id.* art. 1.

³⁷³ *Id.* art. 2.

³⁷⁴ *Id.* arts. 3 & 4.

Establishment of ownership of cultural property

Egyptian law begins with a blanket provision declaring all antiquities state property:

With the exception of religious endowments (*waqf*), all antiquities shall be deemed public property, and its ownership, possession and disposition shall be subject to the terms and conditions set forth in this law and regulations made thereunder.³⁷⁵

The Law recognizes those antiquities whose ownership or possession was established before the coming into force of the Law or is established in accordance with its provisions. But it places certain conditions on the owners, whether they are traders or private persons, including the requirements of registration and preservation, failing which would deem the antiquities in unlawful possession.³⁷⁶

While the Law prohibits an owner or possessor of antiquities from disposing of them outside the country, it permits him or her to do so within the country provided he or she obtains an advanced written approval from the Antiquities Organization. Still, the Organization has the right of preemption or appropriation of such antiquities at its discretion. This is done in return for fair compensation.³⁷⁷

One of the problems faced in the past by countries rich in antiquities, but poor in either expertise or funds to finance excavations and restorations, such as Egypt, has been the ease with which foreign institutions were able to dig and often retrieve their finds without much control from local authorities. The Egyptian authorities became aware of this problem and tried as early as the 19th century to remedy it, but not before much of the historic remains had been uncovered.

Present legislation is quite explicit on this point. Unless the Antiquities Organization determines that some of the finds are expendable and donates them by way of compensation, all antiquities discovered by foreign archaeological excavation missions are deemed public property and revert to the State.³⁷⁸ Likewise, individuals who fortuitously discover antiquities are required within 48 hours to notify the authorities. The authorities may compensate the person who discovered and reported the find, but the find is deemed public property.³⁷⁹

In determining public ownership of antiquities, the courts have considered their excavation or possession a renewable act so long as the excavation or possession continues, which prevents the statute of limitations from running and denying the public prosecutor the right to proceed against the accused so long as the act of excavation or possession did not terminate.³⁸⁰

³⁷⁵ *Id.* art. 6.

³⁷⁶ *Id.* art. 8.

³⁷⁷ *Id.* art. 9.

³⁷⁸ *Id.* art. 35.

³⁷⁹ *Id.* art. 24.

³⁸⁰ A 1956 case cited in Abdel-Mun'im Husni, 4 MAWSU'AT MISR LIL-TASHRI'WAL-QADA' (Egyptian Compendium of Legislation and Judicial Decisions) 8 (Cairo, 1987).

Regulation of traffic in cultural property

The Egyptian Law prohibits outright trade in antiquities, and gives established traders a period of one year to dispose of their inventory of antiques. Antiquities remaining in the possession of such dealers become subject to the provisions of the Law regarding possession of antiquities, including the need to notify the authorities and register the property with the Antiquities Organization.

As has already been pointed out, persons in possession of antiquities may dispose of them locally, within the country, provided it is done by written approval of the authorities.

The Law grants the Antiquities Organization, where the President of the Republic so decides, the right to exchange surplus specimens with foreign countries, museums and scientific institutes.³⁸¹

To help in the enforcement of these restrictions on traffic in cultural property, the Law grants the head of the Antiquities Organization, the directors of museums, and antiquities inspectors, judicial powers to initiate proceedings against any violators.³⁸² The Law provides stiff penalties for persons found smuggling, stealing, excavating without permit, illegally possessing or transporting, imitating or damaging any antiquities.³⁸³ These penalties are subject to maximization if the punishments applicable generally to this type of crimes in the Egyptian CRIMINAL CODE³⁸⁴ exceed those in the antiquities law.

Other protection provided for cultural property

Egypt has also been an active participant in world bodies negotiating and concluding international agreements for safeguarding antiquities. On August 17, 1955, Egypt ratified the Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict (the Hague, 1954); and on April 5, 1973, Egypt ratified the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 1970).

The Convention against illicit trafficking in cultural property binds the States Parties to it to set up within their territories services for the protection of the cultural heritage, inter alia, a national inventory of protected property; the establishment of the requisite institutions, such as museums, to preserve and present antiquities; and organization of supervision of archaeological excavations and safeguarding remains for future research.

As has already been pointed out, Egyptian law has since the 19th century aimed, against great odds, at keeping under control the excavation and trade in antiquities. These odds are partly due to Egypt's endemic poverty coupled with its endowment in antiques, and partly the illegal international art trade which in volume and value comes next to traffic in arms and narcotics. But the greatest loss of Egyptian archaeological finds was the result of the mad rush and overt competition among the European Powers during

³⁸¹ *Id.* art. 10.

³⁸² *Id.* art. 48.

³⁸³ *Id.* arts. 40-47.

³⁸⁴ Law No. 58 of 1937.

the 19th century for the discovery and acquisition of Egyptian, and for that matter Greek and other Near Eastern, antiquities to display in the expanding halls of their museums. This is said to have stripped Egypt of much of its ancient heritage.³⁸⁵

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³⁸⁵ See P. France, *THE RAPE OF EGYPT: HOW THE EUROPEANS STRIPPED EGYPT OF ITS HERITAGE* (London, 1991).

96-1377

EUROPEAN UNION**Nature and significance of cultural property**

In the early 1990s the European Community (EU) became deeply concerned about the issue of escalating art thefts in Europe.³⁸⁶ Awareness of the problem was heightened because of the impending removal of borders in 1992. As a result, the EU sought to protect the cultural property of its Member States in an internal market free of borders. Among the Members, the source countries, which are enormously rich in cultural treasures, such as Italy, France, Greece, Spain wanted the imposition of strict limits in the exportation of cultural objects. The acquiring nations such as Belgium, Germany and the Netherlands sought less rigid controls.³⁸⁷

The need for a Community-wide system to protect cultural treasures became more pressing in the absence of a uniform system to recover national treasures unlawfully removed from the territory of a Member State. The situation was made more necessary since a number of Member States had not signed the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and the European Convention on Offenses related to Cultural Property has not yet been ratified.³⁸⁸

Ownership of stolen cultural property is a particularly intricate issue, and the core of the issue is whether the original owner or the *bona fide* purchaser is to be favored. The European Community, under article 222 of the Treaty of Rome as amended, has no competence to "prejudice the rules of Member States governing the system of property ownership." Thus, the common and civil law legal systems of the Member States³⁸⁹ diverge with regard to the conveyance of title in case of stolen property which is purchased in good faith.

Under the common law system, since a thief does not have good title, good title cannot be transferred to the purchaser of stolen property, and the chain of good title is interrupted.³⁹⁰ As a result, the original owner has the right to recover the stolen property from the purchaser, since the purchaser did not get good title from the thief.³⁹¹ On the other hand, in certain Member States which follow the civil law system, a

³⁸⁶ Art thieves steal approximately 60,000 works of art in Europe annually. The black market is made up of art dealers who are experts in the laundering of stolen artifacts. See, V. J. Vitrano, *Protecting Cultural Objects In an Internal Border-Free EC: The EC Directive and Regulation for the protection and Return of Cultural objects*, 17 *FORDHAM INT'L. L.J.* 1164 (1994).

³⁸⁷ *Id.* at 1164 & 1175.

³⁸⁸ T. J. Nicholas II, *EEC Measures on the Treatment of National Measures*, 16 *LOY. L.A. INT'L. & COMP. L.J.* 127, 150 (No. 16, 1993).

³⁸⁹ The majority belong to the civil law tradition with the exception of England and Ireland.

³⁹⁰ Vitrano, *supra* note 1, at 1170.

³⁹¹ For a description of the development of laws which protect bona fide purchasers and the underlying policies, see K. T. Burke, *International Art Theft*, 13 *LOY. I.A. INT'L. & COMP. L.J.* 427, 442 (1990).

bona fide purchaser acquires good title in a case regarding stolen property. A common phenomenon which has been observed in Europe is that art thieves aware of these legal technicalities often take cultural property from common law countries to civil law countries where they find a system more favorable to selling stolen art objects and where good title can be obtained.³⁹²

Legislative measures

The Treaty on European Union includes a separate title on Culture (title IX). It consists of a sole article which reads as follows:

The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting or supplementing their action in the following fields, including the preservation and safeguarding of cultural heritage of European significance.

Member States, under the terms and within the limits of article 36 of the Treaty, still have the authority to place limits on the free movement of goods in order to protect their cultural treasures in the internal market. Article 36 of the Maastricht Treaty provides:

...the provisions of Arts. 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.³⁹³

The Community adopted a Regulation (EEC) No. 3911/92 on the export of cultural goods³⁹⁴ and a Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State.³⁹⁵

³⁹² Vitrano, *supra* note 1, at 1172.

³⁹³ This article is similar to Art. XX of the General Agreement on Tariffs and Trade (GATT) which provides :

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(f) imposed for the protection of national treasures of artistic, historic or archaeological value....

³⁹⁴ OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, L395 (1992).

³⁹⁵ *Id.* L74/74 (1993).

These legislative measures introduce a Community wide system to protect the cultural treasures of the Member States. The adoption of these measures was deemed necessary in order to balance the need to promote the free commerce among Member States, to ensure that exports of cultural goods are subject to uniform controls at the external borders of the Community and at the same time to monitor the return of cultural objects which were unlawfully removed from the territory of a Member State.

Regulation

The Regulation which is "binding in its entirety and directly applicable in all Member States" provides that the export of all cultural goods outside the customs territory of the Community is subject to an export license. The export license is issued at the request of the person concerned by the competent authorities of the country of origin³⁹⁶ and is valid throughout the Community.³⁹⁷ The Annex which is common to the Regulation and the Directive clarifies the categories of cultural goods which should be especially protected in trade with third countries.³⁹⁸ National art treasures classified as such by a Member State and which do not fall within the Annex are exempt from the export license requirement.³⁹⁹

The export license requirement safeguards cultural property of the Member States from illegal exportation. Thus, the potential buyer of an object found outside the Community without an export certificate should be aware that there is a likelihood that it has been unlawfully removed or that it was exported before January 1, 1993.⁴⁰⁰

According to article 7 of the Regulation, the Commission was required to prepare legislative measures to implement the regulation. Such measures were adopted through Commission Regulation No. 752/93 on licensing.⁴⁰¹ The license regulation contains a sample license form and rules concerning drawing up, issuing and using the form.

Directive

The Directive aims to facilitate the return of cultural objects and establishes the procedure to be followed within the European Union for the return of such objects that have been unlawfully removed from the territory of a Member State and later appear in another Member State. The Directive applies only to cultural objects unlawfully removed either on or after January 1, 1993.⁴⁰² Member States are required to adopt laws, regulations or administrative provisions to comply with its provisions.

³⁹⁶ *Supra* note 9, art. 2, ¶2.

³⁹⁷ *Id.* art. 2, ¶3.

³⁹⁸ *Id.* see Preamble, ¶10.

³⁹⁹ *Id.* art. 2, ¶4.

⁴⁰⁰ Vitrano, *supra* note 1, at 1168.

⁴⁰¹ *Supra* note 9, L77/24 (Mar. 31, 1993).

⁴⁰² *Supra* note 10, art. 13.

Definition of *cultural property*

The Directive defines *cultural objects* as those items which have been classified under domestic legislation as "national treasures possessing artistic, historic or archaeological value" before or after their unlawful removal from the territory of a Member State.

Repatriation of cultural property

Article 4 of the Directive establishes as an initial step a cooperation and consultation procedure between the competent authorities of the Member States for the return of cultural objects. The language of article 4, "upon application of the requesting Member," indicates that claims for return may be made by a Member State and not an individual. The requested and requesting Member State has certain obligations. The requesting Member State must include in the application all the information necessary to facilitate the search. On the other hand, the national authorities of the requested State must notify the requesting state when a cultural object is found which most likely has been unlawfully removed and must enable the appropriate authorities of the requesting Member State to verify that the object is the cultural object in question. The requesting State has a time limit of two months upon notification to do the investigation. If the requesting State conforms to the above period, the requested State is obliged to take the following further steps to:

- take any measures necessary for the protection of the object; and
- to ensure the safe return of the object and to act as an intermediary between the possessor and/or the holder of the object and the requesting state.

Should the cooperation procedure fail to produce the desired results, the requesting State, in order to secure the return of the cultural object, has the right to initiate court proceedings against the possessor or the holder of the object.⁴⁰³ The Directive defines the *possessor* as the "person physically holding the cultural object in his own account" and the *holder* as the "person physically holding the cultural object for third parties."⁴⁰⁴

The Directive includes a specific period of limitations. The requesting State has the right to initiate return proceedings within one year after it became aware of the identity of the possessor or holder of the cultural object and its location.⁴⁰⁵ Otherwise return proceedings may be initiated within 30 years after the object was unlawfully removed. Ecclesiastical items are subject to a 75-year limitation period except in Member States where there is no time limit on proceedings or there are bilateral agreements providing more than a 75-year period.

The competent court of the requested State orders the return of the cultural object in question and awards the possessor a fair compensation.⁴⁰⁶ On the other hand, the requesting State is responsible for

⁴⁰³ *Supra* note 10, art. 5.

⁴⁰⁴ *Id.* art. 1, ¶¶ 6 & 7.

⁴⁰⁵ *Id.* art. 7.

⁴⁰⁶ *Id.* art. 9, ¶ 1. With regard to the amount of compensation, the Commission has stated the following:

compensating the possessor upon return of the object and for any expenses accruing from implementing the return of the cultural object in question as well as the cost of the measures provided in article 4. The possessor has to exercise "due care and attention" in acquiring the object. Issues on the burden fall within the domain of the legislation of the requested State.

Ownership issues arising after the return of the cultural object are regulated by the law of the requesting Member State.⁴⁰⁷

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The amount of compensation will not necessarily be equivalent to the purchase price paid by the acquirer. According to the case in point, it may be more or less than the purchase price because the court also has to take other factors into account, e.g. the objective value of the object, its sentimental value for the acquirer, the costs he has incurred in preserving it and above, whether or not he remains - under the law of the requesting Member State (see Article 12) - owner of the cultural object once returned [Nicholas, *supra* note 3, at 162 & 163].

⁴⁰⁷ *Id.* art. 12.

96-1377

GERMANY**Nature and significance of cultural property**

Germany restricts the export of cultural objects through a Law on the Protection of Cultural Property.⁴⁰⁸ This Federal Law was enacted in 1955, as a consequence of the severe inflation that Germany suffered after World War II and that led to the sale and export of many works of art, rare books, and archival property. Due to the international nature of the arts trade, the Law still serves its purpose even though the strength of Germany's currency should give little cause to fear that German art could be sold abroad at bargain prices. Currently, the German export restrictions are among the most liberal and non-intrusive in all of Europe.⁴⁰⁹ This, however, is apt to change with the implementation of the European framework of rules (see below).

In addition to the Federal Law, virtually all of the German states have enacted laws for the protection of cultural monuments that deal with both movable and immovable cultural property.⁴¹⁰ With regard to movables, these laws protect against changes in location between the states and, therefore, also have an influence on exports from Germany. Cultural legislation falls into the legislative power of the states whereas export is a federal matter. However, the states are also heavily involved in the implementation of the Federal Law.

Germany's awareness of cultural property was heightened by its turbulent history in the twentieth century. After World War I, the Treaty of Versailles required Germany to return or compensate for looted and destroyed art.⁴¹¹ At that time, Germany enacted a law restricting exports of cultural property so as to prevent the impoverished nobility from selling their private collections abroad.⁴¹² During World War II, Germany was first the aggressor and later the victim of unlawful takings of works of art. These events warrant a short description because the aftermath of these occurrences has occupied the courts and legal scholars of many countries and has contributed to the development of private and international law on theft and restitution of cultural property.

During the Third Reich, Germany engaged in one of the most systematic pillages of art of the twentieth century. This commenced as a campaign against so-called *decadent Jewish art*, which

⁴⁰⁸ Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung, Aug. 6, 1955, BUNDESGESETZBLATT (BGBl., official law gazette of the Federal Republic of Germany) I, p. 501. Information on the history of this Law and on its current application has been provided by Reg. Dir. Gerd F. Trautmann, German Federal Ministry of the Interior.

⁴⁰⁹ W. Eberl, *Probleme und Auswirkungen der EG-Vorschriften zum Kulturgüterschutz* 13 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 729 (1994).

⁴¹⁰ For instance, in the state of Baden-Württemberg, Denkmalschutzgesetz, repromulgated Dec. 6, 1983, GESETZBLATT FÜR BADEN-WÜRTTEMBERG 797, as amended.

⁴¹¹ Treaty of Peace with Germany, signed at Versailles, June 28, 1919, 2 BEVANS 43, arts. 245 - 247.

⁴¹² Verordnung der Reichsregierung über die Ausfuhr von Kunstwerken, REICHSGESETZBLATT (RGBl., official law gazette of the German Reich) 1961 (1919).

encompassed virtually all modern art in addition to art created or owned by Jews. At first, works of art were seized in Germany from public and private collections. As the war developed, the pillage was expanded throughout the occupied European countries, and the primary motive of acquiring coveted art treasures and of enriching Germany was more openly admitted. In many of the occupied countries, private collections were robbed, libraries were plundered, and private houses were pillaged.⁴¹³

After 1940, these efforts were masterminded by *Einsatzstab Rosenberg*, the special staff of Alfred Rosenberg, the chief engineer of Nazi philosophy and one of the highest functionaries of the Nazi government who in the Nuremberg trial was convicted and sentenced to death for his war crimes. Between 1941 and 1944, 29 large shipments of pictorial art, including 137 freight cars with 4,174 cases of works of art were brought into the German Reich from the Western occupied countries. In the East, the pilferage was at least as bad, with 43 box cars of cultural object being brought to Germany from Byelorussia in the month of October 1943 alone.⁴¹⁴ Much of the looted art was stored in the Austrian city of Linz, the birth place of Hitler, where a museum of art was to be built in honor of the *Führer*,⁴¹⁵ while some of the more prominent paintings were sold immediately by the Nazis.

In 1943, the Allied Powers agreed that all transfers and transactions involving cultural property that had been taken during the war were to be null and void. When the war was over, the Western Allied powers instituted a program for the return of the looted art and their conduct may give rise to an assumption that customary international law prohibits the war-time looting of art.⁴¹⁶ In 1955, after the occupation was over, restitution was continued by West Germany. Yet despite the comprehensive programs to return art that had been taken by the Nazis, many restitution claims have occupied the courts and the governments in various countries where art works have ended up due to the international nature of the arts trade. Of particular interest among the legal issues have been analyses of conflicts law, public international law, property law, and sovereign immunity.⁴¹⁷

Unlike the Western Allied Powers, the Soviet Army did not try to sort out ownership issues of art found in Germany. Instead, massive amounts of art, artifacts, books and documents were sent to the Soviet Union, among them not only the art previously pilfered by the Nazis but also property belonging to Germany. While the Soviet Union later returned some of these works to East Germany on the basis of treaties,⁴¹⁸ the whereabouts of many other properties remained a mystery until the breakdown of the Communist regime in

⁴¹³ *Menzel v. List*, 267 N.Y.S. 2d 804 (1966).

⁴¹⁴ International Military Tribunal (Nuremberg) 1945-1946, 22 TRIAL OF THE MAJOR WAR CRIMINALS 539 (New York, 1971 reprint); *International Military Tribunal (Nuremberg), Judgment and Sentences* 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 237 (1994).

⁴¹⁵ K. Siehr, *INTERNATIONAL ART TRADE AND THE LAW* 110 (Boston, 1994).

⁴¹⁶ W. Rudolf, *Über den internationalen Schutz von Kulturgütern*, in *STAAT UND VÖLKERRECHTSORDNUNG Festschrift für Karl Doebling* 853 (Heidelberg, 1989).

⁴¹⁷ A case in point is *Menzel v. List*, *supra* note 6, in which an American court granted replevin to the original owner of a painting by Marc Chagall on the grounds that the wartime confiscation by the Germans in Belgium was plunder and pillage and did not extinguish the title of the original owner.

⁴¹⁸ Rudolf, *supra* note 9.

the early 1990's. At that time it became known that the Soviet Union had hidden the looted German treasures in museum repositories.

Recent exhibitions in Russian museums have shown the extent of the Russian holdings and again raised legal and political issues. Among these are the German request for return of German property and claims arising from a Dutch collection of graphics that were forcibly sold to Germany during the Nazi era. At the moment, a solution to these claims does not appear in sight, particularly since Russia argues that these works of art were reparations and should remain entrusted to the Russian people. In addition, Russia has indicated that there is a plan to enact legislation that would make the looted objects Russian property.⁴¹⁹

In the international dispute between the so-called source and market countries, Germany belongs to the latter. To favor the return of all art objects to their country of origin as was proposed in a UN Resolution in 1987⁴²⁰ would make little sense for a country like Germany that had acquired many antiquities during the 19th century and where an Egyptian museum in Berlin houses, among other treasures, the bust of Nefertiti, and where also in Berlin, a Museum on Greek and Ancient Mid-Eastern art displays the frontage of most of the citadel of the Hellenistic city of Pergamos.⁴²¹ Germany's position on art as a common heritage of mankind is reflected in its treaty relations, as is described below.

Definition of cultural property

The Federal Law on Cultural Property⁴²² does not contain a statutory definition of cultural property. Instead, any object qualifies as cultural property if it is designated as such by an administrative act of the German state (*Land*) where the property is located and is thereupon listed in a state register. The state registers, in turn, are then combined into a national register. The criteria for registering cultural objects are given in the Cultural Property Law as:

...works of art and other cultural property -- including the property of libraries -- the removal of which from Germany would constitute a significant loss for the German cultural heritage.

According to a recommendation of the ministers of culture of the states, this definition encompasses modern and ancient objects, including literary and musical manuscripts, archeological resources, coins, implements, artifacts, and technical instruments or machinery.⁴²³ There appears to be, however, some room for disagreement on the connection to Germany that is required to make an object part of the German cultural heritage, in particular, whether the mere location of an object in Germany establishes a sufficient connection with Germany or whether other ties, such as German authorship or subject matter are required.⁴²⁴

⁴¹⁹ *Die zweimal geraubte Kunst*, SÜDDEUTSCHE ZEITUNG, Oct. 7, 1995, Feuilleton, LEXIS, News; R. Boudreaux, *Russia Displays Treasures of Art Seized in Germany*, LOS ANGELES TIMES (Feb. 28, 1995), p. 1.

⁴²⁰ UN DOC A/RES/42/7.

⁴²¹ The Pergamos collection was excavated by Germans under a concession from Turkey that commenced in 1878 and provided that two thirds of the excavated objects would become the property of Prussia [Rudolf, *supra* note 9].

⁴²² *Supra* note 1.

⁴²³ R. Kleeberg & W. Eberl, KULTURGÜTER IN PRIVATBESITZ 177 (Heidelberg, 1990).

⁴²⁴ See B. Pieroth, *Aussenhandelsbeschränkungen für Kunstgegenstände* 34 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1385

The state laws on monument protection contain broad provisions on what is worthy of protection and preservation. These are similar to the Federal Law, except for their emphasis on local traditions and customs. In Baden-Württemberg, for instance, cultural monuments are defined as objects or groups of objects the protection of which lies in the public interest because of their artistic, scholarly, or local historic value.⁴²⁵ Like the Federal Law, the state laws also require registration of designated cultural property.

The German practice of defining cultural property by leaving it up to the local authorities to decide what requires protection on a case-by-case basis according to broad discretionary criteria is apt to change under the new European regulations on the export of cultural objects.⁴²⁶ Much to the chagrin of German arts dealers and administrators, these define cultural property in much detail by providing fourteen categories of objects which are further differentiated by age and value thresholds. To make the new regime more manageable, the Federal Minister of Finance has issued an ordinance that permits arts and book dealers to declare that an item they wish to export is not cultural property.⁴²⁷ However, a more thorough implementation might ensue once Germany enacts reform legislation.

Establishment of ownership of cultural property

German domestic law

Germany does not claim national ownership of cultural property that is in private hands. Instead, acquisition and ownership of cultural property are governed by the generally prevailing rules of property law of the CIVIL CODE,⁴²⁸ and it can generally be stated that these principles place Germany among the civil law countries that allow acquisition in good faith from the non-owner. However, with regard to stolen property, Germany provides more protection for the original owner than other European countries,⁴²⁹ as is explained below.

According to the CIVIL CODE, title to movable property is transferred through delivery⁴³⁰ of the object to the transferee together with an agreement between the deliverer and the transferee that title should pass. It is not necessary that the property be delivered from or by the owner, and it is also noteworthy that the agreement on the passing of the property is different from the legal transaction that may underlie the transfer. Generally, acquisition from an unauthorized person passes title if there is good faith reliance on the

(1990).

⁴²⁵ *Supra* note 3.

⁴²⁶ Council Regulation (EEC) No. 3911/92, Dec. 9, 1992, on the export of cultural objects, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES (OJ) No. L 395/1; Commission Regulation (EEC) No. 752/93 on the implementation of regulation EEC No. 3911/92 on the export of cultural objects OJ No. L 77/24.

⁴²⁷ Eberl, *supra* note 2.

⁴²⁸ Bürgerliches Gesetzbuch, Aug. 15, 1896, RGBl. 195 as amended, §§ 929 - 936.

⁴²⁹ A. Jaeger, INTERNATIONALER KULTURGÜTERSCHUTZ 55 (Köln, 1963).

⁴³⁰ There are some statutory exceptions from the requirement of delivery that are not further discussed in this report.

ownership of the transferor, but this curative propensity of good faith acquisition applies only to transfers *inter vivos* and not by succession.⁴³¹

The most important exception to the principle of good faith acquisition applies to stolen, lost, or missing objects. For these, title cannot be acquired through a transfer in good faith, nor through purchase from a merchant who had acquired the object from a good faith holder. However, there are two circumstances under which ownership can be acquired even in stolen goods. First, property passes if the object is acquired at a public auction held by a duly licensed auctioneer if the person acquiring the object was in good faith concerning the ownership of the person who ordered the object to be auctioned. Second, title is acquired by prescription by someone who possesses the property for ten years in good faith.⁴³²

German conflicts law

German courts have at times been called upon to determine the ownership of cultural property in cases that involve foreign contacts, and these cases have led to some interesting developments in German conflicts law. In particular, it appears that Germany decides the issue of ownership on the basis of the law of the place where the property was originally located. This choice of law is made on the basis of the customary law principle of the *lex rei sitae*, since the German conflicts codification does not contain a choice of law rule for property law. However, in applying the foreign law, the German court will not make any decisions that conflict with German public policy.⁴³³

On the basis of the *lex rei sitae* principle, a German appellate court applied Greek law in a case in 1989 that involved a Greek request for assistance in criminal matters. The German court found that a finder of antiquities in Greece had not obtained ownership in them because Greek law provides that cultural treasure trove is owned by the government.⁴³⁴ The same conflicts rule was applied in 1988 in a case involving an East German work of art, albeit with a different result. A collection of antiquities had been confiscated by the East German Government for non-payment of a tax liability in the value of the entire collection.⁴³⁵ The East German government sold pieces of the collection in West Germany and the former owner claimed one piece, an antique clock, from a West German arts dealer. On appeal,⁴³⁶ the German Supreme Court found German property law governing according to which the East German Government had become the owner. However, the Court refused to apply the East German law because under the facts of the particular case the taxation of the collection had amounted to an uncompensated expropriation which was irreconcilable with the basic tenets of West German law.

⁴³¹ E. J. Cohn 1 *MANUAL OF GERMAN LAW* 182 (London, 1968)

⁴³² Jaeger, *supra* note 22, at 46.

⁴³³ *Id.* at 59.

⁴³⁴ Oberlandesgericht (OLG) Schleswig, Feb. 10, 1989, 33 NJW 3105 (1989).

⁴³⁵ Bundesgerichtshof (BGH) decision, Sept. 22, 1988, 33 WERTPAPIER-MITTEILUNGEN ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT 1739 (1988).

⁴³⁶ The trial court's decision is described in A. Polzer, *A Clock in Court*, 2 *INTERNATIONAL JOURNAL OF PROPERTY LAW* 111 (1993).

Whereas the courts may have established that ownership is governed by the law of the original location of the cultural property, even to the point of respecting the ownership of a foreign government, it is less clear to what extent the German courts would give effect to foreign export prohibitions. Germany is not a member of the 1970 UNESCO Convention that requires such respect for export prohibitions;⁴³⁷ and, in the absence of specific agreements, it might be argued that the general continental rule should prevail according to which European countries do not grant assistance to other courts in administrative matters.⁴³⁸ However, with regard to the export provisions of European Union countries, the German position will have to change with the planned transformation of the European Directive on the return of unlawfully removed cultural objects.⁴³⁹

One German decision of 1972⁴⁴⁰ pays homage to the principles of the 1970 UNESCO Convention, albeit by benefitting a German defendant. The case was decided in 1972 by the Federal Supreme Court on appeal. The plaintiff was a Nigerian firm that had executed an insurance contract with a German firm to cover the risk of transporting cultural objects that had been exported illegally from Nigeria to Germany. Six of the transported bronze statues were lost on the way, and the exporter made an insurance claim. The insurer refused to compensate for the damage on the grounds of the immorality of the insurance contract. The Supreme Court held that the insurance contract was immoral and therefore void because the UNESCO Convention aimed at giving effect to national laws on the exports of cultural property. The Court held that, even though Germany was not a member, the Convention nevertheless expressed a fundamental agreement of the community of nations on this issue.

State ownership of treasure trove

Cultural property that is found as treasure trove is considered public property of the German states according to various state laws that are rooted in formerly existing royal prerogatives. These provisions of state law are an exception from the otherwise prevailing § 984 of the CIVIL CODE that divides the ownership of treasure trove between the finder and the owner of the real estate. The power of the states to legislate on these matters results from introductory provisions to the CIVIL CODE⁴⁴¹ according to which rights and privileges of the states that existed when the CIVIL CODE was enacted in the 19th century, among them the royal ownership of treasure trove, remain in existence; and the states have retained the right to legislate on

⁴³⁷ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 10 INTERNATIONAL LEGAL MATERIALS (ILM) 289 (1971).

⁴³⁸ Jaeger, *supra* note 22, at 97; the European reluctance to enforce public laws of other countries has become evident by the fate art. 7 of the European Convention on the Law Applicable to Contractual Obligations [signed at Rome, June 19, 1980 OJ No. L 266], which provides that mandatory laws of another country may be given effect in conflicts cases if this is warranted by a significant relationship and other factors -- most European countries have made a reservation not to apply this provision [*Id.*]

⁴³⁹ Council Directive (93/7 EEC), Mar. 15, 1993, on the return of cultural objects unlawfully removed from the territory of a Member State, OJ No. 74/74;

⁴⁴⁰ BGH decision, June 22, 1972, 59 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN 82 (1973).

⁴⁴¹ Einführungsgesetz zum Bürgerlichen Gesetzbuch, repromulgated Sept. 21, 1994, BGBl. I, p. 2494, as amended, §§ 3 & 73.

these matters. Case law⁴⁴² has established that the public claiming of cultural treasure is compatible with the fundamental right of property of the Federal Constitution.⁴⁴³

A typical treasure trove provision is found in § 23 of the Cultural Monument Law of the State of Baden-Württemberg.⁴⁴⁴ It provides that movable cultural monuments that are ownerless or that have been hidden for so long that their owner can no longer be identified become the property of the state upon discovery if they are found in the course of governmental archeological digs or if they are found in areas that have been declared protected digging areas or if the objects, wherever found, are of prominent scientific value.

Regulation of traffic in cultural property

The Law on the Protection of Cultural Property⁴⁴⁵ sets up a system for registering privately owned cultural objects and for making their export dependent on a permit. Registration is decided by the highest administrative authorities of the state where the property is located, after a panel of experts has given an opinion. This panel is composed of representatives of the arts community and also includes one spokesman for the Federal Ministry of the Interior (Ministry). Registration may be carried out upon request of the private owner, *ex officio* by the state, or upon request of the Ministry. The state registers are compiled into a national register that is maintained and periodically promulgated by the Ministry.

Requests for export permits must be directed to the Ministry, which decides after listening to the advice of an expert panel that includes two experts of the state where the property is located and one representative of the Federal Council, the parliamentary chamber representing the states. If an export permit is denied and the owner of the property is under an economic necessity to sell the object, the Federal and state authorities must make an effort to come up with an alternative solution that might compensate the owner while keeping the property in Germany.

A surprising feature of the German system is the low number of registered items. Currently, the national register contains less than 700 entries, and included in this number are works of art as well as archival property. Among the reasons for the low numbers may be the exclusion of church property and publicly owned property from the governance of the Act and the discrepancy in state practices. In many instances, the state authorities are not aware of the private holdings, even though the tax incentives should encourage the owners to come forward and register their property. The practical importance of the state laws on cultural monuments also may have an impact. These restrict transfer across state borders. Therefore, if an object is a cultural monument of the state, its export is indirectly restricted even if it not included in the national register.⁴⁴⁶ However, it is expected that the recently promulgated European regulations and directives will make a big change in the German practice and require much more of an administrative effort.⁴⁴⁷

⁴⁴² Decision of Bundesverfassungsgericht, May 18, 1988, 78 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 205 (1989).

⁴⁴³ Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBl. p. 1, art. 14..

⁴⁴⁴ *Supra* note 3.

⁴⁴⁵ *Supra* note 1.

⁴⁴⁶ Pieroth, *supra* note 17.

⁴⁴⁷ Eberl, *supra* note 2.

Other protection for cultural property

The theft of publicly exhibited objects of scientific, artistic, or historical value constitutes an aggravated form of larceny that is punishable with up to ten years' imprisonment as compared to the five year maximum penalty for unqualified theft; the taking of sacred or venerable objects from churches is also an aggravating circumstance for theft.⁴⁴⁸ In addition, a criminal provision against vandalism⁴⁴⁹ protects cultural objects against damage or destruction. The provision applies to objects of art, science, or applied art that are publicly exhibited as well as to sacred objects, monuments, and natural monuments. The penalty is up to three year's imprisonment and the attempted vandalism is punishable.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict⁴⁵⁰ became effective for Germany in November 1967,⁴⁵¹ after an implementing law was enacted in April, 1967.⁴⁵² The latter makes the German states primarily responsible for the implementation of the Convention, yet the Federal government also has certain responsibilities, among them the organization and leadership of civil protection measures in case of war.⁴⁵³ As is required by the Convention, Germany has reported what measures are being undertaken to protect cultural property.

According to the 1984 report,⁴⁵⁴ Germany distributes a German text of the Convention to authorities at all levels, as well as to schools, churches, art galleries, the press, and upon request, the public at large. A systematic program to microfilm valuable archival property has been carried out since 1961, and the microfilms are stored in a central refuge that is located in a mine. Pilot projects have also created shelters for certain movable cultural property. Commissioners-general for cultural property have been appointed, and the states have identified and listed protection-worthy architectural monuments.

Repatriation of cultural property moved abroad

Germany has until now refused to participate in international instruments that call for vast measures of repatriation of cultural property. It appears that Germany distinguishes between the returning of stolen goods, which is to be encouraged, while the enforcement of foreign export laws is approached more cautiously. However, within the European Union, a program of returning unlawfully removed art will come into existence with the transformation into national law of the European Directive on the return of cultural objects (see below).

⁴⁴⁸ Strafgesetzbuch (StGB), repromulgated Mar. 10, 1987, BGBl. I, p. 945, ad amended, § 243.

⁴⁴⁹ StGB, § 304.

⁴⁵⁰ Signed at The Hague, May 14, 1954, 249 UNTS 215.

⁴⁵¹ Bekanntmachung, Oct. 10, 1967, BGBl. II, p. 2471,

⁴⁵² Gesetz, Apr. 11, 1967, BGBl. II p. 1233, as amended by Gesetz, Aug. 10, 1971, BGBl. II, p. 1025.

⁴⁵³ Gesetz über den Zivilschutz, Aug. 9, 1976 BGBl. I, p. 2109, as amended.

⁴⁵⁴ Convention for the Protection of Cultural Property, INFORMATION ON THE IMPLEMENTATION OF THE CONVENTION, 1984 REPORT (Paris, 1984).

German claims for property that has been removed in the aftermath of World War II are handled in different ways, depending on the circumstances. In one recent instance, a German foundation (*Kulturstiftung der Länder*) purchased from the United States for U.S. \$3 million a Carolingian manuscript that had been taken from the Cathedral of Quedlinburg (formerly East Germany) by a U.S. soldier during or after World War II.⁴⁵⁵

With Russia, Germany is negotiating for a return of the art that was taken by the Soviet Army during the occupation and has not been returned. Germany has concluded some bilateral treaties with East bloc countries that call for the repatriation of pillaged works of art, among them two with the Soviet Union.⁴⁵⁶ So far, the treaties with the Soviet Union have not been of much assistance in Germany's efforts for the return of some priceless pictures that are currently being exhibited by the Russians. Germany is also negotiating with Poland for the return of a priceless collection of manuscripts, including some by Bach, Beethoven and Mozart that came from the Prussian state library and ended up in Polish hands after the war.⁴⁵⁷

Other law establishing and protecting cultural heritage

The already mentioned state laws on cultural monuments are administered with much attention to detail by the state authorities, particularly with regard to the protection and preservation of immovable monuments of artistic, scholarly or historic local interest. Germans are proud of their heritage, their old cities, villages, castles, and churches that date back to the Middle Ages or even to Roman settlements; and they preserve them lovingly, with the encouragement of many subsidies and tax incentives at state and federal levels, among them, exemptions and favorable valuations for the wealth tax and the inheritance tax.⁴⁵⁸ In addition, a Federal Law of 1980 requires that monument preservation be taken into consideration in the planning of highways, waterways, railroads, nature conservation projects, zoning, and similar endeavors.⁴⁵⁹

Germany has not as yet transformed the 1993 European Directive on the return of unlawfully removed cultural objects,⁴⁶⁰ even though it called for national implementation by March 1994. It appears that the German authorities are currently drafting such legislation. However, enactment may take some time if Germany uses this opportunity for a comprehensive review of the Cultural Property Law which also may reflect the European regulations on the registration of cultural objects.⁴⁶¹ What also may prove troublesome are the private law aspects of any such legislation. Moreover, the enactment of such a law may eventually require a hearing of the various interest groups and the cooperation of the states. Although the directive is

⁴⁵⁵ K. Siehr, *Manuscript of the Quedlinburg Cathedral Back in Germany*, 1 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 215 (1992).

⁴⁵⁶ German-Russian Cultural Convention, Dec. 16, 1992, BGBl. II, p. 1256 (1993).

⁴⁵⁷ *Walesa says more can be done*, REUTERS WORLD SERVICE, June 14, 1995, NEXIS, NEWS.

⁴⁵⁸ Pieroth, *supra* note 17; Kleeberg, *supra* note 16, at 140 & 330.

⁴⁵⁹ Gesetz zur Berücksichtigung des Denkmalschutzes im Bundesrecht, May 30, 1980, BGBl. I, p. 649.

⁴⁶⁰ *Supra* note 32.

⁴⁶¹ *Supra* note 19.

unpopular in the German arts community, some German experts recognize the necessity for a Community regime due to the elimination of border controls within the European Union.⁴⁶²

Germany is a member of the 1954 Hague Convention that adheres to the heritage of mankind concept but not of the 1971 UNESCO Convention⁴⁶³ that adheres to a national heritage concept for cultural property, even though the German courts have shown some respect for the principles of the UNESCO Convention.⁴⁶⁴ Germany was not among the original signatories of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects of 1995;⁴⁶⁵ and, in view of the German philosophy, it is doubtful whether Germany will become a member.

On the other hand, Germany has shown its willingness to help in the preservation of mankind's cultural heritage by participating in international efforts to preserve individual monuments or cultural sites. For instance, Germany participated in the project to move and thereby save the temples of Philae in Nubia that were endangered by the construction of the Aswan High Dam.⁴⁶⁶ Germany has also ratified the UNESCO Convention for the Protection of the World Cultural and Natural Heritage⁴⁶⁷ and several Council of Europe conventions on cultural property, among them the European Convention on the Protection of the Archeological Heritage.⁴⁶⁸

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⁴⁶² J. Schwarze, *Der Schutz nationalen Kulturguts im europäischen Binnenmarkt*, 49 JURISTENZEITUNG 111 (1994).

⁴⁶³ *Supra* note 30.

⁴⁶⁴ *Supra* note 33 and accompanying text.

⁴⁶⁵ Signed at Rome, June 24, 1995, 34 ILM 1322 (1995).

⁴⁶⁶ Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Save the Temples of Philae, signed Dec. 19, 1970, effective for Germany July 21, 1971, BGBl. II p. 51.

⁴⁶⁷ Done at Paris, Nov. 23, 1972, 27 UST 37; TIAS 8226; BGBl. II p. 213 (1977).

⁴⁶⁸ Signed at London, May 6, 1969, BGBl. II 1285 (1974).

96-1377

GHANA**Nature and significance of cultural property**

The primary legislation that governs cultural property in Ghana is the National Museums N.L.C.D. Decree, No. 387 of 1969 as amended.⁴⁶⁹ The nature and significance of cultural property is evidenced by the regulation and control of artifacts by the Government. Such are referred to as antiquities.

Definition of *cultural property*

Antiquities are defined in § 30 of the National Museums law to include the following:

...an object of archaeological interest or land in which any such object is believed to exist or was discovered including any land adjacent to such object or land which in the opinion of the Ghana Museum and Monuments Board is reasonably required to maintain the object or the land or its amenities or to provide access thereto or for the exercise of proper control or management over such object or land; or any work of art or craftwork including any statue, modelled clay figures, cast or wrought iron metal carving, house post, door, ancestral figure, religious mask, staff, drum, bowl, ornament, utensil, weapon, armor, regalia, manuscript or document if such work of art or craftwork is of indigenous origin and was made or fashioned before the year 1900 or is of historic, artistic or scientific interest, and is or has been used at anytime in the performance, and for purposes of any traditional ceremony.

Establishment of ownership of cultural property

The regulation and control of cultural property is the responsibility of the Government. The Government, through its Commissioner or minister, appoints the Ghana Museum and Monuments Board of ten people. The duties and functions of the Board include a responsibility to equip, maintain and manage the National Museum; and establish, equip, maintain and manage any other structures of cultural property in the country; preserve, repair or restore any antiquity which it considers to be of national importance; investigate and report any matter pertaining to cultural property when required by the Commissioner; and maintain and register all antiquities which it acquires or which have come to its attention.

The Board is responsible to the Commissioner to whom it provides annual reports consistent with the requirements of §§ 14 and 15 of the Law of 1969, as amended. Under § 16 of this Law, the Board enjoys broad powers to list all monuments that have been proclaimed as national monuments or that it considers desirable to be so listed. It also has power to ascertain the identity of the owner or owners of such monuments and other forms of cultural property. It recommends to the Commissioner any monuments or other antiquities and other forms of cultural property that may be proclaimed as national monuments. It is responsible for all the control and management of artifacts and other facets of cultural property. Where such property is private property, the owner must consent to any undertaking by the Board involving his property. Therefore, it is the Board that establishes ownership and control of all cultural property in Ghana.

⁴⁶⁹ 9 ACTS OF GHANA (1969).

Regulation of traffic in cultural property

Part I, §§ 1-11 of the Law of 1969, as amended, governs the traffic and other transactions including exports of cultural property from Ghana. According to § 1 of this Law, no person can export any form of cultural property without an export permit issued by the Board. Applications for such a permit must be made to the Director of the Ghana Museums and Monuments Board three months in advance or three months before the export of the item. The application must provide the name and nature of the property, its functions, its dimensions, its local cost or an estimate of its value, the place where and the source or person from whom it was obtained. Photographs of the item must accompany the application unless the Director of the Board has specifically waived this requirement.

Furthermore, unless the item in question has been delivered to the Director or left in his custody, the applicant should state the current location of the item. This is necessary for the Director or his agents to inspect the article before its shipment or export. Only once it has been inspected does it receive a stamp of approval for its export. As a result, § 3 of the Law of 1969 requires that the Director may with the consent of the Board prohibit the export of any antiquity if he considers that such export would not be in the public interest. However, there may be items of cultural property that may be removed without a permit. But these too must be cleared through the Director of the Board. They also cannot be antiquities or other artifacts as defined by the Law of 1969 as amended.

Therefore, pursuant to §§ 4 and 5 of this Law, an export permit will only be issued in the prescribed form following a successful application for a permit. The permit may be without any encumbrances or subject to terms and conditions as specified by the Board. However, no permit under any circumstances can authorize the removal from Ghana of any antiquity except through a recognized customs port of entry or exit. No customs officer can allow the export of any artifact or other forms of cultural property until and unless the applicant has surrendered to the customs agent an export permit with respect to the item of export.

It is also the law in Ghana that the Director can compulsorily purchase any artifact or other aspects of cultural property from any individual who intends to export such an article. In such an event, the person must then surrender the item to the Board. Failure to surrender it constitutes an offence, and the penalty may include forfeiture.

A license is required to deal in artifacts and other forms of antiquities. Applications for a license to deal in items or articles of cultural property are made to the Director in the prescribed form. Similarly, § 8 of this Law stipulates that a permit is required to excavate for any antiquity or artifact. Before issuing an excavation permit, the Ghana Museum and Monuments Board must be satisfied that the applicant is competent by training and experience to carry out such operations. It is helpful that such a person has the financial and institutional support of an archaeological or scientific body of good standing.

A permit to excavate may be granted freely or subject to terms and conditions as the Board deems fit. The permit could also be revoked at any time without providing reasons for its revocation. The Board can also suspend any excavation operations at anytime according to § 8 of this Law. According to § 9 of this Law, no person can remove any artifact from any original site without the consent of the Board. It is incumbent on applicants engaged in this business when applying for necessary permits and other requisite authority to state the exact location of the item, where it is going and the purpose for its removal. The Board may also require that a photograph or photographs of such items be submitted as part of the application process under § 9 of the Law of 1969, as amended.

Therefore, anyone who discovers an artifact, antiquity or other form of cultural property defined as an antiquity within the purview of this Law must notify the Ghana Museum and Monuments Board in keeping with § 10 of the Law. As a result, the Commissioner or Minister responsible for education in Ghana can at any time, through an executive instrument, proclaim any monument that does not belong to the state as a national monument. The Board, however, makes recommendations to the Commissioner for such a proclamation to be issued in accordance with § 11 of the Law.

Offenses connected to matters of cultural property under this Law carry prison terms and fines imposed under § 12 of the Law. Forfeiture could also be ordered as part of the penalty. Though powers exist under § 28 of the Law of 1969 for the Board to issue regulations governing any facet of cultural property in Ghana, there are no provisions in the Law that control the protection of cultural property in times of war or the repatriation of cultural property removed abroad.

Other laws establishing and/or protecting cultural heritage

Other laws establishing or/and protecting cultural heritage include the Wild Animals Preservation Act, No. 43 of 1961, as amended,⁴⁷⁰ that regulates, among other things, permits and licenses to collect specimens, restrictions on exports and imports of trophies, etc. Other laws pertain to the preservation and protection of fauna, flora, forests and other natural treasures found in Ghana.

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⁴⁷⁰ 2 ACTS OF GHANA (1960-).

96-1377

GREECE**Nature and significance of cultural property**

Greece a source nation,⁴⁷¹ well known for its rich cultural heritage and for being the victim of extensive looting of such heritage, has sought since 1832 when it gained its independence from Turkey to protect its cultural property. The earliest statute establishing state ownership and protecting the cultural property within its territory from illegal export, secret excavations and theft is in itself a recognition of the unique nature of cultural property as evidence of the achievements of ancient Greeks and as a source of information and education for future generations.

The significance of cultural property is further reflected in the current Constitution which is the first in the legal history of Greece to embrace explicit provisions with regard to the protection of cultural and natural environment in general and archaeological and historical objects in particular.⁴⁷² Article 18 spells out that "special laws shall determine the ownership and transfer of caves, archaeological sites and treasures." Article 24, paragraph 1, proclaims that:

...the protection of the natural and cultural environment constitutes a duty of the State. The State has the right to take preventive as well as suppressing measures to protect the natural and cultural environment.

Furthermore, paragraph 6 states that:

...monuments, historic sites and historic elements thereof shall be under the protection of the State. Such restrictions on ownership as are necessary for the implementation of this protection, as well as arrangements and forms of compensation for the owners affected, shall be laid down by law.

Definition of *cultural property*

The first legislation to protect archaeological treasures in general was enacted in 1834; however, effective protection was not afforded until 1932 when Legislative Decree No. 5351/1932 on Antiquities codified all previous existing legislation.⁴⁷³ The second major piece of legislation was enacted in 1950.

⁴⁷¹ Professor Merryman has identified two schools of thought concerning cultural property. He divides the world into *source nations* which are rich in cultural artifacts and *market nations*. The first school of thought, identified as cultural nationalism considers cultural property as a part of national cultural heritage. Arguments for repatriation of objects of cultural significance to source nations belong to this school. The second school identified as cultural internationalism is principally interested in the physical preservation of cultural objects. Market nations, collectors, and museums belong to this school and seek to preserve their holdings of cultural objects. [J. H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J.INT'L. 831, 832, 846 (1986)].

⁴⁷² E. Dores, TO DIKAION TON ARCHAEOETON 31 (1985).

⁴⁷³ OFFICIAL GAZETTE OF GREECE, pt. A, No. 275 (1932). *See also*, P. Raptarchis, 31 DIARKES KODIX NOMOTHSIAS (Continuous Compilation of Laws) 899 (Athens, looseleaf).

Law No. 1469 Regulates Protection of a Special Category of Edifices and Works of Art Subsequent to 1830.⁴⁷⁴ Both legislative pieces follow the traditional definition of *cultural property* that includes tangibles, movables and immovables.

Decree No. 5351, as was common at the time it was drafted, uses the term *antiquities* rather than *cultural property*. Article 2 defines *antiquities* as movable or immovable works of architecture, sculpture, graphic art or any art in general, such as all kinds of edifices and architectural monuments and any carved stone found in such monuments, aqueducts, roads, walls, tombs, statues, bas-reliefs, figurines, inscriptions, pictures, mosaics, pottery, weapons, jewelry and any other work in any kind of material including precious stones and coins. The Decree also includes in the definition any objects belonging to the early Christian period or medieval hellenism. The language used, "such as" or "any other work in any kind" indicates that the lawmakers intended the list not to be exhaustive.

Law No. 1469/1950 broadens the definition of *cultural property* by including sites which have been classified as possessing particular natural beauty (other than historic or archaeological sites⁴⁷⁵ and prominent works of handicraft or popular art subsequent to 1830. The Law requires authorization by the Ministry of Culture for the construction of any edifices in such sites as well as any repair, alteration or any preservation work on edifices subsequent to 1830, which have been designated as works of art deserving special protection.

Establishment of ownership of cultural property

State ownership

Article 1 of Decree No. 5351 establishes State ownership of all antiquities, whether movable or immovable, from ancient or subsequent times which are found in Greece and on any national property, found in rivers, lakes or underwater and on public, monastic or private land. Therefore, the State has the right and obligation to investigate, safeguard and preserve such items in public museums if appropriate.

It has been asserted in the legal literature that the system of State ownership provides the most effective protection for cultural property. Inherent in the definition of State ownership are two aspects: inalienability, the government may not dispose of the property once it has been deemed as essential to the public service; and no person may acquire a State-owned object through prescription. According to well-established court decisions, the State enjoys exclusive and permanent ownership of antiquities and at the same time bears the obligation to preserve and safeguard the antiquities.⁴⁷⁶

A number of provisions aim to promote State ownership. For instance, the Decree places accidental discoveries under State control; and the discovery must be declared or notification must be made within a certain time limit. The Decree also provides for rewards to anyone who indicates to the appropriate authorities where unknown antiquities may be discovered. The amount of the reward is appropriate to the archeological significance of the cultural object and to the assistance provided.⁴⁷⁷

⁴⁷⁴ *Id.* No. 169 (1950) and P. Raptarchès, at 911(a).

⁴⁷⁵ *Id.* art., ¶ 1.

⁴⁷⁶ Dores, *supra* note 2, at 41.

⁴⁷⁷ *Supra* note 3, art. 14 of the Law.

Preemptive rights

The Decree establishes preemptive rights of the State over owners of private collections when antiquities are sold in Greece. Before selling an item, a collector must request authorization by the Ministry. Otherwise he is subject to imprisonment and a fine and the item sold will be confiscated. The State has the right to purchase any antiquity that is for sale by a collector by paying one-half the value.

Preemption at customs is also known as retention. This refers to antiquities which have been the subject of the refusal of an export application. State preemption right may be ceded to a recognized private collector. The price paid on preemption is half the amount of the value declared by the exporter.⁴⁷⁸

Private ownership⁴⁷⁹

Ownership may be ceded to individuals. This type of ownership, however, is *sui generis* as encompassing the obligation to preserve any art objects under their possession as well as the right to transfer them.⁴⁸⁰ However, such transfers must be previously declared.⁴⁸¹ The Decree also recognizes the right of monasteries to continue to own ecclesiastical heirlooms that are not used for worship and any valuable old manuscripts even after such things have been placed in a museum.⁴⁸²

With regard to individuals, the Decree provides that persons who come into possession of an antiquity have two weeks to notify the closest archaeological commission or police authority and indicate the manner of acquisition and the place where the object was found. In addition to this initial obligation, an individual has certain obligations towards preservation, storage and transfer.⁴⁸³

⁴⁷⁸ *Id.* art. 19, ¶¶ 3 & 4.

⁴⁷⁹ Professor Koumantos asserts that one may distinguish between three degrees of ownership: a) civil, b) "second degree ownership" by a nation and c) "third degree ownership" by the international community. He inquires:

...why should we not establish an obligation on States to preserve the cultural property belonging to them, and possibly, to ask for the assistance of the regional or international community to that end? Would this be an admission that even States are only the custodians of the cultural property on their territory and are second degree owners in regard to such property? Must we institute a sort of third degree of ownership of cultural property which would belong to the international community? I think this is an idea ...which might provide food for thought in the future. [G Koumantos, *International Legal Protection of Cultural Property*, COUNCIL OF EUROPE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY 12, 14 (1983)].

⁴⁸⁰ Does, *supra* note 2, at 43.

⁴⁸¹ *Supra* note 3, art. 13 of the Law.

⁴⁸² *Id.* art. 4.

⁴⁸³ *Id.* art. 5.

After the declaration, the possessor may keep the object for himself or sell it to a third party within Greece. The right to sell it arises only after the initial declaration.⁴⁸⁴ The archaeological committee will examine and precisely describe the antiquity. If it is of insignificant archaeological importance and of very small commercial value, the antiquity will simply be described and listed and then left for the free use of the possessor. If the object is important, the individual still retains the right to keep it; however, he is obliged to display and preserve the object.⁴⁸⁵

Antiquities found in the course of excavations on private property are the property of the person who carries out the excavation. That person is still subject to the declaration and time limit of article 5 prescribed above. The Decree strictly regulates the manner in which excavations may be carried out and the appropriate authorities to supervise them. Briefly, permission is required before excavation on private property. No one is granted permission to excavate on the property of others.⁴⁸⁶ If the excavation is carried out by a person without authorization on the property of another, the owner of that property becomes the owner of the antiquity.⁴⁸⁷ If immovables are found during excavations conducted on private property, the Decree provides for compensation of the owner.⁴⁸⁸

A number of court decisions indicate that only *bona fide* possessors, that is possessors who have no knowledge of the illegal acquisition or possessors of accidental discoveries, may make the declaration.⁴⁸⁹ Instances of bad faith possessors are those who possess antiquities through illegal excavations (art. 46, ¶ b(b)), who trade antiquities without a license (art. 58) or transfer antiquities without declaring them first to the appropriate authorities (art. 13). In all the above instances, the object is considered stolen, and the offender commits the crime of stealing cultural property.⁴⁹⁰

An individual who fails to submit this declaration within the prescribed period of two weeks is subject to a fine. If he declares the item after two months, the item is confiscated. Imprisonment is imposed when an individual fails to report it with the intent to dispose of it illegally.⁴⁹¹

Transactions involving antiquities

Transactions involving antiquities are subject to a specific provision in the Decree regulating transfers and the CIVIL CODE provisions with regard to the sale of movable goods. When an antiquity is stolen from its owner and subsequently transferred to a good faith purchaser, the courts in Greece will apply the provisions

⁴⁸⁴ See Supreme Court Decisions 139/41, 101/55. *Supra* note 6, at 68.

⁴⁸⁵ *Supra* note 3, art. 12 of the Law.

⁴⁸⁶ *Id.* art. 39.

⁴⁸⁷ *Id.* art. 47.

⁴⁸⁸ *Id.* art. 8.

⁴⁸⁹ Dores, *supra* note 2, at 69.

⁴⁹⁰ *Id.*

⁴⁹¹ *Supra* note 3, art. 6 of the Law.

of the CIVIL CODE which are applicable to bona fide purchasers of stolen property. The CIVIL CODE favors the true owner in transactions involving movable property, thus it protects cultural property in case of theft.

An individual who through a legal transaction (either sale or donation) transfers a cultural object to a third person must declare such a transfer to the appropriate authorities. The transferee is also subject to the same requirement. A transfer that occurs without prior notification either by the transferor or the transferee is null and void.⁴⁹² Such a transfer is considered a theft.⁴⁹³

The CIVIL CODE provisions are included in articles 1036 and 1038. Specifically, article 1036 regulating the acquisition of a movable from a person who is not the owner provides as follows:

The purchaser becomes owner even when ownership of the item did not belong to the seller, unless the purchaser acted in bad faith.

In case of things stolen or lost, article 1038 of the CIVIL CODE provides that "a transfer by a non-owner to a transferee who is of good faith shall not be effective if the object was stolen or lost." Thus, a thief cannot transfer title, even to a bona fide purchaser, because his title is void.

The Decree contains a number of provisions regulating the establishment of private collections which is subject to prior authorization and imposes certain obligations upon owners of private collections, such as having a precise descriptive list with photographs of each item in the collection and allowing individuals to study and photograph the antiquities. It also contains detailed provisions with regard to antique dealers who must be authorized and are required to keep a list of any transactions conducted.

Regulation of traffic in cultural property

The Decree contains provisions regulating the import and export of cultural treasures as well as provisions which aim to protect property from any improper and dangerous transfers from one place to another within the Greek territory. Greece also ratified the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 1970). The Convention entered into force with respect to Greece on September 5, 1981.

The Decree provides that "antiquities may be imported freely into Greece." However at the time of importation, the importer needs to declare the antiquities along with their monetary value and whether he intends to keep them for private use or to sell them.⁴⁹⁴ Obviously, the law refers to Greek antiquities imported from foreign countries since in the absence of such a declaration the antiquities will be considered as found in Greece, and the question of State ownership may arise.⁴⁹⁵ Any subsequent sale must be declared

⁴⁹² *Id.* art. 13.

⁴⁹³ Dores, *supra* note 2, at 110.

⁴⁹⁴ *Supra* note 3, arts. 15 & 16 of the Law.

⁴⁹⁵ Dores, *supra* note 2, at 116.

to the appropriate authorities. The State has the right of preemption. If the State does not exercise this right, a tax of 10% is added to the sale price.⁴⁹⁶

The exportation of State-owned antiquities is governed by article 45 of Decree No. 5351. Antiquities that belong to private individuals are regulated by article 19 of the same Decree.

Article 45 of the Decree provides that "on no account shall the exportation from Greece of excavation finds be allowed." In 1977, in implementing its international obligations arising from the UNESCO Convention, Greece enacted Law No. 654. It permits the export of antiquities temporarily and for a specific period of time for the purpose of displaying them in foreign museums. The Law required an order of the government after an opinion of the Archaeological Committee was handed down. On the basis of this exemption, several exhibits with Greek antiquities have taken place in a number of countries.

On the other hand, article 19 states that antiquities belonging to private individuals can be exported from Greece with permission from the Ministry of Cultural Affairs following a decision by the Archaeological Council. Upon exportation, the exporter must pay to the State half of the value of the antiquity. The value is established by the Archaeological Expropriation Fund. The tax which may range up to 50% of the value of the object is imposed to a large extent with the intent to discourage the export of antiquities. However, such a tax cannot be imposed on Members of the European Union. The Treaty on European Union prohibits duties and taxes on exports within the Common Market and while it authorizes "prohibitions or restrictions on...exports...justified on the grounds of...the protection of national treasures," it does not authorize taxation. The Court of Justice has ruled a tax imposed on the export of cultural property illegal.⁴⁹⁷ Those who export antiquities sold by the State as superfluous to the needs of the public museums must pay a 5% surcharge on the price at which the antiquity was sold by the State.⁴⁹⁸

The State has the authority to prohibit the exportation of an antiquity. In this case, it may exercise its preemptive right to purchase the antiquity at half of the value declared by the exporter. The State's preemptive right may be transferred to a private collector upon a decision of the Archaeological Council.⁴⁹⁹

As of January 1, 1993, the export of cultural goods outside the customs territory of the European Union is subject to an export license.⁵⁰⁰ The license which is valid throughout the Community is issued at the request of the person concerned by the competent authority of the Member State where the object was located. The Member State may refuse to grant an export license when the cultural object is covered by special legislation which protects national treasures of artistic, historical or archaeological value.

⁴⁹⁶ *Supra* note 3, art. 17 of the Law.

⁴⁹⁷ R. Goy, *International Protection of Cultural Property and Domestic Public Law* 44, 63, in COUNCIL OF EUROPE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY (Proceedings of the 13th Colloquy on European Law, 1983).

⁴⁹⁸ *Supra* note 3, art. 19, ¶ 2, of the Law.

⁴⁹⁹ *Id.* art. 19, ¶ 3.

⁵⁰⁰ Council Regulation (EEC) No 3911/92 on the Export of Cultural Goods, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, No. L 395/1.

Penalties

The Decree provides criminal penalties for anyone who violates the export provisions. Imprisonment ranges from one month to five years and a fine. Political rights may also be suspended for a period of five years. Any antiquities intended for illegal export are seized and confiscated on behalf of the State. When exportation has already taken place, the illegal exporter is liable to pay an amount equal to the entire value of the identified exported piece.⁵⁰¹

Other protection provided

Greece has ratified the Convention and Protocol for the protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954). It entered into force with respect to Greece on May 9, 1981. Greece also ratified the European Convention on the Protection of the Archaeological Heritage (London, 1969). It entered into force with respect to Greece on October 20, 1981. Greece ratified the International Convention of Cultural and Natural Heritage (Paris, 1972) by Law No. 1126/81. In 1985, Greece signed the European Convention on Cultural Offenses.

Repatriation of cultural property

One of the most debated and unsuccessful cases involving return of cultural property to its country of origin is the Parthenon or Elgin Marbles, involving Greece and the United Kingdom.⁵⁰² Greece has advanced a number of legal, political, historical and moral arguments to justify the return of the Marbles. The most publicized was a 1982 request made during a meeting of Ministers of Culture sponsored by UNESCO by the late Melina Merkouri who was the Greek Minister of Culture at the time.⁵⁰³ In 1984, Greece filed a "steering and moving" application with UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of illicit Expropriation.⁵⁰⁴ Greece responded favorably to UNESCO's request that a new museum be constructed so the marbles might be displayed should they be returned, and Greece has almost completed a building designed specifically for this purpose.

Despite the continuing efforts on the part of Greece, it appears that it is rather unlikely that the Parthenon Marbles will ever be returned to Greece. Greece has ratified the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; however, the United Kingdom is not a party to any international agreements on the restitution or return of cultural property. The Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State has no retroactive application. The recently signed UNIDROIT Convention on the International Return or Stolen or Illegally Exported Cultural Objects applies only prospectively.

The recent return of cultural artifacts to the Greek Government by the United States represents a successful example of cultural objects returning to their country of origin. Greece sued in the United States to recover the objects which were illegally exported and were offered for sale by a New York art dealer. The

⁵⁰¹ *Supra* note 3, art. 20 of the Law.

⁵⁰² For an elaborate historical background *see* C. Hitchens, THE ELGIN MARBLES, SHOULD THEY BE RETURNED TO GREECE? (1988).

⁵⁰³ *Id.* at 163.

⁵⁰⁴ K. Jote, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 292 (1994).

out-of-court settlement included return of the objects to the Greek Government and a charitable tax deduction that covered the dealer's costs.⁵⁰⁵

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⁵⁰⁵ J. A. Lewis, *The golden hoard: Greece gets its artifacts back*, WASHINGTON POST 1 (Feb. 1, 1996), at C1.

96-1377

HAITI**Nature and significance of cultural property**

In Haiti archeological, historical, cultural and architectural treasures which bear witness to the extensiveness of Haiti's past are part of the national heritage. Consequently, monuments, ruins, sites related to African beliefs, and all vestiges of the past are placed under State protection.⁵⁰⁶

Definition of *cultural property*

Immovables, the conservation of which is of public interest for historical or artistic reasons, should be deemed as historic monuments. Immovables located in Haiti which belong to or will belong to the State, communes, corporate bodies, public institutions or institutions serving the public interest which constitute or will be categorized as prehistoric or archeological monuments include lands which enclose prehistoric sites, deposits, or hot springs. Also included in this category are immovables which constitute natural sites or monuments of an artistic nature and immovables the scheduling of which is required to isolate, protect, or rehabilitate immovables which remain listed.⁵⁰⁷

When immovable property belonging to an individual has been automatically listed as a historic monument without the individual's express agreement, this listing may initiate a payment for compensation. The amount must correspond to the loss which may be suffered by the owner as a result of the automatic listing. Claims must be presented to the Council of Secretaries of State. This must be done within three months of the publication of the listing order in the official gazette.⁵⁰⁸

Movable objects can also be listed as historical monuments. Such objects that belong to the State, the communes, corporate bodies, public institutions or institutions serving the public interest, or individuals, and conservation of which is or will be in the public interest on archeological, historical, artistic or other grounds, may be subject to automatic listing by order of the President of Haiti. This is done on the basis of a report produced by the Commission for Historical Monuments and the Secretary of State for Public Education.

Establishment of ownership of cultural property

When such a claim is brought before the Council of Secretaries of State, the Council shall determine the compensation to which the owner concerned is entitled if the listing results in a loss. In the event of any related challenge by the owner, the listed property shall be subject to compulsory purchase in the name of the State. This is done on the basis of the report of the Commission for Historical Monuments and is approved by the Secretary of State for Public Education.⁵⁰⁹

⁵⁰⁶ CONSTITUTION OF THE REPUBLIC OF HAITI OF 1987, as amended, art. 215.

⁵⁰⁷ Law of Apr. 23, 1940, enacted on Apr. 17, 1940.

⁵⁰⁸ *Id.* art. 6.

⁵⁰⁹ *Id.*

The situation is quite different for movable objects that belong to individuals. These become permanent State property if their owners do not appeal against their listing within sixty days from the date of publication of the listing order. In the event of an appeal, the Council of Secretaries of State shall give a final decision on the merits of such appeal. However, if the listing has been carried out with the express consent of the owner, no objection is admissible.⁵¹⁰

Regulation of traffic in cultural property

The different services of the State, the communes, public institutions and institutions serving the public interest are required to ensure the safety and conservation of both immovable and movable objects and other listed historic monuments of which they are the owners, grantees or trustees.⁵¹¹

Other protection for cultural property

In 1979 Haiti enacted a law creating the Institute for the Protection of the National Patrimony (*d'Institut de Sauve Garde du Patrimoine National*). Its main purpose is to preserve, protect and restore any immovables and movables listed as national patrimony.⁵¹² In addition, in 1989 the Council of Secretaries enacted a law which emphasized the objectives of the National Haitian Commission (*La Commission Nationale Haitienne de Cooperation*) in collaboration with UNESCO.⁵¹³ One of its main purposes is to educate, develop communicate and publish information regarding Haitian cultural patrimony in cooperation with UNESCO.

Also in 1989, Haiti created an autonomous organization called the National Commission of the Patrimony (*Commission Nationale du Patrimoine*). The Commission's main purpose is to present recommendations to the government regarding the preservation of the National Patrimony.⁵¹⁴ This Law states that the concept of cultural patrimony in Haiti involves natural and cultural values. Such can be classified as immovables and movables.

⁵¹⁰ *Id.* arts. 15 & 16.

⁵¹¹ *Id.* art. 26.

⁵¹² Decree of Mar. 29, 1979, LE MONITEUR JOURNAL OFFICIEL DE LA REPUBLIQUE D'HAITI, Apr. 19, 1979. Its administrative regulations were enacted by a Decree of Oct. 15, 1984.

⁵¹³ Decree of Nov. 9, 1980, created the National Haitian Commission in collaboration with UNESCO; by a Decree of Oct. 15, 1984, the Council of Secretary enacted a law that states the objectives of the Commission.

⁵¹⁴ Decree of May 10, 1989, published on July 20, 1989.

Repatriation of cultural property removed abroad

In Haiti the exportation of objects listed as cultural patrimony is prohibited. Anyone who transfers, knowingly acquires or exports such objects is subject to criminal laws. However, all archeological and ethnographical objects discovered on Haitian territory are declared to be property of Haiti and their owners. The latter shall be authorized to retain such things with the status of keepers after declaring them to the Bureau of Ethnology.

Other laws establishing and/or protecting cultural heritage

As of 1990 Haiti had not presented an instrument of ratification, acceptance or accession for any of the international conventions in force relating to the protection of movable cultural property.

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96-1377

HONDURAS

Nature and significance of cultural property

In Honduras all the anthropological, archeological, historical and manifestations of artistic wealth of the country are part of the cultural heritage of the nation. The law establishes the principles that serve as the basis for its preservation, restoration, maintenance and restitution. It is the duty of all Hondurans to safeguard their heritage and prevent its unlawful removal. All sites of natural beauty, monuments and reserved zones are under the protection of the State. The State also preserves and promotes all native cultures as well as authentic expressions of national folklore, popular art and handicrafts.⁵¹⁵

The National Congress of Honduras, before enacting the Law on the Protection of the Cultural Heritage of the Nation,⁵¹⁶ took the following grounds into consideration:

- The National cultural heritage comprises cultural objects which are of particular value due to their prehistoric, archeological, historic, artistic and scientific importance.
- Cultural objects constitute one of the basic components of the civilization and culture, and their true value can only be recognized when their origin, history and environment are known with the highest accuracy.
- In order to provide adequate protection for the cultural heritage, very close national and international collaboration must exist within and among the States.
- The 1964 General Conference of UNESCO approved a recommendation; and at its sixteenth session, held in Paris from October to November 1970, it adopted the Convention on the Means to Be Taken for the Protection of the Cultural Heritage of the Nations.⁵¹⁷ The main purpose for the adoption of this Convention was to prohibit and prevent illegal trafficking in cultural property.⁵¹⁸

The purpose of the Honduran Law on the Protection of the Cultural Heritage of the Nation⁵¹⁹ is the protection, conservation, recovery, restoration and safeguarding of property forming the cultural heritage of the nation.

⁵¹⁵ CONSTITUTION OF THE REPUBLIC OF HONDURAS, enacted Jan. 20, 1982, as amended, arts. 172 & 173.

⁵¹⁶ Decree No. 81-84 of May 30, 1984, published in the OFFICIAL GAZETTE, No. 24.387, Aug. 8, 1984.

⁵¹⁷ Resolution No. 10 of Nov. 29, 1978, approved by Decree No. 582.

⁵¹⁸ Resolution No. 14 of Apr. 13, 1978, approved by Decree No. 673 the General Convention for the Protection of the Cultural Heritage of the Nations held in Paris from Oct. 17 to Nov. 21, 1972.

⁵¹⁹ *Supra* note 2.

Establishment of ownership of cultural property

The measures contained in the Law apply to movable and immovable property constituting the cultural heritage of the nation, whether in the possession of the State, municipalities, districts or private individuals, and whether or not the property is listed as a national monument or an archeological zone, without prejudice to existing provisions in other laws or regulations.⁵²⁰

The scope of this Law extends to all cultural heritage property which is threatened or in imminent danger of being lost or damaged due to the execution of public or private works for urban or rural development. In handling the different circumstances that may involve these works, the appropriate authorities may dictate the necessary preventive measures, regulations, or prohibitions for the conservation and protection of such property.⁵²¹

The standard regulations for the safeguarding of the nation's cultural heritage relate to the maintenance of law and order following by the national and social interests. Violation of these regulations are punishable under the provisions of this Law and other applicable legal provisions.⁵²²

Definition of *cultural property*

The cultural heritage includes:

Monuments which are architectural works of archaeological, anthropological, historical and artistic value up to and including the nineteenth century;

Movable property consists of engravings, paintings, sculpture, furniture, jewelry, coins, weapons, clothes, machines and tools or other objects of great archaeological, anthropological, historical and artistic content and value made before 1900;

Architectural complexes or groups of buildings, whether isolated or close to each other, whose architecture, unity or integration with the landscape gives them value from an archaeological, anthropological, historical or artistic view, including **sites**; man made or works of both man and nature. Such things that are also considered part of the cultural heritage include **documentary and bibliographical collections, place names and folklore**.⁵²³

⁵²⁰ *Id.* art. 2.

⁵²¹ *Id.* art. 3.

⁵²² *Id.* art. 4.

⁵²³ *Id.* art. 5.

Regulation of traffic in cultural property

The Secretary's Office of State for Culture and Tourism is responsible for enforcing the laws for the protection of the cultural property. Also, all State agencies are required, within their jurisdictions, to collaborate with the Secretary's Office and with the Honduran Institute of Anthropology and History in furthering the objectives of the Law.⁵²⁴

Regarding protective measures, the documentary heritage of Honduras is also considered national property, whether held by judicial, ecclesiastical or administrative bodies or private persons who are the depositaries and guardians of that heritage. No items may be alienated or taken out of the country unless it is necessary to produce them in international courts to defend the national interests of Honduras. Similarly, bodies which maintain administrative records, whether official or private, are encouraged to protect such records. Special regulations establish the system of organization and management of the documentary collections which constitute the national heritage.⁵²⁵ For the due protection of the cultural heritage, the State of Honduras declares its permanent, inalienable sovereignty over such property.

One may not withdraw historical documentary collections that form part of the national cultural heritage from Honduras. Offenders are liable to a minimum penalty of six months to one year's imprisonment regardless whether the documentation has been returned or not.⁵²⁶ The Government of Honduras will sign with foreign governments as observed by bilateral and regional treaties designed to prevent illicit trade in cultural property. Honduran diplomatic and consular missions are required to keep the Secretary Office of the State for Culture and Tourism informed of the location of Honduran cultural items abroad.⁵²⁷ Moreover, the existence, organization and establishment of museums or cultural centers, whether they are official or private, to exhibit collections of items belonging to the cultural heritage may be arranged solely with the authorization of the Honduran Institute of Anthropology and History.⁵²⁸ For the purposes of international cultural exchange in the course of which the temporary transfer of cultural objects is required for exhibitions, the Institute of Anthropology and History administers the agreement of the Executive Power on behalf of the Secretary's Office of the State for Culture and Tourism.

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⁵²⁴ *Id.* arts. 25 & 26.

⁵²⁵ *Id.* art. 26.

⁵²⁶ *Id.* art. 36.

⁵²⁷ *Id.* art. 45.

⁵²⁸ *Id.* art. 46.

96-1377

INDIA

Nature and significance

Alarmed by the flight of its art treasures to the United States, the National Gallery of London warned the people that the "dwindling resources of Britain can no longer safeguard her art treasures against depletion by American wealth and that the only remedy is an embargo on exports."⁵²⁹ Art treasures of India were even more vulnerable to loss since Indian art objects, both metal and stone, have always evoked world-wide admiration because of their aesthetic appeal. Innumerable religious statues and other objects from temples and ruins of monuments were stolen and sold for personal monetary gain. When the piracy reached a threatening height, in 1970 UNESCO adopted the Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property.

The Convention's definition of *cultural property* includes any property declared by a state as being of importance on religious or cultural grounds for archaeology, prehistory, history, literature, art or science. India did not use the term *cultural property* to prevent the theft and smuggling of antiquities and art treasures. Even though the CONSTITUTION OF INDIA declares that it shall be the obligation of the state to protect its art treasures, the first comprehensive enactment was passed in 1972.⁵³⁰ There are three different Acts which partly cover the items categorized under the UNESO's definition of *cultural property*.⁵³¹

The 1958 Act has as its object the protection of immovable cultural property, including any structure, erection, monument, place of internment or any cave, rock-sculpture or monolith which is of historical, archaeological or artistic interest and which is no less than one hundred years in age. The 1972 Act contains rules that protect movable cultural items in India.

Definitions

The 1972 Act defines the term *antiquity* to include:

1. (i) any coin, sculpture, painting, epigraph or other work of art or craftsmanship;
- (ii) any article, object or thing detached from a building or cave;
- (iii) any article, object or thing illustrative of science, art, crafts, literature, religion, customs, or politics in bygone ages;
- (iv) any article, object or thing declared by the Central Government, by notification in the OFFICIAL GAZETTE, to be an antiquity for the purposes of this Act, which has been in existence for not less one hundred years; and

⁵²⁹ H. Bhasham Pal, THE PLUNDER OF ART 97 (1992).

⁵³⁰ CONSTITUTION OF INDIA, art. 49.

⁵³¹ The Ancient Monuments and Archaeological Sites and Remains Act, No. 24 of 1958; The Antiquities and Art Treasures Act, No. 52 of 1972; and the Wild Life (Protection) Act, No. 53 of 1972.

2. (i) any manuscript, record or other document which is of scientific, historical, literary or aesthetic value and which has been in existence for not less than 75 years;
- (ii) *Art treasure* means any work or art made by human hands, not being an antiquity, declared by the Central Government by notification in the OFFICIAL GAZETTE to be an art treasure for the purposes of this Act having regard to its artistic or aesthetic value:

Provided that no declaration under this clause shall be made in respect of any such work so long as the author, thereof, is alive.

As regards *Ancient Monuments*, the Ancient Monuments and Archaeological Sites and Remains Act of 1958 defines such as:

Any structure, erection or monument or any tumulus or place of internment or any cave, rock-sculpture, inscription or monolith which is of historical, archaeological or artistic interest and which has been in existence for not less than one hundred years and includes:

- (i) the remains of an ancient monument;
- (ii) the site of an ancient monument;
- (iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument; and
- (iv) the means of access to, and convenient inspection of, an ancient monument.

Establishment of ownership

Possession by itself creates a presumption of ownership and the burden of proving that one is not the owner is on the person who affirms that he is not the owner.⁵³² However, possession to come within the scope of this provision must be founded on a prima facie right. It must be of a character that leads to a presumption of title. The Act establishes a permissible and rebuttable presumption that a man found in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen.

Regulation of traffic

As stated in the Preamble, the basic object of the Act is the regulation of the export trade in antiquities and art treasures, prevention of smuggling and fraudulent dealings in them. Therefore, the Act provides a deterrent to the smugglers. In addition, the defendants are also dealt with under the penal laws of the country for the theft of cultural property.

The Act subjects antiquities to registration, irrespective of the country of origin and owner. The registering officers are stationed in India, mainly at points of exit such as airports and harbors. All registered

⁵³² The Indian Evidence Act, No. 1 of 1872, § 110.

cultural objects are subject to protection. Objects, less than one hundred years old are also protected if the Government prohibits their export.

No person can transact any commercial deal in art and cultural property without a license.⁵³³ Every licensed dealer in art shall maintain such records, registers and photographs of the property as may be prescribed. These records shall be available for inspection by a licensing officer. An antiquity may be exported only under an export license and in compliance with the conditions imposed therein. Excluding religious objects, the right of preemption to cultural property is an exclusive right belonging to the State.

In the case of transfer of ownership of cultural property, the transferee must report to the registering officer concerned within sixty days.⁵³⁴ A person found in violation of the Law will be liable to a fine and imprisonment for terms ranging from six months to three years.⁵³⁵ Each state in India is also free to make its own regulations for the protection of cultural property. These regulations, however, follow the lines of the principal Acts of 1958 and 1972.

Repatriation of cultural property from abroad

A large number of antiques and religious statues stolen from temples in India usually find their way into foreign countries. It is believed that foreign collectors pay large sums of money even for a second-rate bronze statue or antiquity from India. With the assistance of unscrupulous local smugglers, the antiquity often ends up in the United States, Switzerland or the United Kingdom. These illegal operators are often influential priests or trustees of Indian temples.

Western art collectors have been found to focus on the acquisition of ancient Indian art and cultural property, especially antique bronze statues. The disappearance of these antiques in the early 1970s evoked protests. The Government was compelled to strengthen its regulations on the theft and export of such items. In 1988, India won a long, drawn-out legal battle in the London High Court. As a result, a 12th century bronze statue of Lord Shiva in the Nataraja posture belonging to the Pathur Temple in Thanjavur district of Tamil Nadu State was returned to India. The defence that the defendant was a bonafide purchaser for value was denied as unsustainable since the law of India was different. In India, stolen property can never belong to the buyer.⁵³⁶

There have been other instances where cultural property has been located in the hands of a museum and other individuals in the United States. On occasion, a compromise has been reached where the parties retain the religious statue for a period of ten years before its final return to India.⁵³⁷

⁵³³ The Antiquities and Art Treasures Act, No. 52 of 1972, § 5.

⁵³⁴ *Id.* § 17.

⁵³⁵ *Id.* § 25.

⁵³⁶ Bhisham Lal, *supra* note 1, at 117.

⁵³⁷ *Id.* at 119.

Other laws protecting cultural property

The PENAL CODE also covers cultural property. The possession of such treasures which have been criminally misappropriated or where a criminal breach of trust has been committed are considered as *stolen property*. A person who dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment which may extend to three years or with a fine or with both.⁵³⁸

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⁵³⁸ THE INDIAN PENAL CODE, No. 45 of 1860, §§ 378-379, 410-411 and 414.

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IRAN

Nature and significance of cultural property

Iran, with its long history of civilization, is one of the richest countries in the world so far as arts and cultural heritage is concerned. Excavations have uncovered artifacts from pre-historic times. In the course of history as the Iranian empire was extended to other lands, or as this country was invaded by other conquerors, people exchanged arts and culture and received enormous cultural influences which, in turn, further enriched the already sublime culture of this land.

The development of art and architecture in Iran could, in general, be divided into two distinct historical perspectives: the first period which dates back to ancient times (the middle of the second millennium B.C.) and is traced down to the invasion of the Arabs and fall of Ctesiphon, the capital city of the Sassanid dynasty in 637 A.D. Numerous artifacts recovered from this long period attest to settled agriculture, permanent sun-dried-brick dwellings, and pottery-making from the six millennium B.C. The most advanced area technologically was ancient Susiana, present-day Khuzestan Province in the South of Iran. The inhabitants of Susiana were using semipictographic writing, probably learned from the highly advanced civilization of Sumer in Mesopotamia (now in the eastern part of Iraq). In this period of history, the influence of Sumerian art and culture is noticeable. It is an era in the ancient history of Iran (fourteenth century B.C.) where art achieved its most impressive ascent. Then we come to the establishment of the Achaemenids (550-330 B.C.) who ruled the first Iranian world empire, which stretched from the Aegean coast of Asia Minor to Afghanistan, as well as south to Egypt, and created the magnificent structures at Persepolis, the remains of which still exist.

During the reign of Darius I (522-500), art and architecture flourished. Darius revolutionized the economy by placing it on a silver and gold coinage system. One of the major accomplishments of Darius's reign included codification of the *data*, a universal legal system upon which much of later Iranian law would be based, and construction of a new capital at Persepolis, where vassal states would offer their yearly tribute at the festival celebrating the spring equinox. In its art and architecture, Persepolis reflected Darius's perception of himself as the leader of conglomerate of people to whom he had given a new and single identity. The Achaemenid art and architecture found there is at once distinctive and also highly eclectic. The Achaemenids took the art forms and the cultural and religious traditions of many of the ancient Middle Eastern peoples and combined them into a single form. This Achaemenid artistic style is evident in the iconography of Persepolis, which celebrates the king and the office of the monarch.⁵³⁹

Later in history, when the Achaemenid Empire disintegrated and was occupied by Alexander the Great (334-247 B.C.) who conquered the heart of the Achaemenid Empire -- Susa, Ecbatana, and Persepolis -- the last of which he burned. Under the influence of Alexander's successors, Hellenistic motifs in art and architecture became prevalent.

The second period in art and culture begins in 637 A.D. with the conquest of Iran and the fall of Sassanid Empire. This period is marked with destruction of Iranian art and culture by the Mongols and Tamerlane dynasties. Art, however, took an upward course during Safavids dynasty (1501-1722). It was during this period of history that art and architecture, under the influence of Chinese, Indian, and European

⁵³⁹ IRAN, A COUNTRY STUDY (Federal Research Division, Library of Congress, 1987).

cultures introduced by various invaders including Arabs, Mongul and Turkik rulers, attained the highest degree of its perfection.

Definition of *cultural property*

The first law concerning the protection of movable cultural property was enacted in 1930. It was followed by its applicable regulations which was approved by the Council of Ministers in 1932.⁵⁴⁰

Regulation of traffic in cultural property

A 1968 the Law made it a crime to export items of cultural value enumerated in the Law Concerning the Protection of Movable Cultural Property without observing the legal requirements, punishable by a prison term from one to three years. The Law also made it a crime to excavate to obtain antiques without first obtaining a special permit. Persons engaged in the purchase or sale of antiques were required to obtain a permit to conduct such transactions.⁵⁴¹ Also, the Law on the Punishment of Persons engaged in Economic Subversion of the Country of December 1990 states:

Any act done with the purpose of exporting cultural heritage or national wealth of the country, although ended in failure to export, shall be considered as a crime of smuggling and all the property intended for export shall be regarded as smuggled goods and confiscated by the state (§ D, art. 1).

The above act, if done with the purpose of inflicting a blow to the regime of the Islamic Republic of Iran...or considered as corruption on earth, shall carry the death penalty or otherwise an imprisonment from five to twenty years (art. 2).⁵⁴²

Other laws establishing and/or protecting cultural heritage

Iran has signed and ratified the following international conventions concerning the protection of movable cultural property:

- Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954). The instruments of ratification of the Convention and of the Protocol were deposited on June 22, 1959. The Convention and the Protocol entered into force with respect to Iran on September 22, 1959.

⁵⁴⁰ MAJMU'AH'I QAVANINI SALI 1309 (Compilations of Laws of the Year 1930).

⁵⁴¹ Hujjati Ashrafi, MAJMU'AH'I QAVANIN JAZA'I (Compilation of Criminal Laws) (1974).

⁵⁴² MAJMU'AH'I QAVANINI SALI 1369 (Compilation of Laws of 1990-1991) 673-675 (Tehran, 1991).

- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris 1970). The instrument of acceptance was deposited on January 27, 1975. The Convention entered into force with respect to Iran on April 27, 1975.

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ISRAEL**Nature and significance of cultural property**

The modern State of Israel is located in part of a territory universally called the Holy Land. As home to one of the earliest known civilizations, the cradle of Judeo-Christian culture, and one of the centers of Islam in the Middle East, the area is of great historical, cultural and religious importance. Numerous archaeological sites testify to the veracity of events recorded in the Bible⁵⁴³ which had a significant impact on the development of modern civilization.

Excavations in the Holy Land were started in the early nineteenth century by British military officers and have been continued by various groups ever since.⁵⁴⁴ Today, archeology enjoys the support by the State of Israel and Israeli academic institutions. Numerous archeological artifacts from different periods and cultures found in Israel are displayed by Israeli museums. Many archeological excavations are being conducted by Israeli and foreign professionals and volunteers.⁵⁴⁵

World politics, religious differences and the Arab-Israeli conflict seem to have influenced some actions taken with regard to archeology in the Holy Land. Israel has enthusiastically engaged in archeological excavations in various locations, mainly those connected to the ancient history of the Jewish people. As stated by its Ministry of Foreign Affairs, "Archeology in Israel has provided a valuable link between the country's present and past, with thousands of years of history unearthed at some 3500 sites..."⁵⁴⁶ In response to Arab opposition to such excavations, particularly those conducted in areas occupied following the 1967 Six Days War, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a consistent position opposing any Israeli excavations in Jerusalem⁵⁴⁷ or the West Bank and Gaza. Many viewed the organization's position as stemming from the majority of the Arab countries, the U.S.S.R and its allies. Recent peace agreements reached between Middle East historical adversaries address some aspects of the issue of protection of cultural rights over archeological artifacts. A comprehensive regional peace may divert the focus of attention regarding archeology in the Holy Land from conflict to cooperation in research and preservation of historical treasures.

⁵⁴³ Both Old and New Testaments.

⁵⁴⁴ E. Tal, WHO'S JERUSALEM (1994).

⁵⁴⁵ A list of some ten locations for excavations is provided on line by the Information Division, Israel Foreign Ministry, Jerusalem.

⁵⁴⁶ Israel Information Service Gopher, Archeology, p. 1.

⁵⁴⁷ Regarding the complexity of the legal status of Jerusalem, see R. Levush, *Moving the United States Embassy to Jerusalem, A Legal Analysis*, 1 WORLD LAW INSIGHT (Sept. 1995).

Definition

Israeli domestic law regulates the subject of archeological finds. The Antiquities Law, 5738-1978, as amended,⁵⁴⁸ defines the term *antiquity* as follows:

- (1) any object, whether detached or fixed, which was made by man before the year 1700 of the general era, and includes anything subsequently added thereto which forms an integral part thereof;
- (2) any object referred to in paragraph (1) which was made by man in or after the year 1700 of the general era, which is of historical value, and which the Minister (of Education and Culture) has declared to be an antiquity;
- (3) zoological or botanical remains from before the year 1300 of the general era.

Establishment of ownership of antiquities

The Law provides for state ownership over antiquities found in Israel after the Law came into force in 1978.⁵⁴⁹ Antiquities may cease to be the property of the State upon an explicit waiver done in writing by the Director of the Department of Antiquities and Museums of the Ministry of Education and Culture (the Director).⁵⁵⁰ In order to enable the Director to make a decision whether to hold or to waive the property right of the State in an antiquity, the discoverer of an antiquity should notify the Director of the discovery. The Law provides as follows:

- (a) Where a person carrying out any works on land, whether his own land or the land of another, discovers an antiquity thereon, he shall notify the Director...and shall discontinue the works until the expiration of fifteen days from the date of delivery of the notification unless during that period he receives permission from the Director to continue the work.
- (b) Within fifteen days from the date of delivery of notification as aforesaid, the Director may notify the owner and the occupier of the land, in writing, of the conditions for continuation of the work or may direct its permanent discontinuance.⁵⁵¹

The Director is authorized to request the delivery of the antiquity to him for the purpose of inspection or any other purpose, temporarily or permanently.⁵⁵²

⁵⁴⁸ 32 LAWS OF THE STATE OF ISRAEL (LSI) 93 (1977-78).

⁵⁴⁹ *Id.* § 2.

⁵⁵⁰ *Id.* § 8.

⁵⁵¹ *Id.* § 6.

⁵⁵² *Id.* §§ 5 & 6.

Regulation of traffic in antiquities

Dealing in and exporting antiquities requires a license. A license should indicate the place of business to which it is limited and should be conspicuously displayed there.⁵⁵³ Revocation of a license may be made for violation of the law or the regulations.⁵⁵⁴ A dealer in antiquities is under a duty to keep an inventory.⁵⁵⁵

A dealer may be notified by the Director in writing that an antiquity in his possession is of national value. Within three months of such notification, the Director may request that the antiquity be sold to the State. Furthermore, where a person wishes to sell or otherwise transfer an antiquity of national value, he should give advance notice to the Director of such intention. Within three months of receipt of this notice, the Director may request that the antiquity be sold to the State. If the Director does not so request, the owner of the antiquity may sell or transfer it if he communicates to the Director in writing the name and address of the purchaser or transferee.⁵⁵⁶

Specific restrictions apply to the export of antiquities. The export of antiquities of national value is conditioned upon receipt of a written approval of the Minister of Education and Culture. The export of other antiquities depends on written approval from the Director.

Other protection for cultural property

The Antiquities Law, 5738-1978,⁵⁵⁷ regulates various aspects of dealing with antiquities. In addition to those discussed above, the Law regulates archeological excavations, collections and museums, and preservation of antiquity sites. Offenses and penalties are further specified. The Law also establishes an archaeological council and an Objection Committee to deal with various aspects of application of the Law.

Excavations

The digging, searching (including the use of a metal detector), or the gathering of antiquities is prohibited in the absence of a special license from the Director and must be done in accordance with the conditions of such a license. When evaluating an application for an excavation license, the Director should consult with the archaeological council. The scientific and financial ability of the applicant is the primary consideration in the decision whether or not to grant a license. An excavation license should define the area in which digging is permitted. The grant of an excavation license does not confer the right to enter the land. Right of entry may depend on an agreement with the owner or the legal occupier of the land.

The Law provides for special safety measures during the excavations. The holder of an excavation license should take all measures required to ensure the well being of the workers and visitors, to protect and

⁵⁵³ *Id.* § 16.

⁵⁵⁴ *Id.* § 18.

⁵⁵⁵ *Id.* § 17.

⁵⁵⁶ *Id.* § 19.

⁵⁵⁷ 32 LSI 93 (1977-78).

ensure the preservation of the place of the excavation and the antiquities discovered there, and prevent all damage or nuisance to neighboring property.

The licensee is under an obligation to deliver to the Director in writing within a year or longer a detailed report of the excavations including sketches, plans and photographs of the work carried out as well as particulars of the antiquities discovered in the excavation, including photographs and other pictures. The holder of a license should publish a report concerning the findings and results of the excavations and provide the Director with two copies of the report and any other relevant publications. The licensee has an exclusive right of publication in regard to the excavation for ten years from the termination of the excavation. The publication regarding the findings should be made in *an appropriate scientific publication*.

Collections and museums of antiquities

Collectors and owners or directors of museums are under an obligation to notify the Director of any antiquities in their possession. They should also permit the Director or a person empowered by him to make a photograph or sketch or a cast, print or other reproduction of any antiquity in the collection.⁵⁵⁸

The Director or a person empowered by him may notify a collector or a museum owner or director that an antiquity in his possession is of particular scientific importance. An antiquity subject to such a notification should be available for inspection by the public as the Director prescribes. The sale or transfer of such an antiquity is subject to an advance notice and consent by the Director. Within 21 days of receiving the notice, the Director may request that the antiquity be sold to the State. If the Director and the collector or museum director or owner do not reach agreement as to a solution regarding the antiquity, the court shall decide the matter.

Protection of ancient sites

The Director may declare a particular place to be an ancient site. The declaration should be published in the Official Gazette.⁵⁵⁹ Following such publication, a note to this effect should be entered in the Land Register, and notice should be given to the owner and the occupier of the place, if their identity or address are known. A notice should also be given to the District Planning and Building Commission.⁵⁶⁰

Prohibitions on activities

The Law prescribes the following prohibitions against activities conducted on ancient sites in the absence of a written approval by the Director:

- building, paving, the erection of installations, quarrying, mining, drilling, flooding, the clearing away of stones, plowing, planting, or internment;
- the dumping of earth, manure, waste or refuse, including the dumping thereof on adjoining property;

⁵⁵⁸ *Id.* § 23.

⁵⁵⁹ *Id.* § 28(a).

⁵⁶⁰ *Id.* § 28(b).

- any alteration, repair or addition to an antiquity located on the site;
- the dismantling of an antiquity, the removal of part thereof or the shifting thereof;
- writing, carving or painting;
- the erection of buildings or walls on adjoining property; and
- any other operation designated by the Director in respect of a particular site.

Sites sensitive to religion

Recognizing the high sensitivity of various communities to sites of religious significance, the law specifically provides:

Where an antiquity site is used for religious requirements or devoted to a religious purpose, the Director shall not approve digging or any of the operations enumerated (above) save with the approval of a Committee of Ministers consisting of the Minister (of Education and Culture) as chairman, the Minister of Religious Affairs and the Minister of Justice.⁵⁶¹

In reality, Israel might have been over-cautious in avoiding religiously and emotionally charged controversies. In one case, the Israeli Government was accused of closing its eyes and permitting disregard of the Law by allowing illegal work done by the Moslem *Wakf* (religious endowment) on the Temple Mount-Haram al Sherif. The Supreme Court held that in the circumstances of that case most work, including building of sidewalks, planting olive trees, etc., on the Temple Mount, did not cause irreversible damage to antiquities. The Court also held that future activities on the Temple Mount should be tightly controlled. In order to guarantee the preservation of antiquities, the Court ordered that such sites be fenced and marked with signs.⁵⁶²

⁵⁶¹ *Id.* § 29(c).

⁵⁶² *Temple Mount's Loyals v. Attorney General*, 93(3) Takdin Elyon 2422 (5754-1993). Available on Takdin, CD ROM product. It is interesting to note that the holiest place to Jews, the Temple Mount, is under the autonomous administration of the Moslem *Waqf*, which for all practical purposes has been under the control of the Jordanian *Waqf* authorities. This arrangement continued even after reunification of Jerusalem under Israeli rule in 1967 following the Six Days War. For further information see Levush, *supra* note 5, at 30.

Restoration to previous condition

Any person who has carried out one of the operations specified above, without the approval or in contravention of the conditions of the approval, should, in accordance with the directions of the Director, restore the site or the antiquities located on it to their former condition. The Director may, however, conduct the restoration himself and recover the expenses incurred from the party who acted without the proper approval.⁵⁶³

Expropriation

The Law authorizes the Minister of Education and Culture to expropriate non-religious ancient sites for conservation and research and to enable excavation of the site. Expropriation is carried out in accordance with the Land (Acquisition for Public Purposes) Ordinance, 1943.⁵⁶⁴

Establishment of the Council for Archeology and the Appeal Committee

The Minister of Education and Culture should appoint a Council for Archeology and determine its term and working procedures.⁵⁶⁵ The Council should advise the Minister and the Director on matters related to archeology and antiquities. The Council is composed of up to 38 members appointed by the Minister. The members should include Government representatives, representatives of the Department of Archeology, the Hebrew University of Jerusalem, representatives of the Company for Research of the Land of Israel and its antiquities, and a representative of the Antiquities Department in the Ministry of Education and Culture and public representatives.⁵⁶⁶ The term of appointment for members of the Council is three years.

Offenses and penalties

The wilful injuring, defacing or illegally excavating any antiquity or ancient site is punishable by three years imprisonment or a fine. Other violations, such as disregarding instructions to discontinue excavations, etc., are punishable by two years imprisonment or a fine. Violation of the safety obligations regarding excavations is punishable by one year of imprisonment or a fine. Other violations are punishable by six months of imprisonment or a fine.

Protection of cultural property in time of war

Israel is a signatory to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague Convention).⁵⁶⁷ According to the Convention, the signatories agreed to

⁵⁶³ *Supra* note 15, § 31.

⁵⁶⁴ PALESTINE GAZETTE OF 1943, Suppl. I, p. 44 (English Ed.).

⁵⁶⁵ Antiquities Law, § 34(a).

⁵⁶⁶ Antiquities Regulations, § 2, 26 DINIM (Laws) 15695 (1992).

⁵⁶⁷ 249 U.N.T.S. 240 (1956).

safeguard and respect cultural property.⁵⁶⁸ Among others, the parties agreed to refrain from destruction or damage of such property. The Convention does not expressly address the issue of archeological excavations.

For years, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the position that the State of Israel was in violation of its obligation under the Hague Convention. The controversy over archeological excavations conducted by Israel focused mainly on activities in Jerusalem. Excavations in Jerusalem started shortly after Israel assumed military control over the area following the termination of hostilities in the 1967 Six Days War. Areas involved include land along the monumental Western Wall on the Temple Mount-Haram Al Sharif, a holy place for Jews and Moslems.⁵⁶⁹ Two Moslem mosques⁵⁷⁰ are located there. The excavations were conducted close to Moslem *Waqf* property and in the old Jewish quarter. The claimed primary aim of the excavations has been to "make a stratigraphic study of the site in order to reveal the history of ancient Jerusalem."⁵⁷¹

Archeological excavations in Jerusalem as well as in any other parts of Israel have become a highly politicized issue. A current Government statement on archeology in Israel reflects Israeli traditional approach which prevailed during the 1970s when the controversy over the Jerusalem excavations erupted. It states:

Archeology in Israel has provided a valuable link between the country's present and past, with thousands of years of history unearthed.... Many finds attest to the long connection of the Jewish people with the Land of Israel....

The political implications of finding factual evidence of the connection between Jews and Palestine⁵⁷² are clearly immense. Archeological excavations in Jerusalem more than anywhere else became an emotional issue particularly because of the competing claims to Jerusalem and its heritage by both Israel and the Arab States. The issue was exacerbated by the fact that most of the excavation and restoration work was done on sites of particular interest to Judaism but formerly under Arab control.⁵⁷³ According to G. Lang, "thus the

⁵⁶⁸ *Id.* arts. 2, 3 & 4.

⁵⁶⁹ According to tradition, it is the biblical Mount Moriah on which Abraham was called to sacrifice his son Isaac, the site on which Solomon built his Temple which was destroyed by Nebuchadnezzar of Babylon. It was the hill on which the Second Temple was built, which was destroyed by Romans in AD 70. According to Moslem tradition, Mohammed ascended to heaven from this same site.

⁵⁷⁰ Al-Aqsa and the Dome of the Rock.

⁵⁷¹ Observations of the Government of Israel on the Alleged Violations of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO Doc. 87 EX/34, at 1 (1971), referred to in J. Nafziger, *UNESCO-Centered Management of International Conflict Over Cultural Property*, 27(5) HASTINGS LAW JOURNAL 1052, ft. 4 (1976).

⁵⁷² Including land within the State of Israel, Jordan, and the self-governed Palestinian areas.

⁵⁷³ Some work was also done, however, on Moslem and Christian religious sites, although for the most part under the auspices of the religious groups concerned. See G. Lang, *UNESCO and Israel*, 16 HARVARD INTERNATIONAL LAW JOURNAL 676 (1975).

conflict involved not only conflicting conceptions of political sovereignty, but also differing views of the right of access to religious and cultural heritage."⁵⁷⁴

In response to Arab complaints to UNESCO over Israeli excavations in Jerusalem, two important actions were taken. On November 20, 1974, UNESCO adopted by a vote of 59 to 33, with 24 abstentions, a resolution condemning Israel for "its persistence in altering the historical features of the City of Jerusalem," and its "undertaking [of] excavations which constitute a danger to its monuments subsequent to its illegal occupation of the city," and directed the organization's Director General to withhold assistance from Israel until "it scrupulously respects" previous resolutions and decisions. On November 21, the General Conference rejected, by a vote of 48 opposed to 33 in favor, an Israeli initiative to be included in UNESCO's European regional group, and thus participate fully in the organization's regional functions.⁵⁷⁵ The votes on the resolutions generally conformed to familiar East-West and Arab-Israeli bloc pattern.⁵⁷⁶ While it is questionable whether UNESCO had the authority to pass such resolutions,⁵⁷⁷ strong disagreement was expressed regarding the accuracy of the allegations.⁵⁷⁸ The resolutions prompted several countries and numerous individuals to withdraw their monetary, educational, cultural and scientific assistance from UNESCO. The institution which was supposed to promote international cooperation was rather becoming a symbol of political division.

⁵⁷⁴ *Id.* at 678.

⁵⁷⁵ On the significance of exclusion of Israel from all regional groups in existence, *see* Lang, *supra* note 31.

⁵⁷⁶ Nafziger, *supra* note 29, at 1054.

⁵⁷⁷ Nafziger, *supra* note 29, at 1051. A 1994 study by K. Jote concurs by stating:

Even if it is assumed that the archaeological excavations in the occupied territories by Israel were illegal or destructive, the sanctions imposed against Israel by UNESCO appear to have been *ultra vires*.

The author does, however, find that "[t]he Israeli archaeological and the granting of permission to non-Israeli organizations to carry out archaeological excavations...qualify as offenses against the Hague Convention." *See* K. Jote, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 96, 101 (Stockholm, 1994).

⁵⁷⁸ Strong reaction was expressed by artists and other humanists: "Sixty-two leading figures in the arts and intellectuals, (both Jewish and Christians) including 19 Nobel Laureates, have declared that they will not cooperate with UNESCO as long as that agency persists in its decisions to withhold aid to Israel and to exclude Israel from membership in any of UNESCO's regional groupings. *Intellectual Opposition to UNESCO Policy: Withholding Aid to Israel*, 103 INTELLECT 347 (1975), cited in Nafziger, *supra* note 29, at 1063, ft. 15.

Several members of UNESCO, including the United States, reacted by restricting their ties with UNESCO. In the United States, the Senate Foreign Relations Committee voted to cut a \$16 million contribution to UNESCO from the foreign aid bill, the money to be restored only in the event that UNESCO rescinded its resolution. 171 NEWREPUBLIC 7 (Dec. 14, 1974), cited in Nafziger, *supra* note 29.

Archeological excavations and cultural rights in general are addressed by the peace agreements signed by Israel, Egypt,⁵⁷⁹ Jordan⁵⁸⁰ and the Palestine Liberation Organization (PLO).⁵⁸¹

Repatriation of cultural property removed abroad

The Hague Convention of 1954 recognizes:

...damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.⁵⁸²

The Convention, therefore, sets certain norms of protection including the obligation to safeguard and respect cultural property in time of war. In addition to the latter obligations, the Protocol of the Hague Convention⁵⁸³ provides:

3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property should never be retained as war reparations.

While providing for returning to the situation before the hostilities, the Hague Convention does not address the issue of what will happen to the artifacts after repatriation. This lack of protection is claimed as a cause for alarm for Israel in case of repatriation of Jewish cultural artifacts to non-Jewish hands, based on the above commitment in the Protocol.⁵⁸⁴

⁵⁷⁹ The Agreement between the Egyptian Archeological Delegation and the Israeli Agency for Antiquities, signed on Jan. 21, 1993, called for the return to Egypt of all archeological artifacts discovered by Israel in Sinai before the return of the region to Egyptian control. Among such artifacts, which have already been returned were artifacts of great importance to Jewish heritage. *See, e.g.* T. Einhorn, *Engaging in International Agreements*, 6 HAMISHPAT (The Law) 38, ft. 1 (Dec. 1995). Among other arguments, Dr. Einhorn states that the agreement between Israel and Egypt on the return of archeological artifacts does not guarantee their safety or availability for researchers and for the public at large. The Hague Convention also neglects this issue. The safety and availability of archeological artifacts is of great concern to Israel since many of these artifacts have direct link to Jewish heritage. Specific examples are mentioned, *see* Einhorn, *supra* note 37.

⁵⁸⁰ Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, art. 9, available on Israel Information Service Gopher.

⁵⁸¹ Cairo, May 4, 1994, Agreement on the Gaza Strip and the Jericho Area Annex II, Protocol Concerning Civil Affairs, § B30 (Israel Ministry of Foreign Affairs, Jerusalem), at 19.

⁵⁸² *Supra* note 25, at 240.

⁵⁸³ *Supra* note 25, at 358.

⁵⁸⁴ Einhorn, *supra* note 37.

On January 21, 1993, an agreement was entered between an Egyptian delegation of archaeologists and the Israeli Agency of Antiquities.⁵⁸⁵ According to the agreement all the archeological artifacts discovered in the Sinai would be returned to Egypt within two years. Accordingly, all artifacts have been returned to Egypt. Included in them were some unique artifacts from the ancient Kingdom of Judea.⁵⁸⁶ Moreover, the Cairo Agreement on the Gaza Strip and the Jericho Area between Israel and the PLO provides that the issue of the *return* of archeological artifacts found in the Gaza and Jericho areas since 1967 would "be dealt with the negotiations on the final status."⁵⁸⁷ The topic is expected to be hotly debated between the parties in those negotiations.

Some archeological artifacts of great importance to Jewish culture were removed from the area before the escalation of the Middle East conflict. It appears that Israel has made a request to Turkey to return the original inscription engraved at one end of the Siloam Tunnel⁵⁸⁸ which was used to bring water to besieged Jerusalem. The original was moved to the Museum of Ancient Orient in Istanbul. Similarly, a request was recently made by Shimon Shetreet, the Israeli Minister of Religious Affairs, to Pope John Paul II to confirm whether the seven branched candelabrum from the ancient Israelite Holy Temple in Jerusalem has been located in the Vatican collections of antiquities. The candelabrum, referred to in Hebrew as the *menorah* was taken by the Romans following the Roman conquest of Israel and is depicted in Rome's Arch Titus.⁵⁸⁹ It is expected that Israel will request repatriation of the *menorah* if its existence at the Vatican is confirmed.

Other laws establishing and/or protecting cultural heritage

Israel does not have any specific law for the establishment or protection of cultural heritage. As discussed above, Israeli law protects antiquities found in the current borders of the State of Israel. Paradoxically, the areas of greatest value to Israel's cultural heritage, aside from Jerusalem, are located in the West Bank (Judea and Samaria), currently under Palestinian self government. The unique history of the Jewish people, a great number of whom have returned to their ancient homeland after 2,000 years of diaspora, raises interesting questions regarding cultural rights. International law views the owner of such rights to be the State where the artifacts were found. It is doubtful whether a scenario in which artifacts of one culture are found in land under the control of another was entertained. Should repatriation be made of such artifacts?

Israeli domestic law does not require the preservation of Israeli heritage. The law does not prohibit but merely limits the export of Jewish artifacts; neither is there a law for the encouragement of usage and study of Hebrew or any other language as a symbol of Israeli heritage.

⁵⁸⁵ See R. Lapidot & M. Hirsch, *The Practice and Case Law of Israel in Matters Related to International Law*, 27 ISRAEL LAW REVIEW 515 (1933), cited in Einhom, *supra* note 37, at 38, ft. 1.

⁵⁸⁶ 8th & 9th Century BC.

⁵⁸⁷ *Supra* note 37.

⁵⁸⁸ The Tunnel dates from 705 BC. It was cut by an order of Hezekiah King of Judah in order to bring water into besieged Jerusalem from the Gihon Stream outside the City Wall. See Tal, *supra* note 2, at 206.

⁵⁸⁹ Information received via Israel Line, MAIL.ASK4 AT SWITCH, 1.18.96.

The only law specifically mentioning Israel's heritage is the Foundations of Law, 5740-1980.⁵⁹⁰ It provides:

Supplementary/Sources of Law:

Where the court, faced with a legal question Sources of Law requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage.

The accepted interpretation of the term *Israel's heritage* in the above provision has been that it did not intend to apply Jewish religious law to cases where Israeli law, case-law or analogy are lacking. Rather, the term *Israel's heritage* means the cultural values of the Jewish people, such as the values of freedom,⁵⁹¹ justice,⁵⁹² and peace.⁵⁹³

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⁵⁹⁰ 34 LSI 181 (5740-1979/80).

⁵⁹¹ Expressed by the exodus from Egypt and the transformation from slavery to freedom and independence.

⁵⁹² Based on principles of the written Tora, and dealt with in many commentaries by Jewish philosophers who were not necessarily men of religion.

⁵⁹³ See R. Levush, *The Reception of Legal Systems-Implantation and Destiny in Israel*, LA RECEPTION DES SYSTEMS JURIDIQUES: IMPLANTATION ET DESTIN 411, 446 (Brussels, 1994).

96-1377

ITALY**Nature and significance of cultural property**

The protection through legislation of any objects of historical or artistic interest which serves the purpose of assuring Italy of the preservation of its artistic and cultural heritage dates back to the unification of Italy.⁵⁹⁴ Such legislation was transferred into subsequent laws until the current law was passed in 1939. The importance of the preservation of Italy's cultural heritage received its highest recognition by a solemn declaration to that effect contained in article 9 of the 1948 Constitution, and its relevance is emphasized by the fact that it appears among the fundamental principles of that Constitution.

The Ministry of Cultural Heritage (Ministry) was created in 1975.⁵⁹⁵ Since then all administrative responsibilities pertaining to cultural property, previously distributed among other ministries, have fallen within its competence.

Definition of *cultural property*

Law No. 1089 of June 1, 1939,⁵⁹⁶ as amended, provides for the protection of both movable and immovable objects of historic or artistic interest. The term *cultural property* is not found in the Law since this terminology is relatively recent and was used, perhaps for the first time, in article 1 of the Hague Convention of 1954 for the Protection of Cultural Property in Case of War.

Although the Law does not provide a definition of what constitutes *cultural property*, it does state that movable and immovable objects of artistic, historical, archaeological, or ethnographic interest are all subject to special protection. These protected objects include:

- objects of interest to the study of paleontology, prehistory, and primitive civilizations;
- objects of numismatic interest;
- manuscripts, autographs, notable documents, early printed materials, as well as notably valuable prints, books, and engravings.

The Law also protects villas, parks, and gardens of special artistic or historical value, but excludes the works of living authors or works less than fifty years old.

As it is currently interpreted, the list of objects contained in the Law is only illustrative and should not be considered exhaustive. The Law deals in particular with the preservation, protection and safety,

⁵⁹⁴ A detailed analysis of the legislation preceding the unification of Italy is found in M. Cantucci, LA TUTELA GIURIDICA DELLE COSE DI INTERESSE ARTISTICI E STORICO (Padova, CEDAM, 1953).

⁵⁹⁵ Law No. 5 of Jan. 29, 1975, GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA (official law gazette of Italy) of Feb. 14, 1975.

⁵⁹⁶ CODICE DI DIRITTO AMMINISTRATIVO (Milano, Pirola, 1989).

transfer, import and export, finding or discovery and expropriation of property. It provides for penal sanctions.

Establishment of ownership of cultural property

Italian law recognizes both private and State ownership of cultural property, but in view of its special interest for the preservation of the national artistic and cultural heritage, it grants public administration authorities wide powers to protect and preserve such heritage.

According to the Law, objects of artistic or historic interest belong to the State, regardless of how they are found and no matter who finds them. Any items retrieved during archaeological excavations done directly by public entities or by private individuals properly authorized also belong to the State. In addition, article 511 of the CODE OF NAVIGATION establishes that objects of artistic, archaeological, or historical interest devolve to the State when the owner does not salvage them.

Provisions of the special laws (CODE OF NAVIGATION and Law No. 1089) are applicable to those objects also when they are found in territorial waters, since it is recognized that the nation's sovereignty over this part of the sea is no different from that over the rest of the territory. But there is no certainty on how the matter concerning said objects found outside territorial waters should be regulated. There seems to be a tendency among legal scholars to affirm the State's acquisition of ownership of such items. However, the ownership of items found in open sea could be ascribed to the discoverer, arguing that the special laws would not be applicable in that situation.

Cultural property that belongs to the State or to other public bodies is in principle inalienable. In exceptional cases, when no damage may derive to such objects as a consequence of their transfer and when they are not of a special interest for the collections belonging to the State or to other public entities, such objects may be alienated with a special authorization granted by the Ministry.

As for privately-owned cultural property, the Law established that the Ministry may notify the owners, possessors, or holders when they have items of particular significance. Consequently the Ministry must be informed if such items are transferred, and if they are sold the Ministry may exercise the right of preemption established by the Law. The Law also states that any transaction that is not done in compliance with the established procedures is null and void. Furthermore, movables and immovables protected by the Law may be expropriated for reasons of public interest in relation to their protection and conservation.

Regulation of traffic in cultural property

Unless expressly authorized, exporting from Italy anything under the protection of the Law is prohibited. This applies to cultural property in private ownership when there has been no notification of the special interest of the object to be exported or when such item is not included in any special list of protected objects prepared by the public administration. Authorization is also required for temporary exportation. The Ministry may exercise the right of preemption on items of relevant value and purchase them for the price declared in the export request. This recourse may be taken to protect the country's national interests. Regarding the circulation of cultural property, it is worth noting that Italy ratified by Law No. 873 of October 30, 1975, the Convention done at Paris on November 14, 1970, and which entered into force on January 2, 1979.⁵⁹⁷

⁵⁹⁷ G. De Nova, *ed.*, CODICE CIVILE E LEGGI COLLEGATE 227, note 6 (Torino, Zanichelli, 1993).

Other protection for cultural property (e.g., in time of war)

In addition to the provisions on exportation and those which enable the Ministry to monitor any transfer of cultural property, Italian law also prohibits the demolition, removal, modification, or restoration of such property without the consent of the Ministry of Cultural Heritage. It allows the Ministry to make the provisions for the necessary conservation measures regarding all property, including that privately owned, which is identified as being of interest to the State since the State is considered responsible for the protection of all cultural property.

The Law established penalties for any unlawful activities related to cultural property. Perpetrators may be punished by fines and in more serious cases by both imprisonment and fines. The object may be confiscated in some instances. In addition to any other provision of the PENAL CODE that are applicable to specific violations, article 733 imposes fines and imprisonment for anyone who destroys, causes deterioration of, or in any way damages cultural property belonging to himself, which he knows to be of value, when the act results in injury to the archaeological, historical or artistic heritage of the nation. Confiscation may also be ordered.

Other measures of considerable significance are those that set out to improve the protection of cultural property by granting various tax concessions. The assumption is that the State cannot bear the financial burden of safeguarding its artistic and historical heritage without help from the private sector.

Protection of cultural property becomes extremely difficult when, as often happens in Italy, art treasures find their way out of Italy to where Italian law cannot be enforced. International cooperation is essential for this purpose, and it may best be achieved through international conventions.

Plundering conquered countries has a long tradition. Examples include the Roman Empire, revolutionary France, and Nazi Germany. It has been observed that:

Modern conquerors need neither bloodshed nor ideology to pillage Europe's art collections. Instead, the opening of the internal borders of European Community Member States, combined with the modern practice of collecting illegally exported or stolen art, threatens to result in a renewed plundering of Europe's vast art wealth. Under the EC open border ideal, art may now be moved as easily as any other good.⁵⁹⁸

As the Member States of the European Union recognize the problems presented by inadequate protection of their art treasures, they have to face the challenge of developing new strategies to protect some of the world's greatest art collections housed on their territories.

⁵⁹⁸ A. Riding, *Europe, unifying, has fears for its art*, N.Y. TIMES (Dec. 28, 1992), at C9.

Repatriation of cultural property removed abroad

Though the right to prey on cultural property during armed conflicts is not recognized by international law, Italy has been subjected to much damage during its history. In 1815, at the end of the Napoleonic wars, the prevailing powers imposed a requirement for the restitution of stolen treasures to the countries of origin. At the conclusion of World War II, the Peace Treaty signed at Paris on February 10, 1947, was inspired by the principle of returning objects of national heritage of the countries involved.⁵⁹⁹ It is also important to point out that in a note distributed to universities, museums, libraries, art merchants, and bookstores, the United States Department of State reiterated that it considered it a duty to assure restitution to the countries of origin of all cultural property improperly acquired or taken to the United States during World War II.⁶⁰⁰ The action of the U.S. Government should not go unnoticed, rather it might be recognized as an effective way to deal with the complex problem of the repatriation of cultural property that has been removed abroad.

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⁵⁹⁹ T. Alibrandi & P. Ferri, *I BENI CULTURALI E AMBIENTALI* 39 (Milano, Giuffr , 1995).

⁶⁰⁰ See *THE ART DIGEST* (Dec. 15, 1950), and on the rescue of cultural property missing after World War II; A. R. Hall, 25 *THE DEPARTMENT OF STATE BULLETIN*, No. 635 (Aug. 27, 1951), at 337ff, as cited in M. Grisolia, *LA TUTELA DELLE COSE D'ARTE* 131, note 2 (Roma, Editrice Foro Italiano, 1952).

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JAPAN

Nature and significance of cultural property

In May 1950, Japan enacted the Cultural Property Protection Law⁶⁰¹ in order to broaden the preservation of cultural property and consolidate several existing laws for its protection. The Law's use of the term *cultural property* to define cultural objects to which protection is to be given was the first such application of its kind.⁶⁰²

The purpose of the Law is to "preserve and utilize all the property that makes up the cultural riches of the Japanese people in such a way as to contribute to the progress of culture in the world."⁶⁰³ Cultural property as set forth in the Law is divided into five categories: tangible, intangible, folk, monuments, and groups of historic buildings or structures.⁶⁰⁴

The Law, in 130 articles, contains provisions dealing with the following subjects: a definition of cultural property; the related duties of government at each level; the proper attitude of the people; designation of preservation status, protection, and public access to tangible, intangible, and folk cultural property; treatment of archaeological resources and proper procedures for excavation; designation and revocation of preservation status for historic and natural monuments as well as their maintenance or restoration, environmental preservation, and investigation for the purpose of preservation.

For the protection of cultural property, two levels of government action are required: one is the act of designating and protecting special cultural property, and the other is restricting alterations in the architectural or natural environment of areas designated as historic sites or preservation districts. The former is to be undertaken by the Ministry of Education, while the latter is to be enforced by the Cultural Affairs Agency. In the execution of these actions, national and local governmental agencies are expected to respect the ownership and the property rights of the citizens concerned.⁶⁰⁵ When deemed necessary, compensation for land acquisition and other indemnity payments or subsidies may also be provided.⁶⁰⁶

It should be noted that although Japan was the first nation to use the term *cultural property* (*bunkazai*) in its 1950 Law--a term that was later adopted in the laws of other nations and international agreements--

⁶⁰¹ Law No. 214, May 30, 1950, as last amended by Law No. 49, June 29, 1994.

⁶⁰² Before 1950, no other nation's law had applied the term *cultural property* in the same refined sense as the Japanese legislation did. See K. Jote, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 139 (Juristforlaget, 1994).

⁶⁰³ *Supra* note 1, art. 1.

⁶⁰⁴ *Id.* art. 2.

⁶⁰⁵ *Supra* note 1, art. 4, ¶3.

⁶⁰⁶ 2 KODANSHA ENCYCLOPEDIA OF JAPAN 52-53 (1983).

Japan has not yet become a party to the relevant Conventions of 1954, 1970, and 1972.⁶⁰⁷ However, Japan does have a longstanding bilateral agreement with the Republic of Korea on cultural property and cultural cooperation (*see below*, section on Return of Cultural Property).

Definition of cultural property

The five categories of cultural property defined in article 2 of the Law are as follows:

- *Tangible Cultural Property*: Buildings, pictures, sculpture, objects of applied arts, pieces of calligraphy, classical books, ancient documents, and other tangible cultural products, which possess a high historical and/or artistic value, archaeological specimens and other historical materials of high scientific value.
- *Intangible Cultural Property*: Art and skill employed in drama, music, and applied arts, and other intangible cultural products which possess a historical and/or artistic value.
- *Folk Cultural Property*: Manners and customs related to food, clothing and housing, to occupations, religious faiths, festivals, etc., to folk entertainments and clothes, implements, houses, and other objects used therefor, which are indispensable for the understanding of changes in people's mode of life.
- *Monuments*: Shell mounds, ancient tombs, sites of palaces, sites of forts or castles, etc., which possess a high historical and/or scientific value; gardens, bridges, gorges, sea-shores, mountains and other places of scenic beauty, which possess a high value from the point of view of art or visual appreciation; and animals and their habitats, breeding places, summer and winter resorts, plants and their habitats, and geological features and minerals.
- *Groups of historic buildings or structures*: Groups of buildings or structures having high historical or artistic value, together with the surrounding environment as a whole.

The Minister of Education (referred to below as the Minister) may designate items of tangible property as "important cultural property." From among the important cultural properties, the Minister may designate as *national treasures* those that are of especially high value from the viewpoint of world culture and that are matchless treasures.⁶⁰⁸ The Minister may also designate items of folk cultural property as important folk cultural property.

Establishment of ownership of cultural property

The Law permits both private and public ownership of cultural property, but cultural property is under the protection of the national government irrespective of the type of ownership. There are differences in the degree of protection. Items of registered tangible cultural property become national treasure of Japan and are given special protection. When protection (repair or restoration) incurs a financial burden, the owner or possessor of the cultural property is entitled to receive assistance from the State.⁶⁰⁹

⁶⁰⁷ Jote, *supra* note 2, at 140.

⁶⁰⁸ *Id.* art. 27.

⁶⁰⁹ *Id.* art. 38.

When the ownership of important cultural property has changed, the new owner must report the change in writing within twenty days to the Commissioner of the Cultural Affairs Agency (referred to below as the Commissioner), stating the matters prescribed by the Ministry of Education Ordinance. The certificate of designation must be handed to the new owner or returned for amendment.⁶¹⁰ Any person who undertakes a transfer without informing the Commissioner of the transfer made and who fails to issue a certificate of transfer to the new owner is subject to a minor fine not to exceed 30,000 yen.⁶¹¹

The State has the right of preemption over important cultural property. The Commissioner must exercise this right within thirty days of the date on which the intention to preempt is declared.⁶¹² Failure to comply with the preemption provisions carries a minor fine not to exceed 50,000 yen.⁶¹³

Regulation of traffic in cultural property

The export of important cultural property and national treasures is, in principle, banned, except where the Commissioner has given permission on grounds of necessity for international cultural exchange or from other considerations.⁶¹⁴ Other items of cultural property may only be exported with special permission.

Proposals to export folk cultural property must be reported in writing to the Cultural Affairs Agency twenty days in advance. When he deems it necessary, the Commissioner may give instructions with respect to the exportation for which a report has been filed.⁶¹⁵ Exportation without permission is subject to penal servitude or imprisonment not to exceed five years or a fine not to exceed 500,000 yen.⁶¹⁶

Any person intending to assign an important cultural property for a consideration is required to file in writing with the Commissioner an offer of sale of the said property to the State. The offer must include the name of the assignee, the estimated value of the consideration, and any other matters prescribed by the Ministry of Education Ordinance. However, this does not apply in cases where the Commissioner has approved special circumstances favoring the sale of the property to the assignee.⁶¹⁷ As mentioned above, the Commissioner has the right of preemption. If he fails to exercise this right within the specified thirty-day period, the said property may be assigned to the private party any time thereafter.

⁶¹⁰ *Id.* art. 32.

⁶¹¹ *Id.* art. 111, ¶¶ 1 & 2.

⁶¹² *Id.* art. 46.

⁶¹³ *Id.* art. 106.

⁶¹⁴ *Id.* art. 44.

⁶¹⁵ *Id.* art. 56-13.

⁶¹⁶ *Id.* art. 106.

⁶¹⁷ *Id.* art. 46.

When a local public body or other juridical person that is a custodial body seeks to purchase an important cultural property in its custody for the purpose of ensuring the object's preservation, the State may grant a subsidy to cover part of the expenses required for the purchase.⁶¹⁸

Return of removed cultural property

The 1965 Agreement on Cultural Properties and Cultural Cooperation⁶¹⁹ Between Japan and the Republic of Korea provides that Japan was to turn over to the Republic of Korea art objects or cultural properties which were chiefly removed from Korea during the Japanese Occupation of that country (1910-45). Items enumerated in the Agreement consisted of 97 pieces of ceramic ware, 334 archaeological relics, 3 stone-made art objects, 163 titles of books (or 852 pieces), and 35 articles related to postal service and telecommunications.⁶²⁰

Article 3 of the Agreement states that the two governments will provide the appropriate facilities to accord the nationals of the other country with opportunities for studying the cultural property owned by art museums, museums, libraries, and other institutions of science and culture in their respective countries.

Other laws

The following are some important statutes to implement the Cultural Property Protection Law :

- The Enforcement Order of the Cultural Property Protection Law (Cabinet Order No. 267, Sept. 9, 1975).
- The Enforcement Regulation Concerning the Designation of National Treasures and Important Cultural Property (Ministry of Education Regulation No. 7, Dec. 29, 1950).
- The Standards for the Designation of Cultural Property - This is the Ministerial Notification that spells out the standards applicable to each type of cultural property and the important guidelines for administering the cultural property system.
- The Order for the Cultural Property Protection Council (Cabinet Order No. 171, June 15, 1968).

In addition, there is the Law Concerning Possession of Firearms and Swords, according to which a sword deemed to be an object of art must be registered with the Cultural Affairs Agency.⁶²¹ Certain

⁶¹⁸ *Id.* art. 46-2.

⁶¹⁹ In the English text of the Agreement, the term *bukazai* was translated as *art objects*, although the same term used in the 1950 Law was translated as *cultural property*.

⁶²⁰ Treaty No. 29, Dec. 18, 1965. The English text appeared in 10 THE JAPANESE ANNUAL OF INTERNATIONAL LAW 309 (1966). The English text appeared in 10 JAPANESE ANNUAL OF INTERNATIONAL LAW 309 (1966). As of Dec. 1995, 3,302 items were returned to the Republic of Korea under the 1965 Agreement and other arrangements between the two countries. This information was provided by the Embassy of Korea on Feb. 20, 1996.

⁶²¹ Law No. 6, Mar. 10, 1958, as last amended by Law No. 89, Nov. 12, 1993.

provisions of the Lost Property Law⁶²² are applicable to buried cultural property. Included among many other applicable laws are: the Customs Law, the Export Trade Control Order, the City Planning Law, the Building Standards Law, the Outdoor Advertisement Law, the State Owned Property Law, the Museum Law, the Law Concerning the Preservation of Historic Features of Old Cities, and so on.

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⁶²² Law No. 87, Mar. 24, 1899, as last amended by Law No. 5, Mar. 10, 1988.

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KENYA**Nature and significance of cultural property**

The primary legislation that controls matters of cultural property in Kenya is the Antiquities and Monuments Act, 1983, as amended.⁶²³ Its focus is the preservation, control and management of antiquities and monuments.

Definition of *cultural property*

As in international, regional and other national laws of the Commonwealth countries examined, the Kenyan statute does not contain a specific definition of the term *cultural property*. However, included in this regime under Kenyan law are antiquities and monuments. According to § 2 of this Law, therefore, the term *antiquity* means any movable object other than a book or document made in or imported into Kenya before 1895, or any other human, faunal or flora remains of similar minimum age established before 1895. The same section also defines the term *monument* to mean an immovable structure built before 1895 other than an immovable structure which the Minister responsible for this matter may by notice in the GOVERNMENT GAZETTE of Kenya either specifically or by reference declared not to be a monument for purposes of this Act. A *monument* also includes a rock, painting, carving or inscription made on an immovable surface before 1895 as well as an earthwork or other immovable object attributable to human activity constructed before 1895. A *monument* is also a place or other immovable structure of any age which being of historical interest has been and remains so declared by the Minister under the provisions of § 4(1)(a) of the Act to be a monument. It also includes a site or any other adjoining land that may be required for the maintenance of such a monument.

Section 2 of this Act defines *objects of archaeological or palaeontological interest* as those antiquities that were in existence before the year 1800. On the other hand, *objects of historical interest* include any antiquity that came into existence in or after the year 1800. Consequently, an area or site where buried monuments or objects of archaeological or palaeontological interest exist or are believed to exist and any such adjoining land that is required to maintain such sites are all considered protected areas within the context of section 4(1)(b) of the Law of 1983, as amended.

Establishment of ownership of cultural property

Under § 24-29 of this Law, all cultural property better known as antiquities in Kenya are the property of the Kenyan Government which safeguards them as protected objects. Though such objects can be the subject of a transaction or a sale, an exchange, gift or transfer under § 27 of this Law, such transactions and dealings are only permissible under a license. The difference between the Kenyan and Ghanaian laws is that the scope of permissiveness is narrower under the Kenyan instrument than that of the Ghanaian statute. Under the Law of Kenya, strict compliance and entrenched discretionary powers are vested in the authorities (Minister) to determine whether an antiquity should be sold, exchanged or given away. The Law of Kenya is an instrument of proscription that provides certain limited exceptions in which the sale of artifacts is permissible. Transactions in antiquities or other forms of cultural property under a license from the Minister include exports of antiquities. Under this Law, Kenyan police and antiquities wardens are vested with wide

⁶²³ 6 LAWS OF KENYA, Ch. 215 (rev., 1984); *see also*, THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COLLECTION OF LEGISLATIVE TEXTS: KENYA 23 (UNESCO, 1985).

powers of arrest, search, seizure and forfeiture. A conviction for an offence under this Act carries a penalty of imprisonment and a fine. To this extent, the Kenyan Law is a preservation instrument when compared to the Ghanaian law.

Regulation of traffic in cultural property

Any person who has information concerning antiquities and protected objects must provide information to the appropriate authorities when required to do so. Government offices that deal with matters of cultural property are required at least once a year to notify the National Museums Board of all cultural properties and other protected objects. This information is based on data provided by persons and entities connected with cultural property according to § 25 of the Law of 1983, as amended.

In accordance with §§ 26-28 of this Law, the Minister may, through a notice in the GAZETTE, prohibit removal of any objects of cultural property or items considered protected property from any area. In addition, the Minister can also prohibit the sale, exchange or transfer of such protected objects and artifacts. However, this prohibition does not extend to acquisitions made by the Government or the National Museums Board of Antiquities.

The Minister also enjoys powers of compulsory acquisition of antiquities and other protected objects according to § 28 of the Act. The only exception to the compulsory acquisition of cultural property is voluntary surrender of the item to the National Museums Board. Thus, if the Minister deems it fit that an antiquity or other form of cultural property considered to be a protected object is in danger of being destroyed, injured or allowed to fall into decay or of being unlawfully removed, he may acquire such antiquity or protected object by compulsory acquisition. If the item is acquired in the public interest, he must pay prompt and full compensation for the article as required by expropriation provisions of § 75 of the CONSTITUTION OF KENYA.

It is an offence for anyone to fail to furnish information on any form of cultural property to the authorities as described in the Law of 1983. This information pertains to both discovery, wilful destruction, removal, damage or injury to any protected objects, unless such an activity has been permitted by the Minister under a permit. Another method of regulating traffic in cultural property or other forms of protected objects is through the licensing system. As a result, anyone who wishes to explore, excavate, discover, unearth or export artifacts must obtain a license or a permit for such an activity pursuant to §§ 30-32 of the Act. Such exports where permitted can only be removed from Kenya through regularly defined customs points of entry and exit. Where an application for a permit or license is declined with respect to any protected object or other forms of cultural property, the Minister may notify the owner that such an item or items are subject to acquisition by way of a compulsory purchase as provided by law. It is an offence to contravene any export provisions of this Act. Punishment is both a fine and/or imprisonment.

In addition, police and antiquity wardens in Kenya vigorously enforce the law. They enjoy broad powers of inspection, search, seizure, arrest and forfeiture of any cultural property and other forms of protected objects. Obstruction of an officer or representative of the Government in these matters such as a failure to comply with a lawful order and/or injure, destroy, remove or do other damage to protected objects constitute punishable offenses with a fine or imprisonment or both.

Rule-making powers are vested in the Minister to further regulate matters of cultural property and other protected objects. There are no provisions dealing with the protection of cultural property, for example, in times of war. Neither are there any provisions that regulate the repatriation of cultural property removed abroad.

Other laws establishing and/or protecting cultural heritage

Other laws establishing and/or protecting Kenya's cultural heritage include The National Museums Act, 1983, as amended,⁶²⁴ that establishes the National Museums, their control, management and any other incidental matters; the Kenya Cultural Center Act of 1951, as amended,⁶²⁵ that deals with general cultural areas in this country; and the Wildlife (Conservation and Management) Act, 1976, as amended,⁶²⁶ which consolidates the law relating to the protection, conservation and management of wildlife in Kenya including the regulation of trophies. Other laws dealing with national parks, forests and fishery conservation and protection may also be relevant.

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⁶²⁴ 6 LAWS OF KENYA, Ch. 216 (rev. 1984).

⁶²⁵ 6 LAWS OF KENYA, Ch. 218 (rev. 1984).

⁶²⁶ 11 LAWS OF KENYA, Ch. 376 (rev., 1985).

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THE REPUBLIC OF KOREA

Introduction

In December 1982, the Republic of Korea enacted the Cultural Property Protection Law, which drastically revised the 1962 law.⁶²⁷ The purpose of the new Law as stated in article 1 is to contribute to the cultural advancement of the nation as well as to the cultural improvement of mankind by preserving and utilizing cultural property.

The Law, consisting of 94 articles, deals with the following subjects, among others: a definition of cultural property, establishment of a Cultural Property Committee, State-designated cultural property (designation, management and protection, public access, investigation), buried cultural property, State-owned cultural property, cultural property designated by local governments, export restrictions, the protection of foreign cultural property, penalties and the like.

The Cultural Property Protection Bureau established under the direct supervision of the Minister of Culture and Sports (the Minister) is responsible for the protection and management of State-designated cultural property. The Minister is assisted by the Cultural Property Committee, which conducts research and deliberation on matters concerning the designation, preservation, management, and utilization of cultural property.⁶²⁸ Mayors and provincial governors are responsible for the protection and management of the cultural property designated by local governments.

The Republic of Korea is a party to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.⁶²⁹

Definition of *cultural property*

Under article 2, *cultural property* is divided into four groups and defined as follows:

- *Tangible Cultural Property*: Buildings, classical books, calligraphic works, ancient documents, pictures, sculpture, objects of applied arts, etc., and other tangible cultural products of high historical or artistic value as well as any corresponding archaeological specimens.
- *Intangible Cultural Property*: Drama, music, dance, crafts technique, etc., and other cultural expressions of high historical or artistic value.
- *Monuments*: Shell-mounds, ancient tombs, castle sites, palace sites, pottery remains, strata containing remains, etc.

⁶²⁷ Law No. 3644, Dec. 31, 1982, as last amended by Law No. 4183, Dec. 31, 1989.

⁶²⁸ *Id.* art. 3.

⁶²⁹ Treaty No. 809, entered into force for Korea on May 14, 1983.

- *Folk Material*: Manners and customs relating to food, clothing and housing, to occupations, religious faiths, or annual events, etc., and to clothes, tools, or houses, and other objects used therefor that are indispensable for the understanding of changes and progress in the national life.

Article 2 of the Law further defines: (1) *State-designated cultural property* as that designated from among cultural property by the Minister of Culture and Sports; (2) *City or province-designated cultural property* (local government-designated) as that designated by the mayor of Seoul Special City, the mayor of a city under the direct control of the central government, or the provincial governor from among cultural property not designated by (1) above; and (3) *Cultural property material* as that designated by a city mayor or provincial governor mentioned above from among cultural property not designated by (1) and (2) above.

The Minister may designate important tangible cultural property as treasures, and certain treasures as national treasures, after deliberation by the Cultural Protection Committee.⁶³⁰ The Minister may also designate certain monuments as historic sites, scenic places, or natural monuments or designate certain folk material as important folk material.⁶³¹

The Minister may designate certain intangible property as important tangible property and recognize a holder (or a group holding) of such property.⁶³² Such property is known as *human cultural property*.⁶³³ In order to transmit and preserve traditional culture, the Minister may have the holder of important intangible cultural property teach others his skill and performance arts by providing him with a monthly stipend and other financial assistance and by awarding scholarships to persons who receive training.⁶³⁴

When distinguishing an item as State-designated cultural property or recognizing a holder of important intangible cultural property, the Minister must make an announcement to that effect in the official gazette and notify the owner or holder of the cultural property concerned.⁶³⁵

Establishment of ownership of cultural property

The Law permits undesignated privately-owned cultural property; privately-owned cultural property designated by either the State or local governments, and State-owned cultural property. The owner of a State-designated or local government-designated cultural property is to manage and protect the cultural property

⁶³⁰ *Id.* art. 4.

⁶³¹ *Supra* note 1, arts. 4-7.

⁶³² *Id.* art. 5. As of December 1991, 2,342 items of cultural property were designated by the State; 2,642 items were designated by cities and provinces; 1,251 items of cultural material were designated by cities and provinces; 22 traditional buildings and structures were designated by the State for a total of 6,257. See MUNHWAJE KWALRIYONBO (Annual of Cultural Property Management) 15 (Seoul, Property Management Bureau, 1992).

⁶³³ HYON-TAK HWANG, MUNHWAJE E KWANHAN HYOYULJOKIN KWANRICHEJE HWANGNIP (Establishment of an Effective Management System for Cultural Property) 40 POPCHE 41 (Feb. 1983).

⁶³⁴ *Id.* art. 24. See also *supra* note 6, at 163.

⁶³⁵ *Id.* art. 9.

concerned with the reasonable care of a good manager and according to instructions issued by the Minister or the mayor or provincial governor.⁶³⁶

If the owner of an item of cultural property is not identified within 30 days from the date of the announcement of the discovery of a lost or buried article, the item is to revert to the State.⁶³⁷ State-owned property is generally managed by the Minister.

No person is allowed to transfer State-owned property (including sites) or to create a private right to it unless otherwise provided by the Law. However, the use of State-owned property may be permitted under the condition that it does not interfere with its management or protection and that it is necessary for public use, official use, or public utility.⁶³⁸

Regulation of traffic in cultural property

Whenever he considers it necessary for the State to preserve and manage cultural property by means of purchase, the Minister must endeavor to work out the necessary measures for purchasing the said cultural property.⁶³⁹

The Law provides that any person intending to engage in the business of buying and selling or exchanging tangible cultural property or tangible folk materials that are movable (including a person intending to engage in a business on consignment) is required to obtain the Minister's permission. The Minister may issue orders or instructions necessary for the preservation of the cultural property to the person who obtained permission or ask him to submit a report thereof. He may also have his staff inspect the store or place of business. The Law also prescribes matters relating to requisites for qualification or reasons for disqualification and the duty to keep account books and reports regarding the business.⁶⁴⁰

No national treasure, treasure, or important folk material is to be exported or transported out of the State unless the Minister permits it for the purpose of an international cultural exchange, on condition that the items be brought back to the State within two years from the date of their departure, with a permissible extension of up to two years. Before granting permission or an extension of the time period, the Minister must refer the matter to the State Council for deliberation.⁶⁴¹

The export of cultural property designated by local governments, cultural property material, or non-designated cultural property requires the permission of the Minister only, without being subject to the

⁶³⁶ *Id.* arts. 14, 15, 17.

⁶³⁷ *Id.* art. 48.

⁶³⁸ *Id.* art. 54.

⁶³⁹ *Id.* art. 26, ¶ 2.

⁶⁴⁰ *Id.* arts. 61-65.

⁶⁴¹ *Id.* art. 21.

deliberation of the State Council.⁶⁴² Any person who has exported or transported out of the State designated cultural property without permission or who has not transported it back into the State within the specified time limit is subject to a term of penal servitude of not less than five years and the cultural property concerned is to be confiscated.⁶⁴³

Any person intending to transport foreign cultural property into the State is required to submit a report to the Minister, with documents attached certifying that the cultural property was lawfully transported out of the foreign country. If the Minister believes that an item of cultural property was unlawfully transported into the State, the Minister may retain it in custody.⁶⁴⁴

When foreign cultural property in custody is proved to have been lawfully transported out of the foreign country, the Minister must return it to the owner without delay. When a foreign country has proved that foreign cultural property was unlawfully transported into the State and requested that it be returned in accordance with the terms of the relevant treaty, the Minister must take the necessary measures for returning the cultural property as provided by the treaty.⁶⁴⁵

Repatriation of cultural property removed abroad

The Law is silent on this subject. Under the Agreement on Cultural Property and Cultural Cooperation Between the Republic of Korea and Japan of 1965 and other arrangements, Korea could repatriate from Japan cultural property that was removed from Korea mainly during the Japanese Occupation of that country (1910-1945). Items listed in the Agreement were 97 pieces of ceramic ware, 334 archaeological relics, three stone-made art objects, 163 titles of books (or 852 pieces), and 35 articles related to the postal service and telecommunications.⁶⁴⁶

Article 3 of the Agreement stipulates that the two governments will provide the appropriate facilities to accord the nationals of the other country with opportunities for studying the cultural property owned by art museums, museums, libraries, and other institutions of science and culture in their respective countries.

⁶⁴² *Id.* arts. 58 & 76.

⁶⁴³ *Id.* art. 80.

⁶⁴⁴ *Id.* art. 78, ¶¶ 1-3.

⁶⁴⁵ *Id.* ¶¶ 5, 6.

⁶⁴⁶ Treaty No. 181, Dec. 18, 1965. As of Dec. 1995, Korea was able to repatriate a total of 3,302 items from Japan under the 1965 Agreement and other arrangements between the two countries. This information was provided by the Embassy of Korea on Feb. 20, 1996.

Other laws

The Cultural Property Protection Law of 1982 is implemented by the Enforcement Decree⁶⁴⁷ and Enforcement Regulation⁶⁴⁸ issued thereunder. The 1982 Law is further implemented by the Decree Concerning the Organization of the Cultural Property Management Bureau⁶⁴⁹ and the Regulation of the Cultural Property Protection Committee.⁶⁵⁰

Certain provisions of the following laws are also applicable to the protection of cultural property in Korea: the State-owned Property Law; the Law Concerning the Preservation of Traditional Buildings and Structures; the Law Concerning the Preservation of Historical Buddhist Temples; the Law Concerning the Collection and Preservation of Historical Materials; the Museum Law; the Lost Property Law; the Customs Law; and the Foreign Trade Law.

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⁶⁴⁷ Presidential Decree No. 11184, Aug. 3, 1983, as last amended by Decree No. 14399, Oct. 7, 1994.

⁶⁴⁸ Ministry of Culture and Information No. 77, Sept. 19, 1983.

⁶⁴⁹ Presidential Decree No. 4203, Nov. 5, 1969.

⁶⁵⁰ Presidential Decree No. 4577, Feb. 7, 1970.

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KUWAIT

Not particularly endowed with any major historic remains and antiquities, Kuwait's legislation for the protection of cultural property is quite recent and is the responsibility of the Ministry of Education, rather than a specialized agency.

Indeed, the Explanatory Memorandum to the Emiri Decree on the subject⁶⁵¹ says that the reason for the promulgation of the antiquities law was the decision of the Government to establish a museum to house the historic remains recently discovered and to comply with recent international conventions for the protection of antiquities. Among those mentioned by the Memorandum are the Third Arab Antiquities Conference held in the city of Fez, Morocco, in November 1959 and its draft unified antiquities law for the Arab states; the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954); and the proposals applicable to antiquity excavations adopted at the UNESCO General Conference held in December 1956 at New Delhi, India.

In recognition of these and other international agreements pertaining to the protection of cultural property, the Kuwaiti law pledges the country's *respect* for the Arab and other nations' antiquities outside its borders, as well as the *protection* of antiquities within its borders.⁶⁵²

Definition of *cultural property*

The Law considers *cultural property* for purposes of study, recording and protection, any movable or immovable property made, produced or built by man forty or more years ago.⁶⁵³ This is much shorter than the one hundred years by which most other countries define *antique property*, and is perhaps indicative of Kuwait's limited heritage in physical remains. This also explains the inclusion of "historic buildings, built for various purposes" among the examples given in the Law for protected properties.

Establishment of ownership of cultural property

The Kuwaiti Law begins by declaring all movable and immovable antiquities found in the ground within the territory of Kuwait to be State property.⁶⁵⁴ It goes on, however, to recognize the private ownership of above land antiquities, which ownership is said to remain in the possession of the owner until such time as the Ministry of Education acquires what it deems necessary to acquire such antiquities.

⁶⁵¹ Decree No. 11 of 1960 and its Explanatory Memorandum published in the official gazette, KUWAIT AL-YOUM, of Apr. 17, 1960.

⁶⁵² *Id.* art. 1.

⁶⁵³ *Id.* arts. 3 & 4.

⁶⁵⁴ *Id.* art. 5.

Ownership of land in itself does not entitle the owner the right to excavate or dispose of the antiquities found on the land or beneath it.⁶⁵⁵ The Law, however, permits the acquisition by private individuals of movable property on condition that property considered by the Department of Education as *important* is first recorded and an official certificate issued by it confirming the recording and the owner's right to dispose of the *unimportant* property.⁶⁵⁶

Persons who find a movable antique property or fortuitously discovers it must within 48 hours of its discovery inform the Department of Education. The Department shall decide whether to keep the property itself, in which case the Department will pay appropriate compensation to the finder of the property.⁶⁵⁷

Regulation of traffic in cultural property

The Law prohibits anyone from trading in antiquities unless licensed to do so.⁶⁵⁸ The license is issued by the Department of Education for a period of one year and is renewable. Cultural property intended for trade purposes must be recorded and its disposal permitted. Any antiquities not so recorded and found in possession of a merchant will be confiscated and the merchant prosecuted.

The export of antiquities is prohibited without a special permit from the Department of Education. A permit may be issued only after the Department is satisfied that the antiquities to be exported would not impoverish the Kuwaiti cultural heritage, that similar items exist in the country's museums; and the object may, therefore, be disposed of.⁶⁵⁹ Customs, Postal, and Security Services are instructed to confiscate any antiquities earmarked for export without a permit.

Likewise, anyone importing antiquities from abroad must inform the Department of Education within three months of their arrival; the importer is allowed to retain the antiquities only if they are not intended for trade.⁶⁶⁰

To enforce these provision, the Law grants the Department of Education and its representatives the right to enter merchants' shops and inspect their contents. Merchants are required to comply with any instructions issued to them by the Department.⁶⁶¹

⁶⁵⁵ *Id.* art. 6.

⁶⁵⁶ *Id.* art. 18.

⁶⁵⁷ *Id.* art. 21.

⁶⁵⁸ *Id.* art. 36.

⁶⁵⁹ *Id.* art. 38.

⁶⁶⁰ *Id.* art. 22.

⁶⁶¹ *Id.* art. 37.

Other protection for culture property

The Law penalizes anyone causing damage, disfigurement, or imitation of movable and immovable cultural property in whole or in part; requires the Department of Education to identify and record such property; and see to it that the property is well maintained and safeguarded, including supervision of any repair or construction work in or near such property carried out by the owners of the property.⁶⁶²

Immovable cultural property must be housed in Kuwaiti museums, where it will be exhibited or stored. It cannot be sold or given as gift; it may only be exchanged for other antiquities from Arab and foreign museums.⁶⁶³

Archaeological excavations are the sole responsibility of the Department of Education. Foreign archaeological missions may be licensed to conduct excavations only after proof of their academic and financial ability to do so.⁶⁶⁴ The Law details the terms under which the excavations may be conducted, and declares that all antiquities found as a result of these excavations become the property of Kuwait, and the movable items must be deposited with the Kuwaiti museum. Archaeological missions may be offered by way of compensation such items as the Department of Education deems expendable.⁶⁶⁵

Kuwait is party to the UNESCO Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Law specifically assigns this responsibility to the Department of Education in conjunction with the security agencies of the country. Nevertheless, very little was done in this regard in anticipation of the Iraqi invasion of Kuwait in 1991. Return and/or compensation for movable and immovable cultural property damaged or lost during the Iraqi invasion has been the object of United Nations resolutions against Iraq.

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⁶⁶² *Id.* arts. 12-14.

⁶⁶³ *Id.* art. 17.

⁶⁶⁴ *Id.* arts. 26-28.

⁶⁶⁵ *Id.* art. 33.

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MALAYSIA**Nature and significance of cultural property**

Three laws have been promulgated on cultural property which together cover the whole of the Federation of Malaysia. For the eleven constituent states of West Malaysia, the relevant law, the Antiquities Act, 1976 (Act 168), was enacted to provide not only for the control of antiquities and historical objects and to regulate dealings in and the export of such items, but also to provide for the preservation of ancient and historical monuments, archaeological sites and remains.⁶⁶⁶ The two other states of the Federation, Sabah and Sarawak, each has its own legislation on the subject, in the form of Sabah's Antiquities and Treasure Trove Enactment of 1977,⁶⁶⁷ and Sarawak's Antiquities Ordinance of 1954.⁶⁶⁸

The significance of cultural property in Malaysia stems from the cultural heritage handed down by the ancient rulers who established kingdoms in the area in the thirteenth century A.D. The most important cultural influence was at first that of Hinduism and Buddhism from India, and later that of Islam. Archeological traces of Indian influence have been found dating as far back as the fourth century A.D. and Hindu and Buddhist statues of the 6th or 7th century and 8th centuries have been found at various sites in Malaysia. The Malay kings of Malacca paid tribute to the Ming emperors of China. European influences from Portuguese, Dutch, and British traders or invaders were felt only from the sixteenth century onward.⁶⁶⁹

Definition of *cultural property***Antiquities**

The Antiquities Act, applicable only to the states of West Malaysia, defines various types of cultural property. The term *antiquity* is defined as a moveable or immovable object or any part of the soil or bed of a river, lake or sea, which has been constructed, shaped, inscribed, erected, excavated or otherwise produced or modified by human agency and which is or is reasonably believed to be at least one hundred years old.⁶⁷⁰

The Sabah Antiquities and Treasure Trove Enactment defines an *antiquity* as being any object, moveable or immovable, produced or modified by human agency before January 1, 1920.⁶⁷¹ The term also covers any part of the object added at a later date, and any human, plant or animal remains earlier than January 1, 1920. To qualify as antiquities, the objects or remains must not have been imported into Sabah after the

⁶⁶⁶ 10 GOLDEN'S FEDERAL STATUTES 137 (Kuala Lumpur, 1991).

⁶⁶⁷ Enactment 11 of 1977, SABAH GOVERNMENT GAZETTE, Supplement 1, No. 2, 1977.

⁶⁶⁸ Ordinance 14 of 1957, *see* Prott & O'Keefe, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 134-137 (UNESCO, 1988).

⁶⁶⁹ *See, e.g., MALAYSIA: A COUNTRY STUDY* (Washington, D.C., 1984).

⁶⁷⁰ Antiquities Act, *supra* note 1, § 2, at 139.

⁶⁷¹ *Supra* note 2, § 2, at 2.

date of the Enactment and must be of public interest from a local or national, historical, traditional, artistic, archaeological or other scientific character.⁶⁷²

The Antiquities Ordinance of Sarawak passed in 1954 defines an *antiquity* as meaning any object, whether moveable or immovable, produced or modified by human agency before 1850, any part of the object added at a later date, or any human, plant or animal remains earlier than 1850.⁶⁷³

Historical objects

An *historical object*, on the other hand, is defined in the West Malaysian law as being any artifact of other object to which religious, traditional, artistic or historic interest is attached. It includes ethnographic material in such forms as household implements or personal ornaments; works of art such as carvings, paintings, textiles, or other handicraft; manuscripts, coins, arms, insignia; vehicles, ships and boats, in part or in whole, the production of which has ceased.⁶⁷⁴

Monuments

Types of cultural property also covered by the Antiquities Act applicable to West Malaysia, other than antiquities and historical objects, include ancient monuments and other immovable property which may include land, caves, underground tombs, and the like.

In Sabah, the law defines an *ancient monument* as meaning any monument dating from the period before January 1, 1920. The Antiquities Act applicable to the states of West Malaysia defines a *monument* as meaning any temple, church, building, monument, fort, earthwork, standing stone, keramat, cave or other structure, erection or excavation, tumulus or other place of interment, or any immovable property of a like nature, or any part or remains of the same, the preservation of which is a matter of public interest, traditional or archaeological interest.⁶⁷⁵

In Sarawak, *monuments* are not separately defined, but are included in the definition of *antiquity* in § 2 of the Sarawak Ordinance.⁶⁷⁶

⁶⁷² *Id.*

⁶⁷³ *Supra* note 3, § 13, at 136.

⁶⁷⁴ *Supra* note 1, at 140.

⁶⁷⁵ *Supra* note 1, § 2, at 139.

⁶⁷⁶ *See supra* note 8.

Establishment of ownership of cultural property

The Antiquities Act states that, subject to its provisions, every antiquity discovered in West Malaysia on or after the date of the coming into force of this Act shall be the absolute property of the Government.⁶⁷⁷ Every ancient monument which, on the same date, is not owned by any person or the control of which is not vested in any person as a trustee or manager, shall be deemed to be absolute property of the Government.⁶⁷⁸ Similarly, the Government owns all undiscovered antiquities (other than ancient monuments) whether lying on or hidden beneath the surface of the ground or in any river or lake or in the sea.⁶⁷⁹

The Sabah Antiquities and Treasure Trove Enactment states that every antiquity discovered after 1977 in Sabah is the absolute property of the State. In legal proceedings, it is presumed that antiquities were discovered after 1977 unless the contrary is proven.⁶⁸⁰ The Sarawak Antiquities Ordinance states that all antiquities other than those held by natives of Sarawak had to be registered in 1954/55, after the Ordinance was passed, and that every antiquity found in Sarawak after October 1, 1954, is the property of the Government.⁶⁸¹

Regulation of traffic in cultural property

Part VI of the Antiquities Act covers the export of antiquities and historical objects. The law imposes a prohibition upon the export of any antiquity unless the person has obtained a license to export the antiquity from the Director-General of Museums or a license stating that the antiquity was originally imported into the country by him, and he has declared the antiquity to a proper officer of customs at a customs airport or customs port.⁶⁸²

No export license will be issued if, in the opinion of the Director-General of Museums, the antiquity is or will be of lasting national importance or interest.⁶⁸³ The Act lists the procedures to be followed in applying for a license to export an antiquity.

Part IX of the Antiquities Act, which contains miscellaneous rules on the subject, states that no person is to deal in antiquities unless he is in possession of a dealer's license granted by the Director-General of Museums.⁶⁸⁴

⁶⁷⁷ *Supra* note 1, § 3(1), at 141.

⁶⁷⁸ *Supra* note 1, § 3(2), at 141.

⁶⁷⁹ *Supra* note 1, § (4), at 142.

⁶⁸⁰ *Supra* note 2, § 4, at 4.

⁶⁸¹ *Supra* note 3, § 3, at 136.

⁶⁸² *Supra* note 1, § 21(a), at 149.

⁶⁸³ *Supra* note 1, § 21(2), at 149.

⁶⁸⁴ *Supra* note 1, § 33, at 155.

Penalties in the Antiquities Act range from six months imprisonment and/or a fine of M\$5000, for the export or attempted export of an antiquity without a license, to double the penalty where although a license to export an antiquity has been refused or prohibited, there is export or attempted export of that antiquity.⁶⁸⁵

The Sabah Enactment in like fashion provides that no person is to export any antiquity unless he has first obtained a license to do so. The Curator of the Sabah Museum is the official who issues such licenses, and he will issue no license to export an antiquity unless the applicant has proved to the Curator's satisfaction that the applicant is the owner of the antiquity or that he is acting on behalf of and with the authority of the owner.⁶⁸⁶ Penalties provided in the Sabah Enactment for exporting antiquities without a license range from imprisonment for three months, or a fine of M\$500, or both imprisonment and a fine. Exporting an antiquity for which an export license has been refused is punishable with imprisonment for one year, or a fine of M\$2,000, or both imprisonment and a fine.⁶⁸⁷

Other protection for cultural property, e.g., in time of war

Other protections in the Act pertain to the care of ancient monuments and historical sites. Part IV of the Antiquities Act, for example, provides that where such things are located on private land, the authorities may make arrangements with the owner or occupier for their preservation, inspection and maintenance, and may contribute toward the cost of carrying out repairs of conservation measures as are deemed necessary and which the owner or occupier is willing to undertake. The site may be purchased or leased by the Government, or the monument may be removed from the site, with compensation being paid, the amount to be fixed by agreement. The Act also makes provision for the inspection of ancient monuments and historical sites.⁶⁸⁸

Malaysia is a party to the UNESCO Convention of 1954 (the Hague Convention) for the Protection of Cultural Property in the Event of Armed Conflict, and has also ratified the Protocol thereto which prohibits the export of cultural property from occupied territory and provides for restitution of illegally exported objects.⁶⁸⁹

In 1968, the members of the Asian and Pacific Council (APC)⁶⁹⁰ entered into an Agreement to establish a Cultural and Social Centre for the protection of cultural heritage, with the Agreement calling upon member States to take "long term measures to guarantee the preservation of the cultural heritages of all member countries."⁶⁹¹

⁶⁸⁵ *Supra* note 1, § 28, at 152.

⁶⁸⁶ *Supra* note 2, § 31, at 13.

⁶⁸⁷ *Supra* note 2, § 40, at 15-16.

⁶⁸⁸ *Supra* note 1, §§ 15-18, at 146-148.

⁶⁸⁹ 249 U.N.T.S. (1956), 240-270.

⁶⁹⁰ The APC consisted of Australia, Japan, South Korea, Malaysia, New Zealand, the Philippines, Taiwan, Thailand, and South Vietnam.

⁶⁹¹ K. Jote, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 175 (Stockholm, 1994).

The national laws of Malaysia do not contain any particular provisions addressing the protection of any type of cultural property in time of war.

Repatriation of cultural property removed abroad

No provisions could be located in the national laws that address the question of repatriating cultural property that has been removed abroad.

However, Malaysia is a member of the British Commonwealth. The communique issued at the end of the Commonwealth Law Ministers Meeting held in Mauritius in 1993 included the text of the Scheme for the Protection of Cultural Heritage within the Commonwealth which was adopted by the Meeting.⁶⁹² The Scheme governs the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another country contrary to its laws. While it will not operate retrospectively, the Scheme does not detract from the possibility of Commonwealth countries entering into bilateral discussions among themselves in relation to the repatriation of specific items of importance for the cultural heritage of the countries concerned.⁶⁹³

Other laws establishing and/or protecting cultural heritage

No other laws on cultural heritage could be located.

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⁶⁹² 19 COMMONWEALTH LAW BULLETIN 2015 (No. 4, Oct. 1993).

⁶⁹³ *Id.* at 2008.

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MEXICO

Nature and significance of cultural property

The cultural property of a nation stands as a testament to the origins of its civilization, providing an education to its people and a focal point for national unity. For these reasons, objects and works within the ambit of cultural property are tremendously significant to a culturally rich but economically poor source nation.⁶⁹⁴

Mexico, along with Central America, is located in an area known as Mesoamerica, which is considered by archaeologists to have been a cultural unit in pre-Columbian times. Resembling the Indus, Nile, Tigris and Euphrates valley, this area is deemed one of the cradles of civilization. Vestiges of civilization from 3,000 BC have been found. The cultures that flourished at different times in what is now Mexico include the Olmec,⁶⁹⁵ Toltec, Maya and the Aztec.⁶⁹⁶

Mexico has "15,000 documented and registered archaeological sites, but many more exist and deserve protection."⁶⁹⁷ Of these sites, eight have been classified as World Heritage, seven of them include archaeological zones related to past Indian cultures. Five of these are some of the most famous and significant ruins in the world: Teotihuacan,⁶⁹⁸ Oaxaca, Palenque, Xochimilco and Chichén-Itzá. Puebla/Cholula and Guanajuato are both Spanish colonial sites. Cholula is the location of a massive Indian pyramid. Sian Ka'an Reserve is a wonderland of tropical forest, mangroves, swamps and deciduous forests and also has important archaeological sites as well.⁶⁹⁹

⁶⁹⁴ L. S. Potter & B. Zagari, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 *TRANSNATIONAL LAWYER* 629 (No. 2, Fall, 1992) citing J. H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 *AM. J. INT'L. L.* 831, 832 (1986).

⁶⁹⁵ The Olmecs extended their influence over the central high plateau and the Pacific Coast as far as Costa Rica. They produced the first ceremonial centers in Central America, the first monumental sculpture, the first carved jade objects and the first traces of writing [THE HARPER ATLAS OF THE WORLD HISTORY 132 (New York, Harper & Row Publishers, 1987)].

⁶⁹⁶ J. E. Bezaury Creel, *MASTERWORKS OF MAN & NATURE: PRESERVING OUR WORLD HERITAGE* PATONGA, AUSTRALIA 235 (Harper-Macrae Publishing Pty. Ltd., 1992).

⁶⁹⁷ Pottery & Zagani, *supra* note 1, at 689.

⁶⁹⁸ Teotihuacan, the great metropolis of the central plateau, influenced an extensive geographic zone disseminating cultural characteristics such as the step pyramids and the cult to the rain god. This influence facilitated the establishment of a homogenous culture through Central America [*supra* note 2].

⁶⁹⁹ Bezaury Creel, *supra* note 3.

Mexico enacted the Law on Archaeological Monuments in 1897.⁷⁰⁰ Since then the Nation has demonstrated a concern to prevent the export of cultural property.⁷⁰¹ This legislation proclaimed all archaeological monuments and artifacts within Mexican soil as the property of the Nation.⁷⁰² Movable pre-Columbian objects could not be exported without governmental authorization.⁷⁰³ Subsequent legislation included the following:

- the Law on Protection and Conservation of Monuments and Natural Beauty, promulgated in 1930;⁷⁰⁴
- the Law on Protection and Conservation of Archaeologic and Historic Monuments, Typical Population Centers and Places of Natural Beauty, promulgated in 1934;⁷⁰⁵ and
- the Federal Law on the Cultural Patrimony of the Nation, promulgated in 1970;⁷⁰⁶

These laws constituted a progressive increase in the control of exports of cultural property. The Federal Law on Archaeological, Artistic and Historic Monuments and Zones, currently in force, was promulgated in 1972.⁷⁰⁷

⁷⁰⁰ Ley Sobre Monumentos Arqueológicos, DIARIO OFICIAL (D.O.) May 11, 1897.

⁷⁰¹ In Mexico the pillage and destruction of Mayan sites for pre-Columbian treasures has reached crisis dimensions [*supra* note 1, at 634]. The publication of an article in ART JOURNAL entitled *Illicit Traffic of Pre-Columbian Antiques* by C. Coggins in 1969 was the first announcement that the Maya crisis was taking place. Coggins stated:

In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market. Not since the sixteenth century has Latin America been so ruthlessly plundered [L. S. Waterman, *Was the Stela "Stolen"?* 2 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 532 (No. 2, Spring 1992)].

⁷⁰² *Supra* note 7, art. 2.

⁷⁰³ *Id.* art. 6.

⁷⁰⁴ Ley Sobre Protección de Monumentos y Bellezas Naturales, D.O. Jan. 31, 1930.

⁷⁰⁵ Ley Sobre Protección y Conservación de Monumentos Arqueológicos e Históricos, Poblaciones Típicas y Lugares de Belleza Natural, D.O., Jan. 19, 1934.

⁷⁰⁶ Ley Federal del Patrimonio Cultural de la Nación, D.O., Dec. 16, 1970.

⁷⁰⁷ Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas, D.O., May 6, 1972, Basic Statute.

Definition of *cultural property*

The subject of this report is broadly defined in the Mexican Federal Law on Archaeological, Artistic, and Historic Monuments and Zones,⁷⁰⁸ and its regulation.⁷⁰⁹ This basic statute⁷¹⁰ includes well defined concepts in this regard. The word *monument* is used instead of artifact, and the terms *archaeological*, *historic* and *artistic* are used as qualifiers. Some single items may very well qualify for all three categories. Such may be paraphrased as follows:

Archaeological monuments are either real estate (*immuebles*) or movable objects (*muebles*) that are cultural products pertaining to the period before the establishment of the viceroy of Hispanic culture found in the Mexican Territory. They include human remains, fauna and flora.⁷¹¹

Artistic monuments are those works recognized as having relevant aesthetic value. There is no reference to any time frame for items in this category. Such include the works of artists who are still alive. Murals are included whether or not the artist is still alive.⁷¹²

Historic monuments are those related to the history of the nation, beginning with the establishment of the Hispanic culture according to the designation given thereto by the corresponding authority or as determined by the law. The statutory determination includes real estate and the buildings therein erected between the 16th and the 19th centuries that are of a religious, educational, ornamental and military character. Items found within such buildings are also covered. Works of a private character so designated are also included as are documents, records (*expedientes*) generated by the offices and archives of the Federation, states and municipalities as well as by the ecclesiastical houses (*casas curiales*); original documents and manuscripts related to the history of Mexico; books and booklets of this period printed in Mexico or abroad found to be relevant; and scientific and technical collections that are deemed worth preserving in this category.⁷¹³

Establishment of ownership of cultural property

Cultural property may, therefore, be found in many categories, if the object is declared to be of social and national interest. The provisions of the law were assigned to have a *public order* character.⁷¹⁴ The latter is generally understood to make such interest prevail over those of a private character.

⁷⁰⁸ *Id.*

⁷⁰⁹ Reglamento de la Ley Federal sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas, D.O. Dec. 8, 1975 (The Regulation).

⁷¹⁰ *Supra* note 14.

⁷¹¹ *Id.* art. 28.

⁷¹² *Id.* art. 33.

⁷¹³ *Id.* art. 36.

⁷¹⁴ *Id.* art. 1.

Within this context, archaeological monuments are declared to be the property of the nation, and they may not be transferred or otherwise acquired by adverse possession.⁷¹⁵ Those that are movable may not be transported, displayed or duplicated without permission of a competent authority. No excavations or any other form of work to uncover monuments in this category may be made except by the National Institute of Anthropology and History or other organizations properly authorized to do so.⁷¹⁶

Private owners of real estate declared to be historic or artistic monuments are charged with the duty to conserve them. They may be required to restore them under specific circumstances of authorization and supervision of the Institute above referred to.⁷¹⁷ There are several provisions governing other requirements under special circumstances.

Historic or artistic monuments in the private domain may be temporarily or permanently exported under express authorization issued to that effect by a competent authority. The exportation of archaeological monuments is prohibited with the exception of scientific exchanges or donations to foreign governments or scientific organizations. This can only be done with the agreement of the President of the Republic.⁷¹⁸

All such items require registration after they are identified as belonging to any of the categories in the statute.⁷¹⁹

Regulation of traffic in cultural property

There is an entire section of the statute relating to penalties.⁷²⁰ The more relevant may be paraphrased as follows:

The transfer of ownership of any archaeological monument or its marketing, transporting, displaying or duplicating without the required permit and registration shall be penalized with from one to six years of imprisonment and a fine of from 100 to 50,000 *pesos*.⁷²¹

The illegal possession of an archaeological or movable historical monument when this has been either found or removed from a structure built during a period from the 16th to the 19th centuries shall be penalized with imprisonment of from one to six years and a fine of from 3,000 to 15,000 *pesos*.

The damage or destruction of any monument which comes under the purview of the statute by whatever means will be penalized with imprisonment of from one to ten years and a fine equal to the value of

⁷¹⁵ *Id.* art. 27.

⁷¹⁶ *Id.* art. 30.

⁷¹⁷ *Id.* art. 13.

⁷¹⁸ *Id.* art. 16.

⁷¹⁹ *Id.* arts. 21-26.

⁷²⁰ *Id.* arts. 47-55.

⁷²¹ *Id.* art. 49.

the damage caused. If the damage inflicted or the destruction was carried out by means of fire, flooding or explosion, the penalty prescribed is imprisonment from two to ten years and a fine equal to the value of the damage or destruction caused.⁷²²

The intention to remove or the actual removal from Mexico by any means of any of the monuments which come under the purview of this law without a permit from the corresponding agency is penalized with imprisonment from two to twelve years and a fine of from 100 to 50,000 *pesos*.⁷²³

Traffickers in monuments will be considered habitual offenders under this statute. As such they will be subject to the sentencing principles prescribed for recidivists and habitual offenders in the CRIMINAL CODE FOR THE FEDERAL DISTRICT AND TERRITORIES (two-thirds increase, generally). Other circumstances such as education, conduct, economic status, motives, and other related elements must be considered for the determination of the degree of the penalty applied.⁷²⁴

Any other violation not specifically included in the statute will be penalized by determination of the corresponding competent agency with a fine of from 100 to 50,000 *pesos*.⁷²⁵

The regulation cited covers some of the details related to conservation and preservation of the monuments, permits for a variety of applications, registration, and related procedural aspects.

There is, however, an important restriction concerning monuments existing under private ownership. They may not be permanently exported out of the country. There are only a few exceptions. Further restrictions have been provided for depending on specific circumstances related to the character of the monument, shipping and handling, replication and the like.⁷²⁶

It may be stated that under the laws of Mexico on the subject, no action may be undertaken as regard historic artifacts without registration⁷²⁷ and the expressed consent of the specific government agency in charge. The penalties prescribed for violators involve imprisonment of up to 12 years and fines.⁷²⁸

Other protection provided for cultural property

Mexico has been actively using international mechanisms against the illicit trade of cultural property. Mexico is a party member to the following international Conventions and Treaties:

⁷²² *Id.* art. 52.

⁷²³ *Id.* art. 53.

⁷²⁴ *Id.* art. 54.

⁷²⁵ *Id.* art. 55.

⁷²⁶ Regulation, *supra* note 16, arts. 32-47.

⁷²⁷ *Supra* note 14.

⁷²⁸ *Id.* art. 53.

- The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris, November 14, 1970; entered into force April 24, 1972.⁷²⁹ The Convention entered into force for Mexico on January 4, 1973.⁷³⁰
- The Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, the Hague, 1954.⁷³¹
- The Treaty on the Protection of Movable Property of Historic Value, also known as the Roerich Pact of 1935, which was organized by the Pan-American Union, the predecessor of the Organization of American States (OAS).⁷³²
- As a direct response to the systematic, illicit traffic of pre-Columbian treasures, Mexico and the United States signed the bilateral Treaty on Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, signed at Mexico, July 17, 1970.⁷³³

The Treaty of 1970 applies only to a few category of objects and covers only stolen property. For the purpose of the Treaty, *archaeological, historical and cultural properties* are defined as:

- (a) art objects and artifacts of the pre-Columbian cultures of both countries;
- (b) art objects and religious artifacts of the colonial periods of both countries, including stelae and architectural features such as relief and wall art; and
- (c) documents from official archives for the period up to 1920.

Items in these three categories must be of outstanding importance to the national patrimony and must be the property of federal, state, or municipal governments or their instrumentalities.⁷³⁴ Although the Treaty does not cover privately owned property, it covers the most seriously threaten group of cultural property.

The principal benefit from the Treaty of 1970 is the maintenance of the cultural patrimony of each nation. It reinforces the Mexican objective of cultural retention and marks United States support of Mexico's cultural nationalism. Notwithstanding, the Treaty has been criticized because it exclusively concentrates on recovery of materials that have been lost by Mexico and does nothing substantive to prevent illicit traffic.⁷³⁵

⁷²⁹ Treaties in Force (Dept. of State, Washington, D.C., 1995), at 328.

⁷³⁰ Potter & Zagaris, *supra* note 1, at 642.

⁷³¹ *Mexico*, THE PROTECTION OF MOVABLE CULTURAL PROPERTY 1 (Unesco, 1987).

⁷³² Potter & Zagaris, *supra* note 1, at 647.

⁷³³ 22 UST 494; TIAS7088; 791 UNTS313.

⁷³⁴ *Id.* art. I.

⁷³⁵ Potter & Zagaris, *supra* note 1, at 637-639.

- The Mexico-U.S. Treaty on Cooperation for Mutual Legal Assistance, signed in Mexico, on December 9, 1987; entered into force on May 3, 1991.⁷³⁶

Under article 11 of the Treaty:

1. ...[t]he Coordinating Authority of either Party may notify that of the other when it has reason to believe that proceeds, fruits or instrumentalities of crime are located in the territory of the other Party. 2. The Parties shall assist each other, to the extent permitted by their respective laws, in procedures relating to the immobilizing, securing and forfeiture of the proceeds, fruits and instrumentalities of crime, restitution and collection of fines.⁷³⁷

Under article 18, the parties shall meet at least every two years from the date of entry into force of this Treaty. This is to be done to review the effectiveness of its implementation and to agree on whatever individual and joint measures are necessary to improve its effectiveness.⁷³⁸

- The Mexico-U.S. Extradition Treaty with Appendix, signed at Mexico, on May 4, 1978; entered into force on January 25, 1980.⁷³⁹

Among the acts listed in the Appendix as extraditable offenses are offenses against the laws relating to the importation, exportation, or international transit of goods, including historical or archaeological items,⁷⁴⁰ and acts which constitute violations of the customs laws.⁷⁴¹ Under the Treaty, all objects related to the offense, whether or not they were used for its execution, shall be surrendered upon the granting of the extradition, even when extradition cannot be effected. The requested party may condition the surrender of articles upon a satisfactory assurance from the requesting Party that the articles will be returned to the requested Party as soon as possible.⁷⁴² The condition of having to return archaeological treasures to the requested Party, makes this Treaty ineffectual as an enforcement mechanism for offenses such as the pillage of ancient artifacts.

- The North American Free Trade Agreement (NAFTA) with notes and annexes was signed at Washington, D.C., Ottawa and Mexico, D.F. on December 8, 11, 14 and 17, 1992; entered into force on January 1, 1994.

⁷³⁶ *Supra* note 36, at 173.

⁷³⁷ Mexico-United States: Mutual Legal Assistance Cooperation Treaty, done at Mexico City, Dec. 9, 1987, 27 I.L.M. 443 (1988).

⁷³⁸ *Id.* art. 18.

⁷³⁹ Extradition Treaty between the United States of America and the United Mexican States, 31 U.S.T 5059.

⁷⁴⁰ *Id.* App., No. 21.

⁷⁴¹ *Id.* App., No. 22.

⁷⁴² *Id.* art. 19.

The Agreement aims to eliminate trade barriers, promote fair competition, increase investment, and protect intellectual property rights.⁷⁴³ Although the Agreement covers intellectual property,⁷⁴⁴ it does not address the issue of cultural property, with one insignificant exception which relates exclusively to trade between the United States and Canada with respect to cultural industries.⁷⁴⁵ Unquestionably, the eventual progress of the economic integration will have profound effect on the traffic of goods,⁷⁴⁶ services and people. It may be anticipated that the elimination of trade barriers will have an indirect effect on the trade of stolen cultural property. NAFTA has been censured for lacking a provision on the recovery and return of stolen cultural property.⁷⁴⁷

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⁷⁴³ 1 NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, 103d Congress, 1st Sess., H.R. Doc. No 103-159, arts. 102 (1) (b), 102 (1)(c), and 102 (1)(d) (Washington, D.C., 1993).

⁷⁴⁴ *Id.* Ch. 17.

⁷⁴⁵ *Id.* Annex 2106.

⁷⁴⁶ Years before NAFTA was signed, Mexican "museum officials estimated that the number of pre-Columbian pieces smuggled into the art market daily is as high as three hundred." [J. K. Shedwill, *Is the "Lost Civilization" of the Maya Lost Forever?: The U.S. and Illicit Trade in Pre-Columbian Artifacts*, 23 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 229 (No. 1, 1992-93), citing D. Williams, *U.S. Bill on Stolen Art Under Fire; Mexicans Say Proposed Measure would Protect Thieves*, 'L.A. TIMES (Feb. 5, 1986), at 6)].

⁷⁴⁷ Potter & Zagaris, *supra* note 1, at 684-685. For a proposal to use the liberalized trade of NAFTA and the economic integration efforts of the Enterprise for The Americas Initiative, as both of them make progress, to design and implement regional effort mechanisms to prevent and punish the traffic in cultural property, see Potter & Zagaris, *supra* note 1, at 671-688. The authors suggest to emulate the European models such as the Council of Europe, the European Community, the Schengen Accord and the Maastricht Treaty, which provide regional mechanisms of regional cooperation preventing and punishing the illicit movement of cultural property [*id.*].

96-1377

THE NETHERLANDS

Nature and significance of cultural property

The Netherlands has a rich tradition in the protection of cultural property. Going back to the 17th century, the "Golden Age of Holland," city authorities issued lists or regulations which prohibited the neglect or the demolition of houses and other buildings. However, in the 19th century, because of the stagnation of the economy, neither the central nor local government felt inclined towards intervention in the neglect or the demolition of houses, castles and churches.

Around 1850, protests regarding this situation came from poets, artists and writers. This led to the appointment in 1875 of a civil servant who was charged with compiling a list of monuments and historic buildings. However, it was not until 1918 that a Department for the Protection of Cultural Monuments was established which began to list cultural monuments and subsidize their restoration.⁷⁴⁸ In 1928, the Government introduced the Law on the Protection of Cultural Monuments, but this Law did not come into force until 1961. This Law was withdrawn in 1988 when a new Law on Monuments and Historic Buildings⁷⁴⁹ entered into force.

In the Netherlands, cultural policy is the responsibility of the Ministry of Welfare, Health and Cultural Affairs.⁷⁵⁰

Background

The interference and impoverishment of national cultural properties as a consequence of unrestricted export of art treasures has, for a long time, also been a well-known phenomenon in the Netherlands. During the Second World War, in the years 1940-1945, large losses were inflicted on the national cultural property. After the War, a strong need was felt to enact laws regulating the export of cultural objects. This was done through a law based on the Foreign Exchange Decree of 1945.⁷⁵¹

Under this Law, the export of paintings with a value of more than 20,000 Dutch *guilders* (approx. \$13,000 U.S. dollars) and all other art treasures (including antiques) with a value of more than 80,000 *guilders* (approx. \$52,000 U.S. dollars) was only permitted with a declaration of no objection issued by or on behalf of the Minister of Culture. In the first half of the 1980s, the Law on the Preservation of Cultural Heritage came into effect. It sought to ensure that movable objects of particular cultural, historical or scientific importance are not lost to the Netherlands.⁷⁵²

⁷⁴⁸ J. P. A. M. Geurts, *Monumentenwet 1988 XI*, Nederlandse Staatswetten (Editie Schuurmans & Jordens, Tjeenk Willink, Zwolle, 1993).

⁷⁴⁹ Law of Dec. 23, 1988, STAATSBLAD (official law gazette of the Netherlands, Stb.) 638, as amended.

⁷⁵⁰ *Id.* art. 1.

⁷⁵¹ Stb. 1945, F222.

⁷⁵² Law of Feb. 1, 1984, Stb. 49, as amended.

Definition

Dutch cultural policy is the sum of policy on various sectors, including the arts, the media and preserving the cultural heritage. Nevertheless, all the above policy fields come under the responsibility of the same Minister. There is a reasonable degree of consensus among the main political parties in the Netherlands on the principles and objectives of cultural policy. The policy on arts, museums and historic buildings and public records has three objectives: the conservation, development and the dissemination of cultural values. This embraces the conservation of cultural heritage.⁷⁵³

There is not one single definition of *cultural property*. Each one of the laws dealing with the protection of cultural property defines the specific cultural object for which the rules are prescribed and gives an account of the application area of the law concerned.

The Law on Monuments and Historic Buildings

The 1988 Law on Monuments and Historic Buildings defines *monuments* as man-made objects, more than 50 years old, which are of general interest because of their beauty or their historical significance.⁷⁵⁴ The Law provides for the protection of monuments and historic buildings and creates the possibility of preserving historically valuable sites as town or village conservation areas. A register of monuments has to be drawn up in each of the municipalities; and the permission of the Minister of Welfare, Health and Cultural Affairs has to be sought before a listed building can be altered or demolished.⁷⁵⁵

The Government awards grants for the restoration of monuments.⁷⁵⁶ The restoration budget is granted to municipalities by the central Government. Every municipality has to make a yearly five-year restoration program. Based on this program and the number of listed monuments, a yearly budget is allocated by the central ministry. The provinces make the final decision for municipalities that have few monuments and low budgets.

Archeological finds

Sites and objects of archaeological interest are also protected by the Law on Monuments and Historic Buildings if they are designated as monuments in the archaeological monuments list.⁷⁵⁷ All sites of archaeological interest are registered on archaeological reference maps which are made by the various provinces. Notification of archaeological finds is compulsory in all cases. Any person who finds an object which he knows or has reason to assume is of archaeological interest has three days to notify the mayor of the municipality where the find was made.⁷⁵⁸

⁷⁵³ Cultural Policy, Fact Sheet, Ministry of Welfare, Health and Cultural Affairs, Fact Sheet C-5-E 1990, at 3.

⁷⁵⁴ *Supra* note 2, art. 1.

⁷⁵⁵ *Id.* arts. 6 & 11.

⁷⁵⁶ *Id.* Ch. III.

⁷⁵⁷ *Id.* Ch. V.

⁷⁵⁸ *Id.* art. 47.

The Law prohibits the unauthorized excavation for the purpose of searching for or examining objects of archaeological interest. Only the appropriate minister may designate services, institutions and persons who are then authorized to carry out excavations or have them carried out in accordance with rules laid down by him.⁷⁵⁹ The Minister can also stipulate that the owner of a site must allow excavation to be carried out on that site. Any loss or damage sustained by the owner is made good by the Government.⁷⁶⁰ A violation of the provisions of the Law on Monuments can be punished with a maximum prison term of one year or a fine.⁷⁶¹

The Law on the Preservation of Cultural Heritage

The Law on the Preservation of Cultural Heritage defines *protected objects* as movable objects of particular cultural, historical or scientific importance. The Law seeks to ensure that these objects are not lost to the Netherlands. Objects deemed to form part of the Dutch cultural heritage are listed by the Minister on the advice of a Council of Cultural Heritage and may not be freely exported.⁷⁶²

Regulation of traffic in cultural property

The legal consequences of property being placed on the list are that the ownership of the property concerned may not be transferred. It may not be mortgaged, leased, auctioned, lent or assigned to a non-resident in the event of the division of an estate, nor moved to another location permanently or temporarily before the inspector responsible for the implementation of the Law has been notified of the intention to move it.⁷⁶³

Unless property is to be moved to a location within the Netherlands, notifying the inspector suspends the owner's right to dispose of the property for a maximum of four months. This right is restored if within this period the inspector or the Minister approves the legal transaction in question. If there is an intention to export an object, the Minister's approval must be obtained. If no objection is raised, the person making the notification receives a written "declaration of no objection."⁷⁶⁴

⁷⁵⁹ *Id.* art. 39.

⁷⁶⁰ *Id.* art. 42.

⁷⁶¹ *Id.* art. 56.

⁷⁶² *Supra* note 5, art. 2.

⁷⁶³ *Id.* art. 7, § 1.

⁷⁶⁴ *Id.* art. 7, § 3.

An objection by the Minister automatically becomes an offer from the State to purchase.⁷⁶⁵ The owner of a protected object has the obligation to inform the person to whom he sells the object that the object is placed on the list.⁷⁶⁶

Ownership

Movable monuments that have been found during excavations and for whom nobody can prove the right to ownership are the property of the State.⁷⁶⁷ Monuments that have been excavated by a municipality are the property of the municipality unless someone proves the right of ownership. The owner of the land in which the movable monuments have been found receives half the value of the movable monument.

The new CIVIL CODE of the Netherlands also contains provisions with respect to the ownership of treasure troves.⁷⁶⁸ A treasure is defined as an object of value which has been hidden for so long that the owner can no longer be traced. Ownership in respect of a treasure is divided equally between the discoverer and the owner of the movable or immovable object in which the treasure is revealed. The discoverer of a treasure is obliged to report the find. If the find is not reported or it is uncertain to whom the object belongs, the local authority can require that the object be given to the local authority to hold it in custody until the owner is ascertained.

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⁷⁶⁵ *Id.* art. 10.

⁷⁶⁶ *Id.* art. 9.

⁷⁶⁷ *Id.* art. 43.

⁷⁶⁸ CIVIL CODE OF THE NETHERLANDS, Bk. 5, art. 13.

96-1377

NEW ZEALAND

Nature of cultural property

Almost 10% of New Zealand's population of 3.5 million persons are descendants of Maoris who immigrated there from Polynesia many years before the islands were discovered by British explorers.⁷⁶⁹ "Of the traditional Maori arts--carving, music, dance, rock-drawing, and tattooing--wood carving or **whakairo rakau**, was the most important and remains the most vigorous today."⁷⁷⁰ Many Maori buildings are decorated with carvings that are both massive and elaborate. "The carvings and paintings on different parts depict the ancestors, gods and mythological events most intimately connected with the life of the tribe."⁷⁷¹ In addition to these large figures, Maori artisans have also excelled at creating smaller objects out of greenstone, bone, and other materials.

Maori artifacts are eagerly sought by collectors, and the prices they command have increased greatly in recent years. A government-assisted Maori Arts and Crafts Institute aims at keeping the standard of Maori arts at a high level.

Maori buildings have generally been community-owned. Buried relics are also usually regarded as the community property of particular tribes.

"Before European settlement, all land was held by the various groups and tribes of the Maori people in accordance with their traditional customs and usages, and the land remaining in this tenure is termed Maori customary land."⁷⁷² Land granted or ordered in favor of a Maori or group of Maoris is known as Maori freehold land. Such land falls under the jurisdiction of the Maori Land Court. Maori land cannot be directly acquired by persons who are not a member of a surviving tribe. Only the Crown can acquire Maori land.

Many Maoris in New Zealand have long been highly critical of the Government's failure to settle their land claims. Public protests have been common in recent years despite the Government's position that it is making progress in this area.

Definition of cultural property

New Zealand's Antiquities Act generally applies to antiquities and artifacts. Among other items, the former includes:

- Chattels of national, historical, scientific, or artistic importance that are more than 60 years old and relate to European development;

⁷⁶⁹ B. Hunter, STATESMAN'S YEAR-BOOK 1007-1008 (1994-95).

⁷⁷⁰ E. B. Booz, NEW ZEALAND 74 (1991).

⁷⁷¹ *Id.*

⁷⁷² NEW ZEALAND OFFICIAL YEARBOOK 1982, at 297.

- Works of art that are more than 60 years old and of national, historical, or artistic value;
- Ships and wrecks that are more than 60 years old and of national, historical, or artistic value; and
- Maori artifacts.

The term *artifact* encompasses Maori chattels and objects made before 1902 that relate to the history, art, culture, or traditions of the Maori.⁷⁷³

The Antiquities Act provides that it is unlawful for any person to remove or attempt to remove any antiquity from New Zealand without the permission of the Secretary for Internal Affairs unless it is part of an exempted class or it is lawfully and ordinarily kept outside New Zealand.⁷⁷⁴ In considering whether to approve an application, the Secretary is directed to consider its historical importance, spiritual or emotional association, rarity, the extent to which similar articles are held in public ownership, and any other matters that he or she considers to be relevant. Conditions can be placed on the removal of antiquities and appeals can be made to the Minister of Internal Affairs.⁷⁷⁵

In addition to the rules respecting all antiquities, Maori chattels and objects made before 1902 are subject to special provisions. Section 11 of the Antiquities Act states that all artifacts found after 1975 are "deemed to be prima facie the property of the Crown."⁷⁷⁶ This clause was reportedly added after New Zealand authorities were unable to recover a carved Maori door that had been illegally exported to the United Kingdom before 1975.⁷⁷⁷ That case turned on a finding that the property was subject to forfeiture in New Zealand, but it was not yet the property of the Crown.⁷⁷⁸

Establishment of ownership

Despite § 11 of the Antiquities Act, individual Maoris and Maori tribes can still claim newly discovered artifacts. Such claims are heard by the Maori Land Court.⁷⁷⁹ The Act does not attempt to establish the factors that this Court should consider in weighing competing claims, but it does state that no rights shall be found to exist "solely by virtue of ownership of the land from which the artifact was found or recovered."⁷⁸⁰

⁷⁷³ 1975 N.Z. Stat. No. 41, § 2.

⁷⁷⁴ *Id.* § 5.

⁷⁷⁵ *Id.* §§ 8-9.

⁷⁷⁶ *Id.* § 11.

⁷⁷⁷ T. Simpson, *Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand*, 18 HASTINGS INT'L AND COMP. L. REV 216 (1995).

⁷⁷⁸ *Attorney-General of New Zealand v. Ortiz*, 77 AM. J. INT'L L. 631 (1983).

⁷⁷⁹ Antiquities Act, 1975 N.Z. Stat. No. 41, §§ 11-12.

⁷⁸⁰ *Id.* § 11(2).

In 1990, the Government announced plans to create a Protection of Movable Cultural Properties Act that would have vested ownership of newly discovered artifacts with Maori authorities rather than the Crown.⁷⁸¹ However, this proposal has not yet been implemented by subsequent New Zealand Governments. Maori leaders have long sought direct control over the cultural properties of their tribes.

Regulation of traffic

The Antiquities Act provides that, except in the case of inherited properties, artifacts can only be acquired by registered collectors. Licensed auctioneers and dealers must inform museums of their intent to sell an artifact.⁷⁸²

Repatriation

"Both the New Zealand government and the Maori have attempted to repatriate dispersed Maori cultural artifacts."⁷⁸³ The National Museum has been active in this area.

Other laws

The available laws of New Zealand do not indicate that it has legislation to protect foreign cultural property.

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⁷⁸¹ Simpson, *supra* note 9, at 216.

⁷⁸² Antiquities Act, 1975 N.Z. Stat. No. 41, § 15.

⁷⁸³ Simpson, *supra* note 9, at 216.

95-1377

NIGERIA**Nature and significance of cultural property**

The primary legislation governing cultural property in Nigeria is the National Commission for Museums and Monuments Act of 1979, as amended.⁷⁸⁴ This Law is a consolidating instrument bringing together matters connected to antiquities, museums and monuments that previously had been regulated by separate instruments. The fact that this Law is in place to deal with matters of cultural property constitutes *prima facie* indication of its significance.

Definition of *cultural property*

Cultural property in Nigeria includes antiquities and other artifacts. It also covers monuments, national monuments or any other object and articles of archaeological interest. Section 32 of the Law of 1979, as amended, separately defines these terms in the following fashion:

An *antiquity* is any object of archaeological interest or land on which such object is or was discovered or is believed to exist. An antiquity may also be a relic of early human settlement or colonization. It could also mean any work of art or craftwork including any statue, model, clay figure, figure cast or rust metal, carving, house post, door, bolt, ornament, utensil, weapon, armor, regalia, manuscript or document if such work or art or craftwork is of indigenous origin. Such objects also must have been made or fashioned before 1918. An item is also an antiquity if it is of historical, artistic or scientific interest and is or has been used at any time in the performance and for the purpose of any traditional ceremony and in the case of any object or relic alluded under this section. This includes land adjacent to any such object which in the opinion of the National Commission for Museums and Monuments, a state government, or the President of the Federation is reasonably required for purposes of preservation, maintenance or any other purpose dealing with cultural property under this Law.

A *monument* is also an antiquity as long as it has been declared to be so by the Commission pursuant to section 13 of the Law of 1979 as amended. In addition, the following constitutes objects of archaeological interest and are, therefore, considered forms of cultural property. These include any fossil remains of man or of animals found in association with man or any side traces or ruins of an ancient habitat, working place, midden or sacred place, cave or other natural shelter or engraving, drawing, painting or inscription on rock or elsewhere, any stone object or implement believed to have been used or produced by early man. Objects of archaeological interest also include any ancient structure, erection, memorial, causeway, bridge, cain, tumults, grave, shrine, excavation, well, water tank, artificial hole, monolith, grove, stores, earthwork, wall, gateway or fortification or any antique tool or object of metal, wood, stone, clay, leather, textile, basket wear or other material which is or are of archaeological interest according to section 32 of this Law.

Establishment of ownership of cultural property

The Commission is responsible for matters of cultural property in Nigeria. It is established and constituted under sections 1 and 2 of the Law of 1979, as amended. It has its own staff headed by the Director General of the Commission as its Chief Executive Officer. Members of the Commission and the Director General are appointed by the National Council of Ministers.

⁷⁸⁴ 15 THE LAWS OF THE FEDERATION OF NIGERIA, Ch. 242, 10195-10231 (1990).

The functions of the Commission include the administration of national museums, control and management of antiquities and monuments, establish and maintain national museums and monuments or other similar matters involving cultural property in Nigeria. It is also responsible for establishing and maintaining African or black antiquities, African arts and crafts, African architecture, natural history, etc. The Commission is vested with powers to approve and recommend to state governments any matter dealing with cultural property in the country, acquire and dispose of interests in any land or matter of cultural property, enter into and conclude agreements on matters of cultural property in Nigeria.

Pursuant to sections 12 - 20 of the Law of 1979, as amended, the Commission enjoys special powers to declare national monuments, museums and antiquities, maintain any such facilities or articles, ensure public access to them, compensate owners whose cultural property has been declared national monuments, museums or antiquities, stipulate terms and conditions upon which excavations can take place and to notify the responsible Minister of the discovery of monuments and antiquities within seven days of such discovery and other similar matters.

Regulation of traffic in cultural property

Even though the Law which controls matters of cultural property is a consolidating legislation of previous instruments on this subject, it also provides stiff penalties for infringements of the Law. It permits the sale, transfer and export of cultural property under a license. However, where a license is denied, such affected artifacts or other forms of cultural property become subjects of acquisition by compulsory purchase. The Commissioner must then promptly pay a fair and reasonable local price in the case of export items according to section 26 of the Law.

The sale or transfer of antiquities is prohibited, unless the person involved in this business is an accredited agent operating under a license according to section 21 of the Law. Breach of this provision is punished by imprisonment for three years and forfeiture of the artifacts under a court order. A fine is also an appropriate penalty under this section. Nigerian police including customs officials are vested with powers of inspection, search and seizure of any person or property without warrant based on reasonable belief or suspicion of illegal transactions in artifacts and other forms of cultural property according to section 22 of the Law of 1979, as amended. Additional restrictions are imposed on exporters of antiquities.

Though the Nigerian legislation appears flexible, it contains stiff penalties as a counter balance to the liberalism and permissiveness in transactions involving artifacts. It achieves pluralistic purposes of preservation, control and access to artifacts and other aspects of cultural property as commodities in the market place. Still, the State remains the overwhelming authority in determining what constitutes an antiquity or cultural property, conditions upon which they may be owned or possessed, and conditions upon which they may be disposed of. Significant, though is the reserve power of the state contained in section 26 of the Law, that in case of denial of a permit to export antiquities or other forms of cultural property, the state compulsorily acquires such products on payment of a fair local price. Cultural property is preserved in this way.

There are no provisions concerning the protection of cultural property in times of war, nor any other provisions that deal with repatriation of cultural property removed abroad. However, rule-making powers to further regulate matters of cultural property are vested in the responsible Minister.

Other laws establishing and/or protecting cultural heritage

The National Council for the Arts and Culture of 1975, as amended,⁷⁸⁵ which deals with matters of general art and culture in the country as well as other laws dealing with the preservation and conservation of fauna, floral, wildlife including trophies may also be relevant.

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⁷⁸⁵ 16 LAWS OF THE FEDERATION OF NIGERIA, Ch. 248, 10309-10317 (1990).

96-1377

PERU**Nature and significance of cultural property**

The government provides access to its cultural treasures and promotes their development and dissemination.⁷⁸⁶ Access to Peru's cultural property is considered a social right. The Peruvian Constitution and other laws guarantee the ownership of the following patrimony as belonging to the nation: archeological fields and remains, buildings, monuments, collections, sites, art objects, and tokens of historical value expressly declared to be cultural assets and those provisionally presumed to be the same. It does not matter whether such are owned independently, privately, or publicly. Thus, such things are protected by the laws and the government.⁷⁸⁷ Also, in accordance with the law, private participation in the preservation, restoration, display, and dissemination is promoted.⁷⁸⁸

Definition of *cultural property*

In general, *cultural property* could be defined according to the value placed on those monuments that exist within a social and historical context, particularly those that symbolize the patrimony of a civilization. *Cultural property* is defined as the testament of human creation, material or immaterial, which is expressly declared as such for its artistic, scientific, historic or technical importance. This definition adds that natural objects or property can be the subject of a similar declaration.⁷⁸⁹

Peruvian laws presume that cultural property includes both movable and immobile things, whether owned by the government or privately, which are from the pre-hispanic or colonial times, as well as those from the period of the republic which have the characteristics set forth in the above paragraph. These objects, regardless of who is their owner, are those specified in articles 1 and 4 of the UNESCO Convention of 1972, and articles 1 and 2 of the San Salvador Convention of 1976.⁷⁹⁰

Establishment of ownership of cultural property

The cultural property presumption may be confirmed or negated upon the petition of an interested party to the appropriate government agency. Only the government exercises guardianship rights created by the cultural property presumption. By law, if cultural property (both real and personal property) privately owned is endangered, the government will require its appropriation.⁷⁹¹

⁷⁸⁶ Constitution of the Republic of Peru (text approved by referendum on Oct. 31, 1993), art. 2, § 8.

⁷⁸⁷ *Id.* art. 21.

⁷⁸⁸ *Id.*

⁷⁸⁹ Law No. 2407 of Jan. 3, 1985, as amended by Law No. 24193 of June 19, 1985, art. 1.

⁷⁹⁰ *Id.* art. 2.

⁷⁹¹ *Id.* art. 5.

Regulation of traffic in cultural property

In general, Peru prohibits the export of any cultural property that has been declared as such by the appropriate government agency.⁷⁹² Guidelines are also set for allowing the removal of such property from Peru, primarily for exhibition purposes in foreign museums or for use in the embassies and consulates of the nation abroad, or as gifts from Peru to friendly governments.⁷⁹³

Repatriation of cultural property removed abroad

In 1991, a ministerial resolution created the Fund to Promote Culture (*Fondo para Promoción Cultural*) and the Fund to Return Peruvian Cultural Property from Overseas (*Fondo de Recuperación en el Exterior del Patrimonio Cultural Peruano*). The main purpose of these Funds is to cover the expenses needed in the process of recovering archeological treasures that have been illegally exported from Peru.⁷⁹⁴ The same year, by Supreme Resolution, Peru created the National Emergency Commission for the Protection of Archeological Sites (*Comisión Nacional de Emergencia de Protección de los Sitios Arqueológicos del Perú*). The Commission has proposed measures for the protection of Peru's archeological cultural heritage.⁷⁹⁵

Other laws establishing and/or protecting cultural heritage

Finally, a Legislative Resolution approved the Convention for the Protection of Cultural Assets in Case of Armed Conflicts and its Protocol, signed in The Hague on May 14, 1954.⁷⁹⁶

In conclusion, Peru considers its cultural property as an asset. Beginning with Peru's ancient civilizations and continuing to the present, Peru has enriched its cultural heritage through a large variety of intellectual, artistic, technical, and scientific creations. These are all considered part of the national cultural heritage. Thus, Peru continues to enforce the laws that protect such valuable property.

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⁷⁹² *Id.* art. 13.

⁷⁹³ *Id.*

⁷⁹⁴ Ministerial Resolution 0235/RE, enacted May 3, 1991.

⁷⁹⁵ Supreme Resolution 170-91-PCM, enacted Apr. 29, 1991.

⁷⁹⁶ Legislative Resolution, enacted May 31, 1989.

96-1377

SWEDEN**Nature and significance of cultural property**

State protection of cultural property in Sweden goes back to the year 1630 when King Gustaf Adolf II established the Royal Antiquarian Office. The objective was to search for ancient remains and collect prehistoric artifacts, including old inscriptions, whether on stones or in manuscripts, complete or fragmentary. Officials were to scour all written sources such as chronicles and letters, to collect coins and to seek out all vestiges of the ancient civilization of Sweden.⁷⁹⁷

On November 14, 1666, a Decree imposing legal obligations in regard to cultural property was enacted. The Decree required that all archeological items, piecemeal found in the ground, ancient coins of all varieties, finds of gold, silver, copper and other metals discovered and secretly hoarded should be protected. The Decree also stipulated that archeological finds be shared between their finders and the State.⁷⁹⁸

In 1927, Sweden enacted an ordinance limiting the export of certain artifacts.⁷⁹⁹ The adoption of the Ordinance was a direct response to an extensive outflow of cultural property from Sweden during the 1920s. The Ordinance prohibited the export of cultural items produced before the year 1860.⁸⁰⁰ However, the Ordinance did not fully prevent the outflow of cultural objects, and soon the adoption of new laws appeared to be necessary.

Thus, until 1988, when the Law on Cultural Heritage was enacted, questions relating to cultural property were dealt with in a variety of legislative acts. In 1988 the Law on Cultural Heritage, which replaced previous acts relating to cultural property,⁸⁰¹ was enacted.⁸⁰²

The 1988 Law is an extensive act encompassing all issues relating to the protection of cultural heritage. The Law deals with issues regarding the protection of cultural property under four main headings:

- Ancient Remains;
- Historic Monuments;
- Church Buildings and Sites; and

⁷⁹⁷ K. Jote, INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY 145 (Stockholm, Juristförlaget, 1994).

⁷⁹⁸ *Id.*

⁷⁹⁹ Statens Offentliga Utredningar, 1964: 22.

⁸⁰⁰ *Id.*

⁸⁰¹ The 1942 Law on Ancient Remains, the 1960 Law on Historic Monuments, the 1985 Law on the Protection of Historic Objects.

⁸⁰² SVENSK FÖRFATTNINGSSAMLING (SFS) 1988: 950.

- Export of Cultural Objects.

Definition of cultural property

As was stated above, the 1988 Law on Cultural Heritage, which is a package legislation covering all aspects of the protection of cultural property, contains four main headings under which the area of the application of each type of cultural property is well described and defined.

Thus, the term *ancient remains* comprehends both movables and immovables that are the remains of man's activities in ancient times and that had been permanently abandoned. Such remains include graves; tombs and other burial grounds; raised stones and rock bases with inscriptions, symbols, marks and pictures, carvings or paintings, crosses and memorials; places of assembly for the administration of justice and cult activities; trade centers and other common purposes; remains of homes, settlements, work places, and formations resulting from the use of such homes and places; traces of work sites and economic activity; ruins of fortresses, castles, monasteries, church buildings and defence works; routes and bridges; harbor facilities, road markings and labyrinths; wrecked ships, if at least one hundred years have passed since the wreck, natural formations associated with ancient customs, legends or noteworthy historical events and traces of ancient popular cults; areas of the seabed that preserve ancient remains; archeological finds which are discovered in or near an ancient monument which have no owner when found or that are presumably 100 years old when found.⁸⁰³

An *historic monument* is defined as a building of historic worth from a cultural point of view. Such monuments may also include parks and gardens or any other establishment of historic cultural value.⁸⁰⁴

Church buildings, Church sites, church inventories and burial grounds are the third category of cultural property as contained in the Cultural Heritage Law. A *church site* is defined as the adjacent area around a church building which is not a burial ground and which functions as a part of the church building.⁸⁰⁵

The fourth heading of the Cultural Heritage Law deals with the question of exporting cultural objects. A description of such objects and the rules concerning their export is contained in chapter 5 of the Cultural Heritage Law.⁸⁰⁶ The Law describes cultural property under chapter 5 as those artifacts which are Swedish and those which are foreign made cultural objects. Cultural objects are considered Swedish if they are produced in Sweden or made by a Swedish national abroad. Foreign artifacts are those which are produced in another country by a non-Swedish national (see below).⁸⁰⁷

⁸⁰³ *Id.* 4: 1-3.

⁸⁰⁴ *Id.* 3: 1.

⁸⁰⁵ *Id.* 4: 2.

⁸⁰⁶ *Id.* 5: 1.

⁸⁰⁷ *Id.* 5: 2.

Establishment of ownership of cultural property

Ancient remains

Archeological find are divided into two categories:

- those which are found in the spot and are connected with an ancient site; and
- those which are found elsewhere and are at least one hundred years old.⁸⁰⁸

The first category of artifacts belongs to the State and no transactions are allowed. However, the finder is allowed a finder's fee. In the second category the finds belong to the finder. Under certain circumstances, as specified by the Law, the finder is under an obligation to report the discovery to the appropriate authority and offer the finds for sale to the State.⁸⁰⁹ Moreover, any person who discovers an archeological find is required to inform the appropriate authorities as described in the Law without delay. The information to be supplied includes the date of the discovery and the circumstances under which it was made.⁸¹⁰

A violation of the provisions of the Law, whether by negligence or intent, brings about a penalty of a fine or imprisonment of up to six months. However, if the offense was committed intentionally and is assumed to be flagrant, the penalty will be an imprisonment of up to four years.⁸¹¹

Historic monuments

Upon the initiative of the State or the provincial government or by an application made by an individual, a building of historic interest may be declared cultural property. The application made by private persons must contain a general description of the building for which the application is submitted. The information supplied should include ownership and reasons for which the application has been submitted.⁸¹²

Once a building is declared *historic*, the provincial government must issue specific instructions regarding the protection, preservation and maintenance of the building. Such instructions should include the conditions under which the building may be altered.

If the owner of an historic building neglects the instructions issued by the provincial government, he should be given a reasonable time to take the necessary measures. However, the required measures should not be unreasonable, taking into consideration the way the building is used and the other circumstances

⁸⁰⁸ *Id.* 2: 3.

⁸⁰⁹ *Id.* 2: 4.

⁸¹⁰ *Id.* 4: 5.

⁸¹¹ *Id.* 2: 21 & 22.

⁸¹² *Id.* 3: 2 & 3.

involved. If the required measures are not carried out, the provincial government may carry them out. The accrued expenses must then be paid by the owner of the building.⁸¹³

If an historic building is altered contrary to the provincial government's instructions, the owner can be obligated to restore the building in conformity with the instructions issued by the provincial government.⁸¹⁴

A violation of the provisions of the Law concerning the historic monuments will be punished by a penalty of a fine.⁸¹⁵

Church buildings and sites

According to the provisions of chapter 4 of the Cultural Heritage Law, the cultural value of church buildings and sites and church inventories and burial grounds must be preserved and maintained. However, the Law covers only church buildings which are consecrated to the Swedish Church (Lutheran Church) and are under the management of a church community.⁸¹⁶

Church buildings and sites which have been built before the year 1939 shall not be altered in any manner without a specific permit issued by the appropriate authority. Moreover, in principle, every change made to a church building requires a permit. Thus, as a matter of law it is prohibited to demolish a church, alter, repair or change either the exterior or the interior of a church, or remove a church building without a special permit. The same rule governs any changes or extensions of a church site.⁸¹⁷

Church inventories of cultural value must be preserved and maintained. A list of inventories of cultural value must be made for every church community.⁸¹⁸ A comprehensive control of inventories must be carried out at least every sixth year. Such control should also be carried out every time the church vicar is replaced by another vicar.⁸¹⁹

Concerning the burial ground, any extension or significant changes including erection of a new building or the demolishing of such grounds founded before 1939 require a special permit.⁸²⁰ Moreover, the 1990 Law on Burial establishes general rules on the founding and preserving of burial grounds.⁸²¹

⁸¹³ *Id.* 3: 16.

⁸¹⁴ *Id.* 3: 17.

⁸¹⁵ *Id.* 3: 18.

⁸¹⁶ *Id.* 4: 1 & 2.

⁸¹⁷ *Id.* 4: 3.

⁸¹⁸ *Id.* 4: 6 & 7.

⁸¹⁹ *Id.* 4: 11.

⁸²⁰ *Id.* 4: 13.

⁸²¹ SFS 1990: 1144.

Regulation of traffic in cultural property

In order to protect cultural objects and prevent their export, the Cultural Heritage Law requires a license for the export of both Swedish and foreign made cultural objects described in the Law.⁸²²

Swedish artifacts include objects which are either made in Sweden or made abroad by a Swedish national. *Foreign artifacts* are described as those which are made outside Sweden by foreign nationals.⁸²³ Cultural objects for which an export license is required are described as:

- archeological finds as stated above;
- Swedish historic objects made before the year 1600, regardless of their value, if they are printed material, maps and pictures or are handwritten manuscripts on parchment or paper;
- Swedish cultural objects more than 100 years old regardless of the value, if they are drinking vessels, harnesses and textile tools with painted and carved designs, national costumes and Swedish textiles, painted tapestry, furniture, mirrors and cases, various types of clocks and musical instruments;
- certain Swedish made objects which are more than 100 years old and have a value of 50,000 SEK (equal to ca. US \$7,500) or more;
- certain specified Swedish objects which are older than fifty years with a value of 2,000 SEK or more; and
- certain foreign cultural objects which were brought to Sweden before 1840 and which have a value of 50,000 SEK or more.⁸²⁴

No license is required if the owner intends to leave Sweden to reside abroad. A person who resides abroad and acquires a cultural object by inheritance is not required to obtain a license. Both public and private entities may export historic artifacts on a temporary basis for foreign exhibition without a license.⁸²⁵

In principle, an application for a license to export artifacts of historic value is rejected. However, if the object does not constitute a meaningful and significant value from the view point of Swedish cultural heritage, a license will be issued.⁸²⁶ In the meantime, a license should always be issued if an object is not meaningful to the national cultural heritage. However, regardless of the cultural value of an object, a permit should always be granted if the object is acquired by a foreign institution.⁸²⁷

⁸²² *Supra* note 6, 5: 1.

⁸²³ *Id.* 5: 2.

⁸²⁴ *Id.* 5: 4.

⁸²⁵ *Id.* 5: 7.

⁸²⁶ *Id.* 5: 8.

⁸²⁷ *Id.*

A violation of the provisions of chapter 5 of the Law regarding the export of cultural objects will be punished through the penalty provisions prescribed in the 1960 Law on Punishment for Smuggling of Goods. The penalty for a smuggling offense is a fine or imprisonment of up to two years. However, in flagrant cases the penalty will be a minimum of six months and a maximum of six years imprisonment.⁸²⁸

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⁸²⁸ SFS 1960:418.

96-1377

TAIWAN

Nature and significance of cultural property

The earliest enacted items of legislation in the Republic of China (ROC) on the subject of cultural property are apparently the Law on the Preservation of Ancient Objects (*Ku-wu pao-ts'un fa*), in 14 articles, issued by the government on June 2, 1930 (effective June 15, 1931), and its detailed rules of implementation, issued on July 8, 1931, by the Executive *Yüan* (Cabinet).⁸²⁹ The Measures for Investigating Chinese Cultural Relics Presently in Foreign Countries were issued a few years later, on October 7, 1936, by the Ministry of Interior.⁸³⁰

The most recent major law devoted to the topic is the Law on the Preservation of Cultural Property (*Wen-hua tzu-ch'an pao-ts'un fa*, the Law), in eight chapters and 61 articles, which was promulgated on May 26, 1982.⁸³¹ The chapters include general principles, antiquities (*ku wu*), historical sites, ethnic arts, folk and related cultural objects, natural culture scenic spots and sites, punishments, supplementary provisions. The stated purpose of the Law is to preserve cultural property and glorify Chinese culture.⁸³² Its scope of application includes the preservation, maintenance, and promotion of cultural property as well as the transfer of cultural property rights. The Detailed Rules of Application of the Law, in 77 articles, were issued on February 22, 1984.⁸³³

While the island of Taiwan itself has relatively few cultural relics in comparison with mainland China, the National Palace Museum in Taipei stores myriad treasures from China's imperial past (viewed only by the imperial family) that the Nationalist Government moved to Taiwan when it lost the civil war to the Chinese communists in 1949. Possession of the national treasures is viewed as conferring a symbolic legitimacy on the regime that holds them, hence the Nationalist's extraordinary efforts first to transport the objects to safe

⁸²⁹ For the Chinese text of the Law on the Preservation of Ancient Objects, in 14 articles, and its Detailed Rules of Implementation, in 19 articles, see YEH CH'ÏEN-CHAO, *gen. ed.*, 1 T SU-HSIN SHIH-YUNG CHUNG-YANG FA-KUEI HUI-PIEN (Most Recent Practical Compendium of Central Laws and Regulations) 329-331 (Taipei, Yen-ming Publishing Co., Ltd, 1973). The Law was revised on Nov. 10, 1935.

⁸³⁰ For the text, see *id.* at 331-332. Revisions to the Measures were issued on June 22, 1970, but they are no longer in effect. The stated purpose of the Measures was to understand which important cultural relics were in foreign countries and how they left the country (art. 1). Those entrusted with the task included ROC embassy and consular officials (especially those responsible for cultural, press, and economic matters--note that this dates from the pre-derecognition period), ROC foreign correspondents, ROC professors or students of archaeology in foreign countries, and foreign educational and cultural organs as well as scholarly institutions interested in archaeology (art. 2). A certain form was to be filled out in conducting the investigation, a copy of which was appended to the Measures (art. 4). Authorized agencies might specify certain cultural relics to be searched for abroad and studied if found (art. 6). Those personnel engaged in the investigatory work who made an exceptional contribution were to be rewarded (art. 7).

⁸³¹ For the text in Chinese, see 32 CHUNG-HUA MIN-KUO HSIEN-HSING FA KUEI HUI-PIEN (Compilation of Current Laws and Regulations of the Republic of China) 22365-22374 (Taipei, 1994-) (loose-leaf) (CURRENT LAWS AND REGULATIONS).

⁸³² Law on Preservation of Cultural Property, art. 2.

⁸³³ For the Chinese text, see CURRENT LAWS AND REGULATIONS, *supra* note 3, at 22387-22398.

areas during the war against Japan and subsequently the civil war against the communists, and finally to Taiwan. Plans underway since 1991 for an exhibit in the United States, scheduled to begin in March 1996, of 475 of the collection's masterpieces have been hotly contested by some ROC citizens, who fear that certain treasures are too fragile to withstand the trip and that mainland China may claim ownership of the objects once they are in the United States.⁸³⁴ Others contend that the protest is politically motivated; that members of opposition parties want to embarrass the Nationalist Government as the first popular presidential elections loom in March of 1996.⁸³⁵ In any case, after reviewing the precious items that were about to be sent to the Metropolitan Museum of Art in New York, ROC Government officials withdrew 23 works from the show, and the participating United States museums have agreed to the plan.⁸³⁶

Definition of *cultural property*

Cultural property (wen-hua tzu-ch'an) as defined under the Law refers to the following types of property that have historical, cultural, or artistic value:

- antiques or cultural relics--items that can be appreciated and researched and that have the potential to glorify Chinese history, as well as certain objects designated by the Ministry of Education as items of cultural and historical value;
- historical sites--ancient architecture and ruins and any other vestiges of culture. [The sites are to be designated as Class One, Two, or Three, depending upon their historical and cultural value, and to be separately administered by the Ministry of Interior, the provincial/municipal governments' department of civil affairs, and the county/municipal government (art. 27, ¶1)];
- ethnic art--art of an ethnic group as well as art special to a locality;
- objects related to folk customs and livelihood, e.g., certain relics usually associated with food, clothing, housing, religious festivals, and so on; and

⁸³⁴ Joyce Liu, *Taiwan Sending Imperial Treasures on U.S. Tour*, REUTERS, Jan. 14, 1996. Agreement on the exhibition was reached by the two sides in December 1994. See also Christie Su, *Protest Greets Museum's Project To Sent Art Treasures on US Tour*, THE FREE CHINA JOURNAL, Jan. 12, 1996, at 1; Yueh Ching, *ROC Art Treasures To Tour US*, THE FREE CHINA JOURNAL, Jan. 6, 1996, at 4.

⁸³⁵ C. Vogel, *Inside Art*, THE NEW YORK TIMES, Jan. 26, 1996, Section C, p. 24 (Nexis, Curnws file). The article states that "Among those opposing the show are the Independent presidential hopeful, Chen Li-an, and Senator Chuan Chow, one of six legislators in the recently organized New Party. The museum's director...told the Taiwanese press that canceling the loan would damage the Government's image, as would breaking a contract with the Metropolitan."

⁸³⁶ *Id.* According to the article, in 1961, the National Palace Museum sent all 27 works that were on a "restricted" list (early paintings dating from the 7th to the 14th centuries), on a tour of the U.S.; "[e]ight of the 23 works being withheld this time are on that list." See also *U.S. Approves Taiwan Art Move*, AP ONLINE, Jan. 25, 1996 (Nexis, Curnws file). In all, 19 of the 27 works under contention will be allowed to leave the country; eight works were banned from being sent abroad. In addition, 15 other antiques, not on the fragile list but in poor condition, were also barred from leaving Taiwan. *Taiwan approves 19 fragile art treasures for US tour*, AGENCE FRANCE PRESSE, Jan. 23, 1996 (Nexis, Curnws file).

- natural cultural scenic spots and sites--refers to the historical and cultural background, regions, and environments of man's evolution and to precious and rare animals and plants.⁸³⁷

Certain precious and rare cultural objects may be designated by the Ministry of Education as *important cultural relics*. Among these, ones with especially high cultural value can be designated as *national treasures*. If important cultural relics or national treasures lose value, the Ministry of Education can remove their special designation.⁸³⁸ Historical sites may also be downgraded or have their special designation removed altogether if their value is lost or reduced.⁸³⁹ The Ministry may also designate important objects of ethnic art as *important ethnic art*, or remove the designation if its importance is lost or reduced.⁸⁴⁰ The Ministry of Economics, in conjunction with the Ministry of the Interior, Ministry of Education, and Ministry of Communications, designates a site as a natural cultural scenic spot or site; and, according to their special characteristics, sites are divided into the three types of ecological preserve, natural preserve, and precious and rare animals and plants; if the value of the site is lost or reduced, the same ministries may remove its designation as a natural cultural scenic spot or site.⁸⁴¹

The Ministry of Education is the primary body in charge of cultural relics. It is responsible for overseeing such matters as preservation, maintenance, publicity, transfer of rights, as well as the designation of preservation organs, among others.⁸⁴² The Ministry of Interior is in charge of such matters as preservation, maintenance, publicity, and transfer of rights relating to historical sites and to folk and related cultural objects.⁸⁴³ Natural cultural scenic spots and sites are under the oversight of the Ministry of Economics.⁸⁴⁴

Establishment of ownership of cultural property

ROC law provides for both State ownership and private ownership. The Law on Preservation of Cultural Property stipulates that certain government organs established at the central or local level are to handle the preservation and maintenance of cultural relics that are not owned by private individuals.⁸⁴⁵

⁸³⁷ *Supra* note 2, art. 3. Note that a clarification of what is considered to be ancient architecture is provided in article 3 of the Detailed Rules of Implementation of the Law; of historical sites, in art. 4, and of ethnic arts and local arts, in art. 5.

⁸³⁸ *Id.* art. 11, ¶¶ 1 & 2.

⁸³⁹ *Id.* art. 27, ¶ 2.

⁸⁴⁰ *Id.* art. 41, ¶¶ 1 & 2.

⁸⁴¹ *Id.* art. 49, ¶¶ 1 & 2.

⁸⁴² *Id.* art. 4.

⁸⁴³ *Id.* art. 5.

⁸⁴⁴ *Id.* art. 6.

⁸⁴⁵ *Id.* art. 9.

The transfer of ownership of national treasures and important cultural relics held by private individuals can only be done with the approval of the Ministry of Education.⁸⁴⁶ Cultural relics owned by private individuals may be authenticated and recorded by the Ministry of Education if the owner so desires. The ownership of important cultural relics cannot be transferred to persons who are not citizens of the ROC.⁸⁴⁷ Private individuals who own cultural relics should be encouraged to entrust them to public cultural relic preservation organs for exhibitions.⁸⁴⁸ Such relics (owned by private persons) may be requisitioned by the government, and voluntary donations to the government are to be encouraged.⁸⁴⁹ Public government organs in charge of cultural relics can be entrusted to preserve national treasures and important cultural relics owned by private individuals and to display them in exhibitions.⁸⁵⁰

In the case of privately owned historical sites, the government at various levels may, at their discretion, give assistance or guidance in special cases where a large amount of money is needed for management, maintenance or restoration. They may also notify the group or individual responsible for managing and maintaining such privately owned historical sites to take the necessary action.⁸⁵¹ When there is a transfer of ownership of a privately owned historical site, except in the case of inheritance, the Government has priority in purchasing the site. In cases where it is inappropriate, given its nature, for a historical site to be owned by a private individual or where it is found that because of improper management the value of the site might be reduced or destroyed, the Government may requisition the property.⁸⁵² The donation of privately owned historical sites to the Government is to be encouraged, according to the Law.⁸⁵³ The donation or public exhibition of privately owned cultural objects related to popular customs is also to be encouraged.⁸⁵⁴

If a relic is Government-owned, only the Government organ charged with its preservation has the right to reproduce and sell reproductions of the relic. Others cannot make duplicates of the reproductions unless they have the permission of the original protective organ in charge of making the reproductions.⁸⁵⁵

Ownerless cultural relics that are underground, underwater, or protruding above ground, if discovered, are to be declared as government property.⁸⁵⁶ Ownerless historical sites that are underground, underwater,

⁸⁴⁶ *Id.*, art. 12, ¶ 2.

⁸⁴⁷ *Id.* art. 13, ¶ 1.

⁸⁴⁸ *Id.* art. 13, ¶ 2.

⁸⁴⁹ *Id.* art. 13, ¶ 3. Measures for requisitioning and donation are to be stipulated by the Ministry of Education.

⁸⁵⁰ *Id.* art. 15.

⁸⁵¹ *Id.* art. 31, ¶ 1.

⁸⁵² *Id.* art. 31, ¶ 2.

⁸⁵³ *Id.* art. 31, ¶ 3.

⁸⁵⁴ *Id.* art. 48.

⁸⁵⁵ *Id.* art. 16.

⁸⁵⁶ *Id.* art. 17, ¶ 1.

or on the surface will be treated similarly by the Government.⁸⁵⁷ Excavation of cultural relics is to be done by public cultural relic preservation organs or by academic research organs designated by the Ministry of Education; when excavations are to be carried out with the participation of foreign experts, approval of the foreigners' participation must first be obtained from the Ministry.⁸⁵⁸

Regulation of traffic in cultural property

National treasures and important cultural relics cannot be shipped abroad. However, if the purpose is for international cultural exchanges or other special reasons, exceptions can be made with the permission of the Ministry of Education upon approval by the Executive *Yüan* (Cabinet).⁸⁵⁹ A definite time period within which the items are to be returned to the ROC must be clearly stated.⁸⁶⁰

Waivers of customs duties for cultural relics imported into the ROC are to be handled according to the provisions of the relevant tax laws. In the case of cultural relics imported for reasons of exhibition or appraisal, which must be sent back out of the country again, application and registration must be made in advance.⁸⁶¹ The Government is to encourage private individuals and financial groups to establish museums, art museums, and cultural exhibition halls to store cultural relics or related cultural objects stipulated in the Law and to hold exhibits.⁸⁶²

Other protection for cultural property

Protection against non-criminal loss or destruction

The Law contains several provisions on the protection of historical sites, covering such matters as protecting the sites found during construction, urban planning in connection with the possibility of unearthing historical sites, preserving the original appearance of historical sites, zoning of historical sites, restriction of activities within a historical site preservation zone (e.g., on construction of buildings and roads, removal of plants, etc.), the excavation of cultural relics within such zones, and the procedures to follow if a site is discovered in the process of excavation for cultural relics.⁸⁶³

There is also protection for traditional techniques used in ethnic crafts, through the appointment of those with outstanding skill in important ethnic arts as master craftsmen, the establishment by the Ministry of

⁸⁵⁷ *Id.* art. 32.

⁸⁵⁸ *Id.* art. 20, ¶ 1, & art. 21.

⁸⁵⁹ *Id.* art. 23.

⁸⁶⁰ *Id.* art. 23, ¶ 2.

⁸⁶¹ *Id.* art. 24, ¶¶ 1 & 2.

⁸⁶² *Id.* art. 26.

⁸⁶³ *Id.* arts. 33-39.

Education of specialized education and training organs, and working out of detailed measures to record and gather important ethnic arts that are on the verge of disappearing and so on.⁸⁶⁴ Folk customs and related objects are to be preserved and protected by local governments, which should initiated investigation of and gathering of special local customs and related objects, record them, and designate or establish organs to protect and exhibit them.⁸⁶⁵

Protection against criminal acts

A sentence of fixed term imprisonment of less than five years or detention and a fine of less 30,000 *yüan* (US\$ 1 equals about 27 NT/*yüan*) will be imposed on those who damage State-owned cultural relics, damage historical sites, transfer ownership rights of cultural relics in violation of article 13 of the Law, ship national treasures or important cultural relics abroad without applying for approval as stipulated by the Law or fail to ship back within the restricted time period national treasures or important cultural relics that were approved to leave the country, who shift or remove Grade One historical sites without the consent of the organs in charge, or who change or destroy natural scenic spots or sites.⁸⁶⁶ In the case of those who unlawfully transfer ownership rights or who unlawfully ship out or fail to bring objects back on time, the cultural relics, national treasures, and important cultural relics are to be confiscated; if they cannot be confiscated, demand for payment of the profits gained from the transactions will be made.⁸⁶⁷ Those who carry out excavations in violation of article 20 of the Law (which stipulates that only designated preservation organs or approved research institutions can excavate cultural relics) or who hunt, fish, pluck, fell, or destroy precious and rare animals and plants will be subject to a sentence of less than three years' fixed term imprisonment or detention combined with a fine of less than 20,000 *yüan*.⁸⁶⁸ A fine of less than 50,000 *yüan* will be imposed for a variety of other acts, e.g., transferring ownership rights of national treasures or important cultural relics without having first obtained permission from the Ministry of Education.⁸⁶⁹ Not only the representatives, agents, or hires of judicial persons who violate the Law can be punished as individuals, but the judicial person himself should be fined. Responsible government employees of the organs concerned will be punished even more severely for committing the crimes set forth in the Law.⁸⁷⁰

Repatriation of cultural property removed abroad

The Law stipulates that the Government should investigate and try to acquire rare, precious cultural relics presently held abroad, and should also encourage private individuals and groups to acquire such items

⁸⁶⁴ *Id.* arts. 42-44.

⁸⁶⁵ *Id.* arts. 45 & 46.

⁸⁶⁶ *Id.* art. 55, ¶ 1, items 1-6.

⁸⁶⁷ *Id.* art. 55, ¶ 2.

⁸⁶⁸ *Id.* art. 56.

⁸⁶⁹ *Id.* art. 57. Eight types of acts are listed.

⁸⁷⁰ *Id.* art. 59.

so that they can be brought back to Taiwan.⁸⁷¹ Any cultural relics that are confiscated by a government organ or turned over by a foreign government will be preserved by a public cultural relic protection organ designated by the Ministry of Education.⁸⁷²

Other laws establishing and/or protecting cultural heritage

Among other laws that have to do with protecting the ROC's cultural heritage are the Detailed Rules of Management of the National Palace Museum;⁸⁷³ Measures on the Collection of Collectors' Items by the National Palace Museum;⁸⁷⁴ Measures on the Use and Safeguarding of Accounts for Operational Funds for the Printing and Manufacture of Cultural Objects and Maps of the National Palace Museum;⁸⁷⁵ Measures for the Management of Antiquities and Works of Art of the National Palace Museum;⁸⁷⁶ Measures on the Presentation of Stored Antiquities and Works of Art for Special Viewing and Research at the National Palace Museum;⁸⁷⁷ the Organic Law of the National Palace Museum;⁸⁷⁸ the Organic Law of the Cultural Development Commission of the Executive *Yüan*;⁸⁷⁹ Measures on the Establishment of Cultural Awards by the Executive *Yüan*;⁸⁸⁰ Detailed Rules of Management of the Cultural Development Commission of the Executive *Yüan*;⁸⁸¹ Measures for the Use and Safeguarding of Funds for Cultural Development;⁸⁸² Organic Rules and Regulations of the Committee on Laws and Regulations of the Cultural Development Commission of the Executive *Yüan*;⁸⁸³ the Law on Rewarding and Encouraging Culture and the Arts;⁸⁸⁴ the Detailed

⁸⁷¹ *Id.* art. 14.

⁸⁷² *Id.* art. 25.

⁸⁷³ *Supra* note 3, 31 CURRENT LAWS AND REGULATIONS, at 21667-21684. The Detailed Rules were approved for implementation on Aug. 31, 1966.

⁸⁷⁴ *Id.* at 21685-21687. The Measures were issued on June 6, 1969.

⁸⁷⁵ *Id.* at 21689-21690. The Measures were issued on Jan. 9, 1975.

⁸⁷⁶ *Id.* at 21691-21695. The Measures were issued on Nov. 14, 1975.

⁸⁷⁷ *Id.* at 21697-21698. The Measures were issued on Nov. 14, 1975.

⁸⁷⁸ *Id.* at 21699-21701. The Law was promulgated on Dec. 31, 1986.

⁸⁷⁹ *Supra* note 3, 32 CURRENT LAWS AND REGULATIONS, at 22361-22363. The Law was promulgated on July 31, 1981.

⁸⁸⁰ *Id.* at 22375-22376. The Measures were issued on Apr. 12, 1980.

⁸⁸¹ *Id.* at 22377-22385. The Detailed Rules were issued on Jan. 31, 1983.

⁸⁸² *Id.* at 22399-22401. The Measures were issued on Aug. 26, 1987.

⁸⁸³ *Id.* at 22403-22404. The Rules and Regulations were issued on Mar. 2, 1992.

⁸⁸⁴ *Id.* at 22405-22411. The Law was promulgated on July 1, 1992.

Rules of Implementation of the Law on Rewarding and Encouraging Culture and the Arts;⁸⁸⁵ Measures on the Reduction of Business Tax and Entertainment Tax for Culture and Arts Enterprises;⁸⁸⁶ and Measures on Permits for Outstanding Practitioners of Ethnic Art and Folk Crafts from the Mainland to Come to Taiwan To Teach and Learn.⁸⁸⁷

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⁸⁸⁵ *Id.* at 22413-22416. The Detailed Rules were issued on Apr. 30, 1993.

⁸⁸⁶ *Id.* at 22417-22419. The Measures were issued on June 30, 1993.

⁸⁸⁷ *Id.* at 22421-22423. The Measures were issued on July 12, 1993.

96-1377

TANZANIA**Nature and significance of cultural property**

The primary law that governs cultural property in Tanzania is the Antiquities Act of 1964 extensively amended in 1979 by the Antiquities Amendment Act, No. 22 of 1979.⁸⁸⁸ The Law provides for the preservation and protection of sites and articles of palaeontological, archaeological, historical or/and natural interest as well as other matters dealing with cultural property.

Definition of *cultural property*

As in other Commonwealth jurisdictions of Africa, this Law does not contain the definition of the term *cultural property*. Rather, cultural property in Tanzania includes *antiquities*. An *antiquity* includes a monument, a relic and any protected object according to § 2 of this Law. This section also defines the following terms:

Ethnographic object:

...any movable object, shaped, painted, carved, inscribed or otherwise produced or modified by human agency in Tanganyika after the year 1863; for use in any social or cultural activity whether or not it is still being used by any community in Tanganyika but does not include any object made, shaped, painted, carved, inscribed or otherwise produced or modified by human agency in Tanganyika for sale as a curio;

Museum:

...the National Museum of Tanzania established under any written law relating to museums;

Monument:

- (a) any building, fortification, interment, midden, dam or any structure erected, built or formed by human agency in Tanganyika before the year 1863; and
- (b) any rock painting or any immovable object painted, sculptured, carved, incised or modified by human agency in Tanganyika before the year 1863; and
- (c) any earthwork, trench, adit, well, cave, tunnel or other modifications of soil or rock dug, excavated or otherwise engineered by human agency in Tanganyika before the year 1863, whether or not the monument shall have been modified, added to or restored at a later date and whether or not it is included in a list published by the director; and
- (d) any site or immovable structure declared to be a monument under section 3; and

⁸⁸⁸ 13 REVISED LAWS OF TANZANIA, Ch. 550 (1977); *see also* SUPP. TO THE REP. OF TANZANIA GOVT. GAZETTE (Act's) of Dec. 21, 1979, at 269-277; *see further* The Antiquities (Protected Objects and Monuments) Rules of 1980, SUPP. TO THE REP. OF TANZANIA GOVT. GAZETTE (Subsidiary Legislation) of Mar. 27, 1981, at 55-57; and THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COLLECTION OF LEGISLATIVE TEXTS: TANZANIA (UNESCO, 1985).

(e) such adjoining land as may be required for the purposes of fencing, covering or otherwise preserving the monument;

Protected object:

...any ethnographic object or any wooden door or door frame carved in Tanganyika in any African or oriental style before the year 1940 and includes any object declared to be a protected object under section 9 (1) (a);

Relic:

...any movable object made, shaped, painted, carved, sculptured, inscribed or otherwise produced or modified by human agency in Tanganyika before the year 1863, whether or not it shall have been modified, added to or restored at a later date and includes any human or other vertebrate, faunal, fossil or botanical fossil or impression found in Tanganyika;

Discovery:

...the finding of any object on or under land or in anything growing on the land or attached to or within the fabric or foundations of any structure, the presence of which was previously unknown to the owner thereof, but does not include the recognition or identification as a relic or a relic of a particular description of any object previously in the known possession of any person.

Establishment of ownership of cultural property

The Tanzanian Law is sub-divided into two broad subject areas. The first portion covers monuments while the second is devoted to relics and protected objects. Under § 3 of this Law, the responsible Minister may by an order published in the GAZETTE declare any place, site or structure of *historical interest* to be a monument for the purposes of this Law. The Director of Antiquities and/or any authorized person may execute policy in matters of cultural property pertaining to monuments, museums, relics, ethnographic objects and other protected objects. These include all aspects of control and management of monuments under §§ 8-9 of the Law, control and management of relics and other forms of cultural property. Other statutory offices and officials under this Act include the Conservator of Antiquities and the Advisory Council for Antiquities.

All cultural property is vested in the government. This state interest and ownership of cultural property also extends to protected objects. However, a residual and reversionary interest is reposed in individuals under a license to export artifacts. The State, through the Commissioner, retains overall authority to declare and enforce public domain interests over any such artifacts within the context of § 21 of the Law.

Regulation of traffic in cultural property

Section 10 of the Law controls the discovery of relics and monuments. Under this Section, anyone who discovers a relic or monument or any object or site which may reasonably be supposed to come under the definition of § 2 of the Law of 1964 must report the matter to the Director or his respective officers such as the Conservator or the Curator of the Museum.

No person can excavate any artifact or other form of cultural property without the permission of the Director of Antiquities. It is irrelevant whether or not the land or property upon which such artifact is located is private property. Similarly, no one can remove any artifact without proper authority from the Director or his agents according to § 11 of the Law. It is a criminal offence to excavate, dig, probe, remove or carry out any such activity without a license issued by the Director. As a result, § 11 of this Law states:

No person except the Director or a person acting on his behalf, shall whether on his own land or elsewhere (a) excavate, dig or probe for monuments or relics; or (b) remove any object he supposes to be a relic from the site of its discovery, except for the purposes of protecting it and reporting the discovery under the provisions of section 10 or for the purpose of delivering it to the authorities if required to do so under that section; (c) search or collect any ethnographic object except under and in accordance with an excavation license or in the case of an ethnographic object, a collector's license issued by the Director. Any person who contravenes the provisions of this section shall be guilty of an offence.

Therefore, § 12 of the Law provides for a licensing mechanism for those who wish to engage in the business of discovery, collection, search or excavation of artifacts, monuments and protected objects. Under this Section, two types of licenses are issued, namely an excavation license or a collector's license. These forms of licenses can only be granted if and when the applicant has sufficient scientific training or experience to enable him to carry out the proposed excavation, search, collection, discovery or extraction. The person must also be financially sound with a supporting crew and other requisites to carry out a successful operation. In relation to an excavation license and once the discovery process has been completed, the applicant must undertake and commit himself to the publication of his findings under proper scientific protocols. With respect to a collector's license, the applicant must ensure that ethnographic objects collected will be used for study or for a purpose approved by the Director of Antiquities. Such licenses are issued under § 13 of the Law, unencumbered or subject to specific terms and conditions.

Especially important is the requirement of § 13 of this Law that a license does not constitute authority for a licensee to enter upon or excavate any land or to enter upon any land and search for or collect any ethnographic objects without the consent of the owner of that land. Furthermore, in addition to any terms and conditions in a license, the licensee must take all reasonable measures consistent with current and contemporary scientific practices to ensure the preservation of any relics, monuments or ethnographic objects discovered or collected by such a person. Another caveat is that the Director of Antiquities may cancel a license at anytime if the licensee fails to comply with any of the terms and conditions contained in the license. An appeal is possible to the responsible Minister.

Another mechanism of regulation of traffic in cultural property is the control of exports and sale of artifacts. Under § 14 of the Law, no person in Tanzania can export any item of cultural property covered by this Law without a license. By the same token, according to § 15 of the Law, no person can sell or exchange any artifact or other items of cultural property or anything considered a protected object without a license issued by the Commissioner or his agents.

Tanzanian police and Antiquities Wardens enjoy powers of search, seizure, arrest and forfeiture. Powers of arrest, conviction and penalties imposed for violation of this Law are contained in §§ 22-24 of the Law. Punishment comprises a stiff fine in cases of continuing breach assessed on a pro-rate basis. The Minister is further empowered to promulgate additional rules for the better regulation of traffic in cultural property as well as provide other legislative regimes for the control and management of cultural property in Tanzania.

Tanzanian legislative measures in matters of cultural property are similar to those available in neighboring Kenya with more emphasis on the preservation of artifacts and other forms of cultural property as national treasures. Lack of the sanction of incarceration in case of infringement of the law is a curious omission in the Tanzanian measures considering the entrenched reserve of powers to that State.

There are no provisions concerning other protection of cultural property in times of war.

Repatriation of cultural property removed abroad

Section 18A of this Law states:

Where by the operation of any treaty or agreement there is a reciprocal arrangement between Tanzania and any other country providing for the seizure and exchange of antiquities unlawfully exported from and imported into the territory of either country, the Director or any person authorized by him in that behalf may, upon a written request authorized by him in that behalf, upon a written request of that other country, seize and return to that other country any antiquities imported into Tanzania which are named in that written request or, as the case may be, make a written request to that other country requesting the return of antiquities exported from Tanzania, and imported into that country.

Other laws establishing and/or protecting cultural heritage

Other laws establishing and/or protecting cultural heritage include the Wild Life Conservation Act of 1974, as amended,⁸⁸⁹ which provides for the protection, conservation, development, regulation and control of fauna and fauna products including wild animal life, trophies and transactions in such trophies; and the National Museum of Tanzania Act No.7 of 1980, as amended.⁸⁹⁰ This Act deals with matters of museums in Tanzania.

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⁸⁸⁹ SUPP. TO THE REP. OF TANZANIA GOVT. GAZETTE (Acts) of Aug. 2, 1974, at 55-97.

⁸⁹⁰ SUPP. TO THE REP. OF TANZANIA GOVT. GAZETTE (Acts) of Mar. 14, 1980, at 77-84.

96-1377

THAILAND**Nature and significance of cultural property**

Thailand has policies and laws on the protection of its cultural property and heritage. All matters concerning the protection of this property are governed by the Act on Historical Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961);⁸⁹¹ and the Act on the Control of Auction Sale and the Sale of Antiques B.E. 2474 (1931).⁸⁹² Article 3 of the 1961 Act abrogates two laws of the same title, dated 1934 and 1953, and abolishes any other laws or regulations that contradict or are inconsistent with the provisions of this Law.

Thailand has many historical monuments and sites as well as antiques. Therefore, the 1961 Law was promulgated to establish the country's many national museums and define the role of government authorities in the custody and protection of monuments, antiques and other objects of art considered as national cultural and historical property. The Law also defines different types of cultural property, determines their ownership, and provides procedures for their custody, protection, restoration, and trade. This Act covers both immovable and movable property which has historical, artistic or archaeological value.

The government authority in charge of executing this Act is the Minister of Education. Other officials who have the authority to identify and register cultural property and to issue licenses to trade and permission to restore and preserve historical property and antiques are officers appointed by the Minister, the Director General of the Fine Arts Department, and any *Changwat* Governors with authority delegated by the Director General to be responsible for their respective *Changwats*⁸⁹³. Notices of delegation of authority or appointments by the Minister must be published in the GOVERNMENT OFFICIAL GAZETTE. Ministerial regulations concerning the execution of this Act are also published and become effective on the date of publication in the GAZETTE.

Definition

In accordance with the Act of 1961 on Historical Monuments, Antiques, Objects of Art and National Museums, *historical monuments* are immovable property which by virtue of age, historical or architectural characteristics are considered to have artistic, historical or archaeological interest.⁸⁹⁴ There is no specific cut-off date or criterion for a monument to be considered historical. This decision is to be determined under the discretion of the Director General of the Fine Arts Department of Thailand. The Director General has not only the power to declare and register a monument, building or a site as historical, but also the power to delimit the area surrounding the monument or building, thus deciding on the dimensions of the historical site.

⁸⁹¹ Act on Historical Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961), 2 (CCLI) ROYAL THAI GOVERNMENT GAZETTE, 401 (Sept. 21, 1961).

⁸⁹² P. J. O'Keefe & L. V. Prott, eds., *Thailand*, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 209 (New York, UNESCO, 1988).

⁸⁹³ Thailand is divided administratively into 73 provinces (*changwats*).

⁸⁹⁴ *Supra* note 1, art. 4, at 401.

The decision to register a selected historical monument is to be published in the OFFICIAL GAZETTE. But the Director may amend or withdraw his decision by giving public notice, published in the GAZETTE.⁸⁹⁵

Antiques are all movable property, whether created by men or nature or whether parts of an historical site, including human or animal remains, which by virtue of their age or other characteristics are of artistic, historical or archaeological interest.

Objects of art are works recognized as having high artistic value.⁸⁹⁶

Establishment of ownership of cultural property

The Director General of the Fine Arts Department also has the responsibility to determine and establish ownership of cultural property. He has the duty to register all property qualified as historical or as antiques and objects of arts and to give proper notice for each case by having it published in the GAZETTE. If the historical monument, antique or art object has a lawful owner, the Director General must also notify the owner or possessor in writing of his decision. The latter has the right to file an objection to such a decision within 30 days after the receipt of the notice to a court with jurisdiction. The court, in turn, has the power to dismiss the complaint or to issue an injunction to stop the Director's registration procedure.

Antiques or objects of art that are hidden, buried or abandoned without any claim of legal ownership are considered State property. Finders of objects of cultural value have to turn in their findings to the proper authority. They can be punished under the CRIMINAL CODE for not delivering these objects or be entitled to a reward equal to one-third of the value of the object found, depending on the case.⁸⁹⁷

Under the law, national museums are the only places that have official custody of antiques and objects of art owned by the State. They have the duty to keep, protect and preserve such objects. The Minister must give notice of the establishment or withdrawal of status of national museums along with their locations, in the GAZETTE.⁸⁹⁸ Antiques and art objects may be removed from a national museum for restoration, or for authorized exhibits in another location, or to be on official loan to other ministries or governmental agencies under the authorization of the Director General.⁸⁹⁹ All the national museums that were established and all historical sites and antiques that were registered as State or privately owned property under the old laws and before the application of this Law are considered valid under this act.⁹⁰⁰

⁸⁹⁵ *Id.* art. 7, at 402.

⁸⁹⁶ *Id.* art. 4, at 401.

⁸⁹⁷ *Id.* art. 24, at 404.

⁸⁹⁸ *Id.* art. 25, at 404.

⁸⁹⁹ *Id.* art. 26, at 404.

⁹⁰⁰ *Id.* arts. 8 & 25, at 402 & 404.

Regulation of traffic in cultural property

Owners of registered historical sites or antiques must notify the Director General in writing of all transfers of titles, giving the names of the buyers and dates of transfer. Any person who receives title to a registered historical property by way of inheritance or any other devise must also notify the Director General within 60 days from the date of receipt of title.⁹⁰¹

In the case of a transfer of title of registered antiques or objects of art, the transferrer must notify the Director General of the transfer in writing within 30 days. The notice must include the name and address of the transferee and the date on which the antique was transferred. Anybody who receives title to a registered antique or art object by means of inheritance or devise also has to notify the Director General in writing of such receipt within 60 days of the date of his possession of such a title. If there are many joint owners of the same object, one owner is required to notify the Director General for the other owners.⁹⁰²

Antiques and objects of art which are state property and under the care of the Department of Fine Arts are not to be sold unless it is specifically allowed under provisions of the Law. For example, if there are multiple objects, the Director General, with the approval of the Minister, may sell, exchange in the interest of the National Museum, or give one of the objects to the finder or discoverer of them.⁹⁰³

Other sales and exhibits of registered antiques and objects of art are only permitted by licenses issued by the Director General. The refusal by the Director General to issue a license can be appealed to the Minister for a final decision. Licenses to sell or to exhibit antiques and art objects have to be displayed in a visible place. Authorized officers have the right to enter places of business or exhibit locations to inspect and check the legality and credibility of such sales or displays.⁹⁰⁴ Auction sales of antiques are controlled by regulation and governed by the Act on the Control of Auction Sale and the Sale of Antiques.⁹⁰⁵

It is forbidden to export or take from Thailand any registered or non-registered antiques or objects of art without a license issued by the Director General and without paying special fees prescribed by ministerial regulations. The General Director has the authority to issue licenses to export certain antiques and objects of art in accordance with ministerial regulations. Refusal by the Director to issue licenses can be appealed to the Minister within 30 days, but the Minister's decision is final.⁹⁰⁶

Protection of cultural property

All damage to or deterioration of historical monuments or antiques has to be reported to the Director General within 30 days of the date of the discovery of such damage. No repair or restoration work can be

⁹⁰¹ *Id.*, art. 12, at 402.

⁹⁰² *Id.* art. 17, at 403.

⁹⁰³ *Id.* art. 18, at 403.

⁹⁰⁴ *Id.* arts. 20 & 21, at 403.

⁹⁰⁵ *Id.* at 209.

⁹⁰⁶ *Id.* arts. 22 & 23, at 403 & 404.

made, however, without the written permission and order of the Director General. All restoration and preservation projects are to be performed in accordance with specific instructions from the Director General. He can also order restoration and repair work to be performed by authorized officers after giving notice to the lawful owner of the registered cultural property.

Funds have been made available by law to cover expenditures on the preservation and protection of historical sites and national museums, e.g., the Archaeological Fund. These funds come from the Government's budget, proceeds generated by entrance fees to the historical places or museums, and from donations.

Penalties are provided for by this Law to punish violations of its provisions or for other actions that permit damage to cultural property. For example, the penalty for not reporting the discovery of an object considered as cultural property is up to two years' imprisonment and/or a fine up to 4,000 *bahts*.⁹⁰⁷ The penalty for whoever damages or destroys an historical monument or place is imprisonment up to one year and/or a fine of up to 2,000 *bahts*, and the penalty for exporting antiques and art objects without a license is up to one year's imprisonment and/or a fine of 2,000 *bahts*. The penalty for crimes involving a registered historical monument or antique is more severe. For the same crimes described above, the penalty may be from three months to five years' imprisonment and/or a fine of up to 10,000 *bahts*.⁹⁰⁸

Regarding the protection for cultural property in time of war, Thailand is a signatory country of the UNESCO Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict adopted in The Hague on May 14, 1954, and ratified both the Convention and the Protocol on February 5, 1958.

Repatriation of cultural property removed abroad

Thailand was represented at the Conference for the adoption of the draft of the UNIDROIT Convention on the International Return of Stolen or Illegal Exported Cultural Objects that was held in Rome, Italy in June 1995. The UNIDROIT Convention was adopted on June 23, 1995, but apparently, Thailand has not yet ratified the Convention.

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⁹⁰⁷ 25 *bahts* = \$1.00 US.

⁹⁰⁸ *Supra* note 1, arts. 31-39, at 405.

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TURKEY**Nature and significance of cultural property**

Turkey recognizes the importance of the preservation of the cultural properties of its past civilizations which provide information on the daily lives and the artistic and scientific achievements of its ancient peoples. There may be lessons to be learned from the history of these civilizations. They also give a better understanding of the Turkish culture that has developed under their influence.

Turkey is responsible for protecting the cultural heritage of more than one hundred different civilizations that once occupied its land. Therefore, in addition to its national protective laws, it strongly supports and promotes international cooperation on the protection of cultural property. Turkey is a party to many of the multilateral treaties such as the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970; the Convention for the Protection of the World Cultural and Natural Heritage, 1972; and the Convention for the Protection of the European Architectural Property, 1985.⁹⁰⁹

Turkey also takes every opportunity to enter bilateral agreements that would facilitate the repatriation of its cultural properties, e.g., negotiations for the return of a 17th Century painting to Ireland led to an Agreement on the Return of Illicitly Circulating Cultural Properties with that country.⁹¹⁰

Definition of *cultural property*

The Protection of Cultural and Natural Properties Law⁹¹¹ defines *cultural* and *natural properties* in three categories:

- *cultural properties* are those movable or immovable properties that are either on the surface of the earth, within the earth or under water from prehistoric or historic periods and have scientific, cultural, religious or artistic value;
- *natural properties* are objects either on the surface of the earth, within the earth or under water from geological, prehistoric or historic periods and because of their rarity, special features or beauty are worth protecting; and
- *sites* are cities or their remnants that are the product of various civilizations from the prehistoric period to the present reflecting social, economic, architectural and similar features of their

⁹⁰⁹ B. Umar & A. Çilingiroglu, *ESKİ ESERLER HUKUKU* 29-36 (Ankara, 1990).

⁹¹⁰ The Reuter Library Report, *Turkey Returns Stolen Painting to Ireland* NEXIS (Nov. 29, 1991).

⁹¹¹ Law No. 2863 of 1983 in F. Çoker & S. Kazanci, *TURKIYE CUMHURİYETİ KANUNLARI* 9769 (Ankara, 1972-) (Çoker).

periods, areas where important historic events have taken place and areas with special natural features and are worth protecting.⁹¹²

In addition to the above general definition for *cultural* and *natural properties*, the law describes movable and immovable properties worthy of protection and provides examples of them. Such immovable properties are described as:

- buildings that were built before the end of the 19th Century;
- buildings that the Cultural and Tourism Minister has decided are worthy of protection although they were built after the 19th Century;
- cultural immovable properties that are in areas defined as sites; and
- buildings and areas that have important historical significance in regard to the national struggle, the emergence of the Republic and houses that were occupied by Mustafa Kemal Atatürk.⁹¹³

Some of the above-described cultural and natural immovables may be left unprotected, if the High Council of the Protection of Cultural and Natural Properties⁹¹⁴ decides that they are unworthy of protection because of their lack of architectural, historical, aesthetic, archaeologic and other importance and significance.

Article 6 also states that rock graves, rock inscriptions, pictures or designs on rocks, any acropolis or necropolis, fortresses, towers, walls, historical barracks and forts and their fixture weapons, ruins, inns, baths, schools, cupolas, mausoleums, bridges, water arches, canals, cisterns, wells, remnants of historic roads, stone distance markers, historical boundary marking stones, shipyards, docks, historical palaces, mansions, and houses, mosques, fountains, hospitals, convents, cemeteries, bazaars, covered bazaars, synagogues, churches, historic memorials, and similar immovable are examples of protected immovable cultural properties.

Examples of protected immovable natural properties such as cave dwellings, historic caves, trees or group of trees with special features and similar immovables are also provided by article 6.

The movable cultural and natural properties worthy of protection are described as:

- objects of geological, prehistoric or historic periods with great value in regard of geology, anthropology, prehistory, early history archaeology, art history and ethnology and that reflect social, cultural, technical or scientific features and aspects of their periods;
- objects that reflect the social life of people, including man-made implements relating to science and religion with ethnological value; and

⁹¹² *Id.* art. 2, at 9769.

⁹¹³ *Id.* art. 6, at 9770.

⁹¹⁴ The Council is established to coordinate the protection, repairs and restoration of cultural and natural property under the supervision of the Ministry of Culture and Tourism [*id.* art. 51, at 9781].

- documents and objects that have important historical significance in regard to the national struggle and the emergence of the Republic and Mustafa Kemal Atatürk's personal belongings, documents, books, papers and similar items.⁹¹⁵

Article 23 also states that all kinds of fossils of man and plants, obsidian tools, bone or metal implements, ceramic or porcelain cups and pots, statues, tablets, weapons, icons, glass objects, ornaments, jewels, masks, diadems, documents written on leather, cloth or any other material, scales, coins, manuscripts, miniature, pictures with artistic value, relics and similar objects are examples of movable cultural and natural properties.

As mentioned above, Turkey has signed and ratified many international conventions pertaining to the protection of cultural and natural properties. Under the provisions of the Constitution, ratified international agreements carry the force of law.⁹¹⁶ Therefore, if any of the definitions of the ratified international agreements are broader than the Protection of Cultural and Natural Properties Law, then the properties covered by such definitions would also be protected.⁹¹⁷

Establishment of ownership of cultural property

Under the provisions of the Protection of Cultural and Natural Properties Law, movable cultural and natural properties worthy of protection in or on immovable property belonging to the State, public institutions, individuals or legal entities are also the property of the State.⁹¹⁸ However, as an exception to the general rule, some cultural and natural properties may be owned privately. Examples would include those things obtained before 1906,⁹¹⁹ found abroad, or found on private property and where the Ministry of Culture and Tourism (Ministry) has decided not to acquire them for a museum.⁹²⁰

If the Ministry decides that a privately owned item of cultural or natural property can be better protected by the State, the Ministry can expropriate it.⁹²¹

Regulation of traffic in cultural property

The Protection of Cultural and Natural Properties Law regulates the trade, sale and export and import of cultural and natural properties. To engage in the trade of protected cultural or natural properties without

⁹¹⁵ *Id.* art. 23, at 9776.

⁹¹⁶ Çoker & Kazanci, *supra* note 3, Law No. 2709 of 1982, art. 90, at 136(22).

⁹¹⁷ For example, the Convention for the Protection of World Cultural and Natural Heritage of 1972 provides a broader definition for natural properties [T. C. RESMI GAZETE of Feb. 14, 1983, No. 17959, at 10].

⁹¹⁸ Çoker & Kazanci, *supra* note 3, art. 5, at 9770.

⁹¹⁹ Umar & Çilingiroglu, *supra* note 1, at 80.

⁹²⁰ Çoker & Kazanci, *supra* note 3, art. 25, at 9776.

⁹²¹ *Id.* art. 11, at 9772.

a license is forbidden. Offenders may be imprisoned from one to three years and fined.⁹²² Licenses are issued for three years by the Ministry. However, if the Ministry's orders or the instructions regulating such business are violated, the licenses may be revoked.⁹²³

All State institutions and foundations, municipalities, private persons and legal entities must notify the Ministry that they are offering some cultural and natural properties in their possession for sale.⁹²⁴ Otherwise, the person responsible for making the notice may be imprisoned from three months to one year and fined.⁹²⁵ The Ministry, at its discretion, may acquire some or all of these properties.

As a general rule, there are no restrictions for the import of cultural and natural properties. However, diplomats who temporarily bring such objects into the country must register them at the time of the importation so they can export them when they leave Turkey.⁹²⁶

As a general rule, the export of cultural and natural properties is forbidden. However, those items owned by private parties may be exported with the permission of the Ministry if it is decided that they are not worthy of protection.⁹²⁷ Those who try to smuggle cultural or natural properties subject to export control may be imprisoned from five to ten years and fined. In addition, such properties and the vehicles used in the smuggling are also confiscated.⁹²⁸

Another exception to the general rule is the temporary export of cultural and natural properties for exhibitions. After receiving the guaranty of the host country and making sure every precaution for the safety of these objects has been taken, the Ministry may ask the approval of the Council of Ministers for temporary exportation.⁹²⁹

Other protection for cultural property

The protection of the Cultural and Natural Properties Law provides various protective rules in addition to the sale and export restrictions.

⁹²² *Id.* art. 67, at 9785.

⁹²³ *Id.* art. 27, at 9777.

⁹²⁴ *Id.* art. 30, at 9777.

⁹²⁵ *Id.* art. 73 at, 9785.

⁹²⁶ *Id.* art. 33, at 9778.

⁹²⁷ *Id.* art. 24, at 9776.

⁹²⁸ *Id.* art. 68, at 9785.

⁹²⁹ *Id.* art. 32, at 9777.

Persons who find cultural or natural properties have three days to report the find to the closest museum authorities or to the closest public authorities where there are no museums.⁹³⁰ If the object is found on government property, a reward is given to the finder. If it is found on private property and it is not of museum quality, after it is registered, it is returned with a certificate to the owner of the land.

If the discovery is not reported, the responsible person may be imprisoned from one to three years and fined.⁹³¹

Under the provisions of article 35, exploration and excavation rights for cultural and natural properties are granted to the Ministry. It is also authorized to issue exploration permits to private parties if they can show they have the scientific and financial capability to conduct such work. However, excavation permits must be approved by the Council of Ministers based on a proposal from the Ministry.

Those who engage in exploration activities without a permit may be fined. However, those who excavate without a permit may be fined and imprisoned from two to five years. If the offenders' intention of smuggling the finds is proven, their penalty may be doubled.⁹³²

These permits are valid for one year and may be extended at expiration. However, if the exploration or excavation does not start within six months or is suspended more than two months without an acceptable reason, the permit will be cancelled.⁹³³

An expert from the Ministry must be present at the exploration and excavation sites. The permit holders must also have guards to protect the sites at all times.⁹³⁴

At the end of each year, the cultural and natural properties that are found must be transferred to a museum designated by the Ministry.⁹³⁵

The Ministry is also responsible for the preservation of the cultural and natural properties whether State or privately owned. For the Ministry, the High Council of the Protection of Cultural and Natural Properties prepares the list of properties that are in need of repair or restoration.⁹³⁶

The cultural and natural properties owned by the State agencies must be maintained by them, and must be repaired or restored under the supervision of the Ministry. Those private parties who own such

⁹³⁰ *Id.* art 4, at 9769.

⁹³¹ *Id.* art. 67, at 9765.

⁹³² *Id.* art. 74, at 9785.

⁹³³ *Id.* arts. 39 & 40, at 9779.

⁹³⁴ *Id.* arts. 44 & 48, at 9780.

⁹³⁵ *Id.* art. 41.

⁹³⁶ *Id.* art. 51, at 9781.

properties are also responsible for their care. If they do not have the financial resources, the Ministry may grant a subsidy or expropriate the properties at its discretion.⁹³⁷

As mentioned above, Turkey has ratified the Convention for the Protection of Cultural Property in the Event of Armed Conflict.⁹³⁸ Therefore, provisions of the Convention are applicable in Turkey like any other national law.

In time of Peace, pursuant to article 3 of the Convention, Turkey will take appropriate measures to safeguard its cultural properties. In time of war, cultural properties would be marked with the distinctive emblem designated by the Convention, and the procedures found in the Convention would be followed if such properties must be transported.⁹³⁹

Repatriation of cultural property removed abroad

Turkey has been leading an aggressive campaign to repatriate its numerous cultural properties that have been smuggled out of the country and are in Western museums. Turkey's efforts in this area are far from fulfilling its expectations, in spite of a major victory, e.g., retrieving the cultural properties known as the *Lydian Hoard* from the Metropolitan Museum of Art in New York.⁹⁴⁰

Turkey has faced difficulties in enlisting the cooperation of those countries which have custody of its cultural properties. These are, for the most part, Western European countries that are not a party to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. However, all the countries Turkey considers as major markets for its illegally exported cultural properties have participated in the diplomatic conference for the adopting of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects. If most of these countries become parties to the Convention, Turkey may have a better chance of repatriating some of its cultural properties.

At present, Turkey may deny exploration or excavation permits to the citizens of the countries that do not support its repatriation efforts.

Other laws establishing and/or protecting cultural properties

All the laws and regulations that provide protection for cultural and natural properties have been enacted to implement the following Constitutional provision:

The State shall ensure the conservation of the historical, cultural and natural assets and wealth, and shall take supporting and promoting measures towards this end.

⁹³⁷ *Id.* arts. 10-15, at 9771-9773.

⁹³⁸ 240 UNTS 240.

⁹³⁹ *Id.* arts. 12, 13, 16 & 17.

⁹⁴⁰ L. J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative* 95 COLUMBIA LAW REVIEW 401 (Mar. 1995).

Any limitations to be imposed on such assets and wealth which are privately owned and the compensation and exemptions to be accorded to the owners of such, as a result of these limitations, shall be regulated by law.⁹⁴¹

In addition to the Protection of Cultural and Natural Properties Law and its various implementing regulations, Turkey has passed the Law of the Restoration of the Historic Covered Bazaar in Istanbul; the Law Protecting Remnants of Ciragan Palace; and the Law of Reconstruction and Development which are designed to protect and preserve its cultural and natural properties. The Customs, Export and Import, Prevention of Smuggling and Religious Foundation laws also have some relevant provisions for the establishment and protection of cultural and natural properties.

Also, Turkish law provides for the protection and preservation of Turkish cultural heritage. An institute charged with scientific research on Turkish culture, history, and language and to promote their preservation has been established.⁹⁴²

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⁹⁴¹ *Supra* note 7, art. 63, at 136(15).

⁹⁴² Çoker & Kazanci, *supra* note 3, Law No. 2876 of 1983, at 9809-9837.

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UNITED KINGDOM**Nature and significance of cultural property**

Britain has extensive private and public collections of works of art, antiquities and other cultural artifacts. Consisting of items of both domestic and foreign origin, the collections reflect the country's preeminence in prior centuries. During the heyday of empire and influence, Britain collected magnificent items of cultural property that are now part of a great national heritage.

The present century brought about a reversal in the traffic in such objects, when international market forces created a greater demand in the now more prosperous countries, such as, the United States, Germany and Japan. Methods of retaining the collections in Britain have, therefore, been employed since the turn of the century. Beginning in 1903, a fund was established to allow museums to acquire objects which they could not normally obtain, and over the years many items were saved for the nation.

At the start of World War II, export control regulations were enacted in order to conserve domestic resources for the war effort; and, in 1940, antiques and works of art were placed on the prohibited list. Before granting an export permit for an art work, the national museums were consulted and if they raised any doubts, a license was automatically denied. The system worked amicably for several years until the trade in art again began to rise after the war, when a refusal to export several pieces without there being an offer to buy from a museum created controversy. In 1952 a Committee issued a report on the system of exports of art that laid down criteria for exports which continue to be used presently.⁹⁴³

Definition of cultural property

Cultural property is not specifically defined, but several statutes, regulations and other guidelines describe items that are of historic or national significance. The National Heritage Act 1980, established a National Heritage Memorial Fund to enable the acquisition, maintenance or preservation of, inter alia, any object or "collection or group of objects ... of outstanding historic, artistic or scientific interest."⁹⁴⁴ The Inheritance Act 1984 provides a conditional exemption from the tax of objects which are historically associated with "any building for the preservation of which special steps should...be taken by reason of its outstanding historic or architectural interest."⁹⁴⁵

The Export of Goods (Control) Order 1992 prohibits the export without license of goods "manufactured or produced more than 50 years before the date of exportation" except postage stamps, documents relating to the personal affairs of the exporter, etc.⁹⁴⁶ A definition is also provided in regulations issued by the European Union (EU).

⁹⁴³ C. Maurice & R. Turnor, *The Export Licensing Rules in the United Kingdom and the Waverly Criteria*, INT. J. OF CULTURAL PROPERTY 273, 275 (1992). The report is popularly known as the "Waverley Report" after the name of its chairman.

⁹⁴⁴ Ch. 17, §3(b) & (c).

⁹⁴⁵ Ch. 51, §31(c) & (e).

⁹⁴⁶ S.I. 1992, No. 3092, Sched. 1, Part 1, Group 2, 4.

The Waverley Report developed three criteria for use in deciding whether a cultural item can be granted an export permit:

- Does it have such a close connection with history and national life that its export would be a misfortune?
- Does it have outstanding aesthetic importance?
- Is it of outstanding significance for the study of some branch of art, learning or history?

A wider definition is provided in the Scheme for the Protection of Cultural Heritage within the Commonwealth⁹⁴⁷ adopted in November 1993 by the Law Ministers of member countries. Under paragraph 3(1) of the Scheme, the items of cultural heritage covered by the Scheme must be classified to be of national importance by virtue of one or more of the following criteria:

- the close association of the item with the history or life of the country;
- the aesthetic qualities of the item;
- the value of the item in the study of the arts or the sciences;
- the rarity of the item;
- the spiritual or emotional association of the item with the people of the country or any group or section thereof; and
- the archeological significance of the item.

Establishment of ownership of cultural property

One of the major issues in establishing the ownership of any property, is the general principle of *nemo dat quod non habet* under which a person in possession of goods may not confer any better title to the goods than he himself has. Under an exception, however, title to stolen goods sold in a *market overt* passed to an innocent purchaser who bought them in good faith and without notice of any defect of title on the part of the seller.⁹⁴⁸ The market overt concept, derived from medieval times and was governed by arcane rules of local custom.

⁹⁴⁷ 19 COMMONWEALTH LAW BULLETIN 2015-2017 (1993). The Commonwealth is a voluntary association of mostly sovereign and independent states that were formerly governed by Britain.

⁹⁴⁸ Sale of Goods Act 1979, § 22(1).

The exception led to the inability of owners of cultural goods to claim title after the goods were sold in market overt. Two modern cases illustrate the working of the exception. In *Reid v Commissioner of Police*,⁹⁴⁹ in the early morning a purchaser bought from a street market, recognized as market overt, a candelabra which later turned out to be the work of a reputed artisan. Unknown to the purchaser, the candelabra had been stolen. The owner was able to prevail in an action against the innocent purchaser under a rule that a sale in a market overt must be made between sunrise and sunset after showing that the candelabra was sold before the sun had risen over the horizon.

In the other case, the owner of paintings and artwork that were stolen and sold in a market overt was less fortunate. Alerted by an anonymous phone call she arrived at the market only to find that the goods had already been obtained by innocent purchasers. The rules of the market overt having been complied with, she was unable to regain ownership of the goods.⁹⁵⁰

A statute enacted with the backing of the police, auction houses and antique dealers recently abolished the rule of market overt. The Sale of Goods (Amendment) Act 1994, repealed the section 22(1) of the Sale of Goods Act 1979, with effect from Jan. 3, 1995.⁹⁵¹ The abolition has moved British law further away from the laws of its major European partners which generally favor innocent purchasers. The development, it is claimed, will allow sales of art treasures stolen in Britain to be undertaken in those countries in order to obtain a legitimate title and the goods sent back to Britain.⁹⁵²

In cases of property to which a claim of ownership does not exist, the initial rule is that the property belongs to the finder who then acquires a good title. A good title, however, may not be acquired in cases in which the property was found in the course of employment, in which case possession is vicarious, or if the property was found by trespassing on another person's land. The doctrine of *treasure trove* vests the ownership of property found hidden in the earth, comprised substantially of gold and/or silver,⁹⁵³ in the Crown.⁹⁵⁴ The finder of treasure trove is generally granted compensation. The Crown is also entitled to all unclaimed shipwrecks.

⁹⁴⁹ [1973] 2 All ER 97 (CA).

⁹⁵⁰ S. Bone & L. Rutherford, *Market overt - "closed all hours"?* 140 NEW L.J. 1014 (1994).

⁹⁵¹ For the history of the rule see, B. Davenport & A. Ross, *Market Overt*, 2 INT. J. OF CULTURAL PROPERTY 25 (1993).

⁹⁵² Bone & Rutherford, *supra* note 8. In *Winkworth v. Christie, Manson & Woods Ltd.* [1980] 1 All E.R. 112 (Ch), works of art stolen in England were transported to Italy and sold to an innocent purchaser for value. The purchaser acquired a valid title under Italian law, but not under English law. On grounds that the law of the *situs* governed the disposal of personal property, Italian law was held to prevail.

⁹⁵³ *A-G of the Duchy of Lancaster v. G.E. Overton (Farms)*, [1982] 1 All E.R. 524 (C.A.). (silver alloy coins are not considered to be treasure trove).

⁹⁵⁴ *Constitutional Law*, 8 HALSBURY'S LAWS OF ENGLAND, ¶¶ 1513-1515. A Private Members Bill is being considered by Parliament which would refine the law of treasure trove and make it simpler to define treasure.

Regulation of traffic in cultural property

As noted, the Export of Goods (Control) Order 1992 prohibits the export without permit of objects manufactured 50 years prior to the date of export. A permit to export initially is only granted if the Waverley criteria are found to be inapplicable. If the Committee considers an item to fall within the criteria, export is denied and the object is made available for purchase within the country during a specified period of time. If no sale is made, an export permit is granted. According to the Minister for National Heritage, the export control measures "encourage mutual cooperation ... and the UK's aim throughout has been to reach a balance between allowing countries reasonable protection of their cultural goods, and promoting legitimate free trade."⁹⁵⁵

During the period 1990-95, the Reviewing Committee for the Export of Works of Art considered 154 cases under the criteria and refused to allow export of items in 55 applications; the permits were initially deferred in 124 cases. The manner in which the Committee considers export applications is exemplified in the 1995 case of an Egyptian lintel from a temple (c. 1875 BC).⁹⁵⁶ In January 1996, the National Heritage Minister deferred the grant of an export license for a painting *Ermina finding the wounded Tancard* by Francesco Barbieri which had been acquired by sale in 1772. The deferral period ends on March 15, 1996, but it could be extended until July 15, 1996, if there is a serious intention to raise £3.5m for its purchase and retention in Britain.⁹⁵⁷

The United Kingdom presently has no regulation prohibiting the importation of cultural items, unlawfully brought in from outside the EU. In *Attorney-General of New Zealand v. Ortiz*,⁹⁵⁸ a historic Maori carving was removed from New Zealand in breach of a statute prohibiting its export. The statute allowed the seizure and forfeiture of such property. When the carvings were placed for sale in England, New Zealand sought recovery on grounds of its forfeiture under the statute. The trial court found for New Zealand; but, on appeal, the Court of Appeal and the House of Lords determined that the statute made an illegally exported item liable to forfeiture only upon seizure and since the carving had not been seized by New Zealand customs or police, forfeiture had not occurred.

Lord Denning, M.R., president of the Court of Appeal, suggested that if the law of a foreign state prohibiting the export of works of art provided for its automatic forfeiture, it would not be enforced in England as the forfeiture would be the exercise of sovereign authority which is unenforceable outside its own territory. Disagreeing with the opinion of the trial judge that English courts should enforce foreign laws on works of art so that other countries would reciprocate in enforcing English laws prohibiting exports, he stated:

I regard this as too sanguine. If our works of art are sold to a dealer and exported to the United States without permission, as many have been, I doubt very much whether the courts of the United States would order them to be returned to England at the suit of our government, on the ground of forfeiture.

⁹⁵⁵ Hermes - UK Government Press Release, Mar. 16, 1993.

⁹⁵⁶ *Export of Works of Art 1994-95*, Cm. 3008, 36-37 and Plate XI. A copy is appended. For a detailed discussion of the rules, see Maurice & Turnor, *supra* note 1.

⁹⁵⁷ Dept. of National Heritage, Press Notice, 25/96, Jan. 26, 1996.

⁹⁵⁸ [1982] 3 All E.R. 432 (QB & CA); [1983] 2 All E.R. 93 (HL).

The retrieval of such works of art must be achieved by diplomatic means. Best of all there should be an international convention on the matter where individual countries can agree and pass the necessary legislation.⁹⁵⁹

The movement of cultural goods between the member States of the European Union is governed by regulation.⁹⁶⁰ The United Kingdom has not become part of the UNESCO Convention on the subject.⁹⁶¹ Nor has it ratified the Unidroit Convention on Stolen or Illegally Exported Cultural Objects on grounds that the Convention allows the adoption of extremely wide and imprecise definition of cultural property and leaves little room for courts and competent authorities to question the definition.⁹⁶²

Repatriation of cultural property removed abroad

The Commonwealth Scheme has the objective of allowing "the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another Commonwealth country contrary to its laws."⁹⁶³ The Scheme is complementary to other international arrangements and does not exclude them. It requires member countries to prohibit the export of cultural items, as defined, except in accordance with the terms of an export permit. Cultural exports banned in one country are required to be prohibited from import into another country.

Britain has indicated its inability to implement the Scheme, citing its obligations to the European Union and the extra bureaucratic burdens that would be placed on its large art trade.⁹⁶⁴ It is nonetheless of interest to note the mechanism for the return of objects as a possible model.

When a country of export learns of the whereabouts of an object covered by the Scheme, it may request assistance for its recovery from the country in which the object is located. The request, giving details of the item, must be accompanied by an official notification that the item has been unlawfully exported. The notification will serve as *prima facie* evidence of the matters stated.

The central authority, set up for the purposes of the Scheme, in the country of location in doing all it can in its power to effect a recovery of the item, has two options. First, it can notify the holder of the item that the item will be returned to the country of export, unless legal proceedings are instituted within a stated period. If the holder decides not to take action, the authority is required to seize the item and hold it for a

⁹⁵⁹ [1982] 3 All E.R., at 460.

⁹⁶⁰ Regulation 3911/92/EEC. *See* the EU section of the report.

⁹⁶¹ *See* the discussion of this Convention in the section on "International Law."

⁹⁶² P. Jenkins, Legal Adviser to the Department of National Heritage, in a paper on the Unidroit Convention (Nov. 14, 1995) (in file).

⁹⁶³ ¶ 1(1). Commonwealth Schemes, of which there are three others, do not create binding obligations, and leave it to individual Commonwealth countries to enact any legislation necessary to place them in operation [P. J. O'Keefe, *Protection of the material cultural heritage: the Commonwealth Scheme*, 144 INT'L. & COMP. L. Q. 147, 161 (1995)].

⁹⁶⁴ *Id.*

period of 12 months before returning it to the requesting country. This period is allowed in order to enable those who have any interest in the property to institute proceedings. It is observed that, this scenario is not altogether impractical, for example, in a case in which an item has been stolen from a museum or where an appropriated object has been stored with an innocent holder.⁹⁶⁵

Under the second option, the authority may institute legal proceedings to secure the return of the item. This approach is likely to be adopted in cases in which there is a question about the illegality of the import, or where the holder is innocent, and a judicial determination is sought to settle the questions. The Scheme sets out the principles which a court must apply in its enquiry. If a court finds that the item has been exported unlawfully it must order its return, subject to fair and reasonable compensation payable to an innocent holder. The Scheme presumes the holder of a cultural item not to be an innocent purchaser for value if he has neglected to utilize the validation system under the Scheme. Other questions relating to title and compensation are to be determined by proceedings in the country of export.

A limitation period of five years is provided in the Scheme for making claims. The provisions of the Scheme do not apply retroactively.

Other laws establishing and/or protecting cultural heritage

Several other statutes further the aim of protecting cultural property. The eligible recipient of funds under the National Heritage Act 1980 include museums, art galleries, libraries and other similar institutions which preserve for the public benefit collections of historic, artistic or scientific interest. The Act also places a responsibility on the Department of National Heritage to reimburse the Commissioners of Inland Revenue for the net cost of national heritage property accepted in lieu of tax.

Under a scheme, known as Private Treaty Sales, works of art which have been exempted from inheritance tax can be sold to one of the national collections, as defined in the National Heritage Act, 1980, without the deferred inheritance and capital gains taxes becoming payable. The price paid for the work takes into account the tax exemption and divides the benefit between the owner and the acquiring institution.

The Historic Buildings and Ancient Monuments Act 1953, § 4, allows government grants for the preservation of historic buildings or for "the repair or maintenance of any objects ordinarily kept in any such building."

The National Trust Act 1937, § 3, extended the purposes of the National Trust, a conservation body, to include "the preservation of furniture and pictures and chattels of any description having national or historic or artistic interest."

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⁹⁶⁵ P. J. O'Keefe, *Commonwealth co-operation for the preservation of cultural heritage*, in 10TH COMMONWEALTH LAW CONFERENCE, CONFERENCE PAPERS 643, 648 (1993).

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VIETNAM

Nature and significance of cultural property

Historical and cultural property is considered as a national treasure by the Government of Vietnam. Such property is registered, protected, and preserved by authorized government agencies. The policy on preserving the country's historical and cultural property and heritage is stated in the highest law of the country. Both the Constitutions of 1981⁹⁶⁶ and 1992,⁹⁶⁷ promulgated under the Socialist Republic of Vietnam, contain provisions on the protection and preservation of the cultural property and heritage. Articles 46 and 34 of the 1981 and 1992 Constitutions stipulate that the state and society have the duty to protect the national cultural property, which includes historical and cultural relics, works of art, historical and scenic sites, and museums. In addition to the above stipulation, article 34 of the Constitution of 1992 states that the law strictly prohibits all actions that may cause damage to the country's historical and cultural property.

To carry out the 1981 constitutional provisions, the Council of State three years later promulgated the Law of March 31, 1984, concerning the Preservation and Use of Historical and Cultural Vestiges and Scenic Sites.⁹⁶⁸ This Decree was followed by a Decree of the Council of Ministers No. 288-HDBT of December 31, 1985. It contains detailed provisions on the implementation of the 1984 Law.⁹⁶⁹

Under the 1984 Law, the Government has the power to regulate the management and protection of all national cultural property. Under provisions of this Law, the Government is the Council of Ministers and all authorized agencies in charge of the execution of this Law. The agencies in charge are the Ministry of Culture, its agencies and the People's Committees at all levels. The Government's responsibility includes the identification, classification, and registration of cultural property.

The Ministry of Culture is responsible for issuing regulations and procedures concerning the execution of these regulations, including procedures for the registration, inspection and preservation of historical and cultural property in accordance with laws and regulations.⁹⁷⁰ The People's Committees at all levels are responsible for the direct management and protection of historical and cultural property located within their jurisdictions in accordance with the Council of Minister's regulations. The Council of Ministers and the People's Committees are both assisted in their tasks by the Ministry of Culture and its departments.

⁹⁶⁶ CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM (1981), Hanoi, Foreign Languages Publishing House, 1981.

⁹⁶⁷ *Socialist Republic of Vietnam*, A. Blaustein & G. H. Flanz, eds. CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (New York, Oceana Publications, Inc., 1992).

⁹⁶⁸ *Pháp Lệnh ngày 31-3-1984 bao vệ và sử dụng di tích lịch sử, văn hóa và danh lam, thắng cảnh*. 151-154 CONG BAO (Official Gazette) (Hanoi, Văn Phòng Hội Đồng Bộ Trưởng, 30 April, 1984).

⁹⁶⁹ *Nghi Định của Hội đồng Bộ trưởng số 288-HDBT ngày 31-12-1985 quy định việc thi hành Pháp lệnh bao vệ và sử dụng di tích lịch sử, văn hóa và danh lam thắng cảnh*. 587-590 CONG BAO (Hanoi, Văn Phòng Hội Đồng Bộ Trưởng, Dec. 31, 1985).

⁹⁷⁰ *Supra* note 3, art. 2, at 151-152.

Definition

Historical and cultural property is generally defined by both the 1984 and 1985 documents as buildings, monuments, places, articles, documents and works of historical, scientific, or artistic interest or of other cultural and social value.

Although the Decree of 1985 does not specify criteria for determining whether something constitutes historical and cultural property, it groups the classification into the six following categories:⁹⁷¹

- Immovable and movable property reflecting the historical, cultural and social development of the country;
- Immovable and movable property of historical and archaeological interest relating to the origin of mankind or to various ethnic groups in Vietnam, or to the materialistic and intellectual civilization of the area in ancient times;
- Historical vestiges relating to the life and activities of national heroes, or to the life and creative activities of artists, or to the works of scientists;
- Other property of artistic, architectural, historical and scientific interest, including monuments, works of art, specimens, archives and library's collections relating to the history and culture of the country and its people;
- Beautiful sites and landscapes created by nature or by men, such as caves, mountains and forests, and lakes; and
- Other objects that are considered to have historical and cultural value.

The Minister of Culture has the responsibility to determine the eligibility and approve the registration of historical and cultural property, as well as to amend or withdraw his decision, depending on the circumstances.⁹⁷²

Establishment of ownership

The Ministry of Culture and its agencies, such as museums and libraries, have responsibility for the registration and classification of cultural property under their jurisdiction. Based on criteria established by the Ministry of Culture, local People's Committees are responsible for identifying and proposing the registration of cultural property located or discovered in their provinces or cities.

Historical and cultural property in Vietnam typically belongs to the State, but the law also recognizes private and collective ownership of this property. Privately owned cultural property, however, is also legally under the protection of the Government. This provision of the law allows the Government to issue instructions and provide assistance in the preservation and use of cultural property. In accordance with this

⁹⁷¹ *Supra* note 4, at 587-588.

⁹⁷² *Id.* art. 9, at 589.

Law, although private ownership is acceptable, the Government's policy is to encourage donations of cultural property to the State.⁹⁷³

Finders of objects with historical or cultural characteristics have to notify the authorities without altering the object.⁹⁷⁴

Regulations on traffic in historical and cultural property

Owners of cultural property have to notify the local People's Committees of any sale or transfer of title involving this property. The People's Committees, in turn, notify the proper authorities at the appropriate levels. In the case of a sale of cultural property by a private person, national museums or other Government agencies responsible for the protection of cultural property have priority to buy, based on the price agreed upon by both parties.⁹⁷⁵

The illegal sale and exchange of historical and cultural property are forbidden. The Law also prohibits illegal possession of cultural property and the illegal transport of this property out of Vietnam unless special permission is given by the Chairman of the Council of Ministers. In accordance with Decision No. 238/TM-XNK, issued by the Ministry of Commerce, antiques are listed as one of the types of goods which may not be exported.⁹⁷⁶

Protection of historical and cultural property

The Ministry of Culture is accountable to the Council of Ministers for the management, the protection and use of historical and cultural property. But other Ministries may obtain permission to directly manage and develop historical or cultural property that falls under their expertise. Local People's Committees at the province and city levels are responsible for the protection and preservation of historical and cultural property in accordance with laws and regulations.

All cultural property found in Vietnam, whether it belongs to the State or is privately or collectively owned by its citizens, has to be registered and is protected by the Government.⁹⁷⁷ Thus, no restoration, repair, or development projects involving cultural property or historic and scenic sites can be carried out without the permission of the Ministry of Culture. For example, according to a survey of cultural heritage of Vietnam done by the Institute of Asian Culture of the Sophia University in Tokyo,⁹⁷⁸ in Hue alone there are 361 historical sites and monuments registered as cultural heritage by the Ministry of Culture of Vietnam. This

⁹⁷³ *Id.* art., at 588.

⁹⁷⁴ *Id.* art. 8, at 588.

⁹⁷⁵ *Id.* art. 3, at 588.

⁹⁷⁶ MỘT SỐ VĂN BẢN VỀ CHẾ ĐIỀU HÀNH XUẤT NHẬP KHẨU, NAM 1994 (Documents regarding the regulations on import and export - 1994), 11-12 (Hanoi, Ministry of Commerce, 1994).

⁹⁷⁷ *Id.* arts. 5-7, at 588.

⁹⁷⁸ CULTURAL HERITAGE OF VIETNAM (Tokyo, Institute of Asian Cultures of Sophia University, 1989).

list includes six archaeological vestiges, 161 historical monuments, 174 artistic monuments, and 20 scenic sites. Priority for preservation is given to the cultural heritage in Hue.⁹⁷⁹

The Ministry of Culture also has the authority to issue permits for all archaeological explorations or excavations. Permits are only issued to qualified archaeologists. And all objects discovered from the excavations belong to the State.

Government organizations and agencies responsible for the management of historical and cultural property are allowed to collect donations from the people for the preservation of the property.⁹⁸⁰ A Ministerial Circular issued jointly by the Ministry of Culture and Finance, dated August 1992, provides a special budget to cover expenditures on the protection, preservation and development of historical and cultural property.⁹⁸¹

Other than stating that the Ministry of Culture is responsible for making policy, deciding on the procedures, and administering the registration of historical and cultural property, neither the Law nor the regulations describe the criteria or the actual procedures involved in the recognition and registration of historical and cultural property. Nor do these laws provide specific penalties and sanctions for violations of legal provisions or for actions that cause damage to cultural property. Articles 16 and 17 indicate that there are rewards for finders or scholars who discover cultural property, and there are administrative or legal measures to deal with whoever violates the laws and regulations on the protection and use of historical and cultural property. The penalties for violating the provisions of this Law may be:⁹⁸²

- a warning or a fine;
- payment for the damage in kind or in money; and
- prosecution by law.

There are no specific definitions of violations of this Law or reference to any other laws, but it may be safe to assume that in serious violations of law, Chapters IV and VI on "Crimes against Socialist Property" and "Crimes against Citizens' Ownership of Property" of the 1987 PENAL CODE OF VIETNAM may be applicable.⁹⁸³

⁹⁷⁹ Hue is the imperial capital during the last Nguyen Dynasty from 1802 to 1945. Hue is also the principal city in the central part of Vietnam.

⁹⁸⁰ *Supra* note 4, art. 14, at 590.

⁹⁸¹ NHUNG QUAN ĐIỂM VÀ CHÍNH SÁCH TÀI CHÍNH DỐI VOI VĂN HÓA - THÔNG TIN (Principles and Financial Policy regarding cultures and information) 159-163 (Hanoi, Ministries of Culture and Information, 1993).

⁹⁸² *Supra* 4, at 590.

⁹⁸³ *Criminal Code of the Socialist Republic of Vietnam*, 13 REVIEW OF SOCIALIST LAW 158-162, 164-167 (No. 2, 1987).

Repatriation of cultural property removed abroad

There is no indication that Vietnam is a party to any international conventions or agreements concerning the protection of cultural property. For example, Vietnam did not sign the UNESCO Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict adopted in the Hague on May 14, 1954, and was not represented at the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects that was held in Rome, Italy, in June 1995.

Other laws establishing and protecting the cultural heritage

There may be other laws promulgated to protect the Vietnamese cultural heritage, e.g., Decree on the Preservation of Remains dated November 23, 1945.⁹⁸⁴ Article 24 of the 1984 Law also states that documents and archives relating to the cultural heritage of Vietnam are governed by the Law on the Protection of National Archives.⁹⁸⁵

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⁹⁸⁴ P. J. O'Keefe, & L. V. Prott, *eds.*, *Vietnam*, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 232 (New York, UNESCO, 1988).

⁹⁸⁵ *Supra* note 3, at 153.

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ZAMBIA**Nature and significance of cultural property**

The primary law that governs matters of cultural property in Zambia is the Natural and Historical Monuments and Relics Act of 1948, as amended.⁹⁸⁶ The Act provides for the better protection and preservation of ancient, historical and natural monuments, relics and other objects of aesthetic, historical, archaeological or scientific interest.

Definition of *cultural property*

Section 2 of this Law describes *cultural property* to mean:

...any building, ruin, stone, circle, altar, pillar, statue, tumulus, grave, rock, shelter, midden, mound or other site or thing of similar kind or remains thereof which is known or believed to have been erected, constructed or used before the 1st of January 1890, but does not include any ancient working.

On the other hand, an *ancient working* is a shaft, cutting, tunnel or stope which was made for mining purposes and known or believed to have been in existence before January 1, 1890.⁹⁸⁷

This same section also defines the term *monument* as follows:

...any ancient or national monument;...any area of land of archaeological or historical interest or contains objects of such interest;...any area of land which has distinctive geological formation;...any area of land containing rare or distinctive or beautiful floral or fauna;...any water fall, cave, grotto, avenue of trees, old tree or old building;...any object (whether natural or constructed by man) of aesthetic value or interest.

Furthermore, a national monument is deemed under § 2 of this Law to be so if it has been declared as such by § 10 of the Law of 1948, as amended. This same section also defines a *relic* to mean:

...any fossil of any kind, any petroglyph or drawing or painting or stone commonly believed to have been executed before the 1st of January 1890; any object of archaeological, historical or scientific value or interest; any anthropological or archaeological contents of any monuments or ancient workings.

Establishment of ownership of cultural property

The statutory body responsible for cultural property in Zambia is the Commission for the Preservation of Natural and Historical Monuments and Relics. It is appointed by the responsible Minister under § 3 of

⁹⁸⁶ 5 LAWS OF THE REPUBLIC OF ZAMBIA, Ch. 266 (rev., 1972).

⁹⁸⁷ *Id.* § 2.

the Law. Though a statutory body, its members are not paid salaries but remunerated for expenses connected to their work.

The powers and duties of the Commission include establishing, providing and maintaining the administrative and technical support structures for its work. The Commission also makes lists of all the monuments declared as such or to be declared in the future. They ascertain and determine ownership issues, recommend monuments for declaration to the Minister, purchase or acquire monuments, assume control and management of any monument or relic or other forms of cultural property when requested, and act as a Government Trustee in such transactions. The Commission preserves, repairs, restores or insures any monument or relic whether or not owned by it or under its control. It lends or leases any monument or relic to any museum or other public institution and undertakes excavation operations or permits the same as well as other matters dealing with the preservation and control of cultural property in Zambia.⁹⁸⁸

According to § 8, the Commission cannot alienate, mortgage or rent any monument of other forms of cultural property owned by it or of which it is a trustee for the Government without the written consent of the responsible Minister. This is an obvious limitation on the powers of the Commission compared to other Commonwealth African countries that have vested this form of power to the statutory body responsible for cultural property in their countries. In Zambia, it is the Minister who appears to enjoy more broader powers including statutory authority to declare any monument a national monument or otherwise.

Regulation and traffic in cultural property

Under § 11 of the Law, anyone who discovers any ancient monument or relic must notify the Commission in writing. Furthermore, no excavation of any ancient monument can be carried out without the written consent of the Commission. Such permission may be absolute or conditional.⁹⁸⁹ In addition, no person can without written consent of the Commission alter, destroy, damage, remove from an original site or export from Zambia, carry out any cultivation, mining or other work that can likely cause or likely injure or disturb any ancient monument, national monument, relic or other forms of cultural property. Thus § 13(2) of this Law stipulates:

Any person who desires to remove from its original site or to export from Zambia any ancient monument, national monument or relic...shall, when applying to the Commission for its consent, supply the Commission with a drawing or photograph of the monument or relic...and shall state the exact locality in which it is situated and the place to which and the purpose for which he desires to remove or export it.

Both the Minister and the Commission enjoy rule-making powers to carry out the control and regulation of cultural property in Zambia. The Minister promulgates rules under § 15 of the Law, while the Commission's power of rule-making is similar to that of a local government or local authority. It issues by-laws under § 16 of the Law.

In certain respects, the Zambian Law is identical to that of Botswana. They both vest ultimate authority in executive agencies (Minister and Commission in Zambia) (Minister, the Board, the Commissioner of Monuments, the Inspector of Monuments and the Custodian of Monuments for Botswana). The

⁹⁸⁸ *Id.* § 7.

⁹⁸⁹ *Id.* § 12.

Commission in particular is the enforcement arm of the Law. Among other things, this body regulates the nature and scope as well as the conditions upon which transactions in cultural property will take place. The Zambian Law does not seem to permit commercial transactions in articles and objects covered. Though exports of certain forms of cultural property are possible under a permit issued by the Commission, these appear confined to personal effects by non-commercial individuals rather than an acknowledgment of their commercial trade as is the case in Nigeria and Ghana.

Any offence under this Act is punishable by a fine and in default, imprisonment not in excess of six months. There are no provisions concerning protection of cultural property in times of war or for the repatriation of cultural property removed abroad.

Other laws establishing and/or protecting cultural heritage

Other laws establishing and/or protecting cultural heritage in Zambia include the National Museums Act, 1966, as amended.⁹⁹⁰ It provides for the development, establishment, control and management of museums in the country including a national museum. The Plumage Birds Protection Act of 1915, as amended,⁹⁹¹ prohibits exports of the plumage of wild birds except for scientific and educational purposes. Also relevant are the Natural Resources Act of 1962, as amended,⁹⁹² which deals with conservation of designated areas. The National Parks and Wildlife Act of 1968, as amended,⁹⁹³ deals with the establishment, control and management of national parks for the conservation and protection of wildlife and objects of aesthetic, prehistoric, historical and scientific interest. It is this Law that controls the licensing of hunting and controls the possession, transfer, sale, import and export of wild animals and trophies.

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⁹⁹⁰ *Id.* Ch. 267.

⁹⁹¹ *Id.* Ch. 310.

⁹⁹² 6 LAWS OF THE REPUBLIC OF ZAMBIA, Ch. 315 (rev., 1972).

⁹⁹³ *Id.* Ch. 316.

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