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New International Trends in the Area of Cultural Heritage

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Introduction

The scope of the global environment is now expanding so rapidly that fixed ideas about it can hardly catch up. The whole area of global cultural heritage protection is a case in point. Japanese tend to think of things only in reference to what is accepted inside their country. In fact, environmental issues are often defined in Japan as issues handled as part of the administrative activities of the Environment Agency. This view, however, is erroneous. The contents and qualities of environmental problems are constantly changing, and coming to involve more and more problems and issues. Neither is it true that environmental issues can be handled by the Environment Agency alone. A number of environmental problems come under the purview of the Agency for Cultural Affairs and Forestry Agency as well as the Ministry of International Trade and Industry, Ministry of Construction, and Ministry of Transportation. What is now required is cross-ministry cooperation and the sharing of environmental sensitivity by the various government agencies.

Internationally, an ever-increasing number of issues have been added to environmental concerns ever since the 1972 U.N. Conference on the Human Environment in Stockholm. At present, environmental concerns have come to encompass the following concerns: stopping environmental pollution from harmful substances, the rational management of natural resources including representative ecosystems, the conservation of nature including wild life, appropriate human habitats and urban planning, and proper population policies. The multiple definition of environmental issues had a great impact on the Japanese understanding that environmental problems were synonymous with industrial pollution problems. Two decades after Stockholm, at the U.N. Conference on Environment and Development (UNCED) at Rio de Janeiro, a series of new ideas was hammered out, including for instance the prevention of further deterioration of the global environment, preservation of biodiversity, sustainable development, and the establishment of global partnership on environment issues.

Thus, we need to approach global environmental issues dynamically and flexibly, freeing ourselves from the narrow fixed idea specific to Japan, as well as from the yoke of existing administrative practice. The issue of protecting cultural heritage should be placed and illuminated precisely in this context. In other words, it would be incorrect to merely ask how the Environment Agency should readjust its policies to suit internationally-recognized goals.

Rather, we should ask how domestic administrative policies and systems can be organically integrated and the necessary manpower reallocated in order to properly deal with global environmental issues.

So much for an introduction. We will now discuss the protection of cultural heritage from this point of view, examining what legal measures have already been taken or are scheduled to be taken, what characteristics these measures possess, and what roles the actors concerned are playing in regard to cultural heritage protection.

1. The Concept of Cultural Heritage

First we need to clarify the definition of cultural heritage. We have in Japanese various terms to denote the same object (*bunka isan, bunkateki isan, bunka-zai,* etc.). I went through a number of laws and other official documents but have found no unified, universal definition of cultural heritage. It is defined in various ways depending on the purpose of the conventions and laws concerned.

2. On the Convention Concerning the Protection of the World Cultural and Natural Heritage

2.1 Development Leading to the Conclusion of the Convention and Purposes of the Convention

The Convention concerning the Protection of the World Cultural and Natural Heritage was adopted by the UNESCO general conference on November 16, 1972, the same year as the Stockholm conference on the Human Environment. Twenty years after the adoption, the Japanese Diet ratified it in June 1992, making Japan the 126th party to the Convention. As of January 1995, 136 countries subscribe to it. Asian countries which have ratified it include Pakistan, India, Nepal, Afghanistan, Sri Lanka, Bangladesh, the Philippines, China, Laos, Cambodia, Thailand, Vietnam, the Republic of Korea, Malaysia, Indonesia, and Mongolia.

The purpose of the Convention is to protect, conserve and hand down to coming generations cultural and natural heritage of outstanding universal value for mankind as a whole.

2.2 Methods of Protection

The method taken by the Convention is for the State Parties to submit inventories of property, and from these inventories to create a World Heritage List, and then to use money from the Fund for the Protection of the World Cultural and Natural Heritage to assist nations to protect these heritages. However, developed nations must use their own resources. As of July 1995, there were 326 items on the list of cultural heritage, and 97 on the list of natural heritage, as well as 17 appearing in both categories, adding up to a total of 440. Figure 1 shows properties in Asian countries. Japan has the following three cultural properties: Buddhist buildings in the Horyuji area (registered in December 1993), Himeiji Castle (December 1993), cultural heritage from old Kyoto (Kyoto City, Uji City, Otsu City), (December 1994);

and two natural properties: the Shirakami Mountain region (December 1993), and Yakushima (December 1993).

Of the properties on the World Heritage List, those facing serious and specific danger and requiring major operations are put on another "List of World Heritage in Danger," and this list is publicized to the world. As of July 1994, there were 17 items on the list, including, from Asia, the Manas Wildlife Preservation Area in India and Ankor Wat in Cambodia (see Figure 1).

2.3 The System of International Protection

Article 7 of the Convention reads:

> For the purpose of this Convention, international protection of cultural and natural heritage shall be understood to mean the establishment of a system of international cooperation and assistance designed to support State Parties to the Convention in their efforts to conserve and identify that heritage.

In concrete terms, the Convention decrees the establishment of an intergovernmental committee for the protection of world heritage, called "the World Heritage Committee." This Committee is given the responsibility for establishing and publishing a "World Heritage List," composed of properties forming part of the cultural and natural heritage which it considers as having outstanding universal value "in terms of such criteria as it shall have established" (Article 11, Paragraph 2). It is also charged with compiling another list, the "List of World Heritage in Danger," of property included in the World Heritage List which requires major operations for conservation, and for which assistance has been requested under the Convention (Article 11, Paragraph 4).

The "World Heritage Fund" is a financial basis for international preservation. It is a trust fund in conformity with the provisions of the Financial Regulations of UNESCO (Article 15, Paragraphs 1, 2), and its fund consists of compulsory and voluntary contributions by the State Parties, and contributions, gifts or bequests made by other States, intergovernmental organizations, public or private bodies, and individuals (Article 15, Paragraph 3).

The application procedures, conditions, and mode for international assistance are described in detail in Article 19 and thereafter. First, international assistance is limited to properties forming part of the two aforementioned lists (Article 20). Any State Party may request international assistance to preserve world heritage properties within its own territory (Article 19).

Assistance granted by the World Heritage Committee may take the following six forms (Article 22):

(a) Studies concerning the artistic, scientific and technical problems raised by the protection, conservation, presentation and rehabilitation of the cultural and natural heritage;
(b) Provision of experts, technicians and skilled labor to ensure that the approved work is correctly carried out;
(c) Training of staff and specialists in the field of identification, protection, conservation, presentation and rehabilitation of the cultural and natural heritage;
(d) The supply of equipment;

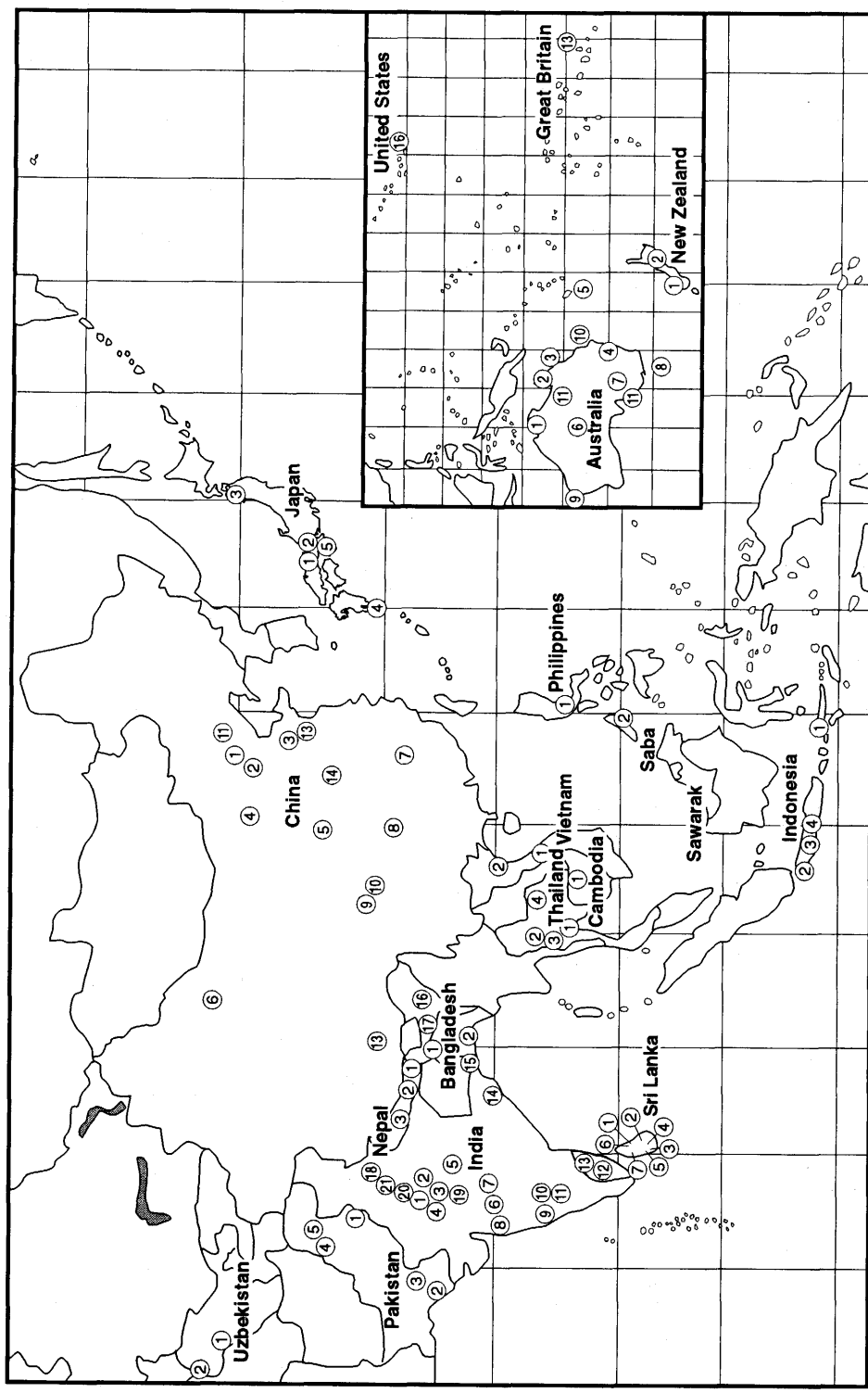

Figure 1 Cutural and Natural Heritage in Asia and the Pacific

Source: National Federation of UNESCO Associations in Japan ed., *The World Heritage Map* (Japanese version), 1995, pp. 9-10.

Uzbekistan
①Itchan Kala (C)
②The Historic Centre of Bukhara (C)
Pakistan
①Fort and Shalamar Gardens at Lahore (C)
②Historic Monuments of Thatta (C)
③Archaeological Ruins at Moenjodaro (C)
④Buddhist Ruins at Takht-i-Bahi and Neighboring City Remains at Sahr-i-Bahlol (C)
⑤Taxilla (C)
Nepal
①Sagarmatha National Park including Mt. Everest (N)
②Kathmandu Valley (C)
③Royal Chitwan National Park (N)
India
①Keoladeo National Park (N)
② Agra Fort (C)
③Taj Mahal (C)
④Fatehpur Sikri (C)
⑤Group of Monuments at Khajurah (C)
⑥Ellora Caves (C)
⑦Ajanta Caves (C)
⑧Elephanta Caves (C)
⑨Churches and Convents of Goa (C)
⑩Group of Monuments at Pattadakal (C)
⑪Group of Monuments at Hampi (C)
⑫Brihadisvara Temple, Thanjavur (C)
⑬Group of Monuments at Mahabalipuram (C)
⑭Sun Temple, Konarak (C)
⑮Sundarbans National Park (N)
⑯Kaziranga National Park (N)
⑰Manas Wildlife Sanctuary (N)
⑱Nanda Devi National Park (N)
⑲Buddhist Monastery at Sanchi (C)
⑳Qutb Minar and its Monuments, Delhi (C)
㉑Humayun's Tomb (C)
Bangladesh
①Ruins of the Buddhist Vihara at Paharpur (C)
②Historic Mosque City of Bagerhat (C)
Sri Lanka
①Ancient City of Sigiriya (C)
②Ancient City of Polonnaruva (C)
③Sinharaja Forest Reserve (N)
④Sacred City of Kandy (C)
⑤Old Town of Galle and its fortifications (C)
⑥Golden Temple of Dambulla (C)
⑦Sacred City of Anuradhapura (C)
Thailand
①Historic City of Ayutthaya and associated historic towns (C)
②Historic Town of Sukhothai and associated historic towns (C)
③Thungyai-Huai Kha Khaeng Wildlife Sanctuaries (N)
④Ban Chiang Archaeological Site (C)
Cambodia
① Angkor (C)
Vietnam
①Hue (Complex of Monuments) (C)
②Ha Long Bay (N)
Indonesia
①Komodo National Park (N)
②Ujung Kulon National Park (N)
③Borobudur Temple compound (C)
④Prambanan Temple compound (C)
Philippines
①Baroque Churches of the Philippines (C)
②Tubbataha Reef Marine Park (N)
China
①Imperial Palace of the Ming and Qing Dynasties (C)
②Peking Man Site at Zhoukoudian (C)
③Mt. Saishan (N, C)
④The Great Wall (C)
⑤Mausoleum of the First Qin Emperor (C)
⑥Mogao Caves (C)
⑦MT. Hungshan (N, C)
⑧Wulingyuan Scenic and Historic Interest Area (N)
⑨Jiuzhaigou Valley Scenic and Historic Interest (N)
⑩Huanglong Scenic and Historic Interest Area (N)
⑪The Mountain Resort and its Outlying Temples, Chengde (C)
⑫The Potala Palace, Lhasa (C)
⑬Temple of Confucius, Cemetery of Confucius, and Kong Family Mansion in Qufu (C)
⑭Ancient Building Complex in the Wudang (C)
Japan
①Himeji-jo (C)
②Buddhist Monuments in the Horyuji Area (C)
③Shirakami-Sanchi (N)
④Yakushima (N)
⑤Historic Monuments of Ancient Kyoto (Kyoto, Uji and Otsu Cities) (C)
Australia
①Kakadu National Park (N, C)
②Wet Tropics of Queensland (N)
③Great Barrier Reef (N)
④Central Eastern Australian Rainforest (N)
⑤Lord Howe Island Group (N)
⑥Uluru-Kata Tjuta National Park (N, C)
⑦Willandra Lakes Region (N, C)
⑧Tasmanian Wilderness (N, C)
⑨Shark Bay, Western Australia (N)
⑩Fraser Island (N)
⑪Australian Fossil Mammal Sites (Riversleigh/Naracoorte) (N)
New Zealand
①Te Wahipounamu (N)
②Tongariro National Park (N, C)

Note: (N) Natural heritage; (C) cultural heritage.

(e) Low-interest or interest-free loans which might be repayable on a long-term basis; and
(f) The granting of non-repayable subsidies.

2.4 Problems

Several problems have been pointed out with regard to the protection of world heritage on the basis of the Convention:

(a) The tendency for financial assistance to be concentrated in places which appear on the World Heritage List, to the detriment of other places (Rolls Royce Park and Automobile Park).
(b) A total of 326 cultural properties and 97 natural properties have appeared on the List up until now, indicating that the great majority are in the former category. Within an international climate in which there are increasing threats to natural heritage, this imbalance has been pointed out as a problem.
(c) There are world heritage properties such as Lake Plitvicka in Croatia, which is in danger but which is inaccessible because it is in a zone of conflict.
(d) There are problems of poaching and mass tourism in world heritage sites in developing countries.
(e) The screening standards used for registering sites may be too strict. This is particularly outstanding when contrasted to the standards of the Ramsar Convention.
(f) There are regional imbalances. There are many world heritage sites in Europe and Africa, and few in Asia.
(g) If we look at the domestic system in Japan and linkages between administrative organizations, we find that natural heritage is under the control of the Forestry Agency, Agency for Cultural Affairs, and Environment Agency, whereas cultural heritage is under the control of the Agency for Cultural Affairs, and that there is a tendency for the recommendations for registration and management and the implementation of protective measures after the registration to be hampered by a lack of cooperation between the agencies.

In connection with these problems, I visited Malaysia in September 1995, and would like to report on the hearing survey that I was able to conduct at that time.

The purpose of this survey was to examine Malaysia's legal responses to the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage. Malaysia ratified the Convention in 1988, four years earlier than Japan. In contrast to Japan, however, which has registered such properties as Yakushima, the Shirakami Mountain region, Himeji Castle, Buddhist buildings in the Horyuji area, and cultural heritage from old Kyoto, Malaysia has yet to add a single item to the World Heritage List. Why is this? To find the answer, I held hearings with people connected with cultural preservation in Malaysia. What I discovered is that Malaysian opinions of the 1972 Convention are extremely low. In October 1988, the Malaysian government applied for the registration of the Malacca Townships, but it was rejected by UNESCO.

The people I spoke with complained that the application procedures were too complicated and the standards for acceptance might be too strict. They also expressed doubts that they could expect to receive any financial support from UNESCO even after properties were

placed on the List. They said, however, that they had plans to make another application for the Malacca Townships.

Because of the high hurdles involved in the UNESCO Convention, movements have begun toward regional heritage registration systems. In ASEAN, an "ASEAN Regional Heritage Register System" was launched, and Malaysia has registered three areas on this list (the Malacca Townships, the MULU Gorge in Sarawak, and the Malay Peninsula's Central Primeval Jungle).

Up until now, the existence of this type of regional heritage framework within ASEAN has been completely unknown in Japan. I would like to continue my research in this area.

I believe that one reason why the countries of Southeast Asia are enthusiastic about having properties designated as either world heritage or ASEAN heritage is that this can produce an opportunity for bringing in larger numbers of foreign tourists. As indicated by the agency name, Ministry of Culture, Arts and Tourism, Malaysia is working on this under a unified administrative structure (In Japan, tourism is under the jurisdiction of the Ministry of Transportation). We cannot simply praise this system without reserve, but nonetheless I believe there is much that Japan can learn from its positive and affirmative aspects.

3. Stolen or Illegally Exported Movable Cultural Objects and International Protection

For international protection of buried and movable property of the cultural heritage, there is the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter called "1970 UNESCO Convention") which was adopted by the UNESCO general conference in 1970. In addition in order to strengthen the above Convention, a Draft Convention concerning the International Return of the Stolen or Illegally Exported Cultural Objects (hereinafter called "UNIDROIT Draft Convention") was discussed and adopted by UNIDROIT on June 23, 1995, at Rome.

3.1 Social Background

It is not unusual to hear of precious cultural artifacts or works of art being stolen from temples, shrines or museums in Japan, and later turning up abroad. This sort of cultural theft is terribly common throughout the world. The most famous instance, perhaps, is the theft, in August 1911, of *Mona Lisa* from the Louvre. An Italian artisan who sometimes worked at the Louvre came to believe that the painting had been stolen by Napoleon, and convinced himself that taking it back to Italy would be a just course of action, so he stole the picture. He was arrested in 1913 when he showed up at an antiquarian shop to sell it, and *Mona Lisa* was returned unharmed.

In 1966, 1973, 1981, and 1983, Rembrants owned by the Dulwich Picture Gallery in England were stolen, and they were discovered in 1986 at a lost and found office in a German railway station.

In a recent event that became a major controversy, 74 paintings which had been looted from Germany by the Red Army after World War II were put on display to the public at the Hermitage Museum in St. Petersburg, starting on March 30, 1995. Among the painting were

works by Degas, Van Gogh, Renoir, Cezanne and Matisse. Germany claimed that they were German property, and demanded that they be returned.

In addition, there are many cases in which local people illegally dig up buried cultural artifacts, sometimes with the assistance of police, and put them onto the world art market. For instance, there have been many cases of artifacts being sold at extremely high prices through the London Auction House.

3.2 The 1970 UNESCO Convention

At its 16th session on November 14, 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, as a means to protect cultural property against the dangers of theft, clandestine excavation, and illicit export, and to ensure that cultural institutions, museums, libraries and archives build their collections in accordance with universally recognized moral principles.

According to the Convention "cultural property" is defined as items designated, on religious or secular grounds, by a State as being of importance for archaeology, prehistory, history, literature, art or science, and which belongs to certain categories (Article 1). The categories listed in Article 1 include: (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest (I think living members of endangered species are included here); (c) products of archaeological excavations; (e) antiquities; (g) property of artistic interest; and (k) old furniture and musical instruments.

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the 1970 UNESCO Convention stipulates that the State Parties set up domestic institutions for the protection of cultural heritage and draw up a list of cultural properties which must not be exported (Article 5); that they prohibit the exportation of cultural property from their territory unless accompanied by an export certificate and publicize this prohibition (Article 6); that in cases where there is an offer of a sale of cultural property which was illicitly exported from a State Party, the State Party which receives the offer shall inform the former of the fact (Article 7-a); and that States Parties prohibit the import of cultural property stolen from museums, public monuments or similar institutions, and at the request of the State Party of origin, take appropriate steps to recover and return any such cultural property imported (Article 7-b).

Of these, Article 7-b is of particular importance:

> The States Parties to this Convention undertake . . . at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices.

In addition, the Convention contains the following stipulation:

> The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit (Article 11).

The States Parties to the Convention also undertake, consistent with the laws of each State:

(a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
(b) to ensure that their competent services cooperate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
(c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners; and
(d) to recognize the indefeasible right of each State party to the Convention to classify and declare certain cultural property as inalienable which should therefore (ipso facto) not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

Japan is not a member of the 1970 UNESCO Convention. It is said that most of the States Parties are developing countries. Among developed countries, the United States, Canada, Australia, Italy, Spain and South Korea have ratified it. Among these, the U.S. Senate declared its own unilateral interpretation of the Convention when it was ratified in 1972, weakening some regulations and adding others which were not in the Convention. For instance, it declared that this did not have an effect on the rights under state law to cultural assets, that the states preserved the right to decide whether to regulate the export of cultural assets or not, that the Convention did not bind private institutions in their collecting activities (it supported the argument that only the National Gallery, Library of Congress, and Smithsonian Institution would be bound by federal regulations), that it would not change the rules for each state to acquire ownership of movable cultural property (the *nemo dat* rule and its exceptions remain effective), and that it was prepared to take necessary actions to carry out restitution of cultural property which was stolen without compensation. As a result the conflicts between the Convention and the rules of states were eliminated, and an imbalance toward those who acquired items other than cultural property was avoided.

In addition, Italy ratified the Convention, but it has not instituted domestic laws.

3.3 Development and Current State of the Law

In Roman Law, the appropriate legal procedures for cases where a movable cultural property was stolen and transferred to a third party was the principle of *nemo dat quod non habet* (no one gives what he possesses not). In other words, the good faith of the third party is not recognized, and the rightful owner has the right to pursue them to the end. This is called *nemo dat* rule.

In contrast to this, Germanic Law had the system of Gewere, and as pronounced in the Hand wahre Hand principle of law, if a person voluntarily handed a movable property to another, it was only against that person that he was allowed to ask for it back. He could only demand it back from a third party if that third party had obtained it illegally, i.e. by stealing it or if the second party lost it (called "*senyu ridatsubutsu*"). Thus, the treatment under Roman and German Law were quite different.

Common Law adopts an approach which is close to Roman Law, and the bona fide possession of stolen goods is, in principle, not recognized. There are, however, instances when a statute of limitation expires and it becomes impossible to demand the return of property. In England, under a 1623 law, a demur of prescription was recognized, in which it

became impossible to sue for the return of a property held by another for six years. In all the United States, too, with the exception of Louisiana, which inherited the French Civil Code, the bona fide acquisition of stolen property is not recognized. However, many have statutes of limitation of between three and four years.

And what about Continental Law? Under the French Civil Code (1804), the return of stolen goods can be demanded for three years (Article 2279-2). However, once the property has been traded in the market, restitution consists of a payment of comparable sum (Article 2280). In addition, in accordance to a 1913 law on items of historical importance, such items cannot be passed to a third party and adverse possession is not recognized, though on the other hand a bona fide purchaser can demand consideration.

Austria's Civil Code (1811), which reflects Germanic Law, makes it pursuable in principle, but does not allow a person, who obtained a stolen good in good faith through a public auction or from a trader who sells similar kind of goods, to claim for return.

Germany's Civil Code (1896) does not recognize bona fide acquisition of stolen goods. Thus, pursuit is always possible with no limit. There is no requirement for compensation. However, it is impossible to demand or pursue the return of something that was transferred through a public auction procedure (Article 935).

Switzerland (1912) uses the French system, but the statute of limitation is five years. There is also a provision for monetary compensation.

Italy's Civil Code (1942) widely recognizes bona fide acquisition of goods whether they were entrusted or found, and whether they were paid for or given for free. The law, however, denies bona fide acquisition of state property. In Italy in the case where any articles with archeological and historical values are excavated, they will all become national property (Civil Code Article 822).

What about Japan? Looking at the provisions for the statute of limitations (two years, Article 193) and on monetary compensation (Article 194), one discovers that it is a direct import of the French law with the only difference being the number of years. In addition Article 21 of the Antique Dealings Act stipulates that when an antique dealer in good faith purchases stolen goods from the open market or from a trader who deals in similar kinds of goods, the victim can make a claim for it free of charge for a period of one year, and there is a similar stipulation in the Pawnshop Act. Among related legal regulations are the Cultural Properties Protection Act, which prohibits in principle the export of important cultural property (Article 44), reverts buried cultural property to the State if its ownership is unknown (Article 63); and the section in the Civil Code which refers to the discovery of lost property (Article 240) and of buried property (Article 241).

According to international civil law, the question of bona fide possession is determined according to the laws of the location where the goods were found.

3.4 The Formulation and Content of the Draft Convention

One of the aims of the UNIDROIT Draft Convention is to establish common international rules in areas which in Japan are covered in Articles 192-194 of the Civil Code, for the recognition of claims for the return of stolen goods moved across national borders. Another aim is to create completely new rules. The first two Chapters of the Convention refer to "the restitution of stolen cultural objects," and Chapter II in particular is closely related to Articles 192, 193 and 194 of Japan's Civil Code. Chapter III refers to the "Return of Illegally Exported" objects, and stipulates that a Contracting State may request the return of a cultural object illegally exported from the country. This request may be filed in a court of other

competent authority in the Contracting State where the object is present. If certain conditions are fulfilled, the illegally exported cultural object will be returned to the country of origin. This is the part which establishes a new form of request. The Draft Convention consists of two parts: one an international charter for the restitution of cultural objects and the other for the return of illegally exported cultural objects.

First, let us look at Chapter I, "Scope of Application" and "Definition." Articles 1 and 2 provide the basic framework for the entire Convention. Article 1 reads "This Convention applies to claims of an international character for: (a) the restitution of stolen cultural objects; and (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects." This "international character" means, simply, that it does not apply to domestic problems. A case where, for instance, an object stolen in Japan moves through many hands within the country, is not regarded as a target of the Convention. The Convention applies when a request is made for the return of an object which was stolen in Japan and moved to another country, such as the United States or England.

Article 2 provides a definition of cultural objects, but it is not clear. In Article 1 of the 1970 UNESCO Convention the term "cultural property" is defined as the one which belongs to a series of categories from (a) to (k), and is specifically designated as a property by a State. In the UNIDROIT Draft Convention, however, Article 1 of the 1970 UNESCO Convention is not used as it is, but rather as a provider of examples. Article 2 of the Draft Convention stipulates that "For application of the Convention 'the cultural objects' are such as those which belong to the categories listed in 1970 UNESCO Convention." Some people, therefore, criticize this definition as being vague. The explanatory comments of the Experts Committee state that it is impossible to insert a variety of views into a definition. It further states that it is very difficult to start with a clear definition, and that it is acceptable to gradually make it clear through the accumulation of concrete precedents in the framework of the purpose of the Convention.

Chapter II sets various regulations concerning "the restitution of stolen cultural objects." In Article 3(1) the basic provision is given as "The possessor of a cultural object which has been stolen shall return it." However, there is no mention anywhere of to whom it is to be returned or who has the right to file such a claim. In its report the Experts Committee gave the following reason for this ambiguity: the circumstances vary from country to country; the question of ownership may not be so problematic, but there are certain circumstances which may present difficulties, e.g., if a cultural object was being exhibited at a museum, can the museum file a claim or is it the sole right of the original owner? or what will happen when an object is stolen while it was serving as collateral for a bank loan.

Article 3(2) stipulates that "For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be deemed to have been stolen." On the other hand, the provisions concerning the return of illegally exported cultural objects, another important part of the issue, are given in Articles 5 and later, but as prescribed in Japan's Cultural Properties Protection Act, if a provision which prohibits the export of excavated cultural objects exists, a claim for restitution can be made according to the provisions given in Article 5 and later. Therefore some people have questioned the need for the stipulation in 3(2).

The next point involves the statute of limitation. Article 3-3 states that "any claim for restitution shall be brought . . . from the time when the claimant knew or should have reasonably known the location of the cultural object and the identity of its possessor," leaving the number of years optional. The views of the Experts Committee were divided on this

issue: there were two alternatives, one for a shorter period of one year and the other for three years, and the problem was slated to be set by the Diplomatic Commission meeting in June. In addition, one alternative provides a limitation of "within a period of 30 years from the time of the theft," but another alternative reads, "within 50 years."

Neither of the two shorter periods, one year or three years, fits within Japan's Civil Code's stipulation, which is two years, but coincides with France's Civil Code stipulation of three years. In both France and Japan, the starting point of reckoning is "from the time of the theft," but in the Convention it begins "from the time when the claimant knew or should have reasonably known the location of the cultural object and the identity of its possessor." It seems difficult to make an objective judgment.

Article 3-4 is a special provision concerning "public collections." Views on the statute of limitations vary by nature from country to country. In particular, there is a tendency for currently developing countries which were once the seat of ancient civilizations to insist that there should be no statute of limitations for claims for restitution. These countries said they should be able to claim restitution not just within 30 or 50 years but no matter how many years had passed. There were, however, people who warned that this would impede safe transactions. As a compromise, a stipulation was drafted to set a 75-year statute of limitation for "public collections." There are thus two optional positions here: one 75 years and the other for no statute at all. The reason for this attempt to set a very long period for public collections is many considered the 30 or 50 years prescribed in Paragraph 3 to be inadequate, and this led them to create a separate provision.

The definition of "public collection" also includes several options, including collections under the ownership of: (1) a Contracting State or, a regional or local authority of a Contracting State; (2) institutions substantially funded by a Contracting State, regional or local authority; (3) non-profit institutions which are nationally (terms "publicly" and "specially" were suggested) recognized as specially important; and (4) religious institutions. Definition (1) is clear, but the further down one goes on the list the more vague it becomes. If we take all four definitions, it would seem difficult to find any collection to which it would not apply. What this means is that the long statute of limitations would apply to everything but personal collections. It seems to me problematic to offer such a broad definition.

Article 4 of the Convention recognizes that right of the possessor of a stolen cultural object to compensation. Article 194 of the Japanese Civil Code also stipulates the right to make claims for compensation, but it seems slightly little different than Article 4 of the Convention. Concretely the article reads, "The possessor of a stolen cultural object which is required to return shall be entitled, at the time of its restitution, to fair and reasonable compensation provided that the possessor nether knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object," placing serious limitations on claims. According to the Experts Committee's explanation, this was likely written for developing countries but these kinds of compensation claims are hardly ever met. Among advanced nations, Germany may consider that it is unnecessary to have a provision on compensation, since its own Civil Code already includes the same proviso. Developing countries strongly opposed the compensation provision, since it meant they would have to pay large sums of money to ensure the return of a stolen object moved to a foreign country. As a result, the compromise phrase "fair and reasonable compensation" was inserted. This is, however, recognized only in very limited cases.

Article 4-2 contains a stipulation for judging whether the possessor has exercised due diligence. It reads, "In determining whether the possessor exercised due diligence, regard shall be had to the circumstances of the acquisition, including the character of the parties,

the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained."

The above provisions concern the return of stolen cultural objects.

The next issue involves the return of illegally exported cultural objects, which institutes a new type of right to claim which has not existed under traditional international law. As prescribed in Article 5, (1)-(a) is the most typical case, and occurs when a cultural object is exported to Country B and is present in that country in contravention of the export regulations of Country A (limited to the purpose of protecting cultural objects), Country A, the plaintiff, may ask the court or other competent authorities in Country B to order the possessor of the object to return it to Country A. In other words after the request is made to the court in Country B, the court issues an order mandating the return of the object, on the basis that it violates Country A's export regulations. This means that the court makes a decision for returning the object based on the legal regulations of a foreign country. In its report, the Experts Committee explains that this is an almost unprecedented legal situation.

This new right to claim differs slightly from that for a stolen object, in that the latter case does not require detailed reasons. The fact that the object was stolen is sufficient. However, as indicated in Paragraph 5-(2), there are substantial conditions which must be met. It reads, "The court of other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one of more of the following interests," with four categories listed, (a), (b), (c), or (d), "or establishes that the object is of outstanding cultural importance for the requesting State." The case for theft is slightly different, as these must be proven.

There is also a statute of limitation for such claims. In (4), there is a choice between one or three years. There is also a longer period, for 30 or 50 years after the date of export. There are two drafts for each.

Article 6 states that even when the above mentioned substantial conditions have been met, "the court of other competent authority of the State addressed may refuse to order the return of a cultural object in the following conditions." Conditions (a) reads that the object has a deeper relationship to culture of the State addressed. Condition (b) reads that, "the cultural object was illegally exported from the territory of the State addressed before it was illegally exported from the territory of the requesting State." In such cases the court can refuse to order its return.

In Article 8, just as with stolen objects, there is a provision that, even when the object must be returned, "the owner of the cultural object is entitled to receive fair and reasonable compensation [the first part of (1)]. However, this only applies when, "the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported" [the latter part of (1)]. The claimant is required to demonstrate this, which must be a heavy burden.

In (3) of the same Article, there is a provision that, "Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide . . .," for instance, "(a) to retain ownership of the object . . ." It is not easy to understand what this means. For instance, let us assume that a cultural object has been exported, against the export regulations of Country A, into Country B, and that it is currently in the possession of C, an individual in Country B. An agreement can be reached whereby C returns the object to Country A, but retains ownership. In this case, if C owns a building in Country A, he or she can display the object and make the building into a

museum. In other words, the object's physical presence must be returned. This is what it appears to mean.

The second choice reads "(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees." What is essential is simply for the object to be physically present within Country A, so continuing with the example above, if there is a person whom C trusts and who resides within Country A, then C can transfer the ownership to that person on the premise that that person will display it. The provision is that either (a) or (b) is acceptable.

What has been the reaction of the different countries and organizations to this draft? Several developing countries which were once the seat of ancient civilizations, such as Egypt, China, and Iran, have issued opinions concerning the Draft Convention. For instance, Egypt issued an opinion that the Convention should apply retroactively to cultural objects that are of particular importance to a requesting State or to excavated objects which are more than 100 years old. If this is accepted, then the Egyptian cultural objects displayed in the British Museum in London will have to be returned to Egyptian owners. China, for its part, has fundamentally supported the position of requesting Nations, and has worked to make the statutes of limitation as long as possible.

Iran has taken the position that there is no need for compensation. This may be related to Islam, but it claims that the taker or possessor of a cultural object, whether stolen or exported illegally, should receive divine punishment, but should not receive compensation.

Brazil has also taken a stance which is quite close to that of requesting Nations.

Japan's Civil Code provisions regarding theft were originally imported from French law. It appears that France essentially supports the Draft Convention. The three years in the Convention coincides with the three-year statute of limitation in French law, and the 30 years on the statute of limitations for launching civil suits. The point of time from which the counting begins, however, is slightly different. I think, therefore, that France will be able to accept the Draft with little resistance.

Italy basically seems to have taken the stance of victim nations, and is in agreement with France.

The German Civil Code does not provide for compensation, but since Article 10 states that the Convention shall not prevent a Contracting State from "applying any rules more favorable to the restitution or the return" of objects, it appears likely that Germany will be able to accept it with little resistance.

If we look at the reaction of the United States, we find many detailed comments in the Experts Committee report. For instance, it has pointed out that there should be a separate section for illegally excavated objects, as this differs significantly from stolen or illegally exported objects, and in addition has requested definitions of the terms "claimant," "possessor," and "theft."

Looking at private organizations, we find that the Art Trade Liaison Committee in London and the International Association of Dealers in Ancient Art, for instance, take the basic stance that Convention is unnecessary. They claim that there should be a more vibrant international distribution of art and cultural objects, and that free trade should not be limited. In concrete terms, they emphasize that duplicated cultural objects which are currently languishing in the storage rooms of museums should be put out onto the market, and that instead of instituting a total ban on the export of cultural objects such exports should be allowed but with reasonable restrictions.

What are Japan's views on the subject? There are two positions, coexistence and necessary conformity. Those who believe that conformity is necessary take the stance that confor-

mity with Civil Code and other national laws is essential, and that the Convention cannot be simply adopted as is. It can also be a position that the Convention should be ratified, but that domestic laws must be amended to conform to it. However, I think that while these points continue to be argued, a framework for international cooperation will fail to emerge. At this point the concept of coexistence will become increasingly important. The Draft Convention only applies to the international movement of cultural objects, and includes the establishment of a new special procedure for making claims for the return of such objects. Consequently, I believe that it does not matter whether it differs from current Civil Codes.

Because of this, France, from which Japan received its Civil Code, is putting efforts into the passage of the Convention, as are Germany, Austria, Belgium, Italy, the Netherlands and other European countries. The same goes for such common law countries as the United Kingdom, United States, Canada, Australia, and India. Originally there were great differences between Continental Law and Anglo-American Law in terms of how to legally solve problems involving the theft of movable cultural objects, but during the debate over this Draft Convention, there was significant harmony and cooperation between the different parties. Therefore, I think it is important for there to be mutual cooperation to overcome barriers such as those between countries using Continental Law and Anglo-American Law, between exporters and importers of cultural objects, and between developed and developing countries. We must contribute to the passage of the Convention from the point of view of protecting international cultural heritage. This is the point emphasized by coexistence theory.