

Zuozhen Liu

The Case for Repatriating China's Cultural Objects

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Foreword

This book explores the topic of restitution of cultural objects. The objects at stake were illegally removed from China a very long time ago and are now housed in Europe. From a legal point of view, should a new owner be obligated to return the objects illegally taken from the original owners? Many answers come to mind. If the law mandates a return of the objects, the new owner has to comply. If the rule of law is silent, new questions arise. For example: How do parties deal with each other outside the scope of the rule of law? The answers to these questions encompass many complex issues: the lapse of time; the knowledge of the new owner about the provenance; the knowledge of the interim owners; the activities of the original owner to seek its return; the significance of the object to both owners; can nonlegal entities, i.e., a specified group of people, qualify as owner; is cultural identity important; do universal museums need protection?

Although UNESCO has set up various treaties to protect cultural heritage, they do not work retroactively. Disputes with regard to looting of cultural objects or pillage of world heritage sites during an international armed conflict cannot be solved under the rule of the Convention for the Protection of Cultural Property in the Event of Armed Conflict. It was issued in 1954 and it has effect only if states are party to it. All other conventions in this area are from a later date.

The question of restitution or return therefore is open to debate.

The issue of ownership of cultural objects is not settled between the Western world on the one side and Africa, the Middle East, China, and many other countries on the other side. What is of more significance: a cultural object's original context or its power to impress when compared to other objects from elsewhere? The seemingly neutral issue is affected by history. Some want to avoid the shadows and endeavor not to mingle with the past. They want to maintain the status quo, while others want to balance the injustices of the past. A better outcome can be reached by publishing the history and shedding light on the provenance.

Dr. Zuozhen Liu has done just that. She discusses all of these topics in a clear way, disentangling them and offering a clear analysis. By giving examples in various cases that she explores in detail, she makes the issues accessible for

everyone. Her focus is on China, from where her examples are derived. You will never forget the history of the Dunhuang manuscripts and the legal implications after reading her description of the legal route followed. She sheds light from the legal perspective on the sale of the manuscripts by a monk to the British explorer who was better informed about the market value. The relationship of the explorer and the British Museum is still under a veil of secrecy.

This book offers a framework of the way these problems can be studied step by step. Each step offers new particularities and different legal issues. The author guides the reader through all steps. The story does not end at the conclusion of the book. Finding the right place for cultural objects will take a long time and is partly dependent on the issue of cultural identity. How society thinks about cultural identity is changing. Determination of the right place for a cultural object will follow new insights into the values of cultural identity.

The style of the book is very clear due to the help of William Fearnow. I highly recommend it.

Amsterdam

Prof. Dr. Inge van der Vlies

Preface

Related to history, law, culture, and international politics, the allocation of cultural heritage is both controversial and complicated. Beginning in the mid-twentieth century, an international legal regime was developed to protect cultural heritage against military operations and illicit trafficking. Subsequent international campaigns seeking the return of cultural heritage to their respective countries of origin have drawn public attention. My interest in this topic arose 5 years ago while studying law in China from reading the numerous press reports in mainland China, as well as attending numerous lectures, regarding the auction of Yves Saint-Laurent's bronze heads from the Old Summer Palace. My master's dissertation treated private international law applicable to the recovering of stolen cultural property. Upon completing my master's dissertation, the Guangzhou Municipality provided me funding for further research.

This book comprises the findings of my 3 years of research into the issues surrounding the repatriation of cultural objects, particularly Chinese cultural relics 'lost' in modern Chinese history, conducted under the guidance of Profs. Inge Van der Vlies and Arthur Salomons, both members of the Faculty of Law at the University of Amsterdam. Following an introduction, I study a number of specific losses of Chinese cultural relics and the legal regimes regarding the protection of cultural heritage applicable to such losses. These case studies first assess the possibility of seeking legal remedies of restitution under the contemporary legal regime. Next, they examine the cultural and ethical issues underpinning the international conventions protecting cultural heritage as well as the claims being made for the return of cultural heritage. The related issues of cultural identity, right to cultural heritage, multiculturalism, the politics of recognition, human rights, and cosmopolitanism are also studied. In the concluding chapter, I answer the research questions and suggest areas warranting future research.

This study has required knowledge in public international law, private international law, common law, ancient Chinese law, Chinese history and culture, and art theory, among other disciplines. In addition to the inherent difficulty of translating Chinese terms into English, terms such as 'unequal treaties,' 'century of

humiliation' and 'patriotism,' which are commonly used in China, are criticized in the West as ideological CPC propaganda. Although I appreciate the comments of Westerners alerting me to cultural and ideological differences and I readily admit such comments have helped me become more objective and view my topic from various perspectives, such comments have made me acutely aware of the chasm of misunderstanding between China and the West regarding this topic. I sincerely hope this book will, to some extent, lay a foundation for bridging that chasm and resolving our respective cultures' disputes over cultural heritage.

Summer 2015

Zuozhen Liu

Acknowledgments

One month before my doctoral promotion in April 2015, I had a call from a Chinese reporter, who told me that there was a Buddha statue containing a mummified monk being exhibited in a Hungarian museum. This statue was believed to be stolen from a village temple in Fujian province in the end of 1995, and then smuggled to Hong Kong. Its present possessor turned out to be a Dutch collector. This case was widely reported in China, and raised huge public interest in and attention to this mummified statue. It has been reported that some local villagers wept tears of joy, set off fireworks, offered sacrifices to the ancestors to celebrate that their God was found. It was the local villagers that make this mummified statue known over China and even the world, because they used all means to make their restitution claims heard and reported. The SACH was requested to make an official claim of the restitution of the statue on behalf of the local villagers. This case also indicates that the disputes over cultural objects are going to resonate in our world, as the illicit trade of cultural objects across borders is sustained by the demands from the art market.

I am so grateful for the opportunity of doing my Ph.D. on this topic in the law faculty of the University of Amsterdam. Before April of 2011, I would not have expected to do a Ph.D. outside of China, as studying abroad is fashionable but unaffordable for most Chinese students. One day, Prof. Yuan, who supervised my master's dissertation in China, informed me about the project launched by the Guangzhou Municipality funding students to do Ph.D. programs abroad. She encouraged me to seize this opportunity to broaden my horizons, which, in her words, might change my life. After the frustrating preparation and applications, finally I got the admission to the law faculty of the University of Amsterdam in May of 2011. Then I came to the Netherlands in the autumn of 2011. At the beginning, everything was so fresh and exciting to my eyes. Compared with the large cities in China, the skyline of Amsterdam is much lower; old-fashioned bicycles are seen everywhere; everything moves at a slower pace. However, my excitement and romantic imagination was quickly converted to frustration and

disappointment. Lack of fluency in English, gaps in knowledge, cultural differences, and homesickness all presented unexpected difficulties. Apart from that, living in Amsterdam still has not been easy. I had two bikes stolen and moved three times in the first 2 years. Fortunately, I am not alone while being faced with all these difficulties during my adventures in the Netherlands. I would take this opportunity to express my gratitude to the people who have helped me out and made my life colorful along the way.

First of all, I would like to thank my parents for their unreserved love, for their continuous belief in me, and for their disobedience of the One-Child policy by giving births to me and my younger brother. In a culture where boys are preferred, my parents love me as much as they love my two brothers. After being laid off from collective enterprises in the 1990s, they have done many low-paid jobs to pay our living expenses and support our grandparents. Growing up in the chaos of the Cultural Revolution, they did not go to university, but they saw their three children through universities. Although they believe that girls need family protection, they have supported me to live alone on the other end of the earth. Compared with the European way of life, my parents have lived a very ascetic life. The word 'luxury' does not exist in their vocabulary. They are just like many ordinary Chinese people: tolerant, hardworking, humble, firm, and content. These qualities help them to cope with all kinds of difficulties in a rapidly transforming society, which has also taught me to be strong and optimistic.

I also owe a debt of gratitude to my supervisors, Profs. Inge Van der Vlies and Arthur Salomons. Without their inspiring encouragement and professional guidance, I do not think I could have finished this book as scheduled. Apart from that, I am very grateful to Inge for her help and care in my expat life in Amsterdam. She did a lot to teach me how to enjoy the Dutch experience, by taking me to museums, concerts, and movies, by lending me a real Dutch bike, and introducing me new friends... The experts of my promotion committee also provided helpful suggestions to the completion of this book. Another debt of gratitude is due to my English teachers, particularly Bill. I feel so lucky to know Bill and Betsy. Bill is unbelievably kind-hearted to help me with the English of this book for free, and polish my daily English so patiently. He is a maximal help in the editing of this book. Also by communicating to the people with different cultural background, it helps to broaden my horizon and know the world.

I would like to thank so many kind and friendly people I have met in the Netherlands, as well as my colleagues of the Department of Constitutional and Administrative Law and other staff members in the Faculty of Law. They all made my Dutch experience joyful and fruitful. Last but not least, I would like to express my gratitude to the municipality of Guangzhou for funding my study in the Netherlands.

July 2015

Dr. Zuozhen Liu

Contents

1	The Loss of Cultural Relics in Modern Chinese History	1
1.1	Introduction	1
1.2	The Social Background of the Loss	2
1.2.1	The Opium Wars	2
1.2.2	The Unequal Treaty System	4
1.2.3	Japanese Aggression Against China	6
1.3	Plunder During Times of War	7
1.3.1	The Sacking of the Old Summer Palace	8
1.3.2	The 1900 Plunder of Beijing	10
1.3.3	Japanese Pillage in the Second World War	11
1.4	Foreign Expeditions, Thefts and Exportations	13
1.4.1	The Loss of Dunhuang Cultural Relics	13
1.4.2	The Loss of Oracle Bones	17
1.5	Recovery Activities and Chapter Conclusion	20
1.5.1	Recovery Efforts	20
1.5.2	Conclusion	22
2	Law and Ethics Protecting Cultural Objects	23
2.1	Introduction	23
2.2	Protection of Cultural Objects During Times of War	24
2.2.1	From Antiquity to the Eighteenth Century	24
2.2.2	The Nineteenth Century	26
2.2.3	The Two World Wars	29
2.2.4	The Post-War Legal Regime	31
2.3	Protection of Cultural Objects Against Illicit Trafficking	35
2.3.1	International Conventions	36
2.3.2	Chinese Legislation Protecting Cultural Relics	41

- 2.4 Soft Laws Protecting Cultural Objects 46
 - 2.4.1 Ethical Guidelines Regarding Illicit Trafficking
in Cultural Objects 47
 - 2.4.2 Ethics of Restitution of Cultural Objects. 50
- 2.5 Chapter Conclusion 53
- 3 Restitution Through International Adjudication:**
- Looted Cultural Objects Case Studies 55**
 - 3.1 Introduction 55
 - 3.2 Are States Responsible for Restitution? 56
 - 3.2.1 The Doctrine of Intertemporal Law 58
 - 3.2.2 International Conventions 62
 - 3.2.3 International Customary Law 65
 - 3.2.4 General Principles of Law 68
 - 3.3 Admissibility of the Restitution Claims. 70
 - 3.3.1 Settlement by Post-war Peace Treaties 70
 - 3.3.2 The Principle of Extinctive Prescription 76
 - 3.3.3 Legal Effects of the Resolutions 77
 - 3.4 Conclusion 80
- 4 Restitution Through Civil Litigation: A Case Study**
- of the Dunhuang Manuscripts 83**
 - 4.1 Introduction 83
 - 4.2 Characterization of the Cause of Action and Proof of Title 84
 - 4.2.1 Trespass to Chattels and Conversion 85
 - 4.2.2 Had the Claimant Acquired the Title? 87
 - 4.3 The Deprivation and Its Effects 91
 - 4.3.1 Choice of Law 92
 - 4.3.2 Application of Chinese Law 94
 - 4.3.3 Exclusion of Chinese Law 98
 - 4.4 Has the Possessor Acquired the Title? 100
 - 4.4.1 Effects of the Lapse of Time. 101
 - 4.4.2 Choice of Limitation Law. 105
 - 4.5 Conclusion 110
- 5 Cultural Identity: The Politics of Recognition 113**
 - 5.1 Introduction 113
 - 5.2 Cultural Objects as Instruments to Identity 115
 - 5.2.1 Culture and Identity. 116
 - 5.2.2 The Power of Possession: Authenticity. 119
 - 5.2.3 Who ‘Owns’ Cultural Objects? 122
 - 5.3 Recognition of Cultural Identity. 130
 - 5.3.1 The Politics of Recognition and Multiculturalism 131
 - 5.3.2 Interpretation of Recognition of Cultural Identity
in Disputes over Colonial Heritage 133

- 5.4 A Cosmopolitan View 135
 - 5.4.1 Universal Museums 136
 - 5.4.2 Balance of the Interests 139
- 5.5 Conclusion 142
- 6 Why Lost Cultural Relics Matter in China 145**
 - 6.1 Introduction 145
 - 6.2 Approaches to Chinese Cultural Relics 146
 - 6.2.1 Symbolizing and Decoding Chinese History 146
 - 6.2.2 Representing Chinese Culture 150
 - 6.2.3 Instruments to Chinese Cultural Identity 153
 - 6.3 Approaches to the Loss of Chinese Cultural Relics 158
 - 6.3.1 Loss of Cultural Relics as National Tragedy 159
 - 6.3.2 Repatriation of Lost Cultural Relics as Recognition of Identity? 163
 - 6.4 Conclusion 166
- 7 Conclusions and Recommendations. 167**
- Bibliography 173**

A Note About Chinese Dynasties and Names

Timeline of Chinese History

Xia dynasty: 2100–1600 BC
Shang dynasty: 1600–1050 BC
Zhou dynasty: 1046–256 BC
Qin dynasty: 221–206 BC
Han dynasty: 206 BC–220 AD
Three Kingdoms: 220–265 AD
Jin dynasty: 265–420 AD
Period of the Northern and Southern dynasties: 386–589 AD
Sui dynasty: 581–618 AD
Tang dynasty: 618–906 AD
Period of the Five dynasties: 907–960 AD
Song dynasty: 960–1279 AD
Yuan dynasty: 1279–1368 AD
Ming dynasty: 1368–1644 AD
Qing dynasty: 1644–1912 AD
Republic of China: 1912–1949 AD
People’s Republic of China: 1949 AD–present

Chinese Names and Romanization

In Chinese, the family name, stated first, is followed by the given name. For example: Wang Yuanlu—Wang is the family name and Yuanlu is the given name. Except when spelling names already well known outside China such as Sun Yat-sen for Sun Zhongshan, and except for a few old spellings of some Chinese place names such as Canton for Guangzhou, I have used the pinyin system, the official Chinese phonetic system for transcribing the Mandarin pronunciation of Chinese characters into the Latin alphabet, throughout.

Abbreviations

CPC	Communist Party of China
ICJ	International Court of Justice
ICOM	International Council of Museums
ICPRCP	Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of origin or its Restitution in Case of Illicit Appropriation
ILC	International Law Commission
PRC	People’s Republic of China
ROC	Republic of China
SACH	State Administration of Cultural Heritage (of the PRC)
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	The United States
UK	The United Kingdom
WWI	The First World War
WWII	The Second World War
Lieber Code	Instructions for the Government of Armies of the United States in the Field (April 24, 1863)
Brussels Declaration	Project of an International Declaration concerning the Laws and Customs of War (Brussels, August 27, 1874)
Oxford Manual	The Laws of War on Land (Oxford, September 9, 1880)
The 1899 Hague Convention (II)	Convention (II) with respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, July 29, 1899)
The 1907 Hague Convention (IV)	Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, October 18, 1907)

Roerich Pact	Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Washington, April 15, 1935)
The 1954 Hague Convention	Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, May 14, 1954)
The 1970 UNESCO Convention	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, November 14, 1970)
The 1995 UNIDROIT Convention	Convention on Stolen or Illegally Exported Cultural Object (Rome, June 24, 1995)
The ICTY Statute	Statute for the International Criminal Tribunal for Yugoslavia (United Nations Security Council, May 25, 1993)
The Rome Statute of ICC	Rome Statute for the International Criminal Court (Rome, July 17, 1998)

Terminology

Cultural Heritage, Cultural Property, Cultural Objects, Cultural Relics, and Art

Twentieth Century international legal conventions have variously used terms such as ‘cultural heritage,’ ‘cultural objects,’ and ‘cultural property’ when referring to an item of cultural value.¹ ‘Cultural object’ is used in The 1995 UNIDROIT Convention. The 1954 Hague Convention and the 1970 UNESCO Convention use ‘cultural property.’ More recently, the 1972 UNESCO Convention concerning the Protection of World Cultural and Natural Heritage, the 2001 UNESCO Convention for the Protection of Underwater Cultural Heritage, and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage use ‘cultural heritage.’ According to cultural rights expert Farida Shaheed, from a human rights perspective ‘cultural heritage is to be understood as resources enabling the cultural identification and development processes of individuals and communities which they, implicitly or explicitly, wish to transmit to future generations.’² Although the existing international conventions use ‘cultural heritage’ to encompass both tangible and intangible cultural heritage, this study discusses only tangible cultural heritage.

At the previous stage, the term ‘antiquities’ (古物) was more widely used, but the term ‘cultural relics’ (文物) is more commonly used in the contemporary Chinese legal documents. Beginning with the Tang dynasty, ‘cultural relics’ referred to historical remains of previous dynasties and their celebrities. Coming into use with the Republic of China, ‘cultural relics’ and ‘antiquities’ refer to the

¹There is a disagreement over ‘cultural property’ versus ‘cultural heritage.’ To Prott and O’Keefe, ‘property’ connotes ownership, while ‘heritage’ creates a perception of something handed down, cared for and cherished. Because ‘cultural heritage’ connotes the interconnection between people and the items, some argue that ‘cultural heritage’ rightfully supersedes ‘cultural property.’ For more information, see Prott and O’Keefe (1992).

²Shaheed (2011).

tangible legacy of valuable historical, artistic, and scientific items.³ Contemporary PRC legal documents use ‘cultural relics’ more widely than ‘antiquities.’⁴ In the PRC Law on Protection of Cultural Relics of 2002, ‘cultural relics’ are items of historical, artistic, or scientific value dating from various historical periods, together with significant items related to more recent or contemporary major events, revolutionary movements or famous individuals (Article 2). Immovable cultural relics are protected at the national, provincial, and municipal or county level depending on their importance and value. Movable cultural relics are divided into valuable cultural relics and ordinary cultural relics, and valuable cultural relics are further divided into three grades (Article 3). Administrative departments at or above the county level authenticate and grade cultural relics.

‘Art’ and ‘works of art’ are also used. According to Canadian legal theorist Rosemary J. Coombe, in the eighteenth century, ‘art’ referred primarily to ‘skill and industry;’ not until the nineteenth century was ‘art as imaginative expression distinguished from ‘art’ as industry and utilitarianism.’⁵ In *The Predicament of Culture*, James Clifford posits that ‘the capacity of art to transcend its cultural and historical context is asserted repeatedly.’⁶ According to Clifford, the ‘art-culture system’ developed in the nineteenth century recognizes two categories of expressive works of esthetic value in the context of European colonialism and imperialism: first, ‘authentic masterpieces’ are created by individual geniuses, the second are ‘authentic artifacts’ created by cultures imagined as collectivities.⁷ Because I agree with Coombe that although Clifford’s ‘art-culture system’ continues to inform property law, his categories may no longer be appropriate in a post-colonial context,⁸ the cultural objects discussed herein include both ‘authentic masterpieces’ and ‘authentic artifacts,’ unless otherwise specifically noted. As Craig Clunas observes, the term ‘Chinese art’ was created in the nineteenth century in Europe and North America. Before the nineteenth century, no one in China considered textiles, calligraphy, paintings, sculptures, ceramics, and other works as parts of a single field of enquiry, despite the long and sophisticated tradition of writing about, collecting, showing, and consuming such works by successive Chinese elites.⁹

³The Chinese term for ‘cultural relics,’ ‘*wenwu*’ (文物) first appeared in the first Chinese narrative history, *Chronicle of Zuo* (*Zuozhuan*, covering 722–468 BC), and referred to objects used in the ritual and ceremonial systems originated during the West Zhou dynasty. See Lei (2012), at 4–5.

⁴In today’s Chinese museum community, cultural relics can be divided into two categories: antiquities and modern cultural relics. Antiquities are cultural relics from before 1840, while modern cultural relics are objects of historical importance related to modern Chinese history. See Zhang Song, ‘Legal History of Protecting Cultural Heritage in China’ (in Chinese), *China Ancient City* (2009), no. 3, pp. 27–33.

⁵Coombe (1993), at 255.

⁶Clifford (1988), at 195.

⁷*Ibid.*, at 215–251.

⁸Coombe, *supra* note 5, at 255.

⁹See C. Clunas, *Art in China*, Oxford: Oxford University Press 1997, at 9, 12, 125.

Because ‘cultural property,’ ‘cultural objects,’ ‘cultural heritage,’ ‘cultural relics,’ and ‘art’ have been used in various legal documents and writings, their precise meaning when used herein depends on the context in which they appear.

Return, Restitution, Recovery, and Repatriation

‘Return’ and ‘recovery’ are both value-free, focusing on the interest or action of the requesting party.¹⁰ Wojciech Kowalski claims that ‘restitution’ arose in Roman private law as ‘restoration of the previous state’ pursuant to the maxim ‘*restitutio in integrum*’¹¹ so that in a general sense, restitution is connected with responsibility and depends on a given legal system and time of origin.¹² Because ‘restitution’ invariably denotes an unlawful situation such as theft or pillage, the use of ‘restitution’ when discussing the relocation of cultural objects is contentious.¹³

The twentieth session of UNESCO’s General Conference in 1978 makes a clear distinction between ‘restitution’ and ‘return.’¹⁴ The *Guideline for the Use of the ‘Standard Form concerning Requests for Return or Restitution’* issued by UNESCO in 1986 provides: “The term ‘restitution’ should be used ‘in case of illicit appropriation,’ i.e., when objects have left their countries of origin illegally, according to the relevant national legislation and with particular reference to UNESCO’s 1970 Convention on the subject.”¹⁵ ‘Return’ “should apply to cases ‘where cultural objects left their countries of origin prior to the crystallization of national and international law on the protection of cultural property. Such transfers of ownership were often made from a colonized territory to the territory of the colonial power or from a territory under foreign occupation. In many cases, they were the result of an exchange, gift, or sale and did not therefore infringe on any laws existing at the time. In some cases, however, the legitimacy of the transfer can

¹⁰L.V. Prott, ‘Note on Terminology,’ in L.V. Prott (ed.), *Witness to History: A Compendium of Documents and Writings on the Return of Cultural Objects*, Paris: UNESCO 2009, at xxi.

¹¹See W.W. Kowalski, *Restitution of Works of Art pursuant to Private and Public International Law* (Receuil des Cours 288), Leiden: Nijhoff Online 2001, at 24.

¹²*Ibid.*, at 24–25. Along with compensation and satisfaction, restitution is a form of reparation provided in the Draft Articles on Responsibility of States for Internationally Wrongful Acts wherein restitution is intended ‘to re-establish the situation which existed before the wrongful act was committed.’ There are two exceptions to the foregoing rule of restitution: when restitution is not materially possible, and when the duty of restitution would involve a much heavier burden than compensation. The first exception relates to the circumstance of the wrongful act. For example, a destroyed cultural object cannot be the subject of a restitution for the simple reason it no longer exists. The second exception relates to the capacity or capability of the wrong-doing state (Article 35).

¹³Pratt, *supra* note 10, at xxi–xxiii.

¹⁴UNESCO, *Guidelines for the Use of the ‘Standard Forum concerning Request for Return or Restitution’*, CC-86/WS/3, (April 30, 1986), at 11.

¹⁵*Ibid.*

be questioned. Among the many variants of such a process is the removal of objects from a colonial territory by people who were not nationals of the colonial power. There may have also been cases of political or economic dependence which made it possible to effect transfer of ownership from one territory to another which would not be envisaged today.”¹⁶ ‘Restitution’ and ‘return’ are used herein in accordance with the foregoing.

‘Repatriation’ is used herein in accordance with the definition provided by Lyndel Prott, a leading authority on cultural heritage law. According to Prott, ‘repatriation’ applies not only to returns from one country to another, but also to returns from an institution to a tribal or indigenous community within the same country.¹⁷ Similarly, according to Kowalski, the destination of repatriation can be either the location or country where the cultural property belongs or the ethnic group that was its original owner.¹⁸ Repatriation aims to protect the integrity of cultural heritage in the event of cession of territory or the breakup of states. The principal objective of repatriation is attaining and maintaining a heritage’s territorial attachment.¹⁹ ‘Repatriation’ is used herein because in addition to the property law aspects of cultural objects, this study explores the interconnection between cultural objects and not only states but cultural groups.

¹⁶*Ibid.*

¹⁷Prott, *supra* note 10, at xxiii.

¹⁸W.W. Kowalski, ‘Types of Claim for Recovery of Lost Cultural Property’, *Museum International* 57 (2005), no. 4, at 95.

¹⁹*Ibid.*, at 97.

Introduction

The bronze heads from the Old Summer Palace were part of the water clock designed by the Italian Jesuit missionary priest Giuseppe Castiglione for the European-styled palaces of the Old Summer Palace at the Qing Court.²⁰ Missing from the Old Summer Palace after it was ransacked and destroyed in 1860 by Anglo-French troops, the bronze heads began to appear on the international art market in the 1980s.²¹ The 2000 auction of the bronze heads of the monkey, ox, and tiger by Christie's and Sotheby's in Hong Kong drew both local and international media attention.²² Although the SACH urged the auction houses not to sell the looted treasures, relying on the 'one country, two systems' principle, Christie's and Sotheby's decided they could proceed with impunity under the laws of

²⁰The fountain featured a large, clam shell-shaped basin surrounded by 12 carved, stone statues of clothed, seated humans, each with head of one of the Chinese zodiac animals representing a 2 h period in the Chinese horary cycle. Each statue spouted water through its mouth for 2 h of the day, and all twelve spouted water simultaneously at noon.

²¹An American antiques dealer reportedly discovered another three bronze heads (ox, tiger, and horse) in Palm Springs, California, in 1985 and purchased them for US\$1500 each. The bronze heads of the monkey and the boar, exhibited in the Metropolitan Museum of Art from 1980 through 1981, were auctioned by Sotheby's in New York in 1987. The bronze head of the monkey was purchased by an American collector for US\$165,000, and the bronze head of the boar was purchased by a Taiwanese entrepreneur for US\$150,000. In 1989, the bronze heads of the ox, the tiger, and the horse were auctioned by Sotheby's in London. A telephone buyer paid £148,500 for the ox, £137,500 for the tiger, and £181,500 for the horse. The telephone buyer was Wang Dingqian, director of My Humble House Corporation, an antiques dealer in Taiwan, which subsequently exhibited the three bronzes in Taiwan, thereby bringing them to the attention of the public. See Wu Shu, *Who is Collecting China* (in Chinese), Taiyuan: Shanxi Renmin Chubanshe 2008, at 76–82.

²²See Tuyet Nguyet, 'Editorials', *Arts of Asia*, April 30, 2000; Erik Eckholm, Mark Landler, State Bidder Buys Relics For China, *The New York Times*, May 3, 2000, viewed June 5, 2013, <http://www.nytimes.com/2000/05/03/arts/state-bidder-buys-relics-for-china.html>.