

UST LAW JOURNAL

THE OFFICIAL PUBLICATION OF THE UST GRADUATE SCHOOL OF LAW



VOLUME 2

DECEMBER 2024

UST LAW JOURNAL

Volume 1, Issue No. 1

December 2024

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**UST LAW JOURNAL (ISSN) is the official publication of the
UST Graduate School of Law Program**

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4f Buenaventura Garcia Paredes O.P. Building
University of Santo Tomas, España Boulevard, Sampaloc,
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EDITOR'S NOTE

Welcome to this 2024 Online Issue of *The UST Law Journal*, where we continue our commitment to providing thoughtful and rigorous analysis of the most pressing legal questions of our time. In this edition, we explore a diverse range of topics that reflect the ever-evolving landscape of law, from emerging constitutional debates to the latest developments in judicial reform governance and international human rights.

As we publish this issue, our field is at a critical juncture. Legal practitioners, policymakers, and scholars are grappling with complex challenges—from the intersection of law and critical legal philosophies to the shifting dynamics of ethics, judicial reform, and economic implications in an increasingly globalized world. This journal aims to serve as a forum for cutting-edge research, fostering dialogue among those who seek to understand, shape, and respond to these challenges.

We are particularly excited to feature a series of articles that delve into topics of great contemporary relevance, such as strengthening Filipino's cultural heritage, the governance structure of the criminal justice system and judicial reforms, the evolving narrative on constitutional change, legal-philosophical norms of public morality, and the notion of justice. These contributions advance academic discourse and provide valuable insights for legal practitioners, academe, and jurists navigating the practical realities of law in today's fast-paced, interconnected society.

As always, we are grateful to our contributors for their expertise and dedication and to our Editorial Board for their tireless efforts in bringing this issue to fruition. Through their hard work and commitment, we can continue to produce a journal that meets the highest standards of scholarship and impact.

With its foundational commitment to encouraging broader discussions through diverse legal perspectives, this issue aims to foster deeper insights for the Philippine legal community. We hope this issue sparks thoughtful reflection and inspires new avenues for inquiry in the legal profession. Thank you for your continued readership and support.

Sincerely,

IRENE D. VALONES, DCL, DPA
Editor-in-Chief
December 5, 2024

PRESERVING OR TAKING OF IMPORTANT CULTURAL PROPERTY?: REVISITING THE LAWS ON NATIONAL CULTURAL HERITAGE OF THE PHILIPPINES

By:

ATTY. MARRIANNE G. REGINALDO¹

ABSTRACT

Property owners are entitled to the possession and enjoyment of properties as attributes of their ownership, however, when the State eventually effectively takes control of or interferes with the use, enjoyment, or benefit of important cultural properties through the implementation of the laws on national cultural heritage, it leads to the depreciation of the economic value of the privately owned important cultural properties, even when such properties are not seized and legal title is unaffected.

The concept of ownership rights based on the absolute individual right to the peaceful enjoyment of possessions is restricted by measures and rules focused on cultural property preservation and protection. Private ownership and important cultural property preservation are indeed in continuing tension. As such, this article ventures to the notion of the increased protection of cultural properties, particularly important cultural properties, along with that of private ownership, which may bring about indirect expropriation or taking.

The findings of the study revealed that recent developments in the world indicate a trend towards increased protection for cultural properties while requiring more sacrifices from private owners. In the domestic setting, there have been restrictions because of the enactment of R.A. 10066, which is focused on protecting cultural properties, leaving private owners of important cultural properties sacrificing their ownership rights.

Keywords: *private ownership, indirect expropriation, important cultural property, cultural preservation*

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I. INTRODUCTION

The Philippines is home to many cultural properties that highlight its rich history and diverse heritage. These properties, publicly and privately owned, are conserved, developed, and even promoted by the State and private owners as these constitute the historic and artistic wealth of the nation. Sections 14-18, Article XIV of the 1987 Philippine Constitution², provide for the preservation, conservation, and popularization of national cultural heritage. Increased protection of these properties is also evident through the passage of cultural laws, particularly Republic Act (RA) No. 10066 or the *National Cultural Heritage Act of 2009*³, and RA No. 11961 (*An Act Strengthening the Conservation and Protection of Philippine Cultural Heritage Through Cultural Mapping and an Enhanced Cultural Heritage Education Program*),⁴ which provide for the categories, privileges, and dealings of these cultural properties. RA 10066 categorizes the country's cultural properties into (a) national cultural treasures; (b) important cultural property; (c) world heritage sites; (d) national historical shrines; (e) national historical monuments; and (f) national historical landmark, whether public or privately owned, moveable or immovable, and tangible or intangible.⁵ To pursue the general interest of protecting cultural properties, R.A. 10066 contains provisions that restrict dealings as well as conservation measures related to important cultural properties, to wit:

Section 11, Article III

Dealings of Cultural Property. - No cultural property shall be sold, resold or taken out of the country without first securing a clearance from the cultural agency concerned. In case the property shall be taken out of the country, it shall solely be for the purpose of scientific scrutiny or exhibit.

² Section 14. The State shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.

Section 15. Arts and letters shall enjoy the patronage of the State. The State shall conserve, promote, and popularize the nation's historical and cultural heritage and resources, as well as artistic creations.

Section 16. All the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition.

Section 17. The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.

Section 18.

1. The State shall ensure equal access to cultural opportunities through the educational system, public or private cultural entities, scholarships, grants and other incentives, and community cultural centers, and other public venues.

2. The State shall encourage and support research and studies on the arts and culture.

³ An Act Providing for the Protection and Conservation of the National Cultural Heritage, Strengthening the National Commission for Culture and the Arts (NCCA) and Its Affiliated Cultural Agencies, and for Other Purposes, Section 4, Art. III, (March 26, 2010) (Phil.).

⁴ An Act Strengthening the Conservation and Protection of Philippine Cultural Heritage Through Cultural Mapping and an Enhanced Cultural Heritage Education Program, August 24, 2023

⁵ Republic Act (RA) No. 10066 (2010), Section 3 (w)

Section 15, Article V

Conservation of Cultural Property. - All intervention works and measures on conservation of national cultural treasures, important cultural property, as well as national historical landmarks, sites or monuments and structure previously marked by the National Museum and/or the National Historical Institute before the implementation of this Act, shall be undertaken through the appropriate cultural agency which shall supervise the same.

The appropriate cultural agency shall approve only those methods and materials that strictly adhere to the accepted international standards of conservation.

On the other hand, the RA No. **11961** provides the **following categories of “cultural properties”**

Section 4, Article III

Categories. - The cultural property and natural property of cultural significance of the country shall be categorized as follows:

(a) Grade I Level: National cultural treasures; national historical shrines; national historical monuments; national historical landmarks; and WHS and other cultural and natural heritage properties or elements inscribed or designated by international convention including, but not limited to, UNESCO lists of intangible cultural heritage, Memory of the World, World Network of Biosphere Reserves, global geoparks, wetlands of international importance, and ASEAN heritage Parks;

(b) Grade II Level: Important cultural property and natural property of cultural significance; heritage zones; archaeological sites; heritage houses; historic sites; all Gabaldon school buildings; other marked structures; and heritage trees; and

(c) Grade III Level: All other cultural property and natural property of cultural, significance in the Philippine Registry of Heritage.

Specifically, this article deals with the increased protection of cultural properties, particularly “important cultural properties,” and its implications for private ownership. “Important cultural properties” refer to those having

exceptional cultural, artistic, and historical significance to the Philippines as determined by the National Museum and/or National Historical Institute.⁶ Important cultural properties include works by the deceased *Manlilikha ng Bayan*⁷ and national artists; archeological and traditional ethnographic material; movable or immovable structures at least fifty (50) years old; archival materials or documents at least fifty (50) years old;⁸ and rare books⁹, special collections, and incunabula.¹⁰ There are also presumed important cultural properties which are those not declared as National Cultural Treasures, United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Sites, National Historical Shrine, National Historical Landmarks, National Historical Monument, or Important Cultural Property but possess the characteristics of an important cultural property.¹¹

However, the traditional concept of rights to property based on the absolute right of individuals to enjoy their possessions peacefully is also enshrined in the Constitution¹² and other laws. With increased protection provided under the provisions of RA 10066, private owners of important cultural properties are constrained in the peaceful enjoyment of their possessions by several rules concerning cultural property preservation. An owner of a property is entitled to the possession of the same as an attribute of his or her ownership. Jurisprudence explained that “an owner who cannot exercise the seven “*juses*” or attributes of ownership - the right to possess, to use and enjoy, to abuse or consume, to accessories, to dispose or alienate, to recover or vindicate and to the fruits - is a crippled owner.”¹³ When the State eventually invokes the laws on national cultural heritage, it essentially seizes or interferes with the use and enjoyment of privately owned important cultural properties, depreciating their economic value. Even when such items are not seized, and legal title is unaffected, indirect expropriation or taking occurs.¹⁴

⁶ RA No. 10066 (2010), Section 3 (w)

⁷ A citizen or a group of citizens engaged in any traditional art uniquely Filipino, whose distinctive skills have reached such a high level of technical and artistic excellence and have been passed on to and widely practiced by the present generations in his/her community with the same degree of technical and artistic competence, Section 3 of RA 7355 or *Manlilikha ng Bayan Act*

⁸ Public and private records in any format which have been selected for permanent preservation because of their evidential, historical information value; otherwise known as archival materials collections or archival holdings, Section 6 (e) of the Implementing Rules and Regulations of RA No. 10066

⁹ All Filipiniana books printed or publish before 1945. It also includes original manuscripts, exceptional collections, and other publications of historical importance, Section 6 (kk) of the Implementing Rules and Regulations of RA No. 10066

¹⁰ Printed works produced by the native press when the art of printing in a particular country or locality is still in infancy. In the Philippines, historians and bibliographers often refers to the years 1593 to 1640 our incunabula period, Sec. 6 (x) of the Implementing Rules and Regulations of RA No. 10066

¹¹ *About PECUP*. (n.d.). Talapamana Ng Pilipinas. Retrieved March 2, 2023, from <https://www.precup.ncca.gov.ph/index.php/talapamana/about-precup>

¹² Article III, Section 9. Private property shall not be taken for public use without just compensation.

¹³ *Samartino v. Raon*, G.R. No. 131482, July 3, 2002.

¹⁴ Barklem, C. B., & Prieto-Ríos, E. A. (2011). *The Concept of “Indirect Expropriation”, its appearance in the international system and its effects in the regulatory activity of governments* (LLM Thesis, Universidad Sergio Arboleda, Colombia). Retrieved December 8, 2022 from <https://www.redalyc.org/pdf/1002/100222638005.pdf>

Private ownership and cultural property protection and preservation are two interests that are both protected by the Philippine Constitution and pertinent laws. Through the enactment of RA No. 10066 and RA No. 11961, the country adopted more extensive legislation protecting cultural properties. On the other hand, the traditional concept of property rights, as provided in the Civil Code, is based on owners' rights to enjoy and dispose of a thing. However, interference in the form of increased protection of cultural properties, particularly those privately owned, may restrict owners' rights to their properties or even impose charges or burdens.

Earning notoriety in the international context, particularly on foreign investment laws, indirect expropriation may result from measures that a State takes to regulate economic activities within its territory.¹⁵ There is an indirect expropriation when the investor's legal title to its investment remains unaffected, and it may even have physical control of its property, however, the investment will still be deprived of its economic use.¹⁶ Indirect expropriation's decisive element is the substantial loss of control or economic value without a physical taking of the foreign investment.¹⁷ Physical invasion of property is not the basis for characterizing expropriations, but it is the erosion of rights associated with ownership by State interferences.¹⁸

Restrictions on ownership rights resulting from Sections 11 and 15 of RA No. 10066 caused a disproportionate burden on the owners of important cultural properties, making them crippled as they could not exercise all attributes of their ownership. Deprivation of ownership brought by the restrictions without fair or just compensation prima facie violates ownership rights that lead to indirect expropriation. Though still not recognized and used in the domestic setup, indirect expropriation inevitably occurs when there is interference by the State in the use, enjoyment, or benefits derived from a property, even when the property is not seized, and the legal title of the property is not affected.

This article explores the legal mechanism drawing from the "important cultural property" as declared under RA No. 10066 and RA No. 11961; analyzes how Sections 11 and 15 of RA 10066 restrict the ownership rights of important cultural property owners; surveys cultural property laws of other countries; and finally, adopts concepts and policies from other countries which may be applied to important cultural properties and may be considered or recommended for the possible amendment of R.A. 10066.

¹⁵ Nikièma, S. (2012). Best Practices Indirect Expropriation. In *iisd.org*. The International Institute for Sustainable Development. Retrieved December 8, 2022, from https://www.iisd.org/system/files/publications/best_practice_indirect_expropriation.pdf

¹⁶ Csernus, M. (2022, October 21). *Indirect Expropriation* (A. Ugale, Ed.). Retrieved December 7, 2022, from <https://jusmundi.com/en/document/publication/en-indirect-expropriation>

¹⁷ Schreuer, C. (2005b). *The Concept of Expropriation under the ETC and other Investment Protection Treaties*. Retrieved January 23, 2023, from https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0272.pdf

¹⁸ United Nations Conference on Trade and Development. (2000). *Taking of Property*. United Nations Conference on Trade and Development. Retrieved November 10, 2023, from <https://unctad.org/system/files/official-document/psiteitd15.en.pdf>

The author revisits the provisions of R.A. 10066, particularly Sections 11 and 15, which primarily focused on the restrictions imposed on the dealings and conservation of important cultural properties. As such this article seeks to inquire on: (a) How do present laws in the Philippines define and declare important cultural property?; (b) How are ownership rights of private individuals and entities owning important cultural properties restricted under Sections 11 Article III and Section 15 Article V of RA No.10066?; (c) How do other countries protect and conserve their cultural properties?; and, (d) How can the Philippines adopt foreign policies and concepts in relation to important cultural property?

The first part of this article introduces the concept of indirect expropriation under the notion that if the attributes of ownership are subjected to restrictions, sacrifices are to be required from private owners of important cultural properties. Examining the protection and conservation legal mechanism of important cultural properties is essential as it is related to attributes of ownership and the State's indirect expropriation, which have not yet been explored. Sections 11 and 15 of RA No.10066 are correlated to the attributes of the ownership under the Philippine Civil Laws and the Roman Laws.

The second part deals with the discussions of pertinent cases and the laws involving attributes of ownership explaining and expounding on each attribute to highlight that indirect taking or expropriation takes place when there are restrictions or interference imposed on the rights to ownership of important cultural property owners, taking into account the newly promulgated law - RA No. 11961 (*An Act Strengthening the Conservation and Protection of Philippine Cultural Heritage Through Cultural Mapping and an Enhanced Cultural Heritage Education Program, Amending for the Purpose Republic Act No. 10066, Otherwise Known as The "National Cultural Heritage Act Of 2009*) signed into law on 24 August 2023.¹⁹

The third part of the article elaborates on the literature regarding policies and enactments of different countries in protecting and conserving their cultural properties by comparing the laws, rules, and regulations enacted in different countries and the Philippines.

II. PHILIPPINE LAWS ON "IMPORTANT CULTURAL PROPERTY"

The National Cultural Heritage Act of 2009 of the Philippines, or RA No. 10066, which aims to protect, preserve, conserve, and promote the country's cultural heritage, its property and history, and the ethnicity of local communities, endeavors to create a balanced atmosphere where the

¹⁹ The new law renumbered some provisions (*Section 15 of R.A. 10066 is now Section 18 of R.A. 11961*).

historic past coexists in harmony with modern society.²⁰ The law defines the term “Important Cultural Property” in Section 3 (w), to wit:

“xxx
(w) “Important cultural property” shall refer to a cultural property having exceptional cultural, artistic and historical significance to the Philippines, as shall be determined by the National Museum and/or National Historical Institute.”

For purposes of protecting cultural properties against the threat of exportation, modification, or demolition, works by a *Manlilikha ng Bayan*, a national artist, shall be considered “important cultural properties” unless otherwise declared by the NCCA.²¹ Archaeological and traditional ethnographic materials are important cultural properties unless declared otherwise by the National Museum.²² Works of national heroes, marked structures, and structures dating at least fifty (50) years old are important cultural properties unless declared otherwise by the National Historical Institute (NHI).²³ Similarly, archival materials or documents dating at least fifty (50) years old shall also be considered as important cultural properties unless declared otherwise by the National Archives.²⁴ Section 5 of R.A. 10066 specified that property owners may petition the appropriate government agency to remove the presumption of important cultural property, which shall not be unreasonably withheld. These are presumed important cultural properties that are not declared as National Cultural Treasures, UNESCO World Heritage Sites, National Historical Shrines, National Historic Landmarks, National Historical Monuments, or Important Cultural Property but possess the characteristics of an important cultural property.²⁵

In the newly promulgated law, R.A. No. 11961, “important cultural property” is defined as “a cultural property that has exceptional cultural, artistic, and historical significance to the Philippines, and has been officially declared as such by law or the pertinent cultural agency or agencies.”²⁶ It is considered under the Grade II Level category provided under Section 4 (b), Article III. Other Grade II Level cultural properties include the following: natural property of cultural significance; heritage zones; archaeological sites; heritage houses; historic sites; all Gabaldon school buildings; other marked structures; and heritage trees.²⁷ The amendments are hugely focused on comprehensive cultural mapping and enhanced cultural heritage education programs. Local government units (LGUs) play a great role in cultural mapping while assisted by cultural agencies. The new law provides for Local Cultural Inventories, which is considered one of the criteria for receiving a Seal of Local Governance for LGUs.²⁸ Aside from this, the right to conduct a

²⁰ RA No. 10066 (2010), Section 2

²¹ RA No. 10066 (2010), Section 5 (a and b)

²² RA No. 10066 (2010), Section 5 (c)

²³ RA No. 10066 (2010), Section 5 (d, e, and f)

²⁴ RA No. 10066 (2010), Section 5 (g)

²⁵ *Ibid.*, 11

²⁶ Section 3 (bb), Article II

²⁷ Section 4 (b), Article III

²⁸ Section 14 (b), Article V

comprehensive cultural mapping of their tangible and intangible heritage, whether located within their ancestral lands or domains by indigenous cultural communities or peoples, is also provided.

Other salient features of R.A. 11961 include the following: categorization of cultural property and natural property of cultural significance under Section 4, Article III into Grade I Level (*national cultural treasures; national historical shrines; national historical monuments; national historical landmarks; and WHS and other cultural and natural heritage properties or elements inscribed or designated by international convention including, but not limited to, UNESCO lists of intangible cultural heritage, Memory of the World, World Network of Biosphere Reserves, global geoparks, wetlands of international importance, and Association of Southeast Asian Nations (ASEAN) heritage Parks*); Grade II Level; and Grade III Level (*all other cultural property and natural property of cultural, significance in the Philippine Registry of Heritage*); establishment of a Philippine Registry of Heritage as provided in Sec. 14, Art. V; and giving of priority government funding for protection, conservation, and restoration of Grades I and II cultural properties under Sec. 7, Art. III.

In declaring a particular property as an important cultural property, Sec. 8 of R.A. 10066 (*and Sec. 11 of the IRR*) provided the following procedure that shall be observed:

(a) A declaration or delisting of a cultural property as a national cultural treasure or an important cultural property shall commence upon the filing of a petition by the owner, stakeholder or any interested person, with the Commission, which shall refer the matter to the appropriate cultural agency;

(b) Upon verification of the property's suitability as an important cultural property, the cultural agency concerned shall send notice of hearing to the owner and stakeholders. Stakeholders including, but not limited to, local government units, local culture and arts council, local tourism councils, non-government conservation organizations, and schools, may be allowed to file their support or opposition to the petition;

(c) The owner and/or other stakeholders shall file their position paper within fifteen (15) days from receipt of the notice of hearing, furnishing all the parties, including the appropriate cultural agency, with such position paper. Extensions may be allowed, but in no case shall it exceed more than thirty (30) days;

(d) The petitioner/stakeholder shall give their answer within fifteen (15) days upon receipt of any position paper. Thereafter, no further submissions shall be allowed; and

(e) The appropriate cultural agency shall have a maximum of ninety (90) days from the deadline of the submission of

all the answers within which to submit its resolution and render its decision on the application.

On 16 September 2021, the National Commission for Culture and the Arts (NCCA) issued Resolution No. 2021- 313 pertaining to the “*Guidelines on the Declaration/Delisting of Cultural Properties as National Cultural Treasures or Important Cultural Properties and Removal of Presumption as Important Cultural Property.*”²⁹ The Guidelines govern the declaration³⁰, delisting, and removal of presumption of important cultural properties, intangible and tangible, movable and immovable cultural properties, and all other works of National Artists and *Manlilikha ng Bayan*, except:

²⁹*Guidelines On The Declaration/Delisting Of Cultural Properties As National Cultural Treasures Or Important Cultural Properties And Removal Of Presumption As Important Cultural Property.* (2021, September 16). National Commission for Culture and the Arts. Retrieved April 4, 2023, from <https://ncca.gov.ph/wp-content/uploads/2021/11/CTC-Annex-A-Res-2021-313-Guidelines-on-the-Declaration-Delisting-of-NCT-ICP-Removal-of-Presumption-16Sept2021.pdf>

³⁰ The following are the steps before a property is declared an important cultural property according to the Resolution:

1. The Commission, through the appropriate unit/division, in coordination with the different national committees, shall identify cultural properties that may be considered for declaration as National Cultural Treasure (NCT) and Important Cultural Property (ICP);
2. Owners of cultural properties, stakeholders, or any interested individuals must file a petition for declaration/delisting/removal of presumption of a cultural property as ICP or NCT accompanied by the accomplished form for moveable/immovable cultural properties, and pay the corresponding amount prescribed in the schedule of fees;
3. The petition for declaration may be dismissed outright when it is insufficient in form and substance, or when the Commission has no jurisdiction over the subject matter of the petition;
4. If the petition for declaration will be filed by a local government unit, the Petition must be accompanied by a *Sangguniang Bayan/Panglungsod/Panlalawigan* Resolution;
5. The Commission, through the appropriate unit/division, shall verify whether the property subject of the petition is suitable for declaration as NCT or ICP;
6. The suitability of the petition for declaration shall be based on a two-level assessment and evaluation of the cultural property subject of the petition for declaration, to wit:
 - a. The first level is to determine if a cultural property has heritage value;
 - b. The second level is to determine the level of significance through the conduct of comparative analysis of the heritage values of the cultural property for declaration relative to similar cultural properties;
 - i. An analysis of the integrity to determine if its key heritage values remain intact; and
 - ii. An analysis of the authenticity to determine if the heritage value is genuine or of undisputed origin.
7. If the cultural property subject of the Petition for declaration qualifies in both levels, the owner(s) or administrators thereof shall be required to provide the NCCA with pertinent data.
8. A public notice shall be posted on the Commission website and social media accounts to invite the public to file their support or opposition to the petition within a period of twenty (20) calendar days.
9. The owner, the National Historical Commission of the Philippines, and stakeholders, including but not limited to the local government units, local culture and arts council, local tourism councils, non-government conservation organizations, and schools, will be invited to file their position paper within fifteen (15) days from receipt of the notice from the Commission. Extensions may be allowed, but in no case shall it exceed more than thirty (30) days;
10. The petitioner/stakeholder shall give their answer within fifteen (15) days upon receipt of any position paper. Thereafter, no further submissions shall be allowed;
11. A Panel of Experts shall convene to assess the merits of the petition for declaration and the position papers;
12. The panel shall submit its recommendation regarding the petition for declaration to the NCCA Board for approval;
13. The NCCA Board shall convene and study the recommendation and arrive at a decision for a meeting conducted for that purpose. A copy of the decision of the NCCA Board shall be furnished to the petitioner.”

- (a) “works of national heroes, marked structures, and structures dating at least fifty years old which are under the National Historical Commission of the Philippines;
- (b) archival materials and documents which are under the National Archives of the Philippines; and,
- (c) rare books, special collections, and incunabula which are under the National Library of the Philippines.”³¹

In Section 8, Art. III of RA No. 11961, (*Procedure for Declaration or Delisting of Grade I and Grade II Level Cultural Properties*), the procedure are as follows:

- (a) A declaration or a delisting of a cultural property shall commence upon the filing of a petition by the owner, stakeholder, or any interested person, with the Commission which shall refer the matter to the appropriate cultural agency;
- (b) Upon verification of the suitability of the property as a Grade I or Grade II Level cultural property or the prima facie sufficiency of the argument for its delisting, the cultural agency concerned shall send a notice of hearing to the owner and stakeholders. Stakeholders, including, but not limited to, local government units (LGUs), local culture and arts council, local tourism councils, nongovernment conservation organizations, and schools, may be allowed to file their position papers in support or in opposition to the petition;
- (c) The owner and the stakeholders shall file their position paper within fifteen (15) days from receipt of the notice of hearing, furnishing all the parties, including the appropriate cultural agency, with a copy of such position paper. Extensions may be allowed, but in no case shall the extension period exceed more than thirty (30) days;
- (d) In cases where the petition was not filed by the owner, the petitioner shall file his or her own position paper within fifteen (15) days from receipt of the owner's or any stakeholder's position paper. Thereafter, no further submissions shall be allowed; and,
- (e) The appropriate cultural agency shall have a maximum of ninety (90) days from the deadline of the submission of all the position papers within

³¹ Ibid

which to render its decision, in writing, on the application.

The above provisions shall not apply to the delisting of cultural properties which are covered and protected under existing laws.

Prior to RA 10066, the term “important cultural property” was also present in RA 4846, as amended by Presidential Decree 374. The law provided that,

“cultural properties which have been singled out from among the innumerable cultural properties as having exceptional historical and cultural significance to the Philippines but are not sufficiently outstanding to merit the classification of "National Cultural Treasures" are important cultural properties.”³²

Unlike in R.A. 10066 and R.A. 11961, there is no mention of a presumption of important cultural property in R. A. 4846.

Procedure on Declaration of “Important Cultural Property”

The declaration of "important cultural property" considers the procedural requirements outlined in the petition filed in relation to the work of national artist Ang Kiukok. The petition involves the declaration of the work of **National Artist Ang Kiukok known as “Men at Work”**, a painting displayed at the entrance wall of the Technical Education and Skills Development Authority (TESDA) Auditorium in Taguig City, as an “important cultural property” which must be preserved and protected by law.

The petition to declare *Men at Work* as an important cultural property was filed by TESDA Director General Isidro S. Lapeña, Phd., CSEE, on 28 April 2021. In the letter of the retired official and employees of the National Manpower and Youth Commission (NMYC) and TESDA dated 11 February 2021, addressed to Director Lapeña, it was mentioned that the painting was commissioned in favor of the then NYMC as a “depiction of the resiliency of the skilled Filipino workforce.” It has been on display since the early 1970s at the NMYC Bookman Building in Quezon City and presently at the TESDA Administration Building.

Following the procedure set forth in Section 8 of RA 10066, the NCCA published a Notice to the Public “*Re: Petition to Declare the work of National Artist ANG KIUKOK entitled ‘MEN AT WORK’ as Important Cultural Property consisting of three (3) panels displayed at entrance wall of the Technical Education and Skills Development Authority (TESDA) Auditorium in Taguig City*” on 24 May 2021 with Case No. NCCA- 05-2021-

³² RA No. 10066 (2010), Section 3(b)

03.³³ The Notice explained that “the painting symbolized the strength of the Filipino working man and emphasizes the significance of TESDA’s mandate of providing relevant, accessible, high quality and efficient technical education and skills development in support of the development of high-quality Filipino middle-level manpower. Thus, the subject painting is said to be the depiction of the resiliency of the skilled Filipino workforce.”³⁴ Also of significance is the fact that the National Artist Award has been conferred to Ang Kiukok by virtue of Presidential Proclamation No. 32, Series of 2001. The Notice also stated that the NCCA is the appropriate cultural agency having jurisdiction in determining whether the painting bears significance in the country’s culture and heritage. It also called on any person adversely affected by the petition to file their written support or opposition with the NCCA through their official e-mail address not later than 25 June 2021. NCCA thereafter referred the petition to its national committees—the NCCA National Committee on Visual Arts (NCVA), National Committee on Museums (NCOM), and National Committee on Art Galleries (NCAG) with members from both the private and public sectors.³⁵

Letters were also sent to other stakeholders, including the National Museum of the Philippines (NMP), the Cultural Center of the Philippines (CCP), and the Taguig City Government, for their position on the petition. The painting was assessed by the NMP and by a panel of experts, and they interposed no objection to its declaration as an important cultural property. In fact, they also recommended considering the painting to be declared as a National Cultural Treasure.

On 25 November 2021, after more or less seven months since the filing of the petition, the NCCA Board of Commissioners granted the same and declared the painting a national cultural treasure and an important cultural property. Finally, on 20 February 2023, TESDA received the heritage marker of Ang Kiukok’s “Men at Work” from the NCCA.³⁶

As may be gleaned, a petition for declaration of an important cultural property could take 7-12 months, and issuance of a heritage marker could take 2-3 years. Stakeholders are given time to comment or express their opinions on the petition, as provided in the law.

³³ *Petition To Declare The Work Of National Artist Ang Kiukok Entitled “Men At Work” As Important Cultural Property (Icp) Consisting Of Three (3) Panels Displayed At Entrance Wall Of The Technical Education And Skills Development Authority (Tesda) Auditorium In Taguig City.* (2021, May 24). National Commission for the Culture and the Arts. Retrieved April 4, 2023, from <https://ncca.gov.ph/wp-content/uploads/2021/05/05-20-2021-Notice-to-the-Public-Petition-to-Declare-the-Work-of-Ang-Kiukok.docx.pdf>

³⁴ Ibid

³⁵ *NCCA declares “Men at Work” by National Artist Ang Kiukok as National Cultural Treasure.* (n.d.). National Commission for Culture and the Arts. Retrieved April 4, 2023, from <https://ncca.gov.ph/2022/01/26/ncca-declares-men-at-work-by-national-artist-ang-kiukok-as-national-cultural-treasure/>

³⁶ *TESDA receives NCCA heritage marker for ANG KIUKOK MURAL.* (2023, March 5). TESDA. Retrieved April 4, 2023, from <https://www.tesda.gov.ph/Media/NewsDetail/20224>

III. OWNERSHIP RIGHTS OF PRIVATE INDIVIDUALS AND ENTITIES OWNING IMPORTANT CULTURAL PROPERTIES

Cultural heritage is described as the continuity between the past and the present. It introduces the concept of cultural identity and describes people's fascination with antiquities.³⁷ It is also perceived as one of the core elements of economic and social development. These may be a few of the many reasons why States continue to pursue the general interest of conserving cultural properties through the enactment of laws that increase the protection of these properties.

In the Philippines, the National Cultural Heritage Act of 2009 of RA 10066 and RA 11961 were enacted with the aim of preserving, conserving, and promoting the Philippines's cultural heritage, its property and histories, and the ethnicity of local communities, resulting in increased protection for cultural properties. However, because of the increased protection provided in the law, private ownership rights are restricted, and this imposes charges or burdens on the owner, particularly on the aspect of disposal and use.

When the National Cultural Heritage Act of 2009 was signed into law, an uproar erupted in the local art scene as property owners and art collectors believed that the law divested them of their attributes to ownership. In an article entitled "*Cultural Property Law Has the Art World up in Arms*,"³⁸ the legal issues of property owners and art collectors regarding provisions of RA 10066 that limited their rights to their properties considered as important cultural properties were raised and discussed, to wit:

"The Heritage Act infringes on private property, both movables and immovables, by effectively limiting the owner's liberty to dispose of the property as he wishes," said art critic, historian and author Ramon Villegas, who moderated a forum on the issue last May 21.

Article 3, Section 11 of the law States that no ICP shall be 'sold, resold, or taken out of the country without first securing clearance from the cultural agency concerned.'

'In case the property shall be taken out of country, it continues, 'it shall solely be for the purpose of scientific scrutiny or exhibit.'

'The Heritage Act says that private collectors and owners of cultural property shall not be divested of their possession and ownership,' Mr. Villegas said, 'but the law, in

³⁷ D. Gillman, *The Idea of Cultural Heritage*, 2nd edn., Cambridge University Press, Cambridge 2010, pp. 9-40.

³⁸ Marcelo, S., Cultural property law has art world up in arms, in Business World Online (2011, June 5)

fact, places limitations on the ownership of such property.”

Article 427 of the Civil Code of the Philippines explains, “ownership may be exercised over things or rights.” Former Supreme Court Associate Justice Edgardo L. Paras noted in his book that:

“Ownership is the independent and general right of a person to control a thing, particularly in his possession, enjoyment, disposition, and recovery, subject to no restrictions except those imposed by the State or private persons, without prejudice to the provisions of the law.”³⁹

In the above Civil Code provision, an owner has the following: (a) right to enjoy, (b) right to dispose of, and (c) right to recover or vindicate. The universe of rights conferred to the owner of property is commonly known as the attributes of ownership.⁴⁰ The rights of an owner to enjoy includes his or her right to possess, right to use, and right to the fruits, while the right to dispose of includes the right to consume or destroy or abuse and the right to encumber or alienate.⁴¹

Prior to the present Civil Code, the concept of ownership was based on Roman Law which the Spaniards introduced to the Philippines through the Civil Code of 1889. In *Velasquez vs. Spouses Gallent, Sr.*,⁴² the Court had the occasion to explain the origin of the Civil Code provisions on ownership, to wit:

“Ownership, under Roman Law, may be exercised over things or rights. It primarily includes the right of the owner to enjoy and dispose of the thing owned. And the right to enjoy and dispose of the thing includes the right to receive from the thing what it produces, [jus utendi; jus fruendi] the right to consume the thing by its use, [jus abutendi] the right to alienate, encumber, transform or even destroy the thing owned, [jus disponendi] and the right to exclude from the possession of the thing owned by any other person to whom the owner has not transmitted such thing [jus vindicandi].”

Applying the Roman concept of ownership, for instance, an individual owns a farmhouse in a province, and as such, he or she can do the following:

- (a) live or stay in it;
- (b) use it in whatever way;

³⁹ Paras, Edgardo, *Civil Code of the Philippines Annotated* (16th ed., 2008).

⁴⁰ *The Heirs of Alfredo Cullado, v. Dominic V. Gutierrez*, G.R. No. 212938, July 30, 2019.

⁴¹ *Spouses George A. Gallent, Sr. and Mercedes M. Gallent v. Juan G. Velasquez*, G.R. No. 203949, April 6, 2016.

⁴² *Ibid*

- (c) receive rentals in case he leases it to someone;
- (d) destroy it;
- (e) sell; mortgage; donate; or alter it; and,
- (f) recover it from anyone who deprives him of its rightful possession.

In *National Waterworks and Sewerage Authority vs. Hobart Dator*,⁴³ the Philippine Supreme Court had the occasion to explain the importance of inherent rights of possession, control, and enjoyment of property. Full enjoyment of one's property includes its legal and beneficial ownership or its universe of rights. As the Supreme Court in *Spouses Warlito Bustos and Herminia Reyes-Bustos vs. Court of Appeals*⁴⁴ explained:

“Placing petitioners in possession of the land in question is the necessary and logical consequence of the decision declaring them as the rightful owners in possession. It follows that as owners of the subject property, petitioners are entitled to possession of the same. **‘An owner who cannot exercise the seven (7) *juses* or attributes of ownership—the right to possess, to use and enjoy, to abuse or consume, to accessories, to dispose or alienate, to recover or vindicate and to the fruits is a crippled owner.’**” (*Emphasis supplied*)

Applying the above cited Court rulings as to “important cultural property” owners, if one of the seven (7) *juses* or attributes of ownership - the right to possess, to use and enjoy, to abuse or consume, to accessories, to dispose or alienate, to recover or vindicate and to the fruit - cannot be exercised as they wish, then they are considered to be crippled owners. In other words, as crippled owners, their ownership over their properties is nothing without the inherent rights of possession, control, and enjoyment.

IV. ONG PAO HU TEMPLE

As an example, Ong Pao Hu Temple is an important cultural property located behind the Sta. Ana Church, or the Parish Church of Our Lady of the Abandoned, was declared an “important cultural property” through National Museum of the Philippines (NMP) Resolution No. 03-2016. It has

⁴³ Even without these express provisions, however, the authority of the municipality to fix and collect fees from its waterworks would be justified from its inherent power to administer what it owns privately. It is now settled that although the NAWASA may regulate and supervise the water plants owned and operated by cities and municipalities, the ownership thereof is vested in the municipality and in the operation thereof the municipality acts in its proprietary capacity. Like any private owner, the municipality enjoys the attributes of ownership under the New Civil Code. One such attribute is the right to use or enjoy the property. The municipality, here concerned, has chosen to use its waterworks system for revenue purposes. Its undertaking to supply water at a cost to its inhabitants, is in itself a business venture, and the fees collected therefrom, would be the only income that said municipality may derive from such business. If a governmental entity, like the NAWASA, were allowed to collect the fees that the consuming public pay for the water supplied to them by the municipality, the latter, as owner, would be deprived of the full enjoyment of its property. As previously stated, ownership is nothing without the inherent rights of possession, control and enjoyment (*G.R. No. L-21911, September 29, 1967*).

⁴⁴G.R. No. 120784-85, January 24, 2001.

two rooms, one dedicated to a Taoist God named Pao Kong and the other room for Guanyin, who is a female deity resembling Mama Mary's image.⁴⁵ Ong Pao Hu's owner, Chloe Go, filed with the NCCA a petition to delist the same as an important cultural property on 8 August 2020. As the owner, Go gave the following reasons for delisting the temple, to wit:

1. the previous and current owner had no knowledge of the important cultural property (ICP) status of the structure, as there was no indication that the property was already declared ICP;
2. the property was turned over to Ms. Go by the previous owner devoid of any artifacts;
3. the declaration of the property as an ICP blatantly disregards the principles of due process, as no public notice and/or hearing has been done; and,
4. after declaring the structure as an ICP, the concerned Registry of Deeds was not notified."⁴⁶

Following Section 8 of RA 10066 and Section 11 of its Implementing Rules and Regulations (IRR), an online public notice was made to invite support or opposition from stakeholders about the petition to delist. NCCA was also said to have requested the comments and or reactions of the National Committee on Monuments and Sites (NCMS), National Committee on Architecture and Allied Arts (NCAAA), Manila Heritage Tours Sta. Ana, and the local government unit of the City of Manila. The NCAAA asserted that the temple had deteriorated so much that its architectural significance has been compromised as an important cultural property.⁴⁷

NCCA Resolution No. 2021- 313, which came out after Go's petition, provides for specific grounds for delisting, to wit:

"xxx

- 3.1. New evidence and substantial proof that the National Cultural Treasure (NCT) and / or ICP does not merit the outstanding significance and recognition given to it;
- 3.2. Misrepresentation by the owner, administrator or custodian of the NCT and or ICP;
- 3.3. Inappropriate or unnecessary intervention, damage and degradation so severe as to

⁴⁵ NCCA denies petition to delist temple as Important Cultural Property. (2021, November 17). *Business World*. Retrieved April 10, 2023, from <https://www.bworldonline.com/arts-and-leisure/2021/11/17/410985/ncca-denies-petition-to-delist-temple-as-important-cultural-property/>

⁴⁶ Ibid

⁴⁷ Ibid

- diminish or destroy the heritage significance;
and
- 3.4. Evidence or recommendation from competent private and/or government agencies that such structure or site poses threats to public health and safety.

For ground 3.3, such incidents may subject the person/s responsible to prosecution under Sections 48 and 49 of RA 10066.”

After more than a year from the filing of the petition or on 16 September 2021, the same day when Resolution No. 2021- 313 was issued, NCCA, through Board Resolution No. 2021-312, dismissed Go’s petition for lack of legal and factual justifications. The resolution stated that Pao Ong Hu Taoist Temple will be duly registered in the Philippine Registry of Cultural Property, and the installation of the declaration marker shall be implemented. As declared important cultural property, there are some implications that were provided in the law and highlighted in Resolution No. 2021- 313:

1. All NCTs and ICPs shall be recorded and included in the Philippine Registry of Cultural Property;
2. All declarations shall be covered with a Memorandum of Agreement between the Commission and the owner of a privately-owned tangible cultural property declared as NCT or ICP pursuant to Section 18 of RA10066;
3. An official heritage marker shall be placed in immovable cultural properties declared as NCT or ICP. At the same time, the Commission shall give due notice to the concerned Registry of Deeds for annotation on their land titles.
4. All cultural properties declared as NCT shall be entitled to priority government funding for protection, conservation, and restoration. All cultural properties declared as ICP may also receive government funding for their protection, conservation, and restoration.
5. Conservation Management Plans (CMPs) shall be developed, prepared, approved, and executed by specialists with the active involvement of stakeholders for immovable cultural properties declared as NCT or ICP. Within a period of one year after the effectivity of these guidelines, the National Committee on Monuments and Sites shall formulate the guidelines and a manual on the preparation of CMPs, which shall be submitted to the NCCA Board for approval.
6. Planning of changes to immovable cultural properties declared as NCT or ICP requires the preparation of a Heritage Impact Assessment (HIA). Changes refer to repair, improvement, adaptive reuse, restoration, reconstruction,

alteration, and demolition. Approval of such changes by the Commission shall be subject to the submission of an HIA. Within a period of one year after effectivity of these guidelines, the National Committee on Monuments and Sites shall formulate the guidelines and a manual on the preparation of HIA which shall be submitted to the NCCA Board for approval; and

7. The Commission shall be given the right of first refusal in the purchase of cultural properties declared as NCTs. Prior to the finality of the sale, the Commission may likewise match any offer made for the purchase of NCT.

In *E. Rommel Realty and Development Corporation vs. Sta. Lucia Realty Development Corporation*,⁴⁸ the Court stated that:

“The records do not show that respondent ever obtained a certificate of title over the disputed property. Nevertheless, the right of ownership of respondent’s predecessors-in-interest had been recognized. **As the purchaser of the property, respondent became the owner of the property and acquired the right to exercise all the attributes of ownership, including the right to possession (*jus possidendi*)** [Emphasis supplied]

As the purchaser and new owner of the Pao Ong Hu Temple, Go acquired all the rights to the property, including the right to exercise all attributes of ownership as provided in the Civil Code. However, given the situation, it was clear from the procedure that she is a “crippled owner” who could not exercise all the attributes of her ownership. Assuming that Go, as the new owner, has other plans for the property, like renovating the same, she cannot do as she wishes without first securing clearance from appropriate agencies following Section 15 of RA 1006 and the preparation of a Heritage Impact Assessment (HIA) for changes that refer to repair, improvement, adaptive reuse, restoration, reconstruction, alteration, and demolition. If, on the other hand, she plans to sell the temple to a third party and the declaration of the same as an important cultural property is annotated to the title of the real property, this may affect the sale as prospective buyers may not want to acquire a property that is subject to various limitations or restrictions. Should Go decide not to utilize the entire property, including the land, and later on the same deteriorates, the local government may assess the property to determine whether it is subject to idle tax or not. These are different scenarios with one common conclusion—ownership rights of private individuals and entities owning important cultural properties are restricted.

Art. 435 of the Civil Code provides that, “No person shall be deprived of his property except by competent authority and for public use and always upon payment of just compensation. Should this requirement be not first complied with,

⁴⁸ G.R. No. 127636, November 24, 2006.

the courts shall protect and, in a proper case, restore the owner in his possession" which is consistent with Sections 1 and 9, Article III of the 1987 Philippine Constitution that *"No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws,"* and *"private property shall not be taken for public use without just compensation."* These provide the limitation of the State's exercise of its power of eminent domain, to wit:

- (a) The competent authority should take private property for public use only; and
- (b) It should pay the owner just compensation.

In *National Transmission Corp. vs. Orville Corp.*,⁴⁹ the Court ruled:

"Eminent domain is the right or power of a sovereign State to appropriate private property to particular uses to promote public welfare. It is an indispensable attribute of sovereignty; a power grounded in the primary duty of government to serve the common need and advance the general welfare. The power of eminent domain is inseparable in sovereignty being essential to the existence of the State and inherent in government. But the exercise of such right is not unlimited, for two mandatory requirements should underlie the Government's exercise of the power of eminent domain, namely: (1) that it is for a particular public purpose; and (2) that just compensation be paid to the property owner. These requirements partake the nature of implied conditions that should be complied with to enable the condemnor to keep the property expropriated."

In the same case, the Court provided that the State must take the private property of the owner to entitle the individual to just compensation. "Taking" requires the following elements:

"First, the expropriator must enter a private property;

Second, the entrance into private property must be for more than a momentary period;

Third, the entry into the property should be under warrant or color of legal authority;

Fourth, the property must be devoted to a public use or otherwise informally appropriated or injuriously affected; and

⁴⁹ G.R. No. 223366, August 01, 2017.

Fifth, the utilization of the property for public use must be in such a way as to oust the owner and deprive him of all beneficial enjoyment of the property."⁵⁰

It is emphasized that the taking must be for public use. In the early case of *Perry v. Keene*,⁵¹ the Supreme Court of New Hampshire stated:

"As to what exactly is *public use* insofar as eminent domain is concerned may be difficult to determine. The character of the entity or agency employed is not a sufficient basis from which to conclude the presence or absence of a "public use." If indeed the use is public, it does not matter that the entity exercising the right be private. On the other hand, just because the agency is public does not necessarily mean that the purpose is also public."

The case of *City of Manila v. Chinese Community of Manila*,⁵² on the other hand, explained that the question as to public use is a judicial question, to wit:

"The question as to whether or not any specific or particular use is a public one is ultimately a *judicial* question. Of course, if Congress has specifically allowed the expropriation of realty for a *designated* or *specified* public purpose, the courts of justice are not allowed to inquire into the necessity of such purpose. If, however, the grant has been merely a general one, that is, authority to expropriate land for *public use*, courts have jurisdiction to decide whether the taking is indeed for a public use. In such case, the issue is a question of fact, and the Court should inquire into and hear proof upon the question. Thus, if an owner successfully proves that an actual taking of his property serves no public use, or that the property is already devoted to or intended to be devoted to ANOTHER public use, courts are allowed to deny the expropriation of said property."

And in the 2015 case of *Republic of the Philippines vs. Heirs of Saturnino Borbon*,⁵³ it was explained:

"xxx

Public use, in common acceptance, means "use by the public." However, the concept has expanded

⁵⁰ Ibid

⁵¹56 N.H. 514, Mar 21, 1876.

⁵² G.R. No. L-14355, October 31, 1919.

⁵³ G.R. No. 165354, January 12, 2015.

to include utility, advantage or productivity for the benefit of the public. In *Asia's Emerging Dragon Corporation v. Department of Transportation and Communications*, Justice Corona, in his dissenting opinion said that:

To be valid, the taking must be for public use. The meaning of the term "public use" has evolved over time in response to changing public needs and exigencies. Public use which was traditionally understood as strictly limited to actual "use by the public" has already been abandoned. "Public use" has now been held to be synonymous with "public interest," "public benefit," and "public convenience."

It is essential that the element of public use of the property be maintained throughout the proceedings for expropriation. The effects of abandoning the public purpose were explained in *Mactan-Cebu International Airport Authority v. Lozada, Sr.*, to wit:

More particularly, with respect to the element of public use, the expropriator should commit to use the property pursuant to the purpose stated in the petition for expropriation filed, failing which, it should file another petition for the new purpose. If not, it is then incumbent upon the expropriator to return the said property to its private owner, if the latter desires to reacquire the same. Otherwise, the judgment of expropriation suffers an intrinsic flaw, as it would lack one indispensable element for the proper exercise of the power of eminent domain, namely, the particular public purpose for which the property will be devoted. Accordingly, the private property owner would be denied due process of law, and the judgment would violate the property owner's right to justice, fairness, and equity."

In the *Pao Ong Hu Temple* case and in other situations where there is a presumption or declaration of important cultural properties, the competent authority or the State did not seize the properties for public use, legal titles remained unaffected, and owners were not paid just compensation. However, it is very clear that the State restricts and interferes with the use, enjoyment, or benefits derived from the properties declared or presumed as important cultural properties. In these instances, the State invoked its legislative power to enact measures that reduced the benefits owners derive from their properties without changing or canceling the owners' legal title to their assets. Hence, indirect expropriation will set in.

As discussed, indirect expropriation is recognized under international law, as “*measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.*”⁵⁴ Determining if a measure falls into the scope of indirect expropriation is not easy. This requires analysis of the circumstances surrounding the taking, including a case-to-case basis. The United Nations Conference on Trade and Development (UNCTAD), for example, pointed out that indirect expropriation results in “*an effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor.*”⁵⁵ It was also said that “*an indirect expropriation can take an infinite number of forms; it can be essentially any action, omission, or measure attributable to a government that interferes with the rights flowing from the foreign-owned property to an extent that the property has been functionally expropriated.*”⁵⁶ Taking that “destroys the ownership rights of an investor in its tangible or intangible assets” would be classified as indirect expropriation or measures having equivalent effect.⁵⁷ While one may argue that the case of important cultural property is just a legitimate non-compensable regulation by the State, there are differences in terms of approaches between legitimate non-compensable regulations and acts that amount to indirect expropriation, which require compensation.⁵⁸

In *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*,⁵⁹ it has been identified that there are certain criteria that can be applied to draw the difference between both figures:

- (a) degree of interference with the property;
- (b) the character of governmental measures and context; and
- (c) interference of the measure with reasonable and investment-backed expectations.

Interference must be substantial to qualify as expropriation, just like when a State deprives the foreign investor of fundamental rights of ownership or when it interferes with the investment for a significant period of time.⁶⁰ Regulation may be considered indirect expropriation when it “substantially impairs investors’ economic rights such as ownership, use, enjoyment, or management of the business, by rendering them useless.”⁶¹

⁵⁴ *Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, IUSCT Case No. 24

⁵⁵ The Multilateral Agreement on Investment Draft Consolidated Text, Org. for Econ. Co-Operation and Dev. 86 (Apr. 22, 1998), <http://wwwl.oecd.org/dai/mai/pdi7ng/ng987rle.pdf>

⁵⁶ Corbella-Valea, M. (2014). Indirect Expropriation and Resource Nationalism in Brazil’s Mining Industry. *The University of Miami Inter-American Law Review*, 46(1), 61–88. <http://www.jstor.org/stable/24375805>

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ ICSID Case No. ARB (AF)/04/5

⁶⁰ *Ibid.*, 17

⁶¹ OECD (2004), ““Indirect Expropriation” and the “Right to Regulate” in International Investment Law”, *OECD Working Papers on International Investment*, 2004/04, OECD Publishing. Retrieved, December 2, 2022, from <http://dx.doi.org/10.1787/780155872321>

Severe economic impact must be present that gives rise to the level of an expropriation requiring compensation.⁶² In the past, the economic impact of the regulation was the exclusive criterion. It maintained that the impact of the regulation on an investor's ability to use and enjoy the property is the only criterion taken when starting the expropriation analysis. However, this ignores other elements.⁶³

In cases of privately owned important cultural properties, enjoyment of properties that include legal and beneficial ownership or its universe of rights are not fully exercised by the owners since there are restrictions as provided in Sections 11 and 15, Article III of R.A. 10066, among others. The rights of owners to enjoy include their right to possess, right to use, and right to the fruits, while the right to dispose includes the right to consume or destroy, or abuse and the right to encumber or alienate. As previously stated, ownership is nothing without the inherent rights of possession, control, and enjoyment.

One more significant criterion is the duration of the regulation. In *S.D. Myers v. Canada*,⁶⁴ the Court ruled that the regulation at issue did not constitute an indirect expropriation because "in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation even if it were partial and temporary."⁶⁵ In the declaration of important cultural properties, properties are considered important unless delisted, or the presumption is lifted. Delisting may only be made on few grounds as provided in Resolution No. 2021- 313.⁶⁶ This only means that RA 10066 will always govern unless properties are delisted or the presumption is lifted; hence, interference by the government always remains. The legal title of important cultural properties remains vested in the private owners, but the owners' rights to use the property are diminished through the passage of time because of the restrictions.

The developments brought by the law, RA 1006, indicate that the trend towards increased cultural property protection requires more sacrifices from the individual owner. Private owners of important cultural properties are constrained in the peaceful enjoyment of their possessions by several rules concerning cultural property protection. Restriction on their ownership rights resulting from provisions RA 10066, particularly Sections 11 and 15, caused a disproportionate burden on the owners. Correspondingly, deprivation without fair or just compensation *prima facie* violates ownership rights. An issue that is intertwined with most of the countries and their cultural properties is ownership. Internationally, there are three most

⁶² Ibid

⁶³ Ibid

⁶⁴ *S.D. Myers, Inc. v. Canada*, Partial Award, 232. I.L.M. 408 (2000)

⁶⁵ Ibid

⁶⁶ (1) new evidence and substantial proof that the NCT and / or ICP does not merit the outstanding significance and recognition given to it; (2) misrepresentation by the owner, administrator or custodian of the NCT and or ICP; (3) inappropriate or unnecessary intervention, damage and degradation so severe as to diminish or destroy the heritage significance (for this, such incidents may subject the person/s responsible to prosecution under Sections 48 and 49 of RA 10066); and (4) evidence or recommendation from competent private and/or government agencies that such structure or site poses threats to public health and safety.

common regimes of ownership in terms of cultural properties. First, almost all cultural properties are privately owned. This is the common situation in the United States, where this is seen in its most extreme form since there is a philosophical commitment to as little interference with private property as possible.⁶⁷

Second, some, if not all, movables belonging to the national cultural heritage are automatically vested in the States or to the public bodies subject to their control. For instance, aside from the countries discussed above, in Israel, all archeological objects discovered after 1972 were automatically vested to the State. This was also adopted in Belize, Brunei, Hong Kong, Libya, Mexico, Oman, Sudan, China, Cyprus, and Turkey on different occasions. Special rules may apply for cultural objects that are in private hands before a specific date/s.⁶⁸

Third, the States has control of cultural objects but allows for private ownership, just like in Bangladesh, Guatemala, Honduras, Mauritius, Romania, and Uruguay. Some other States, though achieving the same effect, vest ownership in favor of the State but allow wide powers to their custodians or possessors, such as that of Haiti and New Zealand.⁶⁹

The Philippines, in its case, falls on the third situation, wherein there is still private ownership of cultural properties, but the State has some control over dealings such as selling, reselling, and taking out of the country as Section 11 provides, and over intervention works and measures on conservation provided under Section 15 of **R.A. No. 10066**.

V. GREENBELT 1 AS AN IMPORTANT CULTURAL PROPERTY.

Ayala Land, Incorporated (ALI), as the owner of Greenbelt 1, a work of National Artist Leandro V. Locsin, has filed with this NCCA a Petition to Remove the Presumption as an important cultural property of the said building on 26 June 2023. ALI enumerated the following as grounds for delisting:

“xxx

1. Greenbelt 1 does not qualify as a "property with exceptional cultural, artistic, and historical significance in the Philippines" under both the Republic Act (RA) No. 10066 and its Implementing Rules and Regulations;
2. Due to the changes and renovations made by the owner prior to the effectivity of RA 10066, the current state of Greenbelt 1 is already not consistent with Locsin's original vision of the building and signature architectural style found in his most celebrated creations; and,

⁶⁷ Prott, L., V., & O'Keefe, P. J. (n.d.). *Law and the Cultural Heritage: Discovery and Excavation*. Lexis Pub.

⁶⁸ Ibid

⁶⁹ Ibid

3. Greenbelt 1 is primarily a commercial establishment and is better suited to house a brand-new comprehensive, well-thought mixed-used development that can be of service to a much larger population and, at the same time, provide much-needed employment - one that is entirely aesthetically consistent and coherent with Makati Central Business District's CBD) urban architectural plan and design."⁷⁰

Under the first ground cited by the ALI in its petition, it further explained that the prohibition against the demolition of Greenbelt 1 is taking without just compensation, to wit:

"The qualifications of the Act for Important Cultural Property must be strictly construed.

31. No less than the Supreme Court has opined that statutes in derogation of rights must be strictly construed. Especially in taking private property, statutes should be strictly construed in favor of the private owner.
32. With all due respect, the prohibition against demolition of Greenbelt 1 is tantamount to taking of private property without just compensation, in violation of the 1987 Constitution. Petitioner Ayala Land's hands are effectively tied and bound to preserve Greenbelt 1 in the interest of the State, the expense burden for which is not replaced by any compensation from the government.
33. Unlike other cultural properties (e.g., national cultural treasures, national historical landmarks sites or monuments), for an Important Cultural Property, the Act does not grant the property government funding for its protection, conservation, and restoration as a matter of right considering that the Act merely uses the term "may."
34. Considering the foregoing, the three-fold qualification in the Act - that is, that the property should have exceptional cultural, artistic and historical significance - should be strictly construed. Thus, any property to be an Important Cultural Property should have all three (3) of the qualifications, with the absence of even one precluding such designation."⁷¹

⁷⁰ Notice to the Public. (n.d.). National Commission on Culture and the Arts. <https://ncca.gov.ph/wp-content/uploads/2023/07/Merged-Public-Notice-Greenbelt-1-delisting-07272023-1.pdf>

⁷¹ Ibid

Although this article does not speak of taking as direct expropriation, the surrounding facts that led ALI to its claim are worthy of discussion. Section 7, Article III of RA 10066 provides:

“Section 7. Privileges for Cultural Property. - All cultural properties declared as national cultural treasures and national historical

landmarks, sites or monuments shall be entitled to the following privileges:

- (a) Priority government funding for protection, conservation, and restoration;
- (b) Incentive for private support of conservation and restoration through the Commission's Conservation Incentive Program for national cultural treasures;
- (c) An official heritage marker placed by the cultural agency concerned indicating that the immovable cultural property has been identified as a national cultural treasure and/or national historical landmark, sites or monument; and,
- (d) In times of armed conflict, natural disasters, and other exceptional events that endanger the cultural heritage of the country, all national cultural treasures or national historical landmarks, sites, or monuments shall be given priority protection by the government.

All cultural properties declared as important cultural property may also receive government funding for their protection, conservation, and restoration. An official heritage marker shall likewise be placed on an immovable cultural property to identify the same as important cultural property.”

ALI's claim is based on the above provision, which explains that cultural properties declared as national cultural treasures and national historical landmarks, sites, or monuments are entitled to some privileges like government funding for conservation. However, when it comes to important cultural properties, the law only states that these properties “may” also receive government funding. Statutory construction teaches us that the word “may” may not necessarily mean that it is not mandatory, but only discretionary. The word is an auxiliary verb that indicates liberty, opportunity, permission, and possibility.⁷² Additionally, if owners initiate intervention works and measures on the conservation of important cultural properties, the law states that the work be undertaken and supervised by the appropriate cultural agency. In fact, the agency is given the authority by the law to only approve those methods and materials that adhere to the international standards of conversation. To concretize, ALI, as the owner,

⁷²*Demaala v. Commission on Audit*, G.R. No. 199752, February 17, 2015.

intends to re-utilize Greenbelt 1. Hence, the same will be demolished for a new project. However, because of the restrictions provided by RA 10066, it cannot do so without first asking the government to remove or lift the presumption of important cultural property on Greenbelt. If, for instance, ALI decides to change its vision and decides to keep Greenbelt 1, it also cannot start its own intervention work or measure for conservation without the approval and supervision of the appropriate cultural agencies.

The discretionary nature of the provision makes it hard for the owners of important cultural properties to receive government funding for protection and conservation, unlike other types or classifications of cultural properties. This only shows that for owners of important cultural property, the burden of maintaining the property in good state appears distinctly to be heavy, as the subsidies or government funding or incentives may depend on NCCA's judgment. To add, important cultural property owners assume burdensome maintenance costs, but it also deprives them of the discretion to do any intervention works and of any value that might arise from the specific features of their property.

The recent amendment made through RA No. 11961 included a provision for priority funding for Grade II cultural properties, which include important cultural property. However, this does not fully resolve the dilemma of private owners of important cultural properties, as the law only provides for "priority funding" and not assured or guaranteed funds. At the same time, the determination of which specific important cultural property should be prioritized in terms of funding is not included.

VI. PROTECTION AND CONSERVATION OF CULTURAL PROPERTIES IN OTHER COUNTRIES

There are a great number of differences in terms of legislative programs and laws of different nations for the protection of their historical, artistic, archaeological, and other cultural properties. The differences express various judgments or conclusions on objects and legal measures of protection and are results of policies adopted by countries that prevailed when each legal system for the protection of cultural properties was created. Due to the variance in the scope and methodologies chosen by countries for the protection of their cultural properties, the author has decided to present different national legislative measures of some countries from the Eastern and Western parts of the world. The East and the West are different in terms of cultural aspects – architecture, clothing, practices, language and script, and others. Taking, for example, the architecture of both the East and the West, it is an art that reflects aesthetics, culture, and surroundings. In this modern time, architecture in the East and the West has become homogeneous in such a way that the city landscapes of Beijing, Tokyo, Seoul, New York, and London look like one another. However, the architectural structures built in the past were different in the two hemispheres of the globe. The architectural design reveals the aesthetic standards of the builder,

and it also exposes the materials that were available at the time of construction. For example, East temples are mostly created out of wood and are circular or not protuberant. On the other hand, churches in the Western part are generally rectangular with sharp pinnacles.⁷³

National and international legislative schemes that protect cultural properties within state boundaries are important. International legal conservation and protection of cultural properties in the world—East and West—reflect substantial variations in terms of legal constructions. Below are the legislation models of Japan, Malaysia, and India for the Eastern hemisphere, and Italy, Switzerland, and Spain for the Western part.

A. EASTERN COUNTRIES

1) JAPAN

Japanese legislation on cultural properties was chosen as a model for various reasons.⁷⁴ The Law for the Protection of Cultural Properties of 1950 has been known as one of the most sophisticated and complete statutes of its kind, and it is viewed as a model for other countries in their pursuit to protect their ethnographic and cultural treasures.⁷⁵ Japan is the only country other than the Philippines that uses the term “important cultural property” in its legislation. The Law for the Protection of Cultural Properties of 1950 (*Last Amendment: Law No. 7, 30 March 2007*) is the only law drafted focused on the purpose of governing the administrative system for the protection of cultural properties.

Japan is one of the countries to introduce the term “cultural property”⁷⁶ into its legislation which was first coined during the preparatory

⁷³ Pae, H.K. (2020). The East and the West. In: Script Effects as the Hidden Drive of the Mind, Cognition, and Culture. Literacy Studies, vol 21. Springer, Cham. https://doi.org/10.1007/978-3-030-55152-0_6

⁷⁴ Halina Niec, Legislative Models of Protection of Cultural Property, 27 *Hastings L.J.* 1089 (1976). Available at: https://repository.uchastings.edu/hastings_law_journal/vol27/iss5/6

⁷⁵ Geoffrey R. Scott, The Cultural Property Laws of Japan: Social, Political, and Legal Influences, 12 *Pac. Rim L & Pol'y J.* 315 (2003).

⁷⁶ Article 2: Definition of Cultural Property (based on the Law for the Protection of Cultural Properties of 1950)

“An object of cultural property” in the present law shall be as follows:

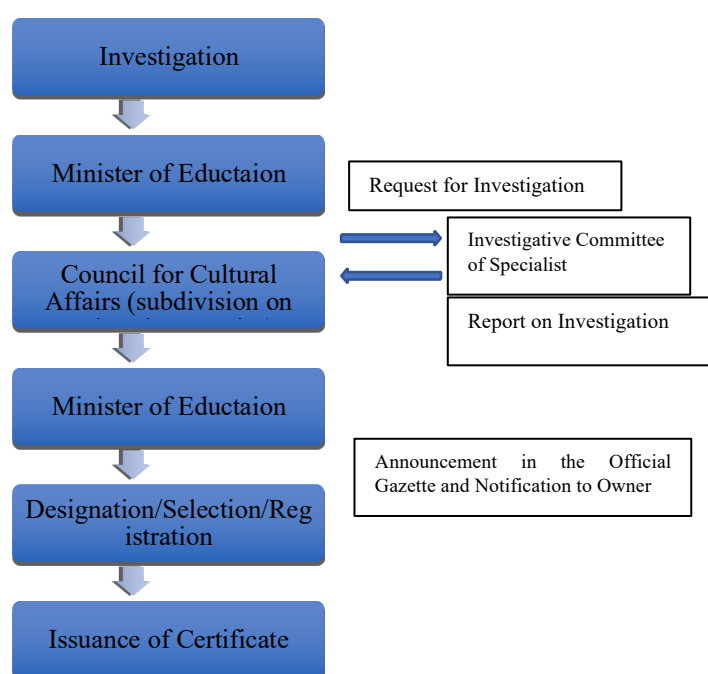
(1) Buildings, pictures, sculptures, applied crafts, calligraphic works, classical books, ancient documents, and other tangible cultural products that are of significant historical or artistic value to Japan (including lands and other objects which are combined with these objects to create such value): archaeological and other historical resources of significant scientific value (hereinafter referred to as “Tangible Cultural Property”);

(2) Drama, music, applied art, and other intangible cultural products that are of a significant historical or artistic value to Japan (hereinafter referred to as “Intangible Cultural Property”);

(3) (i) Manners and customs related to food, clothing and housing, to occupations, to religious faiths, and to annual festivals, etc.: (ii) folk performing arts: (iii) folk skills: (iv) clothes, utensils, houses and other objects used therefor, which are indispensable to the understanding of changes in the mode of life of Japan (hereinafter referred to as “Folk Cultural Property”);

(4) (i) Shell mounds, tumuli, sites of fortified capitals, sites of forts, sites of castles, monument houses and other sites, which are of significant historical or scientific value to Japan: (ii) gardens, bridges, gorges, sea-shores, mountains, and other places of scenic beauty, which are of significant artistic or aesthetic value to Japan: (iii) animals (including their habitats, breeding areas and trails), plants (including their self-seeded areas), and geological features and minerals (including

works of the Hague Conference of 1954. The law indicates the influence of international achievements in the protection of cultural property.⁷⁷ During the enactment of the law, unlike other Eastern countries whose laws were strongly influenced by their colonizers, Japan maintained its unique provisions of the law.⁷⁸ There are categories introduced as cultural properties. The categories include (1) Tangible Cultural Properties or *yūkeibunkazai* (with two subgroups: Movable Cultural Properties-works of fine arts; and Immovable Cultural Properties- buildings and structures); (2) Natural Monuments, Historic Sites, Cultural Landscapes and Places of Scenic Beauty; (3) Intangible Cultural Properties, including folk cultural practices, and Buried Cultural Properties (*maizōbunka-zai*); and (4) Folk practices or cultural properties.⁷⁹ Each category contains important properties that are designated from among the items in one of the four groups.⁸⁰ The law also provides for the process leading to the designation, registration, or selection of cultural properties:



the areas where peculiar natural phenomena are recognizable), which are of significant scientific value to Japan (hereinafter referred to as “Monuments”);

(5) Landscapes that have been created by people’s lives or occupations in their community as well as by the climate prevailing in such community, and which are indispensable to the understanding of the mode of life or occupation of Japan (hereinafter referred to as “Cultural Landscapes”);

(6) Groups of traditional buildings of a high value, which form a certain historic configuration in combination with their environments (hereinafter referred to as a “Group of Traditional Buildings)

2. The term “an object of ‘Important Cultural Property’” prescribed in the provisions of the present law (except for the provisions of Articles 27 to 29 inclusive, Article 37, Article 55 paragraph 1 Item (4), Article 153 paragraph 1 Item (1), Article 165, Article 171, and additional rules’ Article 3) shall include ‘National Treasure’.

3. The term “Historic Sites, Places of Scenic Beauty and Natural Monuments” prescribed in the provisions of the present law (except for the provisions of Article 109, Article 110, Article 112, Article 122, Article 131 paragraph 1 Item (4), Article 153 paragraph 1 Items (7) and (8), Article 165, and Article 171) shall include ‘Special Historic Sites, Places of Scenic Beauty and Natural Monuments’.

⁷⁷ Dal Bianco, A., Lo Sicco, S., Magni, F., & Zoppé, A. (2020). Cultural Heritage Law in Asia. The case of Japan, China and South Korea. Università Ca’Foscari Venezia.

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid

Figure 1: Designation, registration, or selection of cultural properties in Japan

The designation expressly provides that the Minister of Education, Culture, Sports, Science and Technology may designate an important object of Tangible Cultural Property as Important Cultural Property. Among the objects of important cultural property, the minister may designate a “*National treasure* as one of high value from the viewpoint of world culture as irreplaceable treasures of the nation.”⁸¹ The designation shall be announced in the Official Gazette, and the owner of the property or object shall be informed. The Minister shall then issue a certificate of designation to the owner.⁸² The national government and local governments are requested, through the law, to take measures to protect cultural properties. Also, the general populace is requested to cooperate with the government, while owners and custodians of properties or objects are requested to make efforts to protect heritage.⁸³ The purpose of the laws is “to preserve and utilize cultural property objects so that the cultural quality of the nation can be enhanced, thereby contributing to the evolution of world culture.”⁸⁴

Measures for protection in Japan

The Law for the Protection of Cultural Properties stipulates that cultural properties are assets shared by the entire nation. For this reason, the law defines protection as preservation of the existing state of properties and utilization for cultural promotion.⁸⁵

“The national government designates cultural properties of national importance, while those having regional interest and value (*excluding national classifications*) can be designated by relevant local governments. It should be noted that LPCP stipulates that designation should be made with reasonable respect for the property rights of private owners of cultural properties. Thus, in actual implementation, governments seek the agreement of the private owners.”⁸⁶

Article 31, Subsection 2 of Article II⁸⁷ of the Law for the Protection of Cultural Properties provides for the Management of the properties. The law

⁸¹Article 27, The Law for the Protection of Cultural Properties of 1950

⁸² Article 28, The Law for the Protection of Cultural Properties of 1950

⁸³ Kakiuchi, E. (2014). Cultural heritage protection system in Japan: current issues and prospects for the future. *GRIPS National Graduate Institute for Policy Studies*. <https://www.grips.ac.jp/r-center/wp-content/uploads/14-10.pdf>

⁸⁴Article 1, The Law for the Protection of Cultural Properties of 1950

⁸⁵Ibid., at 83.

⁸⁶Ibid

⁸⁷ Article 31: Owner's Duty of Management, and Responsible Manager

An owner of an object of ‘Important Cultural Property’ shall undertake the management thereof under the present law as well as the MEXT ordinances and instructions of the Commissioner for Cultural Affairs as are issued thereunder.

2. In specific circumstances, an owner of an object of ‘Important Cultural Property’ may appoint an appropriate person on his behalf to be exclusively responsible for the management of the said

allows the Commissioner for Cultural Affairs to “give appropriate instructions to an owner of an object of ‘Important Cultural Property’ regarding the management thereof.”⁸⁸ Among the responsibilities of the owners, custodial bodies, and or administrative organizations is to protect the existing or current condition of the cultural properties. The law requires the owners to carry out repairs and actions for disaster prevention. The costs for these are partly subsidized by the government.⁸⁹ The permission of the Commissioner for Cultural Affairs is required for any alteration of the existing state of designated cultural properties, as well as export.⁹⁰ Unlike the express prohibition or restricted transfer of ownership provided in other jurisdictions’ laws, Japan’s law provides that owners must report the transfer of ownership, as well as any loss, destruction, or damage so that the government can be aware of the condition of all designated cultural properties.⁹¹

“Article 32: Changes of an Owner or Responsible Manager

1. Where an owner of an object of ‘Important Cultural Property’ changes, the new owner shall inform the Commissioner for Cultural Affairs of the change in writing within twenty days, stating the matters stipulated by a MEXT ordinance, attaching thereto the

object of ‘Important Cultural Property’ (hereinafter referred to as “a responsible manager” in the present section and in Chapter XII).

3. Where an owner of an object of ‘Important Cultural Property’ has appointed a responsible manager under the provision of the preceding paragraph, he shall inform the Commissioner for Cultural Affairs of the appointment in writing within twenty days, stating the matters stipulated by a MEXT ordinance with the joint signature of the responsible manager. The present provision shall also apply where a responsible manager has been released from the responsibility.

4. The provisions of the preceding Article and the present paragraph 1 shall apply *mutatis mutandis* to the responsible manager.

⁸⁸ Ibid

⁸⁹ Subsection 3. Protection

Article 34: Repairs

The repairs of an object of ‘Important Cultural Property’ shall be implemented by its owner. However, it shall be conducted by a managerial body if such has been appointed.

Article 34: Repairs by a Managerial Body

Where a managerial body repairs an object of ‘Important Cultural Property’, it shall seek the opinion of an owner of the said object of ‘Important Cultural Property’ in advance (except where such an owner is not traceable) and of its occupant by title, regarding the method and the time of repairs.

2. The provisions of Article 32 bis paragraph 5 and Article 32 quarter shall apply *mutatis mutandis* where a managerial body implements repairs.

Article 35: Subsidy for Management or Repairs

Where an owner of an object of ‘Important Cultural Property’ or its managerial body is unable to bear significant expenses required for the management or repairs of such property, or where any other special circumstances exist, the Government may grant a subsidy to the said owner or managerial body to cover part of such expenses.

2. Where a subsidy under the preceding paragraph is granted, the Commissioner for Cultural Affairs may, as a condition thereof, issue any necessary instructions regarding the management or repairs.

3. Where the Commissioner for Cultural Affairs deems it necessary, he may direct and supervise the management or repairs of an object of ‘Important Cultural Property’ for which a subsidy is granted under paragraph 1.

⁹⁰ Ibid

⁹¹ Ibid

- certificate of designation issued to the former owner.
2. Where an owner of an object of 'Important Cultural Property' has replaced a responsible manager, he shall inform the Commissioner for Cultural Affairs of the change in writing within twenty days, stating the matters stipulated by a MEXT ordinance, with the joint signature of the newly appointed manager. In this case, the provision of paragraph 3 in the preceding Article does not apply.
 3. Where an owner or a manager of an object of 'Important Cultural Property' has changed his name, title or address, he shall inform the Commissioner for Cultural Affairs of the change(s) in writing within twenty days, stating the matters stipulated by a MEXT ordinance. Where the change has occurred in the name, title, or address of the owner, he shall attach the certificate of designation to the information document to be submitted."⁹²

Important cultural property may also be opened to the public, as the Commissioner for Cultural Affairs may advise for a limited period. If it has been destroyed or damaged because of being displayed for public viewing, the State shall compensate its owner for ordinary damages incidental thereto. However, it will not do so if the destruction or damage has resulted from a cause imputable to the owner, to the responsible manager, or to a managerial body.⁹³ Some taxes on cultural properties, such as the fixed asset tax (property tax), are exempted. In Japan, there are a considerable number of tax concessions to finance private cultural preservation, but it is also good to note that they are enmeshed in a highly complex set of rules and conditions.⁹⁴

Export and other measures

Article 44 of the Law for the Protection of Cultural Properties provides that important cultural property shall not be exported, but this is not applicable in case the Commissioner of the Agency for Cultural Affairs has given permission due to special necessity from the viewpoint of international exchange or due to other considerations.⁹⁵ It is understood that the second level of classification of the cultural property mentioned above plays an important role in export since the normal reason for export refusal is that the object is considered a national treasure.⁹⁶ Before anyone could assign an important cultural property for consideration, the party should

⁹² Article 32, The Law for the Protection of Cultural Properties of 1950

⁹³ Article 50-52, The Law for the Protection of Cultural Properties of 1950

⁹⁴ McCleary, Rebecca L., "Financial Incentives for Historic Preservation: An International View" (2005). Theses (Historic Preservation). 35. https://repository.upenn.edu/hp_theses/35

⁹⁵ Article 44, The Law for the Protection of Cultural Properties of 1950

⁹⁶ Ibid., 75

first file in writing with the Commissioner an offer of sale to the State, including therein the name of the assignee, the estimated value of the consideration, to be computed in money at the current price in case the consideration consists in things other than money, and any other matters prescribed by the Ministry.⁹⁷ If the Commissioner has, within thirty (30) days from the offer of sale filed, given notice that the State will buy the important cultural property, a bargain shall be deemed to have been closed at a price corresponding to the estimated value of the consideration stated in the offer.⁹⁸ No transfer of the said important cultural property shall be made within the period specified in the preceding sentence or until the time within that period when the Commissioner has noticed that the property will not be bought by the State.⁹⁹

2) INDIA

India's Constitution provides for the obligation of the State to protect its monuments, places, and objects of artistic and historic significance. India enacted the *Antiquities and Art Treasures Act* of 1972 and 1973, as well as the *Antiquities Rules*, both within the authority of the Ministry of Culture, Archaeological Survey of India. Both regulations provide not only the ownership of art or antiquity but also the control or possession of the properties mandating registration.¹⁰⁰ Prior to these laws, India enacted Act No. 24 or *The Ancient Monuments and Archaeological Sites and Remains Act of 1958*, which "provides for the preservation of ancient and historical monuments and archaeological sites and remains of national importance, for the regulation of archaeological excavations and for the protection of sculptures, carvings and other like objects."¹⁰¹ The law defines ancient monuments as follows:

"xxx

- a) "ancient monument" means any structure, erection or monument, or any tumulus or place of interment, 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

⁹⁷ Article 46, The Law for the Protection of Cultural Properties of 1950

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Nagaland, K. (2020). Art law: Restrictions on the export of cultural property and artwork: India. *International Bar Association*, 57-65. <https://www.ibanet.org/MediaHandler?id=d67cb566-b6d4-4ea4-94e5-04d0ac6c7681>

¹⁰¹ *The Ancient Monuments and Archaeological Sites and Remains Act, 1958*. (n.d.). <https://www.indiacode.nic.in/bitstream/123456789/13053/2/A1958-24.pdf>

- 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.”¹⁰²

In case the Central Government **of the country, India**, believes that a monument is in danger of being destroyed, injured, misused, or allowed to fall into decay, it may acquire the protected monument (*Land Acquisition Act, 1894*) as if it were for public purpose.¹⁰³ On the other hand, for an item to be classified as an “antiquity” under the Antiquities Act 2(1)(a), the age of the item or the cultural property is taken into consideration. An “antiquity” is defined as a coin, sculpture, painting, epigraph, or other work of art or craftsmanship that has been in existence for 100 years or more or refers to any manuscript, record, or other document that has been in existence for over 75 years, according to the 1972 Act.¹⁰⁴ Some works of prominent artists and personalities are also considered as national treasures, which cannot be exported out of India as indicated, to wit:

- “2. Definitions.—(1) In this Act, unless the context otherwise requires,—
- (a) “antiquity” includes—
 - 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, morals or politics in bygone ages;
 - iv. any article, object or thing of historical interest;
 - v. 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 than one hundred years; and,
 - vi. 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 seventy-five years.”¹⁰⁵

Under the *Antiquities Act*, one of the consequences of classifying a thing or good as cultural property is the associated movement restriction outside the country without securing prior consent or license from the

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ *The Antiquities and Art Treasures Act, 1972*. (n.d.).

<https://www.indiacode.nic.in/bitstream/123456789/1693/1/a1972-52.pdf#search=antiquity>

¹⁰⁵ Ibid

appropriate authority.¹⁰⁶ Hence, any private individual or institution owning cultural properties tagged as “national treasure” may own the properties within the territory of India.¹⁰⁷ Individual owners may opt to sell it to others who are not residing in India under the condition that the property does not leave India. The tagging or classification of an asset or a thing as antiquity does not affect the rights of ownership. It only limits the asset or thing being taken out of the country.¹⁰⁸ Export is permitted upon strict compliance with the procedure created by the Archaeological Survey of India (ASI) and only to individuals who possess the importers-export code number issued by the Director-General of ASI or any authorized officer. A six-month period is allowed for the export of artwork for exhibition, educational, and research purposes. There may be an extension for another six months on the request of a borrowing institution or organization, and approval of the Inter-Ministerial Committee for Exhibition (IMEC).¹⁰⁹ It may be loaned to foreign institutions or museums for a period of three (3) years, which may be extended for another two (2) years upon request of the borrowing institution and the IMEC’s approval.¹¹⁰ On the other hand, Act No. 24 provides that certain monuments are deemed to be of national importance, and the country’s Central Government has the power to declare monuments to be of national importance:

“3. Certain ancient monuments, etc., deemed to be of national importance.—All ancient and historical monuments and all archaeological sites and remains which have been declared by the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (71 of 1951), or by section 126 of the States Reorganization Act, 1956 (37 of 1956), to be of national importance shall be deemed to be ancient and historical monuments or archaeological sites and remains declared to be of national importance for the purposes of this Act.¹¹¹

When the Central Government is of the opinion that an ancient monument or archaeological site and remains not included in the abovementioned Section 3 is of national importance, by notification in the Official Gazette, it may give two months’ notice of its intention to declare such property/ies to be of national importance. A copy of the notification is affixed in a conspicuous place near the subject monument or site and remains.¹¹² Any person interested in the subject property within two (2) months after the notification may object, and after that, the Central Government may or may not declare by notification in the Official Gazette,

¹⁰⁶ Ibid., 100

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Ibid., 101

¹¹² Ibid

the property to be of national importance.¹¹³ The Central Government may purchase, or take a lease of, or accept a gift or bequest of any protected monument in India. If a protected monument is without an owner, the Central Government, through the Director-General, may assume the guardianship. If there is an owner, he or she may, by written instrument, constitute the Director-General, the guardian. If the Director-General has accepted the guardianship, the owner shall, except as expressly provided by the Act, have the same estate, right, title, and interest in and to the monument as if the Director-General had not been the guardian.¹¹⁴ The Act provides for the preservation and protection of monuments by agreement¹¹⁵ wherein the collector shall propose to the owner of a protected monument to enter into an agreement with the Central Government within a specified period for the maintenance of the monument.

3) MALAYSIA

To support the growth of the tourism industry and enhance its national identity, Malaysia promoted the development of its culture, which included the creation of the Ministry of Information, Communications, and

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Preservation of protected monument by agreement.—(1) The Collector, when so directed by the Central Government, shall propose to the owner of a protected monument to enter into an agreement with the Central Government within a specified period for the maintenance of the monument.

(2) An agreement under this section may provide for all or any of the following matters, namely:—

(a) the maintenance of the monument;

(b) the custody of the monument and the duties of any person who may be employed to

(c) the restriction of the owner's right—(i) to use the monument for any purpose, (ii) to charge any fee for entry into, or inspection of, the monument, (iii) to destroy, remove, alter or deface the monument, or (iv) to build on or near the site of the monument;

(d) the facilities of access to be permitted to the public or any section thereof or to archaeological officers or to persons deputed by the owner or any archaeological officer or the Collector to inspect or maintain the monument;

(e) the notice to be given to the Central Government in case the land on which the monument is situated or any adjoining land is offered for sale by the owner, and the right to be reserved to the Central Government to purchase such land, or any specified portion of such land, at its market value;

(f) the payment of any expenses incurred by the owner or by the Central Government in connection with the maintenance of the monument;

(g) the proprietary or other rights which are to vest in the Central Government in respect of the monument when any expenses are incurred by the Central Government in connection with the maintenance of the monument;

(h) the appointment of an authority to decide any dispute arising out of the agreement; and

(i) any matter connected with the maintenance of the monument which is a proper subject of agreement between the owner and the Central Government.

(3) The Central Government or the owner may, at any time after the expiration of three years from the date of execution of an agreement under this section, terminate it on giving six months' notice in writing to the other party: Provided that where the agreement is terminated by the owner, he shall pay to the Central Government the expenses, if any, incurred by it on the maintenance of the monument during the five years immediately preceding the termination of the agreement or, if the agreement has been in force for a shorter period, during the period the agreement was in force.

(4) An agreement under this section shall be binding on any person claiming to be the owner of the monument to which it relates, from, through or under a party by whom or on whose behalf the agreement was executed.

Culture in 2004. The Ministry is focused on consolidating policy and programs and formulating strategies to make the country's art and cultural heritage more accessible for economic growth.¹¹⁶ A year after, during the Ninth Malaysian Plan, the *National Heritage Act of 2005*, also referred to as the NHA 2005, was enacted with the aim of giving protection and preserving various tangible and intangible cultural heritage and promoting the tourism industry. Initially, RM442.2 million was allocated for culture, arts, and heritage programs under the NHA, wherein 63% was assigned to the preservation and conservation of cultural heritage. NHA was enacted for all 13 states and three (3) federal territories of Malaysia to implement the same provisions and regulations dealing with all types of cultural heritage.¹¹⁷ A Heritage Fund was established under the NHA, which is controlled, maintained, and operated by the Commissioner. The fund may be used for procurement of heritage and conservation areas and other expenses incurred, such as preservation of heritage, whether owned by the government or otherwise, organizing campaigns and research, and underpayments in accordance with NHA.¹¹⁸ Aside from this, NHA also provides for a National Heritage Register that shall be available for public inspection.¹¹⁹ The provisions of the NHA defined cultural heritage under four (4) categories: heritage sites, heritage objects, underwater cultural heritage, and intangible cultural heritage, which includes forms of expressions, sounds and music, dances, and performances, specifically described as follows:

"Heritage Site pertains to any site with natural or cultural significance in the form of immovable heritage, such as an area, place, zone, monument, building, archaeological reserve, land with buildings, garden, and trees.¹²⁰

A Heritage Object is any moveable antiquity, tangible cultural heritage, intangible cultural heritage with cultural significance, or historical object.¹²¹

Underwater Cultural Heritage includes all traces of human existence having a cultural, historical, or archaeological character that have been partially or totally under water, periodically or continuously, for at least one hundred years, such as (a) sites, structures, buildings, artifacts, and human remains, together with their archaeological and natural context; (b) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (3) objects of prehistoric character.¹²²

¹¹⁶ Adabiah, Mustafa & Chua, Nuraisyah. (2013). *Preservation Of Cultural Heritage In Malaysia: An Insight Of The National Heritage Act 2005*.

¹¹⁷ Ibid

¹¹⁸ Part V, National Heritage Act of 2005, Act 645.

¹¹⁹ Part VI, National Heritage Act of 2005, Act 645.

¹²⁰ Part 1, National Heritage Act of 2005, Act 645.

¹²¹ Ibid

¹²² Ibid

Intangible cultural heritage is defined as any form of expressions, languages, lingual utterances, sayings, musically produced tunes, notes, audible lyrics, songs, folksongs, oral traditions, poetry, music, dances as produced by the performing arts, theatrical plays, audible compositions of sounds and music, martial arts, that may have existed or exist in relation to the heritage of Malaysia or any part of Malaysia or in relation to the heritage of a Malaysian community.”¹²³

There is a hierarchy of heritage, which includes two (2) statuses: the *Heritage*, which is declared by the Commissioner of Heritage, and the *National Heritage* status, pertaining to the highest status declared by the Minister of Information, Communication and Culture. For *heritage*, any person may nominate to the Commissioner of Heritage (established under Section 4 of NHA) any potential site, object, or underwater cultural heritage. The same is true with *national heritage*; however, this time, the nomination form has been submitted to the minister.¹²⁴ Subject to status and categories of heritage, the procedure for nomination and declaration of cultural heritage varies. Below is the procedure for declaring the site as heritage:

Table 1: Procedures to declare Heritage Site¹²⁵

Inspection of site (26.) (1) The Commissioner may at any time enter upon a site to inspect, survey, investigate or to carry out any work necessary for the purpose of determining whether to designate the site as a heritage site.

(2) The owner or occupier of the site shall be given a notice in writing of not less than seven days of any proposed entry.

(3) Where any person objects to such entry under subsection (1) on conscientious or religious grounds, such entry shall not be effected except with the permission in writing of the State Authority in which the site is situated.

(4) The Commissioner may enter into any arrangements with the owner or occupier of the site for any loss or damage suffered or alleged to have been suffered by the owner or occupier by reason of such entry under subsection (1).

(5) Any person who obstructs the Commissioner or refuses entry into any site for inspection, survey, investigation, or to carry out any work under subsection (1) commits an offence.

Notice to owner, etc. (27.) (1) Upon determining to designate a site as a heritage site, the Commissioner shall, at least sixty

¹²³ Ibid

¹²⁴ *Malaysia: Response to Questionnaire on Access to Cultural Heritage*. (n.d.). United Nations. Retrieved September 5, 2023, from <https://www.ohchr.org>

¹²⁵ Chapter 1, Part VII, National Heritage Act of 2005, Act 645.

days before making the designation, give a written notice in the form and manner as prescribed by the Commissioner to the owner of the site of the intention to register the site as a heritage site.

(2) As soon as possible after giving notice under subsection (1) the Commissioner shall –

(a) cause to be published in the *Gazette* and a local newspaper –

(i) a notice of intention to designate the site as a heritage site; and

(ii) any other matters constituting or relating to the designation which in his opinion is desirable to publish; and

(b) file a notice of intention to designate the site as a heritage site at the land office where the site is situated.

Objection (28.) An owner of the site or any other person affected or likely to be affected by the designation of the site as a heritage site may make an objection to the designation of the site by serving a notice of objection on the Commissioner within thirty days from the date of the publication of the notice under paragraph 27(2)(a).

Hearing (29.) Where a notice of objection to the designation of the site is served in accordance with section 28 the Commissioner shall set a date, time and place for the hearing of the objection and shall, at least twenty one days before the date of the hearing serve a notice of hearing in the form and manner as prescribed by the Commissioner, upon the objecting party and the owner of the site.

Consent of the State Authority (30.) Where the site is situated in a State, the Commissioner shall obtain the consent of the State Authority of that State before any designation is made.

Decision of the Commissioner (31.) (1) Where the Commissioner, after hearing the parties, if any, is satisfied that –

(a) the site is of cultural heritage significance; and (b) the State Authority has given its consent under section 30, he (i) (ii) (iii) shall – designate the site as a heritage site; record the heritage site in the Register; and give the owner a written notice of the Commissioner's decision.

(2) As soon as possible after the decision in subsection (1), the Commissioner shall –

(a) cause to be published in the *Gazette* and a local newspaper –

(i) a notice that the site has been designated as a heritage site; and

(ii) any other matters constituting or relating to the heritage site which in his opinion is desirable to publish; and

(b) file a notice in the land office where the heritage site is situated notifying that the site has been designated as a heritage site.

(3) Where the Commissioner makes a decision not proceed with the proposed designation of a site, he shall immediately notify the owner of the site and the land office where the site is situated in writing of such decision, with or without assigning any reason.

Section 33, Chapter 2, Part VII of the NHA provides that the Commissioner may make an Interim Protection Order, which may be revoked by the Commissioner himself/herself at any time, in relation to a site if it is his/her of opinion that it is necessary to do so for the purpose of conservation and preservation.¹²⁶

Dealings and preservation of heritage site

If a heritage site is privately owned, the owner who enters into an agreement of sale of the whole or any part of the heritage site shall notify the Commissioner in writing in the prescribed form of the information about the existence of the agreement within 28 days of the date of the agreement.¹²⁷ On the other hand, any person who acquires any heritage site shall, within 28 days of the date of the completion of the acquisition, notify the Commissioner in writing of the (a) person's name and address; and (b) whether the person intends to occupy the site.¹²⁸ On the other hand, if a heritage site is situated on an alienated land, the Commissioner, after consultation with the State Authority, may (a) enter arrangements with the owner or occupier for inspection, maintenance, conservation, and preservation of the heritage site; (b) purchase or lease the site; (c) acquire the site in accordance with the provisions of any law relating to the acquisition of land for a public purpose; or (d) remove the whole or any part of a building or monument on the site. If the owner or occupier agrees to enter an agreement, then the Commissioner contributes towards the costs of carrying out any necessary works of repair or conservation.¹²⁹ The heritage site owner shall ensure that the site is always in a state of good repair. If the Commissioner believes that steps are not being taken to properly preserve the monument, he may carry out the repair works after giving the owner two weeks' notice, and all costs and expenses reasonably incurred to carry out the works shall be reimbursed by such person. However, NHA also provides that an owner of a heritage site may apply to the Commissioner for any grant or loan to carry out any conservation and preservation works on the heritage site.¹³⁰ The following is the procedure to declare a heritage object:

Table 2: Procedures to declare Heritage Object¹³¹

¹²⁶ Part VII, National Heritage Act of 2005, Act 645

¹²⁷ Chapter 3, Part VII, National Heritage Act of 2005, Act 645.

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ Chapters 1-2, Part VIII, National Heritage Act of 2005, Act 645.

Declaration as heritage object by Commissioner (49.) (1)

The Commissioner may declare in the *Gazette* any object which has cultural heritage significance to be a heritage object and shall cause it to be listed in the Register.

(2) Before making the declaration under subsection (1), the consent of the owner of such object shall be obtained and for that purpose, the Commissioner may furnish the owner such prior opportunity for representation or submission in regard to the proposed declaration as may be practicable in the circumstances and in such manner as may be prescribed.

(3) The Commissioner may, in the same manner as in subsection (1), amend or revoke the *Gazette* and in each case of such amendment or revocation he shall substantiate his action with the necessary background and reason.

(4) Upon the object being listed in the Register, the object shall be a heritage object starting from the date of its registration and shall cease to be a heritage object when the Commissioner revokes registration.

Application for registration of heritage object (50.) (1)

Any person may apply for an object to be registered as a heritage object.

(2) An application for registration shall be in such form and accompanied by such documents or information as may be prescribed.

(3) The Commissioner may at any time after receiving the application under subsection (1) and before it is determined, by a written notice require the applicant to provide such additional documents or information as the Commissioner deems necessary.

(4) Where any additional document or information required under subsection (3) is not provided by the applicant within the time specified in the notice or any extension thereof granted by the Commissioner, the application shall be deemed to be withdrawn and shall not be further proceeded with, but without prejudice to a fresh application being made by the applicant.

(5) An application under this section may be withdrawn at any time before it is approved or refused.

Approval or refusal of application for registration (51.) (1)

Where the Commissioner is satisfied that an object is of cultural heritage significance, he shall register the object as a heritage object in the Register and give the applicant a written notice of the Commissioner's decision under this section.

(2) Where the application involves an object which is attached to any alienated land, the concurrence of the State Authority shall be obtained before the application is approved.

(3) Where the application involves intangible cultural heritage in which copyright subsists, the consent of the copyright owner shall be obtained before the application is approved.

(4) An application for registration which is approved under this section may be subject to such conditions as the Commissioner may impose.

(5) As soon as possible after the approval in subsection (4), the Commissioner shall cause to be published in the *Gazette* a notice that the object has been registered as a heritage object and on any other matter constituting or relating to the heritage object which in his opinion is desirable to publish.

(6) Where the Commissioner refuses the application, he shall immediately notify the applicant in writing of the refusal with or without assigning any reason for the refusal.

Certificate of registration (52.) (1) When an object is registered under section 51 the Commissioner shall issue a certificate of registration to the owner.

(2) Upon the heritage object being ceased to be registered as a heritage object, the owner of the object must surrender the certificate of registration to the Commissioner within three months from the date of such cessation.

When an object is now registered under Section 51 mentioned above, the Commissioner shall issue a certificate of registration to the owner. Once the object is delisted as a heritage object, its owner must surrender the certificate of registration within three months from the date of cessation.¹³² If the object discovered has cultural heritage significance, the Commissioner shall be entitled to the custody and possession of the same on behalf of the Federal Government and shall be responsible for its safeguarding and safekeeping. He also has the discretion to pay a reasonable amount of compensation to (a) the finder, (b) the owner of an alienated land in or on which the object was discovered, or (c) the informant.¹³³

Dealings and preservation of heritage object

In writing, the Commissioner may require any person in possession of any heritage object deemed to be of national importance or interest not to sell or dispose of such object without prior written consent of the

¹³² Chapter 2, Part VIII, National Heritage Act of 2005, Act 645.

¹³³ Chapter 3, Part VIII, National Heritage Act of 2005, Act 645.

Commissioner.¹³⁴ Within thirty days from the date of the notice, the Commissioner is given by the NHA the first right to purchase such a heritage object at an agreeable value.¹³⁵ If an owner of a heritage object enters a contract to sell or transfer the heritage object, he shall notify the Commissioner in writing of the information about the existence of that contract within 28 days of the date of the contract. Consequently, any person who purchases a heritage object shall notify the Commissioner in writing within 28 days of the date of the purchase of the acquirer's name, particulars, and address.¹³⁶ The owner or custodian of a heritage object shall keep the property in good condition and in a secure place. He shall also immediately report to the Commissioner any loss or damage to such heritage object or any part of it upon discovery of such loss or damage.¹³⁷ For the conservation of intangible cultural heritage, the owner or custodian shall take all necessary steps to develop, identify, transmit, cause to be performed, and facilitate the research on the intangible cultural heritage.¹³⁸ Any property considered as a National Heritage¹³⁹ owned or possessed by a person other than the government may remain in the possession of its owner, custodian, or trustee. NHA also provides that, "there shall be no change in respect of the ownership of any National Heritage except by – (a) inheritance; or (b)

¹³⁴ Ibid

¹³⁵ **Ibid**

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ibid

¹³⁹ Part X, National Heritage Act of 2005, Act 645- Declaration of National Heritage

67. (1) The Minister may, by order published in the *Gazette*, declare any heritage site, heritage object, underwater cultural heritage listed in the Register or any living person as a National Heritage.

(2) In making a declaration under subsection (1) the Minister may consider –

(a) the historical importance, association with or relationship to Malaysian history;

(b) the good design or aesthetic characteristics;

(c) the scientific or technical innovations or achievements;

(d) the social or cultural associations;

(e) the potential to educate, illustrate or provide further scientific investigation in relation to Malaysian cultural heritage;

(f) the importance in exhibiting a richness, diversity or unusual integration of features;

(g) the rarity or uniqueness of the natural heritage, tangible or intangible cultural heritage or underwater cultural heritage;

(h) the representative nature of a site or object as part of a class or type of a site or object; and

(i) any other matter which is relevant to the determination of cultural heritage significance.

(3) Where the site, object or underwater cultural heritage is situated on State land, the Minister shall consult the State Authority before making any declaration under subsection (1).

(4) Where the site, object or underwater cultural heritage is on an alienated land or belongs to any person other than the Federal Government or a State Government, the owner, custodian or trustee of that site, immovable object or underwater cultural heritage shall be notified at least thirty days prior to the date of the proposed declaration.

(5) Where the declaration under subsection (1) involves an intangible cultural heritage and copyright still subsists in such works, the consent of the copyright owner shall be obtained before any declaration is made.

(6) Where the declaration under subsection (1) involves a living person, the consent of that person shall be obtained before any declaration is made.

(7) A copy of the order shall be served on the owner, custodian or trustee of the site, object or underwater cultural property or on the living person.

(8) Any person who objects to the making of the declaration under subsection (1) may submit an objection in writing to the Minister within three months of its publication and may apply to the Minister for the revocation of the order.

(9) The Minister may, after having been advised by the Council, revoke or refuse to revoke the order and such decision shall be final.

sale, with the prior approval of the Commissioner.”¹⁴⁰ And if there is an intention to sell a National Heritage, the owner, custodian, or trustee shall give priority to the Commissioner to purchase on an agreed value or upon the instruction of the Commissioner to deal with in such manner that the Commissioner deems fit.¹⁴¹ If there is a dispute as to the reasonable compensation for such National Heritage, it shall be referred to the Minister, whose decision shall be final.¹⁴²

Export and import

NHA also included provisions on export and import. Under the law, no person shall export any heritage item unless there is a license to export obtained from the Commissioner. To apply for the license to export any heritage item, an applicant shall submit the description of the item, declare the value, and furnish such relevant particulars that the Commissioner may require. The Commissioner may also require the deposit of the item for inspection. If the Commissioner believes that the item is or will be of national importance or interest, he may prohibit the export thereof.¹⁴³ On the other hand, for importation, a person who intends to import any foreign heritage item has the responsibility to notify the Commissioner with the documents certifying that the item was lawfully transported out of a foreign country. If there is a valid reason to believe that the item was unlawfully transported out of a foreign country, the Commissioner may take possession of it and keep it in custody.¹⁴⁴

B. WESTERN COUNTRIES

4) ITALY

The legal framework of Italian cultural heritage traces its origin back to centuries before the country’s unification in 1861.¹⁴⁵ It was in 1909 when the Italian parliament approved the first comprehensive Italian cultural heritage law or Law No 364/1909. It was then replaced by Law No 1497/1939, abrogated by Decree 490/1999. In 2004, the Italian Parliament approved, by Legislative Decree No. 42 of 22 January 2004, the current Cultural Heritage Code (CHC).¹⁴⁶ In cooperation with the Regions, Provinces, and Municipalities, the Central Government aims to protect the state’s cultural heritage through the CHC. Article 10 of the CHC, states that any object with, immovable or movable, with “cultural interest,” from an artistic, historical, archaeological or ethno-anthropological viewpoint, may be declared of cultural interest and classified as cultural property, even if

¹⁴⁰ Ibid

¹⁴¹ Ibid

¹⁴² Ibid

¹⁴³ Chapter 1, Part XII, National Heritage Act of 2005, Act 645.

¹⁴⁴ Ibid

¹⁴⁵ Carugno, Mazzitti e Zucchelli, *Codice dei Beni Culturali annotato con la giurisprudenza* (Milan: Giuffrè 2006), p 1.

¹⁴⁶ Calabi, G. (2020). Art law: Restrictions on the export of cultural property and artwork: Italy. International Bar Association, 66-80. <https://www.ibanet.org/MediaHandler?id=d67cb566-b6d4-4ea4-94e5-04d0ac6c7681>

owned by public entity such as state, region, and municipality; private entity like corporation or nonprofit organization; or individual.¹⁴⁷ The same provision of CHC, Article 10, paragraph 2, provides that cultural property includes: “*a*) the collections of museums, picture galleries, art galleries and other exhibition venues of the State, the Regions, other territorial government bodies, as well as any other government body and institute; *b*) the archives and single documents of the State, the Regions, other territorial government bodies, as well as of any other government body and institute; *c*) the book collections of libraries of the State, Regions, other territorial government bodies, as well as any other government body and institute.”¹⁴⁸ The following are also considered cultural property as defined in Article 10 of the CHC:

“3. Cultural property shall also include the following when the declaration provided for in Article 13¹⁴⁹ has been made:

- a. immovable and movable things of particularly important artistic, historical, archaeological or ethno-anthropological interest, which belong to subjects other than those indicated in paragraph 1;
- b. archives and single documents, belonging to private individuals, which are of particularly important historical interest;
- c. book collections, belonging to private individuals, of exceptional cultural interest;
- d. immovable and movable things, to whomsoever they may belong, which are of particularly important interest because of their reference to political or military history, to the history of literature, art, and culture in general, or as a testimony to the identity and history of public, collective or religious institutions;
- e. collections or series of objects, to whomsoever they may belong, which through tradition, renown, and particular environmental characteristics are as a whole of exceptional artistic or historical interest.

4. The things indicated in paragraph 1 and paragraph 3, letter *a*) include:

- a. the things that pertain to paleontology, prehistory, and primitive civilizations.
- b. things of numismatic interest.

¹⁴⁷Legislative Decree No. 42 laying down the Code on Cultural Heritage and Landscape. (n.d.). FAO of United Nations. Retrieved April 29, 2023, from <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC042021/#:~:text=Italy-Legislative%20Decree%20No.,the%20Regions%2C%20Provinces%20and%20Municipalities>.

¹⁴⁸ Code of the Cultural and Landscape Heritage. (2004, January 22). Retrieved May 2, 2023, from <https://whc.unesco.org/document/155711>

¹⁴⁹ Ibid

- c. manuscripts, autographs, papers, incunabula, as well as books, prints, and engravings with their relative matrixes, of a rare or precious nature;
- d. geographical maps and musical scores of a rare and precious nature;
- e. photographs, with their relative negatives and matrixes, cinematographic films, and audio-visual supports in general, of a rare and precious nature;
- f. villas, parks, and gardens possessing artistic or historical interest;
- g. public squares, streets, roads, and other outdoor urban spaces of artistic or historical interest;
- h. mineral sites of historical or ethno-anthropological interest;
- i. ships and floats possessing artistic, historical or ethno-anthropological interest;
- j. types of rural architecture possessing historical or ethno-anthropological interest as testimony to the rural economy tradition.

5. Without prejudice to the provisions of articles 64 and 178, the things indicated in paragraph 1 and paragraph 3, letters *a)* and *e)*, which are the work of living authors, or which were not produced more than fifty years ago, are not subject to this Title.”¹⁵⁰

If there is a declaration that an object or property is of cultural interest, its private owner is entitled to sell or donate it, with an obligation to notify the contract to the Italian State within 30 days of the date of the transaction, following Article 59 of the CHC, by the:¹⁵¹

- (a) “alien or the transferor of possession of the property, in the case of alienation made for a money consideration or not for value, or of transferral of possession.
- (b) purchaser, in the case of transferral occurring in procedures of forced or bankruptcy sale or by force of an adjudication which produces the effect of a transfer contract which is not concluded;
- (c) heir or the legatee, in the case of succession because of death. For the heir, the time limit begins with the acceptance of the inheritance or with the presentation of the declaration to the competent tax offices; for the legatee the time limit begins with the opening of the will, except in the case of renunciation under the provisions of the civil code.”¹⁵²

¹⁵⁰ Ibid

¹⁵¹ Ibid at 146.

¹⁵² Article 59, Code of the Cultural and Landscape Heritage

The declaration shall be presented before a competent superintendent in the place where the property is located.¹⁵³ An incomplete declaration or imprecise indications shall be deemed not to have been submitted. The declaration needs to include the following details: *a)* identification of the parties and the signature of the same or of their legal representatives; *b)* the information identifying the properties; *c)* the indication of the place where the properties are located; *d)* the indication of the nature and conditions of the deed of transfer; and *e)* the indication of the habitual residence in Italy of the parties concerned for the purposes of any communication.¹⁵⁴ Article 13 of **CHC** explains the declaration of cultural interest, which states that “the declaration shall ascertain the existence, in the thing in question, of the interest required under Article 10, paragraph 3” above mentioned. However, the declaration is not required for properties referred to in Article 10, paragraph 2 since those properties remain subject to protection even if the subjects to whom they belong in any way change their legal status.¹⁵⁵

In terms of restoration and other conservation, measures on cultural property on the initiative of the proprietor, possessor, or holder shall be authorized. For obligatory conservation work, Articles 32 and 34 provide that the Ministry may oblige the proprietor to carry out work necessary to ensure the conservation of cultural property, or it may take direct action. The following may take place: (1) the expenses incurred for measures shall be paid by the proprietor, possessor, or holder. But, if the measures are carried out on properties granted in use to, or for enjoyment by, the public, the Ministry may participate in the expenses in whole or in part. It shall determine the amount of the expenses it intends to sustain and shall notify the party concerned; and (2) if the expenses of the measures have been sustained by the proprietor, the Ministry shall proceed to their reimbursement and may also do so by part payments on account.¹⁵⁶ Decisions declaring an object as cultural property may be challenged in regional and administrative courts if there is violation of law provision or if the motivation for the declaration is incoherent or illogical.¹⁵⁷ The State also has a pre-emption right to be exercised within 60 days of the date of receipt of the sale notice in case of sale.¹⁵⁸ Classified objects may be moved within the Italian territory upon authorization by the Ministry. In addition, Article 21 of the **CHC** expresses that any restoration of a classified work needs to be authorized by the Ministry of Cultural Property.¹⁵⁹ Those privately owned works with a cultural interest created by non-living authors more than 70 years ago and not classified as cultural property can be exported on a permanent basis from the Italian territory for as long as an export permit is granted by one of the Export Offices of the Ministry of Cultural Property.¹⁶⁰ Consequently, objects which are less than 50 years ago that were created by living artists or non-living artists, cannot be declared of cultural interest and are not subject to cultural heritage protection. However, objects with a

¹⁵³ Ibid

¹⁵⁴ Ibid

¹⁵⁵ Article 13, Code of the Cultural and Landscape Heritage

¹⁵⁶ Article 32 and 34, Code of the Cultural and Landscape Heritage

¹⁵⁷ Ibid at 146.

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ Ibid

cultural interest created by non-living authors aged between 50 and 70 years old may be declared of cultural interest if they show exceptional interest in the integrity and completeness of the Italian cultural heritage.¹⁶¹ An export permit is not needed for artworks that are made by a non-living artist, older than 70 years and with a value of less than €13,500. But if exported, the artworks must be accompanied by a unilateral declaration by the exporting party featuring their nature, author, and the year it was created.¹⁶² If export is to European Union Member State territory, the Export Office shall issue a certificate of free circulation (*Attestato di libera circolazione*) following Article 68 of the CHC.¹⁶³

It is worth noticing that CHC, unlike other national laws, features expressed provisions regarding expropriation for public use of cultural properties. Article 95 states that “immovable and movable cultural property may be expropriated by the Ministry for reasons of public use when the expropriation responds to an important need to improve the conditions of protection for the purposes of public enjoyment of the aforesaid properties.” Expropriation may be initiated by the Ministry upon request. It may authorize the regions and other government bodies, as well as other public bodies and institutions, to carry out the process. In such a case, the Ministry shall declare public use for the purposes of expropriation and shall transfer the deeds to interested bodies for the prosecution of the procedure. It may also order expropriation on behalf of a public, non-profit association.¹⁶⁴ In expropriation, compensation shall include the fair price the property would have in a free contract of sale within the country, and payment shall be made in accordance with the modalities established by the provisions for expropriation for public use.¹⁶⁵

5) SWITZERLAND

For several years, Switzerland has been considered a destination and transit country for cultural goods since it has offered storage and trading facilities that helped sustain local and international markets.¹⁶⁶ In the 1980s to 1990s, the country was viewed as a hub for international trafficking in cultural goods. However, when the spotlight was shone on many cases involving international trafficking, Swiss authorities became aware, which led to the adoption of legal frameworks.¹⁶⁷ Thus, there is a need for the protection and preservation of movable properties, as Switzerland’s law is focused on the prevention of illicit export and transfer of cultural properties,

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ Article 68, Code of the Cultural and Landscape Heritage

¹⁶⁴ Article 95, Code of the Cultural and Landscape Heritage

¹⁶⁵ Article 95, *Code of the Cultural and Landscape Heritage*

¹⁶⁶ Robert Gisler, J.- & Federal Office of Police, Switzerland. (n.d.). Switzerland addresses the traffic in cultural goods. *WCO News*. <https://mag.wcoomd.org/magazine/wco-news-80/switzerland-addresses-the-traffic-in-cultural-goods/>

¹⁶⁷ Ibid

particularly on the measures adopted by the country in facilitating the transfer of ownership and export or import of movable cultural properties.¹⁶⁸

On 1 June 2005, the Cultural Property Transfer Act (CPTA) entered into force. The law includes the implementation, at the Swiss national level, of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, adopted by UNESCO in 1970.¹⁶⁹ The CPTA introduced rules on the export of defined cultural property and a heightened standard of diligence in the art trade, and it also facilitates cross-border museum loans and allows for the protection of other Switzerland's cultural property through bilateral agreements.¹⁷⁰

Cultural property is defined broadly in CPTA with reference to Article 1 of the 1970 UNESCO Convention, which listed the following categories: antiquities more than 100 years old; pictures, paintings and drawings produced entirely by hand, works of statuary art and sculpture, original engravings, prints and lithographs; furniture more than 100 years old and old musical instruments; property of historical interest; products of archaeological excavations or of archaeological discoveries; elements of monuments or archaeological sites which have been dismembered; objects of ethnological interest; rare manuscripts and documents of special interest; and archives, including sound, and photographic and cinematographic archives.¹⁷¹ The property has to be considered meaningful from a religious or secular point of view for archaeology, pre-history, literature, and art or sciences. For the property to pass the test of meaningfulness, it must be "of particular interest to the public, its disappearance would be a loss to cultural heritage, or the object is rare, and the subject matter is of scientific interest."¹⁷² Among the main planks of the CPTA is the protection of Swiss cultural heritage since it differentiates between the protection afforded by the Confederation and by the cantons.¹⁷³ Cultural property that belongs to the Confederation is considered significantly important for Swiss heritage. Hence, it is required to be registered in the Federal Registry. The registration has the following effects: (1) the cultural property may neither be acquired by adverse possession nor be acquired in good faith;¹⁷⁴ (2) the Federal Council will claim the right of repatriation against other contracting States involved in the illicit export from Switzerland;¹⁷⁵ and (3) that property's temporary export hinges on the granting of an export license by the specialized body at least 30 days before the intended export.¹⁷⁶ On the other

¹⁶⁸ Boesch, B. (2020). Art law: Restrictions on the export of cultural property and artwork: Switzerland. *International Bar Association*, 98-105. <https://www.ibanet.org/MediaHandler?id=d67cb566-b6d4-4ea4-94e5-04d0ac6c7681>

¹⁶⁹ Ibid

¹⁷⁰ Ibid

¹⁷¹ Article 1, 1970 UNESCO Convention

¹⁷² Ibid., at 137

¹⁷³ Noth, M., & Noth, E. (2005). Switzerland's New Federal Act on the International Transfer of Cultural Property. *Art Antiquity And Law*, 10(1), 73-91.

http://www.evelynenoth.ch/images/publikationen/Michael%20Noth_Evelyne%20Noth_Switzerland%20New%20Federal%20Act%20on%20the%20International%20Transfer%20of%20Cultural%20Property_Art%20Antiquity%20and%20Law_Vol%20X_Issue%201_March%202005.pdf

¹⁷⁴ Article 3(2)(a) CPTA

¹⁷⁵ Article 6(1) CPTA

¹⁷⁶ Article 5 CPTA

hand, **canton**¹⁷⁷ decides the extent of protection it will give to both cantons' cultural properties and private parties within its cantonal area. A canton may create its own registry, and later connect it to the federal database.¹⁷⁸ For cultural properties with private owners, registration in the Cantonal Registry will only happen with the approval of the owners¹⁷⁹, which provides protection to private parties since the rule respects the constitutional right to property.

In Switzerland, the classification of objects as cultural properties does not affect the right/s of ownership. There are no provisions, particularly in CPTA, restricting the trade and export of cultural property that is privately owned.¹⁸⁰ As a matter of fact, customs clearance, under new customs regulations pursuant to CPTA, is aimed at the import of cultural property.¹⁸¹ But, the due diligence requirements must be met during a transaction. This only means that cultural property may only be sold when it can be assumed that it is not stolen or otherwise lost against the will of the owner and illicitly excavated or illegally imported into Switzerland.¹⁸² Under Article 24 of CPTA, infringement of this duty of diligence leads to criminal sanctions. An additional set of duties of diligence apply to the trade, specifically dealers and auction houses, with the following duties to:

- 1) establish the identity of the supplier or seller during initial contact; including last name, date of birth, address, and citizenship of persons, company name, and registered address of legal entities (it is a matter of verification of the contracting seller's right of disposal, rather than the ultimate beneficial owner);
- 2) review information based on probative documents to the extent questions exist requiring a challenge to the correctness of the information;
- 3) obtain a written declaration on the right to dispose of the cultural property from the supplier or seller;
- 4) inform customers of existing import and export regulations from contracting states to the 1970 UNESCO Convention; and,
- 5) keep records on the acquisition of cultural property, including description and origin or provenance, date of transfer of ownership, sale price or appraised value, and information on identity and declaration on the right to dispose.¹⁸³

An owner who is unlawfully deprived of his/her cultural property will benefit from an extended time limitation period to claim back his/her property. The dispossessed owner must claim within one year from

¹⁷⁷ Administrative division like a state

¹⁷⁸ Articles 4(1) and 19(1) CPTA

¹⁷⁹ Article 4(1)(b) CPTA

¹⁸⁰ *Ibid.*, at 168

¹⁸¹ *Ibid*

¹⁸² *Ibid*

¹⁸³ Article 16 CPTA

knowledge of the location of the object, and identification of the current owner, at the latest, however, 30 years from the date of the theft.¹⁸⁴ On the other hand, anyone who acquires cultural property in good faith and is forced to return the same has a claim for compensation during its return.¹⁸⁵ A general ban is put on the export of any cultural property included on any federal or cantonal inventories, and the export of cultural property containing endangered species requires a permit, which is granted by the customs authorities upon advice by the Specialized Body for the International Transfer of Cultural Property, of the Federal Office of Culture.¹⁸⁶ Anyone who wishes to export cultural property shall complete and complete a detailed customs clearance declaration form, with attached relevant documents such as proof of origin, certificates, and invoice, under penalty of criminal consequences. If customs authorities have suspicions, they may withhold the property at the border, and they can report the matter to the criminal prosecution authorities.¹⁸⁷

6) SPAIN

Spain, as a country with a rich cultural legacy, ranked third in the world with 48 assets declared as World Heritage Sites.¹⁸⁸ This highlights the country's wealth of assets and its commitment to the preservation of its cultural properties and assets.¹⁸⁹ Properties belonging to the Spanish Cultural Heritage are regulated at different levels. The Spanish Law 16/1985 of June 25 on Historical Heritage, developed by Royal Decree 111/1986 of 10 January, is the main regulation with a national scope that distinguishes general, special regimes according to the characteristics of the objects of heritage to be protected. Additionally, each autonomous community in Spain has crafted its own legislation since 1990 in relation to the protection of cultural heritage.¹⁹⁰ Articles 1.2 and 9 of the Heritage Law provide that to classify goods as cultural property, these criteria must be met: (1) to be a movable or immovable object of artistic, historical, paleontological, archaeological, ethnographic, scientific or technical interest; and (2) to be declared as such by the competent administration.¹⁹¹

Article 1.

2. The Spanish Historical Heritage is made up of movable and immovable objects of artistic, historical, paleontological, archaeological, ethnographic, scientific, or technical interest. It also comprises documentary and bibliographical heritage, archaeological sites and areas, as well as

¹⁸⁴ Ibid., 168

¹⁸⁵ Ibid., 173

¹⁸⁶ Ibid., 168

¹⁸⁷ Ibid

¹⁸⁸ General Country data. (n.d.). International Centre for the Study of the Preservation and Restoration of Cultural Property. Retrieved August 8, 2023, from <https://cp.iccom.org/cprofiles/doku.php?id=countries:esp>

¹⁸⁹ Ibid

¹⁹⁰ Ibid

¹⁹¹ de Vicuña, B. and Bernardo, E. (2020). Art law: Restrictions on the export of cultural property and artwork: Spain. *International Bar Association*, 91-97. <https://www.ibanet.org/MediaHandler?id=d67cb566-b6d4-4ea4-94e5-04d0ac6c7681>

natural sites, gardens, and parks having artistic, historical, or anthropological value.

Article 6 of the law, on the other hand, assigned power to the central and regional governments of the country in relation to the protection and management of cultural properties. The central government mainly deals with protected property belonging to the state, and at the same time, it manages public authorities and delegated bodies. Autonomous communities or regions focus on private, local, and regional property within a particular autonomous community.¹⁹² The law covers the three levels of heritage protection: (1) property with historical heritage status, (2) the General Inventory of Movable Property, and (3) the General Register of Property of Cultural Interest (moveable and immovable).¹⁹³ Title I of the law deals with the declaration of property of interest. Any person could request proceedings to be initiated for the declaration of interest. The resolution declaring the property to be of cultural interest needs to be described clearly. If a property is declared of cultural interest, then it shall be recorded in the general Register.¹⁹⁴ The concept of historical-artistic heritage includes different categories of goods. First, there are properties of cultural interest or *bienes de interés cultural* found under Articles 9 to 39, both pertaining to immovable and movable. For immovable property or *bienes inmuebles de interés cultural* under Articles 14 to 25, there are five categories.¹⁹⁵ In terms of

¹⁹² Ibid

¹⁹³ Spain. (n.d.). Council of Europe. Retrieved September 1, 2023, from <https://www.coe.int/en/web/herein-system/spain>

¹⁹⁴ Article IX

1. Property forming part of the Spanish Historical Heritage and declared of cultural interest under this Law or individually by Royal Decree shall enjoy special protection and safeguarding.

2. Declaration by Royal Decree shall require prior administrative proceedings to be taken by the appropriate organisation in compliance with the provisions of article 6 of this Law. These proceedings shall include a favourable report from one of the consultative institutions named in article 3, paragraph 2, or one that is recognised as being of this nature within the area of an Autonomous Community. Three months after this report is requested, if it has not yet been issued, it shall be understood that the report requested finds in favour of the declaration of cultural interest. When the proceedings refer to immovable property, a period of public information shall be opened, and the interested Town Council shall be heard.

3. The proceedings shall result in a decision within a maximum period of twenty months from the date they were initiated. They shall expire at the end of this period if a delay has been reported, provided there is no decision during the four months after the report of the delay. Once the proceedings have expired, they may not be re-initiated during the next three years except at the request of the holder.

4. The work of a living author may not be declared as of cultural interest unless there is express authorization on the part of its owner, or it has been purchased by the Administration.

5. Officially or at the request of the holder of a legitimate, direct interest, administrative proceedings may be initiated by the appropriate official organization containing a favorable, reasoned report from one of the consultative institutions to invalidate by Royal Decree the declaration of cultural interest for a specific property.

¹⁹⁵ Article 15 (1.) Immovable property comprising architectural or engineering work or works of colossal sculpture shall be monuments provided they are of historical, artistic, scientific, or social interest; (2.) A historical garden is a delimited area resulting from organization by man of natural elements, sometimes complemented by constructions, and considered of interest because of its origin or historical past or its aesthetic, sensory or botanical values; (3) A historical unit is a group of immovable properties forming a continuous or dispersed unit of settlement, covered by a physical structure representing the development of a human community in that it testifies to their culture or constitutes a value for public use and enjoyment. A historical unit is also any individualized group of properties included in a larger population unit having the same characteristics and that can be clearly delimited; (4.) A historical site is a place or natural landscape linked to events or memories of the past or to popular tradition, cultural or natural

movable property or *bienes muebles de interés cultural* under Articles 26 to 34, these goods defined by their cultural interests are recorded in a special inventory. Owners have the responsibility to notify the public administration of the existence of such objects before proceeding to sell or transfer them.¹⁹⁶ Individuals or entities that habitually carry out trade in movable property part of the Spanish historical heritage shall also do the same.¹⁹⁷ Article 26 provides that:

“4. The owners or possessors of movable property having the value and characteristics officially laid down shall be obliged to notify the appropriate Administration of the existence of such objects before proceeding to sell or transfer them to third parties. The same obligation is established for people or entities that habitually carry out trade in movable property forming part of the Spanish Historical Heritage who shall also formalise with the Administration a Register of any transfers made of such objects.”

The second category pertains to archaeological heritage or *bienes del patrimonio arqueológico* under Articles 40 to 45. This group includes movable or immovable properties studied using the archaeological methodology, whether extracted or found on the surface or underground, in territorial seas, or on the continent itself. This also includes geological and paleontological elements, including caves, shelters, and places containing expressions of cave art.¹⁹⁸ Third, the ethnographic heritage or *bienes del patrimonio etnográfico* under Articles 46 and 47. This includes movable or immovable properties and knowledge and activities that are or have been a relevant expression of a traditional culture of the Spanish nation in its material, social, or spiritual aspects.¹⁹⁹ Under this category are the following:

- (a) Any buildings and installations whose method of constitution is an expression of knowledge acquired, established, and transmitted by custom and whose creation belongs totally or partially to a type or form of architecture traditionally used by communities or human groups shall be considered buildings of an ethnographic nature and shall be covered by the terms of Titles II and IV of this Law.
- (b) All objects that constitute the expression or the product of labour, aesthetic and pleasure activities of any human group that are

creations and works of man having historical, ethnological, paleontological or anthropological value; and (5) An archaeological area is the place or natural landscape where there are movable or immovable properties that can be studied using the archaeological methodology, whether or not they have been extracted and whether they are to be found on the surface, underground or below Spanish territorial waters.

¹⁹⁶ Capote-Pérez, Luis-Javier. (2018). Cultural Heritage and Spanish Private Law **. Santander Art and Culture Law Review. 2017. 237-254. 10.4467/2450050XSNR.17.017.8431.

¹⁹⁷ Ibid

¹⁹⁸ Ibid

¹⁹⁹ Ibid

established and transmitted by custom shall be considered property of an ethnographic nature and shall be covered by the terms of Titles III and IV of this Law.

- (c) Any knowledge or activities derived from traditional models or techniques used by a specific community shall be considered to have ethnographic value and shall receive administrative protection. When such knowledge or activities are considered to be at risk of disappearing, the appropriate Administration shall adopt suitable measures for such property to be studied and scientifically documented.²⁰⁰

Lastly, the documentary and bibliographical heritage or *bienes del patrimonio documental y bibliográfico* under Articles 48 to 58. This includes several “elements which have in common cultural testimony through all types of data formats, concretized in concepts like document and Library.”²⁰¹ There are differences between the abovementioned categories, and the law includes provisions whereby any object possessing the character of historic heritage is subject to defined limitations on the rights inherent in all private property rights.²⁰² After the classification as a cultural property, legal implications²⁰³ follow. The Spanish law also provides certain prohibitions concerning the sale of works of art such as (1) items of cultural interest and included in the National Heritage General Inventory that is in the possession of church-related institutions, which can only be transferred or sold to the state, public law entities or other church-related institutions; (2) items forming part of country’s national heritage is not subject to any time limitations; and (3) personal property forming part of the country’s national heritage cannot be transferred or assigned by public administration bodies, other than for the benefit of other public administration bodies.²⁰⁴

Export of cultural property and artwork

If the goods are declared as items of cultural interest and other goods forming part of Spain’s national heritage (*classified as non-exportable by the administration*), then export is prohibited until a procedure is initiated to

²⁰⁰ Article 47, Law 16/1985

²⁰¹ Ibid., 196

²⁰² Ibid

²⁰³ the cultural property will be in the public domain (ie, an individual may own the cultural property but the Administration will protect the artistic, historical, spiritual value of said property – therefore indirectly affecting the right of ownership); registration of the cultural property at issue in a general registry; the cultural property will need authorizations for any work or modification to be done in it; the cultural property will have an obligation to facilitate inspection, public visitations and investigation; the cultural property will be inseparable from their surroundings and non-exportable; in the case of real estate, it will be mandatory to write a special plan or protect them with any other planning figure; and in case of movable property, transfers or any change in the situation of property shall be notified to the appropriate Administration and entered in the general Inventory.

²⁰⁴ Ibid., 155.

include the same under any of the special protection categories.²⁰⁵ On the other hand, in cases of other cultural property and artwork not under the category mentioned above, owners or holders must obtain authorization from the administration if the property is more than 100 years old or included in the National Heritage General Inventory.²⁰⁶ The export authorization must be specific and applied beforehand. It must be submitted to (i) the autonomous regions having regional Credit Rating Committees, for goods within their territory or (ii) to the Board for the Certification, Valuation, and Export of Spanish Historical Heritage by the owner or the person with the capacity to dispose of said asset or duly authorized for that purpose. If the export is authorized, the person concerned shall submit the authorization to the Customs Office (outside the boundaries of the EU) and include the transport roadmap (within the EU). The duration for export proceedings is not fixed, and it will depend on a case-to-case basis.²⁰⁷ The state is not obliged to buy out the artwork for which export permission was denied since the refusal of the export permission does not imply acceptance of the offer, which, according to the law, must always be explicit.²⁰⁸ The authorization is needed for goods that are between 50 and 100 years old, provided that their value exceeds €15,000 for drawings, prints, and photographs; €30,000 for watercolors, gouaches, and pastels; €50,000 for sculptures; and €150,000 for paintings.²⁰⁹

VII. SYNTHESIS

Japan's Law for the Protection of Cultural Properties of 1950 has been known as one of the most sophisticated and complete statutes of its kind and the only country other than the Philippines that uses the term "important cultural property" in its legislation. However, in Japan, the definition of important cultural property is different from that of the Philippines. It refers to tangible items (*Works of fine arts and crafts: paintings, sculptures, crafts, calligraphic works, classical books, ancient documents, archeological artifacts, historical material*) officially classified as by the its government's and judged to be of particular importance to the history, arts, and culture of the Japanese people.²¹⁰ Under tangible properties, there are designated important cultural properties and are registered tangible cultural properties (*especially in need of preservation and utilization*). And from the list of important cultural properties, there are items of especially high value or designated as National Treasures.²¹¹

On the other hand, India was chosen as another representative country from the East. Aside from the fact that both the Philippines and India are situated in the southern part of Asia, they are also among the earliest State

²⁰⁵ Ibid

²⁰⁶ Ibid

²⁰⁷ Ibid

²⁰⁸ Ibid., 191.

²⁰⁹ Ibid

²¹⁰ Cultural Properties for Future Generations: Cultural properties in Japan. (2007). https://web.archive.org/web/20090327083232/http://www.bunka.go.jp/bunkazai/pamphlet/pdf/pamphlet_en_03.pdf Cultural Properties Department, Agency of Cultural Affairs, Japan

²¹¹ Ibid

members of UNESCO. India became a State member on 4 November 1946, while the Philippines became a State member on 21 November 1946. India is a good model for it has the most extensive number of World Heritage Sites, with 42 declared by UNESCO among countries located in South Asia. World Heritage is the designation for places in the world that are “of outstanding universal value to humanity and, as such, have been inscribed on the World Heritage List to be protected for future generations to appreciate and enjoy.” One of India’s world heritage sites is the Taj Mahal.²¹² Due to the country’s achievements, it may be concluded that India is protective of its cultural properties. India also enacted its first law on cultural property and protection as early as 1958.

For Malaysia, the National Heritage Act was enacted just four years earlier than the Philippine National Cultural Heritage Act. Both legislations are products of the 21st century and were enacted after the birth of various international conventions on cultural heritage and properties. Aside also from the fact that Malaysia and the Philippines are both countries from Southeast Asia, the former is just slightly bigger than the latter, with 330,345 square kilometers compared to 300,000.²¹³ In terms of gross domestic products (GDP- Nominal billions of \$) in 2022, the two countries are also not too far away from each other as Malaysia was in Rank 36 in the world with 407.03, while the Philippines was in Rank 39 with 404.28.

Below is the table containing the comparison of legislations on the protection and conservation of cultural properties among Eastern countries. The comparison is made based on terms used or categories of cultural properties: repair, alteration, export, transfer of ownership, funding from the government, and effects of being classified as cultural property to ownership.

Table 2: Comparative Table for Counties from the East

East Countries	Japan	India	Malaysia
Legislation	Law for the Protection of Cultural Properties of 1950	The Ancient Monuments and Archaeological Sites and Remains Act of 1958 Antiquities and Art Treasures Act, 1972	National Heritage Act of 2005

²¹² What is World Heritage? (n.d.). UNESCO World Heritage Convention. <https://whc.unesco.org/en/faq/19>

²¹³Jimenez, J. (2023, July 19). Why is Malaysia preferred over the Philippines? Philippine Star. Retrieved October 4, 2023, from <https://www.philstar.com/the-freeman/opinion/2023/07/19/2282157/why-malaysia-preferred-overphilippines#:~:text=Today%2C%20in%20terms%20of%20GDP,%2C%20Vietnam%2C%20and%20the%20Philippines.>

		Antiquities Act the Antiquities and Art Treasures Rules, 1973	
Term Used/ Categories	Cultural Property National Treasure Important Cultural Property (1) Tangible Cultural Properties (2) Natural Monuments, Historic Sites, Cultural Landscapes and Places of Scenic Beauty; (3) Intangible Cultural Properties and Buried Cultural Properties; and (4) Folk practices or cultural properties	Ancient Monument Antiquity National Treasure/Proper ty deemed to be of national importance	(1) Heritage sites; (2) heritage objects; (3) underwater cultural heritage; and (4) intangible cultural heritage
Repair	Owners to carry out repairs and actions for disaster prevention. Costs are partly subsidized by the government.	By agreement between the owner and the Central government	1. Owner 2. Commissi oner Owner shall ensure that site or property is in a state of good repair, otherwise, the Commissioner shall carry out the repair works and owner shall

			reimburse all the costs. Grant or loan may be applied for by the owner to carry out conservation and preservation
Alteration	Permission from proper authority is required		
Export	Permission from proper authority is required	Permission from proper authority is required; maybe loaned to other foreign institution or museums for a period of three (3) years	No person shall export any heritage item unless there is a license to export obtained from the Commissioner
Transfer of ownership	Allowed but subject to the State's first refusal. Owner must inform the Commissioner of the transfer	May be sold to a new owner within the territory of India (<i>condition of sale is that property stays in India</i>)	Allowed but Commissioner has the first right to purchase the object / heritage at an agreeable value Possession remains to the owner but Commissioner may prohibit the selling or disposal of heritage object
Funding from the government	If destroyed or damaged as a result of being displayed for public viewing, State shall compensate owner for ordinary damages	If the government believes that a monument is in danger of being destroyed, it may acquire it (Land Acquisition Act, 1894) as if it were for public purpose.	Reasonable amount of compensation may also be given to the finder, owner, or informant of object with cultural value.

Effect of being classified as cultural property to ownership	Some rights to ownership are affected but property is exempted to some fixed asset tax (property tax) Other considerable number of tax concessions to finance private cultural preservation	Rights to ownership is affected by virtue of agreement between owner and the government	Some rights to ownership are affected
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For the countries that represent the Western hemisphere of the globe, the laws of Italy, Switzerland, and Spain regarding cultural properties and their protection are examined.

Italy's Code of the Cultural and Landscape Heritage was just enacted in 2004. Prior to this legislation, Italy authorized the liquidation of some of its cultural properties to reduce public debt. The country also allowed options to lease or sell art, monuments, and even its natural resources.²¹⁴ With 56 cultural properties inscribed on the World Heritage List, Italy is responsible for more heritage sites than any other country in the world.²¹⁵ For this reason, coupled with the international attention given to the country on the preservation and conservation of its world heritage sites, Italy became one of the country's representatives of the West. As the country with the most world heritage sites, Italy enacted laws and regulations on cultural properties for its protection and preservation.

Switzerland is viewed as a hub for the international trafficking of cultural goods in the past. However, in 2005, it came up with its own set of legal frameworks that focuses primarily on the importation, transition, and export of cultural property, as well as repatriation and measures on illicit transfer. Switzerland, as a representative country from the East, is limited only to its immovable cultural properties that are subjected to export measures.

Finally, Spain was included in the countries representing the West because of its influence as a colonizer of the Philippines in the past. The

²¹⁴ Financing Italy's Cultural Heritage Sites. (2017). Ge-conservación No, 202-207. <https://ge-iic.com/ojs/index.php/revista/article/download/479/779/s>

²¹⁵ Ibid

country's impact has been kept in the Philippines until the present through various ways and things, for instance, the Philippine Civil Code and Penal Code were based on Spanish laws. By choosing Spain, the focus is on the influence of Spanish law in the enactment of laws in the Philippines related to private property relations and classifications and cultural property measures.

Below is the table containing the comparison of legislation on the protection and conservation of cultural properties among Western countries:

Table 3: Comparative Table for counties from the West

Western Countries	Italy	Switzerland	Spain
Legislation	Legislative Decree No. 42 (22 January 2004)	Cultural Property Transfer Act (CPTA) (2005)	The Spanish Law 16/1985 each autonomous community in Spain has crafted its own legislation
Term Used/ Categories	Cultural heritage (cultural property and landscape assets)	Cultural property (under 1970 UNESCO Convention) Property meaningful from religious or secular point of view for archaeology, pre-history, literature, and art or sciences	Properties of cultural interest Archaeological heritage Ethnographic heritage Documentary and bibliographical heritage
Repair	Restoration of a classified work needs to be authorized by the Ministry		

Alteration	Shall be authorized		
<p data-bbox="310 284 427 330">Export</p>	<p data-bbox="500 284 727 1548">Works with a cultural interest created by non-living authors more than 70 years ago and not classified as cultural property can be exported on a permanent basis from the Italian territory for as long as an export permit is granted by one of the Export Offices of the Ministry of Cultural Property.</p> <p data-bbox="500 1593 719 2171">Export Permit is not required for properties that are made by non-living artist, older than 70 years and with value less than €13,500.</p> <p data-bbox="500 2217 670 2483">In case of export to European Union Member State</p>	<p data-bbox="743 284 946 1494">Anyone who wishes to export cultural property shall complete and accomplish a detailed customs clearance declaration form, with attached relevant documents such as proof of origin, certificates, invoice, under penalty of criminal consequences.</p>	<p data-bbox="979 284 1406 827">Goods declared as items of cultural interest and other goods forming part of Spain's national heritage (<i>classified as non-exportable by the administration</i>), export is prohibited until a procedure is initiated to include the same under any of the special protection categories.</p> <p data-bbox="979 873 1414 1185">On the other hand, properties not falling under the above said category may be exported after obtaining authorization from the administration</p>

	territory, the Export Office shall issue a certificate of free circulation.		
Transfer of ownership	<p>Private owner is entitled to sell or donate it, with an obligation to notify the contract to the Italian State within 30 days of the date of the transaction.</p> <p>The State has a pre-emption right to be exercised within 60 days of the date of receipt of the sale notice in case of sale.</p>		<p>Owners have responsibility to notify the public administration of the existence of such objects before proceeding to sell or transfer them. Individuals or entities that habitually carry out trade in movable property part of the Spanish historical heritage shall also do the same</p>
Funding from the government	For obligatory conservation work, the Ministry may oblige the proprietor to carry out work necessary to ensure the conservation of cultural property, or		

	<p>it may take direct action.</p> <p>The following may take place: (1) the expenses incurred for measures, shall be paid by the proprietor, possessor or holder. But, if the measures are carried out on properties granted in use to, or for enjoyment by, the public, the Ministry may participate in the expenses in whole or in part. It shall determine the amount of the expenses it intends to sustain and shall notify the party concerned; and (2) if the expenses of the measures have been sustained by the proprietor, the Ministry</p>		
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	shall proceed to their reimbursement, and may also do so by part payments on account.		
Effect of being classified as cultural property to ownership	Immovable and movable cultural property may be expropriated by the Ministry for reasons of public use, when the expropriation responds to an important need to improve the conditions of protection for the purposes of public enjoyment of the aforesaid properties.	There are no provisions, particularly in CPTA, restricting the trade and export of cultural property that is privately owned, but due diligence must be met.	The cultural property will be in the public domain; an individual may own the cultural property but the Administration will protect the artistic, historical, spiritual value of said property – therefore indirectly affecting the right of ownership

VIII. ADOPTION OF FOREIGN POLICIES IN RELATION TO “IMPORTANT CULTURAL PROPERTY”

Legislations on the protection of archeological sites, buildings, and cultural landscapes vary across the world. In different jurisdictions, authorities over heritage protection may be the purview of national or local authorities or a combination thereof.²¹⁶ Presently, heritage legislation and protection measures continue to evolve.

Although the problems that drove the creation of earlier heritage legislation are still important today, current issues are helping to shape its

²¹⁶ Reap, J. (2022, April 28). Introduction: Heritage legislation and management. SpringerOpen. Retrieved June 2, 2023, from <https://built-heritage.springeropen.com/articles/10.1186/s43238-022-00059-9>

evolution. These include the impact of climate change, the role of technologies in heritage management, property laws, international laws, and the rights of indigenous people. The developments in the Philippines' cultural heritage law through the passing of R.A. 10066 show an apparent inclination towards increased cultural property protection but with a higher number of rules interfering with private property. The Philippines could adopt foreign policies and concepts in relation to important cultural property. It may address the restrictions of limitations provided in Sections 11 and 15 of R.A. 10066.

For Movable Important Cultural Property

The Philippines, like India, could allow owners of important movable cultural properties to sell or resell on the condition that the property does not leave the country. In this case, private individuals or institutions may dispose of their properties as they wish. Parties to the transaction shall have the obligation to notify the contract or the dealing to the **National Commission for Culture and the Arts (NCCA)** within 30 days of the date of the transaction. The notification shall necessarily contain details related to the important cultural property such as: (a) identification, residence, and signatures of the parties and or their legal representatives; (b) the information about the subject important cultural property; (c) the place where the important cultural property is located; and (d) the indication of the conditions of the deed of transfer.

In allowing the sale of important cultural property, owners will be able to exercise the right to dispose of (*jus disponendi*), but the property will only be limited to being taken out of the country. This is a less strict approach since, unlike heritage sites, national cultural treasures, historical landmarks, historical shrines, and historical monuments under Grade I level cultural properties, important cultural properties are considered under Grade II level under IRR of RA10066.

On the other hand, if the property is taken out of the country, RA 10066 states that it shall only be for research and exhibition. The Philippines, however, may adopt and set a threshold of amount and due diligence requirements for the exportation of important cultural properties. For example, the Philippines may allow the export of important cultural property amounting to not more than P1,000,000.00 without an export certificate. In this way, export may be done expeditiously. Notification in writing to the NCCA that the property will be exported will be enough.

In Italy, export permits are not needed for artworks that were created by a non-living artist, older than 70 years, and with a value of less than €13,500.²¹⁷ In Spain, export authorization is needed for goods that are between 50 and 100 years old, provided that their value exceeds €15,000 for drawings, prints, and photographs; €30,000 for watercolors, gouaches, and pastels; €50,000 for sculptures; and €150,000 for paintings.²¹⁸ On the other

²¹⁷ Ibid., 146

²¹⁸ Ibid., 193

hand, Switzerland has a due diligence requirement that must be met during a transaction.²¹⁹ This means that cultural property may be sold or exported when it can be assumed that it is not stolen or otherwise lost against the will of the owner and illicitly excavated or illegally imported.

Section 23-24, Article VI of RA 10066 are dedicated to the details on the export, transit, import, and repatriation of cultural properties, to wit:

Section 23. *Export of Cultural Property.* - Whoever desires to export cultural property registered in the Philippine Registry of Cultural Property shall adhere to the following requirements:

- (a) Authorization from the Commission through the appropriate cultural agencies;
- (b) Application for export permit shall be submitted thirty (30) days before the intended export from the Philippines and
- (c) Application for an export permit must include the following: (1) the purpose of the temporary export; (2) the export date of the cultural property; (3) the repatriation date of the cultural property; (4) a description of the cultural property; and (5) the inventory of the cultural property in the Philippine Registry of Cultural Property.

The grant of export permit shall be based on the following conditions: (i) the cultural property is exported on a temporary basis; and (ii) export of cultural property is necessary for scientific scrutiny or exhibit.

Section 24. *Repatriation Claims and Agreements.* - Should the cultural property registered in the Philippine Registry of Cultural Property be illicitly exported from the country, the Department of Foreign Affairs shall, upon the recommendation of the appropriate cultural agency, claim the right of repatriation *vis-a-vis* all other contracting States. Any compensation and costs shall be carried by the Philippine government.

For the protection of cultural and foreign affairs interests and to secure cultural heritage, the Philippines may conclude international treaties with contracting States on the import and repatriation of cultural property subject to the following conditions:

- (a) The scope of the agreement must be cultural property of significant importance to the cultural heritage of the contracting States;

²¹⁹ Ibid., 168

- (b) The cultural property must be subject to the existing export policies for the purpose of protecting cultural heritage; and,
- (c) The contracting States shall grant reciprocal rights."²²⁰

RA 10066 and its IRR have strict provisions on the exportation, importation, transit, and repatriation, even if the Philippines is not a State party to any instrument on illicit traffic of cultural property.

For Immovable Important Cultural Property

One of the most important concepts that is not present in RA 10066 is a provision for necessary incentives, rewards, or subsidies for private owners of important cultural properties. Unlike other cultural property classifications like national cultural treasures, national historical landmarks, sites, or monuments, which are entitled to priority government funding for protection, conservation, and restoration, the law does not grant important cultural property government funding. It is discretionary on the part of cultural agencies. In fact, in one of the deliberations of the Technical Working Group under the Senate's Committee on Education, Arts, and Culture on 28 February 2008 on Senate bills related to the passing of RA 10066 as law, the issue of incentives was discussed.²²¹ However, when the law was passed, the incentive was focused on the donation of cultural properties to the State, financial assistance or grants for research related to cultural properties, and an annual conservation recognition program, to wit:

ARTICLE IX CULTURAL PROPERTY INCENTIVES PROGRAM

Section 35. *Tax Exemption on Donations.* - All donations in any form to the Commission and its affiliated cultural agencies shall be exempt from the donor's tax and the same shall be considered as allowable deduction from the gross income in the computation of the income tax of the donor, in accordance with the provisions of the National Internal Revenue Code of 1997, as amended.

Section 36. *National Heritage Resource Assistance Program.* - The Commission may provide financial assistance in the form of a grant to historic, archaeological, architectural, artistic organizations for conservation or research on cultural property. No grant

²²⁰ Sections 23 and 24, Article VI of RA 10066

²²¹ MR. DE VIANA: Mayroon po kaming mga cases na yong owner pupunta sa amin and ni-request na delisting. Well, because the maintenance was so expensive and they wanted to sell and the owner would not like to be encumbered by conditions, so nangyayari po iyon.

MR. SIBUG: Kaya itinanong ko kanina iyon, kasi you are punishing the landowner two times. And you declare it national heritage, you will pay higher realty tax. That is what he said, they will be...and you declare now-it's now a heritage-it's now a national heritage ano, oh...

MR. HENARES: What I am saying, sir, is that what house owners are paying right now is not 1,000. The taxes in San Fernando, Pampanga can range from 40,000 to 100,000. And if they are declared, we should give the exemptions from that.

made pursuant to this Act shall be treated as taxable income.

Section 37. *Awards and Citations.* - To encourage preservation of the national heritage, the Commission shall establish an annual conservation recognition program under which monetary prizes, awards and citations will be given by the President of the Philippines, upon the recommendation of the Commission, for special achievements and important contributions and services in the area of heritage preservation and conservation efforts.²²²

With the recent amendment made through the enactment of RA No. 11961, Congress inserted a provision on priority funding for Grade II cultural properties, which include important cultural property under its Section 7, Article III, to wit:

“Section 7. Privileges for Cultural Property. - All cultural properties declared as Grade I or Grade II Level shall be entitled to the following privileges:

- (a) Priority government funding for protection, conservation, and restoration;
- (b) Incentive for private support of conservation and restoration through the Commission's Conservation Incentive Program for Grade I and Grade II Level cultural properties;
- (c) An official heritage marker to be placed by the pertinent cultural agency indicating the official designation of the cultural property;
- (d) Priority government protection for all Grade I or Grade II Level cultural properties in times of armed conflict, natural disasters, and other exceptional events that endanger the cultural heritage of the country; and,
- (e) Priority protection from modification or demolition resulting from all government projects. Government projects that may potentially affect the integrity of any Grade I or Grade II Level cultural property must consult with the Commission at the planning stages.”²²³

However, the wording of the amendment only mentioned “priority funding” and did not guarantee funds for the protection, conservation, and restoration of “important cultural properties.” The determination of which specific important cultural property should be prioritized in terms of

²²² RA No. 10066 (2010), Sections. 35-37

²²³ Section 7, Article III of RA 10066

funding is not included. The Philippines could adopt some policies of foreign countries on incentives or guaranteed funding in the forms of subsidies, grants, payments, etc., aside from the priority funding included in RA No. 11961. For example, in Japan, its law requires that the owners carry out repairs and actions for disaster prevention, but the costs for these are partly subsidized by the government. When a subsidy is given, the State, through its cultural agency, may, as a condition thereof, issue any applicable instructions regarding the management or repairs.

In India, the preservation of protected monuments could be by agreement. This means that the Central Government, through its agent, shall propose to the owner of a protected monument to enter into an agreement within a specified period for the maintenance of the monument. The agreement contains the measures and costs involved in the preservation and protection of the monument and may be terminated through notice from the parties. In Malaysia, heritage site owners shall ensure that the site is in a state of good repair. However, the state may carry out the repair works after giving the owner two weeks' notice, and all expenses incurred to carry out the works shall be reimbursed by such person. The owner may apply for a grant or loan to carry out conservation works.

In Italy, however, immovable and movable cultural properties may be expropriated for public use. Expropriation may be initiated by the state upon request. It may authorize the regions and other government bodies, as well as other public bodies and institutions, to carry out the process. In this process, compensation shall include the fair price the property would have in a free contract of sale within the country, and payment is made in accordance with the modalities established by the provisions on expropriation.

Since cultural property is closely associated with a State or nation, efforts to conserve it are primarily toward keeping monuments, statues, sites, and cultural objects within the state boundaries. This is true with the Philippines. Legislative initiatives and efforts of different States for the protection of movable and immovable monuments and cultural properties are characterized by a great number of distinctions. The distinctions reflect the various viewpoints of states on the legal measures of protection and conservation of cultural properties, taking into consideration domestic and international law concepts. Individual countries could contribute to the further development of cultural property laws by defining property. Several of the definitions and other details now available occur in recently enacted national legislative schemes to control the movements of cultural properties. Hugely inspired at the outset by UNESCO international instruments, some of these regimes have now surpassed or exceeded their models and can, in turn, influence international developments.²²⁴ Since various countries have become state parties to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict¹ and 1972 World Heritage

²²⁴ Graham, G. M. (1987). Protection and Reversion of Cultural Property: Issues of Definition and Justification. *The International Lawyer*, 21(3), 755-793. <http://www.jstor.org/stable/40705939>

Convention, it can be gleaned that the world is interested in the protection of cultural property.²²⁵ In spite of the variety of definitions of cultural property in the countries, the concepts used in most of the models do not differ considerably. The differences in the scope and measures chosen by countries for the conservation and protection of their cultural property. The various national legislative schemes of countries from the East and the West could serve as a guide for the Philippines in improving its cultural laws, taking into consideration private property rights. Among the things created by States to meet their individual needs are standards of age and local origin in terms of their cultural properties. For example, some jurisdictions join age-based tests or interest-oriented schemes. In the fixed-date method, all objects or properties in existence before a certain date are protected. This method used by different states may be supplemented by administrative discretion, or by adopting more stringent date restrictions where circumstances warrant it.²²⁶ Aside from this, national inventory systems that classify and register cultural properties are also in use in many states that exercise export. In fact, other countries even require the maintenance of records by the individual owners.²²⁷ Restrictions or interference are still present in some models of protection and conservation. For movable cultural property, the export limitations imposed—one of the results of the classification measure—risks a serious loss to the economic value of the object. For the immovable, on the other hand, the burden of maintaining a registered or declared monument or site in a good state appears equally heavy as the subsidies may vary depending on the available resources or decisions of the cultural agency involved. Due to the apparent trend towards increased cultural property protection that requires more sacrifices from the owners, an examination of the balance of private property rights and cultural property law is needed to avoid situations leading to indirect expropriation or taking without just compensation.

IX. CONCLUSION

The recent developments worldwide indicate a trend towards increased protection for cultural properties while requiring more sacrifices from private owners. Countries have broader concepts and definitions relating to cultural heritage and properties. In the domestic setting, though private ownership right is enshrined in the Philippine Constitution and other laws, there have been exhibited restrictions because of the enactment of RA 10066, which is focused on protecting cultural properties, leaving private owners of important cultural properties, sacrificing their ownership rights. Private owners of important cultural properties are constrained in the peaceful enjoyment of their possessions by several rules concerning cultural property preservation. Section 11 restricts the private owners of important cultural properties from selling, reselling, or taking their properties outside the country without getting clearance from the proper cultural agency, and

²²⁵ Convention concerning the Protection of the World Cultural and Natural Heritage

²²⁶ Examples of the age-based test include: Belize (150 years), Federated States of Micronesia (30 years), Iceland (100 years), Indonesia (50 years), Kuwait (40 years), Luxembourg (100 years or 51 years from the creator's death).

²²⁷ *Id.*, at 193.

if the property is taken out of the country, the only reason allowed is for scientific scrutiny or exhibit.

On the other hand, Section 15 restricts the private owners from doing intervention works and measures on important cultural properties unless undertaken through the appropriate agency that shall supervise the same. Owners are also restricted in using methods and materials of their choice since the same is required to be approved by the cultural agency. Restrictions on ownership rights resulting from provisions of RA 10066, particularly Sections 11 and 15, caused a disproportionate burden on the owners, making them crippled. Property owners could not exercise all attributes of their ownership, including their inherent rights to control, possession, and enjoyment. Deprivation brought by the restrictions without fair or just compensation prima facie violates ownership rights and leads to indirect expropriation.

Indirect expropriation, though still not recognized and used in the domestic setup, was explained and defined as a concept that occurs when there is interference by the State in the use, enjoyment, or benefits derived from a property, even when the property is not seized, and the legal title of the property is not affected. Indirect expropriation to the private owners of important cultural properties is an important legal mechanism in assessing the recommended solutions. The property is not totally seized, and no transfer of ownership takes place, but the owners are deprived of the value and control over their properties. Indirect taking remains unless the properties are delisted as important cultural properties, the presumption of important cultural properties is lifted, or balancing acts or reliefs are put in place. In consideration of all the discussions made, it is recommended that the amendment of R.A. 10066 with the following suggestions:

Sec. 11, Art. III of RA 10066 (*now Sec. 11, Art. III of R.A. 11961*)

“Dealings of Cultural Property. - No cultural property shall be sold, resold or taken out of the country without first securing a clearance from the cultural agency concerned. In case the property shall be taken out of the country, it shall solely be for the purpose of scientific scrutiny or exhibit.”

The Philippines, through the legislative branch, could allow private owners of movable important cultural properties to sell or resell their property under the condition that the property does not leave the country. In this case, private individuals or institutions may dispose of their properties as they wish, exercising their right to dispose while at the same time still preserving the property as part of Philippine culture. With this less strict approach, the right to dispose is not affected by the classification as an important cultural property, but it only restricts the asset being taken out of the country. Exemption from the payment of indirect tax like Value-Added Tax (VAT) on the sale or lease of important cultural properties, either immovable or movable, is also recommended.

The seller and the new owner who enter into an agreement of sale shall have the obligation to notify the NCCA in writing of the information about the agreement within a reasonable time after the transaction. Reasonable time may pertain to 30 days after the transaction date. The written notification shall include the parties' names, addresses, contact information, and other necessary details regarding the subject important cultural property and the conditions of the transfer, if any. For export purposes, on the other hand, it is suggested that the Philippines, aside from the provisions under Sections 23-24, Article VI (*Regulating the Export, Transit, Import, and Repatriation of Cultural Property*) of RA 10066 could set a threshold on the amount of important cultural properties for exportation without a need for export permits from the NCCA. For instance, an export permit may not be made mandatory for important cultural properties valued at not more than P1,000,000.00. Instead, written notification to the NCCA that the property will be exported for scientific scrutiny may be made. The provision may also differentiate movable from immovable properties in terms of dealings provided in Section 11 since the present wordings pertain only to movable properties following the concepts of statutory construction.

Section 15 should be amended in such a way that the government can provide guaranteed funding for the protection, conservation, and restoration of important cultural properties instead of the priority government funding provided in RA No. 11961. The new law, RA No. 11961, only provides for (a) priority government funding for protection, conservation, and restoration; (b) incentive for private support of conservation and restoration through the Commission's Conservation Incentive Program for Grade I and Grade II Level cultural properties; (c) priority government protection for all Grade I or Grade II Level cultural properties in times of armed conflict, natural disasters, and other exceptional events that endanger the cultural heritage of the country; (d) and priority protection from modification or demolition resulting from all government projects under its Section 7, Article III. It also does not specify the parameters for priority funding. For instance, it is suggested that at the least, assured funding should be provided by the government to owners of important cultural properties to carry out repairs caused by disasters or to prevent disasters. And if there is damage because of the property being displayed for public viewing, compensation could be given to the owner for ordinary damages incidental thereto. This may ease the burden of important cultural property owners from the restrictions provided under the law, which continue to apply unless the property is delisted or the presumption of important cultural property is lifted or removed. Another recommendation is exemption from the payment of real property tax in the same way as those properties actually, directly, and exclusively used for religious, charitable, or educational purposes and those properties owned by the government and government instrumentalities, pursuant to the 1987 Constitution²²⁸ and

²²⁸ Section 28 (4) Charitable institutions, churches, and parsonages or convents appurtenant thereto, mosques, non-profit cemeteries, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.

Section 234²²⁹ of the Local Government Code. To pursue cultural preservation as a strategy for maintaining the state's identity, once privately owned real property is declared as important cultural property, real property tax exemption as a social subsidy granted by the state applies. However, parameters must be set in a way that the government should also be protected from abuse, hence, only the area or portion of property that is actually, directly, and exclusively declared as important cultural property should be exempt from real property tax.

It is also suggested that the tax provisions on allowable deductions for private educational institutions be adopted. A privately owned cultural property with earning capacity is declared an important cultural property, and if it needs repair, the appropriate cultural agency may issue a compulsory repair order²³⁰ under Sec. 26 of R.A. 10066 (*now Sec. 29 or R.A. 11961*). The owner may spend for the conservation or restoration of the said property provided that he/she is given the right to deduct the expense he/she will shoulder from his/her gross earnings or income in the year the expense was incurred. By adopting the allowable deduction for private educational institutions, private owners of important cultural property are incentivized and encouraged to spend for the restoration or conservation of the cultural property.

Further, instead of the new provision in R.A. 11961 that focuses on priority government funding for the protection, conservation, and restoration of Grades I and II cultural properties, it is recommended that guaranteed or assured funds should be allocated. On top of the funds for culture and arts, as provided in RA 10066, it is recommended that the amount necessary and used exclusively for the protection, conservation, and restoration of Grades I and II cultural properties shall be appropriated annually from any source available in the National Treasury. Lastly, it is recommended that provisions pertaining to dealings and protections of important cultural properties be grouped under one article or title for ease of reading and understanding.

²²⁹ Section 234. *Exemptions from Real Property Tax.* - The following are exempted from payment of the real property tax:

(a) Xxx

(b) Charitable institutions, churches, parsonages or convents appurtenant thereto, mosques, non-profit or religious cemeteries and all lands, buildings, and improvements actually, directly, and exclusively used for religious, charitable or educational purposes

Xxx

²³⁰ When a privately-owned heritage site cannot be maintained by the owner or has fallen into disrepair through neglect to such an extent that it will lose its potential for conservation, the appropriate cultural agency may serve on the owner or occupant of such property an order to repair or maintain such site. If the owner fails to comply with the said order within thirty (30) to forty-five (45) days, repairs may be undertaken by the appropriate cultural agency funded by the Commission for the account of the owner.

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