

## REGIONAL FOCUS & CONTROVERSIES

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# Article 2 of the Korea-Japan Basic Treaty and Japan's Repatriation of Korean Cultural Properties: Reviewing *Travaux Préparatoires*

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*The Treaty on Basic Relations between the Republic of Korea and Japan was signed as a result of Korea-Japan talks from October 1951 to June 1965. Article 2 of the Korea-Japan Basic Treaty stipulates the so-called "Article Related to the Former Treaties and Agreements." A compromise was adopted with the term, "already null and void." As regards this expression, Japan asserts that the period of Japanese occupation was once valid, while Korea maintains that it has been "fundamentally null and void." So, the meaning does not change even if 'already' is inserted in the beginning. Korean cultural properties taken away to Japan during the period of Japanese occupation should all be returned to Korea, but Japan evaded the expression, 'return' until Korea referred to the term, 'turn over' as an intermediate expression between 'return' and 'donation.' The author believes that the more both sides mutually communicate with each other for universal value, the earlier they arrive at the final resolution for these issues under international law and justice.*

### Keywords

Korea-Japan Basic Treaty, the Former Treaties and Agreements, Already Null and Void, Cultural Properties, Return, Turn Over

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## 1. Introduction

The Treaty on Basic Relations between the Republic of Korea (“ROK”) and Japan (hereinafter Korea-Japan Basic Treaty) was signed as a result of Korea-Japan talks from October 1951 to June 1965. Its objective was to settle down the issues from the period of Japanese occupation and further normalize diplomatic relations between the two countries. The Korea-Japan Basic Treaty includes the following chapters: ① right of claim; ② fishery; ③ status of Koreans residing in Japan; and ④ return of Korean cultural properties from Japan.-

This research will tackle the issue of return of Korean cultural properties under Article 2 (Article Related to the Former Treaties and Agreements) of the Korea-Japan Basic Treaty. Looking back the entirety of the Korea-Japan talks, there were different views of the period of Japanese occupation between Korea and Japan, which were reflected in the treaty and various agreements. Those differences continue today, obstructing sincere reconciliation between Korea and Japan. Under this premise, this paper will observe how these different views influenced the negotiation for the return of Korean cultural properties. In particular, the author will scrutinize the original documents of both the Korean and Japanese side which were described in the course of drafting the Korea-Japan Basic Treaty in a positive way. In order to examine the Korean and Japanese reasoning for the return of Korean cultural properties, the *travaux préparatoires* of the process of negotiation and adoption of Article 2 of the Korea-Japan Basic Treaty will be carefully reviewed. This paper is composed of four parts including a short Introduction and Conclusion. Part two will discuss Article 2 of the Korea-Japan Basic Treaty and the reasoning for the Return of Cultural Property. Part three will investigate the dispute settlement regarding Article 2 and the Agreement on Cultural Properties.

## 2. Article 2 of the Korea-Japan Basic Treaty and the Return of Cultural Property: A Dispute

When concluding the Korea-Japan Basic Treaty, Korea aimed to confirm that all former treaties and agreements concluded between the Empire of Korea and the Empire of Japan including the Korea-Japan Annexation Treaty had been fundamentally null and void from the very beginning, upon normalization of

diplomatic relations between them. Article 2 of the Korea-Japan Basic Treaty provides: “It is confirmed that all treaties or agreements concluded between the Empire of Korea and the Empire of Japan on or before August 22, 1910 are *already* null and void.”<sup>1</sup> In the negotiation process, however, Korea and Japan faced many difficulties in adopting a consensus on the expression “already null and void.”

Discussion of this question began when Korea proposed a draft to Japan at the fourth meeting of the Basic Relations Committee of the second Korea-Japan talks held on March 5, 1952. This Korean draft indicated that the former treaties and former agreements between the former Empire of Korea and Japan were “null and void.”<sup>2</sup> However, at the fifth meeting of the Basic Relations Committee held on March 12, 1952, Japan made a counter-proposal suggesting that Article 2 be deleted. Mr. Ohno Katsumi, the then Adviser of the Japanese Ministry of Foreign Affairs stated that the Japanese side was desirous to strike this Article out for following reasons:

- (a) As all treaties and agreements between Japan and the Empire of Korea have expired, it would make no sense to insert such provisions;
- (b) It would be unnecessary to stir up unpleasant remembrance of the past with such provisions, when, as a matter of fact, no one would deem these treaties or agreements to be valid at present;
- (c) Such vague provisions which did not exactly describe the time of becoming “null and void” would permit different interpretations and make the situation complicated.<sup>3</sup>

Japan stated that because all former treaties or agreements between the Empire of Korea and the Empire of Japan had actually expired, there would be no meaning in inserting such an article confirming that the former treaties or agreements should be null and void in the treaty, and that it would be unnecessary to stir up unpleasant remembrance of the past. Japan also reasoned that vague expressions would permit differing interpretations, making the situation complicated.<sup>4</sup>

However, the Korean delegates did not agree with the deletion of this provision.<sup>5</sup>

<sup>1</sup> See The formal documents of the Korea-Japan talks; the Korea-Japan Basic Treaty; and the Korea-Japan Agreement <available in English> [Emphasis added]. The author quoted the Korean documents and English documents, *available at* [http://www.donga.com/news/d\\_story/politics/K\\_J\\_agreement65/data.html](http://www.donga.com/news/d_story/politics/K_J_agreement65/data.html) (last visited on Apr. 12, 2017). Their document numbers are began with the words as ‘Doc. No. 723.1 JA’.

<sup>2</sup> See 4th Basic Relations Committee Report of the 1st Korea-Japan Talks, Doc. No. 723.1 JA-80-23.

<sup>3</sup> See 5th Basic Relations Committee Report of the 1st Korea-Japan Talks, Doc. No. 723.1 JA-80-35.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

They asserted that such an article would actually allow the “unpleasant remembrance of the past” to be cleared out.<sup>6</sup> Also, Korean delegates emphasized that “according to the Korean people’s interpretation, all these treaties and agreements had been null and void since the beginning.”<sup>7</sup> Korea further added that “the confirmation of *null and void* did not describe the time of voidance merely to avoid the complicated situation which might arise from the enforcement of this interpretation,”<sup>8</sup> inducing a concession from Japan.

As the English expression “null and void” has a strong meaning of “completely invalid by law”<sup>9</sup> due to substantial and procedural flaws of that contract, discussion on the “time of voidance” shall be naturally unnecessary. This is because the expression “null and void” connotes the meaning ‘fundamentally.’

At the 6th meeting of the Basic Relations Committee on March 22, 1952, Japan proposed a draft to Korea titled, “Article Related to the Former Treaties and Agreements” to the preamble and inserted the following expression.” “It is confirmed that all treaties and agreements concluded between Japan and the former Empire of Korea do not regulate the relationship between Japan and the Republic of Korea.”<sup>10</sup> Korea responded that the terms “null and void” would be clearer, more fundamental, and simpler, and therefore should be used.<sup>11</sup> Even at the seventh meeting of the Basic Relations Committee on March 26, 1952, their dissidents were not reconciled. Mr. Ohno expressed the Japanese side’s intention to use only such terms as “the treaties and agreements are at present ineffective,” while Dr. You Chin-oh<sup>12</sup> stated that the Korean side would like to insert an expression to the effect that the treaties and agreements had been null and void from the beginning.<sup>13</sup>

Immediately, Japan proposed using the expression that the former treaties and agreements are at present ‘ineffective,’ while Korea maintained that the expression “null and void from the beginning” should be used.<sup>14</sup> According to the Japanese

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* [Emphasis added]

<sup>9</sup> “Null and Void” is defined as “of no legal or binding force.” See SHORTER OXFORD ENGLISH DICTIONARY (6th ed. 2007). See also Kenji Fujii, The old agreement invalid problem in the first Japan-South Korea conference, available at <http://repository.hyogo-u.ac.jp/dspace/handle/10132/2674> (last visited on Apr. 12, 2017).

<sup>10</sup> See Particular of Proceedings of the 6th Basic Relations Committee of Japan-Korea Talks [日韓会談第六回基本関係委員会議事要録], Japanese document, Doc. No. 978. (Mar. 22, 1952)

<sup>11</sup> See 6th Basic Relations Committee Report of the 1st Korea-Japan Talks, Doc. No. 723.1 JA-80-43.

<sup>12</sup> Dr. You Chin-oh 유진오 was a highly renowned international lawyer. He was the President of Korea University at that time, and one of the ROK delegates of the Korea-Japan talks.

<sup>13</sup> See 7th Basic Relations Committee Report of the 1st Korea-Japan Talks, Doc. No. 723.1 JA-80-47.

<sup>14</sup> *Id.*

minutes recording, at the 8th meeting of the Basic Relations Committee on April 2, the ROK did not oppose Japan's proposal on the basic relations article, leading to the following temporary agreement between Korea and Japan:

Regarding the treaties and agreements between Japan and the former Empire of Korea, Japan repeatedly asserted the original expression "... do not regulate" and took the stance that in inevitable cases, one of (1) already ineffective, (2) presently ineffective, or (3) ineffective may be considered as an alternative. In response, South Korea proposed (1) are null and void and (2) are ineffective, and an agreement was ultimately reached for the expression "ineffective in the relationship between Japan and the Republic of Korea."<sup>15</sup>

Japanese recorded minutes state that "an agreement was reached" to use the expression that the former treaties and agreements "are ineffective."<sup>16</sup> The author, however, carefully scrutinized the Korean documents and discovered that the Japanese document was inserted into the Korean documents, as well. The title of the Japanese document is "Treaty Establishing the Basic Relations between Japan and the Republic of Korea (draft)."<sup>17</sup> Actually, "the expression disputed by Korea and Japan"<sup>18</sup> shown in this draft text written in Japanese is an evidence to judge that, as of April 2, 1952, Korea and Japan agreed on the ineffectiveness of that expression.

Looking at the Japanese minutes of the "unofficial meeting of Plenipotentiary Matsumoto Syunichi"<sup>19</sup> and Minister Kim Yong Shik<sup>20</sup> on April 21, 1952, Korea requested that Japan use the expression "null and void" again rather than the expression 'ineffective' as follows.

*Kim:* Regarding the basic treaty, we request that the treaties and agreements

<sup>15</sup> See Particular of Proceedings of the 8th Basic Relations Committee of the Japan-Korea Talks [日韓会談第八回基本関係委員会議事要録], Japanese document, Doc. No. 980 (1952. 4. 2.)

<sup>16</sup> The author referred to Japanese documents in this paper filed by private Japanese organizations since 2007. See the Citizen's Group for Full Disclosure of Japan-ROK Normalization Documents, available at <http://www.f8.wx301.smilestart.ne.jp> (last visited on Apr. 12, 2017).

<sup>17</sup> See The Treaty (draft) establishing Basic Relations between Japan and Republic of Korea [日本国と大韓民国との間の基本的関係を設定する条約(案)] in the document named 8th Basic Relations Committee of the 1st Korea-Japan Talks, Doc. No. 723.1 JA-80-52.

<sup>18</sup> "It is confirmed that all treaties and agreements concluded between Japan and the former Empire of Korea are ineffective in the relationship between Japan and the Republic of Korea - was inserted in the preamble." See *id.*

<sup>19</sup> Matsumoto Syunichi 松本俊一: Adviser of the Ministry of Foreign Affairs at the time, chief delegate (plenipotentiary) of the Korea-Japan talks.

<sup>20</sup> Kim Yong-shik 김용식: Minister of the Embassy of the ROK in Japan at the time, alternative chief delegate of the Korea-Japan talks.

concluded between Japan and the Empire of Korea on or before 1910 of Article 3 of the preamble are clearly written as being ‘null and void.’

*Matsumoto:* I do not intend to newly lecture Minister Kim who is an expert of Japanese law, but ‘null and void’ does not match the facts. What is once done cannot be undone. We cannot accept it if the interpretation that it was null and void from the beginning is added.

*Kim:* There is even a strong view internally on our side to change to the term ‘illegal.’

*Matsumoto:* Bringing out such issues only stimulates the Japanese national sentiment. An agreement has been made for the extremely refined expression ‘ineffective’ between Japan and Korea in order to evade stimulus, so this is our best effort. Actually, because of Ambassador Yang’s<sup>21</sup> several press campaigns, authorities concerned have greatly stiffened their attitudes to make things more difficult to deal with overall, so this point absolutely cannot be conceded.

*Kim:* Regarding the draft of the basic treaty, other parts have almost no issues. There is only the issue of the terminology that I just mentioned. So if we talk about this more, then there will be a way for interpretation. (Omitted).<sup>22</sup>

As shown at the above minutes, both sides debated each other on the expression at that meeting. Finally, the agreement on “Article Related to the Former Treaties and Agreements” was deferred until February 1965.

### 3. Japan’s Position over Its Occupation of Korea and the Cultural Properties

Japan’s stance over its occupational period of Korea can be well exhibited by their reasoning in the process of not only determining the wording of Article 2 of the Korea-Japan Basic Treaty, but also handling the right of claim. A critical archive in this regard is “On Hereditary Cultural Properties,”<sup>23</sup> an internal document of the

<sup>21</sup> See Proceedings of the Unofficial Meeting between Plenipotentiary Matsumoto and Minister Kim [松本全権・金公使非公式会談要録], Japanese document, Doc. No. 401 (Apr. 21-24, 1952)

<sup>22</sup> *Id.*

<sup>23</sup> See On Hereditary Cultural Properties [世襲的文化財について] in the document named An agreement know-how concerning Cultural Properties, etc. [文化財等に関する協定要領], Japanese document, Doc. No. 1117. (Feb. 17, 1953).

Japanese Ministry of Foreign Affairs dated February 17, 1953. It analyzed Korea's position during the first Korea-Japan talks, particularly over the return of Korean cultural properties. This archive contains Japan's counter-argument to Korea's claim for the return of its cultural properties in Japan:

In the case of taking away from a territory occupied during wartime, *e.g.*, the range of return is very wide, and the method of taking away or the characteristic of the current owner are being entirely overlooked. This is the case where the authority of the occupying nation taking effect in the military occupied territory is extremely powerful and abnormal, and the illegality of such taking away can be deduced much more generally. Thus, it is considered that the burden of proof of the circumstances of the takeaway is exempted for the demandant of the return. Also, as a peripheral reason, it is assumed that the meaning of compensation and the fact that the period of wartime occupation is usually not very long have also been considered.

In contrast, in the case of split of territory, the range of return is limited to the cases where the method of taking away excludes gratuitous or private law methods. It is also limited to possessions that the current owner is a nation or a public body. Also for the method of return, the term 'relocation' is used for this case in contrast to the case of wartime occupied territories in which the terms 'return.'

This is because the authority established in the area to be split was primarily peaceful, and it is interpreted as such because the illegality of taking away is usually not deduced. It was regulated that there is a burden of proof for the fact that the standard procedure was not followed for each of the issues.

If the purpose of such precedent is applied to Joseon (Korea), the current split territory of Japan, then the conquest of the Three Han States or the conquest of Joseon by Toyotomi Hideyoshi are cases of wartime occupation, and the situation following the Japan-Korea annexation is a case of peaceful possession.

However, it is considered that Korea will assert that even the latter case is an example of wartime occupation from the perspective that the annexation treaty is null and void. It is also assumed that Korea will not take much issue with the historical events prior to the Japanese Invasion of Korea in 1592.<sup>24</sup>

<sup>24</sup> *Id.*

Japan claimed that as Korea was not a “wartime occupied territory” under the Japanese occupation, the liberation of Korea should be ‘territorial split.’ If Korea was a “wartime occupied territory” of Japan, then all Korean cultural properties taken away to Japan could be considered as having been illegally taken away. Accordingly, Japan must repatriate all Korean cultural properties taken away to Japan from Korea during the period of Japanese occupation.

However, if Korea was merely a ‘split territory’ and a ‘peaceful possession,’ the cultural properties were just ‘relocated’ whose returns should be limited to those taken away to Japan against its colonial rules. This reasoning was backed by the Japanese Ministry of Foreign Affairs, which consistently argued that the Japanese occupation of Korea was a ‘legitimate’ and ‘peaceful possession’ based on valid treaties and agreements. Korea totally denied Japan’s stance over this issue. It argued that the Japanese occupation was a ‘wartime occupation’ and fundamentally null and void. Such diametrically opposed viewpoints on basic relations were fully reflected in the negotiations for the return of cultural properties.

#### 4. ‘Return’ or ‘Donation’? What Does ‘Turn Over’ Mean?

In 1955, the Liberal Democratic Party (“LDP”) was formed in Japan as a conservative union with Hatoyama Ichiro, as the first chairman of LDP and the prime minister of Japan. Mr. Hatoyama decided to retract the so-called ‘Kubota statement,’ which severely humiliated Korea.<sup>25</sup> Also, in order to resume the Korea-Japan talks, he addressed the ‘donation’ of Korean cultural properties in Japan rather than ‘return.’ The records of Japan’s Cultural Properties Protection Committee shows it well:

References for Cultural Properties Related to Korea

February 6, Showa 33 (1958) Cultural Properties Protection Committee

On the turnover of Korea-related cultural properties in accordance with Japan-Korea negotiations.

<sup>25</sup> At the 2nd Sectional Conference on Property and Right of Claim on October 15, 1953, Kubota Kanichiro 久保田寛一郎, the chief delegate of Japan, made ludicrous statements, saying: "Japan modernized Korea [via occupation]. If Japan had not colonized Korea, then Russia or China would have colonized Korea, and Japanese occupation was better than that. When the Allied Powers stated that Koreans under slavery will be liberated at the Cairo Statement, they were saying it out of excitement." See 4th regular session of the 3rd Korea-Japan Talks Korean document, Doc. No. 723.1 JA-95-51-67. As Delegate Kubota never withdrew those statements, the Korea-Japan talks came to an end.



## Account

- (1) On the Korea-related cultural properties located in Japan, since the beginning of the Japan-Korea negotiations (late Showa 26 <1951>), ROK has strongly argued for a 'return,' so to speak.

(Omitted)

- (4) However, in February of Showa 32 (1957), there was a discussion with Ministry of Foreign Affairs Director of Asia Nakagawa (predecessor) for orally delivering to ROK the intention that 'apart from the agenda of the Japan-Korea talks, the Government of Japan wishes to turn over to the Republic of Korea, at an early possible date, those Korean art objects now in the possession in which the transfer is possible,' and with regard to this, it was answered that although it is difficult to agree with the aim, it will be considered in inevitable circumstances.
- (5) Afterwards, this issue was discussed about twice at the vice-minister talks of related ministries, but there was no real progress. It was commented that the process is not simple, as it was about the state-owned items of the time.

2. Progress based on the decision of the cabinet meeting on December 30, Showa 32 (1957)

- (1) Such was the past account, but the issue made a progress at the end of last year, and the government of Japan decided the following matters regarding Korean art objects in order to smoothly progress Japan-Korea negotiations. (December 30, Showa 32 <1957>)

Oral Statement

The Government of Japan will turn over to the Republic of Korea, at an early possible date, those Korean art objects now in the possession in which the immediate transfer is possible, and for the later transfer of other Korean art objects discussion and settlement will be made at the overall talks.

- (2) Regarding the matters decided at the above cabinet meeting, the matters differed from what was agreed upon at the past party committee. So, the Minister of Education and Culture asked the following matters to the Minister of Foreign Affairs, and received an affirmative answer from the Minister of Foreign Affairs.

① The term 'turn over' of the previous former part is interpreted to mean 'donate.' Thus, it is interpreted that Japan will select and decide upon the items to be donated and the quantity.

② For the latter part, it shall be worked to not stray from the purpose of the former part, and the Ministry of Foreign Affairs wishes to actively work toward diplomatic negotiations in order to not stray from the scope of the former part.

(Omitted)<sup>26</sup>

<sup>26</sup> See Reference on Korea-Related Cultural Properties [韓国関係文化財参考資料] in the document named On the Provision

The archive above is a part of the records written by the Cultural Properties Protection Committee of the Japanese Ministry of Education and Culture when the Japanese government decided to turn over 106 Korean cultural properties located in Japan to Korea on December 30, 1957. As is well shown in this record, the Cultural Properties Protection Committee of Japan maintained the position that turning over the Korean cultural properties located in Japan to Korea is merely a ‘donation,’ not a ‘return.’ From a viewpoint of international law, the term ‘return’ would imply that Japan’s removal of Korean cultural properties during the occupational period would have been illegal. Japan, therefore, avoided using the term ‘return.’

Conversely, South Korea interpreted the term ‘turn over’ as ‘return,’ rather than ‘donation.’ Both sides clashed each other at the first Subcommittee on Cultural Properties of the fourth Korea-Japan talks, which was formed after Japan turned over 106 Korean cultural properties to Korea. At this meeting held on June 4, 1958, in Tokyo, the Korean delegate Yoo Tae-ha said: “Cultural properties are indispensable to the cultural development of a rising nation that had so far its remaining cultural properties immensely destroyed or looted through a war with communists.”<sup>27</sup> Director Yoo further requested a “prompt return of looted Korean cultural properties” by saying: “the return of art objects to Korea at the earliest possible date is, needless to say, an important issue, and we hope for an effort to be made in this respect to resolve this issue.”<sup>28</sup> Here, Director Yoo used the precise term, ‘return.’ In response, the Japanese delegate, Itagaki Osamu, said: “In order to carry out the action, there will be the issues of procedure and the format of a turn-over, but no more can be discussed today.”<sup>29</sup> At this meeting, Director Itagaki continued to refer to the term, ‘turn-over.’ In this regards, the Japanese government confirmed at the National Diet that the term ‘turn-over’ should have an intermediate meaning between ‘return’ and ‘donate.’ In Japan, it was the official view of the Ministry of Foreign Affairs to distance itself from that of the Ministry of Education and Culture.<sup>30</sup> At the Foreign Affairs Committee of the House of Councilors of Japan on May 31, 1958, Director Itagaki answered the following, in response to questions by an opposition party member of the National Diet regarding the turn-over of 106 Korean cultural properties to Korea, Director Itagaki answered as follows.

of Korean Cultural Properties [韓国文化財の提供について], Japanese document, Doc. No. 567 (Feb. 6, 1958).

<sup>27</sup> See The gist of talks First Sessions Meeting of the Sub-Committee on Claims, Doc. No. 723.1 JA-102-6 (June 4, 1958).

<sup>28</sup> *Id.* at 102-7.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Member of National Diet Mori Motojiro: (Omitted) Did South Korea understand the term ‘donation,’ did it quietly receive the cultural properties, and what was it like when they received the cultural properties?

Director Itagaki: South Korea is not strongly asserting the term ‘return’ as of now. However, it cannot be said that South Korea has sufficiently accepted the term ‘donation’ that Japan is insisting on. Thus, we are considering to use the term ‘turn-over’ as an intermediate expression. This issue has a very delicate relationship, so there has not been an announcement until now. (Omitted)<sup>31</sup>

As shown at the above quotation, Director Itagaki maintained that the term ‘turn-over’ was as an intermediate expression between ‘return’ and ‘donation.’ He also negated the statement by the Cultural Properties Protection Committee of the Ministry of Education and Culture that Korea accepted ‘turn-over’ to mean ‘donation,’ although South Korea did not strongly insist on the term ‘return’ at that time. Actually, Japan wished to use the expression ‘turn-over’ to mean ‘donation,’ but Korea did not accept it. The term ‘turn-over’ was finally adopted by Japan as a compromise between ‘return’ and ‘donation.’

Did Korea then concede ‘turn-over’ as an intermediate expression between ‘return’ and ‘donation?’ At an unofficial meeting between chief delegates of the fifth Korea-Japan talks on November 14, 1960, Japan asserted the following matters regarding cultural properties:

- 1) *The state-owned Korean cultural properties are given back. It is not a ‘return,’ but a ‘donation.’*
  - (a) Looking at international precedents, a case of ‘return’ is only found in that carried out on Indonesia by the Netherlands.
  - (b) For nations like India, Pakistan, Indonesia, and Vietnam, cultural properties were ‘turned over,’ not ‘returned.’ For most nations, they are not even ‘turned over.’
- 2) Privately owned cultural properties cannot be turned over.
- 3) The turn-over of cultural properties is carried out under political and cultural

<sup>31</sup> See the minutes of the Japanese National Diet (House of Councilors Foreign Affairs Committee, May 31, 1958). The following are the Japanese original documents.

○森元治郎君 (Omitted) 向うは贈与という言葉に対してそれは了解しておるのか、ただ黙って受け取ったのか、その間はどういうふうですか、品物を受け取る時。○説明員 (板垣修君) 先方としましては、返還ということは今強くは主張しておりません。しかし、日本側の言います贈与という点につきましては、まだ十分踏み切っていないような節もあるわけがあります。まあ、その中間としまして表現としましては、引き渡す、という形をとろうかと思えます。非常にこの問題は微妙な関係がございしますので、そういうような理由で実は今まで発表ということとはしなかったわけですが、(Omitted) [Emphasis added]

consideration, and it not a legal obligation.<sup>32</sup>

As seen above, Japan claimed that only state-owned Korean cultural properties would be ‘donated’ to Korea rather than ‘returned.’ Japan asserted that there was only one international precedent to ‘return’ cultural properties from the Netherlands to Indonesia, and even the ‘turn-over’ of Korean cultural properties would be carried out under political and cultural considerations of Korea rather than legal obligations of Japan. In the end, the Japanese Ministry of Foreign Affairs emphasized that ‘turn-over’ means ‘donation,’ instead of an intermediate expression between ‘return’ and ‘donation.’ The Japanese Ministry of Foreign Affairs might have come to some compromise with the Ministry of Education and Culture. In the meantime, Korea responded:

- 1) It is being returned to the original owner, so the expression ‘return’ is appropriate. The term ‘turn-over’ was used when receiving the 106 cultural properties, but the meaning of the expression was not determined at the time. ‘Turn-over’ must signify ‘return.’
- 2) The issue of privately owned cultural properties is complicated and must be discussed in the future.<sup>33</sup>

In this discussion, Korea did not accept the term ‘turn-over’ as an intermediate expression between ‘return’ and ‘donation,’ but rather maintained the stance of ‘return.’ Finally, Japan repositioned itself between using the expression ‘turn-over’ to signify ‘donation’ and to be an intermediate expression between ‘return’ and ‘donation.’

## 5. Return of Korean Cultural Properties in Japan

At the first Subcommittee on Cultural Properties of the fourth Korea-Japan talks held on June 4, 1958, in Tokyo, Director Yoo Tae-ha proposed the time period during which Korean cultural properties were taken away to Japan. He asserted: “In order to expedite the resolution of this issue, there are various opinions domestically,

<sup>32</sup> See An unofficial meeting between chief delegates of the fifth Korea-Japan talks [제5차 한일회담 수석대표간 비공식회의], Korean document, Doc. No. 723.1 JA-711-12~14 (Nov. 14, 1960). [Emphasis added]

<sup>33</sup> *Id.* at 711-3.

but the range of time for the return of the Korean cultural properties taken away to Japan can be limited to since 1905.”<sup>34</sup> Director Yoo also explained: “There are claims that cultural properties taken away before 1905 should also be returned, but we decided to limit to cultural properties since 1905 for the early and smooth resolution of this issue.”<sup>35</sup> However, a Korean document outlines the reason in a more detailed manner why time should be limited to since 1905. The document from the Ministry of Foreign Affairs on June 14, 1958 states the following:

As for the return of the Korean art objects, which is now subject for discussion at the Korea-Japan overall talks (at the Subcommittee on Korean Claims), the position of our Government is that the Japanese Government should turn over to us all those art objects taken away from Korea since 1905. (Omitted) When the Russo-Japanese War came to an end with Japanese’s ‘special interests’ over Korea being recognized at the Portsmouth Peace Conference, the Japanese soon set to engulf Korea. The Machiavellian Prince Ito,<sup>36</sup> then the moving power in the Japanese Government, forced with intimidation the Imperial Korean Government into signing on November 17, 1905 the Second Korea-Japan Agreement (so-called Five-Article Treaty), which made Korea a protectorate of Japan. A Resident General was dispatched to Korea in the person of Ito. Japan virtually seized actual control of Korea. The Japanese were able to do anything they wanted to. It was rather easy for them to take away national treasures from Korea. (Omitted)

The history of Japanese occupation of Korea, therefore, should be recorded from the year of 1905. (Omitted)

Since 1905, Korean national treasures were taken away to Japan in large quantity by the marauding Japanese. The range of time for return of the removed Korean art objects should be set from the year of 1905.<sup>37</sup>

This document pointed out that Japan was able to do anything it wanted with Korea after Korea became a protectorate of Japan in November 1905. Also, this document

<sup>34</sup> *Supra* note 27, at 102-7.

<sup>35</sup> *Id.*

<sup>36</sup> Ito Hirobumi 伊藤博文 was the godfather of constitutional government in Japan and the first governor-general of Korea. Ito has been considered in Korea as the main culprit of the occupation of Korea. He was assassinated by a great Korean patriot and pacifist, Ahn Jung-geun in 1909.

<sup>37</sup> See “The Year of 1905” (in connection with return of Korean art objects): Minutes of the 4th Subcommittee on Cultural Properties of the Korea-Japan Talks and Negotiations on the Return of Cultural Properties 1958, Doc. No. 723.1 JA.102-171-173.

maintained that as Japan began to take away Korean cultural properties in large quantities to Japan after 1905, such properties should be subject to return. This is the right perspective of Korea. More concretely, as all treaties and agreements concluded between the Empire of Korea and the Empire of Japan before the Annexation Treaty of 1910 are null and void, eventually, Japan must return all Korean cultural properties taken away to Japan since 1905.

In April 1960, Japan finally decided to ‘turn over’ all state-owned cultural properties of Korea taken away to Japan since 1905 back to Korea. A Japanese document titled, “Basic Policy on the Japan-Korea Overall Talks (draft),” recorded the part related to the state-owned cultural properties of Korea as follows:

(3) Cultural Properties

Among the cultural properties taken from Joseon (Korea) since 1905 (Residency-General installed), the cultural properties existing as our state-owned items, including books, shall be fundamentally turned over to the Government of Republic of Korea following the normalization of diplomatic relations.<sup>38</sup>

Japan pointed to 1905 as the starting point of return. The Korean proposal of 1905 as the time frame eventually became a turning point of Japan’s policy towards the return of the state-owned cultural properties of Korea in Japan. Further progress, however, was not made due to the disagreement on Article 2 of the Korea-Japan Basic Treaty.

## 6. Settlement of Article 2 of the Korea-Japan Basic Treaty and Agreement on Cultural Properties

### *A. Initial signing of the basic treaty in February 1965*

On February 17, 1965, the party of the Japanese Minister of Foreign Affairs visited Seoul for diplomatic talks. During this 4-day’s schedule, Shiina Etsusaburo, the Japanese Foreign Minister had three diplomatic talks with the Korean counterpart. In particular, on February 18, there was a 3-hour’s intensive discussion on the basic relations between Korea and Japan, including the issue of the “Article Related to the

<sup>38</sup> (3) 文化財 1905年(統監府設置)以後、朝鮮から運び来つた文化財で、現在わが国の国有として存在於するものは、原則として(書籍を含み)国交正常化の後、韓国政府に引渡す。See Basic Policy on the Japan-Korea Overall Talks (draft) [日韓全面会議に関する基本方針(案)], Japanese document, Doc. No. 1403 (Apr. 11, 1960).

Former Treaties and Agreements.” These talks were wired by the Japanese delegates to Tokyo as follows:

Regarding Article 2, Korea maintained that any expression other than ‘are null and void’ cannot be accepted considering national sentiment and that there are no alternatives, and said that they cannot consent to the preparation of agreed minutes regarding this expression as it renders approval of the National Assembly impossible. (Omitted) At the final phase, we proposed the expression ‘are already null and void’ as a draft, and South Korea proposed the expression ‘are hereby null and void,’ and both parties agreed to review the matter after reporting to higher authorities until the next meeting.<sup>39</sup>

Minister Shiina continued to send the following telegram to Tokyo:

1. As a result of around 3 hours of discussion on February 18, instructions<sup>40</sup> came to be requested regarding the draft already wired, and although I think that there may be various technical grievances regarding the contents of the request for instruction, (a) I could not but keenly feel at today’s talks that with regard to the Basic Relations Treaty, there have been many years of negotiations and both parties’ claims have all been already brought up. (b) Observing the attitudes of the leading members of the Government of South Korea including President Park,<sup>41</sup> it is difficult to expect that if it is not settled at this opportunity, there will be drafts in future negotiations more favorable than the draft for which instructions were requested. (Omitted) It is judged that it is the best plan to pursue the settlement of negotiation in relation to this treaty at the level of this request for instructions. Thus, an earnest request is made for the Prime Minister to make a decision from a broad perspective. 2. Thus, as I wish for this treaty to undergo initial signing before departing from Seoul, I request the necessary procedure to be taken.<sup>42</sup>

Minister Shiina requested his government to particularly settle the issue whether “Article related to the Former Treaties and Agreements” is ‘already’ null and void or ‘hereby’ null and void. With the approval of the Prime Minister Sato Eisaku, the Japanese government responded to him in Seoul to settle as “are already null

<sup>39</sup> See Initiation of the 7th Talks and Initial Signing of the Draft of the Basic Relations Treaty [日韓国交正常化交渉の記録(第7次会談の開始と基本関係条約案イニシヤル)], at 138-9, Japanese document, Doc. No. 1127 (Feb. 20, 1965).

<sup>40</sup> Request for Instructions (It refers to the action by diplomatic envoys requesting orders from the home government).

<sup>41</sup> President Park Chung-hee.

<sup>42</sup> *Supra* note 39, at 140-1.

and void.”<sup>43</sup> Through such accounts, Article 2 of the Korea-Japan Basic Treaty was drafted as follows:

Article II

It is confirmed that all treaties or agreements concluded between the Empire of Japan and the Empire of Korea on or before August 22, 1910 are already null and void.<sup>44</sup>

The issue of the “Article Related to the Former Treaties and Agreements” was once settled as such. Japanese documents recorded the following with regard to the account through which the term ‘already’ was inserted before ‘null and void.’

Both parties of Japan and South Korea pondered upon various expressions for approximately 3 hours but did not reach an agreement, but just as we were about to leave the discussion for the day, we lightly suggested inserting the term ‘already’ in front of ‘null and void’ which South Korea said that they were willing to consider, so we all sat back down and ultimately established this article in this expression. This expression had received an official approval from the Director of the Treaties Bureau before leaving for Seoul, saying that: “Anyways it is necessary to have a nuance that shows that the annexation treaty was once valid, so using ‘already’ in that meaning is fine as a final scenario.” We did not think that South Korea would attach to this expression, but it is thought that South Korea agreed with this draft as the negotiations were about to be broken off if continued in this direction.<sup>45</sup>

Looking at such records, Japan might have inserted the term, ‘already’ before “null and void” in order to carry the nuance that “the annexation treaty was once valid,” which Korea never acknowledged. Korea ultimately accepted the expression “already null and void” for the following reason:

At the final stages, Minister of Foreign Affairs Shiina said, “We will accept ‘null and void,’ but what about inserting ‘already’ in front of that phrase.” So we consulted a scholar of international law. (Omitted) It appeared that Japan wanted to insert ‘already’ because, while accepting “null and void,” it was desired at all costs for a suitable interpretation. However, we accepted ‘already null and void’ because we reached the conclusion that the English interpretation does not have a difference.

<sup>43</sup> *Id.* at 147.

<sup>44</sup> *Id.* at 161.

<sup>45</sup> *Id.* at 144-5.



From a legal perspective, the administrative nullification of a treaty is not negating the existence of the facts of the period.<sup>46</sup>

The words “null and void” in Article 2 are legal terms which have strongly expressed the meaning of “null and void retroactive to the beginning.” So, the word ‘already’ does not have any influence on the time of null and void.<sup>47</sup>

Korea was reported to accept “already null and void” following the opinion of an international law scholar of Korea who claimed that it has fundamentally the same meaning as “null and void” from a legal perspective. Thus, Korea did not yield on the claim that the former treaties and former agreements are fundamentally null and void.

### ***B. Negotiation for the Return of Korean Cultural Properties***

When the Japanese Foreign Minister Shiina visited Korea in February 1965, Korea requested him to ‘return’ the privately owned cultural properties of Korea in Japan in the form of ‘donation.’

Regarding the issue of cultural properties, Vice-Minister of Foreign Affairs Moon said that he would like to hold a subcommittee to continue consideration of this issue, that privately owned property can be ‘returned’ in the form of ‘donation,’ and that he would like to have even a little bit of privately owned properties returned.<sup>48</sup>

This requirement was made under the Ministry of Education of ROK. The Korean document from January 9, 1965 includes the following:

Final Request Outline of the Ministry of Education regarding the Return of Cultural

<sup>46</sup> See Situation on the Review of "Bill on Treaty and Agreement between Japan and Korea" at the National Assembly of Korea I・II [韓国国会における：日韓間条約および諸協定批准同意案]の審議状況 上・下] (published by Japanese Ministry of Foreign Affairs Directorate of Asia Department of Northeast Asia), (Sept. 1965), *re-cited from* Tsukamoto Takashi, The discussion surrounding the Basic Treaty between Japan and Korea (Discussion for modification) [(補論)日韓基本関係条約をめぐる論議], at 43, *available at* [http://www.jkcf.or.jp/history\\_arch/first/3/09-02j\\_tsukamoto\\_j.pdf](http://www.jkcf.or.jp/history_arch/first/3/09-02j_tsukamoto_j.pdf) (last visited on Apr. 12, 2017). Tsukamoto said in his research paper that he wrote the report, “Situation on the Review of "Bill on Treaty and Agreement between Japan and Korea" at the National Assembly of Korea,” but did not submit to Japanese Diet.

<sup>47</sup> See Ratifications of the Agreements of Basic Treaty and the Normalization of Diplomatic Relations between Japan and Korea [日韓条約諸協定の批准と国交の正常化], Japanese document, Doc. No. 392, 14-32.

<sup>48</sup> *Supra* note 39, at 182.

Properties.

1. It will continue to be carried out in accordance with the return demand list handed by us [to Japan] on February 21, 1962, and state-owned properties are fundamentally subjects of return even on the side of Japan. It will be carried out under the term ‘turn-over.’

For privately owned properties, difficulties are anticipated, but the return will be certainly demanded as follows even by taking the form of ‘donation.’ (Omitted)<sup>49</sup>

Korea’s basic position was to have the state-owned Korean cultural properties inside Japan ‘returned’ under the term ‘turn-over,’ while privately-owned Korean cultural properties inside Japan should be ‘returned’ even by taking the form of a ‘donation.’

As the Korea-Japan Basic Treaty was initially signed in February 1965, following agreements were rapidly concluded. On March 6, 1965, through a document titled, “Agreement Regarding Subcommittee on Cultural Properties,”<sup>50</sup> Japan confirmed the policy of turning over Korean cultural properties in Japan. The Ministry of Foreign Affairs, the Cultural Properties Protection Committee, the Imperial Household Agency, and the Tokyo National Museum agreed as follows:

1. Director of Asia Ushiroku<sup>51</sup> (Omitted) said, “During the Foreign Minister Shiina’s visit to Korea, there was a request from South Korea to ‘consider in some measure the return of privately owned cultural properties in consideration of South Korean national sentiment,’” and added, “If this is not resolved in the Subcommittee on Cultural Properties in the future, it is to be decided by the Prime Minister, and privately owned properties could be considered with regard to cultural properties.” (Omitted)
3. The secretariat of the Cultural Properties Protection Committee said, “We are of the position that the turn-over of cultural properties are only to be carried out as a donation, and as the cultural properties in the list proposed by Japan are being donated as a goodwill, we do not wish to slowly progress the matters by South Korea demanding modifications due to their objections and Japan making drafts again with corrections. The meetings should proceed with first, greetings and free talks; second, proposal of the Japanese draft; third, the South Korean request for modifications; and fourth, the decision of the final compromise.” (Omitted)
6. With regard to the format in the case of actually turning over the cultural

<sup>49</sup> See Host plans of the 7th Korea-Japan Main Meeting (1964.12.3-1965.6.22) by the Subcommittee on Cultural Properties [제7차 한일 본회담 (1964.12. 3~1965. 6.22) 문화재소위원회회의의 개최계획], Doc. No. 723.1 JA-6888-5.

<sup>50</sup> See Discussion on the Subcommittee on Cultural Properties [文化財小委員会に関する打合せ], Japanese document, Doc. No. 581 (Mar. 6, 1965).

<sup>51</sup> Ushiroku Torao 後宮虎雄, The then Director of Asia of the Japanese Ministry of Foreign Affairs.

properties (drawing up a cultural agreement and regulating the turn-over of cultural properties therein, writing an agreed minutes, etc.) and the necessary domestic legal measures in accordance with the overseas export of state-owned cultural properties, Department Head Harigai<sup>52</sup> said, “The Treaties Bureau is studying them.”<sup>53</sup>

As a result, Japan completed the discussion on the return of Korean cultural properties from Japan as mentioned during Foreign Minister Shiina’s visit to Korea in February 1965. It was, however, “of the position that the turn-over of cultural properties are only to be carried out as a donation, and the cultural properties in the list proposed by Japan are being donated as a goodwill.” In Japanese side, the Ministry of Foreign Affairs and the Cultural Properties Protection Committee had subtly different position. The Cultural Properties Protection Committee claimed that the ‘turn-over’ should be carried out only as a ‘donation’ out of goodwill, while the Ministry of Foreign Affairs sometimes used the term ‘return’ in the form of referencing Korea’s statements.

The final position of the Japanese Ministry of Foreign Affairs was that ‘turn-over’ was only an intermediate expression between ‘return’ and ‘donation.’ It must have been hard for the Ministry of Foreign Affairs to ignore the claim that the period of Japanese occupation was fundamentally “null and void” since the “Article Related to the Former Treaties and Agreements” had been settled under the expression “already null and void.” On March 17, 1965, Korea made internal policy to settle the return of Korean cultural properties as follows:

Explanation 6. The Japanese position is that of a ‘donation’ and our position is that of a “return,” and as the claims of both parties are fundamentally impossible to settle in this manner, this issue shall be resolved with the neutral expression of “turn-over” following the precedent of the oral statement of December 31, 1957.<sup>54</sup>

Korea also decided to accept the expression ‘turn-over’ as an intermediate expression between ‘return’ and ‘donation.’ Following such compromise, the “Agreement on Cultural Property and Exchange between the Republic of Korea and Japan” (hereafter Agreement on Cultural Property and Exchange) was finally signed in Tokyo on June 22, 1965, and took effect on December 18 of the same year along with the Korea-

<sup>52</sup> Harigai Masayuki 針谷正之, The then Deputy Director of Asia of the Japanese Ministry of Foreign Affairs.

<sup>53</sup> *Supra* note 49.

<sup>54</sup> See Instructions on the Issue of Cultural Properties [문화재 문제에 관한 훈령], Doc. No. 723.1 JA-6888-10 (Mar. 17, 1965).

Japan Basic Treaty. Article 2 of the Agreement on Cultural Property and Exchange lays down as follows:

**Article 2**

The Government of Japan shall turn over the cultural properties listed in the annex to the Government of the Republic of Korea within 6 months after this Agreement takes effect in accordance with the procedure agreed upon by the governments of both nations.<sup>55</sup>

In Article 2, however, there was no explanation on the term ‘turn over.’ Instead, Professor Lee Hong-jik, a cultural property committee member of Korea, reported that most of the currently state-owned Korean cultural properties taken away from Korea to Japan since 1905 were ‘returned,’ and that the return of privately owned cultural properties was also being pursued.<sup>56</sup> He further explained about the 103 pieces of Goryeo pottery that were taken away to Japan in 1909 by Ito Hirobumi, the governor-general. Ito Hirobumi’s taking away the Goryeo pottery was an illegal act because Governor-General Ito just had power based on a “null and void” treaty. Of the 103 pieces of Goryeo pottery taken away by Ito, 97 pieces were returned to Korea. This case was a good example in which the expression ‘turn over’ was used in a meaning close to ‘return.’<sup>57</sup>

## 7. Conclusion

Article 2 of the Korea-Japan Basic Treaty stipulates the so-called “Article Related to the Former Treaties and Agreements.” A compromise was made with the term, “already null and void.” As regards this expression, there is disagreement between Japan and Korea. Japan asserts that the period of Japanese occupation was once valid, while Korea maintains that it has been “fundamentally null and void,” so the meaning does not change even if ‘already’ is inserted in the beginning.

<sup>55</sup> Embassy of Japan in Korea, Agreement on Cultural Property and Exchange between the Japan and the Republic of Korea 문화재 및 문화협력에 관한 일본과 한국간 협정, available at [http://www.kr.emb-japan.go.jp/rel/r\\_paper/r\\_paper\\_050610\\_5.html](http://www.kr.emb-japan.go.jp/rel/r_paper/r_paper_050610_5.html) (last visited on Apr. 12, 2017).

<sup>56</sup> See Lecture Material by the Korean delegate of the Japan-Korea Talks at the Reporting Lecture on Japan-Korea Negotiations [日韓交渉報告講演会において日韓会谈韓国側代表が行った講演内容], Japanese document, Doc. No. 30 (July 26, 1965).

<sup>57</sup> *Id.*

“The former treaties and agreements” were originally “null and void” from the beginning, and their illegality was recognized immediately with the liberation of Korea. Conversely, Japan claims that the former treaties and agreements were valid until the end of the period of Japanese occupation. However, Japan is avoiding positive interpretation of the meaning of “null and void.” If “the former treaties and agreements” were “valid during the period of Japanese occupation,” it means that Japan forced Korea through military power to pretend as if the treaties and agreements, originally null and void, were valid during the period of Japanese occupation. Japan’s position does not make sense under international law.

As the Japanese occupation was based on those treaties and agreements, originally null and void, ‘peaceful possession’ was impossible. Korea’s claim that it was a “military occupied territory” of Japan during the occupational period reflects a more truthful reality. Japanese colonial rule was extremely harsh, oppressive and often fatal to Koreans; the Japanese government even forcibly enlisted more than hundreds of thousands young ladies as sex slaves.

Korean cultural properties taken away to Japan during this period should all be returned to Korea, but Japan evaded the expression ‘return’ until Korea referred to the term ‘turn over’ as an intermediate expression between ‘return’ and ‘donation.’ Luckily, some Korean cultural properties including the Goryeo pottery taken to Japan by Ito Hirobumi were turned over to Korea. In this case, such a term, ‘turn-over’ was practically interpreted as a ‘return.’

Even today interpretation of Article 2 of the Korea-Japan Basic Treaty and the return of Korean cultural properties are not yet completely settled down. The return of cultural properties are difficult to resolve as both countries’ national sentiments are at stake. The author believes that the more both civic societies and the governments mutually communicate and share their common values for peace and prosperity, the earlier they arrive at the final resolution for these issues under international law and justice.

