Legal Framework for Repatriation of Cultural Property from Illicit Trafficking: An Examination of Its Weaknesses and Prospects*

กรอบกฎหมายว่าด้วยการเรียกคืนวัตถุทางวัฒนธรรมจากการลักลอบนำเข้าและส่งออกโดยผิดกฎหมาย: บทวิเคราะห์ตรวจสอบข้อบกพร่องและความคาดหวัง

Peerapon Jaderojananont

PhD candidate under the Joint Doctoral Supervision Agreement (Cotutelle) between Thammasat University, Thailand and Macquarie University, Australia

พีรพล เจตโรจนานท์

นักศึกษาปริญญาเอก หลักสูตรนิติศาสตรดุษฎีบัณฑิต ภายใต้ความร่วมมือระหว่างมหาวิทยาลัยธรรมศาสตร์ ประเทศไทย และมหาวิทยาลัย Macquarie ประเทศออสเตรเลีย

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Abstract

The repatriation of cultural property from illicit trafficking necessarily depends on the cooperation between states of origin as a requesting party and market states as a requested party of repatriation. However, the legal framework for repatriation under the

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Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention) and Convention on Stolen or Illegally Exported Cultural Objects (the 1995 UNIDROIT Convention) is only designed with cultural property nationalism. This preference for only cultural property nationalism fails to attract many market states into the cooperation. Moreover, its legal defects also decrease opportunities of states of origin to succeed in their repatriation. This article mainly aims to examine the international legal framework and Thailand's practice in order to prove how states of origin including Thailand have been difficult to request for the repatriation. According to the examination, this article finds that the cooperation for repatriation would be impossible without the balance between cultural property nationalism and cultural property internationalism. The balance of both concepts should be promoted as an alternative approach for states of origin so that they would probably convince the requested party to cooperate with them for the repatriation. This would be more interesting to make the win-win solution between the requesting party and the requested party than complying with the international legal framework.

Keywords: repatriation, cultural property, alternative approach for states of origin

บทคัดย่อ

การร้องขอเพื่อเรียกคืนทรัพย์สินทางวัฒนธรรมจากการนำเข้าและส่งออกโดยผิดกฎหมาย มีความจำเป็นอย่างยิ่งที่จะต้องพึ่งพาความร่วมมือระหว่างประเทศ ระหว่างประเทศต้นกำเนิดวัตถุทางวัฒนธรรม ซึ่งมีสถานะเป็นผู้ร้องขอ และประเทศตลาด ซึ่งเป็นประเทศที่ถูกร้องขอ อย่างไรก็ตาม พบว่ากรอบกฎหมายระหว่างประเทศตามอนุสัญญาระหว่างประเทศว่าด้วยการปกป้องคุ้มครองและเรียกคืนทรัพย์สินทางวัฒนธรรมนั้น กลับถูกออกแบบบนพื้นฐานแนวคิดที่มีแนวโน้มเป็นคุณต่อประเทศต้นกำเนิดวัตถุทางวัฒนธรรมเท่านั้น ซึ่งเป็นผลทำให้ประเทศตลาดซึ่งเป็นผู้ครอบครองวัตถุทางวัฒนธรรมที่ถูกลักลอบนำเข้ามา ไม่ต้องการที่จะเข้าร่วมผูกพันอนุสัญญาดังกล่าว อีกทั้ง อนุสัญญาดังกล่าวเอง ก็มีข้อบกพร่องบางประการที่ทำให้ประเทศต้นกำเนิดวัตถุทางวัฒนธรรมเกิดความเสียเปรียบในการเรียกคืนทรัพย์สินทางวัฒนธรรมภายใต้กรอบที่อนุสัญญากำหนด ด้วยเหตุนี้ บทความฉบับนี้จึงมีวัตถุประสงค์ที่จะตรวจสอบกรอบกฎหมายภายใต้อนุสัญญาดังกล่าว รวมทั้งความเชื่อมโยงกับการดำเนินการของประเทศไทย ว่ามีข้อบกพร่องอย่างไร และมีหนทางใดที่จะช่วยให้ประเทศต้นกำเนิดวัตถุทางวัฒนธรรมรวมถึงประเทศไทยประสบผลสำเร็จในการเรียกคืนวัตถุทางวัฒนธรรมที่ถูกลักลอบส่งออกโดยมิชอบ

คำสำคัญ: การเรียกคืน วัตถุทางวัฒนธรรม ทางเลือกสำหรับประเทศต้นกำเนิดวัตถุทางวัฒนธรรม

1. Introduction

Illicit trafficking of cultural property is a major problem in many states of origin including Thailand. It causes the loss of movable cultural property within those countries rich in cultural property, and it also provokes cultural property disputes between states of origin seeking for repatriation of illegally removed cultural property and market states that need to retain foreign cultural property. This conflict is theoretically based on two different ways of thinking about cultural property: cultural property nationalism, or known as cultural nationalism and cultural property internationalism, or known as cultural internationalism. These cultural property concepts have a huge amount of influence over legal framework for repatriation of cultural property at both the international and national levels. This article mainly focuses on the examination of the international legal framework for repatriation in order to prove its weaknesses and seek for an alternative approach for resolving the conflict between the concept of cultural nationalism and cultural internationalism.

There is a great need to focus on states of origin because they are the primary stakeholder who should be engaged in illicit trafficking of cultural property. As defined by Merryman, states of origin, countries of origin, or source nations are countries where "the supply of desirable cultural property exceeds the internal demand ... they are rich in cultural artifacts beyond any conceivable local use"[1] such as Afghanistan, Cambodia, China, Egypt, Greece, Italy, Iraq, Peru, Thailand and etc. This term is obviously contrary to market states or market nations where the demands for cultural property exceed over the supplies and this situation also encourages the export of cultural property from many states of origin[2] such as Canada, Germany, Switzerland, the United Kingdom, the United States, and etc.

As observed by Dutra, most states of origin lack the resources to adequately protect their own cultural objects due to their poor economic status.[3] As relatively poor economy and cultural property's market value, those states of origin have been often

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[1] John Henry Merryman, "Two Ways of Thinking about Cultural Property," The American Journal of International Law, Vol. 80, No. 4, 831, p.832 (1986).

[2] *Ibid*.

[3] Michael L. Dutra, "Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China," Asian-Pacific Law & Policy Journal, Vol. 5, 63, p.65 (2004).

confronting problems of tomb-robbing, artifact mutilation, and corruption.[4] In Thailand, for example, although Thai law vests antiques and works of art in the state's control and prohibits the export of those objects, economic attractions of illicit trafficking become an irresistible incentive to violate the law and provoke corruption by official enforcement officers.[5] In contrast, market nations mostly own the financial resources to purchase cultural objects from abroad even though such high demands and resources encourage both legal and illegal export from states of origin.[6]

2 Two Ways of Thinking about Cultural Property: Cultural Nationalism and Cultural Internationalism

According to the writing of Merryman, the first way of thinking about cultural property is cultural nationalism which recognizes cultural property as part of national cultural heritage which "gives nations a special interest ... implies the attribution of national character to objects ... legitimizes national export controls and demands for the repatriation of cultural property".[7] The other way of thinking is cultural internationalism which views that objects of artistic, ethnological, archaeological or historical interest are "components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction".[8] Obviously, the concept of cultural nationalism is contrary to cultural internationalism because the former concept seems to maintain the power of state to control its cultural property located within the territory while the latter concept needs to share benefits arising from cultural property as common cultural heritage.

Both cultural property concepts are used to explain how each nation creates its own way to preserve cultural property and we can also see an incentive stimulating a nation to choose which concept it favors. States of origin naturally prefer cultural nationalism to designate their law for retaining historic, archaeological, or artistic objects

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[4] Jason M. Taylor, "The Rape and Return of China's Cultural Property: How Can Bilateral Agreement Stem the Bleeding of China's Cultural Heritage in A Flawed System?," Loyola University Chicago International Law Review, Vol. 3, No. 2, 233, p.237 (2006).

[5] Simon R. M. Mackenzie, "Dig a Bit Deeper Law: Regulations and the Illicit Antiquities Market," British Journal of Criminology, Vol. 45, No. 3, 249, p.258 (2005).

[6] Taylor, *supra note* 6.

[7] Merryman, *supra note* 1.

[8] *Ibid*.

within their territory because they deem that cultural property usually contains market value which should be harnessed by the state and their people.[9] This attracts many visitors from all over the world leading to financial benefits while market states likely promote cultural internationalism for claiming the universal status of cultural property which must be shared for humankind. This special status may give them the legitimacy to obtain and possess foreign cultural property.

Although both cultural property concepts have an effect on the designation of cultural property law leading to the difference between states of origin and market states, it is found that cultural nationalism is not absolutely isolated from cultural internationalism and *vice versa*. In *Elgin Marbles*[10], When we claim that the Parthenon Marbles belong to everyone, it also belongs to Greece. Indeed, the interaction between cultural nationalism and cultural internationalism has been implicitly embedded in the legal contexts. For example, the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention) was adopted with cultural internationalism, but its preamble provides that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world".[11] This legal text reflects the interaction between language "its" and "each people" which may imply the status of cultural property originated with a specific group of people and belonged to them.[12] This is realized that whether the claim for cultural nationalism or cultural internationalism over the Parthenon Marbles should not be different from each other.

3 International Legal Framework for Repatriation of Cultural Property

This article asserts that the repatriation would not be accomplished by only an individual party because it is necessary to depend on the consent of both a requesting

[9] Maria Aurora Fe Candelaria, "The Angkor Sites of Cambodia: The Conflicting Values of Sustainable Tourism and State Sovereignty," Brooklyn Journal of International Law, Vol. 31, No. 1, 253, p.268 (2005).

[10] Nadia Banteka, The Parthenon Marbles Revisited: A New Strategy For Greece, (Pennsylvania, Penn Law: Legal Scholarship Repository, 2016) pp.1238-1241.

[11] See *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, signed 14 May 1954, entered into force 7 August 1956, preamble.

[12] David N. Chang, "Stealing Beauty: Stopping the Madness of Illicit Art Trafficking," Houston Journal of International Law, Vol. 28, No. 3, 829, p.847 (2006).

party and a requested party. The outcome of repatriation should be based on the effective cooperation between the requesting party and the requested party. Hence, the preference for only one cultural property concept, whether cultural nationalism or cultural internationalism, claimed to fight against the other party would mostly lead to the failure of repatriation.

Although the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention) and Convention on Stolen or Illegally Exported Cultural Objects (the 1995 UNIDROIT Convention) which were adopted to encourage states of origin to request for repatriation of illegally removed cultural property and to fight against illicit trafficking of cultural property shall promote international cooperation between states of origin and market states, it is argued that the legal framework for repatriation under those conventions is based on an asymmetry between cultural nationalism and cultural internationalism. This does not reflect how the collaboration between cultural nationalism and cultural internationalism would be established to resolve the conflict among the state parties. Hence, there are two main reasons leading to the failure of the request for repatriation by state parties of origin under the legal framework.

While the legal framework prefers to apply cultural nationalism as its legal basis for protecting cultural property from illicit trafficking, this preference leads to the hesitation of many market states to ratify them because they would not need to be bound with the agreement which is not beneficial for them. Consequently, the international cooperation under those conventions should become failed. It seems that the concept of cultural nationalism under the legal framework naturally favors states of origin to succeed in their repatriation, but it is found that some legal defects would make them disadvantageous and difficult to do so.

3.1 The 1970 UNESCO Convention

The 1970 UNESCO Convention encourages its state parties to protect their own cultural property from any removal. For instance, Article 5 of the convention obliges its state parties to enact law and regulations designed to prevent illegal import and export of cultural property and to establish a national inventory of protected property.[13] This legal obligation needs to promote cultural nationalism because state parties can retain cultural property within their own territory. Moreover, the UNESCO Convention also provides legal framework for repatriation in its Article 7(b).[14] The legal framework encourages a state party to cooperate with the other state party for pursing its repatriation. We should have seen that the UNESCO Convention responds to the function of cultural nationalism to support its state party, especially regarded as a state of origin to protect and return cultural property from illicit trafficking.

It is common to assume that the UNESCO Convention should be more beneficial to state parties of origin than market state parties. It is argued that its legal framework designed with cultural nationalism adversely affects the request for repatriation by state parties of origin. Its legal defects also block opportunities of state parties of origin to succeed in their repatriation. The preference for only cultural nationalism becomes the most important shortcoming by itself to promote the effective cooperation between state parties of origin and market state parties. Most market states do not wish to be obliged by the UNESCO Convention because the convention mostly favors states of origin over market states. It only calls for state parties of origin to have a responsibility to protect and return their own cultural property while market state parties are required to take necessary measures to prevent their museums or other similar institutions from acquiring stolen cultural property and they shall be also required to return stolen cultural property.[15] This reflects the fact that state parties of origin only task to protect and return their stolen cultural property while market state parties are obligatory to re-protect those states of

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[13] See *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, signed 14 November 1970, entered into force 24 April 1972, art. 5.

[14] *Ibid*, art. 7(b).

[15] Janene Marie Podesta, "Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Underlines Its Goals by Unduly Targeting Market Nations," Cardozo Journal of International and Comparative Law, Vol. 16, 457, p.473 (2008).

origin.[16] Unsurprisingly, the UNESCO Convention is unable to convince most market states' ratifications.

Although the UNESCO Convention seems to favor the state of origin's stance with the preference for cultural nationalism, it is argued that its legal framework poses some legal defects which should adversely affect the request for repatriation by state parties of origin. Under Article 7(b)(ii), the legal framework is based on the exception to *nemo dat quod non habet* which aims to protect a good faith purchaser who has never known that cultural property was stolen or transferred from any person who has no title to that property or a person who has valid title to the property. This legal principle adversely affects many state parties of origin that are financially limited to pay compensation for repatriation. The vague language of just compensation also provokes the difficulty since the achievement of repatriation really depends upon the pleasure of the requested party. The requesting party may likely risk from the payment of exorbitant or inappropriate prices. The legal framework also provides a rigid scope for repatriation of cultural property that restricts state parties of origin to request for repatriation of only cultural property documented into the inventory and stolen from museums or other similar institutions.

3.2 The 1995 UNIDROIT Convention

Although the 1995 UNIDROIT Convention was adopted to complement the UNESCO Convention, it remains very difficult to convince market states' ratifications because its legal framework is still based on the concept of cultural nationalism. Like the UNESCO Convention, there are some legal defects from its legal framework which are not beneficial to state parties of origin to succeed in their repatriation. Although its legal framework allows an individual to claim for repatriation of stolen cultural property[17], the rule of *lex situs* applied in this legal framework may raise the disadvantage for the claimant and the problem of enforcement. It is impossible to guarantee that the court or other competent authorities shall be obliged to enforce the current possessor to return stolen cultural property because the outcome of any claim must depend on the court's discretion and national law of state party in which cultural property is located. If such a

[16] *Ibid*, p.474.

[17] See *Convention on Stolen or Illegally Exported Cultural Objects*, signed 24 June 1995, entered into force 1 July 1998, art. 3-4.

state party has its law which is based on cultural internationalism or legalizes the removal of cultural property, the claimant probably risks from the failure of his repatriation. Moreover, its legal framework also applies the exception to *nemo dat quod non habet* which is not beneficial to state parties of origin like Article 7(b) of the UNESCO Convention.

4 Thailand and Its Repatriation of Cultural Property

Thailand has not yet ratified the UNESCO Convention and the UNIDROIT Convention, but Thailand enacts its national law and policy based on cultural nationalism to protect its cultural property within the country. Thailand's legal framework on cultural property is under the Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (AON) which has its objective of protecting both immovable and movable cultural property from the destruction, illegal excavation, and illicit trafficking. In terms of protection of cultural property, Thailand has adequacy of providing its policy and legal measures preserving cultural property from the threats and prohibiting the illegal export of such cultural property. However, the lack of law enforcement by the Department of Fine Arts (DFA) becomes a main problem which has a negative impact on its implementation. The DFA also lacks skillful human resources and technical assistance. This claim is examined through many national museums' operations which remain ineffective to complete the national inventory and registration of cultural property.

To examine the repatriation of cultural property, it is so true that Thailand has not yet ratified the UNESCO Convention, but Thailand recently attempted to follow Article 7(b)(ii) of the UNESCO Convention to request for repatriation of cultural property from a requested party. In considering the most iconic repatriation case in Thailand, *Phra Narai*, Thailand's practice was compatible with spirit of the UNESCO Convention. Thailand attempted to follow Article 7(b)(ii) of the convention by applying the diplomatic channel to negotiate with the requested party for repatriation and the exception to *nemo dat quod non habet*.

The *Phra Narai* lintel is a stone lintel which is elegantly carved with an image of one of the Hindu Gods "*Vishnu*" reclining on the water; furthermore, it is also proved that the lintel, produced around between the tenth and thirteenth centuries of Hindu-era, is as a part of the *Phanom Rung* temple's body, located near the Thai-Cambodian border,

the Northeast region of Thailand.[18] In the early 1960s, it was found that the lintel was removed from the *Phanom Rung* temple. The fact is that James Alsdorf, a Chairman of the Art Institution of Chicago (AIC) purchased the lintel and lent it to the AIC in 1967.[19] Many years after the lintel was exhibited at the AIC, the Art Institute learned from media reportage and found that the Thai government requested for repatriation of the lintel.[20] In 1971, as the Thailand's initiative on renovation and restoration of the *Phanom Rung* temple, Thailand found that the lintel disappeared from the temple's site, so the Thai Embassy primarily contacted to James Alsdorf in order to request for repatriation of the Hindu God lintel.[21]

However, the AIC asserted that the Art Institute legally acquired the lintel as the donation from a private foundation and also refused to return it to the Thai government.[22] This conflict became the beginning point with long negotiations between Thailand and the AIC. While their bilateral negotiation remained endless, the Chicago-based Elizabeth Cheney Foundation as the third party intervened the negotiation and offered the AIC the donation of another equivalent Thai object which would replace the lintel in order to secure the AIC from a net loss in its collections.[23] In 1988, the AIC accepted the donation as offered by the foundation and returned the lintel to Thailand.

In considering the case, it is clear to prove that Thailand's practice with spirit of the UNESCO Convention obviously became deadlocked and problematic. Thailand was at difficulty and disadvantage to succeed in its repatriation even though its illegally removed cultural property could be finally repatriated because of the support by the third-party. This case may prove that Thailand is not necessary to ratify the UNESCO Convention

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[18] Barbara Crossette, "Thais Accuse U.S. of Theft of Temple Art," New York Times, (10 February 1988) accessed 25 September 2018, from http://www.nytimes.com/1988/02/10/world/thais-accuse-us-of-theft-of-temple-art.html.

[19] Claudia Caruthers, "International Cultural Property: Another Tragedy of the Commons," Pacific Rim Law & Policy Journal, Vol. 7, No. 1, 143, p.144 (1998).

[20] Associated Press, "Chicago Museum to Return Lintel Thais Say Was Stolen," New York Times, (25 October 1988) accessed 25 September 2018, from http://www.nytimes.com/1988/10/25/us/chicago-museum-to-return-lintel-thais-say-was-stolen.html.

[21] Caruthers, *supra note* 19.

[22] Associated Press, *supra note* 20.

[23] Patrick Reardon, "Art Institute Agrees to Return Thai Sculpture," Chicago Tribune, (25 October 1988) accessed 25 September 2018, from http://articles.chicagotribune.com/1988-10-25/news/8802100130_1_art-institute-thai-government-museum.

because Thailand does not benefit from its legal framework for repatriation. We should have seen that Thailand suffered from the endless negotiations and the exception to *nemo dat quod non habet* which did not provide Thailand any privilege over the other party. Hence, the compliance with the international legal framework for repatriation is inappropriate for states of origin including Thailand.

5 An Alternative Approach for States of Origin and Thailand

The outcome of repatriation necessarily depends on the effective cooperation between the requesting party and the requested party. The claim for only one cultural property concept, whether cultural nationalism or cultural internationalism, against the other party would become a cause of failure to promote the cooperation. This section aims to recommend an alternative approach which will establish the reconciliation between the two cultural property concepts in pursuit of providing possibilities of repatriation for states of origin.

5.1 Establishment of A Mutual Direction for Compromise

We should begin with establishment of a mutual direction for compromise between states of origin including Thailand and market states as a requested party. This direction would become a convergence based-framework for both states of origin and the requested party to make the further step of effective cooperation. Under the mutual direction, this proposal needs to decrease the extreme wish of both parties. They should meet each other halfway and should not claim for only cultural nationalism or cultural internationalism. To implement this objective, the claim for cultural nationalism by states of origin must not be retroactive while market states must actively take appropriate steps to facilitate states of origin to protect their cultural property from any further illicit trafficking. This claim is supported by Klug who encourages states of origin as the leader to forgive for past indiscretion in order to push the compromise forward.[24] This article accepts that the forgiveness should be compatible with international law principle. Both

[24] Nicole Klug, "Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise between the Conflicting Ideologies of Cultural Property," Case Western Reserve Journal of International Law, Vol. 42, No. 3, 711, pp.724-725 (2010).

the Vienna Convention on the Law of Treaties (VCLT)[25] and the UNESCO Convention[26] recognize the non-retroactivity which does not support the request for repatriation of cultural property removed for a very long time. The adoption of the UNESCO Convention in 1970 should become as the timeframe states of origin including Thailand should not request for repatriation of cultural property illegally removed before 1970.

In terms of the market states' position, they should contribute to protection of cultural property together with states of origin by imposing strict import regulations in order to stop a vicious circle of illicit trafficking. As applied by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) model and International Council of Museums (ICOM) principle[27], the control of endangered species movement at both the import and export stage can be compared with the cultural property movement. Market states should establish their competent agency to investigate and prohibit the import of cultural property which is not accompanied with export permit granted by the exporting state. Market states should also impose penalties on museums in their country for acquiring any cultural property with questionable provenance. This article agrees that market states should codify this ICOM principle in their federal or state laws with penalties or sanctions for museums that violate such laws.[28] Those museums should be liable for the acquisition of cultural property illegally removed from states of origin and they should not claim that they have never known such questionable provenance since museums normally possess skillful human and financial resources and ability to research the provenance of cultural property with questionable origins.[29]

5.2 Mutually-Beneficial Repatriation Agreement

With respect to the mutual direction for compromise, this proposal recommends states of origin including Thailand as the requesting party and any market state or foreign

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[25] See *Vienna Convention on the Law of Treaties*, signed 23 May 1969, entered into force 27 January 1980, art. 28.

[26] See *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, signed 14 November 1970, entered into force 24 April 1972, art. 7(b)(ii).

[27] *Code of Ethics for Museums* (ICOM, 2013), principle 2.3.

[28] Leila Amineddoleh, "Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions," Fordham Intellectual Property, Media, Entertainment Law Journal, Vol. 24, No. 3, 729, p.734 (2015).

[29] Leah J. Weiss, "The Role of Museums in Sustaining the Illicit Trade in Cultural Property," Cardozo Art and Entertainment Law Journal, Vol. 25, 837, p.874 (2007).

museum as the requested party to make the mutually-beneficial repatriation agreement so that both of them can reconcile their benefit leading to the win-win solution. This proposal prefers the request for repatriation by making a bilateral agreement than multilateral agreement since the bilateral agreement is flexible to negotiate and bargain the needs and benefits which best suit for both parties. Its full reciprocity should be a key factor convincing the requested party to join in the cooperation. To encourage the bilateral agreement, this proposal provides the feasible option that aims to reconcile the concept of cultural nationalism and cultural internationalism together with interests of both the requesting party and requested party.

The formation of a multilateral agreement becomes ineffective to reconcile cultural nationalism and cultural internationalism because it does not really reflect the specific need of all parties to the agreement. While the formation of a multilateral agreement cannot respond to the different need of all state parties, the establishment of a bilateral agreement would highly provide the best consequence for both parties involved because it is designed from the exact requirement of both parties and it encourages the compromise which should convince both parties to accord with each other for the win-win solution. It is very necessary to think forward that the bilateral agreement for repatriation of cultural property should provide its legal framework or terms that can be persuasive enough to invite the other party in which cultural property concerned is located to accept and join in the agreement. Accordingly, this bilateral agreement aims to facilitate a party to succeed in its repatriation while the other party's interest is not deprived from such repatriation.

This proposal asserts that the legal framework or terms must provide both parties the mutual benefit arising from cultural property concerned. The requested party must not be at disadvantage to accept the request for repatriation if agreeing to take part in the agreement. To support this ideal proposal, the accord between Italy and the Metropolitan Museum of Art in New York, well-known as the MET, should be taken into this account. In 2006, Italy achieved to accord with the MET after a long negotiation for repatriation of the Euphronios Krater and other cultural objects. The conflict began with the claim for good faith acquisition by the MET against the claim for ownership by Italy. The MET claimed that the Krater was purchased from an American dealer in 1972 without knowing that it was

stolen from an Etruscan tomb outside of Rome.[30] Italy claimed cultural nationalism against the MET to request for the repatriation of the Krater by proving the discovery of how it was illegally removed from the tomb through dealers while the MET remained its assertion. In 2006, the bilateral negotiations between Italy and the MET productively resulted in the creation of mutually-beneficial repatriation agreement. This model of Italy-the MET accord would be interesting for this article's proposal.

This agreement reflects the balance of both parties' interest through three major pillars: (1) the acknowledgement of Italian ownership of the Krater, (2) the prohibition of further litigation, and (3) the establishment of loan program between Italy and the MET.[31] When both parties jointly agreed with those major pillars, the repatriation was operated with three phrases. The first phrase is the return of four classical Apulian vases that must be done as soon as possible and the MET will then return the Euphronios Krater in 2008 under the specific condition that the MET shall be credited as the good faith purchaser of the Euphronios Krater[32] which was purchased in 1972 as "one of the finest existing examples of Greek vessels from the sixth century B.C.".[33] In 2010, the repatriation will be finally completed when the MET returns Italy the fifteen-piece silverware set that were purchased in early 1980s.[34] What can we learn from this mutually-beneficial repatriation agreement? This is recognized that the concept of cultural nationalism and cultural internationalism were reconciled together with the balance of interest between Italy as the requesting party and the MET as the requested party. This repatriation of Euphronios Krater and the other cultural objects obviously reflects the cultural nationalism's function which encourages those objects to be preserved at their place of origin so that they become the physical symbol and representative of cultural identity that people living in such place are proud.

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[30] Paige S. Goodwin, "Mapping the Limits of Repatriable Cultural Property: A Case Study of Stolen Flemish Art in French Museums," University of Pennsylvania Law Review, Vol. 157, No. 2, 673, p.689 (2008).

[31] *Ibid*, p.690.

[32] Stacey Falkoff, "Mutually-Beneficial Repatriation Agreement: Returning Patrimony, Perpetuating the Illicit Antiquities Market," Journal of Law and Policy, Vol. 2, No. 9, 265, p.283 (2007).

[33] Anthee Carassava, "Greek Officials Planning to Bring Charges Against Ex-Curator," New York Times, (5 May 2006) accessed 25 September 2018, from http://www.nytimes.com/2006/05/05/arts/design/05getty.html.

[34] Falkoff, *supra note* 32, p.284.

In relation to cultural internationalism, we should have seen that the timeframe of repatriation could be beneficial for the MET because the timeframe permitted the MET to exhibit the Krater and the other cultural objects for nine months in its galleries and the bilateral agreement also maintains the museum's credit as good faith purchaser of cultural property without Italy's action to pursue any form of litigation against the MET.[35] According to the loan program, Italy also promised to give the MET its antiquities that are same important and beauty as the Krater for long-term loans.[36] These conditions under the agreement can contribute to the preservation and distribution of cultural property to people around the world visiting the MET within the certain period of time. Although the Krater and other Italian antiquities were temporarily exhibited in the MET, a series of loans could help people to appreciate and access those antiquities. This element of cultural internationalism is accentuated with the claim for universal museum concept. The MET is regarded as the universal museum, like a number of prominent museums such as the British Museum in London and the Louvre in Paris, where are not universal due to their reputation or oldness, but these museums play a key role in promoting respect for cultural diversity and interchange through the exhibition and study of the cultural heritage of all people.[37] This concept, therefore, meets the nature of internationalism for benefit sharing of the Krater and other cultural objects as common cultural heritage which would be welcome for everyone to access.

According to the mutually-beneficial repatriation agreement between Italy and the MET, it becomes very persuasive to resolve cultural property disputes. We need to take the mutually-beneficial essence into the consideration of making the bilateral agreement for repatriation because its positive consequence is not only applied to reconcile cultural nationalism and cultural internationalism, but it also helps the requesting party and the requested party to acquire what they need without any risk from uncertain result of litigation. As insisted by Briggs, the mutually-beneficial repatriation agreement between Italy and the MET begins to establish new standards for

[35] *Ibid*.

[36] Elisabetta Povoledo, "Met to Sign Accord in Italy to Return Vase and Artifacts," New York Times, (21 February 2006) accessed 25 September 2018, from http://www.nytimes.com/2006/02/21/arts/design/21anti.html.

[37] Craig Forrest, International Law and the Protection of Cultural Heritage, (USA: Routledge, 2010), p.164.

political cooperation with foreign museums without pursuing any form of legal action.[38] Briggs explains that:

> Italy achieves considerable bargaining power by making clear it will refuse to lend art and antiquities to uncooperative museums for temporary exhibitions. Amidst this dual pressure, Italy then offers museums a way out by waiving all liability ... which is good for museum public relations ... in exchange for what Italy desired ....[39]

To agree with the Briggs's statement, we need to look at the heart of compromise which should become the reduction of extreme desire between Italy and the MET for leading to what they finally acquire. While Italy could at last complete its repatriation of the Krater and other cultural objects, the MET has no need to waste the time to proceed the litigious process and it could still benefit from the temporary exhibition of those cultural items within the timeframe. This article supports the requesting party and requested party to make the bilateral agreement based on mutually-beneficial essence as exemplified in the Italy-the MET agreement.

The mutually-beneficial repatriation agreement also detracts from the formation of much-needed international legal precedent because international law does not normally provide much practical assistance in encouraging voluntary repatriation.[40] The creation of mutually-beneficial repatriation agreement helps both parties to avoid legal defects arising from the interpretation of such international law such as limitation on applicability, vague language of legal texts, a lack of uniformity in its application, or financial burdens.[41] These legal defects raise "uncertainty" for states of origin seeking for repatriation and market states or their museums as requested party.[42] To prove this uncertainty, we should have realized legal defects examined and found in the interpretation of the UNESCO Convention and the UNIDROIT Convention such as the vague languages of specifically designated by each state and just or fair and reasonable compensation provided in those conventions, and the rigid scope of claiming for

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[38] Aaron Kyle Briggs, "Consequences of the Met-Italy Accord for the International Restitution of Cultural Property," Chicago Journal of International Law, Vol. 7, No. 2, 623, p.652 (2007).

[39] *Ibid*, pp.642 - 643.

[40] Falkoff, *supra note* 32, p.294.

[41] *Ibid*.

[42] Christa L. Kirby, "Stolen Cultural Property: Available Museum Responses to an International Dilemma," Dickinson Law Review, Vol. 104, 729, p.734 (2000).

repatriation of cultural property. Those flaws would not probably occur if both parties jointly apply the mutually-beneficial repatriation agreement.

However, it is argued that the model of Italy-the MET agreement is not easily replicated in all other repatriation cases due to its particular situations.[43] This article needs to realize some important requirements from the model that may be adopted to make the cooperation between a state of origin and a market state. The requirements are explained by Briggs as the following: (1) cultural object in question becomes important to the possessing museum's collection; (2) the requesting party must be a state of origin having high intention to repatriate cultural object; (3) the museum is unable to proceed lengthy litigation; (4) the requesting party is capable enough to preserve cultural property if repatriated; (5) the possessing museum is located in a state which is a party to international law concerning repatriation of stolen cultural property; and (6) the requesting party is compulsory to show evidence of illegality in the requested party's acquisition.[44] This article will only apply some requirements to make a bilateral agreement based on the mutual direction for compromise as discussed.

This proposal recommends that it is not necessary to focus on cultural property in question that is important to the requested party's collection, but it should be the voluntary consent of both the requesting party and the requested party to claim any cultural property possessed by the requested party of repatriation because the compromise should reflect their voluntary participation as much as possible. Secondly, the preservation of cultural property is the most essential objective of compromise since it is the mutual element of both cultural nationalism and cultural internationalism, so the requesting party must evidently prove its potential to preserve such cultural property with the satisfied standard that is not lower than that of the requested party when such cultural property is repatriated. Thirdly, both parties to the agreement must accord each other not to proceed the litigation or any other legal action because this is recognized that the compromise should be completed with the reciprocity to maintain their relationship and avoid the confrontational litigation. Consequently, those key requirements should be a basis for making the bilateral agreement for repatriation in order to step forward to reconcile the benefits of both parties.

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[43] Goodwin, *supra note* 30, p.702.

[44] Briggs, *supra note* 38, pp.643 - 648.

6 Guidance for Thailand to Implement Its Repatriation

According to the alternative approach, states of origin should apply the proposal to convince market states or foreign museums as a requested party to make the cooperation for repatriation. Focusing on Thailand, Thailand should have been more beneficial to repatriate its cultural property by making a bilateral agreement than complying with the international legal framework. In this section, consequently, Thailand would be guided to proceed to request for repatriation of its illegally removed cultural property by the following steps.

6.1 Short-Term Guidance for Thailand

The short-term guidance will be recommended in accordance with the existing situation that Thailand easily implements by itself and has high potential to succeed in the guidance within a short period. Thailand should initially set up its direction to request for repatriation of its illegally removed cultural property. Thailand has no need to provide a major change of its national policy on cultural property, but Thailand should make its policy as an umbrella framework clear and substantial enough to answer how Thailand should step forward to its repatriation of cultural property.

This Thailand's direction for repatriation should not be too strong to claim the concept of cultural nationalism because the repatriation would be impossible without the amicable cooperation with a requested party in which its cultural property is located. Thailand should launch the flexible policy to open an opportunity for both Thailand and the other party to join in the bilateral negotiation. To step forward, Thailand should initially cooperate with other neighbor countries in the region. This regional cooperation would be very helpful to facilitate Thailand and its neighbor countries to repatriate their cultural property by each other. It would also strengthen the protection and repatriation of cultural property within the region because the smuggler usually uses a neighbor country as a pathway to illicitly transport such cultural property. This idea is proved and supported by the model of Cambodia-Thailand agreement.

The bilateral agreement between Cambodia and Thailand in 2000 was mainly designed to fight against criminal activities which get involved in the removal of movable cultural property between Cambodia and Thailand by introducing key measures for impeding illicit transnational trafficking in movable cultural property, by imposing effective

administrative and penal sanctions, and by providing a method of repatriation of cultural property.[45] This model would be more positive for Thailand and should be applied and extended to cooperate with the other neighbor counties, ASEAN member countries, or states of origin having the same situation of illicit trafficking so that they would facilitate each other to protect their interest.

6.2 Long-Term Guidance for Thailand

The long-term guidance is the further step which supports Thailand to request the effective cooperation from market states or foreign museums in which its illegally removed cultural property is located. Therefore, the key factor to follow the repatriation under the long-term guidance should be based on the establishment of persuasive offer towards a requested party. This article suggests Thailand to initiate its repatriation by negotiation with the requested party in order to proceed the establishment of bilateral agreement. This freely allows both the requesting party and requested party to design the types of agreement in such a way that best suits for their exact needs and provides full reciprocity.[46] The mutually-beneficial repatriation agreement as exemplified in Italy-the MET accord would be the primary option that Thailand should apply with the other party because it is based on an equal interest between the requesting party and requested party. The requested party would not be liable and still keep retaining Thailand's cultural property under the preservative condition and long-term loans program. While retaining such cultural property, the requested party can make the exhibition for earning a fee and allow visitors to access for study or appreciation. This option would satisfy the objective of cultural internationalism while Thailand maintains cultural nationalism because it keeps right of ownership and will repatriate its cultural property when the loans become due.

Thailand does not lose any benefit under this bilateral agreement and this agreement also helps Thailand to avoid the tension of international relation with the requested party. This option would be better than complying with Article 7(b)(ii) of the

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[45] See *Agreement between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and to Restitute It to the Country of Origin*, signed 14 June 2000, entered into force 14 June 2000, preamble.

[46] Arie Reich, "Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity," Working Paper No. 14-09, Bar-Ilan University (2009) pp.15 - 16.

UNESCO Convention because it is pointless to consider the conflict of different legal rules between ownership right under common law and good faith acquisition under civil law. Thailand would not be also obliged by the convention to pay exorbitant compensation. The mutually-beneficial repatriation agreement should be better implemented than complying with the UNIDROIT Convention. Under the UNIDORIT Convention, the request for repatriation shall be proceeded through a judicial system because its state parties shall be obliged to request for repatriation at the court where cultural property is located with respect to *lex situs* principle. When Thailand and the requested party jointly agrees with making the bilateral agreement, Thailand would settle the cultural property dispute at the early stage where the litigious process will be no longer necessary. The mutually-beneficial repatriation agreement provides a soft reconciliation, regarded as a common character of Asian culture which prefers to handle any conflict with conciliation or negotiation over the confrontational litigation in order to save costs, save time, and save relationship.[47]

7 Conclusion

The repatriation would be impossible if a requesting party does not cooperate with a requested party in which its illegally removed cultural property is located. The cooperation for repatriation is so important to be made with both parties' consents. Without complying with international legal framework, states of origin including Thailand seeking for repatriation should necessarily convince market states or foreign museums possessing their own cultural property to participate in the cooperation based on the full reciprocity and the reconciliation between cultural nationalism and cultural internationalism. While Thailand should finally succeed in its repatriation, the other party should not lose any benefit from the distribution and access to such cultural property. The repatriation of cultural property must depend on the cooperation between the requesting party and the requested party. As recommended by this article, making a bilateral agreement with an alternative approach would help to reconcile interests between the requesting party and the requested party. However, it would be interesting to think forward whether or not the cooperation for repatriation may be developed beyond the formation of a bilateral approach. For example, all states of origin in a region

[47] Craig VanGrasstek, The History and Future of the World Trade Organization, (Geneva: World Trade Organization, 2013), pp.231 - 232.

may cooperate with each other as a collective group of interests to have the collective power to negotiate with the requested party in pursuit of their repatriation.