

**DEPARTING FROM
NATIONALISM V. INTERNATIONALISM:
EXAMINING THE OE-KYUJANGGAK RESTITUTION
MODEL AS A MEANS TO PROPOSE A NEGOTIATION
METHOD THAT COULD PROTECT THE INTEREST
OF BOTH THE COUNTRY OF ORIGIN AND MUSEUMS
THAT HOLD THE CULTURAL HERITAGE.**

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ABSTRACT

While several international treaties protect cultural properties from illicit trafficking and urge the return of those already looted, the effectiveness and enforcement of those treaties are seriously limiting. Also, while the disputes between the original country and individuals can be dealt with in the applicable jurisdiction or with monetary compensation, conflicts between the original country and museums expand further and impose political and ideological challenges, mainly because museums also represent their countries' cultural industries. The cultural property repatriation issue is currently bisected by nationalism and internationalism. Nevertheless, neither offers a satisfactory resolution for museums and the original country. Therefore, this article will discuss why existing treaties are limiting and will propose a negotiation method to adequately compensate museums and the original country. This article will support the method by focusing on cultural property restitution disputes regarding the Oe-Kyujanggak case and comparing similar cases found in the United States, France, and Italy.

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Driven by a profound conviction regarding the significance of safeguarding and valuing cultural heritage, Su Young continues to seek opportunities to contribute to both the art world and the field of cultural heritage law. This article is a testament to Su Young's joy and dedication to these intertwined disciplines.

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INTRODUCTION

In 2011, more than a hundred years after the French expedition to Korea, about seventy-five volumes of stolen Oe-Kyujanggak archives were returned to Korea from France.¹ The Oe-Kyujanggak archives are Korea's cultural heritage, containing 260,000 items of Joseon Dynasty

1. *Returned Plundered Goods-On Loan*, HANKYOREH, (Apr. 15, 2011), available at https://english.hani.co.kr/arti/english_edition/english_editorials/473190.html (last visited Nov. 24, 2023).

Annals and the Diary of the Office of Royal Secretaries.² In 1866, French troops conducted a punitive expedition against Joseon Empire (now Korea) in retaliation for executing several French Catholic missionaries.³ The troops attacked Ganghwa-do Island and took 297 books from the Oe-Kyujanggak archives.⁴ In 1967, Dr. Byung Sun Park, a librarian at the French National Library, found stolen books of the Oe-Kyujanggak in a library warehouse.⁵ This revolutionary discovery led the French and Korean governments and the French National Library to a long dispute of claim of ownership. Even the dispute gained nationwide attention from Korea, prompting a Korean civic movement requesting the return of the books.⁶ The librarians of the French National Library strongly protested against the request and the movement, but the Korean and French governments eventually made an agreement to return the books at the 2010 G-20 Seoul Summit.⁷ Although it was given as a five-year renewable loan, the agreement was a rare and successful repatriation model compared to other cultural heritage restitution cases.

Throughout history, numerous looted cultural heritages ended up in other countries' museums. Cultural artifacts from countries that have endured the colonial era or have been defeated in war are prominently displayed as trophies in the museums of dominant nations. As the significance of cultural properties has become increasingly apparent, many countries have signed treaties to recover them. Despite the efforts, countries still face difficulties in recovering their looted cultural properties due to legal and environmental restrictions. The limitations of the treaties normalized interstate lawsuits and negotiations between nations and divided arguments regarding the return of cultural property into two ideologies: nationalism and internationalism. These ideologies encourage a win-or-lose game between countries and museums and harm their

2. *History*, SEOUL NAT'L UNIV. KYUJANGGAK INST. FOR KOREAN STUD., (n.d.), available at <http://e-kyujanggak.snu.ac.kr/kiks/main.do?m=01z04> (last visited Nov. 24, 2023).

3. K. Jack Bauer, *The Korean Expedition of 1871*, U.S. NAVAL INST., (Feb. 1948), available at <https://www.usni.org/magazines/proceedings/1948/february/korean-expedition-1871> (last visited Nov. 24, 2023).

4. Mee-Yoo Kwon, *NGO to Demand Return of Royal Texts from France*, THE KOREA TIMES, (Jan. 26, 2010), available at http://www.koreatimes.co.kr/www/news/nation/2010/01/117_59739.html (last visited Nov. 24, 2023).

5. Hanna Lee, *Re-examining the Hidden Protagonist of the Return of Oegyujanggak Uigwe, Park Byung-sun*, MAEIL ECON., (Oct. 31, 2022), available at <https://www.mk.co.kr/news/culture/10509522> (last visited Nov. 24, 2023).

6. Kwon, *supra* note 4.

7. *Korea, France Clinch Deal on Return of Royal Archive*, THE CHOSUNILBO, (Nov. 13, 2010), available at http://english.chosun.com/site/data/html_dir/2010/11/13/2010111300290.html (last visited Nov. 24, 2023).

reputations and integrity during legal proceedings or negotiations for a resolution. Therefore, an alternate dispute resolution method is needed not only to provide fair compensation to both the country of origin and the museums but also to protect the operational integrity of museums and the cultural identity of the country of origin. Departing from ideological warfare, this article suggests a government-level negotiation method to be used as a guideline for restitution cases by referencing the Oe-Kyujanggak repatriation model. This method is defined as an exchange loan type, in which an agreement forms a 'collective rental' that automatically extends every few years.⁸ By presenting a form of lending, negotiation settlement between the government authorities aids the country where the return of cultural heritage is legally unattainable while also creating opportunities for both the country and museums to promote active academic and cultural exchanges.⁹

The following section of this article will define what a cultural property is and how significant cultural heritage is to the country of origin. It will illustrate the preservation of Korea's Gyeongbokgung Palace to describe the link between cultural heritage and the country's identity. Then, it will describe how the limitations of treaties on cultural heritage restitution impose legal challenges on the repatriation dispute and create polarized ideas such as internationalism and nationalism. It will provide a comprehensive analysis of internationalism and nationalism, particularly in the context of controversies concerning the repatriation of cultural heritage. Part III will conduct an in-depth analysis to elucidate the inadequacy of framing the restitution dispute within the context of either internationalism or nationalism. It will also argue how such framing even creates a win-or-loss game between museums and the country of origin. It will support this argument by illustrating the Elgin Marbles case studies and Chabad-Lubavitch's Movement case studies. Part IV will propose a government-level negotiation as an alternative dispute resolution method for addressing a cultural heritage repatriation dispute. This approach considers the respective interests of both the country of origin and the museum. It will suggest an Oe-Kyujanggak negotiation method as a partially ideal model and will compare it with the arbitration method to support the proposal.

8. Sang Chun Jung, *The Negotiation Process for the Restoration of Korean Manuscripts Stored at the French National Library and Assessment of the Korea-France Negotiations*, 33 J. OF KOREAN POL. AND DIPL. HIST. 235, 235 (2011).

9. *See Id.* at 256.

I. CULTURAL PROPERTY AND THE RESTITUTION PROBLEMS

A. *Cultural Heritage and its Significance*

According to UNESCO, Cultural heritage includes artifacts, monuments, sites, and museums with historical, symbolic, and social significance.¹⁰ It encompasses both movable and immobile objects, but excludes festivals and celebrations.¹¹ Skills and ceremonies are sometimes encompassed under the cultural heritage.¹² Cultural heritage is considered an integral by-product of human activities and is deemed worthy of international and national protection because it can promote the enjoyment of cultural diversity.¹³ It enriches the sense of group identity that helps to maintain social and territorial cohesion.¹⁴ Cultural heritage signifies the nation's identity and history while also stimulating the economy through the attraction of tourists who can explore the country's culture.¹⁵ Individuals in various countries have inherited cultural identity from the past and are making efforts to preserve and deliver this legacy to future generations.¹⁶

Cultural heritage, by its presence, has the power to both directly and indirectly influence a country's history, image, tourism, and even political power.¹⁷ For instance, in Seoul, Korea, the site of Gyeongbokgung Palace lies at the city's heart.¹⁸ All major government offices and the Korean Presidential Residence (the Blue House) surround the palace.¹⁹ The palace was initially torn down during the Japanese occupation era, and the effort for restoration has been in progress since 1990.²⁰ Therefore, this palace symbolizes the cultural legacy of Korea and its

10. UNESCO Inst. for Stat., *Cultural Heritage*, UNESCO, (2009), available at <https://uis.unesco.org/en/glossary-term/cultural-heritage> (last visited Nov. 24, 2023).

11. *Id.*

12. Lyndel V. Prott, 'Cultural Heritage' or 'Cultural Property'? CAMBRIDGE UNI. PRESS, available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/B17F38F4873BDA8B21EF1BEA7DCD7D45/S094073919200033Xa.pdf/cultural-heritage-or-cultural-property.pdf> (last visited Nov. 24, 2023).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Prott, *supra* note 12.

18. *About the Palace: Introduction*, GYEONGBOKGUNG PAL. MGMT. OFF., available at http://www.royalpalace.go.kr:8080/html/eng_gbg/data/data_01.jsp (last visited Nov. 24, 2023).

19. *Id.*

20. *Id.*

achievement of political autonomy from Japan. The palace is accessible to the general public, allowing visitors to acquire knowledge about the history and immerse themselves in the Korean culture. The presence of the palace reinforces Korea's political foundation and sense of national identity.

B. Restitution Problems

Looting cultural property occurs not only after invasion but in all circumstances at any place, such as at auction houses, individual collections, and museums.²¹ In 2020, the total seized stolen cultural properties was 854,742 worldwide.²² The restitution process was especially complicated when the properties were found in libraries and museums since these institutions have complex ownership structures encompassing government and individuals.²³ Currently, cultural property collections in institutions are subject to long-term loans, while certain collections are designated as national heritage under government ownership.²⁴ When a country claims restitution against institutions, it may encounter legal challenges due to the country of the institution's legislation, sovereign immunity, and national ownership laws. Sovereign immunity is from the British common law doctrine that the government cannot be sued without its consent.²⁵ On the other hand, national ownership laws pertain to the possession of national heritage and prohibit their removal without the government's authorization.²⁶ A combination of these two principles imposes hardship on restitution disputes; if the country of origin's cultural heritage is announced as a national treasure in a different country, the cultural property's ownership belongs to the later government. The later government could then challenge the restitution claim under the previously stated laws.

Ineffective enforcement of cultural restitution treaties also poses significant challenges because they are often obstructed by jurisdictional

21. The International Criminal Police Organization [INTERPOL], *Assessing Crimes Against Cultural Property 2020*, 19 (September 2021).

22. *Id.* at 15.

23. Tehmina Goskar, *Ownership and Ethics in Public Museums*, CURATORIAL RESEARCH CENTRE, (Nov. 11, 2021), available at <https://curatorialresearch.com/ethics/ownership-and-ethics-in-public-museums/> (last visited Nov. 24, 2023).

24. *Id.*

25. *Sovereign Immunity*, CORNELL LAW SCHOOL, available at https://www.law.cornell.edu/wex/sovereign_immunity (last visited Nov. 24, 2023).

26. Patty Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, ART ANTIQUITY & L. 14 at 21, 21 (2009).

issues and lack of self-executing clauses.²⁷ If a cultural property dispute occurs between countries and individuals, either the property is seized by INTERPOL or police, or the original country pays monetary compensation to the individuals for the return of the property. If a dispute arises between a museum and the work's original country, it often escalates into a contentious situation, as demonstrated by the prolonged resolution process of the Oe-Kyujanggak issue that spanned over two decades.

Another concern surrounding restitution disputes between a country and a museum pertains to the potential consequences, which typically either damage the credibility of the museum's operation system or undermine the prestige and honor of a country. Both a country and a museum have the same purposes: to promote a culture to the public, to preserve the artwork, and to educate the public and scholars. However, the litigation or settlement of a claim of ownership always results in one party losing these purposes and/or interests. To protect the interests of both parties, disputes with the museum should be resolved in a manner other than arbitration or litigation.

C. *Nationalism vs. Internationalism*

The foundation of the restitution argument is largely divided into two theories: cultural nationalism and cultural internationalism.²⁸ Both terms gained attention after Merryman described them in his 1985 article "Thinking About the Elgin Marbles".²⁹ Cultural internationalism posits that cultural property is not linked to a nation or a territory but remains a cultural feature of mankind as a whole.³⁰ This theory generally suppresses restitution claims unless properties are acquired through illegal trade or crime.³¹ According to this theory, the countries of the property's origin should not determine whether the object has illegally left their territory, as the property should be traded freely.³² This also supports the 'universal museum' theory, wherein cultural artifacts are incorporated into other countries' museums as museums provide extensive care and support the public's education.³³ On the other hand, cultural nationalism asserts that the state of origin should keep the cultural heritage within its

27. *Id.*

28. IRINI A. STAMATOUDI, CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW 19 (2011).

29. Pauno Soirila, *Indeterminacy in the Cultural Property Restitution Debate*, 28 INT'L J.L. CULTURAL POL'Y, 1 (Apr. 01, 2021).

30. Stamatoudi, *supra* note 28, at 21.

31. *Id.*

32. *Id.*

33. *Id.* at 23.

own land.³⁴ As Gyeongbokgung illustrates, the advocates of cultural nationalism argue that many of the cultural properties should be viewed as an illustration of history.³⁵ They believe artifacts play a crucial role in shaping cultural definition, expression, and the formation of a collective identity and community, and people need exposure to those artifacts to ensure their cultural identity.³⁶

However, the debate over nationalism and internationalism rather deepens the divide than leads to a resolution. To solve this issue, it is necessary to differently approach the possession of the title and place of the exhibition. The polarized framework is detrimental to both the country of origin and the museums as it leads to dichotomous thinking. For instance, restitution based on cultural nationalism would undermine the credibility of the museums as a cultural institution. On the other hand, if museums own the work on the grounds of cultural internationalism, the country of origin's culture would be scattered around the world, which may also raise diplomatic issues.

To respect the purpose and credibility of the museum as well as the culture of the original country, determining the location of the exhibition should be prioritized over the issue of determining ownership. Instead of transferring ownership, museums and the country of origin should enter a contract for a permanent rental renewal of the country of origin. Other factors, such as the facilitation of academic exchanges and the production of digital copies, may also be attached as provisional conditions.

II. LIMITATIONS OF THE TREATIES AND PROBLEMS OF THE NATIONALISM V. INTERNATIONALISM FRAMEWORK

A. *Problems of Treaties*

The previous two cultural property law theories stemmed from international legal instruments and treaties.³⁷ The three most influential international treaties that urge the protection of cultural property are the 1954 Hague Convention, the 1970 UNESCO Convention, and the 1995 UNIDR/OIT Convention.³⁸ The 1954 Hague Convention recognizes the importance of protecting cultural heritage during armed conflicts.³⁹ The

34. *Id.* at 28.

35. Soirila, *supra* note 29, at 3.

36. *Id.*

37. Stamatoudi, *supra* note 28, at 19.

38. *Id.*

39. *The Hague Convention*, UNESCO (May 14, 1954), available at https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf (last visited Nov. 27, 2023).

1970 UNESCO Convention expands the protection of heritage and prevents illicit import, export, and transfer of ownership of cultural property.⁴⁰ The 1995 UNIDROIT Convention concerns the illicit trade of cultural objects and urges countries not only to prevent it but also to return the objects that are stolen and illegally exported from their territory.⁴¹ However, these treaties are not strictly enforceable as they don't offer adequate control systems nor build special tribunals to enforce them.⁴² They are also not retroactive and often not self-executing.⁴³ Due to these limitations, those often remain as guidelines in most cultural property restitution disputes and are referenced in political or diplomatic negotiations, arbitration, and litigation before domestic tribunals or existing international courts.⁴⁴ Therefore, the outcome of restitution disputes varies from harmful precedents to scattered opinions based on the choice of forum and applicable law.⁴⁵

B. Case Studies: Elgin Marbles

The Parthenon Marbles case, also known as the Elgin Marbles, is one of the most well-known cases of cultural property restitution. It demonstrates how a debate between cultural internationalism and nationalism escalates conflicts between nations. Between 1801 and 1812, the 7th Earl of Elgin, a British Ambassador of the Ottoman Empire tore numerous Parthenon sculptures into pieces and shipped them to England.⁴⁶ In 1983, the Greek government requested the return of the Elgin Marbles, but the British government declined in 1984.⁴⁷ Greece argued that the Marbles rightfully belong in Greece, namely on the Parthenon, due to the sculptures' intrinsic connection to Greek history and their spiritual essence.⁴⁸ Greece's argument resembles cultural nationalism, that history and culture form a complete puzzle when cultural heritage exists in its

40. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO (Nov. 27, 2023), available at <https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural> (last visited Nov. 27, 2023).

41. *1995 Convention*, UNIDROIT (June 24, 1995), available at <https://www.unidroit.org/instruments/cultural-property/1995-convention/> (last visited Oct. 19, 2023).

42. ALESSANDRO CHECHI, *THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES I* (2014).

43. *Id.*

44. *Id.*

45. *Id.*

46. John Henry Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property*, MICH. L. REV., at 1882 (1985).

47. *Id.*

48. *Id.* at 1882-83.

own territory. Greece, however, did not sue Britain in court to claim repatriation of the Parthenon Marbles despite the international lawyers' advice.⁴⁹ The culture minister of Greece also denied the lawyers' opinion to bring the United Kingdom before the European Court of Human Rights due to concerns about the potential uncertainty of the international court's decision and the risky nature of litigation.⁵⁰ Also, if Greece brought its claim to the European Court of Human Rights, the United Kingdom would not have been bound by any decision.⁵¹

Despite Greece's argument, the British government rejected the restitution request based on cultural internationalism and the limitation of litigation. According to the British Museum, the Museum was functioning as a world museum with a collection of "shared humanity."⁵² British Museum argued that the Marbles are an integral part of the world collection as they influence and embed various countries' cultures, including Egyptian, Persian, Greek, and Roman cultures.⁵³ This suggests that a museum ought to share the collection with the widest possible public, lend the collections worldwide, and benefit the scholars.⁵⁴ The British Museum's argument supports cultural internationalism, as cultural properties that ended up in other countries offer a sense of the broader cultural context and sustained interaction with several other cultures.⁵⁵ The British Museum also emphasized how it has lent the Marbles to the Acropolis Museum, the National Archaeological Museum, and the Museum of Cycladic Art in Athens and stimulated respectful collaboration and professional partnership with Greece.⁵⁶ Overall, the Museum appeared to prioritize its identity as a center of scholarly institution rather than centering its attention on the ownership dispute.

The Museum acknowledged that the ownership dispute will likely remain in favor of the British government due to Greece's limitation in

49. Liz Alderman, *Greece Rules Out Suing British Museum Over Elgin Marbles*, THE N.Y. TIMES, (May 14, 2015) available at <https://www.nytimes.com/2015/05/15/world/europe/greece-british-museum-elgin-marbles.html> (last visited Nov. 27, 2023).

50. *Id.*

51. Katerina Ampela, *The Parthenon Marbles and Greek Cultural Heritage Law*, THE LAWYERS' COMM. FOR CULTURAL HERITAGE PRES., (Jan. 6, 2023) available at <https://www.culturalheritagelaw.org/The-Parthenon-Marbles-and-Greek-Cultural-Heritage-Law> (last visited Nov. 27, 2023).

52. *The Parthenon Sculptures*, THE BRIT. MUSEUM, available at <https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/parthenon-sculptures> (last visited Nov. 27, 2023).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

pursuing legal action. If Greece wished to finally claim legal ownership, applicable authorities would have to investigate the legitimacy of the Marbles' acquisition and the British Museum's title.⁵⁷ However, the British Parliament has already been separately discussing the legitimacy of the acquisition and decided, based on the common law principle of *nemo plus juris ad alium transferre potest quam ipse habet*, or the right of the Crown to the Marbles, was not better than Elgin's right.⁵⁸ If Elgin had a good title, he could rightfully transfer ownership to the British government, and if he had a defective title, such title would have been transferred to the Crown.⁵⁹ Therefore, the future assessment of Elgin's title validation depends on two key factors: whether the Ottoman Empire at the time granted Elgin permission to remove the Marbles and whether the Empire had the authority to transfer rights to Elgin.⁶⁰ Currently, the only evidence that could address the title of Elgin is the *firman*, which was addressed by the Ottoman government and written in Turkish.⁶¹ The original *firman* has been lost and survives as a form of Italian translation.⁶² Without a clear determination of its authenticity, the document's credibility as admissible evidence in a trial is questionable.⁶³ Also, regardless of its authenticity, the context alone does not give permission for the transfer of property as the document lacks other evidence.⁶⁴ However, Greek civil law does not let the purchaser automatically become the owner for purchasing from a non-owner unless he acts in good faith.⁶⁵ Also, Section 4 of the Limitation Act 1980 suggests that the right of any person from whom property is stolen shall not be subject to the usual statute of limitations under sections 2 and 3(1) of this Act.⁶⁶ When the British Parliament was acquiring the Marbles, it did not examine the original document to assess the legality of Elgin's title, and Parliament acquired the Marbles under the knowledge that Elgin lacked evidence to support the removal of the Marbles.⁶⁷ Therefore, the British government's purchase from Elgin cannot be considered as a good faith

57. Ampela, *supra* note 51.

58. *Id.*

59. *Id.*

60. *Id.*

61. Ampela, *supra* note 51.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Ampela, *supra* note 51.

67. *Id.*

acquisition.⁶⁸ However, that does not allow Greece to invalidate the title of the British government. While Greece argued that the Marbles were illegally taken by Elgin, the country has never sued the British government to seek the return of the stolen property.⁶⁹ Also, regardless of the authenticity of the *firman* document, it is hard to prove that Elgin stole the Marbles instead of acquiring them as a gift to the British Minister.⁷⁰ If Greece sued the Trustees of the British Museum in return, the remedy would likely be denied due to this ambiguity.⁷¹

In 2023, Greece also rejected the possibility of structuring the agreement to lend the Parthenon Marbles.⁷² Greece restated its stance on the issue and refused to recognize the British Museum's jurisdiction, possession, and ownership of the Marbles as they are deemed to have been acquired through illicit means.⁷³ Greece supported its stance by bringing UNESCO's decision and international public opinion and exerted pressure on the British government to proceed with negotiations with Greece.⁷⁴ The Intergovernmental Committee for Promoting the Return of Cultural Property also urged the British government on its decision to use the UNESCO Mediation and Conciliation Procedures to respond to Greece's request for mediation.⁷⁵ Recently, Greece and the British Museum sought to negotiate the return of the sculptures.⁷⁶ Greece wanted to reunite the parts by receiving all of the pieces in its collection and put on display in their land for at least 20 years.⁷⁷ Greece was willing to supply the British Museum with loaning rotate selection of cultural properties.⁷⁸

68. *Id.*

69. Merryman, *supra* note 46, at 41.

70. *Id.* at 42.

71. *Id.*

72. Harrison Jacobs & Tessa Solomon, *Greece Rejects Possibility of Parthenon Marbles 'Loan' in New Statement*, ARTNEWS (Jan. 6, 2023, 1:31pm), available at <https://www.artnews.com/art-news/news/greece-rejects-parthenon-marbles-loan-plan-statement-1234652854> (last visited Nov. 27, 2023).

73. *Id.*

74. *Id.*

75. U.N. Educ. Sci. Cultural Org. (UNESCO) Intergovernmental Comm. for Promoting the Return of Cultural Prop. to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Rep. of the Secretariat on the follow-up to the recommendations and decisions adopted during the 21st session, ¶¶ 8-10, UNESCO Doc. ICPRCP/21/22.COM/Decisions (Sept. 27-29, 2021).

76. See Alex Marshall, *After 220 Years, the Fate of the Parthenon Marbles Rests in Secret Talks*, N.Y. TIMES (Jan. 17, 2023), available at <https://www.nytimes.com/2023/01/17/arts/design/parthenon-sculptures-elgin-marbles-negotiations.html> (last visited Oct. 13, 2023).

77. *Id.*

78. *Id.*

Conversely, the British Museum wanted to return the sculptures as a short-term loan in the form of a new Parthenon partnership.⁷⁹ Greece's desperate efforts to evade legal action not only pushed international law and conventions to their limits but also illustrated the significant need to implement a new negotiation method.

C. Case Study: Schneerson Library

The Schneerson Library is a collection of books that belonged to the Lubavitch rabbis before the Russian Revolution.⁸⁰ The collection is sacred Jewish texts on Chabad Chassidic tradition amassed by generations of Rebbes since 1772.⁸¹ The collection consisted of two parts: “the “Library,” which was nationalized during the Bolshevik Revolution, and the “Archive,” which was plundered by the Soviet Union during the Second World War”.⁸² The collection became a part of Russian heritage following the plunder.⁸³ In 1915, the Lubavitcher Rebbes moved the Library to Moscow for safe storage as they fled from the German troops.⁸⁴ Then, when the Bolshevik regime nationalized the Schneerson Library, it became a state property and was deposited into what is today the Russian State Library.⁸⁵ Chabad requested the Russian government to return the Library to Chabad headquarters in the United States, but Russia refused to do so.⁸⁶ Chabad is an incorporated entity of a worldwide organization of Jewish religious communities that are part of the Chasidim movement, so Chabad had a significant interest in the Collection.⁸⁷ In 2004, Chabad of the United States brought its claim to the United States Federal Court, seeking the return of the collection for a default judgment under the Foreign Sovereign Immunities Act (FSIA).⁸⁸ The FSIA allows foreign states and governments to be sued in the United States federal courts under certain circumstances.⁸⁹ Chabad argued under the exception of FSIA,

79. *Id.*

80. Zvika Klein, *Chabad Demands Return of the Schneerson Library Archives from Russia*, JERUSALEM POST (Jul. 25, 2022, 8:39 PM), available at <https://www.jpost.com/international/article-713047> (last visited Oct. 13, 2023).

81. Giselle Barcia, *After Chabad: Enforcement in Cultural Property Disputes*, 37 YALE J. INT'L L. 463, 464 (2012).

82. *Id.*

83. *Id.* at 464 n.12.

84. Klein, *supra* note 80.

85. *Id.*

86. *Id.*

87. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 798 F. Supp. 2d 260, 263 (D.D.C. 2011).

88. *See id.*, at 263.

89. 28 U.S.C.S. § 1330 (LexisNexis 2023).

foreign states cannot claim immunity in any case in which property rights are in violation of international law.⁹⁰ The court held that the FSIA does not bar the suit against the Russian government since it fulfills the requirement of the exception by carrying on commercial activity in the United States.⁹¹ This suggests that the Russian State Library (“RSL”) and the Russian State Military Archive (“RSMA”) engaged in a contractual agreement with United States corporations to sell reproductions of materials in the RSMA’s and RSL’s archives and loan out the archives.⁹²

However, Russia withdrew from the litigation due to fundamental incompatibility.⁹³ Russian cultural officials were aware that if Russia followed the United States’ jurisdiction decision, the loan exhibition could be confiscated.⁹⁴ The Court simultaneously ordered the defendants to surrender the default judgment, but Russia refused to follow.⁹⁵ The Russian government has argued that the claim to return the collection is suspending exchanges of Russian art and American cultural artifacts among museums and universities.⁹⁶ Furthermore, the Russian government asserted that the collections in dispute are state property and are seen as a “treasure of the Russian people.”⁹⁷ Russia’s unwillingness to cooperate led the District Court to impose a daily fine of \$50,000 on Russia for failing to comply with the court’s order, which escalated already existing diplomatic tensions and weakened cultural exchange programs between the United States and Russia.⁹⁸ Russia then proposed transferring the works to a so-called Jewish Museum and Tolerance Center at a New Jewish Center in Moscow in 2013, but Chabad opposed it as there is only a small amount of collection had been transferred to that center.⁹⁹

Noting the limitations of enforcing domestic jurisdiction against foreign countries, limitations also create legal difficulties when parties attempt to resolve the restitution issue through international law or

90. *Supra* note 87, at 264.

91. *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 466 F. Supp. 2d 6, 23 (D.D.C. 2006).

92. *See id.*, at 24.

93. *Supra* note 87, at 264.

94. *Barcia*, *supra* note 81, at 466.

95. *Id.* at 465.

96. *Supra* note 87, at 265.

97. Graham Bowley, *Russia Fined \$44 Million for Refusing to Hand Over Jewish Books*, N.Y. TIMES (Sept. 11, 2015), available at <https://www.nytimes.com/2015/09/12/books/russia-fined-44-million-for-refusing-to-hand-over-jewish-books.html> (last visited Oct. 29, 2023).

98. *Id.* *See also* *Barcia*, *supra* note 81, at 466.

99. Bowley, *supra* note 97.

domestic law. As The Schneerson Library case illustrates, domestic jurisdiction's enforcement of a judgment against a foreign country in a cultural property dispute is less likely to occur due to a lack of forceful international treaties regarding enforcement mechanisms.¹⁰⁰ If Russia had followed the decision, it would have undermined its legal claim against all cultural artifacts that were acquired during the nationalization of the Soviet Union.¹⁰¹ As a consequence of this tension, the Schneerson Library had the potential to become a symbol of a cultural cold war between Russia and the United States.¹⁰² Therefore, this case did not provide any advantages for either the organization or Russia; instead, it gave rise to diplomatic concerns that could have the potential to disrupt cultural exchange programs between the two states. It may have been a prudent decision to bring the claim for arbitration, since it offers the advantage of constraining both the amount of time and financial resources in settling the conflict.¹⁰³ Nevertheless, it is plausible that Russia may not choose to engage with the arbitration process in the future due to its preexisting skepticism over the legitimacy of the claim.

III. PROPOSING A NEGOTIATION METHOD

Considering the limitations of international and domestic law and treaties, this article proposes a government-level negotiation as an alternative dispute resolution method for a cultural heritage repatriation dispute. Among the several negotiation models available, the Oe-Kyujanggak model aligns most closely with complying with the interests of both museums and the country of origin. This model did not adversely affect the museum's credibility as a cultural institution and the country of origin's cultural identity. This model has three advantages: raising awareness of cultural identity, stimulating scholarly exchange between countries, and formulating a friendly diplomatic relationship between countries. To support this model, this article draws a comparison between this negotiation process and the arbitration model to provide additional insights into the proposal.

A. Oe-Kyujanggak's Successful Negotiation Settlement

At the November 2010 G20 Summit in Seoul, Korea, Korea and France negotiated a settlement regarding Oe-Kyujanggak books being available on a batch rental basis renewed every five years at the discretion

100. Barcia, *supra* note 81, at 468.

101. *Id.* at 473.

102. *See id.*

103. *Id.* at 471.

of the head of state, which was evaluated as a substantial return.¹⁰⁴ After this settlement, the archives have been returned distributively four times.¹⁰⁵ It was the first case in Korea to negotiate a single diplomatic issue for over 20 years.¹⁰⁶ The lengthy duration of negotiations was due to the intensely polarized positions between the two countries, which made it difficult to reach a compromise. After the Foreign Ministry of Korea requested the return of the Oe-Kyujanggak books in July 1992, the French government rejected by assessing that even if they had been stolen by the French military, they could not be returned unconditionally because they were now protected as French national treasures.¹⁰⁷ On the other hand, Korea assessed that the only way to restore justice was through unconditional restitution because the stolen archives were not subject to the acquisition of prescription under international law, and France was illegally occupying the archive.¹⁰⁸ Following a prolonged dispute between the two countries, they transitioned from a government negotiation to a civil negotiation, before subsequently reverting to a government negotiation process.¹⁰⁹

During the initial government negotiation from 1992-1999, former French President Mitterrand suggested two proposals.¹¹⁰ The first was to exchange the collection of Seoul National University Oe-Kyujanggak and the collection of France for a permanent lease form, and the other was to exchange the collection of France with an equivalent value of Oe-Kyujanggak for a permanent lease form.¹¹¹ However, Korea refused to exchange cultural property, arguing that it was “sending another child to bring back the other.”¹¹² The negotiation was scattered, but it presented an opportunity to reach a resolution through the establishment of a long-term lease as a substantial return.¹¹³

104. See Min Jung Kim, *The Role of Civil Society Organization in the Conflict Among the French Government Ministries: The Return of Joseon Royal Book “Oe-Gyujanggak Uigwe,”* KOR. POL’L INFO. SOC’Y, 141, 142 (2016).

105. *Id.*

106. *Id.*

107. Sang Chun Jung, *Evaluating the Negotiation Process for the Restoration of Korean Manuscripts Stored at the French National Library*, KOR. SOC’Y OF FRENCH HIST, 193 at 198 (2007).

108. *Id.* at 199.

109. *Id.* at 201.

110. Kim, *supra* note 104, at 149.

111. *Id.*

112. Jung, *supra* note 107, at 211.

113. See *id.*

Next, scholarly professionals tried to enter into a civil negotiation from 1999 to 2004.¹¹⁴ From this negotiation, Korea expected to exchange the copy of archives with the actual collections.¹¹⁵ This time, France also suggested continuously holding ownership of the Oe-Kyujanggak books, while effectively leasing them to Korea, but after preparing several batches of Korean cultural properties to lend them to France.¹¹⁶ This was a temporary revolving formula, such as renewing the lease every ten years.¹¹⁷ Though it has the effect of enhancing global exposure to Korean cultural properties, the process of curating a list for circular rental could pose challenges to Korea.¹¹⁸ As Greece asserted from the Elgin Marbles dispute, Korea also viewed the exchange of cultural property as establishing a harmful precedent in the field of international law, which might hinder the return of unlawfully acquired cultural property.¹¹⁹ Although long-term loans are frequently employed in restitution resolution, the form of loan arrangement could present certain challenges as states cannot effectively guarantee the proper renewal of loans.¹²⁰

Negotiations between France and Korea ended in 2011 at the G20 Summit with settling down to renewable rental in a 5-year unit.¹²¹ Before the settlement at the G20 Summit, the Ministry of Foreign Affairs and Trade held summit meetings, ministerial meetings, and policy consultations to discuss the proper restitution method.¹²² The topic of repatriation was continuously deliberated among the Ministry of Culture, Sports and Tourism, the Cultural Heritage Administration, and related organizations, such as the National Assembly.¹²³ Korean media entities also extensively circulated and promoted this matter to the general public, while civil organizations in Korea also voiced support for the return of the books.¹²⁴ As a result, the negotiation settlement of renewable loans was regarded as a diplomatic achievement for Korea, as it enabled Korea to circumvent practical and legal obstacles while simultaneously generating the interest

114. *Id.* at 201.

115. Kim, *supra* note 104, at 151.

116. Jung, *supra* note 107, at 203.

117. *Id.*

118. *Id.*

119. *Id.*

120. Marie Cornu, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, 17 INT'L J. L. OF CULTURAL PROP. SOC'Y 1, 20 (2010).

121. Kim, *supra* note 104.

122. *See id.* at 152.

123. *Id.*

124. *Id.*

of its citizens in their cultural properties.¹²⁵ The ownership of the collection remained with France's Library, enabling the institution to sustain its research and public education by obtaining a copy of the collection and opening a new channel to discuss the exhibition's circulation.¹²⁶

B. Comparing Arbitration with the Government-Level Negotiation

The other form of Alternate Dispute Resolution of litigation to resolve a cultural property restitution issue is international arbitration. It is a method of resolving disputes between parties in different jurisdictions which is referred by disputants to a decision maker who pronounces a legally binding decision.¹²⁷ Unlike litigation, parties can select their own procedures and choose their decision-maker through the parties' consent.¹²⁸ Arbitration is also largely utilized in cultural property restitution claims because the contestants may select arbitrators with the requisite expertise of the cultural property subject matter.¹²⁹ To prevent litigation under the various laws and judicial tribunals of multiple contracting states, it is encouraged to submit the cultural property dispute for a single arbitration tribunal.¹³⁰ Through arbitration, the parties are not bound by the strict and complicated rules of procedure, evidence, and remedies.¹³¹ The tribunal has the authority to take into account theft or unlawful exportation that took place before the establishment of the cultural property treaties and allow equitable outcomes that are unavailable under the treaty.¹³² Due to these advantages, arbitration is widely practiced for numerous cultural restitution disputes.

However, the arbitration does not protect the interests of both the museums and the country of origin. As discussed previously, museums and the countries of origin share similar goals regarding cultural property ownership. Both parties seek ownership to promote a culture to the public, preserve the artwork, and educate the public and scholars. These

125. Jung, *supra* note 8, at 255.

126. *Id.*

127. Ken Macdonald, *What is International Arbitration?* LEXOLOGY, available at <https://www.lexology.com/library/detail.aspx?g=37d52ad9-2fef-44fc-8177-f6ef0957205b> (last visited Sept. 6, 2023).

128. *Id.*

129. Evangelos I. Gegas, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13:1 OHIO STATE J. ON DISP. RESOL. 129, 151 (1997), available at https://kb.osu.edu/bitstream/handle/1811/79795/OSJDR_V13N1_0129.pdf?sequence=1.

130. *Id.* at 154.

131. *Id.* at 155.

132. *Id.*

goals are achieved when the cultural heritage serves the purpose of promoting a particular culture to the public by generating publicity, ensuring effective preservation, and facilitating access to the public and scholars. If each party of the cultural heritage restitution dispute relies on an arbitration approach, there is a potential to have a neutral and just outcome with a uniform interpretation of the UNESCO and UNIDRIOIT Convention.¹³³ However, the private process will be unable to influence public opinion, thereby discouraging additional exchange programs and increasing the chance that scholars and the public will be deprived of opportunities to learn more about another culture.¹³⁴

The method of government-level negotiation will be able to successfully increase publicity both within and outside the country of origin, and the preservation of the artwork and importation of educational programs for the public and scholars will be automatically stimulated as a byproduct of diplomatic issues.

C. Promoting a Culture to the Public by Raising Awareness

Heightened public awareness of the importance of preserving cultural heritage made Korea's negotiation settlement of Oe-Kyujanggak possible.¹³⁵ When conflicts between government ministries become intense, unexpected outcomes can occur depending on the third party's problem-solving method.¹³⁶ Oe-Kyujanggak negotiation demonstrated how third parties can play significant roles in settling restitution.¹³⁷ In the case of returning the Oe-Kyujanggak, a civic/civil organization worked as the third-party actor.¹³⁸ Depending on their size, characteristics, and orientation, civic groups can influence the negotiation process through a variety of channels.¹³⁹ Numerous civic groups exert influence through large-scale protests or by issuing statements or claiming their agendas through petitions.¹⁴⁰ By adopting civic organizations' articulated statements, it is possible to proactively establish an advantageous position by introducing a new perspective while facilitating a more in-depth understanding of the policy.¹⁴¹ One of the most influential civic organizations that protested for the restitution was an 'Association pour

133. *See id.* at 156.

134. Macdonald, *supra* note 127.

135. Kim, *supra* note 104, at 142.

136. *Id.* at 147.

137. *Id.*

138. *Id.*

139. *Id.*

140. Kim, *supra* note 104, at 147.

141. *Id.*

la reunification en Corée du Sud du fonds documentaire des protocoles royaux de la dynastie Joseon,' (Association for the Reunification of South Korea of the Documentary Fund of the Royal Protocols of the Joseon Dynasty) working with Paris University authorities and scholars who had a close relationship with the previous French Minister of Culture.¹⁴² While the BNF librarians intensely protested against the restitution, this civic organization tried to persuade the French government to show generosity and not view the return of the Oe-Kyujanggak as cultural transactions.¹⁴³ If both France and Korea had brought this dispute to the arbitration tribunal, the panels would not likely have reflected the opinions of the civic organization. Moreover, there has been increased awareness of Oe-Kyujanggak among individuals in Korea and France due to the civic groups' vigorous campaign and media circulation to call for the return. Therefore, the government-led negotiation promotes cultural awareness in the public by dissolving diplomatic concerns and encourages the formation of a third party in the public that can potentially exert influence on the negotiation proceedings.

D. Preserving the Cultural Heritage Under the Increased Publicity

Due to the unique nature of government-level negotiations, political intervention can extend beyond the negotiation's outcome to promote the preservation of cultural heritage.¹⁴⁴ When museums receive a restitution claim from the country of origin, they emphasize their role in providing access to cultural properties to a larger public and acquiring a higher level of safety and protection than the country of origin.¹⁴⁵ When they are pressured to meet the negotiation, the museums try to maintain a good relationship with the country of origin to gain the country's cooperation and sponsorship.¹⁴⁶ The museums can be threatened to receive cultural and educational sanctions from the original country, such as a denial of scientific collaboration, loans for exhibitions, or threatened to cancel excavation permits that were provided for research.¹⁴⁷ For instance, when the Pennsylvania Museum of Archaeology and Anthropology entered into a negotiation of the "Troy Gold" with Turkey, Turkey's threat to pause the University of Pennsylvania's excavation projects played a

142. *Id.* at 154.

143. Jung, *supra* note 8, at 253.

144. Maria Shehade & Kalliopi Fouseki, *The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes*, 23 INT'L J. OF CULTURAL PROP. 357–383 (2016).

145. *Id.* at 360.

146. *Id.* at 363.

147. *Id.*

significant role in settling the dispute.¹⁴⁸ Through exercising such bargaining power, the government can easily put pressure on the museums to implement a system to preserve the heritage or fulfill other demands.¹⁴⁹ If the ownership resides in the museums and a negotiation settlement is reached in the form of a permanent, renewable loan agreement, the museums are expected to have enhanced diligence in preserving and maintaining the heritage to make it available for rental purposes at appropriate moments.

E. Educating the Public and Scholars Through Maintaining a Good Reputation

If museums are required to repatriate the cultural heritage to the country of origin as mandated by arbitration, the public perception of the museums could be negatively affected. Museums are frequently placed in the restitution dispute because their legal position fluctuates.¹⁵⁰ Regardless of their position, museums can often be good-faith purchasers who unknowingly acquire artifacts with uncertain provenance.¹⁵¹ In almost every dispute, the museums also face public relations problems and receive criticisms and commentaries questioning museum practices, management, and ethics.¹⁵² Especially when the other museums involved in restitution disputes return the artifacts, the remaining museums that retain ownership of the cultural property face significant criticism.¹⁵³ For instance, due to the Elgin Marbles dispute, the British Museum received a high volume of criticism and was likely viewed as plundering the artifacts for their own interest.¹⁵⁴ Even if an arbitration judgment holds in favor of the museums, the arbitration method adheres to international law rather than the interests of each country and museums. Therefore, regardless of the outcome, the public will have a cynical perspective toward the museums, as if the museum is involved in a legal dispute due to their skeptical activity.

148. *Id.* at 364.

149. Shehade & Fouseki, *supra* note 144, at 364.

150. Charles L. Kirby, Stolen Cultural Property: Available Museum Responses to an International Dilemma, 104 DICK. L. REV. 729 (2000), *available at* <https://ideas.dickinsonlaw.psu.edu/dlra/vol104/iss4/9> (last visited Oct. 19, 2023).

151. *Id.*

152. *Id.* at 734.

153. *Id.* at 742.

154. Zareer Masani, *The British Didn't Plunder Antiquities, Like the Elgin Marbles. They Rescued Them.*, THE TELEGRAPH (May 28, 2022), *available at* <https://www.telegraph.co.uk/news/2022/05/28/british-didnt-plunder-antiquities-like-elgin-marbles-rescued/> (last visited Oct. 14, 2023).

If museums and a country enter a permanent, renewable loan agreement, the public from both countries will have more opportunities to learn about the culture and history of the country of origin. Referring to the case of Oe-Kyujanggak, the public from both Korea and France were not aware of Oe-Kyujanggak's existence in the Library before the dispute occurred.¹⁵⁵ After the increase in public awareness during the protracted negotiation dispute, both Korea and France acknowledged Oe-Kyujanggak's cultural significance.¹⁵⁶ By refraining from initiating the arbitration process, the Library was able to curate the educational exchange provisions outlined in the agreement. As an illustration, the Korean and French governments initiated a digitalization project and engaged in collaboration with the French engineering team to test the process.¹⁵⁷ The National Museum of Korea even established plans for the Oe-Kyujanggak Academic Series in 2011, anticipating the launch of a comprehensive research project on the archives that would include both premium and standard copies.¹⁵⁸ The implementation of exchange programs and curriculums served to enhance the comprehension of Korean culture among the public in France and Korea. Had the restitution process undergone an arbitration process, the extensive planning of the scholarly/educational exchange provisions between both countries would not have progressed to this stage.

CONCLUSION

It would be unfounded to argue that international law is ineffective due to its lack of enforceability, but it does have significant limitations. Furthermore, despite the existence of diverse protective measures within domestic legislation pertaining to the transfer of cultural properties, there are situations that prevent restitution, even if other nations initiate legal proceedings to retrieve cultural properties. In some instances, mediation or arbitration by third parties may be a useful tool to utilize, but it is difficult to achieve mutual benefits for museums and countries from its

155. Jung, *supra* note 107, at 193.

156. *Id.* at 196.

157. Ministry of Foreign Affairs, *Korea-France Joint Statement on the Outcome of the Digitalization Project for the Oe-Kyujanggak Archives* (Mar. 31, 2008), available at https://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=306133&srchFr=&srchTo=&srchWord=&srchTp=&multi_itm_seq=0&itm_seq_1=0&itm_seq_2=0&company_cd=&company_nm= (last visited Oct. 14, 2023).

158. Lee Kihyun, *Publication of the Oegyujanggak Uigwe Academic Series*, NAT'L MUSEUM OF KOR., available at https://issuu.com/museumofkorea/docs/nmk_v45/s/12339305 (last visited Oct. 14, 2023).

outcome. Therefore, a model of international, government-level negotiation will emerge as the most effective approach to satisfy both parties' interests. Given the case of the return of Oe-Kyujanggak, the negotiation model can be utilized to uphold and safeguard the cultural heritage of a nation by prioritizing substantial ownership transfer through diverse mechanisms, fostering cultural exchanges between nations, and emphasizing cultural identity rather than solely focusing on the determination of legal ownership.

