

PROTECTION AND REPATRIATION OF CULTURAL PROPERTY FROM ILLICIT TRAFFICKING IN THAILAND: LEGAL PROSPECTS AND CHALLENGES

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This research paper finds that Thailand adopts its cultural property law by applying the concept of cultural nationalism embedded in the 1970 UNESCO Convention and ASEAN regional framework even though Thailand has not yet ratified the UNESCO Convention. Thailand has implemented these international and regional frameworks by providing legal measures—including the registration of cultural property, the preservation of national treasures and the prohibition of cultural property export—to pursue the retention of cultural property within the country. Recent cases of repatriation show that Thailand has attempted to borrow the spirit of an international legal framework to support this repatriation, but the country was disadvantaged and encountered difficulties, even though its illegally removed cultural property was eventually repatriated. This research recommends that, regardless of the international framework, Thailand should cooperate with the requested party by making a bilateral agreement for repatriation. This is because the reciprocity embedded in such an agreement would be more helpful than the international framework for Thailand to resolve cultural property disputes and reconcile their mutual interests.

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I INTRODUCTION

Thailand is both a member country and state of origin¹ of ASEAN, having been seriously fighting against illicit trafficking. Although Thailand has not yet ratified the 1970 UNESCO Convention, its national direction and state practice may conform with both the Convention's framework and ASEAN regional framework, which have the same preference for cultural nationalism. Merryman describes two ways of considering cultural property, both of which are based on two competing concepts.² The first is cultural nationalism, which supports retention of cultural property within its nation of origin because it reflects the identity of the people and society. The second is cultural internationalism, which regards cultural property as components of common human culture and states that it should belong to everyone.³ It is unsurprising that Thailand applies cultural nationalism to design laws to protect cultural property from removal and the country has also attempted to repatriate cultural property removed in violation of its laws.

However, this research claims that it is not necessary for Thailand to ratify the UNESCO Convention for two key reasons. First, Thailand has taken adequate legal measures in conformity with legal obligations under the UNESCO Convention. Second, compliance with the Convention's framework for repatriation in Article 7(b) would not be beneficial for Thailand to succeed in its repatriation. To support this claim, this research will discuss and examine how Thailand has taken legal measures to protect its cultural property and how it has recently implemented the international framework to request repatriation of illegally removed cultural property.

II AN OVERVIEW OF THE THAI CULTURAL PROPERTY LAW

The laws and regulations relating to cultural property in Thailand are enacted and codified through parliamentary legislation. This legal system in Thailand is based on a civil law system. The first important step towards legal modernisation in Thailand began with the vision for law reform of King Rama V (1858–1910), who established the Ministry of Justice in the hope of unifying judicial system in 1892.⁴ The revision of

¹ 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 artefacts beyond any conceivable local use. The term 'states of origin' is contrary to 'market states' or 'market nations' where the demand in cultural property exceeds the supply and this demand encourages the export of cultural property from states of origin (see John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 *American Journal of International Law* 831).

² John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 *American Journal of International Law* 831.

³ Theresa Papademetriou, 'International Aspect of Cultural Property: An Overview of Basic Instruments and Issues' (1996) 24(3) *International Journal of Legal Information* 270, 292.

⁴ Tanin Kraivixian, 'Thai Legal History' (1963) 49 *Women Lawyer Journal* 6, 10. See also Chris Baker and Pasuk Phongpaichit, 'Thammasat, Custom, and Royal Authority in Siam's Legal History' in

the old law was also undertaken as part of this legal reform, which preferred to adapt English law because many members of the legal profession were familiar with it, having studied in the United Kingdom.⁵ However, it was argued that English law was specific to English circumstances; other countries may have had difficulty ascertaining where certain laws applied. Thus, Thailand's law reform turned to the continental tradition of codification in which the principles of Roman jurisprudence prevailed in logical form, except for commercial law topics, which Thailand agreed should retain a strong English influence.⁶ As a result of this legal reform, Thailand established the Royal Commission on Codification in 1897 to draft and promulgate the codes of law in Thailand.

After the bloodless revolution of 1932, Thailand's administrative system was greatly changed by a group of military and civil officials to abolish the absolute monarchy and introduce a constitutional form of democratic government in which the King is Head of State.⁷ Like the Western democracy concept, Thailand applied a check-and-balance system to lead the country to the modernisation.⁸ Under the constitution, the King of Thailand theoretically exercises his legislative power through parliament, executive power through the cabinet commanded by a prime minister and judicial power through the courts of Thailand.⁹ In terms of the hierarchy of law, the constitution became the supreme law in Thailand and the lower law includes codes of law and Acts of Parliament. To complement the Acts of Parliament, the Acts may empower the government to enact subsidiary laws such as Royal Decrees, Ministerial Regulations and other governmental notifications. In this regard, the subject matter of lower law must not be contrary to its upper law. The process of legislation requires the Bill commonly presented by either the cabinet or the House of Representatives. When the Bill is taken into consideration and approved by both the House of Representatives and House of Senate, it will be submitted to the King for his assent and then become an Act.

The laws and regulations relating to cultural property are codified in the form of Acts of Parliament and subsidiary laws. The Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (AON) is the most important cultural property law in Thailand and has the objective of protecting both immovable and movable cultural property from destruction, illegal excavation and illicit

Andrew Harding and Munin Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press, 2021) 26-29.

⁵ Sansern Kraichitti, 'The Legal System in Thailand' (1968) 7 *Washburn Law Journal* 239, 241. See also Joe Leeds and Chaninat Leeds, *A Summary of Thailand Law and Legal System* (Web Page, New York University Law School, March/April 2020) <<https://www.nyulawglobal.org/globalex/Thailand1.html>>.

⁶ *Ibid.*

⁷ Kraivixian (n 4) 11.

⁸ Ngamnet Triamanuruck, Sansanee Phongpala, and Sirikanang Chaiyasuta, 'Overview of Legal Systems in the Asia-Pacific Region: Thailand' (A Digital Repository-Overview of Legal Systems in the Asia-Pacific Region Paper No.4, 2004) 3

<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1004&context=lps_lsapr>

⁹ *Ibid.*

trafficking. The protective scheme under the AON is split into two main stages: (1) registration stage and (2) protective stage. The AON is not the only Act for the legal protection of cultural property; it is also embedded in other laws such as the Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931), which prohibits any person from trading movable cultural objects without permission.¹⁰ Similarly, the Land Excavation and Land Filling Act B.E. 2543 (2000) is designed to control land excavation and filling with the academic and engineering technique. If any object of art or antique is found in a particular area while excavation work is in progress, the excavator shall stop the work and inform a local governmental official within seven days of the date of finding—and the local official shall urgently notify the Department of Fine Arts (DFA) as soon as possible.¹¹ This research accepts that the finding of cultural property in Thailand raises a legal obligation for any finder to notify the DFA. Similar obligations are also imposed by other laws, for example, the Artesian Water Act B.E. 2520 (1977), Mineral Act B.E. 2510 (1967), and Petroleum Act B.E. 2514 (1971).

III REPATRIATION OF CULTURAL PROPERTY UNDER THE INTERNATIONAL AND ASEAN REGIONAL FRAMEWORKS

Requests for repatriation depend on the effective cooperation of the requesting party and the requested party, mostly regarded as a market state or foreign museum. This research will examine how the 1970 UNESCO Convention and the ASEAN regional framework can contribute to the establishment of such cooperation for repatriation.

A *The 1970 UNESCO Convention*

The UNESCO Convention encourages a state party to cooperate with other state parties to facilitate repatriation. Its legal framework for repatriation is provided in Article 7(b), which provides a platform for states to make claims for repatriation of stolen cultural property. It provides that all state parties shall undertake:

[T]o prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution.¹²

¹⁰ See Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931) (Thailand) art 4 and 12.

¹¹ See Land Excavation and Land Filling Act B.E. 2543 (2000) (Thailand) art 25.

¹² See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 7(b)(i).

[T]o take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.¹³

This provision obviously reflects a complete import ban under which cultural property stolen from one country cannot be imported into another.¹⁴ It is common to assume that the UNESCO Convention should be more beneficial for state parties of origin than market state parties because it was adopted with the concept of cultural nationalism. In contrast, it is argued that this preference for cultural nationalism may be the most important shortcoming in promoting effective cooperation between a state party of origin (as the requesting party) and a market state party (as the requested party) to facilitate repatriation.

As remarked by many scholars, the UNESCO Convention mostly favours states of origin over market states because it only calls for state parties of origin to be responsible for protecting and returning their own cultural property, as indicated in Articles 5, 6 and 7. In contrast, market state parties are required to take the necessary measures to prevent their museums or similar institutions from acquiring stolen cultural property and are also required to return stolen cultural property.¹⁵ This requirement seems unfair for market state parties—an observation supported by the few ‘market state’ signatories of this Convention. This unfair requirement is also reflected in the fact that state parties of origin are only tasked to protect and retrieve their stolen cultural property, whereas market state parties are obliged to re-protect those states of origin.¹⁶ It appears that market state parties must bear an obligation that does not favour them; thus, these states do not likely have much incentive to ratify the Convention.

Accordingly, the UNESCO Convention fails to convince many countries to be signatories, particularly market states. While state parties of origin are required to designate and certify their own cultural property, market state parties are responsible for preventing illicit trafficking by establishing their own import restrictions.¹⁷ It

¹³ See *ibid* art 7(b)(ii).

¹⁴ John B. Gordon, ‘The UNESCO Convention on the Illicit Movement of Art Treasures’ (1971)

¹² *Harvard International Law Journal* 537, 550.

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

¹⁶ *Ibid*.

¹⁷ *Ibid* 474.

becomes obvious that most legal obligations that market state parties assume are ‘active responsibilities’, while state parties of origin undertake only ‘passive responsibilities’. As agreed by Levine, a large number of market states do not desire to ratify the Convention because they are reluctant to restrict their art markets and hope to avoid the corresponding negative effects on their economic potential.¹⁸ Thus, the inequality between states of origin and market states makes effective cooperation for repatriation via the UNESCO Convention difficult.

Further, certain defects under the legal framework also obstruct the state parties of origin from succeeding in repatriation. Under Article 7(b), the legal framework raises a rigid scope of claim for repatriation. The scope of place (from which cultural property is stolen) is rigidly designated because cultural property could be stolen from a museum or similar institution, but possibly also from private collections. This research does not agree with the UNESCO Convention, which aims to focus only on the repatriation of cultural property stolen from museums or other similar institutions. Considering the number of complaints about the theft of cultural property made to INTERPOL, it is evident that the amount of cultural property stolen from private collections is rapidly growing each year.¹⁹ Further, the Convention’s rigid scope also excludes undiscovered or unexcavated objects stolen from archaeological sites.

Moreover, Article 7(b)(ii) provides that requests for repatriation of stolen cultural property be made through diplomatic channels. This research disagrees with the use of these channels because they are weak and may advantage state parties of origin. A diplomatic channel is regarded as a non-judicial method, which depends upon the consent of both the requesting and the requested party. This method probably increases the likelihood that states parties of origin (as the requesting party) will fail in repatriation of stolen cultural property for various reasons. For example, market state parties (as the requested party) may freely refuse to participate in diplomacy or international negotiations between both parties could be endless or deadlocked if they strongly stand their ground without compromise.

Article 7(b)(ii) is based on the exception of *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 a person who has no title to that property or a person who has valid title to the property. This legal rule adversely affects state parties of origin that are financially limited or unable to pay compensation for repatriation. Most state parties of origin to the UNESCO Convention are economically classified as developing or least-developed countries (e.g., Afghanistan, Chile, Egypt, Ethiopia, Indonesia, Iraq, Mexico, Myanmar, Nepal, Nigeria and Syria).²⁰ This argument is

¹⁸ Alexandra Love Levine, ‘The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention’ (2011) 36 *Brook Journal of International Law* 751, 762.

¹⁹ International Criminal Police Commission, *Works of Art* (4 May 2017) <<https://www.interpol.int/Crime-areas/Works-of-art/Works-of-art>>.

²⁰ United Nations, ‘Country Classification’ (World Economic Situation and Prospect, 2014) 145-47.

supported by Hardy, who found that the majority of stolen cultural objects are found in Europe—nearly 74% of stolen works of art, according to the INTERPOL database.²¹ This research agrees that most state parties of origin with financial limitations would probably be incapable of paying just compensation as required by the requested party. The vague language of ‘just compensation’ also provokes the failure of repatriation since the process is critically dependent upon the pleasure of the requested party. The requesting party may risk the payment of exorbitant or inappropriate prices and hence, the Convention’s vague language and the economic status of most state parties of origin would likely obstruct opportunities to succeed in repatriation.

B *The ASEAN Regional Framework*

In 2000, ASEAN adopted the ASEAN Declaration on Cultural Heritage, which encourages all member countries to perform two important tasks. The first is to protect cultural property from theft, illegal transfer and illicit trade and trafficking. The second task is the establishment of cooperation for repatriation of illegally removed cultural property. According to Principle 10 of the declaration, ASEAN member countries:

[S]hall cooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that has been stolen from a museum, site or similar repositories, whether the stolen property is presently in the possession of another member or non-member country.²²

The ASEAN regional framework on repatriation of cultural property is designed in accordance with Articles 7(b)(i) and (ii) of the UNESCO Convention, which requests the cooperation of state parties to return cultural property from a museum or religious or secular public monument or similar institution in another state party.²³ However, it does not apply the exception of *nemo dat quod non habet* to protect an innocent possessor (as applied by the UNESCO Convention). It also does not state that the requested member country or non-member country (who should return stolen cultural property to the rightful owner) is entitled to the payment of any compensation when proving the good faith of the requested party. This is the difference: the ASEAN Declaration strictly applies *nemo dat quod non habet* without exception.

Like Articles 7(b)(i) and (ii) of the UNESCO Convention, the ASEAN Declaration does not mention the repatriation of cultural property that has been illegally removed in violation of export laws. The nature of ASEAN cooperation

²¹ Samuel Andrew Hardy, ‘Illicit Trafficking, Provenance Research and Due Diligence: The State of the Art’ (Research Paper, UNESCO, 20 March 2016) 3.

²² See ASEAN Declaration on Cultural Heritage, 33rd ASEAN Ministerial Meeting (25 July 2000) principle 10.

²³ See *the UNESCO Convention* art 7(b)(i) and (ii).

critically relies on diplomacy. Although the Declaration does not specifically mention the return of illegally exported cultural property, it would be possible for all member countries to effectively cooperate with each other because the majority of ASEAN member countries are states of origin experiencing the same situations and illicit trafficking problems. This facilitates the establishment of a coherent vision and goal with a mutual concern.

This research accepts that ASEAN prefers cultural nationalism to promote the repatriation of cultural property in the region and is highly reliant on the diplomacy to do so. This 'ASEAN way' becomes a unique style of diplomacy, providing an informal and incremental approach to cooperate through consultation and dialogue while the level of institutionalisation is limited to minimum.²⁴ This seems different from the European Union (EU) method, which establishes a 'super institution' (like the EU Council) to provide a binding legislative act that is applied in its entirety across the EU. Nevertheless, it is argued that the establishment of ASEAN cooperation with only cultural nationalism is only one side of the coin. This may lead to failures in the repatriation of cultural property. Repatriation requests depend on the balance between the potential benefits to the requesting and requested parties. Thus, the promotion of ASEAN cooperation with a preference for cultural nationalism makes it difficult to convince market states outside the region to accept requests from ASEAN member countries.

IV PROTECTION OF CULTURAL PROPERTY IN THAILAND

Thailand has attempted to implement the international and ASEAN regional frameworks even though it has not yet ratified the UNESCO Convention. The AON does not use the term 'cultural property' but rather, 'antique and object of art' (Article 4).²⁵ It is believed that Thailand defines 'antique and object of art' in conformity with 'cultural property' in Article 1 of the UNESCO Convention²⁶ even though it is a non-state party to the Convention. Under Article 4 of the AON, movable cultural property is divided into two forms: 'antique', which is described as 'an archaic movable property, whether produced by man or by nature, or being any part of ancient monument or of human skeleton or animal carcass which, by its age or characteristics of production or historical evidence, is useful in the field of art, history or archaeology'²⁷ and 'object of art', which refers to 'a thing skilfully produced by craftsmanship which is high valuable in the field of art'.²⁸

²⁴ Hiro Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the ASEAN Way' (2003) 25 *Journal of International and Strategic Affairs* 104, 106.

²⁵ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 4.

²⁶ See the UNESCO Convention art 1.

²⁷ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 4.

²⁸ See *ibid*.

A *Registration and Its Legal Consequences*

Article 5(b) of the UNESCO Convention encourages all state parties to create and maintain a national inventory of protected cultural property.²⁹ In Thailand, movable cultural property located in the Kingdom can be possessed by either the state or an individual. Under Article 14 of the AON, the Director-General is authorised to cause, by means of notification in the Government Gazette, any antique or object of art, which is not in the possession of the DFA, to be registered if he deems that it is useful or of special value in the field of art, history or archaeology.³⁰ Although cultural property possessed by any individual has been registered by the Director-General of the DFA in accordance with Article 14 of the AON, the registration does not result in such registered cultural property being owned by the DFA. It is still possessed by its individual owner, who must comply with the special requirements specified by the AON. In this regard, the AON imposes a variety of protective measures and responsibilities. For example, no person is not allowed to repair, modify or alter any registered antique or object of art without the permission of the Director-General.³¹ When the registered antique or object of art is deteriorated, damaged, lost or removed from the place in which it is stored, the AON obliges its possessor to inform the Director-General of the DFA within 30 days from the date of their awareness of such changes.³²

B *Identification of National Treasures*

An antique or object of art becomes a state national treasure through one of three ways. The first is linked with Article 14 of the AON: paragraph 2 empowers the Director-General of the DFA to consider to purchase any antique or registered object of art that should be appropriately conserved as a national treasure.³³ Whether such an antique has been registered or not does not matter. It is also true that the item that is eligible for registration shall not be in the possession of the DFA, but this does not mean that the DFA does not have its right to purchase it if deemed necessary. The AON does not provide any criteria or guidance for how such an antique or registered object of art should be conserved as a national treasure. The consideration and purchase of such an item by the Director-General solely depends on his decision-making. Therefore, this confirms the absolute power of the state to purchase cultural items for its public collections and strongly reflects cultural nationalism. However, the great power of the Director-General may present problems in the form of corruption or poor decision-making.

The second way for an object to become a national treasure is related to cultural property found in Thailand's territory. Article 24 of the AON provides that any antique or object of art that is buried, concealed or abandoned within the country or the

²⁹ See the UNESCO Convention art 5(b).

³⁰ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 14.

³¹ See *ibid* art 15.

³² See *ibid* art 16.

³³ See *ibid* art 14 para 2.

exclusive economic zone under such circumstances and that no person could claim to own shall whether the place of burial, concealment or abandonment be owned or possessed by any person, become national treasures.³⁴ This research accepts that not all cultural objects found in Thailand are owned by the state automatically. An antique or object of art that will be owned by the state must only meet one of three certain conditions: (1) an antique or object of art is buried, concealed or abandoned at any place under such circumstances; (2) no-one claims to be the owner of such an antique or object of art and (3) the place of burial, concealment or abandonment must not be owned or possessed by any person. To support this provision, the DFA should be comfortable to seek an item that is buried, concealed or abandoned within the country because activities relating to excavation in Thailand are under the control of many laws, including the Land Excavation and Land Filling Act B.E. 2543 (2000), Artesian Water Act B.E. 2520 (1977), Mineral Act B.E. 2510 (1967) and Petroleum Act B.E. 2514 (1971). These laws similarly oblige an excavator who finds any antique or object of art within the area of excavation to collaborate with the local government and urgently inform the DFA within the timeframe.³⁵ The punishment will be also applied to any excavator who neglects to inform the DFA.³⁶

Third, Section 1325 of the Thai Civil and Commercial Code provides that if the finder of lost property informs the owner of the property without any delay and the owner neglects to recover his property within one year of the date of finding, the finder of said lost property shall be entitled to the ownership of it; however, if the unclaimed lost property is proved to be an antique or object of art, its ownership shall automatically vest in the state and the finder of the property is entitled to a reward of 10 per cent of its value.³⁷ In this regard, the Thai Civil and Commercial Code generally aims to lay down the law for assuming ownership of lost property. As with Article 24 of the AON, the DFA can claim ownership of unclaimed lost property that is proved an antique or object of art.

To preserve antiques or objects of art belonging to the state, the AON obliges the DFA to manage and collect those cultural objects only within national museums governed by the DFA.³⁸ The AON also prohibits the transfer or trade of national treasures³⁹ and supports their preservation by allowing the DFA to benefit financially from national museums. Article 27 of the AON authorises the Minister of Culture to provide ministerial regulation of visitors and the admission fee. Under this ministerial regulation, each national museum may request admission fees from visitors as an income to preserve national treasures.⁴⁰

³⁴ See *ibid* art 24.

³⁵ See Land Excavation and Land Filling Act B.E. 2543 (2000) (Thailand) art 25.

³⁶ See *ibid* art 39.

³⁷ See Thai Civil and Commercial Code (Thailand) section 1325.

³⁸ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 25 and 26.

³⁹ See *ibid* art 28.

⁴⁰ See Ministerial Regulation on Conducts of Visitors and Admission Fee on 4 September B.E. 2551 (2008) (Thailand).

C *Protection of Cultural Property from Illicit Trafficking*

Article 22 of the AON prohibits any person from exporting or removing any antique or object of art, regardless of whether it has been registered, without the permission of the Director-General of the DFA.⁴¹ This provision reflects the rigid application of cultural nationalism, which does not encourage an individual to freely move cultural property from its place of origin even though it is not a possession of the state. Thailand strictly bans the export of all antiques or objects of art; removing one without permission is illegal. The AON separates the punishment into two cases. First, if an illegally exported item is not yet registered, the exporter may be imprisoned for a term not exceeding seven years, may be required to pay a fine not exceeding seven hundred thousand Baht or may be liable for both⁴². Illegal exporters of registered objects will be imprisoned for a term of one to 10 years and fined an amount not exceeding one million Baht.⁴³ The punishment for illegal export of registered cultural property is harsher because such property is proved by the DFA to be beneficial or specially valuable in the field of art, history or archaeology.

On its own, the DFA has no power to inspect and arrest a person who illegally exports antiques or objects of art. The AON empowers the DFA to use its discretion to approve requests for the export of cultural property but it is not permitted to inspect and arrest perpetrators of illegal exports. Inspections and arrests are undertaken by Thai Customs officials. Under the new Customs Act B.E. 2560 (2017), a Customs official is authorised to inspect any product or item prepared for export and also to confiscate it if they find that it will be exported in violation of the Customs Act or other laws.⁴⁴ It seems obvious that the Customs Act and the AON should be related to each other to establish an institutional collaboration for protecting cultural property.

V REPATRIATION OF CULTURAL PROPERTY IN THAILAND

Although Thailand has not yet ratified the UNESCO Convention, this research finds that the country has recently attempted to implement the spirit of Article 7(b)(ii) to request repatriation of cultural property from foreign museums. However, this was difficult and not advantageous for Thailand even though it finally succeeded in its repatriation efforts. This section will examine the country's recent repatriation through two iconic cases.

⁴¹ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 22.

⁴² See *ibid* art 38.

⁴³ See *ibid* art 39.

⁴⁴ Customs Act B.E. 2560 (2017) (Thailand) art 157 and 158.

A *Repatriation of the Phra Narai Lintel*

The first and most outstanding case in Thai repatriation is the example of the *Phra Narai* lintel in 1988 from the Art Institute of Chicago (AIC) in the United States.

1 *Phra Narai: factual synopsis*

The *Phra Narai* lintel is a stone lintel that is elegantly carved with an image of one of the Hindu Gods, 'Vishnu', reclining on the water. Produced between the tenth and thirteenth centuries of the Hindu-era, the lintel is part of the *Phanom Rung* temple's body, located near the Thai–Cambodian border in the north-eastern region of Thailand.⁴⁵ In the early 1960s, it was found that the lintel had been removed from the *Phanom Rung* temple: James Alsdorf, a Chairman of the AIC, purchased the lintel and loaned it to the AIC in 1967.⁴⁶ In 1971, as part of Thailand's initiative on renovation and restoration of the *Phanom Rung* temple, it found that the lintel had disappeared and contacted James Alsdorf to request repatriation of the Hindu lintel.⁴⁷ However, the AIC asserted that it had legally acquired the lintel as a donation from a private foundation and refused to return it to the Thai government.⁴⁸ This conflict was the beginning point of long negotiations between Thailand and the AIC. While their bilateral negotiation continued, the Chicago-based Elizabeth Cheney Foundation intervened as a third party and offered the AIC the donation of an equivalent Thai object to replace the lintel and protect the AIC from a net loss to its collection.⁴⁹ In 1988, the AIC accepted this donation and returned the lintel to Thailand.

2 *Phra Narai: findings*

The AIC claimed good faith acquisition of the lintel, whereas the Thai government retained the principle of ownership to repatriate the lintel. This is a key point of this cultural property dispute arising from the conflict between a good faith purchase and the principle of ownership. According to the AIC, the *Phra Narai* lintel was purchased in 1966 by a New York art dealer from a Thai dealer on the open market in Bangkok and was then donated to the AIC (who did not know whether or not the

⁴⁵ Barbara Crossette, 'Thais Accuse U.S. of Theft of Temple Art', *New York Times* (online), 10 February 1988, <<http://www.nytimes.com/1988/02/10/world/thais-accuse-us-of-theft-of-temple-art.html>>.

⁴⁶ Claudia Caruthers, 'International Cultural Property: Another Tragedy of the Commons' (1998) 7 *Pacific Rim Law and Policy Journal* 143, 144.

⁴⁷ *Ibid.*

⁴⁸ Associated Press, 'Chicago Museum to Return Lintel Thais Say Was Stolen', *New York Times* (online), 25 October 1988, <<http://www.nytimes.com/1988/10/25/us/chicago-museum-to-return-lintel-thais-say-was-stolen.html>>.

⁴⁹ Patrick Reardon, 'Art Institute Agrees to Return Thai Sculpture', *Chicago Tribune* (online), 25 October 1988, <http://articles.chicagotribune.com/1988-10-25/news/8802100130_1_art-institute-thai-government-museum>.

lintel was stolen).⁵⁰ This claim is based on the exception of *nemo dat quod non habet*, which favours the protection of an innocent purchaser of property over the original owner. Moreover, this exceptional rule is also embedded in Article 7(b)(ii) of the UNESCO Convention, which requires the requesting state to pay just compensation to an innocent purchaser or to a person who has valid title to the property.⁵¹ This exceptional rule became a legal basis for retaining the lintel within the AIC. This research considers that the retention of the lintel by the AIC could also reflect the concept of cultural internationalism, which encourages cultural property to be shared and transferred to other people.

In accordance with the UNESCO Convention, the AIC refused the request for repatriation by the Thai government and claimed that if the *Phra Narai* lintel was to be returned, then the AIC was an innocent purchaser and should be entitled to the payment of just compensation.⁵² Further, the Thai repatriation request would set a dangerous precedent for US museums and similar institutions around the world for the return of stolen cultural property. If these institutions were obliged to return every cultural object stolen and smuggled from foreign countries and did not receive anything in return, they would be nearly empty.⁵³ Nevertheless, the AIC did not argue or reject the right of ownership claimed by Thailand; it only raised its good faith acquisition to retain the lintel and to request fair compensation should it return the item.

In contrast to the AIC's claim, Thailand asserted ownership of the lintel and explained how it was stolen and illegally exported from the country. The lintel was removed during the period when the US military were stationed in the area of the *Phanom Rung* temple to support US troops in the Vietnam War. It is possible that Americans might have used military equipment to blast the lintel from the temple's body and then airlifted it out of the area by helicopter.⁵⁴ To support this claim, many reports from people living in the area during the Vietnam War stated that the US soldiers came with a helicopter and took some of the temple's pieces. When comparing the lintel to other temple pieces, they match a Thai archaeologist's report of Khmer-style temples in the north-east of Thailand, which includes old photos of the lintel at the *Phanom Rung* temple taken by a Thai archaeologist in 1960.⁵⁵ Thailand attempted to present evidence of how the lintel was a part of the temple and how the country had never accepted its removal. Here, Thailand's claim was clearly based on the right of ownership and the concept of cultural nationalism since both concepts are based

⁵⁰ Larry Ter Molen, 'Art Institute Acted in Good Faith', *Chicago Tribune* (online), 13 September 1988, <http://articles.chicagotribune.com/1988-09-13/news/8801300153_1_thai-press-art-institute-thai-government>.

⁵¹ See the UNESCO Convention art 7(b)(ii).

⁵² Ter Molen (n 50).

⁵³ Reardon (n 49).

⁵⁴ Caruthers (n 46) 144-5.

⁵⁵ Ploenpote Atthakor, 'Expert Points to Old Trick to Reclaim Lintel from US' *Bangkok Post* (online), 24 August 2016, <<http://www.bangkokpost.com/news/general/1069412/expert-points-to-old-trick-to-reclaim-lintel-from-us>>.

on the fact that the lintel originated in Thailand and so, must have been under the state's territorial jurisdiction. Thailand exclusively exercises its jurisdiction over the lintel and prohibits any removal. Thus, when the lintel was illegally removed, Thailand was surely entitled to act to recover it.

3 *Phra Narai: discussion*

This cultural property dispute dealt with the conflict between the concepts of cultural nationalism and cultural internationalism, represented through the claims of ownership and good faith acquisition. As discussed, the repatriation of cultural property would be impossible if it is run by an individual country with a single property concept, whether cultural nationalism or internationalism. Repatriation would be highly positive if the requesting and requested parties are able to cooperate effectively based on the balance between cultural nationalism and cultural internationalism. Nevertheless, the request for repatriation of *Phra Narai* lintel lacks such balance because each party to the dispute held only the concept beneficial to it. Although Thailand indirectly applied the legal framework of the UNESCO Convention to repatriate the lintel, this research argues that the UNESCO Convention is not as an advantageous way to do so.

Is the *Phra Narai* lintel covered by the definition of cultural property in Article 1 of the UNESCO Convention? For this, the answers to two key questions are required: (1) Has the lintel been specifically designated by the state? (2) Is the lintel an antique that is prohibited from export by Thailand's law? This research claims that the lintel is consistent with Article 1(d) of the UNESCO Convention⁵⁶ because it is an object of religion that is specifically designated by the state as being of importance for history, literature and art—an element of the *Phanom Rung* temple, a historical monument that has been dismembered. In considering the AON as Thailand cultural property law, Article 7 empowers the Director-General of DFA to select any monument, archaeological site or ancient area to be registered as an ancient monument or site to be preserved by the AON.⁵⁷ Through this Article, the *Phanom Rung* temple was specifically designated as the ancient monument since its registration in 1935, as declared by the DFA's Decree.⁵⁸ Since the temple is not possessed or owned by any individual, it is national property under the custody and care of the DFA. Registration of the temple resulted in the legal status of the lintel as a part of temple's body. Thus, as a result of the registration of the temple, the lintel is also registered and protected under the AON automatically, even though it was later removed from the temple's body. Considering the definition of cultural property in Article 4 of the AON, 'antique'

⁵⁶ See the UNESCO Convention art 1(d).

⁵⁷ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 7.

⁵⁸ See Decree of the Department of Fine Arts, 8 March 1935, as empowered by Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand).

refers to a movable object, which is any part of ancient monument.⁵⁹ When the lintel is regarded as antique under Article 4 of the AON, its export without permission is prohibited regardless of whether it was registered.⁶⁰

Nevertheless, Thailand was at a disadvantage and had difficulty requesting repatriation of the lintel by complying with the spirit of the UNESCO Convention. In considering Article 7(b)(ii) of the UNESCO Convention, the restitution or return of stolen cultural property shall be made through diplomatic offices and the requesting party shall pay just compensation to an innocent purchaser or a person who has valid title to that property.⁶¹ The UNESCO Convention applies diplomatic negotiation as its only avenue to settle cultural property disputes and does not create any alternative mechanisms. It also encourages the exception of *nemo dat quod non habet*, which favours the protection of an innocent purchaser over the original owner. While Thailand used Article 7(b)(ii) for repatriation of the lintel, this Article failed to be implemented because the dispute was resolved by the intervention of a third party. In accordance with the spirit of the UNESCO Convention, although Thailand instigated bilateral negotiation with the AIC, the talks were too uncertain to provide a solid resolution. As noted by Palmer, negotiation is the beginning of peaceful settlements, but these may become endless when parties cannot reach an accord.⁶²

The long negotiations between Thailand and the AIC clearly reflect the failure of diplomatic channels in repatriation of the lintel. When the bilateral negotiation between Thailand and the AIC became deadlocked when both parties asserted only their own right to the lintel and rejected the other's claim, the conflict was difficult to resolve and Thailand could have potentially lost the opportunity to repatriate the lintel. This research argues that the settlement of cultural property disputes should not depend solely on diplomatic channels, but should provide some means of reciprocity or persuasion. For instance, diplomatic negotiations at the state-to-state level generally request some means of political or economic persuasion in the form of an exchange of interests or reciprocal cooperation on particular issues.⁶³ This means of persuasion allows both parties to benefit and thus, settles the dispute. Nevertheless, Article 7(b)(ii) relies upon diplomatic negotiations without recommending any sequential process for a potential deadlock. This research argues that pure negotiation alone, without any other means of persuasion or reciprocity, would fail because each party to a dispute generally strongly maintains on its own standing.

The claims of Thailand and the AIC and the conflict between the right of ownership and the exception of *nemo dat quod non habet* reflects the imbalance of cultural

⁵⁹ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 4.

⁶⁰ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 22.

⁶¹ See the UNESCO Convention art 7(b)(ii)

⁶² Geoffrey Palmer, 'Perspectives on International Dispute Settlement from a Participant' (2012) 43 *Victoria University of Wellington Law Review* 39, 42.

⁶³ Lyndel V. Prott, 'The Fight Against Illicit Traffic in Cultural Property: The Importance of Case Studies' (2004) 35 *International Institute for Asian Studies Newsletter* 24, 24.

nationalism and cultural internationalism. While Thailand claimed cultural nationalism to support its ownership for repatriation of the ancient lintel that originated in Thailand, the AIC raised its good faith purchase to acquire and preserve the lintel regardless of its original place in accordance with cultural internationalism. Negotiators should have recognised that Article 7(b)(ii) of the UNESCO Convention prefers to protect a good faith purchaser than the original owner by allowing the requested party to be entitled to the payment of just compensation. As the requesting party, Thailand could not benefit from this provision despite having proved its title to the lintel—a fact that the AIC never disputed. Although the UNESCO Convention was adopted with a preference for cultural nationalism (as recognised by its encouragement of state parties to retain cultural property within their own territories and take appropriate steps to recover any lost cultural property), its means or framework for repatriation is not consistent with cultural nationalism as it does not protect the requesting party's right of ownership.

4 *Pbra Narai: conclusion*

As discussed, compliance with Article 7(b)(ii) of the UNESCO Convention did not help to resolve the conflict between Thailand and the AIC or facilitate Thailand's recovery of the lintel. The diplomatic negotiations for repatriation were deadlocked. The protection of a good faith purchaser only supports the AIC's claim, regardless of Thailand's title to the lintel and thus, the legal framework for repatriation under the UNESCO Convention did not aid Thailand. Finally, Thailand would not have completed its repatriation if it was not assisted by the third party. Therefore, Thailand was disadvantaged and encountered difficulties because it complied with the UNESCO Convention.

B *Repatriation of Luang Pob Sila Statue*

The second outstanding case in Thailand is the 1996 repatriation of the *Luang Pob Sila* statue from a purchaser who bought the statue in auction at Sotheby's Institute of Art in London.

1 *Luang Pob Sila: factual synopsis*

In 1929, villagers living in Sukhothai province, Thailand, discovered the *Luang Pob Sila* statue in a cave and moved it to the Thungsaliem temple, with the belief that it blessed villagers in the area.⁶⁴ *Luang Pob Sila*, which is a grey-sandstone statue of Buddha in mediation posture with a seven-headed great serpent, *Naga* is over 800 years old.⁶⁵ In 1977, the statue was stolen from the temple and in 1988, Thai people living in London found it exhibited at Sotheby's Institute of Art for auction as part

⁶⁴ Police Office of Thungsaliem, *History of Luang Pob Sila* (15 February 2018) <<http://tungsaliem.sukhothai.police.go.th/room26.htm>>.

⁶⁵ *Ibid.*

of a nine-item sale of Khmer, Thai, Indian and Himalayan Art.⁶⁶ Although the DFA was informed, it was too late to contact with the Institute because the Buddha statue had been sold in auction and removed to the United States. Thailand requested the return of the statue through negotiations with the purchaser, who finally requested compensation from Thailand. In 1996 and via an ad hoc committee, Thailand agreed to pay US\$200,000 to repatriate the statue.⁶⁷ After nineteen years, it was returned to Thailand and has been located at the *Thungsaliem* temple ever since.

2 *Luang Pob Sila: findings*

Like the repatriation of the *Phra Narai* lintel, the cultural property dispute between the purchaser of the *Luang Pob Sila* statue and Thailand is based on the conflict between the *nemo dat quod non habet* exception and the right of ownership. While the purchaser claimed the good faith acquisition (since he neither knew nor ought reasonably to have known at the time of acquisition that the statue was stolen and illegally exported), Thailand claimed its right of ownership because it proved that the statue was originally located in Thailand under the custody of the DFA. Again, both the purchaser and Thailand had valid claims to the same property and chose bilateral negotiations to settle their conflict. Again, the concepts of cultural nationalism and internationalism are reflected in the claims of both parties. The protection of a good faith purchaser of cultural property permits the statue to not to be limited to its original location and to be distributed to everyone in accordance with cultural internationalism. In contrast, Thailand's claim is consistent with the concept of cultural nationalism, which supports it as the existing occupier of the geographical location where the statue was created and thus, proves Thailand's right to retain it there.

3 *Luang Pob Sila: discussion*

The *Luang Pob Sila* statue falls within the definition of an antique under the AON. According to Article 4, it a movable object of religion, which is useful in the field of history and art.⁶⁸ Additionally, it was specifically designated by the DFA as registered cultural property. Considering Article 1(g) of the UNESCO Convention, this statue is property that is important for history and art in conformity with artistic interest.⁶⁹ Under Thai law, the prohibition of cultural property export under the AON does not consider whether illegally exported cultural property has been yet registered or not. Article 22 of the AON clearly prohibits the export of any antique or object of art without the DFA's permission regardless of whether it has been yet registered.⁷⁰ Hence, the registration of the statue does not need to be taken into account. When the

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 4.

⁶⁹ See the UNESCO Convention art 1(g).

⁷⁰ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 22.

Luang Pob Sila is regarded as an antique by the AON, its theft and illegal exportation from Thailand is illicit trafficking. Although the legal framework for repatriation of the UNESCO Convention may not be applied to resolve the conflict between Thailand and the purchaser because its scope is only involved at a state-to-state level, the request for repatriation of *Luang Pob Sila* statue is in accordance with the Convention's spirit.

Thailand and the purchaser of the statue began their cultural property dispute settlement with bilateral negotiations, which is consistent with the diplomatic method as provided by the UNESCO Convention. This research argues that bilateral negotiation is too weak and uncertain to aid Thailand to succeed in its repatriation efforts. The opposing claims of Thailand and the purchaser could have led both parties to a deadlocked and endless negotiation. Likewise, Article 7(b)(ii) of the UNESCO Convention also protects the good faith purchaser rather than Thailand as the original owner. Thus, choosing to repatriate the statue by complying with Article 7(b)(ii) of the UNESCO Convention would adversely affect Thailand's opportunity to succeed.

4 *Luang Pob Sila: conclusion*

Thailand was clearly faced difficulties and disadvantages to request repatriation of the statue using the spirit of the 1970 UNESCO Convention. Its framework for repatriation does not facilitate Thailand's recovery of its cultural property, nor does it resolve the dispute. Thus, the weakness of diplomatic negotiation and the concept of a good faith purchaser became the most important factors and prevented any opportunity for Thailand to regain the statue. It is hardly surprising that Thailand has not ratified the UNESCO Convention. This research suggests that Thailand should seek alternative means of enforcing and make its recovery claims for repatriation.

C *Other Cases of Repatriation and Possibilities*

In the case of both *Phra Narai* and *Luang Pob Sila*, Thailand attempted to borrow the spirit of an international legal framework for its repatriation, but faced difficulties and was at a disadvantage to do so even though its illegally removed cultural property was eventually returned. This research accepts that it is not necessary for Thailand to ratify the UNESCO Convention because the country does not benefit from its legal framework for repatriation. Thailand suffered from the endless negotiations and the exception of *nemo dat quod non habet*, which did not provide any privilege over the other party.

In examining other cases of repatriation, this research finds that Thailand may apply other methods to repatriate its illegally removed cultural property. Thailand recently implemented bilateral cooperation for repatriation with Cambodia (its neighbour) and the outcome of this international cooperation took the form of a bilateral agreement entitled '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'. The agreement was designed to fight criminal activities that involve any movement of cultural property between Cambodia and Thailand by introducing key measures for impeding illicit transnational trafficking. This is achieved by imposing effective administrative and penal sanctions and by providing a method for the repatriation of cultural property.⁷¹

This bilateral agreement adopts the same objective and theme as the UNESCO Convention, which includes the need for both protection and repatriation of cultural property. It is that this requires Cambodia and Thailand to cooperate to return cultural property stolen and then located within the other party's territory. Moreover, it follows the UNESCO Convention by providing a means of diplomatic resolution. Article 4 of the bilateral agreement requires both parties to request repatriation of cultural property through the diplomatic channel.⁷² This is harmonious with Article 7(b)(ii) of the UNESCO Convention in supporting the use of diplomatic offices to request repatriation. Thus, the settlement of cultural property disputes between the state parties falls within the realm of public law only linking with a state-to-state level.

While the bilateral agreement has its objective and theme in accordance with the UNESCO Convention, its specific framework for repatriation is different from Article 7(b)(ii). The request for repatriation of cultural property under the bilateral agreement is applied to either stolen or illegally exported cultural property.⁷³ Unlike the UNESCO Convention, the scope for repatriation is not restricted to only the theft of cultural property from museums or similar institutions. Additionally, the bilateral agreement does not apply the exception of *nemo dat quod non habet* to oblige the requesting state party to pay any compensation. Article 4 of the bilateral agreement provides that:

All expenses incidental to the return and delivery of the movable cultural property shall be borne by the requesting Party and no natural or judicial person shall be entitled to claim any form of compensation from the Party returning the property claimed. Neither shall the requesting Party be required to compensate in any way such natural or juridical person as may have participated in illegally acquiring or sending abroad the property in question.⁷⁴

This provision is different from Article 7(b)(ii) of the UNESCO Convention because Article 7(b)(ii) requires the requesting party to pay just compensation to an innocent purchaser or to a person having valid title to cultural property. In contrast, this bilateral agreement does not oblige the requesting party to pay any compensation. This provision is likely more beneficial for Thailand to succeed in its repatriation without payment of any high costs. In addition, the reciprocal principle embedded in the bilateral agreement for repatriation is the most important outcome of cooperation

⁷¹ 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, opened for signature 14 June 2000 (entered into force 14 June 2000) preamble.

⁷² See *ibid* art 4 para 1.

⁷³ See *ibid* art 1 para 2.

⁷⁴ See *ibid* art 4 para 2.

because it allows both Cambodia and Thailand to mutually accord, leading to a ‘win-win’ solution.

Thailand has since implemented the bilateral agreement. In 2000, Thai Customs found and confiscated 43 antiques, which were illegally imported by shipping and had no identified owner.⁷⁵ The 43 antiques were sent to the DFA for preservation at the National Museum in accordance with Article 24 of the AON⁷⁶: antiques or objects of art that are abandoned within the Kingdom under such circumstances that no-one could claim to own shall become national treasures.⁷⁷ It was questioned whether the antiques should vest in the state. The DFA submitted this question to the Office of the Attorney-General because the Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010) empowers the Office of the Attorney-General to investigate and render a recommendation relating a draft contract or any legal issue to the government and other state agencies.⁷⁸ It was reported that the antiques probably belonged to the Cambodia. To implement the existing bilateral agreement, the DFA was obliged to cooperate with the Cambodian government to request more evidence for pursuing identification of the antiques.⁷⁹ Both countries proceeded with repatriation in accordance with Article 4 of the agreement without payment of any compensation.⁸⁰

As exemplified by the Cambodia–Thailand case, there are both positive and negative aspects to the repatriation of cultural property through bilateral agreements. Positively, the bilateral agreement generally provides both parties with full reciprocity. Under the agreement, Thailand would be treated with the same obligations should it prove that its own cultural property was illegally imported to and found in Cambodia. As already discussed, the request for repatriation would be impossible without cooperation with the requested party in whose territory the cultural property concerned is located. The bilateral agreement enables the requesting and the requested parties to cooperatively design an agreement that best suits their exact needs. Further, the bilateral negotiation is based on a bargain for whatever advantages one party can extract from the other, which will presumably sign the agreement only after obtaining the same advantages.⁸¹ This bilateral agreement between Cambodia and Thailand is a

⁷⁵ Anuchart Kongmalai, ‘Ancient Monument and Antique Laws: The Supreme Court’s Decision and Attorney-General’ (Office of the Attorney General Working Paper, 2015) 18.

⁷⁶ *Ibid.*

⁷⁷ See Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand) art 24.

⁷⁸ See Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010) (Thailand) art 23(2).

⁷⁹ According to the Attorney-General’s Recommendation No. 88/2551 (2008), the Attorney-General recommended that the illegally exported 43 antiques did not vest in the DFA because this case did not fall within Article 24 of the Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand)

⁸⁰ Kongmalai (n 75) 18-9.

⁸¹ Arie Reich, ‘Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity’ (Bar-Ilan University Public Law and Legal Theory Working Paper No.14-09, Bar-Ilan University, 2009) 15-6.

clear example of such reciprocal benefits, which do not oblige either Cambodia and Thailand to request payment of compensation for repatriation. This is not found in the UNESCO Convention, which mostly serves as a common denominator of the many national interests involved.⁸²

Negatively, the most difficult aspect of forging any bilateral agreement is how the requested party is convinced to join the negotiation. Both Cambodia and Thailand, regarded as states of origin, have the same situation of illicit trafficking of cultural property; thus, it is unsurprising that both tend to cooperate to protect their mutual interests. Both favour cultural nationalism. In contrast, Thailand may face difficulties in requesting cooperation with market states or foreign museums that hold its (illegally imported) cultural property because they could sustain a preference for cultural internationalism and hence, aim to retain foreign cultural property. An example of this is the *Elgin Marble Case*⁸³. This situation would absolutely fail to result in cooperation leading to the establishment of bilateral agreement. To disagree with the claim for only a single cultural property concept—whether cultural nationalism or internationalism—it is necessary that for Thailand to provide persuasive options to convince foreign possessors to join bilateral agreements but not to its own disadvantage.

As commented above, power of regional cooperation should be concretely promoted to fight against trafficking of cultural property. This way would be better than any sole country's effort at combating the trafficking as recognized in a recent case of repatriation. Cambodia has been able to bring back cultural objects previously merchandised on the international art market by its efforts and international cooperation.⁸⁴ In 2021, 30 Khmer antiquities that were taken by American authorities through civil forfeiture procedures in relation to instances involving the unlawful possession of artifacts will be returned to Cambodia by the United States in accordance with the terms of the Memorandum of Understanding between the governments of Cambodia and the United States about the Imposition of Import Restriction on Categories of Archaeological Material of Cambodia.⁸⁵ Both Thailand and the United

⁸² Ibid 15-6.

⁸³ In the *Elgin Marble Case*, the Greek government has requested repatriation of the Parthenon Marbles from the British Museum since 1980. The British Museum has always rejected the request, by claiming the concept of cultural internationalism and stating that the Marbles are not only cultural patrimony of Greece, but also belong to everyone as common heritage of mankind. Additionally, the British Museum claims itself as a universal museum that is open for everyone from all over the world to access, study and appreciate the Marbles. See Roger W. Mastalir, 'A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property under International Law' (1992) 16(4) *Fordham International Law Journal* 1033, 1043.

⁸⁴ Meng Seavmey, *Cambodia and ASEAN to Combat Illegal Trafficking of Cultural Properties* (Web Page, 6 September 2022) <<https://cambodianess.com/article/cambodia-and-asean-to-combat-illegal-trafficking-of-cultural-properties>>.

⁸⁵ Phoung Vantha, *Khmer Artifacts Smuggled out of the Country Years Ago to Be Repatriated by the US Authorities* (Web Page, 9 August 2022) <<https://cambodianess.com/article/khmer-artifacts-smuggled-out-of-the-country-years-ago-to-be-rapatriated-by-the-us-authorities>>. See also UNESCO, *Celebrating Regional Efforts at Combating Trafficking of Cultural Objects in Asia Pacific* (Web

States have cooperated with Cambodia's government to prohibit the entry of Khmer antiquities into these nations and it was found that numerous artifacts have been returned home as a result of either the agreements or international diplomatic cooperation.⁸⁶ This is so true that Thailand is not a destination of trafficking of cultural property, but Thailand often becomes a transitional place. Although Thailand has not yet ratified the UNESCO Convention, Thailand has bilaterally agreed to return cultural artifacts to a number of nations, mostly in the Asia-Pacific area. Like Cambodia, in sum, establishing rules for government-to-government requests and discussions to return cultural objects to Thailand, as confirmed as the state of origin, is one of the mechanisms Thailand uses effectively in this respect.

VI CONCLUSION

Thailand faced difficulties and disadvantages in repatriating cultural property by complying with the international framework. This research suggests that repatriation through bilateral agreements would be more positive for Thailand. The bilateral agreement between Cambodia and Thailand is an ideal that should be applied and extended by Thailand for cooperating with other neighbouring countries, other ASEAN members or other states of origin that espouse cultural nationalism and face the same illicit trafficking difficulties. Such agreements would facilitate the protection of their mutual interests. This is also coherent with the ASEAN way, which strongly supports conciliatory and incremental approaches to establish cooperation through diplomacy. For cooperation with market states or foreign museums espousing cultural internationalism, this research encourages Thailand to obtain their voluntary cooperation by presenting feasible options based on balancing cultural nationalism and internationalism while maintaining any advantages that will aid the success of Thailand's repatriation efforts.

Page) <<https://bangkok.unesco.org/content/celebrating-regional-efforts-combating-illicit-trafficking-cultural-objects-asia-pacific>>.

⁸⁶ Etience Clement, Duong Bich Hanh, and Hangying Li, 'Key Actions Proposed for Effective Implementation of the Conventions' (Conference Paper, Asia-Pacific Regional Conference to Celebrate the 50th Anniversary of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 29-30 June 2021) 32.

References

- Associated Press, 'Chicago Museum to Return Lintel Thais Say Was Stolen', *New York Times* (online), 25 October 1988 <<http://www.nytimes.com/1988/10/25/us/chicago-museum-to-return-lintel-thais-say-was-stolen.html>>.
- Atthakor, Ploenpote, 'Expert Points to Old Trick to Reclaim Lintel from US' *Bangkok Post* (online), 24 August 2016 <<http://www.bangkokpost.com/news/general/1069412/expert-points-to-old-trick-to-reclaim-lintel-from-us>>.
- Baker, Chris and Pasuk Phongpaichit, 'Thammasat, Custom, and Royal Authority in Siam's Legal History' in Andrew Harding and Munin Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press, 2021)
- Caruthers, Claudia, 'International Cultural Property: Another Tragedy of the Commons' (1998) 7 *Pacific Rim Law and Policy Journal* 143.
- Clement, Etience Duong Bich Hanh, and Hangying Li, 'Key Actions Proposed for Effective Implementation of the Conventions' (Conference Paper, Asia-Pacific Regional Conference to Celebrate the 50th Anniversary of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 29-30 June 2021).
- Crossette, Barbara, 'Thais Accuse U.S. of Theft of Temple Art', *New York Times* (online), 10 February 1988 <<http://www.nytimes.com/1988/02/10/world/thais-accuse-us-of-theft-of-temple-art.html>>.
- Gordon, John B, 'The UNESCO Convention on the Illicit Movement of Art Treasures' (1971) 12 *Harvard International Law Journal* 537.
- Hardy, Samuel Andrew, 'Illicit Trafficking, Provenance Research and Due Diligence: The State of the Art', Research Paper UNESCO 2016, 20 March: 3.
- International Criminal Police Commission, 'Works of Art: Database', 30 December 2017 <<https://www.interpol.int/Crime-areas/Works-of-art/Database>>.
- Katsumata, Hiro, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the ASEAN Way' (2003) 25 *Journal of International and Strategic Affairs* 104.
- Kongmalai, Anuchart, 'Ancient Monument and Antique Laws: The Supreme Court's Decision and Attorney-General' (Office of the Attorney General Working Paper, 2015) 18.
- Kraichitti, Sansern, 'The Legal System in Thailand', (1968) 7 *Washburn Law Journal* 239.
- Kraivixian, Tanin, 'Thai Legal History', (1963) 49 *Women Lawyer Journal* 6, 10.
- Leeds, Joe and Chaninat Leeds, *A Summary of Thailand Law and Legal System* (Web Page, New York University Law School, March/April 2020) <<https://www.nyulawglobal.org/globalex/Thailand1.html>>.
- Levine, Alexandra Love, 'The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention' (2011) 36 *Brook Journal of International Law* 751.
- Mastalir, Roger W, 'A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property under International Law', (1992) 16 *Fordham International Law Journal* 1033.
- Merryman, John Henry, 'Two Ways of Thinking about Cultural Property' (1986) 80 *American Journal of International Law* 831.
- Palmer, Geoffrey, 'Perspectives on International Dispute Settlement from a Participant', (2012) 43 *Victoria University of Wellington Law Review* 39.
- Papademetriou, Theresa, 'International Aspect of Cultural Property: An Overview of Basic Instruments and Issues', (1996) 24(3) *International Journal of Legal Information* 270.

- Podesta, Janene Marie, 'Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Underlines Its Goals by Unduly Targeting Market Nations' (2008) 16 *Cardozo Journal of International and Comparative Law* 457.
- Police Office of Thungsaliem, 'History of Luang Poh Sila', 15 February 2018 <<http://tungsaliem.sukhothai.police.go.th/room26.htm>>.
- Prott, Lyndel V., 'The Fight Against Illicit Traffic in Cultural Property: The Importance of Case Studies', (2004) 35 *International Institute for Asian Studies Newsletter* 24.
- Reardon, Patrick, 'Art Institute Agrees to Return Thai Sculpture', *Chicago Tribune* (online), 25 October 1998 <http://articles.chicagotribune.com/1988-10-25/news/8802100130_1_art-institute-thai-government-museum>.
- Reich, Arie, 'Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity' (Bar-Ilan University Public Law and Legal Theory Working Paper No 14-09, 2009).
- Seavmey, Meng, *Cambodia and ASEAN to Combat Illegal Trafficking of Cultural Properties* (Web Page, 6 September 2022) <<https://cambodianess.com/article/cambodia-and-asean-to-combat-illegal-trafficking-of-cultural-properties>>.
- Ter Molen, Larry, 'Art Institute Acted in Good Faith', *Chicago Tribune* (online), 13 September 1988 <http://articles.chicagotribune.com/1988-09-13/news/8801300153_1_thai-press-art-institute-thai-government>.
- Ngamnet Triamanuruck, Sansanee Phongpala, and Sirikanang Chaiyasuta, 'Overview of Legal Systems in the Asia-Pacific Region: Thailand' (A Digital Repository-Overview of Legal Systems in the Asia-Pacific Region Paper No.4, 2004)
- Vantha, Phoung, *Khmer Artifacts Smuggled out of the Country Years Ago to Be Rapatriated by the US Authorities* (Web Page, 9 August 2022) <<https://cambodianess.com/article/khmer-artifacts-smuggled-out-of-the-country-years-ago-to-be-rapatriated-by-the-us-authorities>>.
- UNESCO, *Celebrating Regional Efforts at Combating Trafficking of Cultural Objects in Asia Pacific* (Web Page) <<https://bangkok.unesco.org/content/celebrating-regional-efforts-combating-illicit-trafficking-cultural-objects-asia-pacific>>.
- United Nations, 'Country Classification', 20 September 2017 <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>.

Legislation

- Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand).
- Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931) (Thailand).
- Customs Act B.E. 2560 (2017) (Thailand).
- Decree of the Department of Fine Arts, 8 March 1935, as empowered by Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand).
- Land Excavation and Land Filling Act B.E. 2543 (2000) (Thailand).
- Ministerial Regulation on Conducts of Visitors and Admission Fee on 4 September B.E. 2551 (2008) (Thailand).
- Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010) (Thailand).

International Instruments

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, opened for signature 14 June 2000 (entered into force 14 June 2000).

ASEAN Declaration on Cultural Heritage, 33rd ASEAN Ministerial Meeting, 25 July 2000.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972).