

RECLAIMING MONGYUDOWŎNDO: LEGAL CHALLENGES TO RESTITUTING KOREAN CULTURAL PROPERTY FROM JAPAN AND ALTERNATIVE SOLUTIONS

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ABSTRACT

Mongyudowŏndo, the single most influential Korean landscape painting from the Chosŏn dynasty, currently sits in the library of a private university in Tenri, Nara Prefecture, Japan. The painting, likely seized during the Japanese Invasion of Korea (1592-1598), is one of some 89,000 cultural objects of Korean origin currently located in Japan that have yet to be returned.

This Comment examines the numerous legal barriers to restituting Korean cultural property from Japan. Part II addresses the guiding principles in the restitution of cultural property. It explains that existing international treaties are largely inadequate to oversee such cross-border disputes due to their signatory requirements, lack of self-execution and retroactivity. Part III examines the unique complications involved in bringing a claim in Japanese courts under domestic laws, such as title and heightened protection for nationally designated cultural properties. Accordingly, an alternate method of dispute resolution is required. In Part IV, I propose bilateral negotiations between Japan and South Korea and highlight factors that would contribute to a successful negotiation allowing South Korea to reclaim *Mongyudowŏndo*.

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I. INTRODUCTION

In March 1931, a Korean handscroll painting was unveiled to the public for the first time in centuries at an exhibit by the Tokyo Imperial Household Museum in Ueno Park.¹ Titled *Mongyudowŏndo* (“Dream Journey to the Peach Blossom Land”), the work was painted by fifteenth century court artist An Kyŏn² in 1447 and is recognized as the single most influential landscape painting from the Chosŏn dynasty.³ The artist’s most noted work, *Mongyudowŏndo*, depicts his patron Prince Anpyŏng’s dream, in which the Prince is transported to a utopian land envisaged in a fable by fourth century Chinese poet Tao Qian.⁴ The idyllic scenery, reflecting the Prince’s desire to escape from the realities of a court rife with tension, remained just that: a fleeting dream. Just six years after the painting had been completed, the Prince was assassinated by his own brother who staged a coup and usurped the throne as King Sejo.⁵

The vast majority of the Prince’s personal belongings and collections had been relocated to a Buddhist temple just in time to avoid their destruction in the coup.⁶ From then onward, records of *Mongyudowŏndo*’s whereabouts are largely missing. So how did the painting resurface nearly five centuries later in Japan, almost completely unscathed? A certificate issued by the Japanese government in 1893 was discovered along with the painting, stating that the work belonged to the Shimazu family from Kagoshima

¹ Kyŏng-Im Kim, *Sarajin Mongyudowŏndorŭl Ch’ajasŏ: Anp’yŏngdaegunui Isanghyang, Kŭ T’ansaenggwa Yurang* [In Search of the Missing Mongyudowŏndo: Prince Anpyŏng’s Utopia, Its Inception and Wanderings] 19 (2013).

² Hwi-Chun An, *An Kyŏn*, OXFORD ART ONLINE, <http://www.oxfordartonline.com/groveart/view/10.1093/gao/9781884446054.001.0001/oao-9781884446054-e-7000003067#oao-9781884446054-e-7000003067> [https://perma.cc/9LHA-YU5U].

³ So-Yŏng Lee, *Mountain and Water: Korean Landscape Painting, 1400-1800*, METRO. MUSEUM ART (Oct. 2004), https://www.metmuseum.org/toah/hd/mowa/hd_mowa.htm [https://perma.cc/FHC7-4CNJ]. The Chosŏn dynasty was a Korean dynastic kingdom that lasted from 1392 to 1910. *Id.*

⁴ *Id.*

⁵ KIM, *supra* note 1, at 252.

⁶ Tae-Wan Kim, *Shinbihangwa Sŭlp’ŭmi Mudŏ Nanŭn Segye Yusan* [Former Ambassador Unveils the Secrets of *Mongyudowŏndo*], WŎLGANJOSŎN CHOSUN MONTHLY (Jan. 2014), <http://monthly.chosun.com/client/news/viw.asp?ctcd=E&nNewsNumb=201401100053> [https://perma.cc/73MT-KZJM].

Prefecture in Kyushu.⁷ In addition, an appraisal of the work in 1929 by Naito Konan, professor emeritus at Kyoto University, noted that the painting most likely arrived in Japan as a result of looting from the late sixteenth century Japanese Invasion of Korea.⁸ Kyōng-Im Kim, art scholar and former Director of Cultural Diplomacy at the South Korean Ministry of Foreign Affairs and Trade, closely tracks these records and deduces that Yoshihiro Shimazu, a general who had fought in the Japanese Invasion, likely took the work back to Japan as a spoil of war.⁹ The work was then passed down in the Shimazu family for several generations before it was sold to a businessman in 1928.¹⁰ Since then, *Mongyudowōndo* has passed through many hands.¹¹ Ultimately, Shozen Nakayama, founder of Tenri University, a private university in Nara Prefecture, purchased the work around 1950 and bequeathed it to the school in 1953.¹² The painting has since been kept in Tenri Central Library as one of its many prized works¹³ and retains the designated status of Japan's "important cultural property."¹⁴

Mongyudowōndo is an irreplaceable piece of Korean cultural heritage with unparalleled artistic and historical significance. It reflects the unequivocal distinctive style of the artist An Kyōn, who shaped the direction of the landscape genre and became a model for several generations of landscape painters in Chosōn Korea, ink painters of the Muromachi period (1392-1573) in Japan, and painters across Asia.¹⁵ The painting is also an important historical record foreshadowing the Chosōn dynasty's cultural and political tensions that would end the era of a peaceful reign by King Sejong the Great, often called "Chosōn's Renaissance" period.¹⁶

Due to the painting's significance, *Mongyudowōndo* is one of the foremost mentioned works among some 89,000 other cultural

⁷ *Id.*

⁸ KIM, *supra* note 1, at 16.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Kyōng-Im Kim details the transfer of ownership from the Shimazu family in the 1800s to the latest transaction in 1950 between Ryusendo, a leading antique collector in Tokyo, and Tenri University. See KIM, *supra* note 1, at 374.

¹² *Id.* at 373.

¹³ See *Tracing Korea's Missing Treasures*, AL-JAZEERA (Dec. 1, 2004), <https://www.aljazeera.com/archive/2004/12/2008491326867673.html> [<https://perma.cc/9HUM-4MVC>].

¹⁴ KIM, *supra* note 1, at 363.

¹⁵ Lee, *supra* note 3.

¹⁶ KIM, *supra* note 1, at 380.

objects¹⁷ of Korean origin known to be in Japan that the South Korean government seeks to have returned.¹⁸ Even though the exact location of *Mongyudowŏndo* is known, there are substantial difficulties for South Korea in reclaiming ownership. Many of these issues are prevalent in the global efforts toward cultural property restitution and remain unsolved.

The issue of looting has grown in importance over the last few decades. The conversations that have led to the adoption of relevant principles, declarations, and resolutions, however, predominantly revolve around Nazi-confiscated art or colonial looting that took place outside of Asia.¹⁹ With mainly Western international regimes and leading Western museums directing discussions and guidelines

¹⁷ See, e.g., Mi-Yu Kwŏn, *Korea Ramps up Efforts to Bring Back Looted Treasures*, KOR. TIMES (July 16, 2020), https://www.koreatimes.co.kr/www/culture/2020/07/145_292925.html [https://perma.cc/8FCG-8VNX] (reporting that 81,889 Korean artifacts are located in Japan); Brad Glosserman, *Japan Slams the Door on Stolen Artwork*, JAPAN TIMES, (Dec. 4, 2002), <https://www.japantimes.co.jp/opinion/2002/12/04/commentary/japan-slams-the-door-on-stolen-artwork/#.XKIbwi2ZP-Y> [https://perma.cc/KE3C-X5D3] (referring to statistics provided by the Cultural Properties Administration of Korea); *Statistics*, OVERSEAS KOREAN CULTURAL HERITAGE FOUND. (Apr. 1, 2021), http://www.overseaschf.or.kr/front/comm/htmlPage.do?H_MENU_CD=100302&L_MENU_CD=10030201&SITE_ID=ENG&MENUON=Y&SEQ=106 [https://perma.cc/2Y3Q-9EUN].

¹⁸ See Cho Boo Keun, *Reflections on the Limitations of and Overcoming Measures in the Korea-Japan Agreement of 1965*, in FORUM ON THE RETURN OF KOREAN CULTURAL PROPERTY DISPLACED TO JAPAN DURING OCCUPATION OR WAR 29 (Apr. 27, 2007), https://www.unesco.or.kr/assets/data/report/xGdbTV6WPPrV9zbszJAN6Bx0jm3w8W_2.pdf?ckattempt=1 [https://perma.cc/WLG2-EHLS] (mentioning *Mongyudowŏndo* as an example of Korean art plundered during Japan's invasion of Korea); see also Yoko Hayashi, *The Issue of Korean Cultural Property in Japan Seen from the Perspective of Arts Management*, in FORUM ON THE RETURN OF KOREAN CULTURAL PROPERTY DISPLACED TO JAPAN DURING OCCUPATION OR WAR 64-65 (Apr. 27, 2007), https://www.unesco.or.kr/assets/data/report/xGdbTV6WPPrV9zbszJAN6Bx0jm3w8W_2.pdf?ckattempt=1 [https://perma.cc/WLG2-EHLS] (noting that *Mongyudowŏndo* is the "most important painting in Korean art history").

¹⁹ See Ho-Yŏng Song, *International Legal Instruments and New Judicial Principles for Restitution of Illegally Exported Cultural Properties*, 4 PENN STATE J. LAW & INT'L AFFAIRS, 718, 729-730 (showing that World Wars I and II and the growing interests of east European and Latin American countries in cultural property restitution propelled the drafting of numerous international treaties). See also Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2009 n.13 (2010) (explaining that the 1954 Hague Convention was "a descendent of older laws of war but developed after World War II in response to a new style of war in which cultural property was intentionally targeted by the Nazis").

on restitution,²⁰ there is an ongoing need to address looting and restitution of cultural works in and among Asian nations.²¹ Admittedly, each case has its own “character and history that seem to defy generalization,”²² and there certainly are unique challenges posed by Japan’s laws and Japan’s relations with South Korea that hinder South Korea’s potential claim. And yet, the study of cases in South Korea and other Asian countries seeking restitution of looted cultural property would greatly enhance the international dialogue on shaping further guidelines.

In Part II of this Comment, I introduce the main principles that guide decisions regarding the restitution of cultural property today—cultural nationalism and cultural internationalism—and how these principles are reflected in international treaties. In addition, I argue that these international adjudicatory bodies would not help South Korea in bringing a restitution claim against Japan, mainly under procedural grounds. In Part III, I examine the possibility of bringing a claim in Japanese courts under Japanese domestic laws, which present unique complications such as title and heightened protection of nationally designated cultural properties. Finally, in Part IV, I argue that bilateral negotiations between Japan and South Korea are preferred as an alternative method of dispute resolution. By analyzing the restitution of Korean royal records from Japan’s Imperial Household Agency in 2011, I highlight certain factors that would substantially contribute to a successful negotiation for South Korea to retrieve *Mongyudowŏndo*.

²⁰ *Id.* (noting that after the adoption of the Washington Conference Principles on Nazi-confiscated art in December 1998, numerous international organizations such as UNESCO, the Council of Europe, the International Council of Museums (ICOM) and the American Association of Museums (AAM) have adopted subsequent texts on the matter).

²¹ See Donald MacIntyre, *A Legacy Lost*, TIME (Feb. 4, 2002), <http://content.time.com/time/subscriber/article/0,33009,197704,00.html> [<https://perma.cc/US8Q-QP7L>] (“More than 50 years after the end of World War II, governments and museums in the West are grappling with the legacy of Nazi art looting and are working to restore many treasures to their rightful owners. But the story of Japan’s plunder of Asia and in particular of Korea, where the worst abuses occurred, remains relatively unexplored.”).

²² See John Henry Merryman, *Introduction* to IMPERIALISM, ART AND RESTITUTION 1, 13 (John Henry Merryman ed., 2006).

II. POTENTIAL RECOURSE IN PUBLIC INTERNATIONAL LAW

a. Cultural Nationalism

Scholars have frequently referred to two main principles as governing the issues and decisions on claims by source nations for the restitution of cultural property: cultural nationalism and cultural internationalism. Cultural nationalism is a notion that views works as part of a national cultural “‘patrimony’ or ‘heritage.’”²³ Implied in this theory is that cultural objects have national character, separate from where they may be located or who may possess them. For instance, John Henry Merryman uses the case for the return of the Elgin Marbles to Athens as an example of a common nationalistic argument—“that they belong in Greece because they are Greek.”²⁴ Naturally, this principle is frequently invoked by source nations. As the restitution of cultural property from one country to another inevitably raises multinational issues, several treaties and instruments have formed over the last sixty years that align more closely with one principle than the other. Treaties by the United Nations Educational Scientific and Cultural Organization (“UNESCO”) have tended to favor the cultural nationalism view.

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 Convention”) was the first international regime aiming to prevent illicit trafficking of cultural property in peacetime, such as pillaging and illegal sales.²⁵ The 1970 Convention is generally seen to favor cultural nationalism, evidenced by the emphasis in the Preamble on “national culture” and appreciation of the cultural property in relation to its “origin.”²⁶

²³ *Id.* at 10.

²⁴ *Id.* at 11.

²⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 Convention].

²⁶ *Id.* at pmb. (“[C]ultural property constitutes one of the basic elements of civilization and *national* culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its *origin*, history and traditional setting.” (emphasis added)).

In addition, Article 4(b) of the Convention states that cultural property is that which is “found within the national territory.”²⁷

Although it has the greatest number of signatories out of any global legal instrument on cultural property, the 1970 Convention was not as effective as had been hoped. A major weakness in the Convention was its lack of self-execution. It relied on the signatories to implement the Convention’s provisions on their own through domestic legislation and thus also lacked uniformity across nations.²⁸ For instance, Nigeria’s claim to its Nok statuettes against France, based on the 1970 Convention, was rejected by French courts on the basis that although France had become a signatory in 1997, the Convention was not directly enforceable, and France had not adopted any domestic legislation on it.²⁹ Most importantly, the 1970 Convention is not retroactive: it only allows the member country of origin to request the recovery of cultural property “imported after the entry into force of this Convention in both States.”³⁰ Although Japan ratified the 1970 Convention in September 2002 and adopted legislation to effectuate certain aspects of the Convention,³¹ the laws only have prospective effect.³² The lack of retroactivity of the 1970 Convention completely bars South Korea’s potential restitution claim for *Mongyudowöndo*, a work that has been in Japanese possession for centuries.

The International Institute for the Unification of Private Law (“UNIDROIT”) 1995 Convention on Stolen or Illegally Exported Cultural Objects (“1995 Convention”) was adopted by UNESCO’s General Conference to redress the weaknesses of the 1970 Convention. The 1995 Convention also favors the “cultural nationalism” approach by authorizing a contracting nation to submit requests to another contracting nation to order the return of

²⁷ *Id.* art. 4(b).

²⁸ *Id.* arts. 5, 7, 9.

²⁹ Cornu and Renold, *supra* note 19, at 2.

³⁰ 1970 Convention, *supra* note 25, art. 7(b)(ii) (emphasis added).

³¹ *Acceptance of the Convention on the means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, MINISTRY OF FOREIGN AFFS. OF JAPAN (Sept. 9, 2002) [hereinafter *Acceptance of the Convention*], <https://www.mofa.go.jp/announce/announce/2002/9/0909.html> [<https://perma.cc/HL2T-ZQWB>].

³² See Geoffrey R. Scott, *Spoilation, Cultural Property, and Japan*, 29 U. PA. J. INT’L L. 803, 870 (2008).

a cultural object taken by illicit means.³³ An appointed court decides whether the removal of the object from the territory of a requesting State significantly impairs the physical preservation of the object or the object's significant cultural importance for the requesting State, among many criteria.³⁴ If the court holds that one of the criteria has been satisfied, the cultural object is returned to the requesting nation.³⁵

While providing a concrete framework for recovery, the effectiveness of these provisions is severely limited by the fact that a request can only be heard when *both* parties involved have ratified the 1995 Convention.³⁶ Many art-rich nations such as Japan have not become signatories.³⁷ Japan most likely has not become a signatory as its domestic laws are more lenient to the possessing party by favoring a good faith purchaser's title over the original owner. By contrast, the 1995 Convention disallows the good faith acquisition of stolen or illegally exported cultural properties. As the 1995 Convention presents a conflict to countries like Japan with civil law regimes between domestic law and interpretation under international public law, these countries have found it difficult to join.³⁸ And most significantly, the 1995 UNIDROIT Convention bars claims that are brought more than three years after learning that an object has gone missing and more than fifty years from the time of the theft.³⁹

³³ See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, art. 5 [hereinafter 1995 UNIDROIT Convention].

³⁴ *Id.* art. 5(3).

³⁵ *Id.* art. 5.

³⁶ *Id.* art. 5(1). See Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 299-304 (2007) (explaining the numerous problems that claimant countries face under UNIDROIT, including the absence of many market countries as signatories).

³⁷ Falkoff, *supra* note 36, at 300 n.191.

³⁸ See Geoffrey R. Scott, *The Cultural Property Laws of Japan: Social, Political, and Legal Influences*, 12 PAC. RIM L. & POL'Y J. 315, 330-31 (2003).

³⁹ 1995 UNIDROIT Convention, *supra* note 33, art. 3(3).

b. Cultural Internationalism

By contrast, the principle of cultural internationalism embraces the idea that preserving and enjoying a cultural object wherever it is located, rather than where it originated, is in the global public interest.⁴⁰ The 1954 Hague Convention supports the view that cultural property belongs to all mankind.⁴¹ In recent years, this view has gained popularity among internationally acclaimed museums seeking to retain works against restitution claims by their source countries. In 2002, eighteen major museums across the United States and Europe released a joint statement imploring the retention of the works they have housed and cared for, stating that these objects have become part of the heritage of the possessing nations.⁴² This Declaration on the Importance and Value of Universal Museums also highlights the role that museums have played over the centuries as agents in fostering knowledge and admiration of different cultures and civilizations by making these works widely available.

The argument that these institutions are better equipped to preserve and showcase the artifacts than the countries from which they came is a powerful one. Such abilities of the possessing art-rich nation were a significant factor in the 2009 Paris tribunal decision against a Korean cultural organization's petition seeking the restitution of Chosŏn Dynasty royal archives from the French National Library.⁴³ This approach is thus highly favorable to countries, organizations, and museums that house the cultural properties in defending against restitution claims by source countries.

Due to the ongoing debate between "cultural nationalism" and "cultural internationalism," the definition of ownership in cultural property has stalled in international law. Most importantly, the chief international treaties and instruments on these issues fail to address the needs of source countries that have long been deprived

⁴⁰ Merryman, *supra* note 22, at 12.

⁴¹ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 3511 ("[D]amage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world . . ."). See also Merryman, *supra* note 22, at 12.

⁴² JOHN HENRY MERRYMAN, ALBERT E. ELSÉN & STEPHEN K. URICE, *LAW, ETHICS AND THE VISUAL ARTS* 344 (5th ed. 2007) (referring to the 2002 Declaration on the Importance and Value of Universal Museums).

⁴³ I discuss this case further in Part III of the Comment.

of their cultural heritage by allowing possessors an affirmative defense based on the statute of limitations. For instance, the vast majority of cultural objects of Korean origin located in Japan were seized during the Japanese Invasion of Korea from 1592 to 1598 and the Japanese Colonization of Korea from 1910 to 1945.⁴⁴ For a nation like South Korea, any and all of those potential claims would be barred from recovery merely under procedural grounds.

III. POTENTIAL RECOURSE IN PRIVATE INTERNATIONAL LAW

Having acknowledged the lack of remedy for South Korea's potential claim under public international law, we now turn to the possibility of filing a suit in Japanese courts. Kurt Siehr, a leading scholar on cultural property laws, points to three difficulties with recovery proceedings under private international law: 1) jurisdiction; 2) statute of limitations; and 3) title acquired by limitation or looting.⁴⁵ In addition to these more widely applicable issues, I address the unique challenges posed by South Korea's potential restitution claim against Japan—namely, Japan's heightened legal protections for its designated cultural properties and the 1965 Agreement on Cultural Property between Japan and South Korea.

a. Jurisdiction

Because *Mongyudowŏndo* remains in Japan today, Japanese courts would have jurisdiction over South Korea's repatriation claim. While there used to be no explicit provision in the Japanese Code of Civil Procedure regarding international adjudicatory jurisdiction in civil and commercial matters, the recent large-scale codification in 2011 has filled the gap on such disputes. Article 3-3(iii) provides that a claim on a property may be filed with the Japanese court provided that the subject matter is located in Japan.⁴⁶

⁴⁴ See Scott, *supra* note 32, at 836.

⁴⁵ See Kurt Siehr, *The Protection of Cultural Heritage and International Commerce*, 6 INT'L J. CULTURAL PROP. 304, 305 (1997) (describing several cases in international law in which recovery was denied).

⁴⁶ Kazuhiko Yamamoto, *International Jurisdiction Based on the Location of Property*, 54 JAPANESE Y.B. INT'L L. 311, 312 (2011).

b. Title Under the "Lex Situs" Rule

The principle of *lex loci rei sitae* (law of the place where the property is situated at the time of the transaction), or more commonly referred to as *lex situs*, is almost universally applied in multijurisdictional cases that involve the validity of a transfer of a movable good.⁴⁷ Although the rule is recognized for its advantages of simplicity and efficiency, *lex situs* can produce "disastrous effects"⁴⁸ when applied to countries with civil legal systems such as Japan and Switzerland⁴⁹ that favor a good faith purchaser⁵⁰ over the original owner. *Winkworth v. Christie* is a noteworthy case that demonstrates such effects. In *Winkworth*, Japanese works of art were stolen from the English plaintiff in England, taken to and sold in Italy to a good faith purchaser.⁵¹ The purchaser then delivered the works back to England for an auction sale.⁵² Although the objects had been situated in England prior to the theft, the English High Court in *Winkworth* applied Italian law to determine the validity of the sale, under the *lex situs* rule.⁵³ The English court, considering that the goods were located in Italy when the sale took place and Italian law recognized the good faith buyer's title to the objects, held that the plaintiff-original owner had no legal claim for recovery.⁵⁴

⁴⁷ See Siehr, *supra* note 45, at 306; see also Celia Wasserstein Fassberg, *On Time and Place in Choice of Law for Property*, 51 INT'L & COMP. L.Q. 385, 385 (2002) ("Few choice of law rules are as well established and universal as the [*lex situs* rule]."); Christopher Staker, *Public International and the Lex Situs Rule in Property Conflicts and Foreign Expropriations*, 58 BRIT. Y.B. INT'L L. 151, 164 (1988) ("[T]he number of authorities supporting [the *lex situs*] rule as a rule of private international law are too vast to mention . . .").

⁴⁸ Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111, 130 (2008).

⁴⁹ See Scott, *supra* note 32, at 867 ("[T]he disparate treatment of bona fide purchasers under private law regimes in certain civil law countries such as Japan and Switzerland [is often decisive]." (citations omitted)); Scott, *supra* note 38, at 330 (explaining that many civil law countries such as Japan have notions of private property that make it difficult for them to enter international regimes to protect cultural property).

⁵⁰ A good faith purchaser "gives value for an asset in good faith and without knowledge of adverse claims." *Good Faith Purchaser*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/good%20faith%20purchaser> [<https://perma.cc/T8BQ-VBPC>].

⁵¹ Fincham, *supra* note 48, at 115.

⁵² *Winkworth v. Christie Manson & Woods, Ltd.* [1979] 1 Ch. 496 at 499 (Eng.).

⁵³ *Id.* at 514.

⁵⁴ *Id.* at 500-501.

Under Italian law, it was immaterial that the goods had been acquired through theft as long as the purchaser was unaware of the theft.⁵⁵

As exemplified by *Winkworth*, the *lex situs* rule presents considerable barriers to recovery for original owners of stolen or looted cultural property when the transaction takes place in a nation with civil law traditions, such as Japan. Such laws make it significantly easier for a good faith purchaser to have title passed on to them from the original owner. In other words, “possession often equals title.”⁵⁶ This notion contrasts with the common law principle that, in general, no one can acquire good title from a thief, and that the original owner is favored unless a claim is barred by the running of a statute of limitations. In his analysis of Japan’s cultural property laws, Geoffrey R. Scott explains that the divergent treatment of good faith purchasers in Japan and other civil law countries, as opposed to common law countries, is one of the most significant determinants of private disputes on the matter.⁵⁷

The Japanese Civil Code—the applicable law relating to title of goods bought in good faith—protects the owner of the good “without questioning whether the possessor has a genuine right to the property in question.”⁵⁸ The possessor of an object is presumed to have a legal right over the object.⁵⁹ In addition, the Civil Code provides that a person who has openly, peaceably begun to possess a movable good intending to acquire title and in good faith shall acquire the right over the object immediately.⁶⁰

Due to Japanese laws favoring the good faith purchaser over the original owner of a good, South Korea would face considerable difficulty in claiming title to *Mongyudowōndo*. Should South Korea bring a claim in Japanese courts, which will most likely apply the *lex situs* rule, the court will apply the Japanese Civil Code in deciding the ownership of an object purchased in good faith. Even if *Mongyudowōndo* is proven to have been looted in the Japanese Invasion of Korea, which will be challenging in itself, the painting has already passed through the hands of many purchasers who can quite easily argue that they had bought in good faith. Under Article

⁵⁵ *Id.*; see also Fincham, *supra* note 48.

⁵⁶ Scott, *supra* note 32, at 868.

⁵⁷ *Id.* at 867.

⁵⁸ HIROSHI ODA, JAPANESE LAW at 180 (4th ed. 2021).

⁵⁹ MINPŌ [MINPŌ] [CIV. C.] art. 188 (Japan), translated in THE CIVIL CODE OF JAPAN 49 (Ludwig Lönholm trans., 1898).

⁶⁰ *Id.* art. 192.

192 of the Civil Code, the most recent purchaser of the good, Shozen Nakayama, would have acquired title to *Mongyudowōndo* as soon as he began to acquire the painting “without disturbance . . . in good faith and without fault.”⁶¹ Whether the work had originally been pillaged or not is immaterial: title has been cleansed through the good faith purchase. The *lex situs* rule affirms the existence of the “significant transactional loophole”⁶² in many civil law countries where illicit sale of cultural property may be sheltered, and perhaps is unintentionally, but surely, authorized.

c. Japan's Heightened Protection of Nationally Designated Cultural Properties

Another substantial challenge to South Korea's potential claim for *Mongyudowōndo* is the heightened protection that Japan has established for its designated important cultural properties or national treasures. Japan has one of the most extensive, well-developed cultural property laws in the world. As early as 1871, the Meiji government announced a mandate on protecting cultural objects.⁶³ In 1888, the Provisional Bureau for the Nationwide Investigation of Treasures was established to collect goods for the Imperial Museum.⁶⁴ It was during this period that *Mongyudowōndo* was registered with the Japanese government, in 1893.⁶⁵ In 1929, Japan enacted the National Treasures Preservation Law, which encompassed cultural property owned by both the government and private individuals and expressly forbade the export of national treasures.⁶⁶ In 1933, *Mongyudowōndo* was designated as Japan's “national treasure,” which was the highest designation given to a cultural object.⁶⁷ When the law on the protection of its cultural properties was amended in 1950, the Japanese government retained the “national treasure” status for only a select few pieces and

⁶¹ *Id.*

⁶² Scott, *supra* note 32, at 868.

⁶³ See Scott, *supra* note 38, at 346.

⁶⁴ See Glosserman, *supra* note 17.

⁶⁵ KIM, *supra* note 1, at 17.

⁶⁶ Scott, *supra* note 38, at 348-49.

⁶⁷ KIM, *supra* note 1, at 356.

updated most other objects, including *Mongyudowōndo*, to the status of “important cultural property.”⁶⁸

Even though *Mongyudowōndo* is privately owned by Tenri University, its designation by a national law on cultural property “as belonging to the national heritage” implies that there is more at stake than “the power of an owner over an object”⁶⁹ Such designation represents a collective interest in the object, significantly affecting the freedom of the private owner to dispose of the object or transfer ownership. Thus, even in the unlikely event that Tenri University were to try and voluntarily return *Mongyudowōndo*, the institution will likely face greater forces at play, such as being required to attain official permission by the government. Due to these restrictions, the pertinent laws merit further attention.

Under the 1950 Act on the Protection of Cultural Properties (“1950 Act”), the most up-to-date law on national treasures and important art objects, the Japanese government “designates . . . the [nation’s] most important cultural properties and [restricts] . . . [the] alteration of their existing state, repairs and export.”⁷⁰ Designation as *bunkazai*, or cultural property, means “official recognition of cultural importance.”⁷¹ Each addition to the list is made through a rigorous selection process upon recommendations by scholars and specialists who work with the Agency for Cultural Affairs within the Ministry of Education and the Council for the Protection of Cultural Properties.⁷² The system maintains a three-tier hierarchy in importance for tangible cultural properties.⁷³ “Important cultural properties” are given additional designation, and “national treasures” are awarded the highest rank for being of especially

⁶⁸ *Id.* at 363.

⁶⁹ Cornu & Renold, *supra* note 19, at 8.

⁷⁰ AGENCY FOR CULTURAL AFFS., GOV’T OF JAPAN, PRESERVATION AND UTILIZATION OF CULTURAL PROPERTIES 33, [https://dl.ndl.go.jp/view/download/digidepo_11017642_po_h23_chapter_06.pdf?contentNo=6&alternativeNo=\[https://perma.cc/W2JZ-JG3D\]](https://dl.ndl.go.jp/view/download/digidepo_11017642_po_h23_chapter_06.pdf?contentNo=6&alternativeNo=[https://perma.cc/W2JZ-JG3D]).

⁷¹ BARBARA E. THORNBURY, *THE FOLK PERFORMING ARTS: TRADITIONAL CULTURE IN CONTEMPORARY JAPAN* 55 (1997).

⁷² *Id.* at 55.

⁷³ *Bunkazai Hogo Hō* [Law for the Protection of Cultural Property], Law No. 214 of 1950, art. 27 (Japan) (Japan Ctr. for Int’l Coop. in Conservation, trans.), https://en.unesco.org/sites/default/files/japan_law_protectionproperty_entno.pdf [https://perma.cc/QVT4-3LXM].

“high value from the viewpoint of world culture as are the irreplaceable treasures of the nation.”⁷⁴

This exceptional designation to a foreign artwork like *Mongyudowōndo* can be quite problematic for the South Korean government, as the 1950 Act places additional safeguards to protect its designated works, such as a prohibition on their export.⁷⁵ This provision, however, is not absolute: an exception may be made if the Commissioner for Cultural Affairs grants permission for the object’s export “in recognizing its special necessity for international exchange of culture or for other reasons.”⁷⁶ In addition, the 1950 Act includes an annulment provision, meaning that the designation of a cultural property is not binding forever.⁷⁷

The South Korean government may have a chance at retrieving the painting if it requests the annulment of *Mongyudowōndo* as a “Registered Tangible Cultural Property,” a measure permitted when the object no longer “require[s] measures for preservation and utilization . . . or where there is any other special reason.”⁷⁸ This provision, however, leaves the potential annulment completely at the discretion of the Minister of Education, Culture, Sports, Science and Technology, who has the authority to annul such registration.⁷⁹ Where the Japanese government has classified *Mongyudowōndo* as one of the nation’s “irreplaceable treasures,” the work’s declassification might be difficult to attain, no matter what “special reason” the South Korean government presents.

d. Case Study: Korean Claim for Royal Archives Designated as French Cultural Property

A 2009 decision in Paris dismissing a Korean cultural organization’s petition to seek repatriation of Chosōn Dynasty royal archives from the French National Library precisely illustrates this

⁷⁴ See PRESERVATION AND UTILIZATION OF CULTURAL PROPERTIES, *supra* note 70, at 34 (displaying a diagram of the hierarchy of cultural properties in Japan).

⁷⁵ Bunkazai Hogo Hō [Law for the Protection of Cultural Property], Law No. 214 of 1950, art. 44 (Japan) (Japan Ctr. for Int’l Coop. in Conservation, trans.), https://en.unesco.org/sites/default/files/japan_law_protectionproperty_entno.pdf [<https://perma.cc/QVT4-3LXM>].

⁷⁶ *Id.*

⁷⁷ *Id.* art. 29.

⁷⁸ *Id.* art. 59, ¶¶ 2-3.

⁷⁹ *Id.*

problem. The relevant French law, similar to Japan's 1950 Act, protects *biens culturels* (cultural properties) that form part of the "public domain" and defines them as "property of public interest from the point of view of history, art, archaeology, science or technology."⁸⁰ The Korean Cultural Action group had previously sought the Chosŏn archives' declassification from the French public domain, but the French Minister of Culture had denied the request.⁸¹ Like the annulment provision in Japan's 1950 Act, the French Code dictates that property constituting part of the French public domain would remain so unless "no longer specified for public service or in direct use by the public" and an "administrative act" establishes its declassification.⁸²

Although the manuscripts had been looted during the 1866 French military campaign in Korea, this fact was deemed "irrelevant."⁸³ Rather, considering that the manuscripts had resided in the French National Library ever since, the Paris tribunal held that the records constitute French public property.⁸⁴ The tribunal reasoned that archives belonging to public collections of France are considered to be national treasures since they have been "dedicated to public use."⁸⁵ Thus, the Court dismissed the Korean Cultural Action's argument based in cultural nationalism that there is a "lack of a connection between the Korean royal archives and France" that prevents them from qualifying as French public property.⁸⁶ In addition, the tribunal stated that the fact that the archives are "of

⁸⁰ Code général de la propriété des personnes publiques [CG3P] [General Code on Public Property], art. L.2112-1 (Fr.), <https://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000006164223&cidTexte=LEGITEXT000006070299> [<https://perma.cc/E2H6-RWV9>].

⁸¹ Douglas Cox, "Inalienable" Archives: Korean Royal Archives as French Property under International Law, 18 INT'L J. CULTURAL PROP. 409, 414 (2011).

⁸² Code général de la propriété des personnes publiques [CG3P] [General Code on Public Property], art. L. 2141-1 (Fr.), <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070299&idArticle=LEGIARTI000006361323&dateTexte=&categorieLien=cid> [<https://perma.cc/6YFD-GFLC>].

⁸³ TA Paris, Dec. 18, 2009, D. Jur, No. 0701946 (Fr.), <https://plone.unige.ch/art-adr/cases-affaires/affaire-manuscrits-coreens-2013-france-et-coree-du-sud-1/association-action-culturelle-tribunal-administratif-de-paris-2009/view> [<https://perma.cc/2WMN-6VEU>].

⁸⁴ *Id.*

⁸⁵ *Id.* at 5 (referencing Code du patrimoine [Heritage Code], art. L.111-1 (Fr.), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042657818/ [<https://perma.cc/L3FK-PDCY>] (stating that property belonging to the public collection are considered national treasures).

⁸⁶ *Id.* at 4.

foreign origin does not deprive them of the status of national treasure."⁸⁷

This decision, which focused heavily on French heritage and cultural property laws, to which Japan's bear much resemblance,⁸⁸ gives at least some indication as to the degree of flexibility of interpretation permitted to a domestic court to withhold its designated cultural properties, even when the objects have their origin in another nation, and were acquired by dubious means. In addition, the Paris holding reflects the powerful arguments that a possessing country can make under the cultural internationalism doctrine. The French National Library had held the archives for about 140 years, and "[o]ver time, objects so acquired – whether by purchase, gift or partage – have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them."⁸⁹ In this recognition of a global interest in cultural heritage, the fact that Tenri University has kept *Mongyudowōndo* for nearly seven decades may strengthen Japan's arguments. By housing this work of art, which was displaced from its country of origin since the late 16th century, Japan may argue it has the right to continue preserving and utilizing the work, and thus its status as Japan's "important cultural property" should be maintained.

e. Statute of Limitations

By far, the statute of limitations is the most significant barrier to South Korea in bringing a claim in Japanese courts. Japan's Civil Code allows the genuine owner to reclaim a movable good from a

⁸⁷ *Id.* at 6.

⁸⁸ The Japanese Civil Code in its earliest stages was modeled after the French Code. Although the later version, adopted in 1898 and the present Civil Code, was largely based on German law, scholars have pointed to certain provisions in the Japanese Civil Code that adopt the French approach over German, showing that the influence of French law has remained in the current Code. See HIROSHI ODA, *JAPANESE LAW* 130 (2d ed. 1999) ("In order to enact a new Code in a short time-span, the drafters had to rely on the abortive previous Code. Many provisions of the old Code have been inherited by the new. . . . Thus, while maintaining the façade of being strongly influenced by German law, the legislature at that time kept certain parts of the previous Code which were influenced by the French Code. It is more correct to say that the drafters intended to produce an ideal system by taking the best of German and French Codes.")

⁸⁹ MERRYMAN, ELSÉN & URICE, *supra* note 42, at 344 (2006).

possessor who acquired it in good faith within two years from the date of the loss or theft.⁹⁰ In 2002, the two-year statute of limitations was extended to ten years for the return of cultural property, as part of revisions on the Civil Code to uphold the 1970 UNESCO Convention.⁹¹ Even with this extension, however, the statute would still bar a claim for *Mongyudowŏndo*, removed to Japan over four centuries ago.

f. 1965 Korea-Japan Treaty of Basic Relations

A final complication in South Korea's potential claim for *Mongyudowŏndo* is the 1965 Korea-Japan Treaty of Basic Relations ("1965 Treaty"), the culmination of a previous bilateral negotiation between the two nations. Japan has since frequently invoked this Treaty to argue that the issue of Korean cultural properties located in Japan is settled.⁹² In the years following Korea's liberation from Japanese control in 1945, the two countries engaged in a decade-long series of talks to settle the issues from the Japanese occupation period and to improve diplomatic relations.⁹³ The discussions concluded with the signing of the 1965 Treaty, which for the most part addressed Japan's economic assistance to Korea.⁹⁴ The 1965 Treaty, however, also included an Agreement on Cultural Property and Exchange after considering the status of objects claimed to have

⁹⁰ MINPŌ [MINPŌ] [CIV. C.] art. 193 (Japan), translated in THE CIVIL CODE OF JAPAN 49 (Ludwig Lönholm trans., 1898).

⁹¹ See AGENCY FOR CULTURAL AFFS., *supra* note 70, at 70, ("Among other things, [the Law Concerning Controls on the Illicit Export and Import of Cultural Property] establishes import restrictions of cultural property stolen from a foreign museum by designating it as a Specific Foreign Cultural Property, and a *special extension to ten years of the time period* during which a claim for recovery, based on indemnity payments stipulated in civil law, may be made by victims of theft of Specific Foreign Cultural Properties" (emphasis added)).

⁹² A-Yŏng Im, *Hanil Munhwajaehyŏpchŏng 50-chunyŏn, P'ulliji Annŭn Yuch'ul Munhwajae Kaltŭng Ogura K'ŏlleksyŏnŭn Teoch'ajŭl Su Issŭlkka* [On the 50th anniversary of the Korea-Japan Treaty on Cultural Properties, Unresolved Tensions Remain . . . Can Korea Retrieve the 'Okura Collection'] *Kyŏnghyang Sinmun* (June 21, 2015), http://news.khan.co.kr/kh_news/khan_art_view.html?art_id=201506212153205 [https://perma.cc/5YEF-YJ5M].

⁹³ Yuji Hosaka, *Article 2 of the Korea-Japan Basic Treaty and Japan's Repatriation of Korean Cultural Properties: Reviewing Travaux Préparatoires*, 10 *J. E. ASIA & INT'L L.* 157, 158 (2017).

⁹⁴ Scott, *supra* note 32, at 856.

been taken from Korea to Japan during the colonial period.⁹⁵ Article 2 of the Agreement states as follows: “The Government of Japan shall *turn over* the cultural properties listed in the annex to the Government of the Republic of Korea within six months after this Agreement takes effect.”⁹⁶

At the time, there was considerable friction over the choice of wording to express the restitution of the cultural properties. A statement by Daisuke Matsunaga, a deputy press secretary for Japan’s Ministry of Foreign Affairs, captures the then-state of affairs: “We agree to disagree over the nature of the returns.”⁹⁷ While the Japanese position was that the objects were being returned in the form of a “donation,” the Korean position was that they were a “return,” and ultimately the two governments agreed on the intermediate expression of a “turn over.”⁹⁸ The choice of language was so important, according to Yuji Hosaka, because from an international legal standpoint, the use of the term “return” would have implied the illegality of Japan’s initial removal of Korean cultural properties.⁹⁹ By eventually settling with the neutral term of “turn over,” the Agreement fails to denote any legality issues regarding the initial removals of the objects. This outcome makes future restitution claims by South Korea on the basis of a legal obligation by Japan more strained.

While Japan did return over 1,300 state-owned articles in accordance with the Agreement on Cultural Property and Exchange,¹⁰⁰ the Japanese government has taken the position that the 1965 Treaty has settled all cultural property claims.¹⁰¹ It has on numerous occasions invoked the Agreement to argue that South Korea has no right to bring a claim.¹⁰²

⁹⁵ Scott, *supra* note 32, at 856 n.183.

⁹⁶ *Munhwajae Mit Munhwahyömyöge Kwanhan Ilbon'gwa Han'gukkan Hyöpchöng* [Korea-Japan Agreement on Cultural Property and Cultural Cooperation], Japan-S. Kor., Dec. 18, 1965, http://www.kr.emb-japan.go.jp/rel/r_paper/r_paper_050610_5.html [<https://perma.cc/2KAT-M5RX>] (emphasis added).

⁹⁷ MacIntyre, *supra* note 21.

⁹⁸ Hosaka, *supra* note 94, at 167.

⁹⁹ *Id.* at 166.

¹⁰⁰ Im, *supra* note 93.

¹⁰¹ *Id.*

¹⁰² In an effort to retrieve the Okura Collection from the Tokyo National Museum – comprising of no less than 2,200 artifacts amassed from Korea, taken to Japan in the earlier 20th century and registered as Japan’s National Treasure, a

Japan's argument that the Agreement limits future restitution claims by South Korea may not, however, apply to *Mongyudowŏndo*. Minutes from meetings and discussions leading up to the final Agreement show that the "turn over" is only meant to apply to Japan's "state-owned" Korean cultural properties.¹⁰³ The matter of returning privately owned properties was not settled in the Agreement and was left open to further discussion.¹⁰⁴ As a result, we can glean from the negotiation history and the omission of "privately owned properties" in the final text of the Agreement that Japan and South Korea had intended to settle only on Japan's "state-owned properties." This reading would strengthen South Korea's argument that the Agreement's alleged barriers do not apply to *Mongyudowŏndo*, a privately owned work.

In sum, although Japanese courts would have jurisdiction, and the restrictions posed by the 1965 Treaty arguably do not apply to *Mongyudowŏndo*, South Korea faces too many challenges to have a successful restitution claim through civil litigation. Not only does the statute of limitations on claims for the return of cultural property limit South Korea's claim, Japan's special domestic laws on property ownership and cultural property protection present additional obstacles.

Korean civic group had filed for an injunction to stop the Museum from exhibiting the Collection. In response, the Tokyo District Court opined that "this issue has been completely and finally settled through the 1965 Korea-Japan Treaty, and thus, no duty to return [the Collection] remains." *Id.* See also Byŏnjongdokam, *Tok'yo Kungnippangmulgwan Sojang Ogura K'olleksyŏn Toech'atki Sosong P'aeso* [Claim to Retrieve the Okura Collection from the Tokyo National Museum Dismissed], HYEMUNDATK'ŌM WISDOM GATE (May 26, 2015), <https://wisdomgate.tistory.com/entry/도쿄-국립박물관-소장-오구라-컬렉션-뒤찾기-소송-패소> [<https://perma.cc/FC5R-4E32>].

¹⁰³ Hosaka, *supra* note 94, at 167.

¹⁰⁴ *Id.* at 173-74 (in a request to return cultural properties from January 9, 1965, the Ministry of Education of the Republic of Korea wrote, "[f]or privately owned properties, difficulties are anticipated, but the return will be certainly demanded"); see also Discussion on the Subcommittee on Cultural Properties, Doc. No. 581 (Mar. 6, 1965) (Jap.), providing: "If [the return of privately owned cultural properties] is not resolved in the Subcommittee on Cultural Properties in the future, it is to be decided by the Prime Minister, and privately owned properties could be considered with regard to cultural properties."

IV. ALTERNATIVE DISPUTE RESOLUTION: SUGGESTING BILATERAL NEGOTIATIONS

As South Korea currently has no legal recourse in public international law or private law, it must explore alternative means of settling conflicts of interest to reclaim *Mongyudowŏndo*. Methods such as bilateral negotiations and treaties have become increasingly popular in recent decades for countries without a strong legal restitution claim.¹⁰⁵ Alternative dispute resolution allows for consideration of a moral argument to return works extremely valuable to a nation's heritage, particularly when the work was removed during a period of colonialism.¹⁰⁶ A claiming nation can also make a persuasive political argument to induce the return of a cultural object as a gesture of good will.¹⁰⁷

A successful claim will carefully balance both nationalistic and universal arguments.¹⁰⁸ "Even the most persuasive ethical argument for restitution . . . must be accompanied by an appeal to [cultural] nationalism and universalism," notes Paige Goodwin in her inquiry of restitution methods for looted Flemish art in French museums.¹⁰⁹ As a source nation's nationalistic argument—that an unparalleled Korean painting belongs in Korea—is rather straightforward, this section of the Comment will focus on ways to counter universalistic arguments against restitution of a work to its source nation. By satisfying the three key principles underlying cultural internationalism—1) preservation, 2) truth, and 3) access¹¹⁰—and utilizing additional bargaining factors, South Korea

¹⁰⁵ See Cornu & Renold, *supra* note 19, at 12 (discussing successful privately negotiated restitution agreements between the Republic of Italy and American museums, as well as an agreement following mediation between the Swiss cantons of Saint-Gall and Zurich); see also, e.g., Paige S. Goodwin, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 686 ("Because private law generally favors current possessors . . . most nations prefer formal negotiation in heated cultural disputes.").

¹⁰⁶ Cornu & Renold, *supra* note 19, at 3.

¹⁰⁷ See MERRYMAN, ELSÉN & URICE, *supra* note 42, at 339 ("[M]useum curators or archaeologists . . . may be professionally interested in having good relations with, and acquiring or retaining access to sites and institutions in, the source nation.").

¹⁰⁸ *Id.*

¹⁰⁹ Goodwin, *supra* note 105, at 686.

¹¹⁰ Merryman, *supra* note 22, at 12 (highlighting these three principles as "clearly . . . applicable to the restitution dialog").

will have increased chances at a successful negotiation for *Mongyudowŏndo's* restitution.

The 1954 Hague Convention, supporting the view that cultural property belongs to all mankind, encompasses “object-oriented” principles that prioritize a cultural property’s 1) preservation (from destruction and damage); 2) truth (information or insight from the study of the object); and 3) access (to scholars and the public for study and enjoyment).¹¹¹

a. Preservation

The concern for failed restoration or inappropriate alteration of Korean cultural property by foreign institutions in other art-rich nations greatly strengthens South Korea’s argument. A leading conservation expert of South Korean artworks, Chi-Sŏn Park, has noted that Korean paintings have often been altered while abroad to reflect Chinese or Japanese styles due to lack of appreciation of Korean art and culture.¹¹² Due to a dearth of specialists in Korean culture at overseas museums and institutions, many Korean artifacts located abroad have been repaired by experts of other Asian regions, and are often “distorted during the restoration process.”¹¹³

While leading museums and institutions in art-rich nations emphasize that the removal of these cultural artifacts would compromise the preservation and study of these pieces, the opposite has often been true for Korean artifacts. In 2010, the Los Angeles County Museum of Art (“LACMA”) consulted Park in art conservation to restore *Yŏngsanhoesangdo*, a late Chosŏn-era Buddhist painting that was presumed to have been looted during the 1950-1953 Korean War.¹¹⁴ LACMA had invited Park to restore the painting, which had been cut into six pieces and was exhibited that way, to its original shape.¹¹⁵ LACMA has since returned the painting to the Chogyŏ Order of Korean Buddhism this past June.¹¹⁶

This argument is particularly relevant to *Mongyudowŏndo's* restitution. Kyŏng-Im Kim’s painstaking study of the painting’s

¹¹¹ *Id.*

¹¹² Kwŏn, *supra* note 17.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

historical records show that the work was likely taken apart and reassembled in a way different from its original form.¹¹⁷ In a 1929 appraisal of the work, the painting and the set of 20 celebratory poems, handwritten by Prince Anpyŏng as well as leading politicians and scholars, were connected next to each other in one piece.¹¹⁸ In a photograph of the work taken two decades later, however, the order of certain of these poems had changed, perhaps showing that the work had been taken apart into pieces as it changed hands numerous times, and put back together while in Japan.¹¹⁹ Additionally, several parts of the writing have been severely damaged.¹²⁰ South Korea may argue that its own conservationists are best equipped to restore and preserve the painting to its original form and style, and it would be in the international interest to do so for such a significant work of art.

b. Truth (Research)

Art-rich possessing nations also widely argue that housing the cultural object in their museums and institutions allows for better study of the object and its context.¹²¹ Thus, it matters that the claimant is also a developed, art-rich nation that can properly preserve its cultural property once restituted.¹²² In the case of Japan's restitution of 1,205 Chosŏn royal records to Korea in 2011, South Korea could have argued strongly that it could better preserve or study the archives than Japan's Imperial Household Agency, which had failed to even identify the objects during the 1965 Treaty.¹²³ The archives did not come to light until a private Korean

¹¹⁷ KIM, *supra* note 1, at 364.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 365.

¹²⁰ *Id.*

¹²¹ See Merryman, *supra* note 22, at 12 (mentioning truth, "the information and insight that can be derived from the study of object and contexts," as one of the principles applicable to restitution).

¹²² See Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 647 (2007). It is noteworthy that the success to every claim has its own incidental requirements. Even Briggs admits that this model cannot easily be replicated in other situations. *Id.* at 645.

¹²³ Si-Soo Park, *Royal Books Return Home from Japan*, KOR. TIMES (Dec. 6, 2011), http://www.koreatimes.co.kr/www/news/nation/2011/12/116_100286.html [https://perma.cc/J92Z-LEBY].

researcher discovered their identity on his visit to the Agency in 2001.¹²⁴

Mongyudowŏndo offers ample opportunity for the study of not only the landscape genre, but also the historical, social, literary and political analysis of the poems accompanying the painting. Similar to the preservation argument, South Korea can convincingly argue that the nation's museums can collaborate with unparalleled art and literary experts¹²⁵ on the Chosŏn dynasty that can engage in dedicated study of the work.

c. Access

One of the strongest internationalistic arguments against restitution is that the possessing nation's museum or institution assures public access to the valuable work of art.¹²⁶ Tenri Central Library, where the painting is located, however, only puts *Mongyudowŏndo* on exhibit once a year,¹²⁷ and South Korea may suggest that the restricted public access for study and enjoyment substantially deprives the international public of a rich cultural heritage. When Tenri Library lent *Mongyudowŏndo* to the National Museum of Korea for a scant nine days in 2009, crowds stood in line for up to three hours to see the famed work.¹²⁸ There was such overwhelming demand that the museum unfortunately had to restrict individual viewing to a minute each.¹²⁹ When a possessing nation offers limited access to an important cultural property that would be much more widely viewed and visited in the claiming nation, the latter can convincingly argue this prong of the internationalism argument.

¹²⁴ *Id.*

¹²⁵ For instance, Hwi-Chun An, professor emeritus of archaeology and art history at Seoul National University and Director of the Overseas Korean Cultural Heritage Foundation, is an unmatched expert in the field.

¹²⁶ See generally Goodwin, *supra* note 105 (illustrating the cases of the Elgin Marbles and the Italy-Met Accord).

¹²⁷ Cho, *supra* note 18, at 56.

¹²⁸ See Chŏng-Chae Lee, *Ilbone Ppaetkin Munhawjaae Ch'ajaonŭn Pŏp* [How to Have Cultural Property Restored from Japan], CHUNGANGILBO JOONG-ANG DAILY (Aug. 17, 2010), <https://news.joins.com/article/4390980> [<https://perma.cc/2DKJ-UT3L>].

¹²⁹ *Id.*

d. Cultural Cooperation Measures

In his analysis of models of restitution in Germany, Russia and Ukraine, Wolfgang Eichwede recognizes the difficulties of a source nation in recovering cultural property from the possessing nation when there is an “asymmetry of possession.”¹³⁰ This asymmetry, Eichwede poses, presents a need for bargaining in order for the source nation with significantly smaller bargaining power to recover its cultural objects. Pragmatically, “one must offer something to the other side in order to get something oneself.”¹³¹ Scholars have suggested reconciliatory gestures such as exchange of similarly important cultural property of which the source nation possesses in more than a single quantity or reaching a loan agreement.¹³²

In fact, the failed claim by the Korean Cultural Action organization for the Chosŏn Dynasty archives from the French National Library – discussed earlier in this Comment – likely would have had greater success if the recovery had been sought through such an exchange or other cultural cooperation measures. Marie Cornu and Marc-André Renold cite the famed 2006 Italy-Met Accord, the agreement by the Metropolitan Museum of Art in New York to pass back the Euphronios Krater to Italy, as an instance of a successful exchange.¹³³ In exchange for the restitution, the Italian authorities agreed to facilitate loans to the Met of “cultural assets of equal beauty and historical and cultural significance to that of the Euphronios Krater” starting two years later.¹³⁴ The Korean case for the Chosŏn records in France resulted in a deeply dissatisfying compromise for both nations: France retained title to the books and returned them to South Korea conditional on a five-year renewable loan.¹³⁵ The reverse situation would have been a much better deal for either nation: South Korea could have bargained for reacquisition of title to the Chosŏn records and, in exchange, 1) offered loans of Korean cultural assets of equal significance to the

¹³⁰ See Wolfgang Eichwede, *Models of Restitution (Germany, Russia, Ukraine)*, in *SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 216, 217 (Elizabeth Simpson ed., 1997).

¹³¹ *Id.* at 217.

¹³² Cornu & Renold, *supra* note 19, at 4, 8.

¹³³ *Id.* at 19.

¹³⁴ *Id.*

¹³⁵ See generally Cox, *supra* note 82 (analyzing the legal debate between France and Korea).

French National Library, or 2) retained the Chosŏn records in Korea for a few years for preservation and research purposes, and reoffered the records in a better condition to the French National Library as renewable loans.

This need for a bargaining chip seems less relevant in the context of Korea-Japan negotiations on cultural property, however. When examining the history of Japan's restitution of Korean cultural objects over the last century, it is evident that when Japan returns cultural objects to Korea, it returns them with no strings attached.¹³⁶ The Korea-Japan exchanges on cultural property contrasts with South Korea's negotiations with Western nations, which often seek conditions, such as a loan agreement or the production of replicas.¹³⁷

e. Timing and Publicity

i. Case Study: Korea-Japan Treaty on Chosŏn Royal Archives

Although these unsatisfactory compromises are less likely in Korea-Japan negotiations for the restitution of cultural property, it is important to assess the factors influential in making a deal happen at all. Japan's restitution of 1,205 Chosŏn royal records in 2011 – the nation's largest restitution to South Korea since the 1965 Treaty – may provide helpful guidance in gleaning additional factors that would strengthen South Korea's bargaining power, including timing and publicity.¹³⁸

The Chosŏn archives had been seized in 1922 by Japanese colonial government officials and had since been kept in Japan's Imperial Household Agency until their restitution to South Korea in

¹³⁶ See generally Press Release, Overseas Korean Cultural Heritage Found., Main Log of the Last 100 Years of Cultural Property Restitution (June 27, 2014), <http://www.overseaschf.or.kr/> [<https://perma.cc/J7QE-YFSM>] (recording all major restitutions of Korean cultural property from foreign countries, institutions or private individuals from 1915 to 2014).

¹³⁷ See, for example, a German monastery's return of 21 pieces of late-Chosŏn Dynasty artwork in the form of a permanent loan agreement in 2005, conditioned on Korea's production of copies of the artworks for the German monastery. *Id.*

¹³⁸ See generally Briggs, *supra* note 122 (ascribing Italy's bargaining power in restitution matters to its willingness to investigate and prosecute those accused of dealing in misappropriated Italian art, and to withhold art loans from foreign museums reluctant to negotiate).

2011.¹³⁹ The negotiation process for the royal records was much more contrived than it would be for *Mongyudowŏndo* because the records were Japanese “state-owned properties.”¹⁴⁰ The Japanese government has frequently held the position that the restitution of Japan’s state-owned properties of Korean origin was settled in the 1965 Treaty. In fact, a Japanese National Diet¹⁴¹ member raised this issue in a 2011 bilateral meeting of assembly representatives¹⁴² during the negotiations for the archives. In retrospect, South Korea could have argued that these royal records were not bound to the restrictions of the Treaty because they were not contemplated at the time, nor were they included among the cultural properties listed in the annex to be turned over. The records’ existence in Japan had been unknown until their discovery and recognition for what they were much later, in 2001. South Korea, however, did not take that route.

Despite the eventual restitution of the records, South Korea had to overcome numerous hurdles due to the Japanese position on the Treaty. By acquiescing to the alleged restrictions of the 1965 Treaty on the restitution of state-owned cultural properties, members of the South Korean government paid numerous visits to leaders of Japanese political parties and ultimately persuaded Japan’s House of Representatives’ Committee on Foreign Affairs to draft a special bilateral treaty on the royal archives.¹⁴³ Toward the end of the negotiations, the two governments engaged in another round of tug-of-war on the choice of wording to describe the restitution,¹⁴⁴ reminiscent of the heated talks over the same issue in the 1965

¹³⁹ Danielle Demetriou, *Japan Returns Looted South Korean Documents to Homeland*, TELEGRAPH (Dec. 6, 2011), <https://www.telegraph.co.uk/news/worldnews/asia/japan/8937503/Japan-returns-looted-South-Korean-documents-to-homeland.html> [https://perma.cc/Z26S-2NDL].

¹⁴⁰ Hosaka, *supra* note 94, at 167.

¹⁴¹ Japan’s bicameral legislature.

¹⁴² Sang-Kŭn Lee, *Ko Ihaebong Ŭiwŏn’gwa Ilbon Wangshil Sojang Chosŏnwangshirŭigwe Hwansue Ŏlk’in Twisyae gid’ŭl* [The Late Hae-Bong Lee and Previously Undisclosed Discussions on the Return of Uigwe Possessed by the Japanese Imperial Household], CHOSUNPUB (Aug. 16, 2016), <http://pub.chosun.com/client/news/viw.asp?cate=C03&mcate=m1004&nNewsNumb=20160821174&nidx=21220> [https://perma.cc/XS2C-WPPY].

¹⁴³ *Id.*

¹⁴⁴ Jong-Gu Yun, 日 Pulbŏppanch’ul Tosŏ 1205 Ch’aek Toraonda [1,205 Records Illegally Taken to Japan to Return], Dong-a Ilbo (Nov. 9, 2010), <https://www.donga.com/news/Society/article/all/20101109/32452223/1> [https://perma.cc/P7VL-RZAT].

Treaty. While the South Korean government strongly argued for the word “return,” the Japanese government rejected it due to the word’s legal implications,¹⁴⁵ and the two parties settled on the final neutral term of “deliver.”¹⁴⁶ Thus, while the South Korean government did consummate the deal, the terms they negotiated failed to denote anything beyond that 1) the 1965 Treaty terms were “completely and finally settled”¹⁴⁷ and 2) there were legality issues regarding the 1,205 records’ initial removal from the country. Still, after a five-year-long effort, Japan handed both the physical records and their title over to South Korea.¹⁴⁸

While the restitution of the records to South Korea falls short of an outright success for the nation, the deal is noteworthy because of the significant odds against its consummation. It is nearly unheard of that the Japanese government would deliberate so much on transferring Korean cultural property in its possession and go so far as to pass a bill to facilitate such a restitution. Such extreme unlikelihood suggests that there are powerful factors underlying the deal that may be helpful in a future negotiation for *Mongyudowŏndo*.

First, the timing of initiating the negotiation is central to its success. Many major negotiations leading to restitution of cultural property are tied to bilateral or multilateral events or visits by a political leader in one nation to another. The year 2011 was the centenary of Japan’s annexation of the Korean Peninsula:¹⁴⁹ to honor this symbolic year and as a gesture of good will, Japan’s previous prime minister Naoto Kan had pledged the return of these books.¹⁵⁰ Korea-Japan discussions for the restitution of the records located in Japan had begun a year earlier, through an Asia-Pacific Economic Cooperation Summit Meeting in 2010.¹⁵¹ If South Korean

¹⁴⁵ Hosaka, *supra* note 94, at 166.

¹⁴⁶ Tosŏe Kwanhan Ilbon’guk Chŏngbuwa Taehanmin’guk Chŏngbu Kanŭi Hyŏpchŏng [Japan-Korea Treaty on the Records], Japan-S. Kor., Nov. 14, 2010, https://www.mofa.go.jp/mofaj/gaiko/treaty/pdfs/shomei_66_k.pdf [<https://perma.cc/E278-Y6ND>]; *see also* Jong-Gu Yun, *supra* note 144.

¹⁴⁷ Byŏnjongdokam, *supra* note 102.

¹⁴⁸ Hyemun, Ilbon Chungŭiwŏn Hanil Tosŏhyŏpchŏng Pijune Chŭumhayŏ [On the Japanese House of Representatives’ Ratification of the Korea-Japan Treaty on Archives], Han’gyŏrye (Apr. 28, 2011), <https://www.hani.co.kr/arti/475375.html> [<https://perma.cc/K8ZY-S552>].

¹⁴⁹ Demetriou, *supra* note 138.

¹⁵⁰ *Id.*

¹⁵¹ Press Release, *Munhwajaech’ŏng* Cultural Heritage Admin., *Ilbon Kungnaech’ŏng Pogwan Han’guktosŏ 1,205 Ch’aek Panhwan* [The Return of 1,205

government officials find an opportune timing to bring up the issue of *Mongyudowŏndo*'s restitution at a visit by or to a Japanese political leader or at a significant political or economic summit, they will likely have better chances of a successful negotiation.

The second factor is, in fact, closely tied to the first: raising publicity both domestically and internationally on the displacement of the cultural object. For instance, publicity was raised naturally through the incredible timing of negotiating for the Chosŏn records on the centenary of Japan's annexation of Korea. Korean citizens, foreign media and international organizations alike closely followed the negotiation process and watched how Japan would return the objects. The availability of large-scale publicity is a central factor, as it would induce Japan to make a more generous gesture of good will. Not only is Japan a signatory to the 1970 UNESCO Convention,¹⁵² it has also been actively engaged in cultural heritage preservation activities abroad, such as establishing the Japanese Trust Fund for the Preservation of World Cultural Heritage within UNESCO.¹⁵³ A refusal or hesitation to exercise its moral duty to return cultural objects to one of its previous colonies when the global community is watching would perhaps portray a conflicting image that Japan would rather avoid. Additionally, *Mongyudowŏndo* has already been in the international spotlight on numerous occasions. Foreign scholars and media have frequently cited the work. Tenri University has lent the work to Korea on three occasions for exhibitions: in 1986 to the National Museum of Korea, in 1996 to Hoam Museum, and most recently in 2009 to the National Museum of Korea to celebrate the centenary of the first Korean museum opening.¹⁵⁴ Each exhibit generated huge audiences, a bittersweet reminder for Korean citizens of their rich cultural heritage that they could not readily access.¹⁵⁵ Despite their brevity, the exhibits led to immense publicity with the Korean population.

Raising publicity with the Japanese and global population may be a harder task, and South Korea can explore creative tools to produce such outcomes. For instance, K-pop has increasingly gathered attention as the nation's "unlikely go-to champion for

Korean Archives Kept at the Japanese Imperial Household Agency] (Nov 14, 2010), http://www.cha.go.kr/newsBbz/selectNewsBbzView.do?newsItemId=155696164§ionId=b_sec_1&mn=NS_01_02 [<https://perma.cc/2X7T-V6WD>].

¹⁵² *Acceptance of the Convention*, *supra* note 31.

¹⁵³ Scott, *supra* note 32, at 857-58.

¹⁵⁴ KIM, *supra* note 1, at 379.

¹⁵⁵ *Id.*

diplomatically tricky situations.”¹⁵⁶ With K-pop stars now accompanying the South Korean president on international state visits, including a visit to Pyŏngyang,¹⁵⁷ K-pop has become more than just a music genre and may prove to be an unexpected but highly effective tool for Korea’s cultural diplomacy.¹⁵⁸ With Hallyu, the Korean Wave, having spread across Japan since the late 1990s¹⁵⁹ and now well on its Third Wave,¹⁶⁰ a Korean celebrity’s single mention of the Korean cultural object on social media or a creative collaboration engaging with the artwork could be the quickest, most effective method of spreading publicity in Japan and elsewhere.

Should *Mongyudowŏndo* safely return home—by good fortune and successful negotiation—what next? The Overseas Korean Cultural Heritage Foundation (OKCHF) comments that by holding fine exhibitions of restituted works, South Korea can “set an example for how returned cultural heritage should be treated in Korea”¹⁶¹ in the hopes that they would encourage further restitutions by foreign nations. “But who will be willing to do that if no one takes good care of them?” OKCHF Chairman Hwi-Chun

¹⁵⁶ A-Rin Kim, *When K-Pop Meets Diplomacy: 5 Key Moments*, KOR. HERALD (Jun. 29, 2018), <http://www.koreaherald.com/view.php?ud=20180629000695> [<https://perma.cc/7R6K-P9GD>].

¹⁵⁷ *Id.*

¹⁵⁸ See Gunjoo Jang & Won K. Paik, *Korean Wave as Tool for Korea’s New Cultural Diplomacy*, 2 ADVANCES APPLIED SOCIO. 196 (Sept. 2012) (analyzing K-pop’s influence on Korea’s political and diplomatic leverage). Consider additionally famed K-pop group BTS delivering remarks at the 75th United Nations General Assembly in 2020. Press Release, UNICEF, *BTS Heartfelt Message to Young People at UNGA* (Sept. 23, 2020), <https://www.unicef.org/lac/en/BTS-LoveMyself> [<https://perma.cc/XLK7-6H9E>]. The group was also invited to the United Nations headquarters in 2018 to speak at the launch ceremony for Generations Unlimited, a global partnership by the United Nations Children’s Fund (“UNICEF”). Press Release, UNICEF, *We Have Learned to Love Ourselves, So Now I Urge You to “Speak Yourself”* (Sept. 24, 2018), <https://www.unicef.org/press-releases/we-have-learned-love-ourselves-so-now-i-urge-you-speak-yourself> [<https://perma.cc/QQ5V-7SZP>].

¹⁵⁹ Chi-Won Park, *Hallyu Resurges in Japan Amid Diplomatic Rift*, KOR. TIMES (July 24, 2020), https://www.koreatimes.co.kr/www/art/2020/07/398_293277.html [<https://perma.cc/7MAS-YRAG>].

¹⁶⁰ Eun-Yŏng Kim, Kyŏng-Mi Lee and Hee-Un Hahm, *‘Third Korean Wave’ Becomes Part of Everyday Japanese Life*, KOREA.NET (May 18, 2018), <http://www.korea.net/NewsFocus/Society/view?articleId=159139> [<https://perma.cc/NXA9-BR3Y>].

¹⁶¹ Chi-Sook Pae, *Exhibition Highlights Need for Good Use of Returned Heritage*, KOR. HERALD (Nov. 25, 2013), <http://www.koreaherald.com/view.php?ud=20131125000810&mod=skb> [<https://perma.cc/QQ8L-4SUN>].

An asks.¹⁶² This challenge reminds us that a rush to have cultural properties restituted will have little meaning if they return to their homeland only to be forgotten. Leading conservationist Chi-Sŏn Park further notes that Korean artifacts can promote better appreciation and interest for Korean art and culture in their respective overseas locations, rather than return home and potentially sit in museum storage spaces after the initial exhibit celebrating their return.¹⁶³ Transferring ownership of the work to Korea, having the work returned temporarily for proper preservation and research, then subsequently loaning it back to overseas institutions in better condition could be the best outcome for the source nation in promoting its cultural identity and heritage.

V. CONCLUSION

In this Comment, I have aimed to address the merits of a potential restitution claim by South Korea for the acclaimed *Mongyudowŏndo*. International regimes fail to provide a remedy largely due to the statute of limitations. Although South Korea would encounter a similar issue by bringing a suit in Japanese courts, the unique challenges posed by Japanese domestic laws on the protection of its designated cultural properties and the 1965 Korea-Japan Treaty would present additional barriers. And finally, I have recommended bilateral negotiations as an alternative method of dispute resolution. Proper timing, publicity and a showing of South Korea's ability to preserve, facilitate research, and increase access to its restituted works can substantially add to the success of such negotiations. With these factors – and patience – South Korea may successfully reclaim *Mongyudowŏndo*, one of the nation's most renowned and beloved artworks of all time.

¹⁶² *Id.*

¹⁶³ Kwon, *supra* note 17.