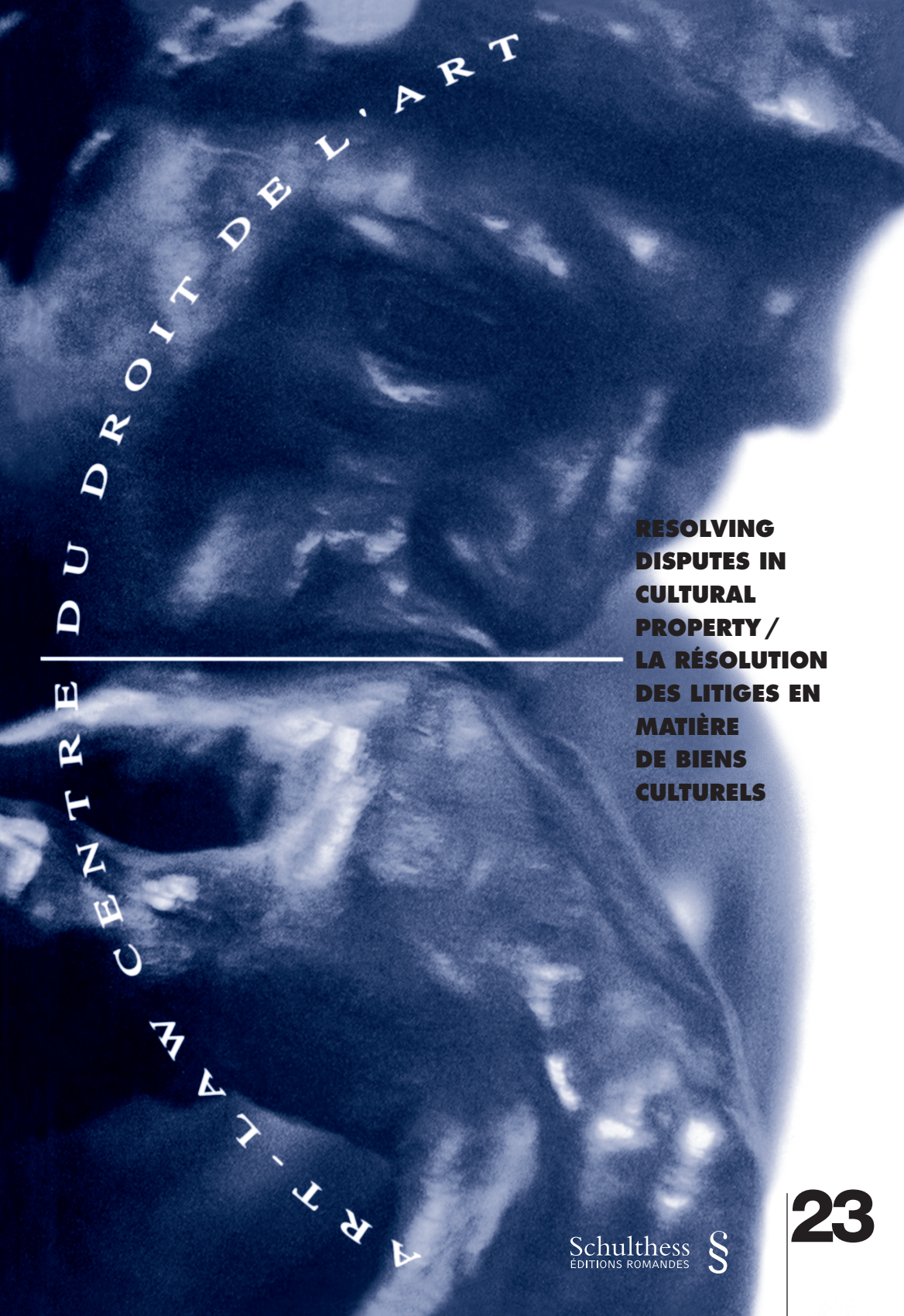
Resolving disputes in cultural property = La résolution des litiges en matière de biens culturels

Renold, Marc-André Jean (ed.); Chechi, Alessandro (ed.); Bandle, Anne Laure (ed.)



RESOLVING DISPUTES IN CULTURAL PROPERTY / LA RÉSOLUTION DES LITIGES EN MATIÈRE DE BIENS CULTURELS

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ÉDITIONS ROMANDES

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Our special thanks go to Valérie Leuba for the enthusiastic and efficient organisation of the conference, to Malorie Buttler for the tangible help in the revision of this publication and to Raphaël Contel for his invaluable intellectual input. We are also particularly grateful to the Swiss National Science Foundation and the Swiss Federal Office for Culture for the financial support.

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PIERRE GABUS*

Préface

Traditionnellement, les litiges relatifs à des biens culturels sont résolus par la voie judiciaire. Toute société démocratique offre en effet à sa population son « troisième pouvoir » et il est donc bien normal que le citoyen ait recours à ce système.

Selon des règles de procédure bien établies, le pouvoir judiciaire assure à chaque partie l'égalité des armes. De plus, le procès étatique aboutit à un jugement qui applique les règles de droit. Ces règles sont par définition « justes », puisqu'elles sont le résultat d'un processus démocratique qui a cherché à offrir la solution la plus adéquate et la plus équitable dans une situation donnée.

Cependant, depuis quelques années, des voies alternatives de réglementation des litiges se sont développées, telles que l'arbitrage, la médiation ou la conciliation. Il est dès lors important de s'interroger sur la légitimité et sur l'efficacité de ces voies alternatives au regard de la voie étatique.

Ces questions sont d'actualité. En effet, les conflits concernant la propriété, la restitution, l'authenticité ou encore l'évaluation des biens culturels sont nombreux et ils défrayent souvent la chronique.

Les méthodes alternatives de résolution des conflits en matière de biens culturels ont été au cœur des débats de la journée d'étude organisée en novembre 2011 par la Fondation pour le droit de l'art et le Centre du droit de l'art de l'Université de Genève. Les modes alternatifs de résolution des conflits y ont été présentés comme de nouveaux moyens mis à disposition des parties leur permettant de ne pas se soumettre à des solutions imposées par l'ordre juridique, mais d'aboutir ensemble à un accord qui les satisfasse, quitte à déroger à ces règles. Le Centre du droit de l'art leur consacre d'ailleurs une étude dont l'un des résultats est la base de données *ArThemis*.

La solution judiciaire résultant de l'application des règles de droit est en effet parfois mal vécue, car elle peut heurter le sentiment d'équité ou aboutir à des résultats frustrants. La longueur des procédures, voire le fait que les règles de procédure ne permettent pas de prendre suffisamment de temps pour entendre les parties, incitera ces dernières à chercher d'autres voies.

A titre d'exemple, on citera le cas du possesseur d'un bien culturel qui fera valoir l'exception de prescription : dans certaines juridictions, par le seul écoulement du temps, une

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revendication, pourtant *a priori* justifiée, s'avèrera tardive, de sorte que le demandeur, propriétaire originaire, se verra débouté de ses conclusions.

Mais que l'on ne s'y méprenne pas : les modes alternatifs ne sont pas un oreiller de paresse pour éviter l'application de la règle de droit. Les solutions offertes par ces nouvelles voies ne sont légitimes que si les deux parties connaissent préalablement la solution offerte par la législation en vigueur et qu'elles décident, en toute connaissance de cause, d'adopter un compromis mieux adapté à leur situation particulière. Les voies alternatives de résolution des conflits en matière de biens culturels doivent être ainsi comprises comme des outils complémentaires à la voie judiciaire étatique. En d'autres termes, elles ne doivent pas servir à échapper à l'ordre juridique, mais bien à rechercher une solution plus juste et plus équitable.

Nous sommes reconnaissants à tous les intervenants de la journée d'étude, et plus particulièrement aux auteurs de ce nouveau volume des études en droit de l'art, d'explorer ces nouveaux domaines et d'apporter ainsi une pierre importante à l'édifice de la résolution des conflits en matière de biens culturels

Genève, septembre 2012

PART I

NATIONAL AND INTERNATIONAL MECHANISMS FOR SOLVING INTERNATIONAL CULTURAL PROPERTY DISPUTES

PARTIE I

MÉCANISMES NATIONAUX ET INTERNATIONAUX DE RÉSOLUTION DES LITIGES EN MATIÈRE DE BIENS CULTURELS

LAWRENCE M. KAYE*

1. Litigation in Cultural Property: A General Overview

Abstract

Disputes over cultural property often involve years of expensive, protracted litigation, and raise complex arguments regarding whether claimants have brought timely actions to recover stolen property. Frequently, statutes of limitations are raised to defeat meritorious claims for Holocaust-era art and looted antiquities, and the difficulties surrounding this issue are compounded when cultural objects appear long after their thefts have occurred. In recent years, alternative dispute resolution ("ADR") remedies, including mediation, negotiation, and arbitration, have emerged as promising options to settling these disputes. Indeed, beginning in 2006, a new spirit of cooperation, at least among art-rich countries and great museums, began to evidence itself, leading to some momentous returns and agreements that did not involve litigation. But, the road to ADR has not been easy or straightforward. Many museums in the United States still resist cultural property claims, very often asserting technical defenses like the statute of limitations. The vast majority of questionable artifacts in American and foreign museums have not been the subject of agreements that saw their return home. Moreover, although many significant cases have ultimately resulted in favorable outcomes for the claimants, including, for example, *Kunstsammlungen zu Weimar v Elicofon, Republic of Turkey v OKS Partners, Republic of Turkey v Metropolitan Museum of Art,* and *Malewicz v City of Amsterdam,* these cases were only resolved after years of costly, hard-fought litigation.

Fortunately, the world of ADR in cultural property disputes is changing. Mediation is becoming increasingly popular as a method for dispute resolution and has been endorsed not only by the International Council of Museums and the World Intellectual Property Organization, but also by UNESCO's Intergovernmental Committee, among other

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* Partner in a major New York law firm and Co-Chair of the firm's Art Law Group. Mr. Kaye and his firm have represented foreign governments, heirs of victims of the Holocaust, families of renowned artists and other claimants in connection with the recovery of artworks. This article is based on remarks delivered by the author at the "Litigation in Cultural Property: Judicial and Alternative Means of International Dispute Resolution" Symposium held at the University of Geneva on 11 November 2011.

groups. Moreover, these organizations not only endorse ADR, but are actively adopting the ADR process to address cultural property disputes, and are offering sophisticated training courses and techniques to produce mediators particularly skilled in the cultural property field. Through these cooperative global efforts, there is hope that the day will come when claimants will be able to reclaim their stolen cultural property without the need to resort to litigation.

Synthèse

Les différends relatifs aux biens culturels impliquent souvent des procédures longues et coûteuses, et soulèvent des problématiques complexes quant à la question de savoir si les demandeurs ont introduit les actions opportunes en vue de récupérer les biens volés. Bien souvent, des délais de prescriptions sont invoqués pour écarter des revendications justifiées ayant trait au pillage d'objets culturels et d'antiquités pendant la période de l'Holocauste, et les difficultés liées à cette question sont encore multipliées lorsque les objets d'art apparaissent bien longtemps après que les vols aient effectivement eu lieu. Ces dernières années, les méthodes alternatives de résolution des litiges (MARL) – comprenant la médiation, la négociation et l'arbitrage – sont apparues comme des moyens crédibles de règlement de ces différends. Dès 2006, il s'est en effet formé un nouvel esprit de coopération – à tout le moins parmi les pays riches en art et les musées de grande renommée – qui a ouvert la voie à des restitutions capitales et donné lieu à des accords importants sans passer par un contentieux judiciaire. En tout état de cause, le parcours des MARL n'a ni été facile, ni sans embûches. Beaucoup de musées aux Etats-Unis continuent d'écarter les actions en restitution de biens culturels, le plus souvent en brandissant des arguments de défense techniques, tels que la prescription. Ainsi, la grande majorité des objets historiques de provenance douteuse dans les collections des musées américains et étrangers n'ont pas fait l'objet d'un accord prévoyant le retour dans leur pays d'origine. De plus, malgré le fait que de nombreuses affaires significatives ont abouti à une issue favorable pour les demandeurs – notamment Kunstsammlungen zu Weimar v Elicofon, Republic of Turkey v OKS Partners, Republic of Turkey v Metropolitan Museum of Art, et Malewicz v City of Amsterdam – il faut garder à l'esprit que ces résultats sont le fruit de durs combats menés lors de procédures contentieuses longues et coûteuses.

Heureusement, le monde des MARL appliqué aux différends relatifs au patrimoine culturel est en évolution. D'une part, la popularité de la médiation comme outil de règlement des litiges ne cesse de croître, d'autre part, cette méthode a été avalisée non seulement par le Conseil International des Musées et l'Organisation Mondiale de la Propriété Intellectuelle, mais aussi par le Comité intergouvernemental de l'UNESCO, pour n'en

citer que quelques-uns. De plus, ces organisations ne font pas qu'approuver les MARL, mais elles utilisent activement les processus des MARL pour régler des différends relatifs aux biens culturels, dispensent de nombreux cours professionnels et enseignent des techniques pointues afin de former des médiateurs particulièrement qualifiés dans le domaine culturel. Grâce à ces efforts combinés et à cette coopération globale, il faut espérer que le jour viendra où les demandeurs pourront se réapproprier le patrimoine culturel qui leur a été volé sans devoir recourir à une procédure contentieuse.

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I. Introduction

My assignment is to give you a brief overview of litigation in cultural property disputes and an introduction to the possibilities of resolving those disputes by alternative dispute resolution (ADR) – and by that I mean mediation, negotiation, and arbitration. I come to you from the trenches of the cultural property wars – and wars they have been – and will therefore give you the grizzled perspective of someone who has been a litigator in the field for more than forty years.

Let me say that I am a vocal advocate of ADR as a means of resolving art disputes. I have litigated some of the most complex cases in the cultural property field – some lasting as long as fifteen years – and I see the need for alternatives to litigation. In particular, alternative means of resolving art and cultural property disputes are useful for avoiding one of the hurdles that often injects an enormous amount of time and expense into such cases – the statute of limitations – and which often prevents claimants with otherwise meritorious cultural property claims from having their day in court.

II. The Complexities of Litigating Art and Cultural Property Cases

My involvement in the cultural property field began while I was still in law school, in the late 1960's, when I first worked on a case in which the Weimar Museum, located in what was then East Germany, sought the recovery of two portraits by Albrecht Dürer stolen at the end of World War II[1]. My initial assignment, as a summer law intern, was to assess the impact of a possible suggestion of interest by the United States Government on the issue of whether the Federal Republic of Germany, the named plaintiff, could represent the interests of all the German people pending the unification of the two Germanys – a rather esoteric issue for a naïve second year law student at a school with no course in international law. The assignment must have been a challenge to me, since I did not submit my memo on the issue until sometime in November, which was long after my summer internship ended. I was most fearful that the case would end before I completed my opus. Little did I know at the time that the affair would take some fifteen years to wend its way through the courts and that I would still find myself working on the matter as a partner in the law firm. Happily, we won the case, and the paintings are now hanging on the walls of the Weimar Museum. Along the way, we confronted issues as disparate as the non-recognition doctrine (under which United States courts will refuse to honor the claim of a government unrecognized by the executive branch), choice of law, *renvoi,* state succession, the German doctrine of prescription (*Ersitzung*), military law, sovereign immunity, the act of state doctrine, and the like. In the end, though, the case was decided on a more mundane issue: the New York statute of limitations[2].

I allude to all of this to make a point. First, the *Dürer* case underscores the complexities of litigating cultural property cases. Second, it demonstrates the importance of the statute of limitations as a defense to such claims. The difficulties surrounding this issue, at least in the United States, are compounded by the fact that cultural objects are often discovered abroad long after the thefts occurred at home, and usually in the hands of a good faith purchaser who has no privity with the thieves. The potential for uncertainty is heightened by the variety of statute of limitations rules applicable in the different states of the United States, which again vary in significant ways from those applicable in civil code countries. Thus, the statute of limitations has haunted me since 1969 and continues to be a thorn in my side right up to the present day. Indeed, just a few months ago, this issue took center stage in a case initiated by Marei von Saher, the sole heir of the noted

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1 *Kunstsammlungen zu Weimar v Elicofon,* 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd,* 678 F.2d 1150 (2d Cir. 1982).

2 *Ibid*.

pre-War Dutch dealer, Jacques Goudstikker, to recover two monumental depictions of "Adam and Eve" by Cranach the Elder, which were looted by the Nazis from Jacques[3]. The United States Supreme Court refused to hear Ms. von Saher's appeal from a Federal court decision that declared unconstitutional a California statute unanimously passed by the California legislature that had relieved Holocaust victims and their heirs suing museums and galleries in possession of Nazi looted art from having to worry about the statute of limitations[4]. The case was subsequently remanded to the District Court, where Ms. von Saher proceeded under the general California statute of limitations. But on 22 March 2012, the District Court dismissed the case on foreign affairs preemption grounds[5]. Ms. von Saher has appealed this decision.

The point is that the statute of limitations has been, in my view, the single most effective weapon wielded by possessors to prevent – or at least delay – claimants seeking the recovery of Nazi looted art, looted antiquities, and other stolen art and cultural property from reaching the merits of their claims. Let me emphasize that the *Dürer* case took some fifteen years from start to finish. Similarly, we represented the Republic of Turkey in its successful efforts to recover the fabled Lydian Hoard antiquities from New York's Metropolitan Museum of Art[6] and the Elmali Hoard of ancient coins from a wealthy United States business tycoon[7], which took more than six and ten years, respectively, to complete. We also represented the Heirs of Kazimir Malevich[8] whose efforts to recover that seminal artist's legacy, which are still ongoing, have lasted some twenty years. I can go on. It took Marei von Saher, whom I mentioned above, more than ten years to recover the Goudstikker works looted by Hermann Göring from the Dutch Government, including magnificent works by Solomon van Ruysdael, Claude Lorrain, and Jan van Goyen, to

3 *Von Saher v Norton Simon Museum of Art at Pasadena,* 592 F.3d 954 (9th Cir. 2010), cert. denied, 131 S. Ct. 379 (U.S. 2010).

4 *Ibid*.

5 *Von Saher v Norton Simon Museum of Art of Pasadena*, 2012 WL 994299 (C.D.Cal. March 22, 2012).

6 *Republic of Turkey v Metropolitan Museum of Art,* 762 F. Supp. 44 (S.D.N.Y. 1990).

7 *Republic of Turkey v OKS Partners,* 797 F.Supp. 64 (D. Mass. 1992); discovery motion granted in part and denied in part,146 F.R.D. 24 (D. Mass. 1993), summary judgment denied, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 8 June 1994), summary judgment on different claims denied, 1998 U.S. Dist. LEXIS 23526 (D. Mass. 23 January 1998).

8 *Malewicz v City of Amsterdam,* 362 F. Supp. 2d 298 (D.D.C. 2005), motion to dismiss granted, 2006 U.S. App. LEXIS 615 (D.C. Cir. 10 January 2006), motion to dismiss on different grounds denied, 517 F. Supp. 2d 322 (D.D.C. 2007).

name just a few[9]. And our clients' efforts to recover "Portrait of Wally," an important Schiele work stolen from Lea Bondi Jaray during World War II[10], took more than twelve years of litigation before it was finally settled, with the defendant, Vienna's Leopold Museum, paying the Bondi Heirs $19 million, the then market value of the work[11]. At a conference in London in 1993, I ended a lecture on the Lydian Hoard case with what I then called *"an admission against interest"* – expressing the hope that through cooperative global efforts the day will come when claimants will be able to reclaim their stolen cultural property without the need to resort to protracted and expensive litigation. Well, I am still in business. And although in 1993, my colleagues and I stood somewhat alone in the field, there are now many lawyers in the United States and Europe who have joined the fray, with plenty of work to keep them busy. I said then and I reiterate now: there must be a better way.

III. A Realistic Look at the Resolution of Art and Cultural Property Cases through ADR

Attempts have certainly been made to resolve art and cultural property cases such as these out of court through ADR, either before or after they were commenced. For example, for several years before we filed Marei von Saher's case against the Norton Simon Museum, we spent countless hours trying to negotiate a settlement. Indeed, we suffered through two failed mediations, one in California and another in New York, both before a respected former judge and experienced mediator who had a terrific track record in resolving disputes by mediation. Likewise, in the Bondi case, at both sides' request, the Court (then Chief Judge Michael Mukasey) appointed a Federal Magistrate to mediate a resolution of the dispute. But, after several meetings, the parties remained too far apart and the mediation efforts failed. The settlement in that case occurred several years later, after much litigation, and on the eve of trial[12]. In the other cases I mentioned – as in so many others I have been involved in or observed – notwithstanding almost continuous

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9 Press Release, Herrick, Feinstein LLP and Baker McKenzie, *Goudstikker, At Long Last, Justice* (6 February 2006), available at: http://www.herrick.com/siteFiles/News/2EFAC18113551A56D4D63417B1FF0E1E.pdf (28.02.2012).

10 *United States v Portrait of Wally,* 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

11 Press Release, Herrick, Feinstein LLP, The United States of America, the Estate of Lea Bondi Jaray and the Leopold Museum Settle the Long-Standing Case Involving "Portrait of Wally" by Egon Schiele (26 July 2010), available at: http://www.herrick.com/siteFiles/News/C31D953CE7FF53601B90397873AB242B.pdf (28.02.2012).

12 *Ibid*.

settlement negotiations, often with informal mediation efforts initiated by independent Government officials or altruistic third parties, it took years of litigation and hard fought and expensive interim court victories, before one side or the other "caved" and settlements were finally achieved. Or, as in the case of the Norton Simon litigation, they go on and on in the courts.

While I believe cultural property cases should be resolved without having to go to court, in the cultural property field this has been harder to achieve than in other areas. I have spent many hours trying to figure out why one case can be successfully negotiated and another cannot. In my experience, unfortunately, it is usually only because one side or the other perceives their case as weak or because it has concluded that the public relations value of a negotiated or mediated settlement outweighs the cost, aggravation and bad karma of litigation. But what about the case where the parties each see themselves as the one with the superior position or where they have decided that they do not care about adverse publicity and must keep the cultural property at issue at all costs? Then what are the chances that ADR will work?

Mediations are often confidential. It is therefore difficult to gauge how many successful resolutions there have been in recent years. But some are publicized, such as the mediation between the Swiss cantons St. Gallen and Zurich regarding a number of cultural objects that were looted during religious wars in that region during the eighteenth century[13]. Using mediation, the two cantons reached an agreement in 2006, which established that Zurich owned the objects at issue, but recognized the importance of the objects to St. Gallen[14]. The settlement granted St. Gallen a long term loan of many objects in the collection, including ancient manuscripts and a replica of a Prince-Abbot Bernhard Muller celestial globe, which was specially constructed for the St. Gallen canton at Zurich's expense[15].

In contrast to mediation, arbitration is binding and typically involves more formal proceedings, where each side has the opportunity to present its evidence, and witnesses may be examined and cross-examined[16]. But international arbitration can be expensive and time consuming as well. Moreover, arbitration has rarely been used in the context of art

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13 CORNU MARIE/RENOLD MARC-ANDRÉ, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution,* International Journal of Cultural Property, Vol. 17, Issue 1, 2010, pp. 1, 12.

14 BANDLE ANNE LAURE/THEURICH SARAH, *Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre,* Journal of International Commercial Law and Technology, Vol. 6, Issue 1, 2011, pp. 28, 35.

15 *Ibid.*; CORNU/RENOLD, *New Developments* (*cit.* n. 13), pp. 1, 12.

16 See generally DREW PETERSON, *Getting Together: Arbitration – How to Save Time and Money and Wish You Hadn't,* 25 Alaska Bar Association 23, June 2001.

and cultural property disputes[17]. Indeed, even in the seminal case used to exemplify the use of arbitration in art disputes – *Republic of Austria v Altmann* – the matter was first the subject of a litigation that lasted more than ten years in the United States courts[18]. The case went all the way up to the Supreme Court before ending with an arbitration decision in Austria (even though, I might add, the Appellate Court in California that heard the case had ordered mediation, and that court-ordered mediation failed). Ultimately, the arbitration tribunal ordered the Austrian Government to restitute to Ms. Altmann five extraordinary works by Gustav Klimt, which had been confiscated from her family by the Nazis during World War II and which ended up in the Austrian National Gallery[19].

It is clear that, under certain circumstances, alternative dispute resolution may provide an amicable and straightforward means of resolving a controversy. But, having been at the center of numerous complex disputes involving claims to art and other cultural property, I am also a great cynic when it comes to alternative dispute resolution. Indeed, from my own experience, I believe that there are, unfortunately, many reasons why the mediation and negotiation of art disputes are often doomed from the outset.

In particular, disputes involving claims to Holocaust-era art or looted antiquities are often more difficult to resolve by alternative means than other types of cultural property disputes – including, for example, disputes relating to art loans, art acquisitions or donations, art fairs, intellectual property, the use of art as collateral in financial transactions, the digitalization of art, and others[20]. With regard to Holocaust-era claims, this difficulty is due in part to the strong emotional component involved in such cases, as well as the typically polarized positions of the parties involved. Indeed, as a general matter, emotions will often play a role in art disputes, more so than in strictly commercial cases, and particularly in Holocaust-era claims. In contrast to commercial cases, where there is often common ground because the main issue is economic, in Nazi-looted art cases, emotions cause the parties to take starkly disparate views of the issues.

The same can be said for cases involving looted antiquities, as such objects often comprise a sovereign nation's cultural heritage. As described by Marie Cornu of the French National Centre for Scientific Research and Marc-André Renold, *"cultural property forming part of a state's heritage […] [are] the items of the highest importance whether they are in public or private hands. Looked at from this standpoint […] [these] items*

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17 CORNU/RENOLD, *New Developments* (*cit.* n. 13), p. 13.

18 *Republic of Austria v Altmann,* 541 U.S. 677 (2004).

19 CORNU/RENOLD, *New Developments* (*cit.* n. 13), p. 13.

20 See ICOM-WIPO Art and Cultural Heritage Mediation, http://icom.museum/what-we-do/programmes/art-and-cultural-heritage-mediation/icom-wipo-art-and-cultural-heritage-mediation.html (28.02.2012).

[are] considered to be inseparable from the country to which they belonged"[21]. And often the sovereign's laws make it difficult or well-nigh impossible to negotiate away the retention of any looted property. Thus, in most cases, the foreign sovereign is open to one solution and one solution only – namely, the repatriation of its property. Consequently, many Nazi-looted art and cultural property cases end up in court, notwithstanding one or both parties' efforts otherwise to resolve such claims. Moreover, as said, where these cases do ultimately end in a settlement, it is often a result of the court proceedings that sway one party or another to commit to negotiations, usually due to the fear of losing at trial.

A good example of this is *Republic of Turkey v Metropolitan Museum of Art*[22], the Lydian Hoard case I mentioned above, in which Turkey retained me and my colleagues to prosecute a claim against the Metropolitan Museum of Art for the return of almost 400 remarkable objects created by master craftsmen in the 6th century B.C. We first sought to resolve the matter peacefully, but the Museum flatly rejected our overtures. Indeed, we were curtly shown the door. A six-year court case ensued, largely spent defending an application by the Museum asking the court to get rid of the case without reaching the merits of Turkey's claim on the ground of the statute of limitations. After three years of litigation on this single issue alone, the Museum's application was denied[23]. Only then could we begin to obtain information from the Museum about its knowledge of the objects' provenance and its conduct in acquiring them – a process that in the United States we call discovery – and thereby proceed with the next phase of the litigation. Finally, in 1993, the Met agreed to resolve the case short of trial, and the Lydian Hoard objects were returned to Turkey[24]. Although the resolution was ultimately favorable, the Republic had to fight a long and costly legal battle before it was finally able to convince the Museum to act on the truth that lay behind its own records from the very beginning – i.e. that the Met knew that the objects had recently been unearthed from Turkey when it acquired them. Undoubtedly, many factors influenced the Museum's decision to return the Lydian Hoard. But it is less likely that the Museum finally saw the light and did the right thing, and more probable that it did not want to hear the upcoming testimony of present and former Museum officials as to what the Museum knew and when it knew it.

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21 CORNU/RENOLD, *New Developments* (*cit.* n. 13), p. 14.

22 *Republic of Turkey v Metropolitan Museum of Art,* 762 F. Supp. 44 (S.D.N.Y. 1990).

23 *Ibid*.

24 Press Release, Herrick, Feinstein LLP, *Turkey's Lawsuit Against Metropolitan Museum of Art Ends with Return of Lydian Hoard Antiquities to Turkey* (1993), available at: http://www.herrick.com/siteFiles/News/94F46F571AA38025A4D3343547A8B65F.pdf (28.02.2012).

In another case we handled on behalf of the Republic of Turkey, *Republic of Turkey v OKS Partners*[25], the facts and evidence similarly led to a favorable settlement, but only after some 10 years of litigation[26]. In that case, Turkey sought to recover the fabled Decadrachm or Elmali Hoard, designated by some as the *"Hoard of the Century"*[27], consisting of almost 2000 ancient Greek and Lycian coins, including a dozen Athenian Decadrachms, the extremely rare and highest denomination of ancient Greek currency. Indeed, in all of history prior to the discovery of the Elmali Hoard, only about 12 or 13 of these silver Decadrachms had ever been discovered, so this Hoard alone doubled the number of these rare coins ever found anywhere[28]. The identity of the Hoard as the one illegally removed from Turkey was a critical factor in the case. Quite simply – and somewhat remarkably – the defendants argued that the hoard of coins they had acquired was not the hoard of coins unearthed in Elmali, but rather coins from a different hoard, which just happened to also contain some of the rarest coins ever discovered. These coins, they claimed, originated from some other country – in other words, anywhere but Turkey[29]. The problem with overcoming this assertion started with the fact that the coins had been found by thieves buried under the ground in a field in a remote section of Turkey. Needless to say, none of the coins had been seen for some twenty-five hundred years, much less studied or inventoried by any archaeologists or museum officials. But we did succeed in linking the coins to Turkey through expert numismatic testimony demonstrating the unique character of the coins and the likelihood of their origin in Turkey. In addition, we relied on interviews and written statements from witnesses, includ-

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25 *Republic of Turkey v OKS Partners,* 797 F.Supp. 64 (D. Mass. 1992); discovery motion granted in part and denied in part,146 F.R.D. 24 (D. Mass. 1993), summary judgment denied, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 8 June 1994), summary judgment on different claims denied, 1998 U.S. Dist. LEXIS 23526 (D. Mass. 23 January 1998).

26 Press Release, Herrick, Feinstein LLP, *Turkey's Lawsuit Against American Businessman Ends with Agreement to Return Rare Ancient Coins to Turkey* (1999), available at: http://www.herrick.com/siteFiles/News/ECE5EA7733B4383784C79AC1BA80C27B.pdf (28.02. 2012).

27 See, e.g., BARRY MEIER, *The Case of the Contested Coins – A Modern-Day Battle Over Ancient Objects,* The New York Times, 24 September 1998, available at: http://www.nytimes.com/1998/09/24/business/the-case-of-the-contested-coins-a-modern-day-battle-over-ancient-objects.html?pagewanted=all (28.02.2012); ÖZGEN ACAR, *Protecting Our Common Heritage,* The Turkish Times, 1 January 2002.

28 See, e.g., MARK ROSE, *Hoard Returned,* Archaeology, Vol. 52, No. 3, May/June 1999, available at: http://www.archaeology.org/9905/newsbriefs/hoard.html (28.02.2012).

29 *Republic of Turkey v OKS Partners,* 1998 U.S. Dist. LEXIS 23526, 6–7 (D. Mass. 23 January 1998) (the defendants sought summary judgment, among other things, on the grounds that *"the Republic has no evidence that the disputed coins are in fact the Elmali Hoard"*).

ing thieves and smugglers implicated in the case[30]. The descriptions of the Hoard given by those who had seen the coins shortly after they were unearthed became critical in Turkey's efforts to establish that the coins in the defendants' possession were identical to those that the thieves described[31]. Ultimately, the Elmali Hoard case was resolved short of trial and the Hoard was returned to Turkey by the wealthy American businessman, William Koch, and his associates[32]. But this agreement was reached only after almost a decade of litigation. And I think it is safe to say that the out-of-court resolution was, once again, prompted in great part by the likely success of Turkey in establishing at trial its right to recover the Hoard.

IV. The Cooperative Model Espoused by Art-Rich States and Leading Museums

Beginning in 2006, a new spirit of cooperation, at least among art-rich countries and great museums, began to evidence itself, leading to some momentous returns and agreements that did not involve litigation. To be sure, protracted litigation in these cases was avoided because of the lessons learned from earlier cases that proved lengthy and costly, like the Lydian Hoard saga. In 2006, the Metropolitan Museum itself agreed to return 21 looted artifacts to Italy, including the famous Morgantina Collection, a group of 16 silver Hellenistic silver pieces (dating from the 3rd Century B.C.), as well as one of the Museum's most prized possessions, the Euphronios krater, a painted vase dating from the 6th Century B.C. In return, Italy agreed to lend objects of *"equal beauty and historical and cultural significance"* to the Museum[33].

A few months later, the Getty Museum in Los Angeles turned to a long-standing claim by Greece, first asserted in the 1990's, that four items acquired by the Museum were stolen

30 *Ibid.,* 8 (describing the testimony of one of the "admitted thieves", who testified that *"photographs of the defendants' coins depict many of those that he unearthed and counted at Elmali"*).

31 *Ibid*.

32 Press Release, Herrick, Feinstein LLP, *Turkey's Lawsuit against American Businessman Ends with Agreement to Return Rare Ancient Coins to Turkey* (1999), available at: http://www.herrick.com/siteFiles/News/ECE5EA7733B4383784C79AC1BA80C27B.pdf (28.02.2012).

33 NICOLE WINFIELD, *N.Y. Museum Will Return Artifacts to Italy,* Boston.com, 22 February 2006, available at: http://articles.boston.com/2006-02-22/ae/29249552_1_euphronios-krater-morgantina-return-artifacts (28.02.2012).

and should be returned[34]. Three of them – a gold funerary wreath, an inscribed grave marker, and a marble torso dating from 400 B.C. – had been purchased by the Getty for $5.2 million in 1993. The fourth item, an archaic marble relief that depicts a warrior with spear, shield, and sword, had been purchased in 1955 by J. Paul Getty himself[35]. In August 2006, the Getty returned the grave marker and the relief to Greece[36], then in March of the following year, it returned the funerary wreath and the marble torso[37].

In September of that watershed year, the Museum of Fine Arts in Boston sent thirteen pieces back to Italy – eleven fifth century B.C. vases, a "portrait statue" of Sabina, and a first century A.D. marble fragment relief of Hermes[38]. The Museum agreed that it will inform the Italian Ministry of Culture of any future acquisitions, loans, or donations of works that could have an Italian origin[39]. In November 2008, the Director of the Cleveland Museum of Art and the Italian Culture Minister signed an agreement pursuant to which the Museum will return fourteen ancient treasures that had been looted from Italy in exchange for several long-term loans of thirteen equally valuable artifacts for renewable twenty-five-year periods[40]. And, in December 2009, France agreed to return to Egypt painted wall fragments that were stolen from the Luxor tomb in Egypt and that had been purchased by the Louvre in 2000 and 2003[41].

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34 HUGH EAKIN, *Getty Museum Will Return 2 Antiquities to Greece,* The New York Times, 10 July 2006, available at: http://www.nytimes.com/2006/07/10/arts/design/10cnd-getty.html?pagewanted=all (28.02.2012).

35 ASSOCIATED PRESS, *Greece Renews Museum Accusations,* Boston.com, 25 October 2005, available at: http://articles.boston.com/keyword/looting/featured/3 (28.02.2012).

36 KAROLOS GROHMANN, *Getty-Owned Antiquities Return Home to Greece,* The Washington Post, 31 August 2006, available at: http://www.elginism.com/20060831/521/ (28.02.2012).; see also ASSOCIATED PRESS, *Greece Displays Returned Getty Antiquities, Vows to Seek More Repatriations,* International Herald Tribune, 31 August 2006, available at: http://www.elginism.com/20060831/520/ (28.02.2012).

37 BBC NEWS, *Ancient Wreath Returns to Greece,* BBC News, 30 March 2007, available at: http://news.bbc.co.uk/2/hi/6505971.stm (28.02.2012).

38 ELISABETTA POVOLEDO, *Boston Museum Returns 13 Ancient Works to Italy,* The New York Times, 29 September 2006, available at: http://www.nytimes.com/2006/09/29/arts/design/29mfa.html (28.02.2012).

39 *Ibid*.

40 *The Cleveland Museum of Art and Italy Agree to Exchange of Antiquities and Scholarship,* Artdaily.org, 20 November 2008, available at: http://www.artdaily.com/index.asp?int_sec=2&int_new=27357 (28.02.2012).

41 Associated Press, *France Returns "Stolen" Relics to Egypt,* The Guardian, 14 December 2009, available at: http://www.guardian.co.uk/world/2009/dec/14/france-louvre-returns-egypt-relics (28.02.2012).

Most recently, Turkey achieved a great victory when Prime Minister Erdogan himself carried the stolen "Weary Herakles" statue back from the Boston Museum of Fine Arts to Turkey[42]. The marble statue depicts the bearded hero Herakles leaning on his club, fatigued by his many labors[43]. In 1990, the top half of the statue was loaned to the Metropolitan Museum as part of a larger exhibition. While on exhibit, a scholar noted its similarities with the bottom half of the Herakles sculpture that had been excavated in Perge, Turkey in 1980[44]. Although the MFA's curator at the time of the acquisition, Cornelius Vermuele, dismissed the notion of the two halves being connected, in 1992 the Museum nonetheless agreed to conduct a test to determine if the two halves of the sculpture were a match[45]. Plaster casts of both original pieces were made and viewed together, ultimately demonstrating that the two halves fit perfectly together. But notwithstanding the successful test, the MFA still refused to return their piece to Turkey[46]. In September 2011, the two parties finally signed a memorandum of understanding, and Turkey dropped all claims that the Museum engaged in illicit trade when it acquired the Herakles[47]. Upon its return to Turkey, the top half of the statue was promptly united with its bottom half and went on display in the Antalya Archaeological Museum to the elation of Turkish citizens and officials alike[48].

And, of course, there have been successes elsewhere as well. In September 2011, the Israel Museum returned the painting "The Return of Tobias" to the heirs of the artist, Max Liebermann. Libermann had loaned the work to the Jewish Museum in Berlin in the 1930's, and it later disappeared during World War II. Following the War, the painting was

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42 JAMES C. MCKINLEY JR., *Boston Museum Returns Bust to Turkey,* The New York Times, 28 September 2011, available at: http://query.nytimes.com/gst/fullpage.html?res=9502E0DB103EF93BA1575AC0A9679D8B63 (28.02.2012).

43 *Ibid*.

44 *Ibid*.

45 GEOFF EDGERS, *After Years of Denial, MFA to Return "Weary Herakles" Statue to Turkey,* The Boston Globe, 23 September 2011, available at: http://www.bostonglobe.com/arts/theater-art/2011/09/23/after-years-denial-mfa-return-weary-herakles-statue-turkey/yhPcDZf9vxwdgkUc97LvrJ/story.html (28.02.2012).

46 See *"Weary Herakles" To Be Reunited With His Legs,* The History Blog, 23 July 2011, http://www.thehistoryblog.com/archives/12051 (28.02.2012).

47 *Museum of Fine Arts, Boston, and Turkish Republic Reach Agreement for Transfer of Top Half of Weary Herakles,* Artdaily.org, 24 September 2011, available at: http://www.artdaily.org/index.asp?int_sec=2&int_new=50671 (28.02.2012). The MFA purchased a half-interest in the statue in 1981; in 2004, the remaining half interest was donated to the museum.

48 JAMES C. MCKINLEY JR., *Boston Museum Returns Bust to Turkey,* The New York Times, 28 September 2011, available at: http://query.nytimes.com/gst/fullpage.html?res=9502E0DB103EF93BA1575AC0A9679D8B63 (28.02.2012).

sent to Jerusalem's Bezalel National Museum, which later became the Israel Museum[49]. While preparing for an exhibit on looted art at the Berlin Centrum Judaicum, art historians began researching the painting and discovered that it had been on loan from the artist himself. Therefore, the work now belongs to the artist's heirs. After the three month exhibit at the Centrum Judaicum, the painting will remain in Berlin with the heirs[50]. The Museum had also returned a looted Goudstikker drawing by Edgar Degas a few years earlier[51].

In November 2010, a United Kingdom national museum returned the Benevento Missal – an Italian liturgical book containing instructions necessary for Mass – to its pre-War owner, marking the first Nazi-looted item to be restituted from a United Kingdom national museum[52]. The Province of Benevento had filed a legal claim in 1978 seeking the return of the missal, but it was rejected because of the United Kingdom statute of limitations. In February 2000, United Kingdom museums published lists of works that had uncertain provenances from the Nazi-era, and the missal was included on that list[53]. Later that year, a London lawyer started putting together a claim and, in 2002, submitted it to the Spoliation Advisory Panel, which provides an alternative to litigation by issuing nonbinding recommendations[54]. If a party decides to accept a recommendation, however, and the recommendation is *"implemented"*, that party is *"expected to accept [the recommendation] as full and final settlement of the claim"*[55]. In 2005, although the Advisory Panel recommended that the missal be returned, legal restrictions on deaccessioning prevented the British library from doing so. But, in 2009, a law on the Holocaust was passed in the U.K. making deaccessioning possible, and the Panel again recommended that the missal be returned. This time, the Museum was able to restitute the missal[56].

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49 Associated Press, *Israel Museum Returns Art to Artist's Heirs,* Ynetnews.com, 9 September 2011, available at: http://www.ynetnews.com/articles/0,7340,L-4119931,00.html (28.02.2012).

50 *Ibid*.

51 Press Release, Herrick, Feinstein LLP, *Breakthroughs on Major Holocaust Claim* (14 March 2005), available at: http://www.herrick.com/siteFiles/News/06B0FACB551C88A15EBCA53E1ED18477.pdf (28.02.2012).

52 MARTIN BAILEY, *How The Art Newspaper Changed the Law,* The Art Newspaper, 10 November 2010, available at: http://www.theartnewspaper.com/articles/How-i-The-Art-Newspaper-i-changed-the-law/21774 (28.02.2012).

53 *Ibid*.

54 Department for Culture, Media and Sport, Spoliation Advisory Panel, http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx (28.02.2012).

55 *Ibid*.

56 BAILEY (*cit.* n. 52); see also Report of the Spoliation Advisory Panel in Respect of a Renewed Claim by the Metropolitan Chapter of the Benevento for the Return of the Beneventan Missal Now in the

It should be noted, however, that these successful negotiations stand out in a larger pool of art disputes that, whether partially or in whole, were resolved only after resorting to litigation. In my experience, it has been the exceptional instance in which a party has agreed to return a work of art without recourse to some sort of court action. Remember that Italy had sought the Morgantina silver from the Metropolitan for more than ten years. And the Weary Herakles did not make its trip home until almost twenty years after we proved the two pieces were from the same statue and negotiations then failed. But some United States museums have become more cooperative in recent times. For example, in March 2011, a long-standing claim against the Getty Museum in Los Angeles was resolved with the return of a looted Goudstikker painting, Pieter Molijn's "Landscape with Cottage and Figures," to the family, marking the first voluntary return to the Goudstikker heir from a United States museum[57]. Even so, it must be underscored that many American museums are still resisting Holocaust claims, very often asserting technical defenses like the statute of limitations. And the vast majority of questionable artifacts in American and foreign museums have not been the subject of agreements that saw their return home. Indeed, one wonders whether the new era of cooperation inaugurated in 2006 was only an instance of a domino effect, when a few institutions got caught with their hands in the cookie jar, the public relations value of quick settlements became the motivating factor, and several museums felt it best to jump on the band wagon. And to illustrate, settlements have been fewer and less dramatic since that watershed year.

V. Concluding Remarks

I do believe that the world of ADR in cultural property disputes is about to change. That is because so many organizations, governments, museums, auction houses and others are working hard to make that happen. ICOM, WIPO and UNESCO, among others, are training mediators in the particular problems posed by cultural property disputes, and I bet those efforts will pay off[58]. I believe that, with a concerted world-wide effort, things

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Possession of the British Library (15 September 2010), available at: http://www.culture.gov.uk/images/publications/Benevento_5119_HC448_7-9.pdf (28.02.2012).

57 See, e.g., MIKE BOEHM, *Getty Museum Agrees to Return Painting Looted by Nazis,* The Los Angeles Times, 29 March 2011, available at: http://www.herrick.com/sitecontent.cfm?pageID=57&keyword=molijn (28.02.2012).

58 See ICOM-WIPO Art and Cultural Heritage Mediation, http://icom.museum/what-we-do/programmes/art-and-cultural-heritage-mediation/icom-wipo-art-and-cultural-heritage-mediation.html (28.02.2012); WIPO Arbitration and Mediation Center, http://www.wipo.int/amc/en/ (28.02.2012); Art and Cultural Heritage Mediation, http://icom.museum/what-we-

will change. I favor mediation as a means of avoiding the pitfalls of litigation, such as the statute of limitations. As envisioned by the ICOM-WIPO Arbitration and Mediation Center, not only does alternative dispute resolution, and particularly mediation, allow for overcoming the statute of limitations, it has the potential to provide for *"speedy resolution[s] of dispute[s] at minimal cost"*, while *"preserving or enhancing the relationship between the parties"*[59]. Indeed, mediation is becoming increasingly popular as a method for dispute resolution and has been endorsed not only by ICOM and WIPO, but also by UNESCO's Intergovernmental Committee, among other groups[60]. And courts in the United States continue to promote mediation as an alternative to protracted litigation. Take the following case as an example. On 3 November 2011, a Los Angeles court denied a motion to dismiss on, among other things, statute of limitations grounds, in a case brought by the Western Prelacy of the Armenian Apostolic Church of America against the J. Paul Getty Trust and Museum to recover pages from a 13th century illuminated manuscript acquired by the Getty, ordering instead that the parties spend four months in mediation to try to resolve the dispute[61].

So, alternate remedies are burgeoning, and many cases are being resolved. But the remedy does not (and cannot) work unless all parties want it to and agree to resolve the dispute in a mutually acceptable way. Unfortunately, I have seen nonbinding mediation used too often by one party as a way to "strong arm" the other side into backing down – i.e. by showing the other side that it has a very strong case – with really no interest in settling fairly. And sometimes, especially in the United States, mediation has been used simply to acquire free information. This ends up wasting everyone's time, can be costly, and can actually delay a resolution. Indeed, international binding arbitration has become so costly

do/programmes/art-and-cultural-heritage-mediation.html (28.02.2012); Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, UNESCO Res. CLT/CH/INS-2005/21 (October 2005), adopted by 20 C/Resolution 4/7.6/5 (28 November 1978), available at: http://unesdoc.unesco.org/images/0014/001459/145960e.pdf (28.02.2012); Working Document for Discussion on a Strategy to Facilitate the Restitution of Stolen or Unlawfully Exported Cultural Property, UNESCO Res. CLT-2005/CONF.202/4 (7–10 February 2005), available at: http://unesdoc.unesco.org/images/0013/001382/138287e.pdf (28.02.2012).

59 ICOM-WIPO Art and Cultural Heritage Mediation, http://icom.museum/what-we-do/programmes/art-and-cultural-heritage-mediation/icom-wipo-art-and-cultural-heritage-mediation.html (28.02.2012).

60 See *supra,* n. 58.

61 *Western Prelacy v J. Paul Getty Museum,* No. BC438824 (Super. Ct. Cal Nov. 3, 2011).

and complex that it can actually be worse than the onerous litigation it was conceived to displace[62].

I would like to conclude by offering a few suggestions on what to worry about in trying to devise workable regimes for alternate dispute resolution in this field. First, especially in the context of Nazi-era and cultural property claims, it is important for the parties to try to understand their opponents' position and show some sympathy, even while stressing the reasonableness of their own position. It is also important for the parties to be flexible. Because mediation gives the parties an opportunity for a more creative solution, clients must be prepared to think "outside the box" when it comes to what they are willing to settle for. For example, Holocaust claimants generally believe that their families have been wronged and their claims must be vindicated. At the same time, the possessor typically believes that it has done nothing wrong, that it acted reasonably and in good faith, and that therefore, it should not be deprived of what it considers "good title." If there is to be any chance of successfully mediating, both sides have to moderate these opening positions.

Indeed, in any mediation, both sides have to give up something in order to find the middle ground. Both the client and the lawyer need to go into the mediation knowing that a successful mediation means not getting everything they want. But, as I mentioned before, this is not an easy task. If the dispute involves a collection of art, it may be easier to find a middle ground solution. But if the parties are dealing with a single piece, they should consider as many options as possible, such as: (i) sharing use and possession of the piece; (ii) selling jointly and dividing the proceeds; or (iii) jointly presenting the piece at a cultural institution together with a financial arrangement. Parties may also want to consider long term loans (which were used in the mediation between the St. Gallen and Zurich cantons)[63] or an arrangement in which the disputed work is returned, but countervailing loans of different works are agreed to. In sum, parties should be flexible and consider every possibility.

Since many mediations take place after failed settlement negotiations, the parties should focus on why negotiations failed and try to bring that sensitivity into the mediation ses-

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62 See, e.g., JOSÉ MARÍA ABASCAL ZAMORA, *Reducing Time and Costs on International Arbitration, Modern Law for Global Commerce,* Congress to celebrate the fortieth annual session of UNCITRAL (2007), available at: http://www.uncitral.org/pdf/english/congress/Abascal-rev.pdf (stating that it is "undeniable" that international arbitration has become "more expensive and time consuming" than litigation) (28.02.2012); for a U.S. perspective, see, e.g., ASHBY JONES, *Has Arbitration Become More Burdensome than Litigation?,* Wall Street Journal, 1 September 2010, available at: http://blogs.wsj.com/law/2010/09/01/has-arbitration-become-worse-than-litigation/ (28.02.2012).

63 See CORNU/RENOLD, *New Developments* (*cit.* n. 13), pp. 1, 12; BANDLE/THEURICH, *Alternative Dispute Resolution and Art-Law* (*cit.* n. 14), pp. 28, 35.

sion. Parties may also wish to discuss the failed negotiations with the mediator, albeit in private sessions. In this regard, it may also be beneficial for the parties to consider a hybrid form of alternative dispute resolution, such as "binding mediation" – this refers to a process in which the parties start out with nonbinding mediation and, if unsuccessful, automatically convert to binding arbitration, with or without the same mediator[64].

Another thing to consider is that mediation allows the parties to be drawn more directly into the process than litigation and arbitration – the lawyers play a lesser role. Therefore, the lawyer must make sure that the client is able to separate the people from the problem and be objective during the course of the mediation. Some mediators will expect the client to respond to questions directly. It is thus important that the client be prepared for this type of interaction and be ready to passionately, yet objectively, advocate his or her position to the mediator.

One final note to consider is the use of long distance mediation in international transactions. Telephone conferences and correspondence can often be very effective means of communication in mediation because they take the personal element out of the picture when that can be a negative aspect of the dispute.

Hopefully, by addressing these concerns, and with the good will of all stakeholders involved, ADR will become an important tool in the future of art disputes.

64 For a discussion on binding mediation, see RUSSELL BECK, *Is "Binding Mediation" A New Solution?,* Virginia Lawyers Weekly, 2 February 2009, available at*:* http://valawyersweekly.com/2009/02/02/is-%E2%80%98binding-mediation%E2%80%99-a-new-solution/ (28.02.2012).

TERESA GIOVANNINI*

2. La pratique de l'arbitrage en matière de biens culturels

Synthèse

L'arbitrage peut se définir comme étant *"un mode conventionnel de règlement des litiges par des particuliers choisis directement ou indirectement par les parties et investis du pouvoir de juger à la place des juridictions étatiques par une décision ayant des effets analogues à ceux d'un jugement."*[1] Il s'agit ainsi bel et bien d'un jugement exécutoire, et non d'une négociation ou médiation entre les parties concernées. S'agissant de litiges portant sur des biens culturels tels que définis dans les conventions internationales, l'arbitrage permet une résolution par une procédure souple (libre choix du droit et de la procédure applicables, délocalisation, confidentialité). Cette solution alternative du différend trouve sa source dans des conventions internationales (telle la Convention UNIDROIT sur les Biens culturels volés ou illicitement exportés du 24 juin 1995). En pratique, le recours à l'arbitrage reste toutefois très limité. Les quelques cas connus montrent toutefois qu'il permet une résolution rapide et efficace du différend.

Abstract

Arbitration is "a contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in the place of state courts by rendering a decision having effects analogous to those of a judgment."[2] *It results in a binding and enforceable decision, unlike in a negotiation or mediation between the parties. Arbitration allows a flexible procedure for the settlement of disputes concerning cultural property pursuant to international conventions (choice of governing law and procedure by the parties, relocation, and confidentiality).*

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1 POUDRET JEAN-FRANÇOIS/BESSON SÉBASTIEN, *Droit comparé de l'arbitrage international,* Zurich et al. 2002, p. 3, n. 3.

2 POUDRET JEAN-FRANÇOIS/BESSON SÉBASTIEN, *Comparative Law of International Arbitration*, translated by Berti Stephen V./Ponti Annette, 2nd ed., London 2007 (original work : 2002), p. 3, n. 3.

Such an alternative dispute resolution mechanism finds its source in international conventions (such as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995). In practice, recourse to arbitration is still very limited. However, the few reported cases show that it provides a rapid and efficient resolution to a dispute.

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I. Notions

L'arbitrage peut se définir comme étant *"un mode conventionnel de règlement des litiges par des particuliers choisis directement ou indirectement par les parties et investis du pouvoir de juger à la place des juridictions étatiques par une décision ayant des effets analogues à ceux d'un jugement"*[3]. Il s'agit ainsi bel et bien d'un jugement exécutoire, et non d'une négociation ou médiation entre les parties concernées.

S'agissant des biens culturels, ceux-ci trouvent leur définition à l'article 1 de la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriétés illicites des biens culturels du 14 novembre 1970 (la Convention de l'UNESCO de 1970) comme étant *"les biens qui, à titre religieux ou profane, sont désignés par chaque Etat comme étant d'importance pour l'archéologie, la préhistoire, l'histoire, la littérature, l'art ou la science"*. La Convention de l'UNESCO énumère ensuite les catégories de biens visés par cette notion, lesquelles incluent en particulier tous les biens mobiliers[4] d'intérêt artistique tels que:

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3 POUDRET/BESSON, *Droit comparé* (*cit*. n. 1).

4 GABUS PIERRE/RENOLD MARC-ANDRÉ, *Commentaire de la Loi fédérale sur le transfert international des biens culturels (LTBC)*, Zurich et al. 2006, art. 2 nº 5.

- *"tableaux, peintures et dessins faits entièrement à la main sur tout support et en toutes matières";*
- *"productions originales de l'art statuaires et de la sculpture en toutes matières";*
- *"gravures, estampes et lithographies originales";*
- *"manuscrits rares et incunables";*
- *"objets d'ameublement ayant plus de cent ans d'âge et instruments de musique anciens".*

II. Pourquoi l'arbitrage en matière de biens culturels?

La question de savoir pourquoi l'arbitrage pour régler un litige en matière de biens culturels se pose naturellement.

Mis à part les avantages traditionnels de l'arbitrage par opposition ou comparaison avec les tribunaux ordinaires, soit en particulier la liberté des parties de choisir leur arbitre (ce qui est impossible devant les tribunaux étatiques), ou encore le fait que la sentence arbitrale constitue le jugement final (alors que les procédures étatiques prévoient généralement trois instances, ce qui ralentit forcément le processus de résolution du litige), l'arbitrage en matière de biens culturels présente un intérêt particulier en ceci que:

(i) Il permet aux parties de choisir librement le droit applicable, et ce, y compris des normes de source non étatique, tels des principes généraux du droit, des usages, des recommandations, des directives ou encore simplement l'équité, alors que le système étatique interdit un tel choix s'agissant de relations internes et, au plan des relations internationales, restreint généralement cette liberté à des sources de droit exclusivement étatique, ainsi que cela est reflété expressément dans le Règlement européen sur la loi applicable aux obligations contractuelles du 17 juin 2008 (Rome I), lequel se réfère uniquement (article 3) à la loi choisie par les parties, excluant ainsi implicitement la désignation de "règles de droit" n'appartenant pas à un système juridique étatique[5];

(ii) Il permet aux parties de "délocaliser" le litige, et ainsi de le soustraire à tout ordre juridique national donné (sous réserve bien sûr de l'ordre public);

(iii) Il permet aux parties de choisir les règles de procédure ou de fond relatives à la preuve (particulièrement difficile en ce qui concerne par exemple les œuvres pillées) ou à la prescription (lorsque, comme en Suisse, cette dernière ne relève pas de l'ordre public);

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5 BONOMI ANDREA, *Commentaire ad art. 116 n° 23,* in: BUCHER ANDREAS (ed.), Commentaire romand, Loi sur le droit international privé, Convention de Lugano, Bâle 2011.

(iv) Il permet la résolution rapide du litige, les parties renonçant d'entrée de cause à toute objection de principe sur leur capacité ou leur volonté de plaider. Ce point est particulièrement sensible s'agissant d'un défendeur étatique, qui renonce ainsi à l'immunité;

(v) Il garantit la confidentialité, élément jugé généralement crucial en matière de litiges touchant des biens culturels;

(vi) Il permet une exécution facilitée, les parties ayant librement choisi ce système de résolution.

III. Comment l'arbitrage en matière de biens culturels?

Le recours à l'arbitrage en matière de biens culturels peut exister de deux manières distinctes.

La première manière consiste à convenir, dans un contrat de vente portant sur un tel bien, que tout litige – y compris relatif à l'authenticité de l'œuvre ou à son état – sera réglé par voie d'arbitrage, ceci, en référence ou non à un règlement institutionnel tel celui de la Chambre de Commerce Internationale ou encore de la London Court of International Arbitration ou de l'American Arbitration Association.

La seconde manière peut découler de conventions internationales ou de normes internationales ou encore de conventions bilatérales impliquant un Etat.

IV. Instruments juridiques contenant une clause d'arbitrage

Au niveau international général, seules quatre Conventions internationales contiennent la possibilité (mais non l'obligation) de recourir à l'arbitrage en cas de conflit. Il s'agit:

En premier lieu, de la *Convention de la Haye du 14 mai 1954 protégeant les biens culturels en cas de conflits armés,* à laquelle à ce jour 123 Etats ont adhéré (dont la Suisse en 1962), qui prévoit que *"Chacune des Hautes Parties Contractantes peut faire opposition à l'inscription d'un bien culturel ... au registre"* auprès du Directeur Général de l'UNESCO. En cas de litige, les parties pourront recourir à l'arbitrage, le tribunal arbitral ainsi désigné fixant sa propre procédure et sa décision étant sans appel (article 14);

En deuxième lieu, de la *Convention des Nations Unies sur le Droit de la Mer du 10 décembre 1982,* laquelle contient une disposition (article 303) imposant aux Etats signa-

taires l'obligation de protéger les objets de caractère archéologique ou historique découverts en mer, et qui prévoit (article 287), parmi d'autres moyens de résolution de litiges, la voie de l'arbitrage telle que détaillée à l'Annexe VII de la Convention. 162 Etats ont ratifié cette Convention à ce jour.

En troisième lieu, de la *Convention de l'UNESCO du 2 novembre 2001 sur la Protection du Patrimoine Culturel Subaquatique,* laquelle prévoit également (article 25.5) la possibilité, parmi d'autres moyens de résolution de différends, le recours à l'arbitrage conformément à l'article 287 de la Convention sur le Droit de la Mer citée plus haut;

Enfin et en dernier lieu, de la *Convention UNIDROIT sur les Biens culturels volés ou illicitement exportés du 24 juin 1995,* laquelle prévoit qu'en cas de litige, *"les parties peuvent convenir de soumettre leur litige soit à un tribunal ou à une autre autorité compétente, soit à l'arbitrage"*. La Convention UNIDROIT a été ratifiée à ce jour par 32 Etats.

Les instruments de l'Union Européenne reflètent la même approche non contraignante de l'arbitrage. Ainsi la *Directive 93/7 relative à la restitution de biens culturels ayant quitté illicitement le territoire d'un Etat membre du 15 mars 1993* prévoit que *"les autorités compétentes de l'Etat membre peuvent […] faciliter la mise en œuvre d'une procédure d'arbitrage"* à condition toutefois que *"l'Etat requérant et le possesseur ou le détenteur donnent formellement leur accord"* (article 4.6).

Par ailleurs, certaines conventions privées impliquant un Etat contiennent une clause d'arbitrage. Ainsi l'*Accord entre la République italienne et le Metropolitan Museum of Art de New York du 21 février 2006* prévoyant le transfert de propriété de certains biens culturels à l'Etat italien contient une clause arbitrale obligatoire pour les parties en cas de litige, celle-ci se référant en l'espèce au Règlement d'Arbitrage de la Chambre de Commerce de Paris.

V. La pratique

A. Recours fréquent à l'arbitrage?

Mais qu'en est-il en pratique? Les Parties à un litige portant sur un bien culturel ont-elles recours à l'arbitrage en cas de conflit?

Une réponse générale et péremptoire à cette question est éminemment impossible compte tenu de la confidentialité entourant précisément le processus. Nous avons cependant interrogé les principales institutions d'arbitrage, à savoir la Chambre de Commerce de Paris, la London Court of Arbitration et la Chambre arbitrale de la Chambre de Com-

merce de Milan. Seule cette dernière a pu nous rapporter un cas isolé, les deux premières ayant déclaré qu'à leur connaissance, aucun litige portant sur un bien culturel n'avait jamais été soumis à un arbitrage sous leur égide.

Quant aux Maisons de vente aux enchères, celles-ci – telles par exemple Christie's ou Sotheby's – ne prévoient généralement pas de clause d'arbitrage dans leurs conditions générales. Une seule maison de vente fait exception à notre connaissance, Bonhams, aux Etats-Unis, laquelle a inclus une clause arbitrale contraignante dans ses conditions générales de vente, cette clause renvoyant au Règlement d'Arbitrage de l'American Arbitration Association pour le surplus.

Force est ainsi de conclure que le recours à l'arbitrage en matière de litiges portant sur des biens culturels demeure encore aujourd'hui l'exception, et ceci alors que l'arbitrage commercial international constitue une méthode alternative privilégiée de résolution de controverses.

B. La jurisprudence arbitrale en matière de biens culturels

Selon la jurisprudence arbitrale pertinente actuellement disponible, trois litiges en matière de biens culturels méritent notre attention.

Le premier litige concernait 6 tableaux de Klimt appartenant à une famille autrichienne juive qui avait été spoliée par les Nazis durant la dernière guerre mondiale[6]. Après que l'Autriche ait émis une loi (1998) permettant la restitution, la famille Altmann a saisi les tribunaux ordinaires américains pour obtenir la restitution de ces œuvres. Les parties ont ensuite décidé de se soustraire à la justice américaine et de soumettre leur différend à un arbitrage en Autriche, chacune des parties nommant son propre arbitre. La sentence fut rendue en mai 2004: elle concluait à la restitution de 5 des 6 tableaux en question à la famille spoliée.

Cette affaire est particulièrement intéressante en ceci que la décision de procéder par voie de justice a été prise par la famille Altmann en 1999. Après 5 ans de procédure devant les juges aux Etats-Unis, soit en 2004, la famille Altmann a obtenu un jugement de principe autorisant les plaignants à plaider contre le Gouvernement autrichien, les tribunaux n'ayant pas encore abordé le fond. Par comparaison, la procédure arbitrale, débutée en mai 2005, a abouti en 6 mois à la sentence arbitrale ordonnant la restitution des 5 tableaux.

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6 *Maria V. Altmann and others v Republic of Austria,* sentence arbitrale du 15 janvier 2004, disponible sur: http:/bslaw.com/altmann/Klimt/award.pdf (28.02.2012), traduction en anglais disponible sur: http://www.adele.at/Schiedsspruch/award.pdf (28.02.2012).

Cette affaire démontre ainsi la rapidité et l'efficacité de la procédure arbitrale par opposition à la procédure étatique.

Le deuxième litige opposait l'Etat d'Erythrée à la République Fédérale Démocratique d'Ethiopie ensuite – en particulier – des pillages survenus pendant le conflit entre ces deux Etats en 1998, 1999 et 2000[7]. En bref, et dans le contexte qui nous intéresse ici, l'Etat d'Erythrée invoquait, d'une part, le pillage et la dégradation d'un cimetière d'intérêt historique et, d'autre part, l'endommagement délibéré, par explosion, de la Stèle de Matara, un monument considéré comme étant probablement le site archéologique le plus fameux d'Erythrée et datant du milieu du premier millénaire.

Cette procédure arbitrale avait été engagée sur la base d'un accord conclu entre les Etats cités mettant fin aux hostilités le 18 juin 2000 et réitéré le 12 décembre 2000, lequel prévoyait la mise en place d'une Commission de 5 membres nommés par les Parties chargée de régler leurs différends résultant des hostilités citées[8]. Cette Commission devait statuer sur la base d'une procédure ad hoc basée sur le Règlement Facultatif de la Cour Permanente d'Arbitrage pour l'arbitrage des différends entre deux Etats, le droit applicable étant défini comme étant "les règles pertinentes de droit international".

Le tribunal arbitral a conclu, après 2 ans environ (les réclamations étaient nombreuses et complexes) à la responsabilité de l'Etat défendeur s'agissant du cimetière comme de la stèle.

Là encore, la procédure arbitrale a permis une résolution rapide et efficace du litige que n'aurait jamais consenti une procédure étatique menée dans l'un ou l'autre des Etats concernés.

La troisième affaire mettait en présence une société de sauvetage maritime malaisienne, la *Malaysian Historical Salvors Sdn BHD,* et l'Etat malaisien[9]. La première avait été chargée par le second de retrouver un vaisseau britannique échoué en 1817 et de ramener et restaurer les objets culturels s'y trouvant. Ces objets (24'000 en tout) ont été ensuite vendus (1995) par Christie's à Rotterdam pour environ 3 millions de dollars américains. Le litige concernait le montant de la commission due à la société de sauvetage.

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7 *State of Eritrea v The Federal Democratic Republic of Ethiopia,* Partial Award on Central Front Eritrea's Claims 2, 4, 6, 7, 8 & 22 of 28 April 2004, disponible sur: http://www.pca-cpa.org/upload/files/Eritrea%20Central%20Front%20award.pdf (28.02.2012).

8 Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea signed at Algiers on 12 December 2000, disponible sur: http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf (28.02.2012).

9 *Malaysian Historical Salvors SDN BHD v Government of Malaysia,* ICSID Case No. ARB/05/10, Partial Award on Jurisdiction of 17 May 2007, disponible sur: http://icsid.worldbank.org/ (28.02.2012).

Le contrat entre les Parties contenait une clause d'arbitrage selon le droit malaisien. Le siège de l'arbitrage était Kuala Lumpur. L'arbitre unique nommé par l'Etat malaisien rejeta la demande en 1995.

La partie perdante, la société de sauvetage, s'est alors adressée au Centre International pour le Règlement des Différends Relatifs aux Investissements (CIRDI) créé par la Convention de Washington de 1965 à laquelle 157 Etats ont adhéré à ce jour. Ce Centre a pour objet d'offrir des moyens de conciliation et d'arbitrage pour régler les différends relatifs aux investissements opposant des Etats contractants à des ressortissants d'autres Etats Contractants[10].

Par sentence du 10 Mai 2007, l'arbitre unique a jugé que le Centre n'avait pas compétence pour juger du différend en tant que ce dernier ne concernait pas un investissement au sens de la Convention de Washington. Cette sentence a ensuite été annulée par le Comité ad hoc en date du 19 février 2009.

L'affaire est restée sans suite.

VI. Et maintenant?

Le concept même de biens culturels recouvre l'intérêt général des Etats à la préservation du patrimoine archéologique, artistique, culturel, historique et littéraire, préservation qui est de l'intérêt de toute l'humanité. Cette préoccupation ne doit toutefois pas empiéter sur le droit à la propriété garanti par nombre de constitutions modernes.

Ces deux intérêts doivent se concilier, et là où la conciliation n'est pas possible, la justice propre à l'Etat de droit doit trancher.

L'arbitrage, reconnu par la majorité des Etats comme un moyen alternatif à la justice étatique, présente indubitablement des avantages par rapport à cette dernière dans ce contexte. On en a cité quelques-uns. Pourquoi dès lors ne pas adopter un instrument contraignant – pour les Etats qui l'accepteraient – les parties à recourir à la procédure arbitrale en cas de litiges selon une procédure taillée sur mesure par un règlement spéci-

[10] Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, signé à Washington le 18 mars 1965, disponible sur: http://icsid.worldbank.org/ (28.02.2012) et au Recueil systématique du droit fédéral suisse (RS 0.975.2).

fique comparable à celui adopté par la Cour Permanente d'Arbitrage en matière d'environnement[11]?

Ceci constitue précisément l'objet de la Résolution No. 4/2006 adoptée à Toronto en juin 2006 par le Comité International sur le droit de l'héritage culturel de l'Association de Droit International qui recommande, s'agissant de la coopération dans la protection mutuelle et du transfert des biens culturels, le recours à l'arbitrage pour toute résolution de litige se rapportant à ces matières[12].

Mais la volonté politique manque probablement encore. Et en ces temps troublés, il est peu probable que ces questions – pourtant essentielles à notre patrimoine culturel à tous – suscitent à court terme l'intérêt qu'elles méritent.

Mais le temps viendra.

11 Voir le Règlement facultatif de la Cour permanente d'arbitrage pour l'arbitrage des différends relatifs aux ressources naturelles et/ou à l'environnement, entré en vigueur le 19 juin 2001, disponible sur: http://www.pca-cpa.org/upload/files/French%20Env%20ARB%20rules.pdf (28.02.2012).

12 International Law Association, Heritage Law Committee Resolution No. 4/2006 on Cultural Heritage Law, Toronto 2006, Principles For Cooperation In The Mutual Protection And Transfer Of Cultural Material, disponible sur: http://www.ila-hq.org/en/committees/index.cfm/cid/13 (28.02.2012).

SARAH THEURICH*

3. The Role of International Institutional Dispute Resolution in Art and Cultural Heritage Matters: The World Intellectual Property Organization (WIPO) and Its Arbitration and Mediation Center

Abstract

This paper illustrates the positive role that international institutions can play in art and cultural heritage dispute resolution, with a particular focus on the work of the World Intellectual Property Organization (WIPO). The first part of this paper looks at the background and recent trends of institutional involvement in this area. This is followed by an overview of the reflections on art and cultural heritage dispute resolution undertaken in WIPO's work, in particular in the forum of the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources and Folklore. Finally, the paper explains the WIPO Arbitration and Mediation Center's experience with art and cultural heritage dispute resolution, illustrated with concrete case examples.

Synthèse

Cet article souligne le rôle positif joué par les institutions internationales dans le règlement des différends relatifs à l'art et au patrimoine culturel, et analyse en particulier les travaux de l'Organisation Mondiale de la Propriété Intellectuelle (OMPI). La première partie de cet article est consacrée à un historique et aux engagements récents des institutions dans ce domaine. Ensuite de quoi il est dressé un bilan des réflexions menées dans le domaine de la résolution des litiges relatifs à l'art et au patrimoine culturel au sein de l'OMPI, plus particulièrement dans le cadre du Comité intergouvernemental de la pro-

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priété intellectuelle relative aux ressources génétiques, aux savoirs traditionnels et au folklore de l'OMPI. Pour terminer, cette étude décrit l'expérience du Centre d'Arbitrage et de médiation de l'OMPI en ce qui concerne le règlement des litiges relatifs à l'art et au patrimoine culturel, et illustre celle-ci à l'aide d'une série d'exemples tirés de la pratique.

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I. Introduction

Following early discussions on the need for institutionalized initiatives, international institutions in the field of art and cultural heritage have increasingly recognized the potential of Alternative Dispute Resolution (ADR)[1] in this sector.

[1] ADR is used in the wider sense here as referring to out-of-court dispute resolution mechanisms, such as arbitration, mediation, conciliation and expert determination. A more detailed explanation of the different ADR mechanisms and their advantages in art and cultural heritage disputes can be found for example in THEURICH SARAH, *Art and Cultural Heritage Dispute Resolution,* WIPO Magazine, July 2009, Issue 4, pp. 17 et seqq, available at: http://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2009/wipo_pub_121_2009_04.pdf (29.02.2012).

Already in 1995, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects referred to the possibility of submitting disputes over the restitution of stolen cultural objects or the return of illegally exported cultural objects to arbitration in article 8.2[2]. Since then, a number of international institutions have become more prominently involved by setting up specific ADR structures and frameworks for art and cultural heritage matters. The efforts of the United Nations Educational Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO) and the International Council of Museums (ICOM) are particularly noteworthy in this regard.

This paper aims to illustrate the positive role that international institutions can play in art and cultural heritage ADR. Particular focus is thereby set on WIPO's work and general policy reflections on this topic, as well as the practical experience of the WIPO Arbitration and Mediation Center.

The term *"art and cultural heritage"* is used in the broad sense in the present context. Without attempting a definition, which would exceed the scope of this paper, suffice it to say that the term is understood as to include both tangible cultural heritage (e.g., a sculpture or a vase) and intangible cultural heritage (e.g., folklore or a song). Tangible and intangible cultural heritage may also converge in one object, such as a *"painting that depicts a myth or a legend"*[3]. Furthermore, relevant legal issues that may pertain to *"art and cultural heritage"* are understood here as to cover issues of a tangible nature (e.g., restitution), as well as of an intangible nature (e.g., intellectual property). The WIPO Arbitration and Mediation Center has indeed encountered disputes in which such different issues were combined in a single case. For example, one case related to a dispute in which the return of a physical cultural object was claimed, in addition to intellectual property issues because of the reproduction of an image of the object[4].

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2 The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organization with its seat in Rome and currently has 63 Member States, see http://www.unidroit.org (29.02.2012).

3 Example provided in the context of traditional cultural expressions: *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions,* Document prepared by the WIPO Secretariat, 2 May 2003, WIPO/GRTKF/IC/5/3, Annex, no 51: "Expressions of" 'traditional culture (or 'expressions of' folklore) may be either intangible, tangible or, most usually, a combination of the two […]. For example, a painting may depict an old myth or legend – the myth and legend are part of the underlying intangible 'folklore,' as are the knowledge and skill used to produce the painting, while the painting itself is a tangible expression of that folklore." http://www.wipo. int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_3.pdf (29.02.2012).

4 See *infra* section IV.D.2.

II. The Role of International Institutional Alternative Dispute Resolution (ADR) in Art and Cultural Heritage Matters

Responding to early calls for institutionalized ADR (as opposed to *ad hoc* approaches), international institutions have developed tailored ADR mechanisms for art and cultural heritage matters. These efforts are certainly justified by the many benefits that international institutional ADR offers.

A. Early Calls for Institutional Art and Cultural Heritage ADR

For many years there has been discussion amongst practitioners and academics about the need for some form of institutional approach to art and cultural heritage dispute resolution.

For example, at a Symposium on "Resolution Methods for Art-Related Disputes" at the University of Geneva in 1997, several calls were made by speakers for the creation of a specialized arbitration center[5] or mediation structure[6] for the resolution of art-related disputes. It was also proposed that the structure and procedures of existing arbitration institutions be adapted to the resolution of art-related disputes[7]. Similar reflections took place in other *fora*[8], suggesting for example the creation of an international court of

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5 See for example RIGAUX FRANÇOIS, *Avantages possibles de l'arbitrage,* in: Byrne-Sutton Quentin/Geisinger-Mariéthoz Fabienne (eds.), Resolution Methods for Art-Related Disputes, Proceedings of a Symposium organized on 17 October 1997, Studies in Art Law, Vol. 11, Zürich 1999, p. 122; BYRNE-SUTTON QUENTIN, *Introduction: Alternative Paths to Explore,* in: Resolution Methods for Art-Related Disputes, p. 11.

6 See SCOTT RAU ALAN, *Mediation in art-related disputes,* in: Resolution Methods for Art-Related Disputes (*ibid.*), p. 183.

7 See KAUFMANN-KOHLER GABRIELLE, *Art et Arbitrage: Quels enseignements tirer de la résolution des litiges sportifs?*, in: Resolution Methods for Art-Related Disputes (*cit.* n. 5), p. 149.

8 See for example, CHECHI ALESSANDRO, *The Settlement of International Cultural Heritage Disputes: Towards a Lex Culturalis?*, Doctoral Thesis, European University Institute, Department of Law, March 2011, Chapter IV, Section A; HOFFMAN BARBARA T., *Introduction to Creating Value – Considering Arbitration or Mediation to Resolve Art and Cultural Property Disputes,* Part Ten, in: Hoffman Barbara (ed.), Art and Cultural Heritage, Law, Policy and Practice, Cambridge et al. 2005, p. 464; BARKER IAN, *Thoughts of an Alternative Dispute Resolution Practitioner on an International*

arbitration for restitution/return issues established through the United Nations[9], or a role for the Permanent Court of Arbitration in this area[10]. Further, it had been proposed that a specialized forum be created for Holocaust-looted art claims[11].

Some authors indicated among other options, that the WIPO Arbitration and Mediation Center would be well placed to play a role in the endeavor to institutionalize art and cultural heritage dispute resolution[12]. They justified this option in particular by underlining the fact that WIPO is a UN agency that deals with intellectual property and cultural heritage issues, that there is a link between cultural and intellectual property, and that the WIPO Arbitration and Mediation Center has experience with dispute resolution. As explained below, WIPO has followed such institutional approach by developing tailored art and cultural heritage ADR services.

ADR Regime for Repatriation of Cultural Property and Works of Art, in: Art and Cultural Heritage, Chapter Sixty-Five, pp. 483 et seqq; FELLRATH GAZZINI ISABELLE, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes,* New York 2004, pp. 209 et seqq.

9 See PHELAN MARILYN, *Legal and Ethical Considerations in the Repatriation of Illegally Exported and Stolen Cultural Property: Is There a Means to Settle the Disputes?,* p. 7, available at: http://media.rcip-chin.gc.ca/ac/intercom/phelan.pdf (29.02.2012).

10 See DALY BROOKS W., *Arbitration of International Cultural Property Disputes: The Experience and Initiatives of the Permanent Court of Arbitration*, in: Art and Cultural Heritage (*cit*. n. 8), Chapter Sixty-Three, pp. 465 et seqq; see also the papers emanating from the 7th Permanent Court of Arbitration International Law Seminar, 23 May 2003, Den Haag, International Bureau of the Permanent Court of Arbitration (ed.), The Hague 2004.

11 PELL OWEN C., *Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art,* in: Resolution of Cultural Property disputes: papers emanating from the 7th Permanent Court of Arbitration International Law Seminar, 23 May 2003, Den Haag, International Bureau of the Permanent Court of Arbitration (ed.), The Hague 2004, p. 315; DAS HANS, *Claims for looted cultural assets,* in: *Idem,* pp. 194 et seqq.

12 See in particular, KAUFMANN-KOHLER, *Art et Arbitrage* (*cit*. n. 7), p. 149; BARKER IAN, *Alternative Dispute Resolution Practitioner* (*cit*. n. 8), p. 487; SKRYDSTRUP MARTIN, *Should ICOM adjudicate cultural property disputes?,* A review essay from the Triennial in Seoul, ICME papers 2004, available at: http://icme. icom.museum/fileadmin/user_upload/pdf/2004/skrydstrup-review.pdf (02.03. 2012).

B. Institutional Art and Cultural Heritage ADR v *Ad Hoc* Approaches

Institutional art and cultural heritage ADR generally presents many advantages over *ad hoc*[13] ADR approaches.

However, it should also be mentioned that sometimes parties prefer *ad hoc* ADR. This may be the case where the parties cannot agree on an administering institution. Proponents of *ad hoc* ADR also may not wish to submit to the authority and control of an institution. Another argument that is often put forward is that *ad hoc* ADR is less expensive, the parties do not have to pay institutional administrative fees[14].

On the other hand, international institutions offer efficient procedural and administrative frameworks against a moderate fee. This allows parties to focus on the substance of the dispute and to actually save costs and time that they would otherwise have to spend on organizing the procedure themselves. It also reduces the need for recourse to the national courts. In addition to administrative and logistical assistance, many institutions, such as the WIPO Arbitration and Mediation Center, also take care of fixing the mediator's or arbitrator's fees and managing the deposits[15]. Negotiating these fees directly in *ad hoc* ADR may prove delicate and cumbersome. Moreover, in cases where the parties have difficulties to cooperate, administering institutions can contribute to a more efficient conduct of the procedure.

Furthermore, international institutions, such as UNESCO, WIPO and ICOM, have the substantive expertise to tailor ADR options exactly to the specific features of art and cultural heritage disputes. Most importantly, they can establish lists of experienced mediators, arbitrators or experts (together "neutrals") with the relevant qualifications in art and cultural heritage matters. This is indeed paramount for the success of the dispute resolution process, as many of the authors cited above have indicated. Through their international networks, these institutions can identify lists of neutrals from a wide range

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13 Ad hoc dispute resolution means that no institution administers the process but that the parties organize the procedure, as well as the administrative and logistical parts of it.

14 Arguments mentioned in the context of *ad hoc* arbitration, in: LEW JULIAN D. M./MISTELIS LOUKAS A./KRÖLL STEFAN M., *Comparative International Commercial Arbitration,* The Hague 2003, pp. 3.14 et seqq.

15 Advantages mentioned in the context of institutional arbitration in WIPO Arbitration Guide, WIPO publication 919E, p. 14, available at: http://www.wipo.int/freepublications/en/arbitration/ 919/ wipo_pub_919.pdf (02.03.2012); COOK TREVOR/GARCIA ALEJANDRO, *International Intellectual Property Arbitration, Arbitration in Context Series,* the Netherlands 2010, pp. 123 et seqq; LEW/MISTELIS/KRÖLL (*ibid.*), pp. 3.20 et seqq.

of jurisdictions that cover a large spectrum of art and cultural heritage subject matters. This would be a difficult undertaking for individual parties in *ad hoc* processes. International institutions are also well placed to check the impartiality and independence of the neutrals.

In sum, through their integrity and neutrality, international institutions are able to provide a forum of trust to the parties. The "cachet" of an internationally recognized and experienced institution creates a "comfort element" for the parties[16]. Having an impartial body supervising and overseeing the dispute resolution procedures creates an atmosphere of respect and can stimulate parties to effectively engage in the process.

C. Recent Trend Towards International Institutional Art and Cultural Heritage ADR

A recent trend towards the institutionalization of art and cultural heritage ADR on an international level can be noted. Indeed, a number of existing international organizations and institutions in the art and cultural heritage sector have shown willingness to play a more prominent role in that area by providing adapted ADR mechanisms.

While several institutional efforts for art and cultural heritage dispute resolution have been undertaken on the national level[17], the international initiatives by WIPO, UNESCO and ICOM should be mentioned in particular, as they originate from prominent international organizations and institutions in this field. The particularity is that these institutions developed ADR options that are specifically tailored to art and cultural heritage

16 LEW/MISTELIS/KRÖLL (*ibid.*), pp. 3.20 et seqq.

17 Including for example ArtResolve, a UK non-profit company, see http://www.artresolve.org (02.03.2012); the Australian Arts Law Centre's mediation service, see http://www.artslaw.com.au/services/mediation-service (02.03.2012); as well as the procedures offered by the national advisory commissions for Holocaust-related art claims, i.e. the Austrian Commission for Provenance Research, the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value in the Second World War, German Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property, the UK Spoliation Advisory Panel, the New York State Banking Department's Holocaust Claims Processing Office. It also seems that the former Venice Court of National and International Arbitration had aimed to deal with art law related cases (see SIEHR KURT, *Resolution of Disputes in International Trade, Conference Report,* Third Annual Conference of the Venice Court of National and International Arbitration, 29–30 September 2000, International Journal of Cultural Property, Vol. 10, Issue 1, 2001, pp. 122 et seqq).

disputes, as opposed to general institutional ADR mechanisms offered by other international ADR providers.

The WIPO ADR Service for Art and Cultural Heritage provides a number of ADR procedures for a wide range of disputes and parties in the area of art and cultural heritage[18]. WIPO also collaborates with ICOM[19] in the provision of the new ICOM-WIPO Mediation Program, which is available to art and cultural heritage disputes relating to ICOM's areas of activities[20]. The UNESCO[21] Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) recently adopted specific Rules of Procedure for Mediation and Conciliation for requests for the return or restitution of cultural property[22].

The main advantage lies certainly in the fact that these institutions provide international lists of specialized neutrals that are qualified in art and cultural heritage. However, the three systems differ in scope, type of procedure and administrative framework. For example, the ICPRCP procedures are only available to UNESCO Member States and Associate Members of UNESCO[23], while the WIPO service and the WIPO-ICOM Mediation Program can also be used directly by private parties.

While a more detailed analysis would exceed the scope of this paper[24], it may be said that the three mechanisms should provide parties in the art and cultural heritage sector with a range of complementary and efficient ADR options.

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18 See *infra* section IV.B.

19 ICOM is an international nongovernmental organization committed to the conservation, continuation and communication to society of the world's natural and cultural heritage, present and future, tangible and intangible, see http://icom.museum/ (29.02.2012).

20 See also *infra* section IV. C.

21 UNESCO is an intergovernmental organization with its seat in Paris, France and currently has 193 Member States, see http://www.unesco.org (02.03.2012). Its mandate is to contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information.

22 Adopted at the 16th Session of the ICPRCP in September 2011. The Rules are available at: http://unesdoc.unesco.org/images/0019/001925/192534E.pdf (29.02.2012). On the scope, see article 1 of the ICPRCP Rules of Procedure for Mediation and Conciliation.

23 See article 4 of the ICPRCP Rules of Procedure for Mediation and Conciliation. In certain circumstances States may represent the interests of their nationals or of public or private institutions located in their territory, and States may also initiate a procedure with regard to a public or private institution if the other State is informed and does not object.

24 Such analysis is undertaken in the author's forthcoming PhD thesis.

III. General Reflections on Art and Cultural Heritage ADR in WIPO's Work

In the context of WIPO's work, general reflections have been undertaken on the potential of ADR to resolve certain art and cultural heritage disputes[25].

A. Brief Overview of WIPO

As a specialized agency of the United Nations, WIPO is *"dedicated to developing a balanced and accessible international intellectual property system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest"*[26]. WIPO is based in Geneva, Switzerland, currently has 185 Member States and administers 24 international Treaties[27]. It was founded by the Convention Establishing the World Intellectual Property Organization of 1967[28], but its history goes back to the Paris Convention for the Protection of Industrial Property of 1883[29], and to the Berne Convention for the Protection of Literary and Artistic Works of 1886[30].

The organization is active in a number of areas, including copyright, cultural heritage, traditional knowledge, traditional cultural expressions, and dispute resolution.

WIPO's work concentrates in particular on the role that intellectual property can play in protecting traditional cultural expressions against various forms of misappropriation and unauthorized use, which may result from activities such as recording, digitization and

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25 For a more detailed overview of this topic, see THEURICH SARAH, *Alternative Dispute Resolution in Art and Cultural Heritage – Explored in the Context of the World Intellectual Property Organization's Work*, in: Odendahl Kerstin/Weber Peter Johannes (eds.), Kulturgüterschutz – Kunstrecht – Kulturrecht, Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden – und Habilitandenseminars "Kunst und Recht", Schriften zum Kunst- und Kulturrecht, Baden-Baden 2010, Vol. 8, pp. 569 et seqq, available at: http://www.wipo.int/amc/en/docs/theurich beitrag. pdf (02.03.2012).

26 See http://www.wipo.int/about-wipo/en/what_is_wipo.html (02.03.2012).

27 See http://www.wipo.int/treaties/en/ (02.03.2012).

28 The Convention was signed in Stockholm on 14 July 1967. See http://www.wipo.int/treaties/en/convention (02.03.2012).

29 See http://www.wipo.int/treaties/en/ip/paris/ (02.03.2012).

30 See http**:**//www.wipo.int/treaties/en/ip/berne/ (02.03.2012).

dissemination. It also addresses the role of intellectual property in generating and equitably sharing benefits from the commercialization thereof[31].

In that context, the organization often works in consultation with cultural institutions, such as museums, archives and libraries, as well as with indigenous peoples and local communities and other stakeholders.

B. ADR Reflections in the Context of the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources and Folklore (IGC)

The potential role of ADR has been addressed in the context of the IGC in policy discussions, draft provisions, and working documents. The IGC is a specific intergovernmental body within WIPO to facilitate discussions on intellectual property and genetic resources (GR), traditional knowledge (TK) and traditional cultural expressions (TCEs)[32], established by the WIPO General Assembly in 2000[33].

The mandate of the IGC was recently renewed by the WIPO General Assembly for the 2012–2013 biennium[34]. The new mandate aims to *"expedite the Committee's work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs"*[35]. Such text(s) are to be submitted to the 2012 General Assembly, which will consider them and decide on convening a Diplomatic Conference.

While the IGC deals with three main topics, i.e. GR, TK and TCEs, this paper focuses mainly on the IGC's work on TCEs[36], as TCEs seem more relevant to art and cultural

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31 See http://www.wipo.int/tk/en/ (02.03.2012).

32 See document WIPO/GA/26/6, p. 3, with references on the background of the creation of this body, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=1460 (02.03.2012).

33 Report adopted by the WIPO General Assembly at its 26th Session, WIPO/GA/26/10, Agenda Item 15, p. 23, available at: http://www.wipo.int/meetings/en/html.jsp?file=/redocs/mdocs/govbody/en/wo_ga_26/wo_ga_26_10.html (02.03.2012).

34 Assemblies of the Member States of WIPO, Forty-Ninth Series of Meetings Geneva, 26 September to 5 October 2011, see Draft Report, WO/GA/40/19 Prov, 5 October 2011, nº 168.

35 See document on Matters Concerning the IGC, WO/GA/40/7, 12 August 2011, nº 16.

36 The current Draft Articles on The Protection of Traditional Cultural Expressions propose the following description of traditional cultural expressions, see WIPO/GRTKF/IC/19/4, 17 May 2011, Annex, p. 3: "'Traditional cultural expressions' are any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied and have been passed on [from genera-

heritage in the present context. In that area, a number of interesting ADR avenues have been considered.

For example, the latest version of the IGC's Draft Articles on the Protection of Traditional Cultural Expressions proposes that disputes between beneficiaries or between beneficiaries and users of a TCE may be referred to an independent ADR mechanism, recognized by international and/or national law, such as the WIPO Arbitration and Mediation Center[37].

Some WIPO Member States participating in the IGC have also early on raised the potential of considering ADR and the need to further reflect on ADR options in particular in relation to intellectual property and TCEs[38].

Further, a number of IGC working documents and studies have examined the role of ADR in the resolution of disputes in this area. For example, a WIPO study on the international dimension of the IGC's work found that *"(t)here are salient aspects of international disputes over genetic resources, traditional knowledge and traditional cultural expressions which may at once lend themselves to alternative dispute resolution and yet call for specially adapted rules for mediation or arbitration"*[39].

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tion to generation], tangible or intangible forms of creativity of the beneficiaries, as defined in article 2 including, but not limited to:

(a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, [signs,] names, [and symbols];

(b) musical or sound expressions, such as songs, [rhythms,] and instrumental music, the sounds which are the expression of rituals;

(c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, [sports and traditional] games, puppet performances, and other performances, whether fixed or unfixed;

(d) tangible expressions, such as material expressions of art, [handicrafts,] [works of mas,] [architecture,] and tangible [spiritual forms], and [sacred places.]".

37 See document on Draft Articles on The Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/19/4, May 17, 2011, proposed article 8bis on Alternative Dispute Resolution, Annex, p. 11.

38 See for example the Position Paper of the Asian Group and China, 3 December 2001, WIPO/GRTKF/IC/2/10, Annex, p. 2, available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_10.doc (02.03.2012), and the Position paper of the African Group, 14 June 2002, WIPO/GRTKF/IC/3/15, Annex, p. 7, available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_15.doc (02.03.2012).

39 Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: The International Dimension, WIPO/GRTKF/IC/6/6, 30 November 2003, prepared by the WIPO Secretariat following a request from the WIPO General Assembly that the IGC consider in particular the "international di-

Another WIPO study examined the role that ADR can play in the recognition of customary law and protocols in intellectual property disputes involving TCEs and TK[40]. According to this study, customary laws and protocols could be incorporated into ADR proceedings at three levels: for the substantive issues in dispute, for dispute resolution procedures that take account of customary procedures and for appropriate remedies in line with customary practices.

C. ADR References in the Context of Related WIPO Programs

The role of ADR for cultural heritage disputes has also been considered in other related WIPO Programs. For example, WIPO's Program on Intellectual Property and GR, TK and TCEs, which has a capacity building role and goes beyond IGC related work, has issued relevant publications that also deal with this topic. A recent publication on *"Intellectual Property and the Safeguarding of Traditional Cultures"*[41] looks in particular at disputes between holders of TCEs and third party users over issues such as ownership, control, and access and benefit sharing. It finds that ADR offers appropriate avenues for such disputes and shows how these mechanisms work in practice. It also gives an interesting example of a *"Native Lands and Title Tribunal"* in Fiji, which deals with traditional land claims and involves independent indigenous Fijian customary experts in the process[42].

Relating to that WIPO Program as well as the WIPO Copyright Program, the WIPO Guide on Managing Intellectual Property for Museums[43] emphasizes in particular that ADR can be a time and cost-efficient tool for museums to resolve contractual intellectual property disputes in which they may be involved. It also explains how museums can use

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mension" of its work, p. 24, available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_6.pdf (02.03.2012).

40 WIPO revised issues paper, Customary Law and the IP System in the Protection of TCEs and TK, version 3.0, December 2006, p. 33, available at: http://www.wipo.int/tk/en/consultations/customary_law/index.html (02.03.2012).

41 *Intellectual Property and the Safeguarding of Traditional Cultures – Legal Issues and Practical Options for Museums, Libraries and Archives*, written for WIPO by TORSEN MOLLY/ANDERSON JANE, WIPO Publication No. 1023(E), 2010, on dispute resolution see pp. 62 et seqq, available at: http://www.wipo.int/export/sites/www/tk/en/publications/1023.pdf (02.03.2012).

42 *Idem,* p. 63.

43 This WIPO-commissioned guide was prepared by ELSTER PANTALONY RINA and published in August 2007, available at: http://www.wipo.int/copyright/en/museums_ip (02.03.2012).

ADR contract clauses in their agreements in order to provide for the eventuality of future disputes[44].

IV. The WIPO Arbitration and Mediation Center's Experience in Art and Cultural Heritage ADR

As part of WIPO's *"Premier Global IP Services"*[45], the WIPO Arbitration and Mediation Center provides not-for-profit dispute resolution services. Being active in a number of intellectual property related sectors, it has in particular built up procedural experience with ADR in the area of art and cultural heritage.

A. Background of the WIPO Arbitration and Mediation Center

The WIPO Arbitration and Mediation Center was established in 1994 to offer adapted dispute resolution mechanisms that respond to the specificities of intellectual property related disputes[46]. It is based in Geneva, Switzerland and also has a regional office in Singapore. As part of an international organization, it is particularly recognized for cross-border and cross-cultural dispute resolution.

The different ADR procedures offered by the WIPO Arbitration and Mediation Center were developed by leading international dispute resolution experts[47] and include mediation, arbitration, and expert determination. They were inspired by other well-established rules, such as the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules.

The WIPO Arbitration and Mediation Center's role is twofold, as it acts both as an administering institution and as a resource center.

As an administering institution it administers cases filed under different procedures through its active case management system. The system provides multilingual case ad-

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44 See Part I, Section 2.7 of the guide (*ibid.*).

45 WIPO Premier Global IP Services are part of the organization's nine strategic goals, see http://www.wipo.int/about-wipo/en/what_is_wipo.html (02.03.2012).

46 See for example, GURRY FRANCIS, *The WIPO Arbitration and Mediation Center and its Services,* The American Review of International Arbitration, Vol. 5, No. 2, 1994, pp. 197 et seqq.

47 See, Development of WIPO's Dispute Resolution Services, World Intellectual Property Organization, 1992–2007, Part III, pp. 93 et seqq, available at: http://www.wipo.int/amc/en/history/ (02.03.2012).

ministration, including assistance with the appointment of mediators, arbitrators and experts, fee management, electronic case communication tools, such as WIPO ECAF[48], as well as logistical and technical assistance. To date, it has administered over 250 mediations and arbitrations most of which have been filed in the last years, in addition to over 20,000 domain name cases[49].

This procedural experience also serves the WIPO Arbitration and Mediation Center in its function as a resource center, whereby it raises awareness about the role of ADR in different sectors. This includes the provision of a number of resources, such as ADR Rules and model clauses, a database of over 1,500 specialized mediators, arbitrators and experts, as well as different publications and educational tools. It also offers training, as well as procedural guidance and good offices through its Submission Advisory Service[50].

As a resource center, it provides in particular tailored WIPO ADR Services for Specific Sectors[51], such as Art and Cultural Heritage, Biodiversity, Collecting Societies, Film and Media, Information and Communication Technology, Research and Development and Technology Transfer, and Sports. While the standard WIPO ADR Rules are generally appropriate for all commercial disputes, adaptations tailored to the particular dispute resolution needs of specific sectors can enhance dispute resolution efficiency. Such adaptations may be made at the level of ADR rules and clauses, as well as model contracts. Most importantly, they usually include the identification of specific lists of mediators, arbitrators and experts with expertise in the concerned sector. In the development of these specific ADR services, the WIPO Arbitration and Mediation Center generally works with intellectual property owners and users, their representative organizations and associations, interested entities and experts, as well as with other WIPO Divisions. For example, in the biodiversity sector, it has provided technical assistance to the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) in the development of *"Rules for Mediation of a Dispute in Relation to a*

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48 On the WIPO Electronic Case Facility, see http://www.wipo.int/amc/en/ecaf/index.html (02.03.2012).

49 See http://www.wipo.int/amc/en/center/caseload.html (02.03.2012).

50 For an explanation of the Submission Advisory Service, see The Services of the WIPO Arbitration Center, WIPO Publication No. 445, 1995, pp. 20 et seqq., available at: http://www.wipo.int/freepublications/en/arbitration/445/wipo_pub_445.pdf (02.03.2012).

51 See http://www.wipo.int/amc/en/center/specific-sectors (02.03.2012); THEURICH SARAH, *Designing Tailored Alternative Dispute Resolution in Intellectual Property: the Experience of WIPO,* in: DE WERRA JACQUES (ed.), La résolution des litiges de propriété intellectuelle/Resolution of intellectual property disputes, Genève et al. 2010, pp. 175 et seqq, available at: http://www.wipo.int/amc/en/docs/tailoredada.pdf (02.03.2012).

Standard Material Transfer Agreement" for which it was recently appointed to act as administrator[52].

B. WIPO ADR Service for Art and Cultural Heritage

In light of the specificities of art and cultural heritage disputes, the WIPO Arbitration and Mediation Center has recently set up an ADR Service for Art and Cultural Heritage[53]. The service aims to provide efficient and neutral dispute resolution options that are appropriate for art and cultural heritage related disputes.

In the art and cultural heritage sector, the WIPO Arbitration and Mediation Center collaborates in particular with WIPO's Program on IP, GR, TK and TCEs, and with WIPO's Copyright Program. It should be clarified, however, that the WIPO ADR Service for Art and Cultural Heritage is *"operationally distinct from and without prejudice to ongoing normative discussions in the WIPO IGC and elsewhere. The WIPO ADR service is intended as a voluntary and complementary mechanism and does not substitute or interfere with ongoing IGC discussions"*[54].

Since art and cultural heritage matters are usually quite specific and may raise complex legal and non-legal questions, it is paramount to have intermediaries with relevant expertise in this area. For that purpose, the WIPO Arbitration and Mediation Center has established a specific international list of mediators, arbitrators and experts that combine qualification in art and cultural heritage matters with dispute resolution experience. The WIPO Arbitration and Mediation Center also organizes specific training for art and cultural heritage neutrals, as well as for parties and other concerned stakeholders.

In light of the diversity of potential art and cultural heritage disputes and involved subject matters and parties, a "one size fits all" approach would be unlikely to cater for all possible situations. This is why it is important to offer parties a wide range of procedural options with a large scope of application. This enables them to choose an appropriate procedure or to combine the options as they see fit for their individual dispute.

Under the WIPO ADR Service for Art and Cultural Heritage, parties are provided with a number of procedural options, such as the WIPO Mediation, Arbitration, Expedited Arbi-

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52 See Resolution 5/2011, ITPGRFA, Fourth Session of the Governing Body, 14–18 March 2011, available at: http://www.itpgrfa.net/International/sites/default/files/R5_2011_en.pdf (02.03.2012).

53 For more information on this service, see http://www.wipo.int/amc/en/center/specific-sectors/art/ (02.03.2012).

54 Quoted from http://www.wipo.int/amc/en/center/specific-sectors/art/ (02.03.2012).

tration and Expert Determination Rules[55], which are appropriate for disputes in this sector. The scope of application of these Rules is wide, the only requirement being the parties' agreement to submit the dispute(s) to such a procedure[56]. While these Rules are particularly suitable for intellectual property disputes, the scope *ratione materiae* is not limited to intellectual property matters, and the WIPO Arbitration and Mediation Center has indeed administered a number of disputes in other areas. *Ratione personae,* the scope is quite broad as well. Most of the cases involve private parties, but also public entities, such as universities, research centers, and collecting societies, have also been parties in WIPO cases. A State may be a party in a procedure under these Rules, provided that it has expressed its consent, just as any other involved party(ies), to submit the dispute to such a procedure[57].

The WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules allow for a great deal of party autonomy, which gives them the flexibility to deal with a wide range of art and cultural heritage disputes. Indeed, parties can choose and appoint the mediator, arbitrator, or expert, they can agree on the language and the applicable law as well as on other procedural elements. Parties can also combine the different procedures with each other. For example, they may use WIPO Mediation in a first phase and WIPO Arbitration in a second phase, should the dispute or some of the issues in dispute not be settled through mediation. The second phase of WIPO Arbitration may also follow a mediation procedure under other rules, such as the ICOM-WIPO Mediation Rules. WIPO Expert Determination can also be part of a WIPO Mediation or Arbitration procedure, for example to determine a matter of art authenticity. Combining procedures increases settlement chances. In that respect, it may be noted that 73% of WIPO Mediations have settled. Even in WIPO Arbitrations, 58% of cases have settled, while the rest concluded with an award[58].

These Rules also contain detailed confidentiality provisions[59]. Given the importance of reputation in the art market, confidentiality may be key in the resolution process. It may also be a crucial aspect when sacred traditional material is involved[60]. There are of

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55 WIPO Arbitration, Mediation, and Expert Determination Rules and Clauses, WIPO Publication No. 446, January 2009, available at: http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf (02.03.2012).

56 See article 2 "Scope of Application of Rules".

57 See The Services of the WIPO Arbitration Center, WIPO Publication No. 445, 1995, p. 18, available at: http://www.wipo.int/freepublications/en/arbitration/445/wipo_pub_445.pdf (02.03.2012).

58 Statistics taken from http://www.wipo.int/amc/en/center/caseload.html (02.03.2012).

59 See COOK/GARCIA, *International Intellectual Property Arbitration* (*cit.* n. 15), pp. 235 et seqq.

60 On the confidentiality implications in art and cultural heritage dispute resolution, see also THEURICH, *Art and Cultural Heritage* (*cit.* n. 1), p. 19.

course circumstances in which parties prefer or are required by law to disclose certain elements of the dispute. Such exceptions are provided for in the Rules, based on legal requirements or party agreement.

Art and cultural heritage disputes often require creative and non-conventional solutions or remedies that may not be available through court litigation. The WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules are flexible and allow parties to adopt appropriate and satisfactory remedies. In addition to monetary damages, remedies in WIPO cases have included a number of non-monetary solutions and specific performance (as illustrated in the art-related WIPO Arbitration case example *infra*)[61].

C. ICOM-WIPO Art and Cultural Heritage Mediation Program

Under the WIPO ADR Service for Art and Cultural Heritage, the WIPO Arbitration and Mediation Center also works with other relevant stakeholders and organizations to respond to specific dispute resolution needs.

This includes, for example, the above-mentioned collaboration with ICOM. Under this collaboration, the WIPO Arbitration and Mediation Center and ICOM have recently developed a specific ICOM-WIPO Art and Cultural Heritage Mediation Program[62]. The ICOM-WIPO Mediation Rules have a broad scope, as they are applicable to art and cultural heritage disputes relating to ICOM's areas of activities. This covers a wide range of subject matter, *"including but not limited to return and restitution, loan and deposit, acquisition and intellectual property"*[63]. The ICOM-WIPO Mediation Rules can be used by private or public parties and are available to ICOM-members and also to non-members. A specific ICOM-WIPO List of Mediators with expertise in art and cultural heritage has been established from which parties can select mediators.

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61 On the types of remedies in WIPO procedures, see WILBERS ERIK/DE CASTRO IGNACIO/ MIN EUN-JOO/THEURICH SARAH, *WIPO Arbitration and Mediation Center,* in: Schneider Michael/Kroll Joachim (eds.), Performance as a Remedy: Non-Monetary Relief in International Arbitration, ASA Special Series No. 30, JurisNet LLC, 2011, pp. 179 et seqq, available at: http://www.wipo.int/amc/en/docs/centerasa.pdf (02.03.2012).

62 See http://www.wipo.int/amc/en/center/specific-sectors/art/icom/ (02.03.2012). The ICOM-WIPO Mediation Program is explained in more detail in a separate conference by SLIMANI SAMIA and the present author.

63 See article 2(a) of the ICOM-WIPO Mediation Rules.

ICOM-WIPO Mediation can also be combined with other WIPO procedures, such as WIPO Arbitration, Expedited Arbitration or Expert Determination.

D. Practical Case Examples of WIPO Art and Cultural Heritage ADR

As indicated above, the WIPO Center has been administering an increasing amount of mediations and arbitrations over the last years. A number of these cases have involved art and cultural heritage matters[64]. Two of these cases are set out below in more detail to illustrate the types of substantive and procedural issues that may arise in disputes in that sector.

1. WIPO Arbitration in an Artist Promotion Dispute

The following is a summary of an art-related WIPO Arbitration that involved interesting procedural aspects and creative remedies[65]:

"A European art gallery had concluded an exclusive cooperation agreement with a European artist in order to promote the artist in the international market. The agreement contained a WIPO Arbitration clause providing for a three-member arbitral tribunal. Three years after the signing of the agreement, the parties' relationship began to deteriorate and the artist sent a notice terminating the agreement. At that point, the art gallery initiated WIPO Arbitration proceedings.

Following consultations between the parties and the WIPO Center, the WIPO Center appointed three arbitrators experienced in art law issues.

After studying the parties' pleadings, the tribunal considered that there may be potential for settlement. With the agreement of the parties, the tribunal issued a preliminary case assessment encouraging the parties to resume settlement negotiations, which the parties had attempted at an earlier stage. The parties did indeed reach a settlement and asked the tribunal to render a consent award[66], incorporating the parties' settlement agreement. The terms of the settlement included the termination of the cooperation agreement

64 The cases are summarized in anonymized form in order to respect the confidentiality of the proceedings.

65 This case summary was initially prepared by the author for the WIPO Center's case summary webpage at: http://www.wipo.int/amc/en/arbitration/case-example.html (20.02.2012).

66 In WIPO Arbitration and Expedited Arbitration, parties can jointly request the arbitrator(s) to issue a consent award, which is an arbitration award that records the settlement reached by the parties (article 65.b of the WIPO Arbitration Rules, article 58 WIPO Expedited Arbitration Rules).

and the provision of a number of art works by the artist to the gallery in final settlement".

2. WIPO Good Offices in a Cultural Heritage Matter between an Indigenous Community and a Museum

The following is a summary of a good offices procedure that the WIPO Arbitration and Mediation Center carried out in a cultural heritage matter between an indigenous community and a museum[67]:

"In this matter, an indigenous community had approached the WIPO Arbitration and Mediation Center requesting mediation and arbitration assistance concerning a cultural object displayed in a museum in another country. The community regarded the object as sacred and to belong to it. Amongst other issues, it claimed the repatriation of the object and its recognition as the original owner, including associated moral, economic and other rights. It also sought an agreement to share related financial or commercial benefits, as well as compensation for the reproduction of the image of the object.

Following the indigenous community's request for assistance in this matter, the WIPO Arbitration and Mediation Center exercised its good offices in order to explore the potential interest of the museum to agree to submit the matter to mediation and/or arbitration.

In its response, the museum explained the facts from its perspective and sought to address concerns raised by the indigenous community. In particular, it set out its differing understanding of the nature of the object and attempted to clarify the history of its purchase. However, it did not see the need to submit to mediation or arbitration.

While this matter was not resolved through mediation or arbitration, it still permits to draw interesting lessons on ADR in cultural heritage disputes. Indeed, the good offices involvement by a neutral institution seems to have contributed to further the dialogue between the indigenous community and the museum, by providing a platform, which allowed them to set out the facts and their positions. Also, this matter illustrates the types of issues that may arise in cultural heritage disputes and in particular the possible combination of intangible and tangible elements in a single matter. It further shows that there seems to be increasing awareness amongst indigenous communities and museums about the availability of ADR options and that ADR is seriously considered by concerned stakeholders for the resolution of cultural heritage related disputes".

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67 A version of this summary and comments thereon was published in THEURICH, *Alternative Dispute Resolution* (*cit.* n. 25), pp. 592 et seqq.

V. Conclusion

As this paper illustrated, international institutions play an important role in art and cultural heritage ADR. As providers of much needed specific ADR services in this area, they are filling a gap that has certainly existed for too long. It is now up to these institutions to undertake continued awareness raising efforts about the positive role of ADR for resolving art and cultural heritage disputes. Potential parties and stakeholders in this sector need to be further sensibilized about available ADR options and their functioning, which is why specific training is important. Exchange and cooperation amongst concerned institutions may assist in this endeavor, as illustrated by the recent collaboration between WIPO and ICOM. Finally, practice will show how these mechanisms work and how parties will use them. For that purpose, it will be beneficial to analyze further actual cases as they arise.

SAMIA SLIMANI* AND SARAH THEURICH**

4. The New ICOM-WIPO Art and Cultural Heritage Mediation Program

Abstract

This paper provides an overview of the new ICOM-WIPO Art and Cultural Heritage Mediation Program. It briefly introduces the particular features of art and cultural heritage disputes and the need for specialized resolution mechanisms. In the first part, the paper sets out the background to the ICOM-WIPO Mediation Program. In particular, it examines ICOM's endorsement of amicable dispute resolution, as well as the *Makonde Mask* case, an interesting ICOM mediation precedent. In the second part, the paper analyzes the procedural and administrative framework of the ICOM-WIPO Mediation Program. It looks at how the procedure works in practice by explaining the ICOM-WIPO Mediation Rules and the different procedural steps.

Synthèse

Cet article donne une vue d'ensemble du nouveau programme de Médiation ICOM-OMPI en Art et Patrimoine Culturel. Il présente brièvement les caractéristiques des différends relatifs à l'art et au patrimoine culturel et la nécessité de mécanismes spécialisés pour leur règlement. Dans la première partie, cette recherche expose le contexte dans lequel s'inscrit le programme de Médiation ICOM-OMPI. En particulier, elle analyse le soutien de l'ICOM aux règlements amiables des différents et examine un cas intéressant de médiation par l'ICOM, l'affaire du Masque de Makondé. Dans la seconde

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partie, l'article étudie le cadre procédural et administratif du programme de Médiation ICOM-OMPI. Il explique le fonctionnement de la procédure en pratique en s'intéressant de plus près au Règlement de médiation ICOM-OMPI et ses différentes étapes procédurales.

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I. Introduction

In the face of increasing art-digitization, restitution claims, and international art transactions, museums and other stakeholders are ever more exposed to potential disputes.

Art and cultural heritage disputes can be complex, and may involve sensitive non-legal issues of a cultural, religious or political nature. As has been voiced by many authors[1],

[1] See for example, BRYNE-SUTTON QUENTIN, *Arbitration and Mediation in Art-Related Disputes,* Arbitration International, Vol. 14, 1998, pp. 447 et seqq; KAUFMANN-KOHLER GABRIELLE, *Art et Arbitrage: Quels enseignements tirer de la résolution des litiges sportifs,* in: Resolution methods for art-related disputes, Studies in Art Law, Vol. 11, Zürich 1999, pp. 123 et seqq; SIEHR KURT, *Resolution of Disputes in International Art Trade,* Third Annual Conference of the Foundation "The Venice Court of National and International Arbitration", Venice, 29–30 September 2000, International Law FORUM du droit international, Vol. 3, 2001, pp. 64 et seqq; WICHARD CHRISTIAN/WENDLAND

court litigation may often not be an appropriate forum. Alternative Dispute Resolution (ADR), and in particular mediation, through its flexible and informal nature, may be better equipped for the resolution of such disputes.

The ICOM-WIPO Art and Cultural Heritage Mediation Program has been tailored to respond to the specific needs in art and cultural heritage disputes. It was jointly developed by the International Council of Museums (ICOM)[2] and the World Intellectual Property Organization (WIPO)[3] Arbitration and Mediation Center and launched in July 2011[4].

WEND, *Mediation as an Option for Resolving Disputes between Indigenous/Traditional Communities and Industry concerning Traditional Knowledge,* in: BARBARA HOFFMAN (ed.), Art and Cultural Heritage, Law, Policy and Practice, 2005, pp. 475 et seqq; RENOLD MARC-ANDRÉ, *Arbitration and Mediation as Alternative Resolution Mechanisms in Disputes Relating to the Restitution of Cultural Property,* in: Jaynie Anderson (ed.), Crossing Cultures: Conflict, Migration and Convergence, The Proceedings of the 32nd International Congress in the History of Art, CIHA, The University of Melbourne, 13–18 January 2008, pp. 1104 et seqq; PALMER NORMAN, *Litigation: The Best Remedy?*, in: LYNDEL V. PROTT (ed.), Witnesses to History, A Compendium of Documents and Writings on the Return of Cultural Objects, UNESCO, Paris, 2009, pp. 358 et seqq; THEURICH SARAH, *Art and Cultural Heritage Dispute Resolution,* WIPO Magazine, July 2009, Issue 4, pp. 17 et seqq; SCHÖNBERGER BEAT, *Restitution von Kulturgut, Anspruchsgrundlagen – Restitutionshindernisse, Entwicklung,* Bern, 2009, pp. 274 et seqq; SIEHR KURT, *Internationale Schiedsgerichtsbarkeit über Kulturgut-Streitigkeiten,* in: Resolving International Conflicts, Liber Amicorum Amicorum Tibor Várady, Budapest, New York, 2009, pp. 255 et seqq; CORNU MARIE/RENOLD MARC-ANDRÉ, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution,* International Journal of Cultural Property, Volume 17, Issue 1, February 2010, pp. 1 et seqq.

2 ICOM is an international nongovernmental organization that maintains formal relations with the United Nations Educational Scientific and Cultural Organization (UNESCO). ICOM is committed to the conservation, continuation and communication to society of the world's natural and cultural heritage, present and future, tangible and intangible. For further information on ICOM, see http://icom.museum/ (24.04.2012).

3 WIPO is an intergovernmental organization dedicated to developing a balanced and accessible international intellectual property system. Its areas of activity include in particular copyright, cultural heritage, traditional knowledge and traditional cultural expressions, often in consultation with cultural institutions, such as museums, archives and libraries, as well as with indigenous peoples and local communities and other stakeholders. WIPO also provides not-for-profit alternative dispute resolution services through the WIPO Arbitration and Mediation Center, including in the art and cultural heritage sector. For further information on WIPO, see www.wipo.int (24.04.2012) and on the WIPO Arbitration and Mediation Center, see www.wipo.int/amc (24.04.2012).

4 http://ICOM.museum/uploads/media/110701_DP_Mediation_EN.pdf (24.04.2012).

The ICOM-WIPO Mediation Program is part of a general collaboration between ICOM and WIPO. This collaboration goes back a number of years and has been formalized in a Memorandum of Understanding concluded between the two organizations on 3 May 2011[5]. Under that Memorandum, WIPO and ICOM agreed to collaborate in a number of areas relating to museums and the management of intellectual property. This concerns in particular copyright, traditional knowledge and traditional cultural expressions, the digitization of cultural artifacts, as well as dispute resolution.

This paper briefly sets out the background to the ICOM-WIPO Mediation Program (II), followed by an explanation of the different procedural and administrative features of the ICOM-WIPO Mediation Framework (III).

II. Background to the ICOM-WIPO Mediation Program

Both ICOM and WIPO are active in art and cultural heritage and have long recognized the benefits of ADR in this area.

Since its creation in 1994, the WIPO Arbitration and Mediation Center has gained in-depth experience with the time and cost efficient resolution of intellectual property related disputes[6]. In particular, it provides a specialized WIPO Art and Cultural Heritage ADR Service[7], which includes the ICOM-WIPO Mediation Program, as well as other ADR procedures.

ICOM has been endorsing ADR for the resolution of such disputes for a number of years and has also gained experience in the provision of good offices.

A. ICOM Endorsement of Amicable Dispute Resolution

Over the past few years, ICOM has developed an increasing interest in intellectual property as a major tool for museums' cultural heritage protection. In the face of globalization, and knowledge and technology based development, ICOM sought a proper legal balance and a global system of cultural heritage and intellectual property protection.

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5 See WIPO press release of 3 May 2011, available at: www.wipo.int/pressroom/en/articles/2011/article_0015.html (24.04.2012).

6 On that subject, see *supra* in this book the paper by THEURICH SARAH, The Role of International Institutional Dispute Resolution in Art and Cultural Heritage Matters: The World Intellectual Property Organization (WIPO) and its Arbitration and Mediation Center.

7 See http://www.wipo.int/amc/en/center/specific-sectors/art/ (24.04.2012).

In 2005, ICOM started to encourage the amicable resolution of disputes regarding the ownership of objects in museum collections that were allegedly stolen or illegally exported from the country of origin, as well as early settlement procedures rather than lengthy and expensive litigation.

The 22nd General Assembly of ICOM adopted in 2007 Resolution No. 4 on *"Preventing Illicit Traffic and Promoting the Physical Return, Repatriation and Restitution of Cultural Property"*, which recommends in particular the use of mediation in such disputes[8].

With this in mind, ICOM established an international mediation discussion group to consider issues relating to the return/restitution of cultural property in museums collections that were stolen, illegally exported, illegally confiscated, or otherwise wrongfully expropriated.

In 2007, a draft guidance note, prepared by Marilyn Phelan, a member of the ICOM Legal Affairs Committee, explained practical aspects of invoking and pursuing the ICOM Mediation Policy.

In 2008, the ICOM Legal Affairs Committee considered mediation as an alternative dispute resolution process for cultural issues and this position was confirmed and very well supported during the International Bar Association (IBA) Conference in Argentina (in mid-October 2008).

In accordance with its ethical standards, ICOM deemed that preventive mechanisms are vital tools for appeasing conflicts involving cultural and/or intellectual property issues. The museum community has indeed long expressed a need for an innovative and specialized dispute resolution system, which further fostered the ICOM-WIPO Mediation initiative.

B. ICOM Mediation Precedent: Donation of the Makonde Mask in 2010

ICOM has experienced early on the positive role that a neutral intermediary can play in the resolution of a restitution dispute. This can be illustrated with the *Makonde Mask*

8 The Resolution is available at: http://icom.museum/who-we-are/the-governance/general-assembly/resolutions-adopted-by-icoms-general-assemblies-1946-to-date/vienna-2007.html (24.04.2012).

case in which ICOM carried out its good offices. ICOM's involvement in this matter helped to facilitate a solution, as explained below[9].

1. History of the Makonde Mask

The Makonde Mask[10], a "lipiko" helmet mask type, characterized by its realism and caricature features, was initially part of the collections of the National Museum of Tanzania in Dar Es Salaam. In 1984 the mask was stolen from the National Museum of Tanzania together with other artifacts. The theft was reported to all relevant authorities at national and international level, including the Tanzanian police, the International Criminal Police Organization (INTERPOL) and ICOM.

In 1990, an Italian professor from the University of Perugia informed the Barbier-Mueller Museum in Geneva (Switzerland) that the Makonde Mask in its collection might come from the Dar Es Salaam Museum. The Barbier-Mueller Museum immediately informed ICOM, indicating that the object had been purchased in Paris in 1985.

The Barbier-Mueller Museum thereafter initiated appropriate steps and proposals to facilitate a possible return of the Makonde Mask to Tanzania. In 2002, the Barbier-Mueller Museum officially indicated the conditions under which it would accept to transfer ownership of the Makonde Mask to the United Republic of Tanzania. Although the Director General of the National Museum of Tanzania highly appreciated the handling of the case by the Barbier-Mueller Museum, the parties could not reach an agreement over the question of ownership.

In 2006, negotiations were frozen after the United Republic of Tanzania filed a request for the return of the Makonde Mask with the Secretariat of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Restitution in case of Illicit Appropriation (ICPRCP). In reaction to Tanzania's action, the Barbier-Mueller Museum filed a formal and official complaint against the United Republic of Tanzania with the Federal Office of Culture of Switzerland.

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9 The description of the Makonde Mask case in this paper is mainly reproduced from the corresponding ICOM press release of 10 May 2010 with the kind authorization of ICOM. The press release is available at: http://archives.icom.museum/press/MM_PressFile_eng.pdf (24.04.2012).

10 The Makonde Mask is 30.5 cm high and made of soft, lightweight wood, wax and pigment. Its hair and moustache are made of human hair. This kind of mask was usually worn during male initiation festivals. The dancers looked out through the mouth opening of the mask and attached their costume through a hole at the rim of the mask.

2. Donation of the Makonde Mask

In August 2009, the Ministry of Natural Resources and Tourism of Tanzania informed the Barbier-Mueller Museum of its intent to accept the required conditions proposed by the Swiss Museum in 2002. A governmental delegation of Tanzania met the representatives of the Barbier-Mueller Museum in Geneva, on 6 November 2009, to conduct good faith discussions and negotiations, which eventually led to the donation of the Makonde Mask to Tanzania.

The donation of the Makonde Mask is the happy outcome of more than twenty years of negotiations and efforts by the two parties involved as well as ICOM's good offices.

Under the auspices of ICOM, the United Republic of Tanzania and the Barbier-Mueller Museum signed an agreement for the donation of the Makonde Mask to the National Museum of Tanzania on 10 May 2010, in Geneva. The ceremony was organized by ICOM and was held in Paris, in the presence of ICOM's Director General, Mr Julien Anfruns; Dr Donatius M. K. Kamamba and Ms Caroline Mchome, the Permanent Secretary and the Head of the Legal Unit of the Ministry of Natural Resources and Tourism of Tanzania; Ms Monique Barbier-Mueller, the co-founder of the Barbier-Mueller Museum; and Ms Laurence Mattet, the Director General of the Barbier-Mueller Museum.

III. The ICOM-WIPO Mediation Framework

The ICOM-WIPO Mediation Program provides an efficient procedural and administrative framework that was jointly developed by the WIPO Center and ICOM[11]. The process has been customized to art and cultural heritage disputes. Specialized practical tools make it easy to use for parties.

[11] On the ICOM-WIPO Mediation Process, see for example, SLIMANI SAMIA, *When the Dust Settles – How ICOM and WIPO Created a Programme to Facilitate Dispute Settlements Related to Art and Cultural Heritage,* ICOM News 2011 Nr. 2, pp. 16 et seqq, http://icom.museum/fileadmin/user_upload/pdf/ ICOM_News/2011-2/ENG/p16-17_2011-2.pdf (24.04.2012); see also THEURICH SARAH, *ICOM-WIPO Mediation: A New Option for Efficient Art and Cultural Heritage Dispute Resolution,* IBA Art, Cultural Institutions and Heritage Law Committee's Newsletter, Vol. 9 No. 1, October 2011.

A. The ICOM-WIPO Mediation Rules and Other Practical Tools

The mediation framework is set out in the ICOM-WIPO Mediation Rules[12]. The ICOM-WIPO Mediation Rules are based on the WIPO Mediation Rules[13], which were adapted in certain aspects so as to reflect the specific features in art and cultural heritage disputes. Adaptations include for example the specific scope of application, reference to the ICOM-WIPO List of Mediators with expertise in art and cultural heritage, joint administration of the procedure by ICOM and the WIPO Center, reference to the ICOM Code of Ethics for Museums, as well as streamlined timelines. Moreover, a reduced Schedule of Fees on a not-for-profit basis aims to make the mediation process accessible to a wide range of stakeholders from different backgrounds and regions. It also makes it possible to apply even lower fees in exceptional circumstances, which may for example allow parties from small not-for-profit structures or from developing countries to use the process.

In addition to the ICOM-WIPO Mediation Rules, a number of specialized practical multilingual tools are offered to parties to facilitate the mediation process. These include model mediation clauses, and model mediation submission agreements, as well as an optional standard form to file a request for mediation.

B. Broad Scope of Application

Museums and other stakeholders can be involved in different kinds of art and cultural heritage disputes. These may relate to a wide range of subject matter, combine different areas of law as well as tangible and intangible cultural heritage, and involve different types of parties.

Against this background, the ICOM-WIPO Mediation Rules have been provided with a broad scope of application, so as to make them accessible to a large variety of disputes in this area. Article 2 of these Rules provides that they are applicable to art and cultural heritage disputes relating to ICOM's areas of activities, as detailed below.

Ratione materiae, the scope covers a wide range of subject matter, *"including but not limited to return and restitution, loan and deposit, acquisition and intellectual property"*.

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12 See www.wipo.int/amc/en/center/specific-sectors/art/icom/rules (24.04.2012).

13 See WIPO Mediation Rules, WIPO Arbitration, Mediation, and Expert Determination Rules and Clauses, WIPO Publication No. 446, January 2009, pp. 7 et seqq, www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf (24.04.2012).

Other potentially concerned subject matter may include insurance of art works, art as collateral in financing transactions, art fairs, digitalization, donation, droit de suite, misappropriation of traditional cultural expressions, and repatriation. The cultural objects or works of art concerned in such disputes may be manifold as well. For example, in a recent mock mediation organized by ICOM and the WIPO Center, the simulated case scenario related to a dispute over the return of a funeral mannequin[14].

Ratione personae, the scope is also broad, as it refers to *"private or public parties, including but not limited to States, museums, indigenous communities and individuals"*. Most importantly, the ICOM-WIPO Mediation Rules can be used by ICOM-members and also by non-members. This should make it possible to use the mediation process in a range of constellations, for example where a museum is involved that is not an ICOM member or where none of the parties is an ICOM member.

The condition to use the process is that the parties agree to submit the dispute(s) to mediation under the ICOM-WIPO Mediation Rules[15].

The ICOM Secretariat verifies that a dispute is *prima facie* within the scope of application as defined above within 30 days of the receipt of a Mediation Request. If it finds so, it forwards the Request to the WIPO Center, which commences the mediation process. If however the ICOM Secretariat considers the Request not to be within the scope of ICOM-WIPO Mediation, it informs the parties of the rejection of the Request[16]. This *prima facie* check aims to ensure that only disputes that relate to art and cultural heritage are processed under these Rules, for which they were designed.

The broad scope of the ICOM-WIPO Mediation Rules makes them a flexible and complementary option to other existing procedures, such as the WIPO ADR procedures[17], or the mediation and conciliation procedures of the ICPRCP[18].

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14 Organized during the recent ICOM-WIPO Workshop for Mediators in Art and Cultural Heritage, see www.wipo.int/export/sites/www/amc/en/docs/icomoct2011.pdf (24.04.2012).

15 See article 2(b) ICOM-WIPO Mediation Rules.

16 See article 3(d) of the ICOM-WIPO Mediation Rules.

17 See *supra* in the present book the paper by THEURICH SARAH, The Role of International Institutional Dispute Resolution in Art and Cultural Heritage Matters: The World Intellectual Property Organization (WIPO) and its Arbitration and Mediation Center.

18 See The Rules of Procedure for Mediation and Conciliation of the UNESCO ICPRCP Mediation and Conciliation Rules, which were adopted at the 16th Session of the ICPRCP in September 2011. They are available at: http://unesdoc.unesco.org/images/0019/001925/192534E.pdf (24.04.2012).

C. The Mediation Process under the ICOM-WIPO Mediation Rules

1. Consensual Process

ICOM-WIPO Mediation is a consensual process based on party agreement. For future disputes, such party agreement is provided if a relevant mediation clause inserted in a contract refers disputes to ICOM-WIPO Mediation. For existing disputes in situations where no such contract or mediation clause exists, party agreement can be reached if the parties sign a mediation agreement submitting the existing dispute to ICOM-WIPO Mediation. As indicated above, parties can use the recommended ICOM-WIPO clause and submission agreement[19].

In the drafting of such clauses and submission agreements, it is generally advised to use the recommended model text to make sure that all the necessary elements are included. For example, it is essential that correct reference be made to the desired institutional Rules, i.e., the ICOM-WIPO Mediation Rules. Ambiguous wording such as "Mediation in Geneva" without any mention of the institution would be problematic. Other elements useful to define are the place of mediation and the language of the proceedings, although this may also be done at a later stage (which may however delay the proceedings). The model text can of course be adapted and completed by further elements if the parties so wish. For example, in a submission agreement, parties sometimes already indicate the name of the mediator if they already happen to know a competent person. They may also provide that in case the mediation is not successful, the dispute be submitted to arbitration under the WIPO Arbitration or Expedited Arbitration Rules.

In cases where no party agreement exists yet, ICOM and the WIPO Arbitration and Mediation Center are available to provide their good offices on a confidential basis and free-of-charge to facilitate the submission of a dispute to ICOM-WIPO mediation. Typically in such situations one party contacts ICOM or the WIPO Arbitration and Mediation Center and requests the institution to contact the other party. The institution then explains the mediation procedure to the other party and the process of submission, thereby exploring whether that party would be willing to accept such submission. The institution can then also assist in the drafting of the mediation submission agreement if the parties wish.

2. Party Autonomy and Flexibility

The ICOM-WIPO Mediation Rules are based on principles of party autonomy and flexibility. The parties have control over the entire mediation process and can define the

[19] See www.wipo.int/amc/en/center/specific-sectors/art/icom/clauses/ (24.04.2012).

elements of the mediation procedure. The Rules provide a flexible framework and allow the parties to adapt the procedure to their specific needs by party agreement if they wish.

For example, parties can agree on the type of mediation. Such decision often depends on the parties' cultural and legal backgrounds. While other models exist, the two most common types of mediation are facilitative and evaluative mediation. In facilitative mediation, the mediator *"endeavors to facilitate communication between the parties and to help each side to understand the other's perspective, position and interests in relation to the dispute."*[20] In evaluative mediation *"the mediator provides a non-binding assessment or evaluation of the dispute, which the parties are then free to accept or reject as the settlement of the dispute."*[21]

Further, no decision can be imposed by the mediator upon the parties. Each party is also free to abandon the mediation process at any time by a written declaration. Hence, the risk involved is relatively low for the parties. This is another reason to try ICOM-WIPO Mediation as there is not much to lose but all to win in a mutually satisfactory process.

3. Mediator Appointment

Once the ICOM Secretariat has confirmed that the Request for Mediation is within the scope of the Rules and has transmitted it to the WIPO Arbitration and Mediation Center, the latter announces the commencement of the mediation and informs the parties about the further conduct of the process. In the administration of the procedure, the WIPO Arbitration and Mediation Center uses its case management system, which includes assistance with the appointment of mediator, fee management, electronic case communication tools, such as WIPO ECAF[22], as well as logistical and technical assistance.

The success of mediation depends to a large degree on the quality of the mediator. This is why ICOM and the WIPO Arbitration and Mediation Center have been taking great care in establishing the ICOM-WIPO List of Mediators. The List comprises mediators who are qualified in different areas of art and cultural heritage and come from a wide range of countries. The List is open and further candidates are being added in order to cater for specific needs in art and cultural heritage disputes.

While usually a sole mediator is appointed, sometimes parties prefer to have several co-mediators, for example in cases involving multiple parties or parties from very different cultural backgrounds. Under the ICOM-WIPO Mediation Rules, parties are free to agree

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20 Quoted from Guide to WIPO Mediation, WIPO Publication 449E, pp. 4 et seqq, www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf (24.04.2012).

21 *Ibid*., p. 5.

22 On the WIPO Electronic Case Facility, see www.wipo.int/amc/en/ecaf/index.html (24.04.2012).

on the person of the mediator. They can select someone from the ICOM-WIPO List of Mediators or outside that List. If the parties do not reach agreement on the mediator, the mediator is appointed through a "List Procedure"[23].

Through this List procedure, the WIPO Arbitration and Mediation Center first consults the parties about the required qualifications of the mediator, such as expertise, experience and nationality. It then sends, in consultation with ICOM, a list of qualified mediator candidates to the parties, who can agree on a candidate or rank them according to their preferences. The WIPO Arbitration and Mediation Center then requests the chosen mediator to sign a declaration of impartiality and independence[24] and to confirm his/her availability[25], and appoints the mediator accordingly.

4. Efficient and Ethical Conduct of the Mediation

Once the mediator is appointed, he/she establishes a first contact with the parties, and the WIPO Arbitration and Mediation Center organizes a preliminary conference, which often takes the form of a telephone conference. At the preliminary conference the parties and the mediator usually set up a procedural timetable, determine the persons who will participate at the mediation meeting(s), and agree on the documents and statements that are to be submitted to the mediator.

The mediator's role is to promote the settlement of the dispute. In that effort, the mediator usually holds one or several mediation meetings with the parties and their representatives. The mediator can also meet separately with each party in so-called "caucus" meetings[26]. The information provided in such meetings cannot be disclosed to the other party, unless the party that provided it expressly authorizes the mediator to do so. Caucus meetings can be an efficient method for the mediator to help identifying the underlying interests of the parties, their alternatives and readiness for compromise and certain solutions.

In the conduct of the mediation, the parties are to cooperate in good faith with the mediator to advance the mediation as expeditiously as possible[27]. In addition, the ICOM-WIPO Mediation Rules provide that the mediator and the parties shall bear in mind the ICOM Code of Ethics for Museums in the conduct of the mediation[28]. The Code was adopted in 1986 and revised in 2004. It provides a minimum standard for museums

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23 See article 8 ICOM-WIPO Mediation Rules.

24 See article 10.

25 See article 11.

26 See article 15.

27 See article 14.b.

28 See article 14.a. The ICOM Code of Ethics for Museums is available at: http://icom.museum/ fileadmin/user_upload/pdf/Codes/code2006_eng.pdf (24.04.2012).

through professional principles and guidelines[29]. For example, it includes guidance on how to deal with requests for return or restitution from a country or people of origin[30]. It also provides that museum policy should acknowledge international legislation, such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Expert and Transfer of Ownership of Cultural Property of 1970, as well as other relevant Conventions[31]. These and other substantive principles of the Code may well be used by parties as a basis for the identification of solutions of the dispute.

5. Confidentiality

The ICOM-WIPO Mediation Rules contain detailed provisions on confidentiality[32]. Reputation and integrity are important for museums and other stakeholders in the art and cultural heritage sector, which is why confidentiality may be key in the resolution process. It may also be a crucial aspect when sacred traditional material is involved[33]. There are of course circumstances in which parties prefer or are required by law to disclose certain elements of the dispute. Such exceptions are provided for in the ICOM-WIPO Mediation Rules, based on legal requirements or party agreement.

6. End of the Mediation

The mediation can be concluded in a short time frame. Once the parties have agreed to mediate, it may take only a few months from the commencement of the mediation to the settlement. For example, in the recent mock mediation mentioned above the simulated ICOM-WIPO mediation process took about three months[34].

The mediator helps the parties to identify possible solutions. In mediation parties can adopt sustainable win-win solutions that may help them to preserve their relationship or form a basis for future collaboration. Especially in art and cultural heritage disputes parties can explore creative solutions beyond monetary damages. Once the parties have agreed on a solution, they usually formalize the outcome in a settlement agreement. The settlement agreement has the force of a contract between the parties and can be enforced under general contract law.

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29 See Preamble of the ICOM Code of Ethics for Museums.

30 See principles 6.2 and 6.3 of the ICOM Code of Ethics for Museums.

31 See principle 7 of the Code.

32 See articles 18–22.

33 On the confidentiality implications in art and cultural heritage dispute resolution, see also THEURICH, *Art and Cultural Heritage Dispute Resolution (cit.* n. 1), pp. 17 et seqq.

34 See www.wipo.int/export/sites/www/amc/en/docs/icomoct2011.pdf (24.04.2012) *(cit.* n. 14).

Under the ICOM-WIPO Mediation Rules, the mediation can also be terminated by decision of the mediator if no settlement is found or if he believes that the mediation is unlikely to lead to a resolution of the dispute, or by written declaration of a party at any time.

If no settlement is found, parties have the possibility to submit the dispute to another ADR procedure, such as WIPO Arbitration/Expedited Arbitration or WIPO Expert Determination. Combining procedures increases settlement chances. In that respect it may be noted that 70% of WIPO mediations have settled. Even in WIPO arbitrations, 56% of cases have settled, while the rest concluded with an award[35].

IV. Conclusion

The ICOM-WIPO Art and Cultural Heritage Mediation Program is a good example of effective inter-organizational collaboration. With ICOM and WIPO putting together their respective areas of expertise, the art and cultural heritage world has been provided with a specialized all-encompassing dispute resolution service.

The ICOM-WIPO Mediation Program has also been considered in practice, for ICOM has recently been approached by potential parties with pending art and cultural heritage disputes. ICOM is currently carrying out its good offices to try to facilitate submission of these disputes to mediation under the ICOM-WIPO Mediation Rules. As the recent mock mediation case has illustrated[36], the ICOM-WIPO Mediation Program can indeed lead to a quick and successful resolution of art and cultural heritage disputes.

35 Statistics taken from www.wipo.int/amc/en/center/caseload.html (24.04.2012).

36 See www.wipo.int/export/sites/www/amc/en/docs/icomoct2011.pdf (24.04.2012) (*cit.* n. 14).

SOPHIE DELEPIERRE*

5. Résolution des différends internationaux en matière de biens culturels: le Règlement sur la médiation et la conciliation de l'UNESCO

Synthèse

Lieu privilégié d'échanges et de réflexions en matière culturelle, cadre favorable à la compréhension mutuelle et à la cohésion entre les peuples, l'Organisation des Nations Unies pour l'éducation, la science et la culture (UNESCO) s'investit particulièrement dans la recherche d'instruments destinés à faciliter une circulation licite des biens culturels, porteurs de l'identité et de l'histoire des peuples et communautés. L'UNESCO développe plusieurs outils juridiques et opérationnels et les met à la disposition de ses États membres tout en décuplant ses efforts afin de leur permettre d'accéder à un consensus quant aux différends en matière de biens culturels. Parmi les nouveaux mécanismes proposés à cette fin, le Comité intergouvernemental de l'UNESCO pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale s'est doté d'un Règlement intérieur pour la médiation et la conciliation.

Abstract

The United Nations Educational, Scientific and Cultural Organization (UNESCO) works to create the conditions for dialogue in cultural matters, based upon mutual understanding and cohesion amongst peoples. Because cultural goods are the vehicles of identity and history of communities, UNESCO promotes research to enhance the licit exchange of cultural property. It develops legal and operational tools at the disposal of member States to increase the opportunities of building consensus and resolve cultural property disputes. Among other mechanisms, the Intergovernmental Committee for Promoting the

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Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation enacted the Rules of Procedure for Mediation and Conciliation.

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I. Introduction – Des instruments juridiques internationaux au service de la diplomatie

Depuis plus de soixante-cinq ans l'UNESCO est au centre des efforts entrepris par la communauté internationale en faveur de la sauvegarde du patrimoine culturel et naturel, matériel et immatériel. Ce mandat se traduit concrètement par la mise en œuvre de conventions internationales[1] et notamment la Convention de La Haye de 1954 (accompagnée de ses deux Protocoles) sur la protection des biens culturels en cas de conflit armé ainsi que la Convention de 1970 concernant les mesures à prendre pour interdire et em-

[1] http://www.unesco.org/new/fr/culture; voir aussi les Conventions de l'UNESCO sur: la protection du patrimoine mondial culturel et naturel (1972), la protection du patrimoine culturel subaquatique (2001), la sauvegarde du patrimoine culturel immatériel (2003), la protection et la promotion de la diversité des expressions culturelles (2005).

pêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (ci-après "la Convention de 1970").

Cette dernière Convention, dont l'objectif principal est de lutter au niveau international contre le trafic illicite de biens culturels, vient de célébrer son quarantième anniversaire. Un premier constat s'impose d'emblée: ce traité est non seulement reconnu comme le cadre juridique de référence incontournable en la matière mais il a également permis d'entreprendre un travail de sensibilisation considérable sur l'ampleur de ce trafic et l'enjeu des restitutions de biens culturels[2]. Depuis son adoption, le 14 novembre 1970, cet instrument de coopération internationale a été ratifié par 122 pays dont certains parmi les plus importants du marché de l'art[3]. Ces ratifications impliquent l'adoption de législations nationales mises en conformité avec les dispositions de la Convention. La protection juridique des biens culturels à travers le monde s'intensifie donc au rythme des nouvelles ratifications de la Convention par les États[4].

Si, dès sa création, la Convention de 1970 a été reconnue comme une avancée majeure, pionnière en matière de protection des biens culturels mobiliers contre leur trafic illicite, elle n'en est pas moins le résultat d'âpres négociations aux enjeux culturels, diplomatiques et financiers importants; discussions qui transparaissent jusque dans la rédaction des dispositions et dans l'interprétation large qui peut en être faite[5].

Aujourd'hui, la coopération internationale en matière de circulation des biens culturels s'étend bien au-delà de la Convention *stricto sensu*. En sus de la mise en œuvre au niveau national, l'adoption de nouveaux instruments pratiques et éthiques[6] influencent positivement la définition des politiques nationales mais également le fonctionnement du marché de l'art. Dans le secteur académique, on constate un nombre croissant de travaux scientifiques et de publications consacrés au trafic illicite de biens culturels et, plus largement, à la question de la restitution des biens culturels illicitement sortis de leur pays d'origine. Quant aux médias, ils accordent aussi – depuis ces dernières années – une attention particulière aux enjeux du trafic illicite et des restitutions de biens culturels.

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2 LYNDEL V. PROTT, *Forces et faiblesses de la Convention de 1970: un bilan 40 ans après son adoption,* Document de référence à l'attention des participants au 40ème anniversaire de la Convention de 1970 les 15 et 16 mars 2011 (Doc. CLT/2011/CONF.207/7).

3 Ont notamment ratifié la Convention de 1970: les Etats-Unis d'Amérique (1983), la Chine (1989), la France (1997), le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord (2002) et la Suisse (2003).

4 Plus de 30 nouveaux Etats ont ratifié la Convention au cours des dix dernières années.

5 Pour une analyse complète des dispositions de la Convention: PATRICK J. O'KEEFE, *Commentary on the 1970 UNESCO Convention,* Institute of Art and Law, 2ème éd., 2007.

6 La liste et la description de tous ces outils est disponible en ligne à l'adresse: http://www.unesco.org/new/fr/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/practical-and-ethical-instruments/

Celles-ci se font de plus en plus fréquentes et témoignent d'un changement d'attitude aux niveaux politique, juridique et déontologique parmi les décideurs mais aussi dans l'opinion publique et les médias.

Ainsi, de part son mandat spécifique en matière de protection internationale des biens culturels[7], l'UNESCO n'a de cesse de mettre en place des outils permettant aux États de trouver des dispositifs toujours plus appropriés afin de mieux protéger et valoriser leur patrimoine. L'UNESCO et ses États membres travaillent en particulier pour que soit mis en place un mécanisme permettant d'atteindre des solutions mutuellement acceptables en cas de différends concernant des biens culturels. Si la création du Comité intergouvernemental pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale a, par le passé, déjà constitué un geste fort à l'adresse des États (partie I), l'UNESCO poursuit son action en ce sens en proposant à ses Membres de disposer d'un cadre procédural unique en matière de résolution alternative de différends concernant des biens culturels d'importance: une procédure de médiation et de conciliation (partie II).

II. Un forum de réflexion et de discussions au sein d'un Comité intergouvernemental

Huit ans après l'adoption de la Convention de 1970, la complexité et l'extrême sensibilité politique de certains cas de demandes de restitution – qui tombaient hors du champ d'application de la Convention de 1970 (qui n'est pas rétroactive) – ont montré la nécessité de créer un organe spécial permettant un dialogue politique ouvert. C'est dans cette optique qu'a été créé, en 1978, le Comité intergouvernemental pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale (ci-après "le Comité intergouvernemental"). Comité intergouvernemental qui s'est bien entendu doté, d'un point de vue procédural, de Statuts[8] et d'un Règlement intérieur[9].

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7 UNESCO, Acte constitutif, article 1.2.c.

8 UNESCO, Statuts du Comité intergouvernemental pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale, approuvés par la résolution 4/7.6/5 de la 20ème session de la Conférence générale de l'UNESCO tenue à Paris, 24 octobre au 28 novembre 1978 (CLT/CH/INS-2005/21).

9 UNESCO, Règlement intérieur du Comité intergouvernemental pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale (CC-89/CONF-213/COL-3).

Ce forum de réflexion et d'expertise permet aux États qui le souhaitent de présenter au Comité intergouvernemental une demande de restitution d'un bien culturel d'importance significative[10] dont ils estiment être spoliés et ce, dans un climat favorable aux discussions diplomatiques et politiques. Les sessions de ce Comité permettent également aux États de réfléchir à l'actualité en ce domaine et de proposer des sujets d'étude afin d'encourager la création de nouveaux outils de natures variées – juridiques, pratiques ou éthiques – et de développer de nouvelles stratégies dans la réflexion relative à la restitution de biens culturels. Outre les vingt-deux États membres du Comité[11] et les autres États observateurs, des représentants d'organisations partenaires de l'UNESCO en matière de lutte contre le trafic illicite de biens culturels participent régulièrement, tels que l'Institut international pour l'unification du droit privé (UNIDROIT), INTERPOL, l'Office des Nations Unies contre la drogue et la crime (UNODC), l'Organisation Mondiale de la Propriété Intellectuelle (OMPI), l'Organisation Mondiale des Douanes (OMD) et le Conseil international des musées (ICOM), ou encore des représentants de polices spécialisées telles que l'Office Central de lutte Contre le trafic de Biens Culturels (OCBC, France), les Carabinieri (Italie) ou la Police fédérale suisse (Fedpol). Le fait d'inviter ces experts à participer aux débats entre États permet d'apporter un éclairage tout à fait particulier et pratique aux discussions en cours. Ces spécialistes de haut niveau ont dès lors la possibilité de fournir une expertise précise sur des sujets pour lesquels les États sont en demande d'informations. Il s'agit certainement de l'une des principales forces de ce Comité intergouvernemental.

Ce forum de discussions s'est également révélé être, au fil des sessions, un terreau fertile à la création d'outils pratiques permettant une plus grande sensibilisation ou la mise en œuvre de certaines dispositions de la Convention de 1970. Ainsi ont été, entre autres, créés: un Code de déontologie pour les négociants en biens culturels (1999), un modèle de certificat d'exportation des biens culturels (en 2005 avec la collaboration de l'Organisation mondiale des douanes), une base de données de législations nationales relatives au patrimoine culturel (2005), des mesures élémentaires concernant les objets culturels mis en vente sur Internet (2006), des campagnes de sensibilisation avec films et vidéo-clips (2010–2011), des dispositions modèles définissant la propriété de l'Etat sur les biens culturels non découverts (2011).

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10 UNESCO, Statuts du Comité intergouvernemental pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale (*cit.* n. 8), article 3.2.

11 UNESCO, Statuts du Comité intergouvernemental pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale (*ibid*.), article 2.1. Notons également que la Conférence générale de l'UNESCO a adopté, à sa 28ème session (Paris, novembre 1995), la résolution 28C/Résolution 22 portant la composition du Comité intergouvernemental de 20 à 22 Etats membres.

Outre le développement de ces outils, des cas présentés au Comité intergouvernemental par les États ont fait l'objet de discussions et ont trouvé une solution mutuellement acceptable pour les parties en présence. Certains cas ont été résolus par retour direct, d'autres ont été réglés par la justice et enfin certains ont trouvé une solution par voie de médiation[12]. Il est intéressant de noter que la médiation, qui fait l'objet de cet article, est au cœur des activités du Comité intergouvernemental depuis son origine. Néanmoins, dans le cadre du développement de stratégies propres à faciliter le travail du Comité intergouvernemental, la Conférence générale de l'UNESCO, lors de sa 33ème session (octobre 2005) a adopté une résolution ajoutant explicitement les fonctions de médiation et de conciliation au mandat du Comité intergouvernemental[13]:

La Conférence générale,

(…)

Décide d'amender les Statuts du Comité afin d'y inclure les fonctions de médiation et de conciliation comme suit:

Le Comité est chargé:

1. *"de rechercher les voies et les moyens de faciliter les négociations bilatérales pour la restitution ou le retour de biens culturels aux pays d'origine quand elles sont engagées dans les conditions définies à l'article 9. À cet égard, le Comité peut également soumettre aux États membres concernés des propositions en vue d'une médiation ou d'une conciliation, étant entendu que la médiation suppose l'intervention d'un tiers pour réunir les parties à un différend et les aider à trouver une solution, tandis que dans le cadre d'une conciliation, les parties concernées acceptent de soumettre leur différend à un organe constitué pour que celui-ci enquête et s'efforce de parvenir à un règlement, sous réserve que tout financement supplémentaire nécessaire provienne de sources extrabudgétaires. Afin d'exercer ces fonctions de médiation et de conciliation, le Comité peut se doter d'un règlement intérieur approprié. Le résultat du processus de médiation et de conciliation n'a pas de caractère obligatoire pour les États membres concernés, de sorte que s'il n'aboutit pas à la résolution d'un problème, le Comité demeure saisi de celui-ci, comme de toute autre question non résolue qui lui aura été soumise."*

C'est donc conformément à l'article 4.1 de ses Statuts, tels que modifiés en 2005, que le Comité intergouvernemental a décidé de *"se doter d'un règlement intérieur approprié"* afin d'exercer ses fonctions de médiation et de conciliation.

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12 LYNDEL V. PROTT (ed.), Témoins de l'histoire – recueil de textes et documents relatifs au retour des objets culturels, UNESCO 2011, pp. 16 et seqq.

13 UNESCO, 33C/Résolution 44.

III. Le règlement intérieur pour la médiation et la conciliation

A. Genèse du texte

En février 2005, lors de la 13ème session du Comité intergouvernemental, les États membres ont examiné la possibilité d'élargir le mandat du Comité afin de lui permettre de jouer un rôle de médiation ou de conciliation dans le cadre des fonctions qu'il exerce à l'appui du retour ou de la restitution de biens culturels. Après examen, les vingt-deux membres du Comité se sont montrés favorables à la proposition de renforcement de son mandat, qui a fait l'objet d'une recommandation[14]. La modification des Statuts du Comité intergouvernemental nécessitant une décision de la Conférence générale de l'UNESCO, celle-ci a adopté lors de sa 33ème session (octobre 2005), la résolution 33 C/44 qui a ajouté la médiation et la conciliation au mandat du Comité.

Sur la base de ces décisions, le Secrétariat de l'UNESCO a présenté, lors de la 14ème session (juin 2007) du Comité intergouvernemental, un projet de règlement intérieur[15]. Lors de cette session, deux articles sur onze ont été examinés et amendés. Un paragraphe relatif à la procédure de médiation a été ajouté à l'article 2 afin de fournir une liste de médiateurs possibles en accord avec les paragraphes 1 et 2 tels qu'amendés.

C'est également un processus d'examen du texte par étapes qui a été retenu par le Comité intergouvernemental lors des travaux de la 15ème session (en mai 2009). Les quatre premiers articles du projet de règlement intérieur (champ d'application, nature des procédures et rôle du médiateur et du conciliateur, principes fondamentaux et parties) ont fait l'objet d'un long débat animé par un esprit de coopération et un sens du consensus de la part des membres du Comité et des observateurs. Cependant, il n'a pas été possible de parvenir à un accord sur plusieurs questions clés et il a, par conséquent, été décidé de créer un groupe de travail, durant la session, chargé d'élaborer des propositions qui pourraient refléter les différentes positions. Ce groupe a présenté ses résultats et proposé des amendements en séance plénière, permettant ainsi d'approuver les trois premiers articles. Toutefois, en ce qui concerne l'article 4 relatif à la nature des parties à une procédure de médiation ou de conciliation, le Comité intergouvernemental n'a pu parvenir à un consensus. Pour cette raison, il a été décidé de constituer un sous-comité *ad hoc* chargé de poursuivre les discussions sur le projet de texte entre les 15ème et 16ème sessions et de

14 UNESCO, Document 33C/REP/15.

15 UNESCO, Document CLT-2007/CONF.211/COM.14/3.

présenter les résultats de ses travaux lors de la session suivante du Comité[16]. Ce sous-comité s'est réuni en novembre 2009 sous la présidence du Professeur Constantin Economidés (Grèce). L'ensemble des articles ont été réexaminés, amendés et provisoirement adoptés, à l'exception de trois dispositions respectivement contenues aux paragraphes 1 et 2bis de l'article 4 et paragraphe 2 de l'article 7 qui ont été laissées entre crochets afin de les soumettre à la décision souveraine du Comité intergouvernemental.

Le texte du Projet de règlement intérieur tel que proposé par le sous-comité[17] a été présenté à la 16ème session du Comité en septembre 2010 qui, après discussion, l'a adopté[18].

B. Analyse du texte

1. Champ d'application et nature des procédures

À l'aide du Règlement intérieur pour la médiation et la conciliation, le Comité intergouvernemental propose aux États impliqués dans un cas discuté devant le Comité de recourir, s'ils le souhaitent, aux procédures de médiation ou de conciliation. Il n'est, par conséquent, pas étonnant de retrouver à l'article premier traitant du champ d'application du Règlement intérieur, un renvoi explicite aux Statuts du Comité intergouvernemental.

"[…] toute demande soumise au Comité intergouvernemental […] en vue du retour ou de la restitution de biens culturels tels que définis à l'article 3 des Statuts peut également être traitée dans le cadre d'une procédure de médiation ou de conciliation si les parties au différend […] en conviennent."

Les Statuts du Comité intergouvernemental prévoient en effet qu'en pratique un État membre ou membre associé de l'UNESCO ayant perdu des biens culturels d'une importance fondamentale pour sa culture et son histoire et qui en demande la restitution ou le retour peut s'adresser au Comité afin de faciliter les négociations bilatérales engagées à ce sujet, étant acquis qu'il aura par ailleurs déjà épuisé les voies de recours bilatérales à sa disposition et que celles-ci n'auront pas permis de trouver une solution satisfaisante.

La plus-value apportée par le Règlement intérieur pour la médiation et la conciliation réside dans le fait que cette demande déposée devant le Comité intergouvernemental pourra dorénavant être traitée dans le cadre d'une procédure:

(a) de médiation

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16 Document CLT-2009/CONF.212/COM.15/8 Rev, recommandation n° 4.

17 Document CLT-2010/CONF.203/COM.16/1 Rev.

18 Document CLT-2010/CONF.203/COM.16/6, recommandation n° 4, Document CLT-2010/CONF.203/COM.16/7.

Dans ce cas, une tierce partie, *"avec l'accord préalable des parties concernées, intervient pour les réunir et les assister afin de parvenir à un règlement amiable de leur différend résultant de la demande de restitution ou de retour de biens culturels"* (article 2.1).

(b) de conciliation

Dans ce cas, *"les parties concernées soumettent leur différend concernant la restitution ou le retour de biens culturels à un organe constitué à des fins d'investigation et d'efforts pour établir un règlement amiable de leur différend"* (article 2.3).

2. Principes généraux

Si l'article 3 du Règlement intérieur pour la médiation et la conciliation est titré *"Principes fondamentaux"*, une lecture rapide est suffisante pour constater que certains principes forment la trame du texte dans sa globalité. Ainsi, on constate que la procédure proposée est caractérisée, de l'engagement jusqu'à la clôture, par le consentement libre des parties. En cela, il s'agit à nouveau d'une caractéristique propre au Comité intergouvernemental qui a été transposée dans ce Règlement intérieur.

Ensuite, par une lecture plus précise de l'article 3, on relève la présence des principes généraux d'équité, d'impartialité et de bonne foi (article 3.2). Les parties devront participer à la procédure *"de façon responsable et coopérer dans la mise en œuvre de la procédure dans les délais les plus brefs possibles"* (article 3.3). Enfin, *"les parties et le(s) médiateur(s) ou les conciliateurs, participeront en vue de faciliter un règlement ou une solution à l'amiable et juste du différend eu égard au droit international et aux principes reconnus"* (article 4.4).

Concernant le(s) médiateur(s) ou les conciliateurs, l'article 5 prévoit expressément qu'ils ne peuvent pas agir en tant que représentants ou conseils de l'une ou l'autre partie dans une procédure concernant le différend en question. Il est en effet important que les parties ne puissent en aucun cas remettre en cause l'impartialité du médiateur ou du (des) conciliateur(s).

Finalement, il est prévu une obligation d'information puisque les parties sont obligées d'informer conjointement le Comité intergouvernemental de l'état d'avancement de la procédure lors des sessions de celui-ci (article 9). En ce sens, le fait que les parties s'engagent à rendre compte au Comité, est une garantie de progrès dans les discussions et la recherche d'un résultat constructif.

3. Parties

Lors de la rédaction du Règlement intérieur pour la médiation et la conciliation, l'article 4 a été celui dont la rédaction s'est révélée être la plus compliquée. Lors des négociations, certains États se sont montrés favorables à l'ouverture de cette procédure aux

personnes privées. D'autres États s'y sont, en revanche, fortement opposés pour des raisons politiques et procédurales. En effet, le Règlement intérieur pour la médiation et la conciliation a pour objectif de compléter le travail du Comité intergouvernemental. Par conséquent, le champ d'application *rationae personae* ne pouvait pas être plus large que celui prévu par les Statuts du Comité intergouvernemental. Il a donc été décidé que *"seuls les États membres de l'UNESCO et ses États membres associés peuvent recourir à la procédure de médiation et de conciliation"* (article 4.1).

Cependant, et afin de ne pas complètement fermer la porte aux revendications privées, il est prévu que les États puissent *"représenter les intérêts des institutions publiques ou privées établies sur leur territoire ou les intérêts de leurs ressortissants"* (article 4.2). Notons que le consentement de la part de l'État à l'entame de la procédure est ici crucial[19].

De la même façon, un État membre (ou un État membre associé) de l'UNESCO peut présenter une requête tendant à engager une procédure de médiation ou de conciliation à l'égard d'une institution publique ou privée si: ces derniers sont en possession du bien culturel concerné, et si l'État, sur le territoire duquel se trouve ladite institution publique ou privée, a été immédiatement informé de la requête et n'y a pas fait objection.

4. Médiateurs et conciliateurs

Le Règlement intérieur pour la médiation et la conciliation prévoit dans son article 7 paragraphe 3 que *"le(s) médiateur(s) et conciliateurs sont choisis en raison de leurs compétences en matière de restitution, et/ou de leurs connaissances quant à la nature du différend ou au caractère spécifique des biens culturels en cause"*. Or, il n'est pas toujours facile pour les États d'identifier les experts qui seront les plus qualifiés pour les aider dans la recherche d'une solution à leur différend. Pour palier à cette éventuelle difficulté, et cela est certainement l'une des originalités du texte, il est prévu que chaque État membre de l'UNESCO soit invité *"à désigner deux personnes qui pourraient jouer le rôle de médiateur ou de conciliateur dans des différends internationaux relatifs à des biens culturels"* (article 2.6). C'est ensuite le Secrétariat de l'UNESCO, qui doit, à l'intention des parties, établir et tenir à jour cette liste qui devra être revue tous les deux ans afin que les États puissent confirmer les nominations existantes ou en soumettre de nouvelles. L'objectif de ladite liste est de permettre aux parties à une médiation ou à une conciliation de sélectionner et de nommer, si elles le souhaitent, leur médiateur ou leurs conciliateurs dans cette liste internationale d'experts.

Les principes qui président à la composition de cette liste de médiateurs et de conciliateurs présentent plusieurs avantages. Tout d'abord, une grande variété dans la répartition

[19] Sur l'importance du principe de consentement, voir *supra* section III.B.2.

géographique puisque cette liste est internationale (deux personnes par État). Par conséquent, chaque partie impliquée dans un différend est certaine de trouver, parmi les noms proposés, le profil d'un expert qui, en fonction de son origine, de sa culture et de sa formation sera à même, avec l'accord de l'autre partie, de faire office de meilleur médiateur ou conciliateur. Ensuite, cette liste présente l'avantage d'être renouvelée régulièrement (tous les 2 ans). Cela offre la garantie aux parties de trouver les experts les plus qualifiés et impliqués dans les procédures de médiation et de conciliation. Enfin, les médiateurs et conciliateurs, de par la diversité de leurs origines géographiques, garantissent aux parties de parler plusieurs langues et, à tout le moins, une des six langues de l'UNESCO (à savoir, l'anglais, le français, l'espagnol, le russe, l'arabe et le chinois). Cela est un atout considérable pour la compréhension des problèmes posés, la consultation des documents versés au dossier et la communication parfaite avec les parties impliquées.

5. Déroulement de la procédure de médiation/conciliation

a) Engagement de la procédure

A l'entame de la procédure de médiation ou de conciliation, les parties qui ont évidemment consenti à engager une telle procédure doivent soumettre leur requête par écrit à la Directrice générale de l'UNESCO qui confirmera réception et en informera le Président du Comité intergouvernemental (article 6.1). Cette requête comporte les informations principales relatives au cas, à savoir: le nom et les coordonnées des parties, l'indication de l'objet du différend ainsi que les pièces justificatives pertinentes (article 6.3). Il est également possible pour le Comité intergouvernemental de recommander aux parties qui ont une affaire devant cet organe, d'avoir recours à une procédure de médiation ou de conciliation (article 6.2). Le Comité se pose ainsi explicitement en acteur pro-actif dans la recherche d'une solution aux différends liés aux biens culturels.

Comme pour les cas soumis devant le Comité intergouvernemental, aucune procédure de médiation ou de conciliation ne peut empêcher ou retarder des procédures légales poursuivies selon la législation nationale applicable (article 6.5). De plus, la procédure de médiation ou de conciliation ne peut pas porter atteinte à l'application ou aux effets de toute autre procédure ou tous autres moyens de règlement du différend que les parties ont mis en œuvre ou souhaitent mettre en œuvre simultanément ou ultérieurement (article 6.4).

b) Désignation des médiateurs ou conciliateurs

Lorsque la procédure a été engagée selon la procédure décrite au point précédent, les parties disposent d'un délai de soixante jours pour nommer le(s) médiateur(s) ou conciliateurs sur base de la liste d'experts constituée et mise à leur disposition par le Secréta-

riat de l'UNESCO sur la base de l'article 2.6 et en informer le Président du Comité intergouvernemental (article 7.1). Faute d'une telle nomination, c'est la Directrice générale qui, après consultation des parties concernées, nomme dans les meilleurs délais le(s) médiateur(s) ou conciliateurs (article 7.2). Concernant particulièrement la procédure de conciliation, chaque partie désigne un ou deux conciliateur(s). Le conciliateur additionnel, qui devra être d'une nationalité différente de celle des parties, sera choisi conjointement par les parties et fera office de président de la commission de conciliation (article 2.5).

En cas de violation des principes généraux ou de l'obligation de confidentialité (voir *supra* section III.B.2), toute partie peut demander le remplacement du (des) médiateur(s) ou des conciliateurs, et ce à n'importe quelle étape de la procédure, sous réserve de consultation préalable de l'autre partie. Les motifs doivent être expressément exposés. Dans un tel cas, de nouveaux médiateurs ou conciliateurs devront être nommés selon la procédure initialement utilisée (article 7.4).

Les causes habituelles de remplacement telles que le décès ou la démission sont également prévues par l'article 7.5 qui assure la procédure à suivre en cas de remplacement; la vacance devant être comblée dans les meilleurs délais selon la procédure initialement utilisée pour la nomination des experts.

c) Conduite des procédures de médiation ou de conciliation

S'agissant des modalités pratiques, les médiateur(s) ou conciliateurs fixent, en consultation avec les parties, les horaires, lieux et dates des réunions et précisent la ou les langues de travail et de présentation des documents (article 8.2). Il faut également noter la possibilité donnée aux parties concernées par une procédure de conciliation, d'adopter ou non un règlement intérieur spécifique (article 8.8).

Dans la recherche d'une solution au différend qui oppose les parties, le(s) médiateur(s) ou conciliateurs s'efforcent d'amener les parties à parvenir à un règlement amiable du différend dans un délai d'un an à compter de la date de leur nomination sauf accord contraire des parties qui ont possibilité de fixer un délai spécifique pour la clôture de la procédure au-delà duquel la procédure sera considérée comme close, et ce, même si les parties ne sont pas arrivées à un règlement de leur différend qui les satisfassent (articles 8.9 et 8.10).

Enfin, en matière de médiation, il va de soi que chaque partie est représentée lors des réunions. Par ailleurs, les représentants de ces parties sont investis des pouvoirs nécessaires pour préparer, avec l'assistance du (des) médiateur(s), les conditions et les modalités du règlement du différend (article 4.4).

d) Réunions, documentation et communication

Afin de donner au(x) médiateur(s) ou conciliateurs toutes les informations nécessaires à leur compréhension du cas présenté, les parties leur exposent les différents arguments à ce sujet ainsi que tous les documents pertinents. Ceux-ci doivent également être communiqués à l'autre partie (article 8.1). Une fois ces informations reçues, le(s) médiateur(s) ou conciliateurs peuvent entreprendre leurs propres recherches afin de déterminer les faits concernant le différend (article 8.3). Ils peuvent également, à la demande des parties, autoriser des témoins, des experts ou des personnes tierces à fournir des documents (article 8.4). La procédure étant prévue pour être la plus flexible possible afin que chaque partie puisse s'exprimer, il est prévu que lesdites parties puissent avoir le droit de présenter de nouveaux arguments et documents par écrit avant la clôture de la procédure (article 8.5).

Les différends relatifs aux biens culturels présentés au Comité intergouvernemental étant généralement complexes sur les plans politique, diplomatique, juridique et financier, il a été prévu que les consultations, dans le cadre des procédures de médiation et de conciliation, soient confidentielles. Par conséquent, les renseignements et les documents obtenus au cours de la procédure ne sont pas divulgués et aucun enregistrement n'est effectué, à moins, bien sûr, que les parties n'en décident autrement (article 8.6). Les médiateurs ou conciliateurs peuvent s'entretenir et communiquer séparément avec chaque partie. Dans ce cas, les informations fournies ne sont divulguées qu'avec l'autorisation expresse de la partie les ayant communiquées (article 8.7).

e) Clôture de la procédure et information du Comité

L'article 10.1 du Règlement intérieur pour la médiation et la conciliation prévoit qu'une procédure de médiation ou de conciliation est considérée comme close dans l'un des 4 cas suivants:

(a) lorsque toutes les parties considèrent qu'elles sont parvenues à un règlement amiable du cas présenté,

(b) lorsque toutes les parties concernées acceptent par écrit de considérer la procédure comme close,

(c) lorsque toutes les parties au différend ont fixé un délai avant la fin duquel aucun règlement amiable n'est intervenu,

(d) lorsque l'une des parties a notifié par écrit son retrait de la procédure.

Les principes généraux énoncés précédemment (voir *supr,* section III.B.2) sont également présents durant cette étape de clôture puisque le résultat de la procédure n'est obligatoire pour les parties que si celles-ci parviennent à un accord obligatoire à cet effet

(article 10.4). De plus, toute communication sur le règlement intervenu doit être faite sur une base concertée (article 10.2). Ce sont ici très clairement des exemples d'application du principe de consentement. Quant à l'obligation d'information, elle se poursuit durant l'étape de la clôture de la procédure puisque les parties doivent informer le Président du Comité intergouvernemental du résultat de la procédure. Le Président relaye ensuite l'information à la Directrice générale et au Comité intergouvernemental lors de sa session suivante (article 10.2). Il est intéressant de noter que lorsque la procédure se termine sans qu'un règlement ne soit intervenu, le Comité intergouvernemental demeure saisi de la question litigieuse comme d'ailleurs toute autre question non résolue qui lui aura été soumise (article 10.3). Un nouveau recours existe donc toujours.

f) Coûts

S'agissant des frais afférents à la procédure, et à moins qu'un autre arrangement n'ait été conclu, les parties les supportent à parts égales. Si l'une des parties souhaite se retirer de la procédure, elle reste dans l'obligation de respecter ses engagements sur les frais encourus jusqu'à la date de la notification de retrait (article 11.1).

Pour les dépenses concernant les témoins, les experts ou l'assistance juridique qui ne sont sollicités que par une seule partie, elles sont à la charge de cette dernière, à moins, bien entendu qu'un autre arrangement n'ait été convenu (article 11.2).

IV. Conclusion

Une analyse approfondie du Règlement intérieur pour la médiation et la conciliation conduit avant tout à souligner le caractère intergouvernemental de ces procédures dans la mesure où ce nouvel outil est directement issu des travaux du Comité intergouvernemental duquel il tire sa légitimité et, l'avenir le confirmera, son effectivité. Cet aspect est particulièrement remarquable dans la procédure prévue pour choisir le médiateur ou les conciliateurs. L'établissement de la liste constitue le gage de bénéficier des meilleurs experts internationaux issus de tous les continents[20].

Finalement, s'il fallait revenir sur les principaux piliers de ce nouvel outil, il faudrait certainement rappeler que les procédures de médiation et de conciliation proposées sont caractérisées, de l'engagement jusqu'à la clôture, par la recherche de consensus entre les parties, d'une certaine flexibilité afin d'offrir aux parties la latitude dont elles ont besoin pour conduire la discussion et, enfin, la confidentialité nécessaire pour des dossiers qui sont généralement complexes et politiquement sensibles.

[20] À ce jour, le Secrétariat a déjà reçu les noms d'une vingtaine d'experts désignés par leur pays.

Avec l'adoption de ce Règlement intérieur pour la médiation et la conciliation, les États disposent d'un nouvel outil qui a vocation à devenir la pierre d'angle d'un vaste répertoire de moyens mis en œuvre dans la recherche de solutions extrajudiciaires en matière de différends internationaux relatifs aux biens culturels.

"Les monuments, les tableaux, les statues, les livres, sont les accumulateurs qui emmagasinent ce que l'âme des peuples a conçu de plus beau, de meilleur, de plus profond au cours des temps, et de ces énergies jaillit l'étincelle qui donne un élan nouveau aux aspirations de la nation. Ces sont bien les ancêtres qui ont produit les floraisons artistiques et les ont incorporées dans les œuvres de leur imagination, mais celles-ci, à leur tour, exercent un effet réflexe sur la civilisation de leur postérité."

Hippolyte Taine, Philosophie de l'art, 1865.

NORMAN PALMER*

6. Waging and Engaging – Reflections on the Mediation of Art and Antiquity Claims

Abstract

The parties involved in art and antiquity claims increasingly favor methods of dispute resolution alternative to litigation, such as arbitration and mediation. The greater awareness of their benefits and the encouragement by courts to adopt these "Alternative Dispute Resolution" (ADR) techniques have led to an expansion of their usage. By way of several case examples, this article acknowledges that court action is, in many cases, the only way of bringing the holder of an art object to the negotiating table and obtaining a constructive response to a claim. However, it also shows that litigation may entail non-negligible drawbacks, including economic waste, public embarrassment, and errors by judges and lawyers. Similarly, arbitration may suffer from the many of the drawbacks of court litigation, including formality and cost.

The author then emphasizes that mediation can achieve results that are beyond the reach of courts alone. By way of comparing mediation to arbitration, the article identifies the many advantages of the former. As an informal dispute resolution method, mediation is not conducted according to strict principles of legal right and wrong, and offers the parties an almost unlimited range of solutions. Finally, judicial and governmental encouragements towards mediation confirm that disputants should well be inclined to settle art and antiquity claims by means of this consensual mechanism of dispute resolution.

Synthèse

Les parties impliquées dans les litiges concernant l'art et les antiquités favorisent de plus en plus les méthodes de règlement des différends alternatifs à la résolution judiciaire, tels que l'arbitrage et la médiation. Les avantages reconnus ainsi que l'encouragement par les tribunaux d'adopter ces « modes alternatifs de résolution des

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litiges » (MARL) ont conduit à leur utilisation plus fréquente. A travers plusieurs exemples pratiques, cet article reconnaît qu'une action judiciaire est, dans de nombreux cas, la seule façon d'amener le possesseur d'un objet d'art à la table des négociations et d'obtenir une réponse concrète à une prétention. Cependant, l'auteur souligne également que la résolution judiciaire peut entraîner des inconvénients non négligeables, y compris le gaspillage économique, l'embarras public et les erreurs des juges et des avocats. D'une manière similaire, l'arbitrage peut également souffrir des nombreux désavantages de la voie judiciaire, tels que le formalisme et les coûts.

L'auteur établit ensuite que la médiation permet d'obtenir des résultats qui vont au-delà de la portée des tribunaux. A l'aide d'une comparaison, l'article identifie les nombreux avantages de la médiation par rapport à l'arbitrage. Etant un moyen de résolution des litiges informel, la médiation n'est pas contrainte par la loi et offre aux parties une variété quasi illimitée de solutions. Enfin, les encouragements judiciaires et gouvernementaux à l'égard de la médiation confirment que les parties en litige devraient préférer une résolution à l'aide de ce moyen consensuel.

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I. Preliminary points

This paper begins by outlining two disputes that occurred in Commonwealth countries. Both of them involved cultural objects and both were finally resolved out of court, through modes of resolution other than litigation. Coincidentally, both of these cases involved a contest as to whether the delivery of cultural material to a cultural institution had taken place by way of bailment ("loan") or as an outright transfer of property by way of gift. Distinguishing between gift and loan is in fact a common problem for those who manage art collections[1]. It is also one of the many situations where mediation has strong advantages over other methods of resolving disputes. Part of the reason in both cases is that the "gift or loan" cases often turn on evidence of acts done and relationships forged decades earlier, the true analysis of which has been lost with the passing of time.

Having recounted these two cautionary tales, the paper proceeds to compare mediation and arbitration before looking at mediation in greater detail: in particular, the benefits that it confers, the means by which modern courts seek to encourage it and some of the ethical questions to which it gives rise.

1 The question is examined at length in PALMER NORMAN, *Palmer on Bailment,* 3rd ed., 2009, Chapter 3.

II. Australia and Canada: two cases of benign but vague intentions

A. Dame Mary Durack Miller[2]

This case involved a claim by the Battye Library in Perth, Western Australia, against the distinguished Australian author Dame Mary Durack Miller ("Dame Mary"). The Library claimed both title to and possession of certain Durack family papers, which Dame Mary had entrusted to the Library in 1959 or 1960. The Library had later redelivered the papers to Dame Mary at her request and she had signed certain "loan chits" on that occasion. The papers did not return to the Library and at one point negotiations were begun for their sale to the National Library of Australia at Canberra. Family members alleged that the original deposit to the Battye Library by Dame Mary was solely for the purpose of safekeeping and did not affect her title, and that if the State Library Board wished to regain the papers it should submit to arbitration and accept an agreed valuation. The Board rejected this and issued a writ in the Supreme Court of Western Australia, allegedly on the day that Dame Mary was diagnosed as suffering from cancer. By that time a rift was reported to have developed between her siblings (who favoured the Library) and younger members of the family (who favoured retention). After some anguish, the claim was eventually settled by mediation on undisclosed terms, the mediator being Sir Laurence Street, former Chief Justice of New South Wales. Sir Anthony Mason has described the case as a suitable one for mediation because *"it was a dispute in which both parties might have sustained some damaging publicity had the matter gone to trial and the costs of mediation may have been less than the costs of litigation"*[3]. Sir Anthony has also remarked that the Australian government increasingly favours mediation as a means of resolving agency disputes and that the United States government has called on federal agencies to expand their use of Alternative Dispute Resolution ("ADR") techniques, even in the case of negotiated rule making.

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2 The case is discussed by PALMER NORMAN, *Art Loans,* 1997, pp. 171 et seqq, and by SIR MASON ANTHONY, *Mediation and Conciliation in Art Disputes*, Institute of Art and Law seminar with Allen & Overy, 16 June 1997.

3 MASON, *ibid*.

B. The Beaverbrook Foundation and the Beaverbrook Art Gallery[4]

This was a controversy that went to arbitration. The Beaverbrook Foundation laid claim to certain paintings that Lord Beaverbrook had delivered (or caused to be delivered) to a public Gallery which he had established in his name at Fredericton in New Brunswick. The works had entered the Gallery some four to five decades prior to the eruption of the dispute and virtually all of the persons involved were now dead. There existed a mass of conflicting documentation as to whether the delivery of the works to the Gallery amounted to a gift or a loan. On this distinction depended the answer to the question whether the property in them had vested irrevocably in the Gallery or whether the Foundation was entitled, as bailor to the Gallery, to demand their delivery up. Aside from voluminous evidence as to the state of mind of Lord Beaverbrook at the time of the stocking and opening of the Gallery, the resolution of the dispute involved detailed analysis of the law concerning gifts of chattels and of the numerous defences that might be raised claims for the possession of chattels, including the triggering and suspension of limitation periods, the tributary doctrines of fraudulent concealment and discoverability, the concepts of laches, estoppel by convention and estoppel by representation, and various principles of evidence. Harsh words were spoken by the arbitrator about the conduct and motives of Lord Beaverbrook, and by the Foundation about certain allegedly prejudicial comments from the arbitrator that indicated inferable bias. The arbitrator (the Hon Peter Cory, a former justice of the Supreme Court of Canada) held in favour of the Gallery and the appeal tribunal (consisting of three retired Canadian judges) upheld his award. The appeal tribunal remarked on the "tsunami" of material that the Foundation had served up in order to substantiate its appeal. From the Foundation's unsuccessful appeal on costs, we know that the Gallery's costs alone (awarded against the Foundation) were in the region of 4.9 million Canadian dollars. One can fairly assume that (at the very least) the Foundation's own costs were not significantly less than this.

C. Some observations on the foregoing cases

Even this limited comparison shows that litigation, arbitration, and mediation are not always distinct processes for the resolving of disputes. The lines of demarcation are not

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4 See the analyses by JAHN INA, *Loans Versus Gifts: Determining the Donor's Intention, Lord Beaverbrook v The Beaverbrook,* Art Gallery Art Antiquity and Law Vol. 12, 2007, p. 81 on the original arbitration and by HERMAN, Art Antiquity and Law, Vol. 16, 2011, p. 317 on the appeal.

watertight. For one thing, there are methods available beyond those three[5]. For another, modes of resolution exist that do not fall precisely within the established categories, for example reference to those national panels that exist to pronounce on claims regarding Holocaust-related objects[6]. And thirdly, litigation, arbitration, and mediation will sometimes intermesh or operate in sequence. This duplication and diversity may raise questions as to how far information gained in one process can be used for a later process.

Many claims against nations and cultural institutions have been successfully concluded only after undergoing two or three of those processes. Aside from Dame Mary's dispute with the Battye Library, we have the example of Mrs Altmann and the Klimt portrait of Adele Bloch-Bauer in 2006[7], and of the Tasmanian Aboriginal Centre's claim against the Natural History Museum in 2007[8]. Both of these were launched through the medium of litigation, the Altmann claim culminating in an arbitration award at Vienna and the Tasmanian Aboriginal claim being resolved by mediation in London. The Islamic Republic of Iran's claim to the alleged Jiroft Valley antiquities, on the other hand, was resolved by litigation on preliminary points as to the efficacy of Iranian law in 2007[9], followed by an agreed settlement four years later. A positive decision in favour of Iran on the principle of State ownership was achieved only after Iran appealed from an earlier negative decision of Gray J. in the High Court, delivered in March 2007 after a two-day hearing in March 2006. In due course, permission was refused to appeal to the House of Lords[10]. The success of the first appeal and the defendant's failure to obtain permission for a second appeal played of course a significant part in the final settlement.

Each of these controversies came with a substantial bill of costs. As we have already implied, the costs of arbitrating the Beaverbrook Foundation's claim against the Beaverbrook Art Gallery from 2007 to 2010 may well have exceeded 10 million Canadian dol-

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5 Disputes might be resolved, for example, by resort to expert determination, early neutral evaluation, or some Government-endorsed advisory panel such as (in the United Kingdom) the Spoliation Advisory Panel.

6 See further PALMER NORMAN, *Museums and the Holocaust,* 2000, especially Chapter 8.

7 In the arbitral case *Maria V. Altmann v the Republic of Austria*, award of 15 January 2006. The dispute had earlier been referred to mediation by the Californian court but this attempt at a settlement failed.

8 *In re An Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5.

9 *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374; see notes by GERSTENBLITH PATTY, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities,* Art Antiquity and Law, Vol. 14, 2009, p. 21; CHAMBERLAIN KEVIN, *The Recognition and Enforcement of Foreign Cultural Heritage Laws: Iran v Barakat,* Art Antiquity and Law, Vol. 13, 2008, p. 161.

10 *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWHC 705 (QB).

lars. Even those disputes that invoke only one dispute resolution process can be enormously expensive. The costs may be grossly disproportionate to the value of the subject matter and also perhaps, in an objective sense, greater than the importance of the questions at issue would justify. The loss to the parties, moreover, may exceed the merely financial.

III. The perils and drawbacks of litigation

No case illustrates better than *Neave v Neave*[11] the almost surreal process by which litigation can take on a life of its own, luring the parties into a spiralling pit of economic waste and public humiliation, and driving judges into paroxysms of disbelief. The peril is particularly pronounced, perhaps, where people turn to litigation as a means of pursuing and escalating family disputes. In *Neave v Neave* a long-festering animosity between a mother and son erupted in the removal from land occupied by the mother of a number of derelict cars formerly collected by the son's now-deceased father. The mother sued for trespass and other wrongs, and the son vigorously defended. In a baffled and imploring judgment Holland J pointed to the conflict between a self-indulgent use of the legal system and the overriding objective "to do justice between the parties" that the modern Civil Procedure Rules now enjoin upon courts, advisers and parties:

"*It is plainly difficult to reconcile this litigation with that objective. Granted that the 'raid' of March 1998 should never have taken place; granted that the five vehicles should never have been removed; and granted that Mrs Neave has proved ownership with respect to one more vehicle, this litigation in so far as it goes beyond a simple claim in trespass is a nonsense deserving of no significant allotment of the Court's resources, that is, of public expenditure. Turn back to photograph 1290: the object of the litigation is to restore that status quo of derelict hibernation, presumably with the additional vehicle SH 294 dumped somewhere else, all seemingly out of sentiment and pique. The essential feature is not an interest in historic vehicles suddenly kindled in mother and son after thirty years of inactivity, but another chapter in an appalling family rift giving rise to the mutual desire to hurt and wound that was distressingly obvious in the course of the hearing before me and which had no doubt been a dominant feature of the protracted county court hearing. It would be nice if almost certainly naive to think that this litigation has helped the Neave family; my guess is that in addition to absorbing vast amounts of its precious funds it has served irretrievably to perpetuate the rift. Let us hope that I am wrong in this but if I am proved to be right then we have this added dimension: the public expenditure has been not only to no avail but indeed counter productive. This litiga-*

[11] [2002] EWHC 784 (QB); on appeal [2002] EWCA Civ 1193.

tion should never have got under way – the only thing that should could and should have been offered by the court is Alternative Dispute Resolution. Further, once underway it could and should have been resolved by constructive agreement – and not countered, as has been the case, by the Defendant's aggressive short-sighted intransigence. Throughout this family has needed – and still needs – constructive disinterested help: is it too large to find and act upon such?"

Similar sentiments were expressed by Brooke LJ in the judgment that preceded *Neave v Neave*[12]. In his view a mediator can accomplish results that are beyond the reach of lawyers and courts alone: *"Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve"*. Brooke L. J. further pointed out that some claimants feel driven to pursue litigation simply because they want someone in authority to respond seriously and sympathetically to their grievances. They want to be treated with respect. A defendant who ignores the prospect of, for example, a conciliatory expression of sorrow or an open-minded meeting to explain what happened does so at his or her peril.

"*This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.*"[13]

The perils and drawbacks of litigation are well known. They have been described in numerous studies[14]. For the present, only three points are made.

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12 *Dunnett v Railtrack Plc (Costs)* [2001] EWCA Civ 303.

13 *Dunnett v Railtrack Plc (Costs)* [2001] EWCA Civ 303, para. 14.

14 The main advantages of mediation over litigation have been aptly summarized by SIR MASON ANTHONY, *Mediation and Art Disputes,* Art Antiquity and Law, Vol. 3, 1998, p. 31: (i) Confidentiality: "One of the main advantages", although unless this is expressly stipulated its effectiveness cannot be guaranteed. (ii) Economy: "Perhaps its greatest advantage". The great value of this feature is that it (a) enhances the resources available for settlement, (b) reduces the prospects of an inequitable settlement forced on one party by the expiry of funds, (c) removes the threat of a party's not recovering costs and (d) makes money available for concurrent remedies. (iii) Ductility: Mediation offers the

A. A Rolls-Royce service?

Litigation may be expensive but this does not guarantee a high quality of service. Every lawyer in this field can cite examples of blunder, ignorance, eccentricity, and neglect - invariably on the part of someone else. Clients do not always get what they pay for and advisers do not always get the necessary support from their clients. The results can include avoidable defeat, unreliable precedent, wasted costs, and a costly corrective trip to some appeal tribunal.

This can be seen from two cases among many that have followed the heartbreaking trail from the court of first instance to the Court of Appeal.

In *Tandy v Kidner*[15], members of a family were disputing the entitlement to the proceeds of certain letters written by T. S. Eliot, which the defendant Edward Kidner had already sold to the British Museum. The trial judge wrongly identified the defendant as a witness whose evidence was tainted by a history of alcoholism and erratic behaviour. In so describing the defendant, the judge was confusing him with his son Timothy, who had earlier "clammed up" under hostile examination, had absented himself from court on the following day and had thus declined to testify further. When counsel for Edward Kidner pointed out to the judge the error in his identification, the judge still failed to correct his earlier remarks about the defendant's shiftiness and deviousness under examination. The appellate court expressed astonishment and virtual disbelief that the judge at first instance could have gone so far wrong, especially in a reserved judgment, and it held that only a new trial could correct the deficiencies of the last one.

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prospect of a resolution other than on "all or nothing" terms. For example where there is more than one cultural object at issue a settlement might be based on a shared distribution. An interesting comparable proceeding was the Tate-Griffier case before the Spoliation Advisory Panel, where the grant of an adjustable ex gratia money fund together with public commemoration of the family's loss enabled the resolution of the claim to be fine-tuned to the particular justice of the case. (iv) Community/Collegiality: Mediation is "better adapted to cultivating a co-operative approach". It draws the parties more directly and personally into the dispute resolution process, thus improving the chances of a congenial outcome and a more lasting relationship post-settlement. (v) Transparency: "Mediation will inject a dosage of reality". It can lead the parties to a better and more subjective appreciation of the strengths of their own positions and cases. This can be especially helpful in cases of art expert evidence; a skilled mediator will identify and reduce the significance of this.

15 [1996] unreported 1st March, CA; noted by PALMER NORMAN/CHESTERFIELD WINSTON, *Family Disputes over Cultural Material: Tandy v. Kidner,* Art Antiquity and Law, Vol. 12, 2007, p. 305.

In *Tavoulareas v Lau*[16], a dispute arose about the defendant's failure to return various artworks. The claimant had deposited these in a bistro that he had operated as a joint venture with the defendant but which had since failed. The defendant resisted the claim on the basis that he was entitled, under the venerable principle in *Clayton v Le Roy*[17], to a reasonable time in which to examine the title to the objects, and the trial judge upheld the defence despite compelling evidence that the defendant's position was at variance with the facts. The Court of Appeal castigated the trial judge's *"manifest failure to get to grips with the issues"*, his *"total failure"* to analyse the law and to give reasons for his decision, and his *"inadequate reasoning"* generally. These failings so seriously infected the whole of his judgment as to disable the Court from relying on such findings as the judge did make. The result here was particularly disastrous because it necessitated a new trial:

"In […] this case it is impossible for us to make any findings as to whether or not […] the claim is satisfied. Regrettably, the remainder of this claim must be remitted back to the County Court for further consideration when the issue of damages, if any, can also be considered."

Perhaps ironically, the threat of misdirection at first instance can also be glimpsed in *Neave v Neave* itself, where the Court of Appeal gave permission to appeal against Holland J.'s decision on costs[18]. Viewed in that light the case offers a further reason for avoiding litigation, beyond those already given by Holland J himself: to wit, that the first-level judge may misapply the law, requiring an expensive journey to some higher tribunal[19].

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16 [2007] EWCA Civ 474; noted by BRISTOW MELANIE, *Bistro Blues: Tavoulareas v Lau,* Art Antiquity and Law, Vol. 13, 2008, p. 99.

17 [1911] 2 KB 1031; PALMER, *Palmer on Bailment* (*cit.* n. 1), p. 71.

18 [2002] EWCA Civ 1193 at para. 35 per Chadwick LJ: "The judge does not seem to have addressed himself to that point. He simply observed that the offer did not match the judgment. But the question was not whether the offer matched the judgment; the question is whether the offer was more or less advantageous to the claimant than the ultimate result. Had the judge reached the conclusion that the judgment was no more advantageous than the offer, then he would have been obliged to order indemnity costs from the date on which the offer could have been accepted and interest at 10 per cent on any money recovered unless he considered it unjust to do so. In considering whether it was unjust, he was required to take into account the matters in CPR Part 36.21(5). His costs judgment is open to the criticism that he does not seem to have addressed either of those points expressly; save in the short observation that the offers did not match the ultimate judgment".

19 For a further example of the Court of Appeal's pungent castigation of a first instance judge see *Brewer v Mann* [2012] EWCA Civ 246.

The bungling legal adviser poses a threat to litigants in every realm of controversy, not least that of claims to chattels. The pressures of daily practice and the frantic pace of legal change can lead to what might euphemistically be termed "uneven knowledge". While one rarely experiences serious ineptitude, a failure to keep abreast of developments and a resultant ignorance of modern authority are not uncommon in some quarters. In 2008, the author was surprised to read a letter from a leading firm of City solicitors alleging that a defendant had committed the tort of detinue. This venerable tort may well have been alive and kicking when the writer of the letter last studied his law, but it was abolished by section 2(1) of the Torts (Interference with Goods) Act 1977, which came into force in 1978. Throughout a period of more than thirty years, the solicitor had apparently failed to grasp this fact. One wonders how much the client was being charged for this trip down memory lane.

Perhaps the practising lawyer is not always to blame. One sometimes finds that the authors of learned treatises on law have not fully assimilated and accurately expounded the effects of modern case law. For example, the decision of the Court of Appeal in *Iran v Barakat*[20] was delivered in 2007 and is a leading authority both on the cross-border recovery of archaeological finds and on the types of interest in goods that are necessary to enable a claimant to sue in conversion. One of the significant *obiter dicta* delivered by the Court was to the effect that, while a claimant in conversion must in certain circumstances show an immediate right to possession of the claimed chattel, that right of possession need not stem from a proprietary interest. The Court further opined that the decision in *Jarvis v Williams*[21] (which appeared to impose the requirement of a proprietary interest) could properly be explained on other grounds. As late as 2009 and 2010 two of the leading practitioner textbooks were continuing to recite as law the now-discredited requirement of a proprietary interest and were citing *Jarvis v Williams* as authority for that requirement[22].

Clients can sometimes fail to provide the information that a legal adviser needs and can bridle at the adviser's attempts to extract this. One difficulty may lie in persuading the client that the prosecution of the claim requires the presentation of evidence, not of the cultural property laws that are currently in force in the client's country, but of those now-repealed laws that were in force when the cultural objects in question were removed from that country. Obtaining a copy of those ostensibly defunct laws, and *a fortiori* obtaining an authentic translation into English, can be a trickier and more delicate exercise than one might suppose. Clients may be unwilling to admit that such laws are no longer

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20 [2007] EWCA Civ 1374.

21 [1955] 1 WLR 71, CA.

22 JONES MICHAEL A./DUGDALE ANTHONY M., *Clerk and Lindsell on Torts*, 20th ed., 2010, para. 17 et seqq; GOODE ROYSTON M., *Commercial Law,* 4th ed., 2009, p. 67.

available, or they may wish for whatever reason to promote the current law and put the past behind them. Unwelcome probing on this point can lead to emotional challenges about whose side the adviser is really on.

B. Volatility of legal decisions

The co-existence within England and Wales of an incremental system of common law decision-making, a hierarchical system of precedent and a well-balanced system of appeals can mean that the common law hovers in a state of uncertainty for an unacceptably long period. This can of course affect third parties who are awaiting a ruling on the points under litigation as well as the parties themselves. In *Iran v Barakat,* for example, the first instance hearing in March 2006 was followed by a judgment of the Queen's Bench judge in March 2007; the appeal hearing was held in October 2007 and the Court of Appeal delivered its judgment in December 2007. The matter did not come to rest judicially until the House of Lords refused permission to appeal in mid-2008. The Court of Appeal's decision was in any event only a ruling on preliminary points and the claim itself did not finally settle until late 2011. The author is aware of at least one other set of parties that were awaiting a final result in *Iran v Barakat* in order to guide their own management of a claim. Although the time consumed by this litigation hardly rivalled that consumed by the litigation in the Dickens novel "Bleak House", the chronology of *Iran v Barakat* does little to entice future adversaries into litigation.

Similar difficulties can arise from legislative change. Claims to cultural property often turn on events from long ago. As we have seen, this may require reference to laws that have since been repealed, the texts and translations of which may be hard to obtain. The exercise in legislative necromancy may prove frustrating and can easily inflate the costs.

C. Proportionality and the overriding objective: judicial despair at excessive, prodigal and self-indulgent litigation over chattels

There is an ingrained judicial dislike of litigation that costs more than the value of its subject matter. A sense of proportion in such matters is now embedded into the United Kingdom legal system as part of the overriding principle that courts must do justice between the parties. A successful claimant might therefore fail to recover costs from the losing party where the matter at hand could reasonably and more economically have been referred to alternative dispute resolution.

A typical expression of this view can be found in the judgment of Ward L. J. in *Tavoulareas v Lau*[23]:

"This litigation fills me with despair. […] The first extraordinary aspect of this bitterly-fought litigation is that the claimant has spent some £60,000 on it to date, the defendants £25,000; £85,000 in all, over a claim worth at most £23,500. Now, litigation must be fun if the parties are prepared to spend that much on a rollercoaster ride to judgment without pausing, either of them, to suggest that mediation would be a more sensible way to resolve their differences. I am sorry to say that the second extraordinary feature of the case is the perfunctory judgment under appeal. […] This is extraordinary litigation and it will be even more extraordinary if it continues any longer than this court. What is now in issue is a question of damage to the paintings that have been recovered, allegedly because they have been splattered with white paint or possibly damaged. Although Mr Marland boldly submitted that that claim might be measured in an amount up to £1,000, I would have thought he is optimistic and, indeed, at one point he seemed inclined to accept that that part of the claim would be abandoned. I do not hold him to the concession, but I remind him of it and observe that it makes eminently good sense to me. […] What the remainder of the claim is worth I do not know, but since it is perfectly obvious that paintings are in the possession or were in the possession of the defendants' solicitors, I would have thought that there are very easy ways through mediation and a bit of common sense to resolve this matter and hopefully to resolve it quickly and without a further extraordinary waste of money."

Similar attitudes can be glimpsed in cases involving claims to more everyday chattels, such as cars. An example is *Mainline Private Hire Ltd v Nolan*[24]:

"I add this post-script. This case has been fought tooth and nail and in the end the only claim to succeed is about a broken down car which […] has not turned a wheel in nearly five years. It may be that there is a substantial claim for damages still to be adjudicated upon. Had matters been otherwise, this court would under its present practice have refused permission to appeal. […] However, it is difficult to believe that after about four days before the judge and another in this court there is much left to gain in this for either party. Moreover, litigation of this kind is not a proportionate use of an expensive and scarce public resource. I am not suggesting that either party should bear all the blame but I am asking them, and their advisers, to make every effort to find a way of reaching some agreement about this outstanding claim before engaging them in further litigation.

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23 [2007] EWCA Civ 474.

24 [2011] EWCA Civ 189, para. 43; noted by PALMER NORMAN, *Identifying the Parties to an Art Transaction: Mainline Private Hire Ltd v Nolan,* Art Antiquity and Law, Vol. 16, 2011, p. 161.

I have no doubt that the courts which are concerned with the trial on damages will wish also to know that that has been done."[25]

Domestic building disputes are a further example of a field in which the judges are quick to assert the virtues of mediation. In *Vernon v Spoudeas and Another*[26] Ward LJ described the case as one *"which fills me with gloom and despondency"*. Costs in the region of £75,000 had already been expended over a five-year period in fighting two claims totalling some £25,000 and a counterclaim for just over £12,000. The learned Lord Justice said:

"One would have thought that this was quintessentially the case which cried out for compromise through mediation, rather than confrontation through litigation. It was always inevitable that the cost would exceed the sums truly in dispute and so it has proved"[27].

One could multiply such expressions of disbelief and dismay. Another case involving domestic construction work is *Burchell v Bullard*[28], where Ward LJ said:

"As we had expected, an horrific picture emerges. In this comparatively small case where ultimately only about £5,000 will pass from defendants to claimant, the claimant will have spent about £65,000 up to the end of the trial and he will also have to pay the subcontractor's costs of £27,500. We were told that the claimant might recover perhaps

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25 Disputes over cars have a tendency to attract somewhat "over the top" responses from aggrieved parties. An early example is *Ashby v Tolhurst* [1937] 2 KB 242, where the owner of a car stolen from a car park at Southend-on-Sea succeeded at first instance in recovering slightly over £30 for the value of the car, but lost the case on appeal: a costly experience for so inexpensive a chattel. A later case, *Woodard v Woodard* [1995] 3 All ER 980, involved the alleged gift from father to son of an Austin Metro car, seldom a prized asset in discerning circles. Similarly to the dispute in *Neave v Neave,* a mother was suing her son over the title to a car that had once belonged to the husband and father. DILLON L. J. described the appeal as "about the most sterile appeal I have ever come across" and continued: "The amounts at issue are not very large. Both parties had legal aid in the court below. Both parties have legal aid in this court. Both parties are living entirely on state benefits. The defendant became unemployed six months ago and has also had to undergo heart surgery. There appears to be no prospect of his being able to meet any judgment that the plaintiff might achieve by this appeal, and any sum for which judgment was recovered would be subject to the legal aid board's charge for the plaintiff's costs in the court below and in this court. None the less, we have to deal with the issues […]". For a case where a claimant car-owner was held to have properly attached a value to the car that exceeded the purely commercial value cf. *O'Grady v Westminster Scaffolding Ltd* [1962] 2 Lloyd's Rep 238.

26 [2010] EWCA Civ 666.

27 At para. 3.

28 [2005] EWCA Civ 358, para. 23.

only 25% of his trial costs, say £16,000, because most of the contest centred on the counterclaim. The defendants' costs of trial are estimated at about £70,000 and it was estimated the claimant would have to pay about 85%, i.e. £59,5000. Recovery of £5,000 will have cost him about £136,000. On the other hand the defendants who lost in the sense that they have to pay the claimant £5,000 are only a further £26,500 out of pocket in respect of costs. Then there are the costs of the appeal – £13,500 for the appellant and over £9,000 for the respondents. A judgment of £5000 will have been procured at a cost to the parties of about £185,000. Is that not horrific?"

Finally, in *Shovelar v Lane*[29], Ward L. J. said:

"If the claimants are right in their assessment of their costs, then, even without a success fee, the costs incurred by them exceed the sum over which battle has been joined. The great British public must think that something has gone wrong somewhere if litigation is conducted in that way. I share that sense of horror. One answer has to be to engage in mediation constructively and at the very earliest stage."[30]

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29 [2011] EWCA Civ 802, para. 61.

30 See further *Rolf v De Guerin* [2011] EWCA Civ 78 at para. 1 per Rix LJ: "This is an appeal solely about costs. It is also a sad case about lost opportunities for mediation. It demonstrates, in a particular class of dispute, how wasteful and destructive litigation can be." The excessive incurring of costs was recently lambasted by HENDERSON J. in *D R Sheridan LLP v Higgins and Woods* [2012] EWHC 547 (Ch) at para. 38: "A further disturbing feature of the case is that D R Sheridan's statement of costs for the proceedings amounts to no less than £35,882.09 plus VAT, including fees to counsel (Mr Studer) of approximately £16,100 for advice on some 17 occasions from 18 October 2010 onwards, as well as fees for settling the claim form, his skeleton argument and brief fee. As I said in the course of the hearing, I find it shocking that fees of this order of magnitude should have been incurred by a solicitor in dealing with an essentially straightforward dispute that should have been capable of rapid resolution." And see further *Zarb v Parry* [2011] EWCA Civ 1306 at para. 58 to 59 per Arden LJ, who suggests that procedures other than those relating to dispute resolution can in appropriate cases head off extravagant disputes: "These proceedings have been costly and there is a cautionary story here for purchasers of land. No doubt those advising on transfers of land will consider what they need to do in future to protect their clients from costly disputes such as this one. Purchasers are not necessarily protected merely because the seller gives an assurance that the dispute with a neighbour has seemingly "gone away". Boundary disputes have a habit of reappearing until finally resolved. The neighbour or the neighbour's successor in title may, for whatever reason, resuscitate the dispute, unless something is done to prevent them from doing so. It may be that the purchaser will have to consider whether to ask the neighbour to confirm the boundaries and have the necessary deed of confirmation registered at the Land Registry in a manner capable of binding successors in title. That will involve extra costs and delay but the costs may be less than the undoubted cost of litigation of this kind. If the neighbour refuses to be bound by an agreement as to the boundary the purchaser will then know the risks that he

IV. In defence of litigation

A. The value of litigation

There is of course another side to the coin. Blunder and squander are by no means inevitable in litigation. Not all first instance judges are inattentive and not all lawyers are out of date. Litigation often proceeds in a seemly and efficient manner, managed by advisers who are well informed about the issues and keen to minimise costs, at least so far as concerns any award against their clients. Moreover, going to court can offer many advantages to a claimant, not least because the modern administration of justice is much more closely geared than in earlier times to streamlining the progress of litigation and to ensuring that the management of claims is responsive to changed conditions. Wastage and delay have been much reduced.

There are, in any event, some situations where nothing short of the issue of proceedings will draw forth a constructive response from a defendant. Many of the cases that ended in mediation began with the issue of court proceedings because there was no other way of bringing the defendant to the table. The claim by the Tasmanian Aboriginal Centre against the Natural History Museum was a vivid example of this. The element of surprise that legal proceedings have been set in motion, and the daunting prospect of a long-term gamble at high stakes, may be highly material factors in inclining both parties towards alternative dispute resolution.

Material in this regard are the words of Richard Arnold QC, sitting as a Deputy Judge of the High Court, in *Vitoft Ltd v Altof*[31]:

"This dispute cries out for mediation if a settlement cannot be achieved through direct negotiations. Now that some of the more pressing issues have been determined I hope that the parties will be able to reach an accommodation. In case they are not I am minded to order a stay with a view to mediation."

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is running by completing the purchase. Moreover, the purchaser on acquiring possession might himself be advised to bring matters to a head by himself applying for registration as owner of the land in question. If a dispute emerges, every effort should be made to resolve it without litigation. […] I find myself in agreement with the judge's observation that it is simply not clear why the parties have been unable to resolve this matter. He goes on to speculate about whether the driving force is the legal costs. If that is so, and it has in the past been found to be the reason for an appeal in a boundary dispute, it highlights the need for professional advisers to think about some kind of strategy such as I have suggested above." See further, on family provision disputes, *Lilleyman v Lilleyman* [2012] EWHC 1056 (Ch).

31 [2006] EWHC 1678 (Ch), para. 221.

B. The limits of proportionality

Self-indulgent voyages through the legal system are of course to be discouraged. The courts are a limited resource and should not be exploited as a soap box for personal attitudinising or an instrument of vengeance. One must beware however of reducing claims for the restitution of historic or spiritual material to a simple matter of economics. While no litigant should be encouraged to take prodigal action in pursuit of a claim for restitution, certain objects may be so heavily charged with legitimate subjective or personal concerns, peculiar to the individual and divorced from their economic value, that it could be reasonable to pursue them through court action, even though the cost of such action exceeds their economic worth. Obvious candidates for such special consideration are national historical treasures (the "keys" to a nation's ancient history)[32] and Holocaust-related objects. A similar argument might be made about claims by indigenous peoples to recover ancestral remains or other relics having spiritual force. In many cases court action may be the only way to compel a museum or private possessor to pay serious attention to a claim. Indeed, one English national museum agreed to mediation only after being sued[33]. It would be unfortunate if the low economic value of the material claimed were to be invoked as a ground for denying costs to the successful claimant.

V. Arbitration and Mediation compared

A. General

If (for whatever reason) the parties choose to discard litigation from the range of acceptable options, the principal remaining options are arbitration and mediation. These have both similarities and differences. An understanding of these points of contrast is crucial to an informed choice between them.

B. Similarities

Speaking in general terms, both of these forms of resolution are consensual: they can operate only if the parties agree that they should occur. In each case, moreover, an agreement as to the resolution process can be made either before or after the dispute

32 *Webb v Ireland and the Attorney General* (1988) IR 353; *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374.

33 *Tasmanian Aboriginal Centre v Natural History Museum* [2007].

arose. In both cases it seems that an agreement to resolve disputes by one of these processes, if properly framed, will be enforceable as a contract and will not (for example) be void for uncertainty[34]. In both cases the parties must pay the honorarium of the arbitrator or mediator (compare the judge in a litigated dispute). Both processes are confidential so far as the parties agree.

C. Differences

The arbitrator is largely restricted to adjudicating the parties' rights *according to law*. Arbitration is a formal process under which the arbitrator must conduct the proceedings in a manner akin to that of a judge. Mediation is much less formal: for example, the mediator can speak to the parties separately if that is agreed. The mediator is not governed by legal principle, because he or she is not entrusted with the task of *deciding* anything. The purpose of mediation is to encourage the parties to explore common ground in order to enable them to reach their own agreement and compose their own differences, not to produce a judgment upon them.

One might therefore say, as a very loose generalisation, that while arbitration can be a very effective mechanism to remedy past wrongs, mediation is a mechanism better suited to the building of future relationships. Arbitration is perfected by an adjudicator who delivers a determination of the dispute (the award) which becomes binding irrespective of the parties' specific acceptance of it. Once they agree to arbitration they are bound by the result, whether they like it or not. In mediation, no party need accept or follow any result unless he/she agrees to it, because the outcome is *agreed* by the parties, and not *imposed* by an outsider.

Mediation can also generate remedies that are not possible in law-based resolution methods. A loosely-drawn example might be drawn from the commemorative plaque that was recommended by the Spoliation Advisory Panel, and agreed by the parties, in the Tate-Griffier claim[35].

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34 In *Hooper Bailie Associated v Natcom Group Pty Ltd* (1992) 28 NSWLR 194, a mediation clause was specifically upheld because the clause included specific attributes that made it enforceable. SPENCER J.M., *Case notes: Mediation practice notes – around the grounds!*, Australasian Dispute Resolution Journal, Vol. 15, 2004, p. 156 refers to four principles that can provide the requisite "certainty" in a mediation clause: (i) use of language with precise meaning for procedure and obligations; (ii) derivation from an external standard document recognized in the industry; (iii) capability of attributing an industry-recognised standard of reasonableness to a term; (iv) a third party mechanism to clarify and cohere the facts, principles and assumptions at issue.

35 Report of the Spoliation Advisory Panel on a Painting in the Tate Gallery, 2001.

On the other hand, there is an effective international process for enforcing arbitration awards in cross-border disputes in the shape of the New York Convention 1958. Outside the European Union[36] there exists no generalised international process for the enforcement of settlement agreements reached through mediation.

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[36] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, art. 19 to 22, implemented in the United Kingdom by CPR 78.24. Very broadly and generally, the implementing CPR states that where the parties to a settlement agreement arising from the mediation of a cross-border dispute explicitly consent to the making by one or more of their number of an application to the court that the court shall make an enforcement order, and evidence of that consent is attached to the application, the court will make an order making the mediation settlement enforceable. Explicit consent is deemed to exist (CPR 78.24[7]) where a party to the mediation settlement (a) has agreed in the mediation settlement agreement that a mediation settlement enforcement order should be made in respect of that mediation settlement; (b) is a party to the application; (c) has written to the court consenting to the application for the mediation settlement enforcement order. The rules laid down on enforcement (and generally) by the Mediation Directive govern only to the mediation of cross-border disputes as defined in the Mediation Directive. By Art 2(1) of the Directive "For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on [the critical date]." By art. 2(2) of the Directive the critical date is the date on which (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes of article 5 an invitation is made to the parties. Note however that by art 2(3) of the Mediation Directive: "Notwithstanding paragraph 1, for the purposes of articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c)". The Directive, and its implementing regulations within the United Kingdom (The Cross-Border Mediation (EU Directive) Regulations 2011, No 1133) deal also with the suspension of limitation periods for the duration of a mediation and beyond and with the confidentiality of mediation proceedings. On the former see especially the Mediation Directive articles 15 and 24, and the Regulations para. 26 which adds a new section 33A to the Limitation Act 1980. Very broadly and generally, for the purpose of calculating the time available for initiating judicial proceedings or arbitration, any relevant statutory time limit that would otherwise have expired *either* before the mediation ends *or* less than eight weeks after it ends, now expires instead at the end of eight weeks after the mediation ends (sections 33A(2) and 33A(3); and see section 33A(4)). On the latter see the Mediation Directive articles 16 and 23, the Regulations para. 9 and 10, and CPR 78.26. Very broadly and generally, a party who wishes to obtain mediation evidence from a mediator or mediation administrator must provide the court with evidence that (a) all parties to the mediation agree to the obtaining of the mediation evidence, (b) obtaining the mediation evidence is necessary for overriding reasons of public policy, in accordance with article 7(1)(a) of the Mediation Directive, or (c) the disclosure or inspection of the mediation settlement is necessary to

VI. Judicial and governmental encouragement towards mediation

A. General

Where a relationship is not governed *ab initio* by a mediation agreement, the question arises as to what arguments, procedures, sanctions and other devices exist to incline or compel an intransigent party toward mediation. Leaving aside the inherent persuasiveness of a system that offers a more frugal and conciliatory forum for the resolution of disputes, the answer is broadly two-fold.

B. Judicial initiatives

1. Positive encouragements by the courts

The court can, of its own volition, "stay" (i.e. suspend) existing legal proceedings, in order for the parties to explore alternative dispute resolution. By Rule 26.4 (*"Stay to allow for settlement of the case"*) of the Civil Procedure Rules:

"(1) A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.

(2) Where –

(a) all parties request a stay under paragraph (1); or

(b) the court, of its own initiative, considers that such a stay would be appropriate,

the court will direct that the proceedings, either in whole or in part, be stayed for one month, or for such specified period as it considers appropriate.

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implement or enforce the mediation settlement agreement. Art. 7(1)(a) of the Mediation Directive reads: "Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except: (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; […]".

(3) The court may extend the stay until such date or for such specified period as it considers appropriate.

(4) Where the court stays the proceedings under this rule, the claimant must tell the court if a settlement is reached.

(5) If the claimant does not tell the court by the end of the period of the stay that a settlement has been reached, the court will give such directions as to the management of the case as it considers appropriate".

2. Negative encouragements – orders as to costs

A successful claimant in a court action may find that its earlier rejection of an invitation from the other party to explore mediation is adversely reflected in the court's apportionment of liability for costs. By reducing the costs recoverable by the winning party the court may show its disapproval of the winner's choice of a longer and most expensive mode of dispute resolution than was necessary. Such an order may also send a signal to other litigants that the self-indulgent and prodigal use of the courts in low value cases attracts painful sanctions, and that an invitation by one party to the other to opt for mediation might properly be viewed, not as a sign of weakness or "cold feet" at the approach of litigation, but as a hard headed and responsible move to ensure that the proposer does not end up in the wrong position on the costs chess board.

There are numerous authorities on this point, of which two are examined here. The first is *Dunnett v Railtrack Plc (Costs)*[37] where Brooke L. J. referred to the "helpful" notes on page 18 of the Autumn 2001 edition of the White Book Service and continued:

"The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r.44.3(4), see r.44.5)".

Brooke L. J. concluded by expressing the hope that:

"any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in Part 1 of the Rules and to the possibility that, if they turn down out of hand the chance of

37 [2001] EWCA Civ 303, para. 12 to 16.

alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence.

In my judgment, in the particular circumstances of this case, given the refusal of the defendants to contemplate alternative dispute resolution at a stage before the costs of this appeal started to flow, I do not think that it is appropriate to take into account the offers that were made. In my judgment, taking into account all the circumstances of the case, as we are bound to do under CPR Part 44, which applies as much to the Court of Appeal as it does to courts at first instance, the appropriate order on the appeal is no order as to costs".

In *Halsey v Milton Keynes General NHS Trust*[38] the Court of Appeal, while recognising that courts can impose costs penalties on parties that have unreasonably refused to consider some form of ADR, observed that since the general rule is that the losing party should pay the winning party's costs, it is up to the losing party to show that the winning party was unreasonable in refusing to mediate, or to consider some other form of ADR. The court set out a non-exhaustive list of criteria, none of which is determinative, that go towards determining whether a party acted unreasonably in refusing ADR. The criteria are (i) the nature of the dispute, (ii) the merits of the case, (iii) the extent to which other settlement methods have been attempted, (iv) whether the costs of the ADR would be disproportionately high, (v) whether any delay in setting up and attending the ADR would have been prejudicial and (vi) whether the ADR had a reasonable prospect of success.

The decision confirms the duty of the courts to encourage ADR, following the Woolf Report ("Access to Justice"), and the changes to the Civil Procedure Rules, but stops short of compulsion. Dyson L. J. said:

"It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court"[39].

C. Governmental initiatives

Particular governments have established specially constituted entities charged with the consideration of claims relating (or potentially relating) to cultural objects. The principal example in the United Kingdom is the Spoliation Advisory Panel ("the Panel"). The

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38 [2004] EWCA Civ 576.

39 DYSON L. J. quoted article 6 of the European Convention on Human Rights in support of this, and distinguished between a voluntary agreement to waive access to a court (such as an arbitration clause) and compulsion by the court itself.

Minister for the Arts established the Panel in June 2000 to consider claims brought against publicly funded museums by those who lost possession of cultural objects between the years 1933 and 1945. It is governed by closely-defined terms of reference and produces a scheme of resolution that to a limited degree resembles mediation.

The Panel is entrusted with evaluating the moral quality as well as the legal force of individual claims. Paragraph 7(e) of its Terms of Reference requires the Panel to *"give due weight to the moral strength of the claimant's case"* while Paragraph 7(g) requires the Panel to *"consider whether any moral obligation rests on the institution"*. In the latter regard, the Panel must take into account "*in particular*" the circumstances in which the object was acquired by the institution, and the institution's knowledge at that juncture of the object's provenance. The phrase "*in particular*" admits of considerations other than the circumstances of a museum's acquisition, including the basic truth that the object was taken from the claimant without consent and in circumstances never since ratified. An innocent acquisition does not therefore necessarily denote a creditable retention. The institution may owe a moral obligation to return an object irrespective of any moral transgression on its part.

VII. The value of ADR to art mobility

Article 167 of the Lisbon Treaty of 2007 enjoins on Member States of the European Union a programme of co-operation to promote cultural exchange. Many countries have embraced such a policy and have indeed been practising it for many years. A policy of mobility can however be hindered and discouraged by the continued festering of claims and controversies relating to cultural objects that are held in one country but eyed jealously by another. Mediation can resolve such thorny issues and thus equip such objects for international travel. Conscious of this situation, the Salzburg Expert Legal Committee in May 2008 made the following recommendations ("Proposition 5"):

"Special attention should be given to the challenges that unlawfully removed cultural objects present to the increased mobility and sharing of cultural objects at large:

A. Clear and independent ethical provision should be made for the exclusion of illicit cultural material from involvement in the negotiation, conduct and resolution of cross-border loans. Such distinct provision should recognise that loans are different in principle from outright acquisition by sale, gift or exchange and require special treatment, separate from the more general treatment accorded to other forms of museum acquisition.

B. There should be effective early warning systems to prevent recently looted cultural objects from being loaned or borrowed. Lending and borrowing museums should be pro-

active in seeking to identify and isolate such material and should embody strict undertakings, which demand such vigilance and active inquiry from their loan partners, into their loan agreements.

C. Museums must recognize that the existence and continuation of unresolved repatriation and restitution disputes can, in the absence at least of serious efforts at conciliation, paralyse the circulation and sharing of significant cultural objects. Museums that are seriously committed to the more liberal circulation of cultural material must act positively and resourcefully to resolve or neutralize such disputes and bring such objects into circulation".

VIII. Some miscellaneous questions

We approach our conclusion by noting a number of further questions that arise from the use of mediation in the resolution of art and antiquity claims, but which must await deeper analysis in another occasion.

1. Is there a legitimate public concern about "secret deals" that suppress public knowledge of discreditable conduct relating to (for example) looted art or antiquities? How far should the impetus towards out-of-court resolution be restrained by a conviction that gross malefaction towards cultural objects (at least) should be put on the carpet and not swept under it? And whose responsibility is it to impose that restraint? It is notable in this regard that article 14(a) of the WIPO-ICOM Mediation Rules requires that: *"In the conduct of the mediation, the mediator and the parties shall bear in mind the ICOM Code of Ethics for Museums."*

2. To what extent are anticipatory mediation clauses (i.e, those inserted in a larger agreement before a dispute has arisen) emasculated by the illegality or termination of the parent contract? Does the doctrine of the free-standing character of an arbitration clause apply by analogy to a mediation clause[40]? Can the parties in an anticipatory mediation clause make express provision for that effect?

3. Can the enforcement of an agreement arising from a concluded mediation relating to the lending of a cultural object be barred by anti-seizure legislation operative in the jurisdiction in which the defaulting party is resident and has its assets? Should an agreement to mediate be deemed a waiver of immunity from seizure, and can a mere consensual waiver displace that immunity in any event?

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[40] See *Bakwin v Erie Trading Co* (2005) unreported 27th November.

IX. Some lessons to be learnt from the case law

Such questions aside, I would submit that the following principles apply to all potential issues arising from transactions in cultural objects, and not merely to those that concern the method of dispute resolution:

1. Entry into common law relationships affecting art must be accompanied by an understanding of the common law principles that govern them. These principles can derive not only from the law of agency and bailment, but from contract, tort, partnership, equity and restitution, not to mention criminal law. Similar converging and intermingling streams of law will of course operate under civil law systems, and must equally be understood if a projected art transaction is to be effective.

2. Life could be simpler if parties thought through at the outset what they wanted to happen in potential situations and used their party autonomy to provide for these contingencies in advance. This may cost more at the beginning, but it saves in the long run. It saves not just money but time, reputation, secrecy, and peace of mind.

3. The cost of going to law can easily outpace the value of the prize. The outcome can be damaging to a party who succeeds in court as well as to the party who fails. Appellate judges have commented tartly on the folly of prodigal expenditure in art claims. Remember the judge who opened his judgment with the words *"This litigation fills me with despair"*.

4. Settled planning should involve defining both the obligations of the parties and the mode of dispute resolution[41]. As Robert Frost said, good fences make good neighbours[42]. Deals involving art or gems worth millions of pounds should not be left to chance. Those who habitually make deals on a handshake still need to count their fingers.

The author extends cordial thanks to Alex Herman, Nina Neuhaus and Kevin Tang for their valuable assistance in the preparation of this paper.

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41 Agreement on the mode of dispute resolution is not of course the only form of pre-planning that parties should be adopt: they should also take care to agree, for example, clear provisions on rates of pay for art-related services, the value of chattels bailed, the nature of the agreement (sale, loan, hire, bailment on approval?) and other terms that are in practice all too often left blank. Consider in this regard for example *Spencer v Franses* [2011] EWHC 1269 (QB) and *Jabir v H Jordan & Co* [2011] EWCA Civ 816.

42 In the poem *"Mending Wall"* first published in 1914. The aphorism is said to date from the mid-seventeenth century.

KATHRYN ZEDDE*

7. UNESCO's Intergovernmental Committee on Return and Restitution of Cultural Property and the Mediation and Conciliation of International Disputes

Abstract

UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation was established in 1978. Since that time, the Committee has constituted one of the few formal, non-litigious mechanisms available for the resolution of international disputes between states over cultural property. During that time, its effectiveness in that role has been hampered by the limitations of its Statutes. Recent amendments to those Statutes, however, now allow the Committee to offer formal mediation and conciliation to parties to a cultural property dispute. The Committee thereby joins an expanding range of alternate dispute resolution mechanisms available internationally to states and the cultural community. This paper examines the history of the Committee and the way in which it has approached this new, expanded role.

Synthèse

Le Comité intergouvernemental UNESCO pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale a été établi en 1978. Depuis lors, le Comité constitue l'un des rares mécanismes formels non-contentieux à disposition des Etats pour la résolution des différends internationaux relatifs aux biens culturels. Pendant longtemps, son efficacité a été considérablement diminuée par des limites statutaires. Mais des modifications récentes de ces derniers

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permettent dorénavant au Comité d'offrir formellement une médiation et une conciliation aux parties d'un litige relatif à des biens culturels. Cet article retrace l'histoire du Comité UNESCO et examine sa manière d'appréhender ce nouveau rôle plus étendu.

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I. Introduction

In 2005, the statutes of UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) were amended to allow for mediation and conciliation of disputes under the aegis of the Committee. To understand the context in which the Committee has approached this new role, it is useful to first examine the mandate of the Committee, and how and why it was established.

II. Establishment of the Committee

In 1972 the UNESCO Convention of the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, otherwise known as the 1970 Convention, came into force. Unlike other UNESCO conventions that came after it, the 1970 Convention did not establish an intergovernmental committee tasked with overseeing its implementation. This left UNESCO without any regularly convened forum for discussions among Member States on the illicit traffic of cultural material, and its return to its country of origin.

Some years later, though there is no indication that it was a response to that omission in the Convention, UNESCO began to examine the specific issue of the restitution or return of cultural property as a legacy of colonial and other foreign occupation – without, at least initially, any reference to the larger issue of illicit traffic *per se*. As far as one can tell, this appears to have stemmed from a debate that took place during the 18th UNESCO General Conference in 1974. Resolution 3.428 from that Conference references the independence of former colonies, the fostering of development and preservation of national culture and recalls the Declaration of the 4th Summit Conference on Non-Aligned Countries which stressed *"the need to reassert indigenous cultural identity and eliminate the harmful consequences of the colonial era."*[1]

The same Resolution also refers to the 1943 London Declaration and the fact that various armistice conventions following the Second World War included provisions for the return of cultural property. Ultimately, the Director-General of UNESCO was tasked with defining the most suitable methods to promote return and restitution of cultural property lost during colonial or other foreign occupation.

A range of options in this regard was brought forward to the 19th General Conference in 1976, including the possible establishment of an intergovernmental committee. As a result of a Resolution[2] at that General Conference, an *ad hoc* committee of experts was convened to explore options for the establishment of an intergovernmental committee that would be tasked with *"seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to the countries having lost them as a result of colonial or foreign occupation."*[3]

The debates and resolutions that led to the creation of what became the ICPRCP had that specific, defined vision for the committee and its mandate. But, as is so often the case in

1 UNESCO C/18 Resolution 3.428.

2 UNESCO C/19 Resolution 4.128.

3 *Ibid*.

such situations, that clear, limited mandate was, in the end, not reflected in the Statutes that were adopted by the General Conference for the new Committee. The draft Statutes establishing the Committee that had been developed by the *ad hoc* committee of experts met with divergent points of view by certain states[4], and what had been a reference to requests concerning the restitution or return of cultural property lost *"as a result of colonial or foreign occupation"* became *"as a result of colonial or foreign occupation* ***or*** *as a result of illicit appropriation"*[5]. In other words, what was to have been a mechanism to help resolve a very specific set of disputes became, from its inception, a very general forum to which seemingly almost all disputes over the return and restitution of cultural property could be brought. The only requirement was that a request must be made by a Member State or Associate Member of UNESCO and that the property have *"fundamental significance from the point of view of the spiritual values and cultural heritage"* of its people[6]. While not explicitly stated in the Statutes, subsequent information documents also make it clear that cases where the 1970 Convention applies cannot be brought to the Committee[7].

The broadening of the statutes had the effect of creating what has come to be considerable uncertainty about what exactly this Committee is supposed to do, and what sorts of disputes it should seek to resolve. This uncertainty was to have a direct effect on the recent development of Rules of Procedure for mediation and conciliation under the ICPRCP.

III. The role of the Committee

The role of the Committee, as defined by its original Statutes, was to seek ways and means of facilitating bilateral negotiations to resolve the broad range of disputes in question, and to promote multilateral and bilateral cooperation generally in the return and restitution of cultural property to its country of origin. This reflected discussions by the *ad hoc* committee of experts, which noted that the proposed committee could act as

4 LYNDEL V. PROTT, The UNESCO Intergovernmental Committee for Promoting the return of Cultural Property to its Countries of origin or its restitution in Case of Illicit Appropriation – Origin, Developments, Accomplishments and Challenges, in: ICPRCP Expert Meeting and Extraordinary Session in Celebration of its 30th Anniversary, Cultural Heritage Administration of Korea, Vita Books Co. Ltd., 2010, pp. 288 et seqq.

5 UNESCO 20 C/86 Annex I, Rev.

6 *Ibid*.

7 Guidelines for the use of the "Standard Form Concerning Requests for return or Restitution", UNESCO CC-86/WS/3, p. 17.

a *"liaison between the different parties concerned in order to stimulate initiatives for the restitution or return of cultural property and to ensure the coherence of action taken"*.[8] This is what is termed in the UNESCO vocabulary as good offices. The use of good offices consists essentially of working to bring the parties to the dispute together, and hopefully in doing so, help them develop a dialogue that can ultimately lead to resolution of the dispute in a mutually satisfactory way. This remained the Committee's only role in the resolution of cultural property disputes for more than 25 years.

In addition to that central role, the Committee was also charged with:

- undertaking research and studies toward programs for the constitution of representative collections in countries whose cultural heritage has been dispersed;
- public information campaigns concerning return and restitution of cultural property and capacity-building in the development of infrastructure for the protection of cultural property;
- promoting international exchanges of cultural property; and
- guiding the planning and implementation of UNESCO's activities in this area.

In some respects, aside from the work related to programs for the constitution of representative collections (efforts by the Committee in this regard are unclear), it was these other aspects of the Committee's mandate that represent its greater success over the years, not its role in the resolution of disputes. Indeed, the Committee has been associated with only a small handful of resolutions to date. Its primary contribution to those resolutions appears to have been that discussions during the Committee's sessions, and the profile accorded to disputes by their inclusion in its reports, served to keep a diplomatic and public focus on disputes that might otherwise receive little attention outside the countries that were directly involved.

IV. Mediation and Conciliation

It was perhaps in recognition that the Committee was a potentially very useful tool, but a comparatively little-used one, that efforts to strengthen its effectiveness began at the 32nd General Conference in 2003. The development of an overall strategy to facilitate the return and restitution of cultural property focused quickly on strengthening the mandate of the Committee by, among other things, introducing formal mediation and conciliation of disputes. The Statutes of the Committee were correspondingly amended in 2005 (see Annex 1).

8 UNESCO CC-78/CONF.609.3.

In getting to that point, a number of issues had been debated by the Committee between 2003 and 2005 and certain positions taken, as reflected in the Committee's relevant decision from its 13th Session[9]. Debate took place in response to a document drafted by the UNESCO Secretariat[10] which raised a number of questions for consideration. The results of part of that debate are reflected in the revised Statutes:

"The Committee shall be responsible for:

1. Seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin when they are undertaken according to the conditions defined in Article 9. In this connection, the Committee may also submit proposals with a view to mediation or conciliation to the Member States concerned, it being understood that mediation implies the intervention of an outside party to bring the concerned parties to a dispute together and assist them in reaching a solution, while under conciliation, the concerned parties agree to submit their dispute to a constituted organ for investigation and efforts to effect a settlement, provided that any additional, necessary funding shall come from extra budgetary resources. For the exercise of the mediation and conciliation functions, the Committee may establish appropriate rules of procedure. The outcome of the mediation and conciliation process is not binding on the Member States concerned, so that if it does not lead to the settlement of a problem, it shall remain before the Committee, like any other unresolved question which has been submitted to it."[11]

In addition to clarifying the difference between mediation and conciliation, the Statutes allow the Committee to make a proposal for mediation or conciliation to States who have a dispute before it, specifying that any necessary funding come from extra budgetary sources (the regular UNESCO budget will not cover the costs of mediation and conciliation).

The Statutes also specify that the outcome of such a process is not binding and that, in the event it is not successful, the dispute will remain before the Committee. This point generated considerable debate among Member States. Some felt that, having exhausted both the good offices and mediation and conciliation efforts of the Committee, it would be counterproductive, as well as potentially damaging to the credibility of the ICPRCP, to have intractable disputes remain before the Committee indefinitely. Others observed that parties to a dispute might be reluctant to resort to mediation or conciliation if it represented an "*all or nothing*" option in which they could find their dispute relegated to

9 Recommendation 3, UNESCO 33 C/REP/15.

10 UNESCO CLT-2005/CONF.202/4.

11 Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (see Annex 1).

the less visible environment outside UNESCO if the process proved unsuccessful. In the end, consensus among Committee members favoured the latter view, which was then endorsed by the General Conference. If mediation or conciliation efforts are unsuccessful, the dispute remains before the Committee.

V. The Rules of Procedure

As provided for by the Statutes, all other details of the mediation and conciliation process have been determined by the Committee. Work on the Rules of Procedure for Mediation and Conciliation took place until 2010, when they were adopted in final form by the Committee at its 16th Session (see Annex 2).

The Committee started with a draft prepared by the Secretariat, and the final version differs significantly from it. A number of important characteristics of how this process will be undertaken at the Committee are worth noting, and are the product in some cases of very difficult debate among Member States that recalls the question of the ill-defined role of the Committee itself.

A. What disputes – who can the "Parties" be?

The most difficult aspect for the Committee in defining how mediation and conciliation would work was determining, in some ways for the first time, exactly what disputes would be eligible for mediation and conciliation. This despite the fact that disputes must already be before the Committee – an indication that the larger question of eligibility had perhaps never been sufficiently dealt with.

Certain states felt strongly that, as an intergovernmental committee of an intergovernmental organization, the ICPRCP should concern itself only with disputes between states. The observation was also made that with organizations like ICOM (the International Council of Museums) launching similar mechanisms, there was no need for UNESCO to venture beyond the intergovernmental sphere. In contrast, other states took the position that as long as the requestor seeking return or restitution of cultural property in a dispute was a Member State or Associate Member of UNESCO, they should have recourse to mediation/conciliation at the Committee, regardless of who the current holder of the property is.

An impasse over this issue stymied progress on development of the Rules of Procedure and led to the convening of an ad hoc subcommittee in November, 2009 to continue work on the draft. While consensus on all other outstanding questions was reached by

the subcommittee and recommendations on them made to the ICPRCP, the question of who the "Parties" could be and therefore what disputes would be eligible for mediation/conciliation was deemed too significant to be resolved by the subcommittee, where the impasse continued, and was returned to the Committee itself for further debate.

In the end, a compromise was reached. In each case, the *requesting party* must be a Member State or Associate Member of UNESCO, with the understanding that they are free to represent the interests of public or private bodies in their territory, or their nationals. The *respondent,* on the other hand, being the possessor of the cultural property, may be a Member State or Associate Member of UNESCO, or a public or private body in such a state, providing that the state in question has no objection to the involvement of UNESCO or the ICPRCP. This issue of consent was an important point for governments who might be expected to assist the holder of a property with costs of participation in mediation/conciliation, or where the involvement of UNESCO and its Committee might have ramifications on other fronts for bilateral relations between states.

The Committee will not oversee mediation or conciliation of disputes where the current holder of the property is an individual.

B. Who will the mediator or conciliator(s) be?

A second important point debated by the Committee early on, in response to proposals included in the first document drafted by the Secretariat, was who the mediator or conciliators would be. The Secretariat document had suggested the option of the Committee itself, or states that are members of the Committee, acting as mediator/conciliators, or staff from the Secretariat, or an outside person or persons selected by the Committee. This approached was ultimately rejected by the Committee in debate. It was also noted by states that it was unnecessary to "reinvent the wheel" – that there were many existing models, including within the UN system[12], as to how mediation and conciliation of disputes between states may be undertaken, and the Committee determined that such models should be examined.

Consensus was reached that:

- mediators and conciliators will be, preferably, independent experts on the return and restitution of cultural property, and that knowledge of the nature of the dispute or the cultural property in question would be advantageous;

[12] Such examples include the United Nations Model Rules for the Conciliation of Disputes between States, adopted by the UN General Assembly in 1995, available at: http://www.un.org/documents/ga/res/50/a50r050.htm (28.02.2012).

- in mediation, there will be one or more individuals chosen by the Parties to be mediator(s); and
- in conciliation, the number of conciliators will be mutually agreed on by the Parties, that each will appoint one or two conciliators, and will jointly choose an additional conciliator who is of a different nationality than either of the Parties to be President of the conciliation commission.

So the Committee's intention is that it not *be* the mediator, that it not *choose* the mediator, and that the mediator *not be a staff member of UNESCO.* In effect, then, the Committee has severely limited its own direct involvement in the process, in comparison with that originally proposed by the UNESCO Secretariat. From a practical standpoint, this seems appropriate: the Committee is made up of 22 states and its membership changes every two years. Unlike other UNESCO intergovernmental committees, the ICPRCP and its Bureau are virtually inactive as a body between Committee sessions. And it must meet only once every two years – while a decision was recently take to convene annual meetings, those additional meetings take place only if states are willing and able to contribute additional funds to cover the meeting costs. So to have the Committee facilitate the process rather than to participate intimately in it, was perhaps a wise approach.

Based on models existing, for example, in international conventions that include provisions for mediation of disputes, the Committee also decided that a list of potential mediators and conciliators will be developed and maintained by the UNESCO Secretariat. States will have the option of choosing their experts from the list but would also be free to choose experts not on the list. Each UNESCO Member State has been invited to submit the names of two of its nationals to the list.

C. What is the role of UNESCO/the Secretariat?

The process for appointing mediators and conciliators led to a debate about the role of UNESCO and the Secretariat in the process. It was agreed that there will be a deadline of 60 days for appointment of the mediators or conciliators, and this led to much debate about what would happen if that deadline passes without agreement. Some states felt that this would be an appropriate point for intervention by the Committee and that its Chair should, after consultation with the Parties, appoint the mediators or conciliator. Other states preferred that the Director General of UNESCO play such a role, and it was that view that prevailed in debate. In the event that the Parties do not appoint a mediator or conciliator, the Director General will, albeit after consulting them, make the appointment.

D. What are the rules for confidentiality/disclosure?

A final issue worth noting is the relationship between the procedure and its progress, and the Committee, in terms of confidentiality and disclosure. While it was reasonable to assume that all aspects of the procedure, interviews, documentation etc would remain confidential and not disclosed without consent of the Parties, this aspect of the Rules actually generated considerable debate and much time was spent on finalizing the wording of these provisions. Certain states favoured a level of transparency that raised concern with others. Those states were clearly sensitive to the possibility that disclosure of progress and other reporting could be used to increase external pressures for a settlement, or that subsequent communication could lay blame or misrepresent the proceedings or their outcome.

VI. The main characteristics of the process

In summary, mediation and conciliation under the aegis of the ICPRCP:

- is voluntary and must be agreed to by both Parties and is binding only if the Parties chose it to be so at the outset;
- may be initiated at the request of the Parties, or in response to a proposal by the Committee;
- requires each Party to pay its share of expenses;
- requires requesting Parties to be a Member States or Associate Member (whether acting on their own behalf or others with their state) and a respondent Party to be a Member State, Associate Member, or a public or private body within the state, providing that there is no objection by the state;
- involves mediators and conciliators who are preferably independent experts in the mediation/conciliation of such disputes, hopefully with some knowledge of the cultural property in question, and are chosen by the Parties;
- allows mediators/conciliators to determine their own procedures;
- tasks UNESCO and its Secretariat to maintain a list of possible mediators/conciliators submitted by Member States, and provides for the Director General to intervene to appoint a conciliator/mediator if the Parties cannot agreed within the specified period;
- allows Parties to set a time limit but does not compel them to do so;
- when unsuccessful, allows the dispute to remain before the Committee;
- cannot prevent or delay any normal legal proceedings;
- specifies that the process, consultations and documents are confidential and may not be disclosed without consent of the Parties; they jointly inform the

Committee on progress and of the outcome and all communications concerning a settlement are to be done in a coordinated manner.

VII. Current Status

The Rules of Procedure are now in place. There is only one dispute before the Committee – that between Greece and the United Kingdom over the Parthenon Sculptures held by the British Museum. There has been no discussion at the Committee thus far of formally proposing mediation or conciliation for that dispute. So far five states have submitted names for the list.

VIII. Conclusion

It remains to be seen whether the option of mediation or conciliation encourages more states to bring their disputes to the Committee, particularly given the launch of ICOM's process. The two are clearly different, with ICOM offering a service for a set schedule of fees, and UNESCO offering to facilitate a process as an extension of its existing involvement in a dispute. Ideally they should prove to be complimentary. One might assume that disputes involving non-state players may prefer a non-governmental organization like ICOM to an intergovernmental organization like UNESCO to engage in such a process. As stated previously, one aspect of the UNESCO option that will continue to attract states wishing to create diplomatic pressure and a public profile for the dispute and the need to resolve it is that the involvement of the ICPRCP is relatively public. The comparatively more private nature of the ICOM route may, in contrast, be more attractive to non-state entities.

There are also a range of disputes that could seek the Committee's help, but have apparently not done so to date. For example, certain international disputes over human remains in museum collections, or over cultural property displaced in connection with the Second World War, are disputes involving states but they have thus far not come to the Committee. It will be interesting to see whether the option of mediation and conciliation makes the ICPRCP a more attractive option in such cases.

But the introduction of these two mechanisms by UNESCO and ICOM obviously goes a significant way toward enlarging and diversifying the international "toolkit" for resolving a very wide range of types of disputes.

Annexes

Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation

(Adopted by 20 C/Resolution 4/7.6/5 of the 20th session of the General Conference of UNESCO, Paris, 24 October – 28 November 1978)

Article 1

An Intergovernmental Committee of an advisory nature whose services will be available to Member States and Associate Members of UNESCO involved, hereafter called the Committee, whose functions are defined in Article 4 below, is hereby established within the United Nations Educational, Scientific and Cultural Organization, hereafter called UNESCO.

Article 2

1. The Committee shall be composed of 22 Member States of UNESCO[1] elected by the General Conference at its ordinary sessions, taking into account the need to ensure equitable geographical distribution and appropriate rotation, as well as the representative character of those States in respect of the contribution they are able to make to the restitution or return of cultural property to its countries of origin.

2. The term of office of members of the Committee shall extend from the end of the ordinary session of the General Conference during which they are elected until the end of its second subsequent ordinary session.

3. Notwithstanding the provisions of paragraph 2 above, the term of office of half of the members designated at the time of the first election shall cease at the end

[1] The General Conference of UNESCO adopted, at its 28th session (Paris, October–November 1995), 28 C/Resolution 22 increasing the membership of the Intergovernmental Committee from 20 to 22 Member States.

of the first ordinary session of the General Conference following that at which they were elected. The names of these members shall be chosen by lot by the President of the General Conference after the first election.

4. Members of the Committee shall be immediately eligible for re-election.

5. States members of the Committee shall choose their representatives with due attention to the terms of reference of the Committee as defined by these statutes.

Article 3

1. For the purposes of these statutes, "cultural property" shall be taken to denote historical and ethnographic objects and documents including manuscripts, works of the plastic and decorative arts, palaeontological and archaeological objects and zoological, botanical and mineralogical specimens.

2. A request for the restitution or return by a Member State or Associate Member of UNESCO may be made concerning any cultural property which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation.

3. Cultural property restituted or returned shall be accompanied by the relevant scientific documentation.

Article 4

The Committee shall be responsible for:

1. seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin when they are undertaken according to the conditions defined in Article 9. In this connection, the Committee may also submit proposals with a view to mediation or conciliation to the Member States concerned, it being understood that mediation implies the intervention of an outside party to bring the concerned parties to a dispute together and assist them in reaching a solution, while under conciliation, the concerned parties agree to submit their dispute to a constituted organ for investigation and efforts to effect a settlement, provided that any additional, necessary funding shall come from extra budgetary resources. For the exercise of the mediation and conciliation functions, the Committee may establish appropriate

rules of procedure. The outcome of the mediation and conciliation process is not binding on the Member States concerned, so that if it does not lead to the settlement of a problem, it shall remain before the Committee, like any other unresolved question which has been submitted to it[2];

2. promoting multilateral and bilateral cooperation with a view to the restitution and return of cultural property to its countries of origin;

3. encouraging the necessary research and studies for the establishment of coherent programmes for the constitution of representative collections in countries whose cultural heritage has been dispersed;

4. fostering a public information campaign on the real nature, scale and scope of the problem of the restitution or return of cultural property to its countries of origin;

5. guiding the planning and implementation of UNESCO's programme of activities with regard to the restitution or return of cultural property to its countries of origin;

6. encouraging the establishment or reinforcement of museums or other institutions for the conservation of cultural property and the training of the necessary scientific and technical personnel;

7. promoting exchanges of cultural property in accordance with the Recommendation on the International Exchange of Cultural Property;

8. reporting on its activities to the General Conference of UNESCO at each of its ordinary sessions.

Article 5

1. The Committee shall meet in regular plenary session at least once and not more than twice every two years. Extraordinary sessions may be convened as specified in the Committee's Rules of Procedure.

2. Each member of the Committee shall have one vote, but may send to the Committee's sessions as many experts or advisers as it deems necessary.

3. The Committee shall adopt its own Rules of Procedure.

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[2] The General Conference of UNESCO adopted, at its 33rd session (Paris, October 2005), 33 C/Resolution 44 adding mediation and conciliation to the mandate of the Intergovernmental Committee

Article 6

1. The Committee may set up ad hoc subcommittees for the study of specific problems related to its activities, as described in paragraph 1 of Article 4. Membership of such subcommittees may also be open to Member States of UNESCO which are not represented in the Committee.

2. The Committee defines the mandate of any such ad hoc subcommittee.

Article 7

1. At the beginning of its first session, the committee shall elect a Chairman, four Vice-Chairmen and a Rapporteur; these shall form the Committee's Bureau.

2. The Bureau shall discharge such duties as the Committee may lay upon it.

3. Meetings of the Bureau may be convened in between sessions of the Committee at the request of the Committee itself, of the Chairman of the Committee or of the Director-General of UNESCO.

4. The Committee shall elect a new Bureau whenever its own membership is changed by the General Conference in accordance with Article 2 above.

5. The members of the Bureau who are representatives of Member States of UNESCO shall remain in office until a new Bureau has been elected[3].

Article 8

1. Any Member State which is not a member of the Committee or any Associate Member of UNESCO that is concerned by an offer or a request for the restitution or return of cultural property shall be invited to participate, without the right to vote, in the meetings of the Committee or of its ad hoc subcommittees dealing with that offer or request. The States which are members of the Committee that are concerned by an offer or request for the restitution or return of cultural property shall not have the right to vote when such offer or request is being examined by the Committee or its ad hoc subcommittees.

2. Member States and Associate Members of UNESCO which are not members of the Committee may attend meetings of the Committee and of its ad hoc subcommittees as observers.

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[3] The General Conference of UNESCO adopted, at its 23rd session (November 1985), 23 C/Resolution 32.1 concerning members of the Bureau.

3. Representatives of the United Nations and other organizations of the United Nations system may take part, without the right to vote, in all meetings of the Committee and of its ad hoc subcommittees.

4. The Committee shall determine the conditions under which international governmental and non-governmental organizations, other than those covered by paragraph 3 above, shall be invited to attend its meetings or those of its ad hoc subcommittees as observers.

Article 9

1. Offers and requests formulated in accordance with these statutes, concerning the restitution or return of cultural property, shall be communicated by Member States or Associate Members of UNESCO to the Director-General, who shall transmit them to the Committee, accompanied, in so far as is possible, by appropriate supporting documents.

2. The Committee shall examine such offers and such requests and the relevant documentation in accordance with Article 4, paragraph 1, of these statutes.

Article 10

1. The Secretariat of the Committee shall be provided by the Director-General of UNESCO, who shall place at the Committee's disposal the staff and other means required for its operation.

2. The Secretariat shall provide the necessary services for the sessions of the Committee and meetings of its Bureau and ad hoc subcommittees.

3. The Secretariat shall fix the date of the Committee's sessions in accordance with the Bureau's instructions, and shall take all steps required to convene such sessions.

4. The Committee and the Director-General of UNESCO shall make the greatest possible use of the services of any competent international non-governmental organization in order to prepare the Committee's documentation and to ensure that its recommendations are implemented.

Article 11

Each Member State and Associate Member of UNESCO shall bear the expense of participation of its representatives in sessions of the Committee and of subsidiary organs, its Bureau and its ad hocsubcommittees.

Rules of Procedure for Mediation and Conciliation in Accordance With Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation

Article 1 Scope of the Rules of Procedure for Mediation and Conciliation

1. In accordance with Article 4.1 of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (hereinafter the "Statutes"), any request for the return or restitution of cultural property, as defined under Article 3 of the Statutes, which are submitted to the Intergovernmental Committee (hereinafter "the Committee"), may also be dealt with under a mediation or a conciliation procedure if the parties to the dispute (hereinafter "the parties") so agree.

2. The rules contained herein apply both to the mediation and conciliation procedures before the Committee unless the Parties agree to amend them before the procedure.

Article 2 Nature of the Procedures and Roles of the Mediator and of the Conciliator

1. For purposes of these Rules, "Mediation" means a process whereby, with the prior consent of the parties concerned, an outside party intervenes to bring them together and to assist them in reaching an amicable solution of their dispute with respect to the restitution or return of cultural property.

2. A mediation procedure shall require the involvement of one or more individuals who shall act as mediators, chosen by the Parties preferably among independent experts on the return and restitution of cultural property.

3. For purposes of these Rules, "Conciliation" means a process whereby, subject to their prior consent, the parties concerned submit their dispute with respect to restitution or return of cultural property to a constituted organ for investigation and for efforts to effect an amicable settlement of their dispute.

4. A conciliation commission shall be composed of conciliators who are preferably independent experts on restitution and return of cultural properties whose number shall be mutually agreed upon by the parties concerned.

5. Each party to the dispute shall appoint one or two conciliators. An additional conciliator, which shall be of a nationality different from that of the parties involved, shall be chosen jointly by the parties and will be the President of the conciliation commission. If the parties cannot agree on that person within 60 days the procedure provided under Article 7.2 below will be followed.

6. A list of potential mediators and conciliators shall be drawn up and maintained by the Secretariat for the information of, and possible use by, the Parties in appointing mediators or conciliators. To that end, each Member State of UNESCO shall be invited to nominate two individuals who could fulfil the role of mediator or conciliator in international cultural property disputes. The list shall be reviewed at two-year intervals when Member States may confirm existing nominations or submit new nominations. The Parties to a mediation or conciliation procedure shall remain free to appoint mediators or conciliators not included in this list.

Article 3 Basic Principles

1. Mediation and conciliation procedures require the consent in writing of the Parties before they may be initiated.

2. Mediation and conciliation procedures shall be conducted in conditions of confidentiality and in accordance with the general principles of fairness, impartiality and good faith.

3. The Parties shall participate in a responsible manner and cooperate in order to proceed as expeditiously as possible.

4. The Parties, the Mediator(s) or the Conciliator(s) shall participate with a view to facilitate an amicable and just solution or settlement of the dispute having due regard to international law and recognized principles.

Article 4 Parties

1. Only UNESCO Member States and Associate Members of UNESCO may have recourse to a mediation or conciliation procedure pursuant to these rules of procedure

2. States may represent the interests of public or private institutions located in their territory or the interests of their nationals.

3. A request to initiate a mediation or conciliation procedure may be submitted by a member state or associate member of UNESCO with regard to a public or private institution, if the latter are in possession of the cultural property concerned, and if the state mentioned in paragraph 2 has been immediately informed of the request by the initiating member state or associated member of UNESCO and does not object.

4. A representative of each Party shall be present at mediation meetings. Subject to Article 10, paragraph 4, each Party's representative shall have the requisite authority to prepare, with the assistance of the Mediator(s), the terms and conditions of a settlement.

Article 5 Rules of conduct for Mediator(s) and Conciliators

The Mediator(s) and Conciliators shall:

(a) act according to the principles listed in Article 3 paragraph 2.

(b) not act as a representative or counsel of either Party in any proceedings concerning the dispute at issue.

Article 6 Commencement of a Mediation or Conciliation Procedure

1. A mediation or conciliation procedure may be commenced only upon mutual consent of the parties concerned to resort to such procedure. Upon such mutual consent, either party shall submit in writing a request to initiate a mediation or conciliation procedure to the Director-General who shall acknowledge receipt and inform the Chairman of the Committee.

2. The Committee, pursuant to article 4.1 of its Statutes, may also recommend to parties which have a case pending before it to make use of mediation or conciliation procedure.

3. The request shall contain the names and contact information of the parties, including the State mentioned in art. 4 paragraph 2, if any, an indication of the subject of the dispute and the relevant supporting documents.

4. If a mediation or conciliation procedure is initiated, it shall not prejudice the application and the effects of any other procedure or other means of dispute settlement that the parties have undertaken or wish to undertake concurrently or at a later stage.

5. No procedure of mediation or conciliation may prevent or delay any legal proceedings in pursuance of applicable national legislation.

Article 7 Appointment and Replacement of the Mediator(s) or Conciliators

1. The Parties shall appoint (a) Mediator(s) or Conciliators within 60 days of the written request to initiate a procedure of mediation or conciliation and shall inform the Chairman of the Committee accordingly.

2. Failing such appointment, the Director-General of UNESCO shall, after consultation with the Parties concerned, appoint (a) Mediator(s) or Conciliator(s). Such an appointment shall be made as soon as possible.

3. Mediator(s) or Conciliators shall be selected taking into consideration their expertise in the field of restitution and/or their knowledge with regard to the nature of the dispute or the specificity of the cultural property at stake.

4. Any Party, after consultation with the other party, may, in case of breach of any of the obligations set forth under Article 3 (2), request at any stage of the procedure the replacement of the Mediator(s) or Conciliators. The grounds for the requested replacement must be set out clearly. In such a case, the new Mediator(s) or Conciliators must be appointed according to the same procedure originally used.

5. Any vacancies which may occur during a procedure as a result of death, resignation or any other cause shall be filled as soon as possible according to the procedure originally used for appointing these individuals.

Article 8 Conduct of the mediation or conciliation

1. The Parties shall submit to the Mediator(s) or Conciliators the issue which is the subject of the dispute, their position thereon and all relevant documentation. All documentation will be transmitted to the other Party.

2. In consultation with the Parties, the Mediator(s) or Conciliators shall then set the times, places and dates of their meetings and specify in which language(s) documentation and evidence shall be submitted.

3. The Mediator(s) or Conciliators may conduct their own inquiries and research to determine the facts of the dispute.

4. Following the request of a Party, the Mediator(s) or Conciliators may allow witnesses, experts or third parties to provide documentation or evidence.

5. Each Party shall have the right to submit new arguments and documents in writing before the procedure is concluded.

6. Consultations are confidential, no recording shall be made, and information or documents obtained during the procedure shall not be disclosed, unless the Parties agree otherwise.

7. While complying fully with the principles listed in Article 3, paragraph 2, the Mediator(s) or Conciliators may meet and communicate separately with each Party. The information given in this way shall not be disclosed without the express authorization of the Party providing the information.

8. Within a conciliation procedure, unless the parties to the dispute otherwise agree, the Conciliators may decide whether to adopt specific rules of procedure, including with respect to the submission of written pleadings by the Parties.

9. The Mediator(s) or Conciliators shall endeavour to bring the Parties to reach an amicable settlement of the dispute within one year from the date of his/her appointment unless otherwise agreed by the Parties. At the end of the procedure, the Conciliators submit to the Parties a report which includes their recommendations.

10. The Parties may set a time limit for the conclusion of the procedure, beyond which, if no settlement has been reached, the procedure shall be deemed to have been concluded. The Parties may extend the time limit.

Article 9 Information

The Parties shall jointly inform the Committee on the state of progress of the procedure at its following session and its subsequent sessions.

Article 10 Conclusion of the Procedure(s)

1. A mediation or conciliation procedure shall be deemed to have been concluded in one of the following cases:

(a) when all Parties deem that an amicable settlement to that dispute has been reached;
(b) when all of the Parties concerned consent in writing to deem the procedure concluded;
(c) when all Parties to the dispute have set a time limit, and the time limit has expired without a settlement having been reached;
(d) when one of the Parties has notified in writing its withdrawal from the procedure.

2. The Parties shall promptly inform the Chairman of the Committee, who shall inform the Director-General of UNESCO and the Members of the Committee at the next

session, of the result of the mediation or conciliation procedure. Any communication of a settlement reached should be done in a coordinated manner.

3. When a procedure has been concluded without a settlement, the issue which is the subject of the dispute shall remain before the Committee as any other unsolved question which has been submitted to it.

4. The outcome of the procedure shall be binding on the Parties only when they reach a binding agreement on it.

Article 11 Costs

1. The Parties shall bear in equal share the costs of the mediation or conciliation procedure unless another arrangement has been agreed. In the event of a withdrawal by a Party, this will not have an affect on the obligation of the Party in question to pay the expenses incurred up to the date of notification of withdrawal.

2. Expenses incurred for witnesses, experts, or legal assistance when requested by only one Party, shall be borne by that Party, unless another arrangement has been agreed.

MANLIO FRIGO*

8. The Role of the "International Network" and Its Importance in Recent Italian Practice

Abstract

The recent Italian practice concerning the fight against the illicit traffic in cultural property provides some interesting examples of – bilateral and multilateral – cooperation and settlements of disputes over the ownership of cultural objects removed from their countries of origin. The present study examines the agreements concluded by Italy and two former Italian colonies – Ethiopia and Libya – and the accords entered into by the Italian Ministry of Cultural Heritage with a number of United States museums between 2006 and 2008. The aim of this analysis is to highlight the importance of multilateral cooperation in the resolution of disputes over the restitution and return of cultural objects.

Synthèse

La pratique italienne récente concernant la lutte contre le trafic illicite des biens culturels fournit quelques exemples remarquables de coopération bilatérale et multilatérale, ainsi que de règlement de différends relatifs à la propriété de biens déplacés de leur pays d'origine. L'analyse se concentre notamment sur les traités signés entre l'Italie et deux anciennes colonies – Ethiopie et Lybie – ainsi que les accords signés entre le Ministère pour les biens et les activités culturelles italien et certains musées des Etats-Unis entre 2006 et 2008. Cette étude vise à mettre en lumière l'importance de la coopération multilatérale dans la résolution des différends relatifs à la restitution et au retour des biens culturels.

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I. Introduction

In the last few years, Italian practice has been enriched by some interesting instances of restitution and return of cultural property to their country of origin. A brief overview of this practice permits to highlight the main aspects of the international cooperation in the field of the protection of cultural property, at both the bilateral and multilateral level, and to identify some of the available legal means that can be employed to settle disputes concerning the ownership of movable objects removed from their countries of origin, either during armed conflict or in time of peace.

The present analysis refers, first of all, to the agreements concluded by Italy and two former Italian colonies – Ethiopia and Libya – and concerns the return of the Obelisk of Axum and the Venus of Cyrene. In these two cases, Italy was asked to comply with the international agreements concluded after the end of World War II and to make reparation for the spoliations occurred during the occupation of the territories annexed by force to Italy at the time of colonial wars. One can see in such examples a positive conclusion – even if a bit controversial, particularly at the domestic level – of the colonial policy of European countries by means of international agreements, i.e. the typical and traditional instrument aimed at establishing rules of international law, as well as at ensuring the settlement of disputes between subjects of international law.

On the other hand, the recent examples of restitution of cultural objects to Italy represent the outcome of negotiations carried out by the Italian Ministry for Cultural Goods and Activities (MIBAC) and some museums of the United Stated, concerning items of archaeological interest of doubtful provenance. In such cases, we shall take into consideration agreements of a contractual nature, the content of which in some cases has not even been published.

The aim of this brief analysis is to appraise the means of dispute settlement available to States, foreign institutions or moral entities exemplified by the recent Italian practice, that is, a State particularly concerned with the problem of the removal and restitution of cultural objects.

II. The Restitution and Re-erection of the Axum Obelisk

In 2008, Italy returned the Obelisk of Axum to Ethiopia. This obelisk was removed in 1937, after the Italian annexation of Ethiopia. It is to be observed that the obelisk, at the time, lay broken in fragments. Despite their considerable weight and size, the fragments were transported by road from Axum to Massawa, then by ship from Massawa to Naples, and finally by road from Naples to Rome. Here the obelisk was re-erected in Piazza di Porta Capena, in front of the building that now is the seat of the Food and Agriculture Organization of the United Nations (FAO) and that, at the time, hosted the Ministry of the Colonies[1].

After the end of World War II, various international agreements obliged the Italian State to return the obelisk to Ethiopia: the Treaty of Peace between Italy and the Allied Powers of 1947; the bilateral agreement between Italy and Ethiopia of 1956; a Joint Declaration of Italy and Ethiopia of 1997; and the Protocol concerning the restitution of the Obelisk of 2004. According to the latter treaty, Italy agreed to finance and organize the shipment of the obelisk to Ethiopia and its re-erection in the archaeological site of Axum[2], which was included in the World Heritage List as from 1980. Accordingly, Italy made an extraordinary financial contribution to the budget of UNESCO. This was followed by the conclusion of a contract between the UNESCO World Heritage Centre and an Italian construction company. The re-erection of the obelisk involved a number of complex

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1 See the reconstruction offered by SCOVAZZI TULLIO, *Diviser c'est détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property,* Rivista di diritto internazionale, 2011, pp. 341 et seqq., p. 360; SCOVAZZI TULLIO, *La restituzione dell'obelisco di Axum e della Venere di Cirene,* Rivista di diritto internazionale privato e processuale, 2009, pp. 555 et seqq.

2 Pursuant to the Protocol: "The Italian Government shall transport the three sections of the Axum Obelisk from Italy to Ethiopia. The Italian Government shall also ensure that the air transport of the three sections of the Axum Obelisk from Fiumicino Airport to Axum Airport is carried out under conditions of maximum safety and security" (art. I). "The Italian Government shall take charge of all the operations associated with the off-loading of the three sections of the Obelisk from the airplane at the Axum Airport" (art. II). "The Italian Government commits itself to finance the re-erection and restoration of the Obelisk in the Axum archaeological site, to be executed by UNESCO with technical support from Italian experts in collaboration with the Ethiopian side" (art. VI).

operations, such as the separation of the obelisk in three pieces in 2005 and its transportation to Ethiopia by plane[3]. It is to be noted that the above events have been greeted by legal scholars as a positive example of return of cultural objects plundered in time of armed conflict. The improvements made to the obelisk as compared to its condition in 1937 have also been interpreted as an example of reparation in response to the delay[4].

III. The Restitution of the Venus of Cyrene

A second example concerns the restitution to Libya of a statue known as "Venus of Cyrene", a Roman copy of a Hellenistic sculpture. The statue was found by Italian troops in 1913, during the Italian-Turkish war in Cyrene, a territory belonging to the Ottoman Empire. In 1915, the statue was shipped to Rome. It is to be observed that Italy and Libya agreed on the restitution of the Venus of Cyrene by way of a Joint Declaration of 4 July 1998. With this accord the Italian Government committed to return the Venus of Cyrene as well as all manuscripts, documents and archaeological objects transferred to Italy during the Italian occupation of Libya in accordance with the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970[5].

Interestingly, the restitution of the Venus of Cyrene involved difficulties that did not characterize the repatriation of the Axum Obelisk. Pursuant to Italian law, the statue belonged to the "public domain" and fell within the scope of application of article 826 of the Civil Code. Accordingly, no restitution could have taken place without a previous modification of its legal status. The MIBAC, by way of a decree of 1 August 2002, authorized the removal of the statue from the State patrimony and its restitution to Libya.

The Ministerial decree was challenged by *Italia Nostra,* an association very active in the field of the protection of the environment and of the Italian cultural heritage. According to the association, the legal status of the Venus could be altered only with the enactment of a specific law – not with a simple ministerial decree. Furthermore, *Italia Nostra* challenged the goal of the decree to reintegrate the statue in its original context. According to the association, the decree was contradictory in that it failed to recognize that the Venus

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3 See BANDARIN FRANCESCO, *The Reinstallation of the Aksum Obelisk,* Patrimoine mondial, No. 51, 2008, pp. 13 et seqq.

4 See SCOVAZZI, *Diviser c'est détruire* (*cit.* n. 1), p. 13.

5 Available at: http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (28.02.2012).

belonged to the Italian cultural and historical context, rather than to Libya, a country notoriously of Islamic culture and tradition.

The Administrative Tribunal of Rome (*Tribunale Amministrativo Regionale, TAR*) in 2007 and, in the appellate proceeding, the State Council (*Consiglio di Stato*) in 2008 dismissed the claim filed by Italia Nostra[6]. According to the *Consiglio di Stato,* the legal status of an object belonging to the public domain could be changed to abide by pertinent international obligations; the fact that the obligation of restitution arose from the international agreements concluded between Italy and Libya and that no specific order for the enforcement of the agreement at the domestic level was provided for, was totally irrelevant. The duty of restitution, in the opinion of the *Consiglio di Stato,* was grounded on the international customary law applicable in Italy pursuant to article 10 of the Italian Constitution, which considers customary international law rules as having a self-executing character.

In this respect, it is interesting to observe that one of the legal grounds of the decision was the identification of a new customary international law resulting from the prohibition of the threat or use of force (article 2.4 of the United Nations Charter)[7] and from the principle of self-determination of peoples (articles 1.2 and 55 of the United Nations Charter). The *Consiglio di Stato* explained that the principle of self-determination has come to include the identity as well as the patrimony linked either to the territory of a State or to peoples subject to foreign occupation and hence entails an obligation of restitution. The decree under attack was, therefore, an act *"implementing in details a pre-existing obligation of restitution"*[8].

The decision of the *Consiglio di Stato* is important in that the rules of international customary law were defined as the legal ground of the ministerial decree of 2002 and of the consequent restitution. On the other hand, one could cast some doubts on certain parts of the decision of the *Consiglio di Stato,* particularly as to the link between the principles of customary international law evocated by the judge (prohibition of the use or threat of force and self-determination of peoples) and the obligation of restitution of cultural property; or the absence of a position on some intertemporal aspects of the applicable rules of law[9]; or, again, the possible conflict between the above international law princi-

6 See *TAR Lazio,* 20 April 2007, No. 3518, *Associazione nazionale Italia Nostra-ONLUS v Ministero per i beni e le attività culturali et Republique Libyenne (Ambassade de la République Libyenne),* and *Consiglio di Stato*, 23 June 2008, No. 3154, Rivista di diritto internazionale privato e processuale, 2009, respectively p. 629, p. 656.

7 Available at: http://www.un.org/en/documents/charter/ (28.02.2012).

8 See *Consiglio di Stato* (*cit.* n. 6), p. 660.

9 One can consider that the *Consiglio di Stato* applied, without providing any justifications, some international customary rules supposedly come into existence very recently to facts and circumstanc-

ples, which have acquired a constitutional status by virtue of article 10 of the Italian Constitution[10].

Whatever the opinion on the above may be, this case can be seen as an interesting and significant contribution of the Italian judiciary to the development of the international legal regime concerning the protection of cultural property, particularly from the point of view of the restitution and return of cultural objects to their countries of origin.

IV. The Agreements Concluded by Italy with American Museums

In the last few years, a number of agreements have been concluded between the Italian Government and some prominent American museums concerning the restitution of cultural objects to Italy. These agreements are different from those concluded by Italy with Ethiopia and Libya. In effect, the agreements with the Metropolitan Museum of Art of 2006, with the J. Paul Getty Museum and the Boston Museum of Fine Arts of 2007, and with the Cleveland Museum of Art of 2008, are not international treaties but rather agreements of a contractual nature.

In this respect, we can hereby try to briefly examine such agreements while taking into consideration some aspects concerning both the form and the substance. Under the first point of view, one can take into consideration not only their legal status, but also the problem of the applicable law, as well as the method of settling disputes provided for by such agreements. As far as the substance of the agreements is concerned, it is worth focusing on the provisions determining the duration and the subject matter, which does not exclusively concern the restitution of cultural objects, but also aims at establishing more complex and articulated forms of cultural cooperation.

The choice of the contractual instrument where one of the parties is a State is, naturally, quite common in the practice of international relations. Such a practice is well known by

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es having taken place well before. According to the *Consiglio di Stato*, the protection of the cultural-territorial identity entails for the State not respecting such rules a duty of restitution as a consequence of the colonial occupation.

10 Pursuant to article 10 of the Italian Constitution: "The Italian juridical order shall comply with the rules of international law generally acknowledged"; such a rule is commonly interpreted as providing the automatic application of the rules of customary international law without the need for any further implementing activity. See CONFORTI BENEDETTO, *Diritto internazionale,* 8e ed., Napoli 2010, pp. 319 et seqq.

the legal scholars that have studied the relations between States and private and public entities, particularly, but not exclusively, in the field of international law and economics. In this regard, the figure of the "*State contract*" has also been elaborated, with the possibility – according to some scholars – of considering such contracts as governed by public international law[11].

First of all, it is to be observed that the accords concluded with American museums are different from other and more complex international agreements, even concerning cultural cooperation, such as the agreement between the Louvre and Abu Dhabi[12]. In fact, the above mentioned agreements share two main characteristics: a clearly and purely contractual nature; and a structure of understanding providing for long term cultural cooperation. As a matter of fact, in almost every case they are defined as a *"Long Term Cultural Cooperation Agreement"*.

In the second place, international law is never evocated as applicable law; the contractual nature of the agreements puts, of course, the problem of determining not only the contents of the mutual obligations, but also the law that is supposed to govern such obligations. It is noteworthy that in most cases, no domestic law is indicated as the applicable

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11 The literature concerning State contracts is abundant and rich of different nuances; for the assertion that State contracts may be governed by public international law, see the theories of MANN FRANCIS A., *The Law governing State Contracts,* British Yearbook of International Law, Vol. 21, 1944, pp. 11 et seqq; JENNINGS ROBERT Y., *State Contracts in International Law,* British Yearbook of International Law, Vol. 37, 1961, pp. 156 et seqq; SACERDOTI GIORGIO, *I contratti tra Stati e stranieri nel diritto internazionale,* Milano 1972, pp. 215 et seqq, WEIL PROSPER, *Problèmes relatifs aux contrats passés entre un Etat et un particulier,* Recueil des Cours, Vol. 128, 1969, pp. 186 et seqq, who evocates the notion of "contrat de droit international" as representing a new international juridical act if compared to treaties, to unilateral acts and to acts of jurisdictional nature; LEBEN CHARLES, *La théorie du contrat d'Etat et l'évolution du croit international des investissements,* Recueil des cours, Vol. 302, 2003, pp. 197 et seqq; for the assertion of the theory of State contrats as "contrats sans loi" (i.e. documents of contractual nature that can be detached and not governed by a precise legal order) and for the distinction between State as a Sovereign and State as Organization, see MAYER PIERRE, *La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat,* Journal du droit international, 1986, p. 9; MAYER PIERRE, *Le mythe de l'ordre juridique de base (ou Grundlegung),* in: FOUCHARD PHILIPPE/KHAN PHILIPPE/LYON-CAEN ANTOINE (éds.), *Le droit des relations économiques internationales: Etudes offertes à Berthold Goldman,* Paris 1982, pp. 199 et seqq; see also the recent contributions in the French legal doctrine by LEMAIRE SOPHIE, *Les contrats internationaux de l'administration,* Paris 2005, pp. 54 et seqq, and by LAAZOUZI MALIK, *Les contrats administratifs à caractère international,* Paris 2008, pp. 271 et seqq.

12 See in this regard, CORNU MARIE/FRIGO MANLIO, *L'accord portant création du Louvre Abou Dhabi, musée universel: une double invention culturelle et juridique,* Annuaire français de droit international, Vol. 55, 2009, Paris 2010, pp. 111 et seqq.

law and only sometimes Italian law is chosen expressly by the parties. In other cases, when a dispute arises, it will be up to the arbitral tribunal to determine the applicable law, pursuant to the rules of private international law that the arbitrators shall have to take into consideration.

In the third place, as far as the issue of dispute settlement is concerned, the parties have always selected arbitration and the Rules of Arbitration of the International Chamber of Commerce in Paris[13].

As far as the subject matter is concerned, it is to be submitted that these agreements do not exclusively provide for the restitution of the objects indicated by each agreement, but also provide for a general framework of cultural cooperation. This characteristic explains their long duration, between 25 and 40 years.

The restitution of cultural objects actually represent but one of the duties appearing in the above agreements, even though it is the most relevant one, possibly for both parties. It is to be noted that restitution only concerns objects acquired after 1970, whose provenance and ownership have clearly been determined. The year 1970 was agreed upon as a symbolic date marking the formation of an international consciousness about the necessity to abide by an ethical (if not yet juridical) principle preventing the import, export and transfer of wrongfully removed cultural materials[14].

The agreements under examination contain other provisions, which are not less important. Particularly, these regulate: the exchange, through international loans, of items equivalent to those which are to be returned, for a four years period and free of charge; the exchange of professionals and students; programs of assistance, research, archaeological excavations, conservation and restoration of cultural objects[15].

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13 Available at: http://www.iccwbo.org/ICCDRSRules/ (28.02.2012).

14 The ideal reference to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is definitely evident, even though it must be stressed that in 1979 the Convention was not yet in force; accordingly, it represents a conventional indication of a date by the parties in the above mentioned contracts, taken as an ideal time dating from which the persons in charge of a museum acting in good faith should beware of a gift or purchase in the international market of objects with no appropriate documentation issued by the country of origin.

15 See CORNU MARIE/RENOLD MARC-ANDRÉ, *Le renouveau des restitutions de biens culturel: les modes alternatifs de règlement des litiges,* Journal du Droit International, 2009, pp. 493 et seqq. See particularly the Agreement between the Italian Republic and the Metropolitan Museum of 21 February 2006, Journal du Droit International, 2009, pp. 527 et seqq.

A. The Development of International Law through State Practice

The foregoing overview of the recent Italian practice concerning restitution of cultural property plundered during the colonial period can help us in pointing out some common features.

First of all, it is worth emphasising that restitution was set forth as a legally binding obligation in international treaties. This entails that international law remains essential for the settlement of inter-State disputes. Of course, the above consideration is not surprising at all, but it leads us to take into account a second aspect, which concerns the role and the importance of the diplomatic practice in the formation of international customary law. In fact, it is frequently difficult to verify the progress and, even more, to establish the existence of a rule of international customary law, as it implies the task of certifying the double condition of a general practice (*diuturnitas*) accepted as law by States (*opinio juris et necessitatis*). One has therefore to deeply appraise State practice on a case-by-case basis, taking into consideration one of the official and typical expressions of international relations, such as existing international treaties.

One of the most interesting aspects of the restitution of the Venus of Cyrene is that the execution of the relevant international agreements was followed by a judicial dispute. As we have seen, the State Council justified both the challenged ministerial decree and the international agreement providing for the restitution of the Venus on the basis of a new international customary rule[16].

One can certainly dissent from the reasoning of the *Consiglio di Stato* as it supports a "progressive" interpretation of the developments of international law, from the point of view of the creation of new rules of customary law. Nevertheless, it is to be added that it is not a matter of interpreting international treaties as evidence of the existence of customary law, but rather to consider domestic case law as an expression of international diplomatic practice (material or objective element) adopted with the intention to comply with a binding legal rule (psychological or subjective element). In a word, the *"evidence of a general practice accepted as law"*[17]. At present, it is not possible to affirm the existence of a constant and consistent judicial practice sustaining a new customary rule.

16 See *supra,* section III.

17 See article 38 of the Statute of the International Court of Justice.

B. Appraising the Agreements Concluded between Italy and American Museums

Some slightly different remarks may be drawn from the agreements concluded between the Italian Government and American museums.

The first point concerns the instrument selected to achieve restitution and the other aims pursued. As it has been observed, such contractual agreements represent efficient out-of-court settlements under a dual point of view.

On the one hand, the agreements under consideration are substantially different from the typical instrument of international relations, i.e. the treaty. In other words, rather than negotiating an international treaty with the national State of the museums involved – the United States – the Italian Government privileged the conclusion of agreements of a contractual nature. This solution has the merit of, among others, reducing the diplomatic and political dimension of restitution claims.

On the other hand, it is to be observed that the conclusion of contractual agreements was necessary to overcome the refusal of the involved museums to return the claimed objects. As such, the accords facilitated the broadening of the negotiations so as to include features that permitted the achievement of mutually satisfactory settlements. Moreover, this approach has favoured the enlargement of the subject matter of the agreements and the exclusion of the issue of responsibility. In effect, in order to obtain the restitution of the objects forming part of the negotiations, the Italian State waived its right of suing the museums before a civil or administrative jurisdiction claiming any kind of responsibility or liability. For this reason, the above agreements do not include expressions such as "return" or "restitution", but always employ a more neutral expression, such as "transfer"[18]. Therefore, the agreements concluded between the Italian Government and American museums provide a model. As such, it not only contemplates the loan of artworks of importance or value equivalent to those "transferred", but also the cooperation in the fields of research, restoration and conservation of cultural objects, exchanges of researchers, museum directors, students, and so forth.

It is to be added that the choice of such contractual agreements in order to settle disputes concerning the return or restitution of cultural objects have a double character that contributes to make them particularly suitable and interesting for both parties. Such agree-

[18] See the Agreement between the Italian Republic and the Metropolitan Museum (*cit.* n. 15): "The Museum, rejecting any accusation that it had knowledge of the alleged illegal provenance from the Italian territory of the assets claimed by Italy, has resolved to transfer the Requested Items in the context of this Agreement".

ments give the public administrations involved the opportunity of asserting before the public opinion the success represented by the return of property of significant importance for the national cultural heritage, bearing in mind that such an outcome would not have been guaranteed by a judicial claim, the result of which is often highly uncertain. On the other hand, the concerned museum not only avoids the (potentially) negative effects of a judicial claim, but also obtains considerable results by eliminating every reasons of conflict and by opening a long period of scientific collaboration, which is also characterized by the loans of artworks of importance equivalent to the "transferred" artworks. These represent mutually satisfactory benefits at the domestic and international level.

Moreover, the assurance of the respect of the ethical rules that are supposed to assist the purchase of cultural objects by museums is included in the above agreements. The explicit condemnation of looting, plundering and of illicit archaeological excavations, carried out with no respect for any appropriate scientific methods, as well as of the deterioration of monuments and theft of artworks is, on the other hand, present in all the mentioned agreements. The respect of the ethical codes of the professionals involved, namely the ICOM Code of Ethics for Museums of 2004 and of the Code of Ethics of the American Association of Museums, is not expressly mentioned in the agreements[19]. Nevertheless, it is to be observed that rules and conducts such as those concerning the purchase and the transfer of collections[20], the origin of works and collections[21] and the conducts of the professionals[22], have in the abovementioned agreements an important and coherent application. This brings about a positive feeling that a real background facilitating the approaching between rules of law and rules of ethics is on the course of consolidation.

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19 ICOM Code of Ethics for Museums (revised in 2004), available at: http://icom.museum/who-we-are/the-vision/code-of-ethics.html (28.02.2012); Code of Ethics for Museums of the American Association of Museums (2000) available at: http://www.aam-us.org/museumresources/ethics/coe.cfm (28.02.2012).

20 See article 2.2 et 2.3 of the ICOM Code of Ethics for Museums (revised in 2004), as well as the Code of Ethics for Museums of the American Association of Museums (2000).

21 See articles 6.1, 6.2 and 6.3 of the ICOM Code of Ethics for Museums (revised in 2004), and article 4 of the Code of Ethics for Museums of the American Association of Museums (2000).

22 See articles 1.16 and 8 of the ICOM Code of Ethics for Museums (revised in 2004); concerning the importance of the codes of ethics in our domain see FRIGO MANLIO, *Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property,* International Journal of Cultural Property, 2009, pp. 49 et seqq.

V. The Development of an International Network for the Prevention and the Settlement of Cultural Property Disputes

At first sight, it may seem that the cases of restitution described above did not involve international institutions. At closer examination, however, it simply is not true. If we look at the long process concerning the signature and the complex organization of the operative aspects of the return to Ethiopia of the Obelisk of Axum, it results that UNESCO played a fundamental role. This is particularly true so far as the administrative, technical and scientific aspects of the operation are concerned[23]. This shows that international cooperation in the field of cultural heritage requires more than the elaboration of legal rules by international organizations, such as UNESCO, UNIDROIT and the Council of Europe.

If we take into consideration both the 1970 UNESCO Convention and the European Union (EU) rules concerning the export of cultural property[24] and the return of cultural objects unlawfully removed from the territory of a Member State[25], it appears that the cooperation at an administrative, technical and scientific level, both at an universal and at a regional level, is essential. In effect, the above international acts contain duties on the exchange of information and on technical assistance[26]. Nevertheless, the periodical reports of the EU Commission revealed that the administrative cooperation between national and EU authorities needed improvement because it had not taken any practical shape[27].

This is further demonstrated by the text of article 5 of the 1970 UNESCO Convention and its undertaking by the States Parties to set up *"one or more national services"* for the protection of cultural heritage, and to establish and keep up to date, *"on the basis of a*

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23 See *supra* section II.

24 See EC Regulation No. 116/2009 of 18 December 2008 on the Export of cultural property, EU Official Journal, n° L 039, 10 February 2009, article *6,* pp. 1 et seqq.

25 See EC Directive No. 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, EU Official Journal, n° L 074, 27 March 1993, articles 4 and 6, p. 74.

26 See particularly, article 17 of the 1970 UNESCO Convention (*cit.* n. 5).

27 See Second Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 21 December 2005 on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM/2005/675/final).

national inventory of protected property, a list of protected property whose export would constitute an appreciable impoverishment of the national cultural heritage".

The following is another obvious example of cooperation. In 2010, the British Library returned to the Italian city of Benevento a missal (a liturgical book) of the 12th century that had been stolen during World War II. The restitution, which was recommended by the British Spoliation Advisory Panel, represents the first case of restitution that occurred after the entry into force of the Holocaust (Return of Cultural Objects) Act of 2009 in England[28]. It is to be observed that in this case the restitution resulted from the implementation of domestic legislation. However, it must also be stressed that such a law was enacted pursuant to an international set of non-binding rules, known as the "Washington Principles", which were adopted by the 44 governments who participated in the Conference on Holocaust-Era Assets that was held in Washington, D.C., on 3 December 1998[29].

These examples demonstrate on the one hand, that the participants in the cultural heritage world are increasingly involved in an international network and, on the other hand, that UNESCO seeks to play the role of coordinator in this domain. In this sense, this organization should be praised for the creation of the cultural heritage laws database, which is an irreplaceable tool for those engaged in the fight against the illicit trafficking in cultural property. Moreover, if we look at the experience of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation since its establishment in 1978, we can see a clear example of the will of UNESCO to assume a role of leadership and coordination of the international activities in the field. Not only does the UNESCO Committee represent a specialised forum for the non-adversarial settlement of disputes concerning the return of cultural property, but it also plays a role of increasing importance as the legal and technical advisor for UNESCO Member States. In the first sense, it is to be observed that the Rules of Procedure for Mediation and Conciliation pursuant to article 4.1 of the Statutes of the Committee have just recently been approved[30]. In the second sense, it is noteworthy that the Committee has recently decided to create an international committee of experts in order to discuss the preparation of model rules defining State ownership of

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28 See BAILEY MARTIN, *Benevento Missal Returns Home,* The Art Newspaper, 24 November 2010, available at: http://www.theartnewspaper.com/articles/Benevento%2BMissal%2Breturns%2Bhome/21936 (28.02.2012).

29 See the Washington Conference Principles on Nazi-Confiscated Art, 3 December 1998, available at: www.lootedartcommission.com/Washington-principles (07.02.2012).

30 See Rules of Procedure for Mediation and Conciliation in accordance with article 4.1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, February 2011, UNESDOC CLT-2011/CONF.208/COM.17/1.

cultural property. The main goal of this committee is to secure model provisions with explanatory guidelines on State ownership of undiscovered cultural property with the aim of facilitating its restitution and "*avoid the difficulties associated with the disparate definitions present in national legislation*"[31].

The fact that a number of restitutions and return of cultural property are carried out without the direct intervention of the Committee[32] does not affect in any way the activity of the Committee itself, nor does it diminish its role as a coordinator of an international network aimed at enhancing the cooperation and mutual assistance among States, which remain the final recipients of its activities.

31 See Intergovernmental Committee for promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, October 2010, Final Report of the Sixteenth Session, 21–23 September 2010, UNESDOC CLT-2010/CONF.203/com.16/6.

32 Examples of return or restitution carried out "without action by the Committee" are regularly published in the records of the Committee; see UNESDOC Annex, February 2011, CLT-2011/CONF.208/COM.17/2.

PART II

FINDING SOLUTIONS : METHODS AND ANALYSIS

PARTIE II

TROUVER DES SOLUTIONS : MÉTHODES ET ANALYSES

ALESSANDRO CHECHI*

9. The Role of Domestic Courts in Resolving Restitution Cases: Unveiling Judicial Strategies for Culture-Sensitive Settlements

Abstract

The fight against the dispersion of cultural heritage as a result of theft, illicit exportation and clandestine excavation is further complicated by the lack of a dedicated system for resolving disputes. The purpose of this article is to analyse the role of domestic litigation in settling cultural heritage disputes and to demonstrate that national courts play a non-marginal role. This is due to the fact that for many disputes there is no possible substitute for ordinary court proceedings, and that alternative dispute resolution methods may be unavailable or unproductive. This paper, on the one hand, observes that domestic courts have adopted a number of culture-sensitive rulings by engaging in "cross-fertilization" – the practice with which judges, whether or not belonging to the same legal system, refer to and borrow decisions from each other in order to better cope with the problems posed by the disputes pending before them. On the other hand, the present article reveals that a number of culture-sensitive judgments have been adopted on the basis of the public policy reasons shaped by UNESCO through its standard-setting activity. It concludes by arguing that both judicial trends should be nurtured and strengthened to improve the quality of decision-making.

Synthèse

La lutte contre la dispersion du patrimoine culturel par suite de vols, d'exportations illicites et de fouilles clandestines est rendue encore plus difficile en raison de l'absence d'un système spécial pour résoudre les litiges en la matière. Le but de cet article est d'analyser le rôle des tribunaux nationaux pour résoudre les litiges en matière de patri-

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moine culturel et de prouver que ceux-ci ne jouent pas un rôle marginal. En effet, dans de nombreux litiges, il n'existe pas d'autres possibilités qu'une action en justice. De plus, les méthodes alternatives de résolution des litiges peuvent ne pas être disponibles ou se montrer improductives. Cet article, d'une part, démontre que les tribunaux nationaux ont adopté un certain nombre de décisions accueillantes pour la culture par le biais de la "fertilisation croisée" – pratique des juges, appartenant ou n'appartenant pas au même système légal, qui consiste à se référer et à emprunter des décisions rendues par les uns et les autres dans le but de mieux répondre aux problèmes qui leurs sont soumis. D'autre part, cet article constate qu'un certain nombre de jugements accueillant pour la culture ont été adoptés sur la base des standards développés par l'UNESCO à travers son activité d'élaboration de règles internationales. Il se termine en affirmant que les deux tendances mentionnées devraient être développées et renforcées afin d'améliorer la qualité des décisions judiciaires.

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I. Introduction

International practice in the past forty years has shown the proliferation of a great variety of disputes concerning cultural heritage. These mostly consist of inter-State and private claims concerning artworks that have been stolen, illegally exported or looted in times of

war. Indeed, the Greek request for the restitution[1] of the Parthenon Marbles from the British Museum[2], the most famous of all cultural heritage disputes, is by no means the only one. For instance, Egypt meets the strenuous opposition of the Altes Museum in Berlin regarding the restitution of the bust of Nefertiti[3]. Moreover, the protracted litigation over the Goodstikker collection evidences that Holocaust survivors or their families face daunting legal obstacles in attaining the recovery of looted artworks[4]. In addition, it should be emphasised that the requests advanced by former colonies and indigenous peoples transcends the physical act of return; indeed, the restitution of sacred or representative objects is essential to strengthen claims to self-determination, national identity and cultural diversity[5].

These examples testify that cultural heritage disputes are characterized by three major features. The first is that the special nature of cultural heritage always lies at the heart of such disputes[6]. Disputes over art objects rarely revolve exclusively around the issues of aesthetic or monetary value. On the one hand, these often concern objects bearing an "emotional" connection with the individual or collective victim of the wrongdoing. On the other hand, many disputes involve the question of the proper allocation of contested artefacts in light of their cultural, historic and scientific value. The second feature to consider is that disputes over illicitly exported or stolen artworks are usually cross-border in nature in that they involve more than one jurisdiction. This is mostly due to the fact that thieves and smugglers know in which State is more convenient to "launder" the

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1 The terms "restitution", "return" and "repatriation" will be used interchangeably. Note, however, the distinction proposed by KOWALSKI W. WOJCIECH, *Types of Claims for Recovery of Lost Cultural Property,* Museum, 2004, No. 228, pp. 85 et seqq.

2 The literature is copious, but see particularly BROWNING ROBERT, *The Case for the Return of the Parthenon Marbles,* Museum International, 1984, Vol. 36, No. 1, pp. 38 et seqq; MERRYMAN H. JOHN, *Thinking about the Elgin Marbles,* Michigan Law Review, 1984–1985, pp. 1881 et seqq.

3 See DEMPSEY JUDY, *A 3,500-Year-Old Queen Causes a Rift between Germany and Egypt,* The New York Times, 18 October 2009, available at: http://www.nytimes.com/2009/10/19/world/europe/19iht-germany.html (02.03.2012).

4 BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case 202 Paintings – Goudstikker Heir and The Netherlands,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

5 FRANCIONI FRANCESCO, *Reparation for Indigenous People: Is International Law Ready to Ensure Redress for Historical Injustices?,* in: LENZERINI FEDERICO (ed.), Reparations for Indigenous Peoples. International and Comparative Perspectives, Oxford 2007, p. 27 et seqq.

6 BYRNE-SUTTON QUENTIN, *Introduction: Alternative Paths to Explore,* in: BYRNE-SUTTON QUENTIN/GEISINGER-MARIÉTHOZ FABIENNE (eds.), Resolution Methods for Art-Related Disputes, Etudes en droit de l'art, Vol. 11, Zurich 1999, p. 3 et seqq.

tainted title of stolen objects[7]. The third feature is that the resolution of cultural heritage disputes is affected by the drawbacks of the existing normative framework. At least since the end of the Second World War, the international community has acted towards the building of a comprehensive regime for safeguarding the world cultural heritage. Yet, this legal regime has proven to be imperfect in many respects. The treaties adopted under the aegis of the United Nations Educational, Scientific, and Cultural Organization (UNESCO)[8] do not regulate the issue of the applicable law or the reach of domestic laws with respect to good faith assessment and limitation periods. In addition, national and international instruments have proved to be structurally weak due to vague and ineffective clauses. Furthermore, domestic laws and international treaties are not retroactive.

However, the major pitfall of the international law concerning cultural heritage is represented by the lack of a dedicated system for resolving disputes. None of the existing treaties sets up a special forum or adequate systems of control to ensure the consistent application of their norms. As a result, controversies are to be settled through political or diplomatic negotiation or, if these fail or are not available, through existing dispute settlement mechanisms, which include mediation, conciliation, arbitration and litigation before domestic courts or international tribunals.

This *ad hoc* fashion of dealing with cultural heritage disputes is not without consequences. The main problem is that the final settlement mostly depends on the selected dispute settlement method and on the applicable law. With respect to litigation before domestic courts, this means that, as the substantive law of one jurisdiction may be more favourable to one party than to the other, the party that benefits may well opt to have the dispute decided by the court that is bound by the favourable law[9]. This entails the risk that national and international courts, in the absence of formal links, may produce different solutions for the same legal problems and hence may bring about harmful precedents, incoherent and fragmentary development of the law and divergences of interpretation.

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7 SIEHR KURT, *The Protection of Cultural Heritage and International Commerce,* International Journal of Cultural Property, 1997, pp. 304 et seqq.

8 The most relevant treaties are: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954, 249 UNTS 215), the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (17 November 1970, 823 UNTS 231 – hereinafter 1970 UNESCO Convention), and the UNIDROIT Convention on Stolen or Illegally Exported of Cultural Objects (24 June 1995, 1995, ILM, pp. 1322 et seqq – hereinafter UNIDROIT Convention).

9 KAYE M. LAWRENCE, *Disputes Relating to the Ownership and Status of Cultural Property,* in: BYRNE-SUTTON QUENTIN/GEISINGER-MARIÉTHOZ FABIENNE (eds.) (*cit.* n. 6), p. 46.

This paper examines the role of domestic litigation[10] in resolving restitution cases and brings to light two intertwined trends that could be seen as remedies to the inherent weaknesses of this dispute settlement mode. The paper begins by discussing the strengths and limits of litigation (section II). It then proceeds to analyse the available case law in order to appraise critically the first trend: the process of cross-fertilization (section III). This can be defined as the practice with which domestic judges – whether or not belonging to the same legal system – refer to and borrow decisions from each other in order to better cope with the specific problems posed by the disputes pending before them[11]. This section questions whether cross-fertilization is compatible with the role of judges and whether it can meaningfully enhance the effectiveness of litigation in the field of cultural heritage. Next, this paper examines a second jurisprudential trend that is discernible from the courts' reasoning (section IV). It is submitted that this culture-sensitive trend is developing as a result of the consolidation of an international public policy based on the need to warrant restitution of wrongfully removed art objects. The paper concludes by arguing that these "endogenous" trends can result in shaping an effective and coherent framework for the sound resolution of restitution cases (section V).

II. Domestic Courts and Cultural Heritage Disputes

The initiation of legal proceedings before domestic courts is the main avenue for the settlement of transnational cases. When contracts are not performed, or wrongs are committed, or in any other case where rights or interests are interfered with or infringed, the aggrieved party can go to court. However, it is an indisputable fact that litigation is a matter of last resort. States, as much as individuals, go before courts when extra-judicial methods have failed or are not available. The possible worsening of relations, the uncertainty of the outcome and the eventual embarrassment of an adverse ruling are considera-

10 The focus is limited to litigation before domestic courts because of the paucity of international decisions. For instance, the International Court of Justice (ICJ) has dealt with restitution claims only twice in the cases *Temple of Preah Vihear* (*Cambodia v Thailand*, Judgment of 15 June 1962, ICJ Reports, 1962, p. 6), where the issue of restitution of cultural assets was incidental to that of the delimitation of national boundaries, and *Certain Property (Liechtenstein v Germany)* (Preliminary Objections, Judgment of 10 February 2005, ICJ Reports, 2005, p. 6), which was not discussed on the merits because the applicant's claim was rejected on the grounds of lack of jurisdiction *ratione temporis*.

11 The practice of cross-fertilization has also been labelled as "judicial dialogue", "judicial comity", "judicial cooperation", "trans-judicialism", or "trans-judicial communication".

tions that may deter potential litigants from filing a case in domestic fora. But litigation presents further flaws that can dissuade from bringing an action.

A. The Judicial Route: Its Limits...

Access to the court system is the first problem. Although several constitutions guarantee the right to bring an action for the protection of individual rights and legitimate interests, legal action is not always available. For instance, courts may dismiss restitution claims on grounds of lack of jurisdiction. In addition, lawsuits may be barred by the expiry of limitation periods[12]. The second barrier to litigation is represented by the burden of proving title. The claimant must show that he has a superior right of possession to the object in order to prevail over the alleged good faith possessor. This evidentiary burden could be a huge deterrent for many people – especially non-professional owners – with otherwise valid claims. Likewise, States that seek the recovery of antiquities excavated clandestinely from unofficial archaeological sites bear the burden of proving that, at the time of the discovery, national law vested ownership in the State. In the case of Holocaust-related disputes, the problem of proving ownership is even more acute. Since more than half a century has passed since the Second World War, evidence is now lost or extremely difficult to collect: many Nazi victims have passed away, while those who are still alive or their descendants may have no documentation. Third, the enforcement of judgments is a major drawback: after the issuance of the final decision, the winning party may have to proceed to have the judgment recognized and enforced in a foreign jurisdiction. For this reason States and non-State entities alike normally seek redress in the courts of the country where the requested object is located (*in rem* jurisdiction) because it has the most control over the disposition of the chattel. Fourth, resort to litigation entails considerable economic and human expenses. Litigants may not only suffer the loss of time, but also the burden of paying the legal costs for lengthy proceedings as a consequence of the intricate issues of fact and law involved in transnational cases[13]. Fifth, stakeholders tend

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12 All legal systems subject the starting of proceedings to certain time limits which may start from the time of the theft, from the discovery of the location of the object or of the identity of the holder. See REDMOND-COOPER RUTH, *Limitation of Actions in Art and Antiquity Claims*, Art Antiquity and Law, 2000, pp. 185 et seqq.

13 PALMER NORMAN, *Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities,* in: PALMER NORMAN (ed.), The Recovery of Stolen Art, London 1998, pp. 1 et seqq. Legal costs can easily exceed the value of the contested artwork. For example, the Metropolitan Museum of Art of New York paid $1,7 million for the *Lydian Hoard,* but it spent at least twice as much as this to litigate the case. BESSIÈRES MICHEL, *We Have To Change the Buyer's Attitude,* UNESCO Courier, 1 April 2001, p. 36 et seqq.

to avoid lawsuits because of the fear that judges may be mechanistic in their attention to procedural rules and not capable of taking into account the interests and the factors that normally characterize restitution cases. Available practice not only shows that judges awkwardly mistake outstanding art treasures to ordinary chattels[14], but also evidences that they have an insufficient understanding of market practices and of the causes and consequences of illicit trafficking. Such disparate reasoning and lack of experience, understanding and wisdom – which can be referred to as "*fragmentation of knowledge*" – is a serious concern.

In light of the foregoing survey, it should not be surprising that the majority of disputes concerning art objects arose in the past three decades have been settled out-of-court[15]. Indeed, the above shortcomings strengthen the appeal of alternative dispute resolution (ADR) methods – which include negotiation, mediation, conciliation and arbitration. This means provide the necessary flexibility for handling cultural heritage disputes and facilitating consensual, mutually satisfactory settlements[16]. For these reasons the use of ADR techniques is advocated by international instruments[17] and the nonbinding statements adopted to guide the resolution of Holocaust-related claims[18].

Nevertheless, the use of ADR methods is not widespread. This is due to the fact that such methods are characterized by some important shortcomings. For the limited purposes of this paper it is not necessary to embark in an in-depth examination of available ADR methods and of the corresponding problems. Instead, it is worth mentioning the most significant handicap, namely the voluntary essence of ADR mechanisms. Indeed, outside

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14 PATERSON K. ROBERT, *Resolving Material Culture Disputes: Human Rights, Property Rights, and Crimes against Humanity,* in: NAFZIGER A.R. JAMES/NICGORSKI M. ANN (eds.), Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce, Leiden 2009, p. 379.

15 BORODKIN J. LISA, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, Columbia Law Review, 1995, p. 403; and COGGINS CLEMENCY CHASE, *A Licit International Traffic in Ancient Art: Let There Be Light!,* International Journal of Cultural Property, 1995, pp. 61 et seqq, p. 75. According to BAZYLER, only ten Holocaust-related suits were filed in United States courts in the period 1945–1995, whereas less than a handful of lawsuits concerning art looted during the Second World War have been brought since 1945: BAZYLER J. MICHAEL, *Nuremberg in America: Litigating the Holocaust in United States Courts*, University of Richmond Law Review, 2000, p. 165.

16 PALMER NORMAN, *Museums and the Holocaust: Law Principles and Practice,* Institute of Art and Law, London 2000, p. 107.

17 See article 8 of the UNIDROIT Convention (*cit*. n. 8) and article 4.3 of the Statutes of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.

18 See, e.g., the 1998 Washington Principles on Nazi-Confiscated Art, available at: http://www.lootedart.com/MG7QA043892 (02.03.2012).

the realm of contractual disputes, litigants may be reluctant to resort to negotiation, mediation or arbitration in the absence of significant incentives[19]. Another aspect of this problem is that, given the lack of a mechanism by which parties can be compelled to honour the settlement, negotiation and mediation do not guarantee that the final accord is enforced and complied with.

B. ...and Its Strengths

Against this background, it is worth mentioning the reasons why litigation is used for the adjudication of art cases. First, because at the end of litigation there is a definitive court determination that can be enforced though the ordinary machinery. Domestic courts have enforcement and sanctioning powers that are weak or absent in supranational legal systems and ADR mechanisms. Second, the function of national courts is precious given that, as said, litigants may be unwilling to resort to ADR methods and international fora are not always available to individuals or interest groups. Third, recourse to litigation may exert pressure on the defendant. The initiation of legal proceedings may lead the requested party to abandon an overly legalistic approach and to meditate on the positive aspects of an amicable solution. This is proved by the fact that many lawsuits concerning cultural heritage have not been pursued further as the parties have reached an out-of-court settlement. In effect, it appears that the increasing use of cooperation witnessed by the last two decades is not always based on a willingness to contribute to combat the illicit trafficking in cultural objects. As a matter of fact, requested parties have agreed to cooperate either because inspired by selfish reasons – like avoiding reputational harm – or constrained by the evidence gathered by claimants through specialized squads' investigation[20], State archives or databases of lost art[21], demonstrating that they have not exercised the required due diligence at the moment of the acquisition.

A further strength that is worth mentioning is that national courts can come to play an important law-making role. This aspect does not refer to the incidents of "judicial activism" that are condemned by practitioners and scholars on the grounds that judges should not go beyond the limits of their competence. On the contrary, it relates to the fact that

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19 FELLRATH GAZZINI I., *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes*, New York 2004, pp. 124 et seqq.

20 These include INTERPOL, the Federal Bureau of Investigation (FBI) Art Theft Program (United States) and the Italian Carabinieri-Comando per la Tutela del Patrimonio Culturale.

21 See, e.g., the databases created by governmental authorities (Catalogue des Musées Nationaux Récupération set up by the French Minister of Culture), specialist crime teams (INTERPOL and the Carabinieri), museums associations (American Association of Museums Code of Ethics for Museums) and independent agencies (Art Loss Register and the Commission for Art Recovery).

the settlement of disputes does not merely require the literal application of the law; rather, judges are called to decide which way of continuing the path that the legislature has begun is the most satisfactory with respect to an actual dispute. Hence, such a law-making role is just a natural consequence of the duty of judges to interpret and apply the law to old or new issues[22].

With respect to law-making, the judicial practice demonstrates that judges can prompt legal developments, thereby supplementing – or overcoming the failure to act of – legislators. National courts can instigate normative change in several ways. On the one hand, domestic judges use international law to clarify, expand and fill gaps of domestic law. International law is used as an auxiliary interpretative instrument, i.e. to interpret domestic norms in such a way as to give them the meaning which is most consistent with the treaty obligations of the State[23] – even in the case of treaties that are awaiting ratification or incorporation. By the same token, domestic judges often use public policy reasons in order to ensure the prevalence of international interests over national ones, thereby contributing to the effectiveness of international law[24]. On the other hand, domestic judges increasingly engage in a process of "cross-fertilization". This means that judges – whether or not belonging to the same legal system – refer to and borrow decisions from each other in order to obtain some guidance on how to cope with specific factual and legal problems. It is submitted that the interaction between domestic judges broadens the interpretative parameters at their disposal, thereby enhancing the quality of the settlement of cultural heritage disputes.

III. The Settlement of Cultural Heritage Disputes through Cross-Fertilization

Until clear cut obligations are established to ensure the return of wrongfully removed art, only two solutions seem feasible in practice to achieve this goal: first, creating incentives for possessors of contested art to consider restitution through one of the available ADR

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22 DWORKIN RONALD, *The Judge's New Role: Should Personal Convictions Count?*, Journal of International Criminal Justice, 2003, p. 5.

23 This aspect is crucial considering that the treaties which deal with the issue of restitution (*cit*. n. 8) are heading towards universal participation (as for UNESCO treaties, up-dated list is available at: http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html [27.02.2012]; as for the UNIDROIT Convention, up-dated list is available at: http://www.unidroit.org/english/implement/i-95.pdf [02.03.2012]).

24 See CONFORTI BENEDETTO, *Diritto internazionale,* Napoli 2006, pp. 7 et seqq.

methods; second, relying on the power of State courts to adopt sound solutions for the resolution of cultural heritage disputes.

As far as the first option is concerned, it appears that the stakeholders of the cultural heritage milieu are not as intransigent as in the past. This is the consequence of the collaborative approaches adopted by: (i) museums and private collectors, which now approach the question of ownership and restitution with an open mind, untied to trite arguments based on the alleged legality of the original acquisition; and (ii) source countries[25], which pursue the repatriation of cultural objects with determination but also with a sense of flexibility and openness in order to modify existing rules so as to facilitate the transfer of materials to collaborative museums. In essence, cooperative approaches allow well-disposed counterparts to set aside legal defences and to put emphasis on the significance of the object concerned for the requesting party. As a result, the number of objects returned is growing, just as the number of cooperation agreements concluded by States and museums.

As for the second option, it is necessary to understand that for many disputes there is no possible substitute for ordinary court proceedings. This is certainly the case when claimants are not willing to make compromise and insist on litigating the matter or when defendants rebuff restitution demands by relying on their rights under the general law of possession and ownership. In any case, it is of considerable importance to observe that the role played by courts should not be diminished by the fact that pride, self-interest, education, class, gender, ethnicity biases, as well as plain incompetence may affect the work of judges. These also possess the human virtues of creativity, dedication, intellectual acumen and the competence to adopt culture-sensitive rulings in the face of existing procedural and legal constraints. Likewise, available practice shows that judges possess the capacity to ponder when and to what extent they may seek guidance from foreign jurisprudence[26] through cross-fertilization. Clearly, this procedural tool becomes essential whenever disputants are unable or unwilling to cooperate to achieve an amicable settlement through ADR means.

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25 This paper uses the term "source" nation to indicate those countries recognised as having a net loss of cultural materials and the term "market" nation those in which a thriving market for these assets exists. See MERRYMAN H. JOHN, *Two Ways of Thinking about Cultural Property,* American Journal of International Law, 1986, pp. 831 et seqq.

26 NEUHOLD HANSPETER, *Variations on the Theme of "Soft International Law"*, in: BUFFARD ISABELLE/CRAWFORD JAMES/PELLET ALAIN/WITTICH STEPHAN (eds.), International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner, Leiden 2008, pp. 343 et seqq, p. 355.

A. Cross-Fertilization: What It Is and Where It Comes From

As hinted above, cross-fertilization constitutes a process through which the judges that face issues in which they lack specific training or expertise may decide to pay attention to the jurisprudence of other fora in order to learn how other jurisdictions have coped with such issues. Essentially, domestic judges resort to cross-fertilization in order to take into consideration the solutions espoused in foreign legal systems. As a result, this growing judicial interaction enables domestic courts to forge dynamic and informal relationships with the courts of other jurisdictions, as well as with regional and international tribunals.

The most obvious reasons for the affirmation of this global jurisprudential networking in legal practice are: (1) the existence of legal families of courts originating from historical or geographical commonalities or subject-specific networks[27]; (2) the specialisation of subject areas; (3) the internationalisation of the law as a result of the emergence of cross-border challenges; (4) the fact that domestic courts are increasingly called upon to adjudicate disputes involving transnational issues because of: (i) the intensification of the international movement of people, property and capital; (ii) the rule on the exhaustion of domestic remedies[28]; (iii) the constraints that hinder the access of certain litigants to existing international tribunals.

B. Forms and Methods of Cross-Fertilization

It may be useful to distinguish between two forms of cross-fertilization. The first refers to a vertical, hierarchical system where judges are bound to follow what another judge has ruled. Such a relationship exists between courts belonging to the same national system, where there are a supreme court, courts of appeal and courts of first instance. The second form of interaction is horizontal and takes place across national borders. In this case, domestic judges are not bound to follow or even take account of each other's jurisprudence. Nor are they required to acknowledge the outcomes of such communication by

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27 CANIVET GUY, *Trans-Judicial Dialogue in a Global World,* in: MULLER SAM/RICHARDS SIDNEY (eds.), Highest Courts and Globalization, The Hague 2010, p. 23.

28 This rule dictates that individuals, in the case of breaches of human rights law, must attempt to avail themselves of the avenues available in the alleged wrongdoer State before seeking justice in any international forum (see *Interhandel (Switzerland v United States of America)*, 21 March 1959, ICJ Reports, 1959, p. 6). Therefore, it enables the courts of the alleged wrongdoer State to decide whether its international legal obligations have been met and to examine the case in a comparative perspective, possibly by taking into consideration the interpretation given by foreign courts to the international rules at stake.

citation. The latter is the type of cross-fertilization on which this paper is focused on. Between these two extremes lie a number of more nuanced positions where the vertical and horizontal forms of interaction combine in different ways.

Moreover, it is interesting to note that the dynamics of cross-fertilization are variable. Some courts prefer "talking" to "listening". For instance, the Supreme Court of the United States refers only rarely to the jurisprudence of other courts. The opposition seems to be based upon the concerns about the separation of powers and the associated view that courts should be deferential to the legislator[29]. On the other hand, some courts work consciously to coordinate their approaches. At the European Union level, the Conference of European Constitutional Courts[30] and the Network of the Presidents of the Supreme Judicial Courts of the Member States of the European Union[31] represent successful paradigms for cross-fertilization.

As for the methods of cross-fertilization, domestic judges can make use of foreign authorities through the regular exchanges of information worldwide. The exchange of information may be one way and virtual, for instance through the citation of the judgments of other courts. In the present era, the Internet, electronic databases and other forms of information technology allow adjudicators to conduct research into international and foreign law and jurisprudence faster and easier. Apart from this passive reception of foreign decisions, the actual circulation of jurisprudence can be promoted through active face-to-face contacts, through visits or informal meetings between judges of higher national courts, training courses, conferences and joint-seminars organized by ministries, universities and bar associations[32]. All in all, these activities favour a genuine dialogue and foster the awareness that cross-fertilization is ongoing on a global level and create an incentive for courts to be both lender and borrower[33].

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29 MULLER SAM/RICHARDS SIDNEY, *Introduction: Globalisation and Highest Courts,* in: MULLER SAM/RICHARDS SIDNEY (eds.), Highest Courts and Globalization, The Hague 2010, p. 8.

30 Set up in 1972, the Conference organizes regular conferences with a view to sharing experience as regards constitutional practice and jurisprudence and to maintaining regular contacts on the basis of the principle of judicial independence. See http://www.confcoconsteu.org/en/common/home.html (02.03.2012).

31 Founded in 2004, this association provides a forum for bringing Supreme Courts closer by encouraging discussion and the exchange of ideas. In 2006, the Network developed a portal of jurisprudence which allows its members to search in all the national case law databases. See: http://www.network-presidents.eu/spip. php?rubrique1 (27.02.2012).

32 SHANY YUVAL, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford 2003, pp. 278 et seqq.

33 SLAUGHTER ANNE-MARIE, *A New World Order*, Princeton 2004, pp. 74 et seqq.

C. The Actual Affirmation of Cross-Fertilization

Desirable as it seems, it appears that – outside hierarchical systems – a binding procedural obligation requiring domestic judges to adopt a cross-fertilizing perspective has not yet emerged. Nevertheless, the urge for consistency and legitimacy is so powerful that in all legal systems judges cite previous decisions to justify their rulings[34]. Accordingly, a *de facto* use of judicial decisions exists not only among the courts of legal systems that belong to the common law family (such as the United States and the United Kingdom) but also among the courts of mixed jurisdictions (such as Israel and South Africa) and of civil law countries (such as Italy and Switzerland). Indeed, the judges of civil law countries routinely refer to previous domestic decisions – especially those set by supreme courts – and to foreign precedents. This means that the Justinian maxim *non examples, sed legibus iudicandum est* has not succeeded in preventing the development of the precedential influence of decisions in civil law systems[35].

Cross-fertilization between domestic courts, and between domestic courts and international tribunals, has developed in various fields of law. In the field of environmental protection, the courts of several countries are engaging in a worldwide dialogue, with the Indian Supreme Court leading the way[36]. In the area of migration, national courts dealing with asylum seekers have long began citing each other's interpretation of the Convention Relating to the Status of Refugees[37]. By way of example, in 1993 the Canadian Supreme Court cited a 1985 decision of the US Board of Immigration Tribunal, which was later cited by the High Court of Australia (1997), by the New Zealand Refugee Status Authority (1998) and by the House of Lords (1999)[38]. Domestic courts also engage in inter-judicial exchange with respect to human rights law. Recently, the views of the supreme

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34 SANDHOLTZ WAYNE, *Prohibiting Plunder. How Norms Change,* New York 2007, p. 15.

35 SHAHABUDDEEN MOHAMED, *Precedent in the World Court,* New York 1996, p. 6.

36 In 1994 the Pakistani Supreme Court made references to Indian cases (*Zia v WAPDA*, PLD 1994 Sup. Ct. 693); in 1996 Judge Rahman of the Bangladesh Appellate Division presented the Indian jurisprudence as a model for emulation (*Farooque v Gov't of Bangladesh*, 17 BLD[AD] 1[1997] App. Div. [1996]); in 2000 the Sri Lanka Supreme Court referred to an Indian judgment with approval (*Bulankulama v Sec'y, Ministry of Indus. Dev.* [2000] LKSC 18). The Indian Supreme Court itself referred to judgments of the courts of the Philippines, Colombia, and South Africa as well as to the jurisprudence of the European Court of Human Rights (*AP Pollution Control Bd. [II] v Nayudu* [2000] INSC 679, [2001] 2 SCC 62 [India Sup. Ct.]). BENVENISTI EYAL, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts,* American Journal of International Law, 2008, p. 241 et seqq, p. 260.

37 28 July 1951, 189 UNTS 150.

38 *Regina v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 A.C. 629, para. 643. BENVENISTI, *Reclaiming Democracy* (*cit*. n. 36), pp. 264 et seqq.

courts of Greece, Italy, Germany and United Kingdom clashed over the question of whether human rights protection should prevail over the principle of State immunity[39]. Moreover, the Italian Court of Cassation has decided a case concerning the legal status of the unborn child by referring extensively to foreign authorities[40]. In this case the Court of Cassation boldly highlighted the normative role of case law by stating that judges are increasingly conscious of operating in a legal system that – though different from a common law system where the *stare decisis* principle prevails – allows them to employ general clauses – such as *bona fide,* solidarity, the fundamental importance of human rights – to bring the law up-to-date.

The same practice is discernible in the field of cultural heritage. The first case that is worth mentioning is the renowned *Menzel v List*[41]. In this case, the Supreme Court of New York ordered the restitution of a painting by Chagal – which had been stolen by Nazi forces during the Second World War – by relying on the Regulations annexed to the 1907 Hague Convention[42] and on foreign case law, such as the Nuremberg Tribunal judgments and the decision *Mazzoni v Finanze dello Stato*[43]. The *Barakat* case is also relevant to the present discussion. This case concerned a collection of eighteen carved jars, bowls and cups allegedly unlawfully excavated in the Jiroft region of Iran. The English Court of Appeal held that the Iranian law of 1979 denied ownership rights in antiquities to finders but conferred both ownership and an immediate right to possession on the State[44]. Crucially, the Court classified the claim as a *"patrimonial claim, not a claim to enforce a public law or to assert sovereign rights"*[45]. Next, the Court distinguished between *recognition* of a nation's ownership rights and *enforcement* of a foreign nation's laws, and held that if a State has acquired title to property situated within its jurisdiction by virtue of its legislation, there is no reason why such a title should not be

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39 In *Jones and others v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* (14 June 2006 [2006] UKHL 26) the House of Lords discussed, inter alia, the decisions *Ferrini v Germany* (Italian Court of Cassation, No. 5044, 11 March 2004), *Kalogeropoulou and others v Greece and Germany* (European Court of Human Rights, Application No. 59021/00, 12 December 2002), and *Houshang Bouzari and ors. v Iran* (Ontario Superior Court of Justice [2002] OJ No. 1624, 1 May 2002).

40 *A.V. v P. D. and V.S.*, Court of Cassation (Third Civil Section), 11 May 2009, No. 10741.

41 267 N.Y.S.2d 804, 809 (Sup. Ct. N.Y. 1966), *rev'd,* 246 N.E.2d 742 (N.Y. 1969).

42 Regulations Respecting the Laws and Customs of War on Land, annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907), 1 Bevans 631.

43 Tribunale di Venezia, 8 January 1927, Foro It., 1927, I, pp. 961 et seqq. This case concerned the application of the Peace Treaty of Saint-Germain between Italy and Austria and the Regulations annexed to the 1907 Hague Convention (*cit.* n. 42).

44 *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.* [2007] EWCA Civ. 1374.

45 *Idem*, para. 148 et seqq.

recognized by a foreign court. As a result, the Court of Appeal affirmed that English courts should recognize Iran's national ownership law and allowed Iran to sue to recover the contested collection[46]. The appellate court reached this conclusion by relying on the case *United States v Schultz*[47] and by departing from the established case law that had long been cited by English courts to exclude the extraterritoriality of foreign laws[48].

The third case was decided in 2008, when the Italian *Consiglio di Stato* closed the litigation over the "Venus of Cyrene" – a headless marble sculpture removed from the ancient Greek settlement of Cyrene, in the Eastern part of Libya, following the Italian invasion of 1911 – by reshaping the foundation of the obligation to return objects removed as a result of war and colonization[49]. The Court affirmed that Italy was under an obligation to return the sculpture to Libya by virtue of a general and autonomous customary principle. According to the Court, this principle was the corollary of the interplay between the principle prohibiting the threat or use of force (enshrined in article 2.4 of the Charter of the United Nations) and the principle of self-determination of peoples (enshrined in articles 1.2 and 55 of the Charter of the United Nations). The *Consiglio di Stato* held that these principles belong to customary law by referring to the International Court of Justice's Advisory Opinions on *Namibia*[50] and *Western Sahara*[51].

The fourth instance of cross-fertilization is provided by the litigation stemming from the 1997 suicide bombing at a pedestrian mall on Ben Yehuda Street in Jerusalem, which

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46 *Idem,* para. 163.

47 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd,* 333 F 3d 393 (2d Cir. 2003). The *Schultz* decision and the cases leading up to it (e.g., *United States v An Antique Platter of Gold* [184 F.3d 131, 2d Cir. 1999], *Government of Peru v Johnson* [720 F.Supp. 810, C.D. Cal. 1989], and *United States v McClain* [545 F.2d 988, 5th Cir. 1977]) indicate that US courts are traditionally willing to recognize the ownership title of source countries and to facilitate the repatriation of items that can be shown to have been stolen or taken in contravention of the laws vesting property in the State, even where the requesting State never had possession.

48 See, above all, *Attorney General of New Zealand v Ortiz* (1982) 3 QB 432, *rev'd,* (1984) A.C. 1, *add'd,* (1983) 2 All E.R. 93. In this case, Lord Denning, from the Court of Appeal, asserted (*obiter*) that, by virtue of international law, no court would enforce foreign laws so as to allow a foreign State to exercise its sovereignty beyond the limits of its authority. He further explained that the category "other public laws" had to be understood to include the legislation prohibiting the export of works of art. *Barakat* case (*cit*. n. 44), para. 104 et seqq, para. 112 et seqq.

49 *Associazione nazionale Italia Nostra Onlus v Ministero per i beni e le attività culturali et al.,* Consiglio di Stato, No. 3154, 23 June 2008.

50 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276,* 21 June 1971, ICJ Reports, 1971, p. 16.

51 16 October 1975, ICJ Reports, 1975, p. 6.

killed five people and left 192 people injured[52]. The Palestinian terrorist organization Hamas claimed responsibility for the bombing. On July 2001, the American survivors of the terrorist attack filed a civil suit in the United States against the Islamic Republic of Iran. The plaintiffs alleged that Iran provided material support to Hamas to carry out the attack. As Iran did not appear in the proceedings, the plaintiffs won a default judgment including over $300 million in compensatory and punitive damages[53]. They sought to execute the judgment against various Iranian-controlled bank accounts. Having achieved minimal success, they tried to attach Iran antiquities held in US museums, either to persuade Iran to pay damages or to forfeit the artefacts and sell them to the highest bidder. In particular, the plaintiffs identified a number of priceless artefacts in the possession of the Boston Museum of Fine Arts and Harvard University in Massachusetts. The museums opposed these attempts arguing that the targeted antiquities constituted Iran sovereign property and therefore were immune from attachment pursuant to United States legislation. In September 2011, Judge O'Toole marked the latest step in this lengthy fray. With a succinct decision, the Judge denied the motion for attachment of the artefacts by ruling that the plaintiffs failed to demonstrate that the targeted objects belonged to Iran[54]. Importantly, the Judge reached this conclusion by relying on the English judgments in *Barakat*[55].

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52 *Campuzano v Islamic Republic of Iran,* 281 F.Supp.2d 258 (D.D.C., 10 September 2003).

53 *Idem*. The lead plaintiff, Diana Campuzano, supplied the name for the consolidated case that led to default judgment award, but the cases regarding the artefacts are called *Rubin* after the lead plaintiff in the group.

54 *Rubin v The Islamic Republic of Iran,* Civil Action No. 06-11053-GAO, D. Mass., 15 September 2011.

55 However, it should be pointed out that Judge O'Toole did not rely on the *Barakat* Appeal decision in its entirety. In effect, it appears that he focused only on the English Court's finding that the Iranian law of 1930 was inconsistent with the "automatic government ownership of all antiquities originating from Iran". Instead, the Judge failed to acknowledge the subsequent finding that ownership was vested in Iran by a law of 1979 (see *supra* n. 44 and related text). However, although this decision could be seen as an inaccurate statement of law or as an unfortunate instance of cross-fertilization, it must be emphasised that such selective reading allowed Judge O'Toole to reach the same substantive result of the *Barakat* Court of Appeal, i.e. to prevent the dispersion of a collection of invaluable archaeological relics (if sold at auction, the artefacts would be scattered among private owners). This is motivated by the different legal issues involved: the *Rubin* litigation revolved around the question of the immunity from attachment of State cultural property, whereas the *Barakat* case was a restitution case. Accordingly, the culture-sensitive settlement of these cases required two diametrically opposed decisions: one impeding the deaccessioning of the antiquities from the museums' collections (in *Rubin*) and another ordering restitution (in *Barakat*).

D. A Realistic Assessment

The foregoing survey evidences that the disputes where domestic judges have adopted a cross-fertilizing perspective in the field of cultural heritage is not extensive. This is motivated by the fact that cultural heritage law has only had a relatively brief history. Moreover, as said, ADR methods are the preferred means for dealing with art disputes. Some cases have been resolved through extra-judicial mechanisms even if lawsuits were already initiated. The case of the Macchiaioli paintings of the Dunedin Art Gallery (New Zealand) is telling. This small collection of 19th century Italian paintings had vanished before 1946 from the farm cottage of Cino Vitta, the head of the Jewish community in Florence. In 1996, a customs officer identified the paintings as they entered Italy to go on loan at the Panati Gallery of Florence. Litigation followed as the Vitta family brought a civil action against the museum. Having realized that the parties had been involved in 3 years of costly litigation and that its continuance would make it more lengthy and expensive, in 1999 the civil judge proposed that the case be settled by apportioning the paintings between the parties. Eventually these agreed to resolve the dispute out-of-court with an agreement. Under its terms, three paintings returned to New Zealand, two were awarded to the Vitta family[56].

In any case, the appraisal of the practice of cross-fertilization cannot result from the arithmetic operation of summing up the decisions where this practice has actually been employed. On the contrary, the question whether judicial cross-fertilization should be considered as a useful practice to deal with art disputes, notwithstanding the lack of a legally binding obligation, requires a thorough discussion of its benefits and shortcomings.

1. The Strengths

Cross-fertilization entails a number of important advantages. First, it strengthens the decisions of the "*listening*" court as it provides the evidence that other bodies have reached the same or similar conclusions[57]. Following precedents defuses the crisis of legitimacy by showing that judgments are not predilections or random events[58]. Second, as an auxiliary interpretative instrument, cross-fertilization may facilitate the implemen-

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56 PALMER, *Museums and the Holocaust* (*cit*. n. 16), pp. 17 et seqq. See also: BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case Landscape with Smokestacks – Friedrich Gutmann Heirs and Daniel Searle,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

57 SLAUGHTER ANNE-MARIE, *A Typology of Transjudicial Communication,* University of Richmond Law Review, 1994–1995, p. 119.

58 SANDHOLTZ, *Prohibiting Plunder* (*cit*. n. 34), p. 15.

tation of the law if this offers limited guidance to interpretation[59]. This aspect becomes clear considering that law is never determinate. It provides abstract and general prescriptions that are not always clear and understandable to those who must obey it. This is why interpretation – the creative process with which judges identify the applicable rules, clarify their meaning, and relate them to the specific facts of the case – is necessary. Third, the reference to the experiences of external jurisdictions – which may be cited as indicative of international trends, or to support or reject a particular interpretative approach adopted in a particular country or region – may lead domestic judges to examine their own legal system in a comparative perspective and, if necessary, to urge legislative reforms, especially to fill up the gaps of their constitutive instruments and procedural rules[60]. Fourth, cross-fertilization allows coping with the "*fragmentation of knowledge*", that is, the incomplete or partial knowledge of the law on the part of domestic judges. These often face issues in which they may lack specific training or expertise, such as science and engineering in patent cases and psychology in criminal cases. Apart from hearing and consulting with experts, in those instances judges could gain valuable insights into how other jurisdictions have framed the issues and developed solutions by looking at foreign material. Fifth, the citation of foreign sources permits the construction of an international consensus with a view to coping with common problems. This results from the fact that cross-fertilization enables judges to expand the interpretative field of vision and judicial thinking beyond the arguments and legal trends available within their forum and to balance the objectives, values and interests underlying the pertinent rules against other objectives, values and interests[61]. In other words, when dealing with a dispute, judges have the power to bring the law up-to-date with prevalent or new societal beliefs and supranational interests. The obvious example relates to the human rights domain, where the interpretation and application of each treaty falls to an international tribunal. Evidently, the jurisprudence elaborated by such a tribunal influences the work of other fora, thereby strengthening the protection of human rights worldwide. Hence, when common concerns are at stake, it is natural that domestic courts be responsive and look beyond the narrow borders of their legal system[62].

This aspect signals that cross-fertilization allows judges to exercise their discretion in the selection of foreign precedents. Crucially, it also proves that judges are capable of es-

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59 BARELLI MAURO, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, International and Comparative Law Quarterly, 2009, pp. 980 et seqq.

60 BROWN CHESTER, *A Common Law of International Adjudication*, Oxford 2007, p. 229.

61 DWORKIN, *The Judge's New Role* (*cit*. n. 22).

62 SACERDOTI GIORGIO, *Discussion,* in: BAUDENBACHER CARL/BUSEK ERHARD (eds.), The Role of International Courts, München 2008, p. 203.

pousing novel solutions adopted in other fora or to engage in norm elaboration[63] in order to participate in the *"common judicial enterprise"* and cope with *"common substantive problems"*[64]. National courts can do this in several ways. They can provide a re-interpretation of consolidated international legal principles[65]. They can draw on foreign interpretations of treaty language and reject their own government's interpretation. They can interpret domestic (constitutional) provisions in light of international and foreign law[66]. They can enforce the norms embodied in an international treaty even if the national government or the legislator have not enacted legislation to incorporate the treaty into domestic law. They can take steps to serve their own consideration of the most important needs of contemporary society – especially in the cases where the national government is perceived to be failing to meet these needs – by restraining their own governments or extending jurisdiction over their actions and inactions[67].

2. The Deficiencies

The realistic observation of the practice of cross-fertilization requires a consideration of its deficiencies. The first problem relates to the fact that judges may err in the selection of case law or may be unprepared to grasp the legal and technical aspects of foreign jurisdictions. In effect, who can guarantee that a national judge will correctly apply foreign jurisprudence? Therefore, there is the risk that "*bad*" jurisprudence will be produced or reiterated. Second, the absence of formal ties among courts and tribunals means that judges have total discretion as to whether and to what extent they may take into account foreign jurisprudence. In this respect, it has been argued that judges resort to foreign authorities to support the result they want in the particular case, for instance, to serve the policy objectives of their national government or protect domestic values and policies from external economic, political and legal pressures of interested groups, powerful

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63 SHANY YUVAL, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, European Journal of International Law, 2009, pp. 73 et seqq, pp. 80 et seqq.

64 SLAUGHTER, *A New World Order* (*cit*. n. 33), p. 68.

65 The jurisprudential attitude of the courts in Italy and Belgium in the first part of the 20th century against the rule of absolute State immunity is illustrative. Initially, these courts intentionally breached such a well-established rule of customary international law and developed the theory of restrictive immunity. This excludes immunity for purely commercial activities carried out by States. Then, other courts adhered to this trend. Later on, national statutes were passed confirming this change. Today, the majority of jurisdiction endorses the restrictive immunity. See VAN ALEBEEK ROSANNE, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law*, Oxford 2008, pp. 12 et seqq.

66 POSNER A. ERIC, *The Perils of Global Legalism*, Chicago 2009, p. 117.

67 BIANCHI ANDREA, *Globalization of Human Rights: The Role of Non-State Actors,* in: TEUBNER GUNTHER (ed.), Global Law without a State, Dartmouth 1997, pp. 179 et seqq, pp. 194 et seqq.

governments, international institutions and even private companies[68]. In other words, it has been contended that jurisprudence is selected depending on the agenda pursued by the judge concerned[69]. Often, this is done through a creative use of the judicial discretion that results in the re-interpretation of consolidated legal sources or in the deviation from existing precedents. Furthermore, domestic judges may show a certain self-restraint or bias in case selection. The judges of a certain legal system may look only at the jurisprudence of a limited range of foreign jurisdictions. British Commonwealth judges, for instance, tend to refer to British case law. In addition, as domestic judges in most countries are not internationalists, they may interpret an international treaty (and the foreign case law relating to it) in light of local legal assumptions and policy needs, with the risk of defeating the objectives and purposes underlying such a treaty[70].

E. An Appraisal: The Legitimacy of Cross-Fertilization

The preceding paragraphs emphasise that cross-fertilization entails a certain degree of uncertainty that derives principally from the human component of adjudication. Moreover, it appears that there are not clear parameters as to the circumstances under which it is necessary to seek guidance from foreign jurisprudence, about which areas of law should (or should not) be excluded, or how the selection process should work. With regard to the latter point, it seems that the selection of external sources is guided by a number of variable factors: (i) the extent to which the lending system and the borrowing system share similar values and common ideological bases; (ii) the degree of similarity between the issues faced by the two systems; and (iii) whether foreign legal materials are available in a language that judges are able to work with.

Nevertheless, it is submitted that these problems do not decisively rule out resort to cross-fertilization. The fact is that the risks associated with this process are not dissimilar from those normally related to court cases that contain no recourse to foreign material. Either way the settlement procedure may be affected by the whims of judges. In effect, decisions of national courts are sometimes followed by suspicions of political motivations. Decisions of international courts are not exempted from similar criticisms[71]. Hence, it seems fair to assert that judges are justified in engaging in cross-fertilization,

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68 BENVENISTI, *Reclaiming Democracy* (*cit.* n. 36), pp. 247, 268; SHANY, *Department of Power* (*cit.* n. 63), p. 86.

69 MCCRUDDEN CHRISTOPHER, *Human Rights and Judicial Use of Comparative Law,* in: ORÜCÜ ESIN (ed.), Judicial Comparativism in Human Rights Cases, British Institute of International and Comparative Law, London 2003, p. 17.

70 POSNER, *Global Legalism* (*cit.* n. 66), p. 115.

71 SHAHABUDDEEN, *World Court* (*cit.* n. 35), p. 4.

even if there is no obligation to do so, because it entails advantages that outnumber and offset its inherent deficiencies.

In this respect, many practitioners and scholars emphasise that ignoring jurisprudential solutions simply because there are foreign demonstrates not just parochialism, but blindness as to the nature of the problem. In the words of former Chief Justice of the Supreme Court of Israel, judges that do not cite foreign decisions "*fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems"*[72]. Moreover, it is instructive to consider a statement from former Chief Justice Smith of the Norwegian Supreme Court: *"[i]t is a natural obligation that, in so far as we have the capacity, we should take part in European and international debate and mutual interaction. […] It is the duty of national courts […] to introduce new legal ideas from the outside world into national judicial decisions"*[73].

All in all, these opinions point to the fact that judicial dialogue improves the quality of decision-making. In effect, regular and interactive cross-fertilization corresponds to a sort of collective deliberation producing a better solution than can be reached by any one individual. Jeremy Waldron described this aspect through the analogy between law and scientific findings. Existing science stands as a repository of enormous value to individual researchers and it is unthinkable that they would try to proceed without drawing on that repository to supplement their own individual research. So, if the health authorities of a given State are dealing with a new epidemic, it would be absurd to look only at the scientific data available at home. On the contrary, they would look abroad, to the conclusions and strategies adopted in foreign States where the same or similar epidemic has been defeated. Similarly, domestic judges dealing with a novel legal problem should be open to considering the jurisprudence of other jurisdictions. If certain vexing issues have been already wrestled with in other jurisdictions, then the commitment to the pursuit of just, effective and coherent treatment requires the examination of the end product of others for guidance[74].

To conclude, the added-value of cross-fertilization as an auxiliary interpretative instrument for the sound resolution of cultural heritage disputes resides in that it places the accent on the objective value – the persuasiveness – of external authorities in light of the end pursued. While "*binding authority*" derives from the hierarchy of sources that do-

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72 Cited by LIPTAK ADAM, *US Supreme Court's Global Influence Is Waning,* The New York Times, 17 September 2008 available at: http://www.nytimes.com/2008/09/17/world/americas/17iht-18legal.16249317.html?pagewanted=all (02.03.2012).

73 Cited in SLAUGHTER, *A New World Order* (*cit.* n. 33), pp. 69 et seqq.

74 WALDRON JEREMY, *Foreign Law and the Modern Ius Gentium,* Harvard Law Review, 2005, pp. 129 et seqq, pp. 132 et seqq, pp. 143 et seqq.

mestic judges are obligated to apply and follow, "persuasive authority" is not binding on the judge under the rules of the national system that determine authoritative sources. Glenn described "*persuasive authority*" as *"authority which attracts adherence as opposed to obliging it"*[75]. Slaughter affirmed: *"[d]ecisions rendered by outside courts can have no authoritative power",* but *"[t]hey carry weight only because of intrinsic logical power [...]"*[76].

Therefore, it is not necessary to establish a binding obligation to engage in cross-fertilization, so as to bring about the universal application of the doctrine of *stare decisis*. More simply, it is imperative to nurture the tools and the methods (and possibly to develop new tools and methods) that allow domestic judges to engage in an open approach, one that permits to study, learn and take inspiration from the jurisprudential solutions adopted in foreign legal systems essentially because of their inherent merits and because of the necessity to offset the shortcomings of the existing legal framework.

IV. Beyond Cross-Fertilization: Disclosing the Judicial's Ongoing Penchant for Public Policy Reasons

The analysis set out above illustrates that the echo of important judgments goes beyond the boundaries of the jurisdictions where they have been adopted. However, international practice evidences that culture-sensitive settlements do not only depend on the adoption of a cross-fertilizing perspective on the part of judges. Various judgments demonstrate that domestic courts can adopt culture-sensitive decisions by taking account of international cultural heritage law and policy. This case law includes a number of successful claims whereby domestic courts have ordered restitution through the enforcement of foreign laws – as recommended by a number of UNESCO instruments and notwithstanding the rule that prevents a State from relying on its public law in an action brought before a foreign court – and the implementation of the norms of international treaties – even if such norms are not self-executing or the national government or the legislator have not enacted legislation to incorporate them into domestic law.

The first case that is worth mentioning is the so-called Nigerian mask case[77]. In this case, the German *Bundesgerichtshof* assessed the export laws of Nigeria while applying German law to an insurance contract. This contract related to three containers with tradition-

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75 GLENN H. PATRICK, *Persuasive Authority,* McGill Law Journal, 1987, pp. 261 et seqq, p. 294.

76 SLAUGHTER ANNE-MARIE, *The Real New World Order,* Foreign Affairs, 1997, pp. 183 et seqq, p. 187.

77 Bundesgerichtshof, *Allgemeine Versicherungsgesellschaft v EK,* 22 June 1972, BGHZ 59 No. 14.

al masks to be transported from Nigeria to Germany. During the transportation, several of these artefacts disappeared. The insurer paid out in respect of the loss incurred and then sued the ship-owner for compensation. The defendant argued, *inter alia*, that the insurance contract, governed by German law, was void because the export of Nigerian cultural objects violated Nigerian export control legislation. The *Bundesgerichtshof* espoused this view and held that the shipping insurance contract was unenforceable because it would be contrary to German "*good morals*". Furthermore, the Court declared the contract void by referring to the 1970 UNESCO Convention (even if the Federal Republic of Germany was not a State Party to it) and ruled that foreign laws have to be taken into account if they pursue policies about which the international community of States has reached consensus. A few years later, the *Tribunale di Torino* ordered the restitution of a number of archaeological objects illicitly exported from Ecuador by an Italian citizen[78]. This decision was based on the finding that the law of Ecuador vested ownership in the State and prohibited the export of objects of archaeological value. However, the *Tribunale* also made reference to the 1970 UNESCO Convention and its Preamble and affirmed that, although it was not applicable *ratione temporis* to the dispute, it delineated some key principles of international public policy that should be abided by both nationally and internationally to secure the protection of cultural heritage. A similar stance characterises the decision of the *Elicofon* case[79]. This case concerned two valuable Dürer paintings that were stolen in 1945 during the occupation of the Schwarzburg Castle by United States Forces. The Court of Appeals for the Eastern District of New York ordered the restitution of the two artworks following an examination of each of the legal issues involved – State succession, due diligence and the timeliness of the legal action – in light of its international implications. As a result, the Court declined to yield to the foreign laws that conflicted with a specific national policy that, in turn, reflected an internationally recognized policy of restitution of works of art disappeared during times of warfare which can be traced through the cultural heritage treaties adopted under the aegis of UNESCO[80].

The English decision in the *City of Gotha* case is also remarkable for its exploration of the public policy issue[81]. In this case, the defendants had pleaded the statute of limita-

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78 *Repubblica dell'Equador v Danusso*, *Tribunal of Torino,* 22 February 1982, RDIPP, 1982, pp. 625 et seqq.

79 *Kunstsammlungen zu Weimar v Elicofon*, 478 F.2d 231 (2d Cir. 1973), 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd,* 678 F.2d 1150 (2d Cir. 1982).

80 OSTENBERG L. HELEN, *International Law in Domestic Forums: The State of the Art, Kunstsammlungen zu Weimar v Elicofon,* Brooklyn Journal of International Law, 1983, pp. 179 et seqq, pp. 190 et seqq.

81 *City of Gotha and Federal Republic of Germany v Sotheby's and Cobert Finance SA* (9 September 1998, unreported, available at: http://www.iuscomp.org/gla/judgments/foreign/gotha1.htm

tions. Moses J. found that German law applied. However, pursuant to Sections 1 and 4 of the Foreign Limitation Period Act of 1984[82], the judge further held that the restitution claim was not barred because, according to the German Civil Code[83], the period of limitation with regard to the item concerned had begun to run anew when it was transferred into the possession of the person who misappropriated it in 1987. Consequently, the claim succeeded. However, Moses J. established – *obiter* – that if German law had barred legal action, thereby protecting thieves or *mala fide* purchasers, it should not have been applied as it would have conflicted with English public policy[84]. Furthermore, in 1997, a Swiss court ordered the return of a painting stolen in France and found in Switzerland on the grounds that the onus of proof of good faith on the accused had not been met[85]. Crucially, the Federal Court emphasised that the 1970 UNESCO Convention and the UNIDROIT Convention, which contain principles expressing an *"ordre public internationale"* either in force or in formation and which *"concrétisent l'impératif d'une lutte internationale efficace contre le trafic de biens culturels, permettent en outre de sauvegarder les garanties procédurales nécessaires à la protection des intérêts légitimes du possesseur de bonne foi"*. This ruling is remarkable given that at that time Switzerland was not party to neither of the two conventions. The same deference to the 1970 UNESCO Convention emerged from an earlier decision of a Canadian court in a case concerning the return of about 6,000 ancient textiles that had been illicitly exported in the 1980s from Bolivia[86]. In the case *United States v Schultz* an art dealer was convicted of conspiracy to receive property stolen in Egypt[87]. This case is interesting not only because it demonstrated that United States courts could make use of domestic anti-theft laws to recognize and enforce foreign nations' patrimony laws, but also because the Court confirmed that it is a policy of the United States to prohibit the importation of stolen or converted goods[88].

[02.03.2012]). See generally LOMAS PAUL/ORTON SIMON, *Potential Repercussions from the City of Gotha Decision,* Art Antiquity and Law, 1999, pp. 159 et seqq, p. 165.

82 This Act provided that where proceedings before an English court were governed by the law of a foreign legal system, that system's statutes of limitation also applied, to the exclusion of the English statute of limitations.

83 Section 221 BGB contained a limitation period of 30 years on the right to recover property which run irrespective of whether the claimant was aware of the existence of the claim or the identity of the person in possession.

84 *City of Gotha* (*cit*. n. 81), para. II.4.

85 *L. v Chambre d'accusation du Canton de Genève,* 1 April 1997, ATF 123 II 134.

86 *R. v Yorke* (1998), 166 N.S.R. (2d) 130 (Nova Scotia Court of Appeal).

87 *Cit.* n. 47.

88 The same policy argument was endorsed by the Southern District Court of New York in *United States v Portrait of Wally* (2002 US Dist. LEXIS 6445, 11 April 2002, p. 33).

The appeal decision in *Barakat* is also relevant for the present discussion[89]. The Court of Appeal did not limit itself to recognize Iran's ownership, as illustrated above, but it went on to affirm that *"[t]here are positive reasons of policy why a claim by a State to recover antiquities which form part of its national heritage [...] should not be shut out […]. Conversely, [...] it is certainly contrary to public policy for such claims to be shut out. […] There is international recognition that States should assist one another to prevent the unlawful removal of cultural objects including antiquities"*[90]. The Court briefly examined the international instruments having the purpose of preventing unlawful dealing in property which is part of the cultural heritage of States – i.e. the 1970 UNESCO Convention, the UNIDROIT Convention, Directive 93/7, and the Commonwealth Scheme for the Protection of the Material Cultural Heritage of 1993 – and asserted that *"[n]one of these instruments directly affects the outcome of this appeal, but they do illustrate the international acceptance of the desirability of protection of the national heritage. A refusal to recognise the title of a foreign State, conferred by its law, to antiquities unless they had come into the possession of such State, would in most cases render it impossible for this country to recognise any claim by such a State to recover antiquities unlawfully exported to this country"*[91]. Hence, the court affirmed that it is British public policy to recognize the ownership claim of foreign nations to antiquities that belong to their patrimony.

This growing jurisprudence signals that judges are aware of the consequences of applying rules enacted for normal business transactions involving ordinary goods to cultural heritage disputes. This is why this jurisprudence has the effect of countering the domestic systems' failures to yield culture-sensitive settlements and of developing an environment more protective of dispossessed owners, where honesty and good faith are strictly assessed by courts and the protective laws of foreign States are taken into account[92]. In other words, it appears that the "public policy" reservation is used by domestic courts as a safety valve, as a corrective, to prevent miscarriages of justice either by introducing new principles and rules in the law of the forum or by influencing the interpretation and implementation of existing norms.

89 *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd.* (2007) (*cit*. n. 44).

90 *Idem*, para. 98 et seqq, para. 154 et seqq.

91 *Idem,* para. 163.

92 HENSON J. EMILY, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners – Can Moral Obligations Be Translated into Legal Duties?,* DePaul Law Review, 2001–2002, pp. 1103 et seqq, pp. 1145 et seq.

V. Conclusions

This paper has examined the problem of the resolution of restitution cases by focusing on the role played by domestic courts. One of the reasons for choosing this point of view is that the development of cultural heritage law has not been accompanied by the creation of a specialized dispute settlement system. Another reason is that for many disputes there is no possible substitute for ordinary court proceedings. This is the case when claimants are not willing to make compromise and insist on litigating the matter or when defendants turn a deaf ear to restitution demands by relying on their ownership rights. A further reason is that the available ADR methods are not free from flaws. The realistic observation of contemporary practice indicates that negotiation, mediation and arbitration are not always available and cannot guarantee that a dispute will eventually be settled.

Against this background, the present paper has highlighted the strengths of litigation and has examined two different trends. In the first place, it has demonstrated that national courts engage in various forms and degrees of jurisprudential networking. As they often face issues in which they may lack specific training or expertise, they increasingly engage in cross-fertilization in order to learn how other jurisdictions have coped with such issues – even if a procedural obligation to refer to foreign authorities has not yet emerged outside hierarchical systems. The second trend shows that domestic courts have adopted culturally-sensitive decisions by taking account of various policy arguments. In other words, judges have infused principles and policy reasons in their rulings in order to overcome the weaknesses and gaps of the existing legal regime.

All in all, these trends demonstrate that judges are increasingly aware of the unique features of cultural objects and of the necessity to find means to resolve art-related disputes that could balance the parties' interests and reconcile the various moral, historical, cultural, financial and legal issues involved. Accordingly, it becomes imperative to identify suitable ways to nurture these trends. On the one hand, this would permit to avoid the adoption of awkward judgments whereby legislation designed for ordinary property is applied to disputes involving objects endowed with unique qualities and history[93]. On the other hand, the selection of adequate tools might serve as a catalyst for the development of initiatives on the part of the stakeholders of the cultural heritage milieu. These might include solutions aimed to: (i) facilitate the prevention of controversies; (ii) assist in the settlement of disputes by way of the streamlining of claims procedures and the removal of legal impediments; (iii) raise awareness and further sensitize art trade professionals, collectors and the public about the problems connected to the dispersion of cultural objects as a result of theft, illicit exportation and clandestine excavations.

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93 PATERSON, *Resolving Material Culture Disputes* (*cit*. n. 14), p. 376.

In this respect, it is interesting to note that the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) has taken various steps in the direction to attain the above goals. For example, in 2003, the ICPRCP invited *"the UNESCO Secretariat to provide the Committee with examples of returns and restitutions upon which to develop a database and from which the Committee may draw inspiration"*[94]. The objective is to build a database containing *"examples of restitution of cultural goods of different kinds and origins, whose return was obtained in an original way"*[95]. This initiative is laudable in that it aims to lay the foundation for the development of a consistent pattern of restitution. *ArThemis,* the database created by the Art-Law Centre of the University of Geneva, goes even further. It does not merely provide a description of "*original*" examples of restitution. Rather, it aims to offer a comprehensive collection of case studies about ADR settlements and judicial decisions. These case notes emphasise that non-confrontational, extra-judicial dispute settlement processes entail significant advantages and that cultural heritage law is evolving also as a result of the sound settlements ordered by domestic courts. Furthermore, *ArThemis* could be seen from a more general perspective, as an additional tool of the arsenal available to disputants that – in combination with existing investigative and regulatory devices – may contribute to the creation of an environment more favourable to restitution and hence more responsive to the ideals propounded by UNESCO in its treaties.

94 Recommendation No. 3, Annex III, UNESCO Doc. 32 C/REP/15, 12th Session, 25–28 March 2003.

95 The Fight against the Illicit Trafficking of Cultural Objects – The 1970 Convention: Past and Future, Information Kit Produced by the Division of Public Information and the Culture Sector of UNESCO (CLT/2011/CONF.207/6), available at: http://unesdoc.unesco.org/images/0019/001916/191606e.pdf (14.02.2012), p. 26.

RAPHAEL CONTEL*

10. Echange, prêt et coopération culturelle: Solutions en matière de restitution de biens culturels

Synthèse

Par le biais d'affaires portant sur la restitution de biens culturels résolues principalement à l'amiable, nous analysons trois solutions: l'échange, le prêt et la coopération culturelle. La relation entre les parties autorise des coopérations sur le long terme qui impliquent souvent les modalités du prêt. La figure de la propriété (*erga omnes*) semble ainsi en porte à faux avec le caractère majeur des biens culturels (double nature: économique et culturelle) ou les besoins des parties. Le renvoi à la culture, qui serait le propre des biens culturels, empêche toute réduction définitive. En d'autres termes, tout litige portant sur un bien culturel questionne la relation juridique *per se*: est-elle possible? Est-elle même juste?

Abstract

Several cases concerning the restitution of cultural objects have been resolved amicably through the exchange or the loan of artworks or the establishment of inter-institutional programmes of cultural cooperation. The purpose of this article is to analyze these three different means of dispute settlement and their connections. For instance, a tight relationship between the parties of a dispute may facilitate the development of forms of long-term cooperation that may involve arrangements similar to those of art loans. This paper aims to disclose the dual nature of cultural objects: cultural and economic. In particular, it emphasises that property rights are at odds with the cultural, intangible, nature of every cultural object or with the parties' needs. In other words, any dispute relating to

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cultural objects entails a question on the legal relationship between the disputants per se: is it possible? Is it just?

Table des matières

I. Introduction

La relation juridique est définie par l'objet du litige. Le juge rendra une décision qui viendra souvent aussi solder les relations entre les parties. Un différend cristallise en surface une relation devenue difficile et inapte à évoluer. Le résultat de ce différend est la production d'un objet litigieux. Dès lors, la résolution du litige peut aussi reposer sur les parties elles-mêmes: rétablir la relation entre les parties peut conduire à des solutions innovantes.

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Le bien culturel est un objet délicat, difficile à saisir. Le droit lui réserve un régime d'exception fondé sur son caractère particulier: il est double. Le bien culturel ne peut être réduit à sa part matérielle, économique, mais il ne peut pas pour autant se prévaloir uniquement de sa part culturelle, immatérielle. Néanmoins, le renvoi à la culture, qui serait le propre des biens culturels, empêche toute réduction définitive. En d'autres termes, tout litige portant sur un bien culturel questionne la relation juridique *per se:* est-elle possible? Est-elle-même juste? En effet, la décision judiciaire tranche le litige sans pour autant rétablir le dialogue. Et le bien culturel n'ouvre-t-il pas sur la narration de nos humanités, parce qu'il est porteur d'identités, de valeurs et de sens[1]?

D'une part, le droit semble extrêmement rigide: les processus d'adoption et de mise en œuvre des conventions internationales sont lents et fastidieux. D'autre part, à l'inverse en quelque sorte, une fois les parties prêtes à réfléchir à des solutions qui répondent à leurs besoins et à leurs intérêts communs, le droit sait aussi faire preuve d'une certaine plasticité. A la double nature des biens culturels répond en écho une des dichotomies essentielles du droit entre possession et propriété. En effet, le prêt, figure juridique qui autorise l'écart entre possession et propriété, est une des solutions qui semble le mieux satisfaire aux besoins de coopération autour des biens culturels.

Nous analysons trois solutions que les parties à un différend portant sur un bien culturel ont adoptées: l'échange (II), le prêt (III) et la coopération culturelle (IV). Si l'échange porte sur la propriété et demeure dans une relation exclusive à l'objet convoité, le prêt fissure cette logique et ouvre la porte à des modalités multiples. Enfin, la coopération culturelle est un cadre plus large qui porte expressément sur les relations entre les parties.

Nous procédons de façon inductive en analysant différentes affaires qui ont consacré ces solutions pour en extraire les éléments les plus pertinents. Ensuite de quoi, nous mettons en relation ces solutions avec la problématique judiciaire de la restitution de biens culturels (V), en particulier par contraste avec deux obstacles notoires en la matière. Enfin, notre conclusion porte sur la fonction des modes alternatifs de résolution des litiges dans la sphère internationale.

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[1] Préambule de la Convention UNESCO 2005 sur la promotion et la protection de la diversité des expressions culturelles: "Convaincue que les activités, biens et services culturels ont une double nature, économique et culturelle, parce qu'ils sont porteurs d'identités, de valeurs et de sens et qu'ils ne doivent donc pas être traités comme ayant exclusivement une valeur commerciale."

II. L'échange: une solution en opportunité

A. Définition

1. En général: sens commun

On peut définir l'échange comme un double transfert de propriété. A propose à B un objet X dont il est propriétaire en échange d'un objet Y dont B est le propriétaire. Ensuite de l'échange, A est devenu propriétaire de l'objet Y et B propriétaire de l'objet X. La valeur des objets échangés peut être relative/subjective et/ou absolue/objective. Elle est absolue dans la mesure où, par exemple, les objets échangés possèdent la même valeur monétaire sur le marché. Elle est relative si les objets échangés peuvent être alloués en fonction de l'intérêt différentiel de l'une et l'autre partie.

La solution d'échange suppose donc, en principe, que la valeur monétaire des biens culturels échangés soit à peu près équivalente et l'intérêt des parties inverses en fonction de critères qui renvoient à la part immatérielle du bien culturel, soit au contexte culturel. Les conditions nécessaires à la réalisation de cette solution, telle que définie ci-dessus, semblent *a priori* plutôt maigres.

2. En droit suisse

En droit suisse, l'art. 237 du Code des obligations (CO; RS 220) consacré au contrat d'échange, reprend la définition exposée ci-dessus, tout en l'assortissant techniquement aux conditions de la vente[2], chacun des copermutants étant considéré comme vendeur quant à la chose qu'il promet et comme acheteur quant à la chose qui lui est promise (renvoi aux articles 184 CO et seqq). Les parties qui décident de résoudre leur litige par l'échange de biens culturels doivent donc faire attention au droit applicable à leur contrat d'échange et s'assurer que les conditions prévues par ce droit sont belles et bien remplies. Par mesure de prudence, ils devront donc assortir leur contrat d'une clause d'élection de for et de droit et s'assurer de l'adéquation de celle-ci avec le droit choisi.

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2 Pour une analyse de la vente d'œuvre d'art et de biens culturels, voir RENOLD MARC-ANDRÉ, *Le droit de l'art et des biens culturels en Suisse: Questions choisies,* Revue de droit suisse, Vol. 2, No. 129, Bâle 2010, pp. 153 et seqq.

B. Exemples

1. Affaire Tête égyptienne – MEN et Egypte[3]

Dans l'affaire de la Tête égyptienne du Musée d'ethnographie de Neuchâtel (MEN), qui date du début du XX^{ème} siècle, le conservateur de l'époque se félicite de l'échange car, selon lui, il a effectué une bonne affaire: la Tête retournée[4] à l'Egypte est de valeur moindre que les statuettes reçues en échange et qui font encore aujourd'hui, il est vrai, la réputation de la collection égyptienne du MEN[5]. Mais le Service des antiquités égyptienne voulait récupérer la Tête, non par simple caprice, mais parce qu'il avait retrouvé le buste de la statue[6.]

Les biens échangés n'étaient donc pas directement équivalents mais, selon l'estimation du Service des antiquités égyptiennes, indirectement équivalents, dans la mesure où la réunion de la Tête avec son ensemble vaut les statuettes.

2. Affaire Cloche de Shinagawa – Ville de Genève et Japon[7]

Dans l'affaire de la Cloche de Shinagawa, et qui date aussi du début du XX^{ème} siècle, le Japon demande par voie diplomatique à Genève la restitution de la Cloche, située à l'époque dans le Parc du Musée l'Ariana à Genève, en échange d'une lanterne en granit de forme Zendoji. Le Japon avance même que la lanterne viendrait heureusement compléter les collections du Musée de l'Ariana. La Cloche est un exemplaire extrêmement rare, sauvé miraculeusement de la destruction lors des guerres de Shogunat, pendant le

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3 BANDLE ANNE LAURE/CONTEL RAPHAEL/KNODEL BERNARD/RENOLD MARC-ANDRÉ, *Affaire Tête égyptienne fragmentaire – MEN et Service des antiquités de l'Egypte,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

4 Nous utilisons de façon plus ou moins équivalente les termes: restitution, retour et rapatriement. Pour une catégorisation de la matière en fonction de ces termes, voir KOWALSKI WOJCIECH, *Les divers types de demandes de récupération des biens culturels perdus,* Museum International, Vol. 57, No. 228, 2005, pp. 92 et seqq; CORNU MARIE/RENOLDMARC-ANDRÉ, *Le renouveau des restitutions de biens culturels: les modes alternatifs de règlement des litiges,* Journal du Droit International 2009, pp. 493 et seqq.

5 JÉQUIER GUSTAVE, Lettre du 11 décembre 1926, plateforme ArThemis (https://unige.ch/art-adr), Centre du droit de l'art, Université de Genève.

6 Voir les photos de la Tête et du buste dans le dossier relatif à cette affaire sur la plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève.

7 CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Cloche de Shinagawa – Ville de Genève et Japon,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

moyen-âge japonais, et qui comprend des gravures exemplaires[8]. La lanterne est très certainement d'un intérêt culturel moindre. La Ville de Genève accepte néanmoins l'échange.

La Cloche de Shinagawa n'est pas seulement un exemplaire rare de la culture japonaise, elle est aussi et avant tout un objet cultuel. Cet objet est donc dans une relation très forte avec une pratique effective[9]. La réinsertion de la Cloche dans son tissu historique et culturel, une fois les possesseurs originaires au fait du lieu de la Cloche (Parc de l'Ariana à Genève) et apte donc à fournir un récit, un contexte à la Cloche, produit des significations fortes qui érodent les prérogatives du propriétaire contemporain. En d'autres termes, un titre de propriété même valide (d'ailleurs, la Cloche fut sauvée de la fonte par M. Gustave Revilliod, collectionneur genevois, avant d'être léguée à la Ville de Genève), même investit des missions muséales classiques[10], n'a pas semblé un argumentaire suffisant pour justifier un refus. Cela étant, la démarche du Japon fut consciencieuse et opérée selon les voies formelles des relations entre Etats. De plus, le Japon a proposé un autre bien en échange. Enfin, la Cloche appartient à des rites cultuels qui sont vivants. On pourrait donc ici plutôt parler de restitution inconditionnelle couplée avec une compensation pratiquement symbolique (la lanterne) plutôt que d'un échange *stricto sensu* même si des biens culturels ont bien été matériellement échangés.

L'analyse juridique, du moins en droit positif suisse, ne retient pas un critère matériel d'équivalence de l'échange, ce sont bien les conditions de forme de l'échange que la loi prévoit, sauf si les limites de l'art. 27 du Code civil en venaient à être franchies (CC; RS 210). En d'autres termes, la loi entérine un échange d'objet et de titre de propriété, peu importe qu'ils soient cultuels ou culturels, et peu importe l'équivalence et sa mesure objective ou subjective. Mais dans l'ordre des relations, un échange symbolique entre deux univers culturels a opéré. La lanterne n'est donc pas venue remplacer la Cloche comme équivalence matérielle (même mesurée en intérêt culturel *lato sensu*). Elle fut bien plutôt, dans le processus de résolution, probablement destinée à assurer l'échange symbolique[11].

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8 Un très beau livre a été consacré à cette affaire qui présente notamment l'historique de la Cloche: ERIC BURKHARD/MARIE-THÉRÈSE COULLERY/DIDIER GRANGE/ANDRÉ KLOPMANN (éds.), *Genève-Shinagawa Shinagawa-Genève,* Genève 1996.

9 *Idem,* pp. 25 et seqq: on peut réaliser l'importance d'un bien culturel pour une population en mesurant la liesse qui a accompagné le retour de la Cloche au Temple de Shinagawa (voir, en particulier, les photos d'époque).

10 Voir par exemple les art. 4 et seqq du Code de déontologie de l'ICOM pour les musées, 2006.

11 Une association d'amitié Genève-Shinagawa a d'ailleurs été créée suite à cette affaire: http://www.geneve-shinagawa.ch/cloche.html (02.03.2012).

3. Affaire Collection 101 – Musée de Brême (Kunsthalle) et Russie[12]

Dans l'affaire de la collection du Musée de Brême, l'échange a opéré sans équivalence directe. En effet, celui-ci a été réalisé entre 101 biens culturels, dont des tableaux de maître, et deux biens culturels, une mosaïque florentine et un dessin de buste. La solution d'échange est apparue de façon opportune au bout d'un long processus. Elle a permis de soulever divers obstacles politiques et juridiques qui, jusqu'alors, avaient empêchés la restitution de la collection des 101 biens culturels, emportée de Brême par la Russie pendant la seconde guerre mondiale.

C. Synthèse

Les biens culturels échangés sont rarement de même valeur objective et ce, autant du point de vue de la valeur chiffrable que d'une importance artistique ou historique potentielle et définie scientifiquement ou de façon désintéressée. C'est bien plutôt un contexte, avec lequel le bien culturel est en relation plus ou moins étroite, qui est attributif de valeur ou d'importance. Ce contexte est souvent différentiel et dans un rapport non équivalent.

La valeur d'échange ne se trouve donc pas dans l'équivalence directe des biens échangés mais de façon médiane: pour la Tête égyptienne, la possibilité de reconstituer la statue en son entier; pour la Cloche de Shinagawa, l'exercice du culte; et pour la collection des 101 biens culturels de Brême, la difficulté de gestion du conflit sous-jacent, en lien avec la seconde guerre mondiale. La solution de l'échange vient donc jouer comme un catalyseur dans une situation qui, pour se résoudre, ne demande qu'une compensation *ad minima* (statuettes d'importance pour l'étude de l'Egypte ancienne, une lanterne en granit pour compléter les collections muséales, deux biens culturels saisis en Allemagne et volés à Saint-Pétersbourg).

La solution d'échange répond donc à un critère d'opportunité qui pourra souvent faire défaut. En effet, il faut non seulement que les arguments en restitution trouvent des ancrages en légitimité (exercice d'un culte vivant: c'est donc les personnes dans leur existence et leur identité qui sont directement touchées) ou en efficacité (posséder la moitié

12 BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case Sammlung 101 – City of Bremen, Kunsthalle Bremen and Russia,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, avril 2012.

d'une pièce importante[13]) ou encore en légalité (accord de coopération entre l'Allemagne et la Russie qui prévoit le retour des biens culturels emportés pendant la seconde guerre mondiale[14]), mais aussi être apte à proposer un bien culturel au moment opportun, même de moindre valeur, mais non pas sans intérêt pour la partie opposée et à convaincre.

III. Le prêt: une solution aux modalités plurielles

A. Définition

1. En général: sens commun

On peut définir le prêt comme une mise en possession pour une durée limitée, durée qui peut d'ailleurs être renouvelée, d'un objet à titre gratuit. Le prêt ne consiste pas en un transfert de propriété. Cette solution ne permet donc pas *a priori* de restituer un bien culturel. En effet, elle autorise uniquement le demandeur à utiliser le bien culturel pendant une période limitée, par exemple, à des fins d'exposition. En principe, au terme de la période de prêt, le bien culturel devra être rendu au propriétaire.

2. En droit suisse

Selon l'art. 305 CO, le prêt à usage est un contrat par lequel le prêteur s'oblige à céder gratuitement l'usage d'une chose que l'emprunteur s'engage à lui rendre après s'en être servi. Au titre de l'art. 309 al. 1 CO (*a contrario*), le prêt prend fin une fois que la durée prévue conventionnellement expire. Si aucune durée n'a été prévue conventionnellement, le prêt prend fin une fois que l'emprunteur a fait de l'objet l'usage convenu ou à l'expiration du temps dans lequel cet usage aurait pu avoir lieu. Enfin, si ni le temps d'usage ni l'usage lui-même ne sont déterminés, le prêteur peut réclamer l'objet en tous temps[15].

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13 Voir aussi l'Affaire de la Sculpture d'Héraclès, dans laquelle, néanmoins, le Musée de Boston a restitué sans conditions: CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ/CONTEL RAPHAEL, *Case Weary Herakles – Turkey and Boston Museaum of Fine Arts,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, octobre 2011.

14 Voir art. 16 du Treaty between the Federal Republic of Germany and the Union of Soviet Socialist, Republics on Good-Neighbourliness, Partnership and Cooperation, signé à Bonn le 9 November 1990, ILM 30 (1991), pp. 504 et seqq.

15 TERCIER PIERRE/PASCAL G. FAVRE, *Les contrats spéciaux,* 4e éd, Genève 2009, p. 436, no 2979. Sur la question du prêt en relation avec les musées, voir RENOLD MARC-ANDRÉ, *Vertragsverhältnisse in*

Ce bref aperçu des dispositions légales suisses consacrées au prêt à usage montrent que le législateur a voulu protéger le propriétaire en cadrant la durée possible du prêt[16]. L'expiration de cette durée ou de l'usage convenu emportant une obligation de restitution à charge de l'emprunteur[17].

B. Exemples

1. Mise en possession et restitution différée: le prêt pragmatique

a) Affaire des Manuscrits Coréens – France et Corée du Sud[18]

Les Manuscrits coréens découverts au dépôt de la Bibliothèque nationale de France (BnF) ont été rendu à la Corée du Sud sous la forme d'un prêt de courte durée (5 ans) par le Président français (voir art. 1 de l'accord[19]). Ce geste est intervenu dans le cadre des négociations entre la France et la Corée du Sud relatives au TGV coréen. Ensuite du retour des manuscrits sur le sol de la Corée du Sud, l'opinion qu'ils y resteraient a très vite été relayée dans la presse par des figures politiques et des associations militantes[20]. Et ce nonobstant la formule du prêt.

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der Welt der Bildenden Kunst und der Museen, 8. Kapitel, §4: Die Leihe und die Hinterlegung, in: MOSIMANN PETER/RENOLD MARC-ANDRÉ/RASCHÈR ANDREA F. G., Kultur, Kunst, Recht, Basel 2009, pp. 548 et seqq.

16 Extrait de l'arrêt de la I[ère] Cour civile du 27 juillet 1999 dans la cause Assocation Maison du Bout-du-Monde contre Ville de Genève, ATF 125 III 363, p. 365, consid. 2. d.: "Si l'on devait suivre l'opinion des parties, il en résulterait que l'emprunteur – qui est une personne morale dont le but statutaire n'est pas limité dans le temps – pourrait conserver l'usage de la chose indéfiniment, sauf s'il viole le contrat ou si le prêteur peut invoquer un besoin qui est à la fois urgent et imprévu (voir art. 309 al. 2 CO). L'usage de la chose étant un attribut essentiel du droit de propriété, on ne peut déjà guère imaginer que le propriétaire s'en défasse contractuellement pour l'éternité. Au demeurant, le droit suisse n'admet pas la conclusion de contrats "éternels" (voir ATF 114 II 159 consid. 2a p. 161 et les références). Une telle conception irait à l'encontre de la nature du prêt à usage, qui fait de la restitution l'obligation principale de l'emprunteur (art. 305 CO)".

17 TERCIER/FAVRE, *Les contrats spéciaux* (*cit.* n. 15), p. 435, n° 2973.

18 CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Manuscrits Coréens – France et Corée du Sud,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, juin 2012.

19 Décret n° 2011-527 du 16 mai 2011 portant publication de l'accord signé le 7 février 2011 entre la France et la République de Corée prévoyant le prêt des manuscrits de la dynastie Joseon.

20 OH JEONG-HUN, *Ces manuscrits sont maintenant sur le sol coréen durablement,* Yonhap News Agency, 11 juin 2011.

Il semblerait que la solution du prêt fut choisie en raison de sa simplicité et de sa rapidité. En effet, celle-ci permet le retour des manuscrits sur le sol de la Corée du Sud et la mise en possession de ceux-ci par la Corée du Sud, tout en évitant une procédure potentiellement plus longue et sujette à difficulté qui consisterait à faire sortir les manuscrits des collections publiques[21] (voir par exemple l'affaire de la Tête maorie de Rouen[22] dans laquelle une loi au sens formel[23] a dû être adoptée pour que les têtes maories appartenant aux collections publiques puissent être restituées).

b) Affaire Fresques de Casenoves – Ville de Genève et France[24]

Dans l'affaire des Fresques de Casenoves, la Ville de Genève a décidé de prêter lesdites Fresques à la France malgré l'échec des actions en justice menées sur le sol français[25] et l'échec potentiel d'une action en justice à introduire en Suisse. A l'échéance du prêt, la Ville de Genève a décidé unilatéralement de restituer les Fresques à la France. Pour ce faire, le Conseil administratif de la Ville de Genève a dû formellement décider de faire sortir les Fresques des collections publiques[26].

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21 Sur la protection particulière des biens du domaine public en droit français, voir CORNU MARIE, *Droit, oeuvres d'art et musées: Protection et valorisation des collections*, Nouvelle éd. revue et augmentée, CNRS, Paris 2006, pp. 265 et seqq.

22 CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Tête Maori de Rouen – France et Nouvelle-Zélande,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012. Voir aussi le Rapport Richert, n° 482, Sénat, 23 juin 2009 et l'article émouvant de CORNU MARIE, *Le corps humain au musée, de la personne à la chose,* Recueil Dalloz, 2009, pp. 1907 et seqq.

23 Loi n° 2010-501 du 18 mai 2010 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections.

24 CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Fresques de Casenoves – Musée d'Art et d'Histoire de la Ville de Genève et France,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

25 Arrêt de la Cour de Cassation, Assemblée plénière du 15 avril 1988, 85-10.262 85-11, entre la Fondation Abegg, la Ville de Genève et Mmes Y. et Z.

26 Sur une analyse de ces questions en droit Suisse, dont le régime de protection est certainement plus souple qu'en droit français, voir KNAPP BLAISE, *Liberté des musées de procéder à des transactions d'objets d'art: Suisse,* in: La vente internationale d'oeuvres d'art – Le commerce international de l'art et le droit, Paris et al. 1991, p. 138; RENOLD MARC-ANDRÉ/CONTEL RAPHAEL, *Rapport national suisse,* in: Protection de la propriété culturelle et circulations des biens culturels – Etude de droit comparé Europe/Asie, sous la responsabilité scientifique de CORNU MARIE, *Mission de recherche droit et justice,* CNRS, 2008, pp. 352 et seqq. Sur une analyse en droit comparé, voir CORNU/RENOLD, *Le renouveau des restitutions* (*cit.* n. 4), pp. 502 et seqq.

c) Affaire Tête Maorie de Genève – Ville de Genève et Nouvelle-Zélande[27]

Dans l'affaire de la Tête Maorie de Genève, ensuite de la demande du Musée national de Nouvelle-Zélande, la Ville de Genève a décidé de prêter la tête maorie détenue par les musées genevois depuis le début du XX^{ème} siècle. Ce prêt d'une durée de sept ans, renouvelable, n'a jamais été prolongé. Néanmoins, la tête maorie est restée au Musée national de Nouvelle-Zélande depuis lors (plus de dix ans ensuite de l'échéance du prêt). La Ville de Genève est actuellement en réflexion sur une possible prolongation du prêt ou sur la restitution pure et simple de la tête maorie (transfert définitif du titre de propriété).

2. Transfert du titre de propriété et restitution différée: le prêt symbolique

a) Affaire du Cratère d'Euphronios – Metropolitan Museum of Art (MET) et Italie[28]

Le Cratère d'Euphronios est considéré comme une des pièces parmi les plus importantes de la Grèce antique. Les circonstances exactes de son acquisition par le MET dans les années 1970 demeurent plus ou moins inconnues mais, ensuite de la découverte du réseau de trafic illicite de biens culturels liés à M. Medici dans les années 1990, les certitudes sur la connaissance de l'origine illégale du Cratère par le Directeur du MET à l'époque sont presque certaines[29].

En 2006, un accord a pu être conclu entre le MET et l'Italie qui prévoit notamment le transfert du titre de propriété à l'Italie et le retour du Cratère. Avant son retour en Italie, prévu pour le 15 janvier 2008 selon l'accord (environ deux ans ensuite de la signature de

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27 CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Tête Maorie de Genève – Ville de Genève et Nouvelle-Zélande,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

28 CONTEL RAPHAEL/BANDLE ANNE LAURE/SOLDAN GIULIA, *Case Euphronios Krater and Other Archaeological Objects – Italy and Metropolitan Museum of Art,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, juin 2012.

29 Voir GILL DAVID/CHIPPINDALE CHRISTOPHER, *From Boston to Rome: Reflections on Returning Antiquities,* International Journal of Cultural Property, Vol. 13, No. 03, 2006, pp. 311 et seqq; GILL DAVID/CHIPPINDALE CHRISTOPHER, *From Malibu to Rome: Further Developments on the Return of Antiquities,* International Journal of Cultural Property, Vol. 14, No. 02, 2007, pp. 205 et seqq.

l'accord), le Cratère doit néanmoins être exposé au MET avec la mention "prêté par l'Italie". Le Cratère est aujourd'hui exposé au Musée National Etrusque[30].

Le prêt par l'Italie du Cratère au MET, avant son retour, emporte plusieurs significations fortes: premièrement, le Cratère est exposé au MET avec la mention du prêt, c'est-à-dire avec l'indication que le propriétaire légitime n'est pas le MET; deuxièmement, même si le Cratère n'est pas tout de suite retourné ensuite de la signature de l'accord, le transfert de propriété est visible publiquement, ce qui signale la bonne foi du MET vis-à-vis des obligations entérinées par l'accord; troisièmement, l'Italie n'exige pas le retour immédiat du bien culturel, dont l'origine illicite est avérée, mais en prêtant celui-ci signale aussi que les relations entre le MET et l'Italie sont entrées dans une phase de coopération (ce que les autres clauses de l'accord formalisent, voir en particulier l'art. 7 de l'accord qui prévoit que les biens culturels découverts par des fouilles autorisées au frais du MET doivent être prêtés à celui-ci); enfin, le prêt du Cratère initie la coopération entre le MET et l'Italie dont le fonctionnement est basé sur le prêt de biens culturels de l'Italie au MET.

Le prêt symbolique du Cratère par l'Italie au MET avant son déplacement au Musée National Etrusque n'est pas dans cette affaire lié à une exposition symbolique en relation avec la mémoire collective (voir, par exemple, l'Affaire de la Valise d'Auschwitz[31]). Le prêt vient ici jouer plutôt comme symbole des nouvelles relations de coopération du MET et de l'Italie. Par cet accord, au-delà de la restitution du Cratère, de nouvelles règles de comportement, qui bénéficient en principe aux deux parties, sont établies. Le principal intérêt du MET, c'est-à-dire l'exposition de pièces exemplaires de l'antiquité, est atteint grâce aux prêts qui suivront celui du Cratère. Dans un sens, il emporte peu au MET d'être propriétaire des pièces. Son besoin véritable consiste à pouvoir exposer des pièces exemplaires, nombreuses et variées; et encore mieux avec une rotation (voir les articles 4.1 b, 5.3 et 7 de l'accord). Quant à l'Italie, son intérêt principal est le rapatriement des trésors de son patrimoine mais elle n'a pas besoin de conserver sur son territoire les innombrables pièces de son patrimoine archéologique. Elle a bien plus besoin de s'assurer de la collaboration d'institutions étrangères, autant pour la circulation des pièces de son patrimoine, que pour l'étude et la découverte de nouvelles pièces archéologique; ce qui peut aussi faire diminuer les fouilles illicites.

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30 Voir http://villagiulia.beniculturali.it/index.php?it/141/selezione-di-opere/17/cratere-di-euphronios (27.02.2012).

31 BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Auschwitz Suitcase – Pierre Lévi Heirs and Auschwitz-Birkenau State Museum Oswiecim and Shoah Memorial Museum Paris,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

Matériellement, la formule du prêt permet la mise en possession et la circulation des biens culturels. Formellement, la formule du prêt signale aussi que le bien culturel doit être rattaché à un patrimoine d'origine: l'Italie en est propriétaire. De façon exemplaire, on assiste ici à une sorte d'inversion de la dichotomie propriété/possession. En principe, pour le contexte culturel d'origine, il suffit de jouir de la possession du bien culturel (c'est la privation de biens culturels qui empêche l'exercice d'une culture qu'il faut signaler comme les atteintes les plus graves); pour l'acquéreur subséquent, la reconnaissance du titre de propriété suffit pour établir sa bonne conduite. Néanmoins, le renvoi à la culture, à cette autre chose qu'est la culture, qui serait le propre des biens culturels, n'est pas sans plasticité. La part immatérielle peut être rattachée symboliquement à la propriété de biens culturels issus du territoire national sans toutefois que la possession soit nécessaire en tous les temps et tous les lieux. Cette figure est très proche de celle du patrimoine de l'humanité dans la mesure où le titre de propriété du bien culturel consacre le lien fort entre un patrimoine et les représentations du détenteur de celui-ci tout en laissant une marge (nécessaire: la surveillance des sites archéologiques peut être une tâche ingrate) quant à sa gestion; gestion qui peut incomber à divers partenaires et dont le lien avec ledit patrimoine est étroit sans être aussi prééminent. Il est vrai que cette figure qui voudrait voir les liens les plus étroits entre certains biens culturels et une nation n'est qu'une hiérarchie potentielle (ou de circonstance: le jour n'est peut être plus si loin ou les Etats ne seront que les gestionnaires de biens culturels propriété de l'humanité). Hiérarchie qui pourrait être ventilée en différentes catégories auxquelles des compétences et des responsabilités se verraient allouées. La propriété de certaines catégories de biens culturels consacreraient ce qui demeure de l'ordre des représentations: d'une nation et d'une culture, d'une histoire des identités (c'est le sens évident des trésors nationaux). Quant à la possession, elle participerait du dialogue des cultures.

3. Rejet de la demande en restitution: prêt symbolique et autres mesures

a) Affaire du Globe terrestre – Saint-Gall et Zurich[32]

Ensuite de la guerre des religions entre Saint-Gall et Zurich (1712), des biens culturels sont emportés par Zurich dont notamment un Globe terrestre tout à fait exceptionnel. Celui-ci et d'autres manuscrits appartenant à l'Abbaye de Saint-Gall ne sont jamais restitués. Le 27 avril 2006 un accord fait suite à la médiation entre les parties. Dans cet accord, la propriété de Zurich sur le Globe terrestre est reconnue. Néanmoins, le Globe

[32] BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Ancient Manuscripts and Globe – Saint-Gall and Zurich,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

est prêté à Saint-Gall pour une durée de quatre mois. De plus, Zurich doit réaliser une copie exacte du Globe à ses propres frais et la donner à Saint-Gall.

A l'inverse de l'Affaire du Cratère d'Euphronios, la possession est ici nécessaire pendant au moins un laps de temps pour affirmer le lien entre un bien culturel et un contexte culturel mais elle n'est pas nécessaire *ad aeternam;* on peut ensuite se contenter d'une copie. Car ce qui est en jeu ce n'est pas la possession de l'authentique (et de sa valeur marchande ou rituel) mais bien le jeu sur les représentations et la reconnaissance de l'importance culturelle des uns et des autres (voir art. II. 2 de l'accord). Le couple propriété et possession permet ainsi d'assurer, d'une part, la légalité de l'acquisition et, d'autre part, le rattachement entre le bien culturel et un contexte culturel.

b) Affaire Portrait of Wally – Etats-Unis, les héritiers de Lea Bondi et le Musée Léopold[33]

Lors d'une exposition temporaire au Musée d'Art Moderne de New York (MoMa), "Portrait of Wally" d'Egon Schiele, qui figure parmi les biens culturels prêtés par le Musée Leopold, est saisi par les autorités new-yorkaises. Il s'en suit une longue procédure judiciaire intentée par les héritiers de Lea Bondi qui avancent que le tableau fut spolié à Vienne pendant l'Anschluss. Juste avant de procéder devant un jury afin de déterminer si M. Léopold savait l'origine illicite du tableau au moment de son importation aux Etats-Unis, les parties concluent un accord transactionnel. Celui-ci prévoit que les héritiers de Lea Bondi seront indemnisés à hauteur de 19'000'000 U.S. dollars. Avant de retourner en Autriche, le tableau est néanmoins exposé sous la forme d'un prêt pendant trois semaines au Musée Juif de New York.

Les œuvres d'Egon Schiele furent d'abords collectionnés par des amateurs et des professionnels éclairés. Le Professeur Léopold fut l'un deux. On lui reproche néanmoins ses méthodes sans scrupule[34.] La collection des œuvres d'Egon Schiele du Musée Léopold est sans conteste une des plus importantes et elle est publique. Les œuvres des peintres de la modernité, tel Egon Schiele, trouvent leur place légitime aujourd'hui dans des musées. Il aurait été tout à fait curieux de restituer *in rem* aux héritiers le tableau d'Egon Schiele. L'indemnisation compense la perte du tableau en valeur marchande mais vient

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33 CONTEL RAPHAEL/CHECHI ALESSANDRO/SOLDAN GIULIA, *Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

34 DOBRZYNSKI JUDITH, *The Zealous Collector: A Singular Passion For Amassing Art, One Way or Another,* The New York Times, 24 décembre 1997, available at: http://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html?pagewanted=all&src=pm (02.03.2012).

aussi trouver sa légitimé dans la reconnaissance de l'holocauste et des abus commis pour profiter des biens acquis, collectionnés, par les personnes juives. Pour cette raison, le tableau fut exposé au Musée Juif de New York sous la forme d'un prêt symbolique.

La propriété et la possession du tableau importe peu au final ici, pourvu que celui-ci soit exposé au public dans un cadre qui lui redonne un contexte difficile mais nécessaire, et qu'un travail sur la mémoire collective puisse être accompli. L'œuvre sera ainsi dorénavant exposée au Musée Léopold avec la mention que le tableau fut volé à Lea Bondi par les Nazis ainsi que l'a établi un tribunal new-yorkais.

4. Rejet de la demande en restitution: le prêt à long terme

a) Affaire de la valise d'Auschwitz – Musée d'Auschwitz et héritiers de M. Levi[35]

Le Musée d'Auschwitz prête des objets de sa collection au Mémorial de la Shoah de Paris. Lors d'une visite au Musée par M. Levi-Leleu, celui-ci reconnaît une valise ayant appartenu à son père. Il s'ensuit des négociations entre les parties qui n'aboutissent pas. M. Levi-Leleu introduit une action en justice auprès du Tribunal de grande instance de Paris qui ordonne la confiscation et la séquestration de la valise. A la fin de l'exposition au Mémorial de la Shoah (prolongé d'entente entre les deux musées), le Tribunal interdit le retour de la valise. Les parties finissent par s'entendre et signent un accord qui prévoit que la valise demeure exposée au Mémorial de la Shoah à Paris sur la base d'un prêt à long terme. Le Musée d'Auschwitz reste propriétaire de la valise.

Le conflit est ici très fort entre la mémoire collective et la blessure individuelle: comment ne pas comprendre, d'une part, Monsieur Levi-Leleu lorsqu'il s'oppose au retour de la valise par le même chemin qui a mené son père à la mort et, d'autre part, comment ne pas comprendre le Musée d'Auschwitz dont le but est d'entretenir la mémoire collective de l'holocauste?

La muséification de l'holocauste enlève au destin individuel la part propre pour la restituer au destin collectif. Le prêt à long terme au Mémorial de la Shoah respecte ainsi la narration collective du drame et le choque personnel, l'incarnation de l'Histoire, tout en soulignant la légitimité du travail du Musée d'Auschwitz qui, gardant la propriété sur la valise, apparaît comme un des *trustees* de notre Histoire humaine et non pas, à l'évidence, comme des acquéreurs belliqueux et égoïstes.

35 BANDLE/CONTEL/RENOLD, *Case Auschwitz Suitcase* (*cit.* n. 31).

5. Rejet de la demande en restitution: le prêt et restitution différée

a) Affaire Ayuba Suleiman Diallo – Qatar et Royaume-Uni[36]

Ensuite de l'achat de la peinture d'Ayuba par le Qatar auprès de Christie's au Royaume-Uni, le tableau se voit refuser l'exportation hors du Royaume-Uni. Celui-ci, en respect des critères Waverly, est considéré comme un trésor national. Il s'ensuit une procédure de récolte de fonds. La National Portrait Gallery (NPG) de Londres fait une offre d'acquisition que le Qatar refuse. Un accord transactionnel est conclu entre les parties qui prévoit le prêt du tableau à la NPG puis son exposition au Qatar et enfin le retour du tableau au Royaume-Uni sous la forme d'un prêt de cinq ans. On ne sait pas si à l'expiration de celui-ci le tableau pourra définitivement sortir du Royaume-Uni.

Au moment où le Royaume-Uni décide que le tableau appartient au patrimoine britannique, il réclame indirectement la restitution du tableau contre le paiement de sa valeur marchande au motif qu'il est un trésor national. Le but de l'acquisition est de permettre le contrôle du tableau et son exposition sur le sol britannique. Le prêt permet ici d'atteindre cet objectif tout en ménageant un aller-retour au Qatar auprès de son propriétaire actuel.

Cela étant, une fois le tableau sur le sol du Qatar, le Royaume-Uni pourra difficilement faire valoir son doit public. Mais l'accord doit plutôt être perçu comme un accord de coopération culturelle dont le tableau d'Ayuba fut l'élément déclencheur. De plus, la violation de l'accord entraînerait la responsabilité des parties et serait bien sûr dommageable quant à leur coopération; coopération très certainement plus importante que la possession d'un seul tableau. A noter, que la sortie hors du Royaume-Uni à l'expiration du second prêt pourra encore donner lieu à une interdiction d'exportation. Peut-être que le Qatar décidera alors de vendre le tableau au Royaume-Uni?

6. Solutions complexes impliquant le prêt de biens culturels

Dans les affaires du Cratère d'Euphronios et du Globe terrestre de Saint-Gall, le prêt symbolique à courte durée avant la restitution ou l'abandon de la contestation du titre de propriété est couplé avec des prêts de biens culturels par la partie qui conserve le titre de propriété sur la ou les pièces majeures. Ainsi, l'Italie s'est-elle engagée à prêter des pièces de valeur esthétique et archéologique égale au Cratère pour des périodes de quatre

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36 BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Ayuba Suleiman Diallo – Qatar Museums Authority and the United Kingdom,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, septembre 2012.

ans. De même, Zurich s'est engagé à prêter pour une période indéterminée 35 manuscrits qui appartiennent à la Bibliothèque centrale de Zurich.

Le prêt symbolique de la pièce majeure avant la restitution ou l'abandon de la contestation permet la mise en place de la coopération tout en signifiant symboliquement que le litige est dépassé. Ce dépassement du litige est ensuite entériné par une collaboration plus large qui implique le prêt de biens culturels par la partie qui a bénéficié en principal de la pièce majeure et, surtout, des clauses de coopération comme celle portant sur les fouilles en Italie aux frais du MET.

C. Synthèse

Dans les affaires de demande en restitution de biens culturels, le prêt peut apparaître quelque fois comme une solution qui vise non pas au respect des prérogatives du propriétaire mais bien plutôt au contournement de celles-ci (Affaire des Manuscrits Coréens par exemple). Le prêt apparaît aussi comme une solution accessoire qui peut compléter la restitution de façon variable: prêt de l'objet restitué (transfert du titre de propriété) pour une durée limitée à la personne physique ou morale qui a restitué; prêt d'autres biens culturels en compensation de l'objet restitué; prêt pour une exposition exemplaire avant le retour du bien culturel.

Le titre de propriété peut être important non pas quant à la libre disposition du bien culturel mais quant à la légitimité de celui qui se prévaut d'un tel titre[37]. Pour de nombreuses institutions, la remise en question du titre de propriété revient à mettre en doute l'intégrité des personnes en charge de l'institution et l'institution elle-même. Alors que pour les personnes revendiquant les biens culturels, c'est souvent la possession même de l'objet et sa jouissance qui peuvent être relativement les plus importantes. A vrai dire, la reconnaissance de l'importance culturelle du bien peut passer par la propriété sans possession (rattachement au patrimoine national par exemple) ou à l'inverse par la possession sans la propriété (jouissance nécessaire du bien culturel). Les affaires que nous avons passées en revue montrent que les parties parviennent à des équilibres très subtils qui dépassent la simple problématique du titre de propriété. La figure du prêt est un des éléments combinatoires par excellence de ces accords transactionnels. Le prêt est aussi une figure importante de la coopération culturelle et de la circulation des biens culturels dès lors que les Etats et leurs institutions publiques inhérentes sont en voie de devenir des *trustees* du potentiel de l'humanité.

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37 Sur un développement de cette question, voir WOLKOFF JOSHUA S., *Transcending Cultural Nationalist and Internationalist Tendencies: The Case for Mutually Beneficial Repatriation Agreements,* Cardozo Journal of Conflict Resolution, 2010, p. 735.

IV. La coopération culturelle: une solution paradigmatique

A. Définition

1. En général

On pourrait définir, dans la sphère internationale, la coopération culturelle comme une des expressions de la solidarité entre les Etats (*"faire la paix dans les esprits"* au sens de la Charte constitutive de l'UNESCO). La coopération culturelle renvoie ainsi à une nouvelle hypothèse des relations internationales qui ne seraient plus fondées sur la coexistence des Etats[38].

Mais alors que le dispositif de règles de l'Organisation mondiale du commerce (OMC) vise à la suppression des prérogatives étatiques sur le commerce transfrontalier, les conventions internationales adoptées sous l'égide de l'UNESCO placent les Etats au cœur de la régulation des échanges culturels. L'opposition de principe est ici fort connue entre politique culturelle invasive ou réalisée par le marché (par exemple, la culture étasunienne *mainstream*) et politique culturelle de construction, en particulier pour les Etats plus ou moins récemment décolonisés. Quoiqu'il en soit, ces deux principes généraux des échanges culturelles reposent sur une vision plus ou moins poreuse de l'Etat; soit l'Etat est perçu comme un capteur dangereux de ressources et doit donc être assoupli, soit l'Etat est perçu comme nécessaire mais encore trop frêle et doit donc être aidé dans sa croissance triple: économique, politique et culturelle. De façon radicale, il faudrait donc soit donner libre cours au marché sur toutes les matières, soit exclure du marché la culture; il reviendrait alors aux Etats d'en gérer l'essor comme l'archive. A ces deux principes opposés générateurs, viendrait s'en accoler un troisième: l'idée d'un patrimoine culturel de l'humanité dont les Etats seraient des *trustees*.

A des vitesses de croissance différentes répondent des besoins différents. Ces trois principes, ou hypothèses de réflexion, ne doivent pas être positionnés les uns contre les autres. Ils doivent se répondre, se compléter. Le patrimoine culturel de l'humanité ne doit pas servir à s'opposer au patrimoine national mais bien à graduer des intérêts et des besoins différents, ici une culture en voie de cimenter une nation (ou qui renvoie à une narration de la nation ou à une intelligence des peuples), là des biens culturels qui dépassent les antagonismes du moment. Mais le patrimoine national ne peut être plébiscité au-

38 MAINETTI VITTORIO, *L'intérêt culturel internationalement protégé: Contribution à l'étude du droit international de la culture*, Genève 2011, p. 32.

delà d'une certaine mesure dont les forces vives pâtiraient. Par ailleurs, la diabolisation des forces du marché déforme l'analyse des échanges et des créations culturelles. L'humanité s'enrichit certainement de ses frottements paradoxaux[39]. Enfin, les Etats ne sont plus les seuls acteurs de la communauté internationale[40].

La culture ne doit donc pas être seulement définie en fonction des compétences étatiques en la matière et des engagements conventionnelles. Les forces du marché ne provoquent pas forcément un reflux des Etats vers les questions culturelles dans le but de capter ces questions comme domaine résiduel de compétence. En effet, tout un chacun aujourd'hui participe de la communauté culturelle internationale à toute heure du jour et de la nuit; et chacun y participe individuellement ou par l'entremise d'associations locales, régionales, internationales, ou encore par des institutions privées. Et l'Etat est probablement un des régulateurs ou un des interfaces importants de ces différents intérêts et acteurs en cause.

2. La coopération culturelle au sens technique

Nous entendons par coopération culturelle, au sens technique, l'insertion de clauses dans des accords portant sur la résolution d'un litige en matière de biens culturels qui prévoient des échanges de compétences culturelles (experts, recherche) et l'établissement de relations sur le long terme (échange d'étudiants, fonds de recherche, prêts).

L'insertion de ces clauses dans les accords repose sur les principes généraux évoqués précédemment: politique culturelle étatique (patrimoine national); politique culturelle de la communauté internationale (patrimoine de l'humanité); et force du marché. C'est-à-dire sur la reconnaissance différée de ces divers intérêts et besoins et sur des solutions de coopération qui cherchent à les équilibrer.

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39 Sur une critique du débat traditionnel entre "nationalisme culturel" et "internationalisme", tel que défini notamment par le Prof. MERRYMAN, débat malheureusement réducteur; et conduisant à une impasse idéologique, théorique et pratique, voir WOLKOFF JOSHUA, *Transcending Cultural Nationalist and Internationalist Tendencies* (*cit.* n. 37), p. 725.

40 Pour une typologie des acteurs du droit international en la matière, voir CHECHI ALESSANDRO, *The Settlement of International Cultural Heritage Disputes: Towards a Lex Culturalis?*, European University Institute, 2011, pp. 78 et seqq.

B. Exemples

1. Approche mécaniste ou collaborative: mise en œuvre de la Convention Unesco 1970

a) Approche mécaniste: les accords bilatéraux suisses fondés sur l'art. 7 LTBC.

Ensuite de la ratification de la Convention Unesco 1970, la Suisse a adopté en juin 2005 une législation de mise en œuvre, la loi fédérale sur le transfert international de biens culturels (LTBC; RS 444.1). Quant au volet du vol de biens culturels, la LTBC a notamment permis l'introduction d'une modification du Code civil suisse en prolongeant le délai de péremption de l'action en revendication à 30 ans. Quant au volet de l'exportation illicite de biens culturels, la LTBC prévoit à son art. 7 que le Conseil fédéral peut conclure des accords bilatéraux avec les Etats parties à la Convention de l'Unesco 1970. La Suisse a donc choisi la voie des accords bilatéraux quant à la mise en œuvre de l'art. 2 al. 2 et 13 de la Convention UNESCO 1970. A ce jour (octobre 2011), 4 accords sont entrés en vigueur (Grèce, Italie, Egypte, Colombie). Ces accords permettent pour l'essentiel de reconnaître le droit public étranger. En effet, par le truchement de l'accord bilatéral, une exportation illicite d'un bien culturel hors de ces quatre pays devient une importation illicite en Suisse (et inversement). L'approche peut être décrite comme mécaniste. Cette interprétation a été confirmée par le Tribunal fédéral qui a exclu toute autre approche pour reconnaître le droit public étranger en la matière (par exemple, en application de l'art. 19 de la loi fédérale sur le droit international privé, LDIP; RS 291)[41].

41 Arrêt du Tribunal fédéral du 8 avril 2005, ATF 131 III 418; sur la relation entre la LTBC et cette décision, voir FELLRATH GAZZINI ISABELLE, *The Swiss Supreme Court Decides: India v Credit Agricole Suisse,* Art Antiquity and Law, Vol. X, Issue 4, 2005, pp. 401 et seqq; en particulier, sur l'interprétation des accords bilatéraux, p. 406. Sur une critique de cet arrêt, voir BUCHER ANDREAS, *La clause d'exception dans le contexte de la partie générale de la LDIP,* in: La loi fédérale de droit international privé: vingt ans après, Actes de la 21ème Journée de droit international privé du 20 mars 2009 à Lausanne, Genève 2009, p. 68: "Cette jurisprudence inverse l'ordre des valeurs […]"; RENOLD MARC-ANDRÉ, *Une importante décision Suisse en matière de transfert international de biens culturels: L'arrêt du Tribunal fédéral sur les pièces d'or anciennes du 8 Avril 2005,* Revue de droit uniforme, Vol. 11, No. 2, 2006, pp. 399 et seqq.

b) Approche collaborative: les accords bilatéraux américains fondés sur la loi de mise en œuvre de la Convention Unesco 1970 (art. 9)

Les Etats-Unis ont notamment mis en œuvre la Convention de l'UNESCO 1970 par le biais de la *Convention on Cultural Proprety Implementation Act* du 12 janvier 1983 (CCPIA) qui permet aux Etats-Unis d'établir des restrictions à l'importation de certains biens culturels par la voie d'accords bilatéraux avec d'autres Etats parties à la Convention UNESCO 1970. Sur demande d'un Etat partie, une Commission doit établir que l'Etat en question remplit les conditions établies par le CCPIA avant de recommander la conclusion d'accords bilatéraux. Ces conditions sont en rapport avec la coopération culturelle (relation patrimoine national/patrimoine de l'humanité) dans la mesure où elles visent à vérifier que les restrictions à l'import sont un complément à la lutte menée par l'Etat sur son propre territoire et que ces restrictions sont consistantes avec les intérêts de la communauté internationale en ce qui concerne l'échange de biens culturels (SEC. 303 CCPIA).

A titre d'exemple, l'accord bilatéral conclu entre la Colombie et les Etats-Unis en 2006[42], s'il prévoit bien une mesure technique à son art. I (restriction à l'import d'objets Pré-Colombiens), est complété par un art. II dédié à la coopération culturelle qui prévoit notamment une assistance technique des Etats-Unis auprès de la Colombie (art. II C), l'échange d'experts, la mise en place de collaborations de recherche, etc. (art. II D) ainsi que, par exemple, le prêt de biens culturels dans la mesure où celui-ci ne met pas en péril lesdits objets (art. II E).

A la différence des accords bilatéraux suisses, les accords américains ne se satisfont pas d'une réponse mécaniste située à un seul bout de la chaîne du trafic et/ou de l'échange de biens culturels[43]. Ces accords entérinent au contraire une collaboration dans le but de lutter contre le trafic illicite par l'aide à la protection du patrimoine national de l'Etat étranger et, dès lors, logiquement, par l'admission de la reconnaissance de sa législation de protection. Les accords visent ainsi non seulement l'assainissement du trafic mais aussi le renforcement des échanges culturels (objets et expertises).

c) Synthèse

Les dangers de l'approche mécaniste consistent dans le risque de rétention des Etats dans le but d'obtenir, au cas où et à tout prix, le retour des biens culturels illicitement exportés et dans une forme d'aveuglement pour l'Etat du *for* quant aux réalités de la situation des

42 Voir http://exchanges.state.gov/heritage/culprop/cofact/pdfs/co2006mou.pdf (12.03.2012).

43 Néanmoins, les accords bilatéraux conclus par la Suisse pourraient améliorer les échanges entre les administrations concernées.

Etats étrangers (d'où, dans le fond, la raison de la non-applicabilité du droit public étranger: à l'impossible vérification succède le refus). Alors que l'approche collaborative vise à permettre la circulation des biens culturels tout en renforçant la licéité de cette circulation; ce qui ne peut se faire, de façon pragmatique, qu'en s'assurant de la qualité de la chaîne de transaction à chacun des tenants de celle-ci.

2. Les accords complexes en matière de biens culturels

a) Affaire du Cratère d'Euphronios

Le litige entre l'Italie et le MET trouve son ancrage principal dans l'acquisition probablement illicite du Cratère d'Euphronios par le MET (ce que l'accord nie formellement, voir préambule lettre I). Quoiqu'il en soit, la restitution de celui-ci par le MET est encadrée par un processus de coopération culturelle qui vise à mettre fin au conflit qui porte sur les pratiques, avérées ou probables, de certains musées américains en lien avec le pillage des biens archéologiques italiens. L'accord quant à sa structure thématique est très proche de l'accord entre la Colombie et les Etats-Unis que nous avons mentionnés auparavant. En effet, celui-ci dispose expressément que la restitution du Cratère, et d'autres biens culturels litigieux, prend place dans le contexte d'une coopération de longue durée (*Long-Term Cultural Cooperation Agreement*). Cette coopération de longue durée passe par un certain nombre de principes cadres, de mesures techniques et de collaboration culturelle matérielle.

- Principes cadres:

Le préambule de l'accord est divisé en deux parties: l'une est consacrée à l'Italie, l'autre au MET. Le préambule énonce les principes cadres qui gouvernent les parties quant aux clauses contenus dans l'accord. Ces principes renvoient à un potentiel intérêt commun. D'une part, on reconnaît l'importance des biens archéologique découverts sur le sol italien pour la mémoire collective italienne, comme la responsabilité italienne quant à une législation apte à les conserver comme à fournir les autorisations nécessaires. D'autre part, on reconnaît l'importance des missions muséales pour l'intérêt du public quant à la préservation, l'interprétation et l'échange du patrimoine culturel, comme on déplore que les missions muséales s'accomplissent au détriment de la recherche scientifique (excavation illicite) et de manière illégale.

La clé de l'équilibre repose sur le renforcement des législations nationales de protection des biens culturels pour autant qu'elles ne mettent pas fin à la circulation des biens culturels (c'est-à-dire au dialogue interculturel); ce qui peut être réalisé par un accès légitime aux fouilles et par des collaborations scientifiques et muséales (prêts). L'intérêt commun des parties consiste en la fluidité des relations coopératives qui doivent, d'une part, permettre d'empêcher le développement du trafic illicite et, d'autre part, nourrir les

échanges culturels grâce à la circulation des expertises et des biens culturels. La non-coopération entre les parties, en ce qu'elle risque de nourrir le trafic illicite, peut entraîner le durcissement des législations nationales comme les demandes en restitution contentieuses (sans pour autant parvenir à protéger le patrimoine), comme une politique prédatrice des musées (au détriment des missions idéales de connaissance et de divulgation de l'information). La polarisation des intérêts semble ainsi rendre moins efficace le comblement des besoins.

- Mesures techniques et collaboration culturelle:

La restitution des biens culturels à l'Italie par le MET (art. 3, 4 et 5) est couplée à des prêts par l'Italie au MET. De même, l'accès au sol italien pour des fouilles par le MET, ou financée par le MET, est couplée à la possibilité de prêter les biens culturels trouvés (art. 7). L'accord insiste sur la notion de durabilité (*Long-Term Cooperation*) dans le cadre duquel ces prêts doivent avoir lieu.

C'est bien à un nouveau comportement, ou à une nouvelle définition de leurs relations mutuelles, que les parties se sont engagées. Le but de l'accord n'est pas seulement de mettre fin à un litige concernant tel ou tel bien culturel mais bien de modifier les causes qui sont susceptibles d'engendrer des litiges. Dès lors, l'accord postule que si les musées et les Etats au patrimoine riche en biens culturels agissent en commun, ils le feront au détriment des trafiquants et pour leurs bénéfices mutuels.

b) Affaire Ayuba Suleiman Diallo

Dans l'affaire du tableau d'Ayuba, la situation de blocage (acquisition licite du tableau et impossibilité de l'exporter au Qatar) est surmontée grâce à la figure du prêt. Mais à nouveau, les parties ne se contentent pas du simple prêt pour contourner ou remettre à plus tard la douloureuse question de la libre disposition par le propriétaire, ils encadrent la solution du prêt par des mesures de coopération culturelle: financement de programme de recherche (Qatar) et organisation (NPG), divulgation internationale des résultats, échange de compétences (expert du Qatar en *interim* à la NPG).

c) Affaire Obélisque d'Axoum – Italie et Ethiopie[44]

Le retour de l'Obélisque d'Axoum sur le site d'Axoum, entièrement au frais de l'Italie, qui constitue une prouesse technique, ledit Obélisque pesant près de 27 tonnes, après un long processus de plus de 50 ans, doit être considéré en regard de nombreux éléments

[44] CONTEL RAPHAEL/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Affaire Obélisque d'Axoum – Italie et Ethiopie,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

déclencheurs: traité de paix et mise en œuvre différée; déclaration conjointe des parties qui reconnaît notamment l'importance de l'Obélisque pour l'Ethiopie; organisation non-gouvernementale de soutien au retour de l'Obélisque; etc. Mais à cela, il faut ajouter l'inscription du site d'Axoum au patrimoine mondial[45]. D'ailleurs, les travaux de remise en place de l'Obélisque ont été réalisés par une entreprise italienne mandatée par le Comité du patrimoine mondial de l'UNESCO. Le financement des travaux est le fruit d'une contribution extraordinaire de l'Italie au budget de l'UNESCO.

Le rattachement du site d'Axoum au patrimoine mondial autorise aussi le dépassement du litige. La résolution n'a plus seulement lieu dans une relation bilatérale où il faut répartir les dommages et les intérêts mais sous l'égide d'un tiers libérateur: le patrimoine de l'humanité. L'Ethiopie est ainsi devenue garante d'un bien culturel qui participe du patrimoine de tout un chacun, y compris l'Italie.

d) Affaire des Manuscrits Coréens

La restitution des Manuscrits a peut être opérée en opportunité; le président français voulant s'assurer la confiance de ses partenaires coréens sur le projet ambitieux du TGV coréen. Cette décision a été très mal perçue par les défenseurs du patrimoine culturel (pétition des conservateurs de la BnF). Mais peut être ne faut-il pas trop vite opposer culture et économie? L'engagement de la France et de la Corée du Sud dans une relation importante d'un point de vue économique peut être heureusement couplé avec la manifestation ostensible de la reconnaissance de la culture du partenaire[46]. Ce d'autant que les Manuscrits sont inscrits au registre de la mémoire du monde.

Là encore, le retour des Manuscrits coréens sur le sol de la Corée du Sud doit plutôt être perçu comme une collaboration et une mise en gestion des éléments les plus notoires du patrimoine de l'humanité. Qui plus est, le prêt des Manuscrits est aussi accompagné de mesures de coopération culturelle telle que la mise à disposition des Manuscrits pour des expositions en France sur le thème de la Corée (art. 3 de l'accord).

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45 Voir http://whc.unesco.org/fr/list/15 (02.03.2012).

46 Voir néanmoins l'art. 6. 2. du Code de déontologie de l'ICOM pour les musées: "Les musées doivent être disposés à engager le dialogue en vue du retour de biens culturels vers un pays ou un peuple d'origine. Cette démarche, outre son caractère impartial, doit être fondée sur des principes scientifiques, professionnels et humanitaires, ainsi que sur la législation locale, nationale et internationale applicable (de préférence à des actions à un niveau gouvernemental ou politique.)" (Nous soulignons). On comprend bien le risque d'une démarche en opportunité qui est basée sur des intérêts et des besoins momentanés; qui peuvent rendre obsolète une lente sédimentation des besoins et intérêts véritables par le biais, notamment, des législations nationales et internationales.

e) Synthèse

Les accords "complexes" que nous avons passés en revue portent sur la restitution de biens culturels. Le litige entre les parties est concentré sur le sort de ces biens culturels. Néanmoins, ils comportent pour la plupart aussi des clauses de coopération culturelle dont au moins l'annonce de la reconnaissance de l'importance des biens culturels pour l'une ou l'autre des parties; reconnaissance qui forme un socle minimal de négociation et d'entente. Ces clauses de coopération culturelle viennent cadrer l'accord et visent plus particulièrement les relations entre les parties. Elles ont donc pour but de résoudre le conflit sous-jacent générateur du litige[47]. Ce conflit trouve sa source dans la gestion et la divulgation du patrimoine culturel que cela se fassent par les Etats ou par d'autres entités (musées privés). Le rattachement de ce patrimoine se fait principalement soit à la figure de l'humanité (vocation internationale), soit à la figure du territoire (vocation nationale). Ces rattachements ne sont pas exclusifs l'un de l'autre mais complémentaires[48].

La propriété juridique entraîne la pensée vers l'idée d'un droit à faire valoir à l'encontre de tous; droit qui isole la personne juridique des relations intrinsèques à toute société. Les patrimoines sont des figures abstraites qui autorisent la gestion au nom d'une narration des humanités. Le besoin auquel il faut ici répondre consiste en un pouvoir de raconter. Les litiges portant sur tel ou tel bien culturel donnent à penser que ces gestionnaires sont en désaccords profonds sur le rattachement de ces biens à des patrimoines alors que cet argumentaire cristallise en surface la défense d'un intérêt commun: la gestion et la divulgation de nos histoires.

La circulation et le traitement de l'information par la coopération permet de surmonter aisément le litige apparent. La solution qui entoure le bien culturel litigieux (restitution inconditionnelle, prêt, co-propriété, etc.) et qui vise à mettre fin au litige (les accords comportent aussi des clauses de renonciation à toute poursuite judiciaire) n'atteint pas forcément les relations entre les parties alors que les clauses de coopération culturelle visent expressément ces relations. La réussite n'est pas garantie mais l'amélioration de ces relations peut certainement aider à éviter les litiges, voire même à diminuer le trafic illicite[49].

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47 Voir PALMER NORMAN, *Litigation: The Best Remedy?*, in: The Permanent Court of Arbitration/Peace Palace Papers (eds.), Resolution of Cultural Proprety Disputes, Vol. 7, 2004, p. 289.

48 Sur une idée similaire; qui vise aussi à dépasser l'opposition nationalisme *versus* internationalisme, voir GERSTENBLITH PATTY, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects,* Connecticut Journal of International Law, Vol. 16, 2001, p. 201.

49 Sur un constat positif, voir WOLKOFF JOSHUA, *Transcending Cultural Nationalist and Internationalist Tendencies* (*cit.* n. 37), p. 737.

On peut donc renverser l'hypothèse de départ qui postulait que les accords portaient sur la résolution d'un litige en matière de restitution de biens culturels: les contentieux autour d'un bien culturel ne sont que l'occasion d'établir des relations coopératives de longue durée entre partenaires qui ont des intérêts et des besoins communs et des ressources différentes. Est-il possible de rattacher dès lors ces accords de résolution des litiges en matière de restitution de biens culturels dans la catégorie très large des accords de coopération culturelle[50]? Ce serait aller un peu vite en besogne.

f) Aspects critiques à propos des accords aux bénéfices mutuelles (*mutual beneficiary agreement*)

La résolution des litiges à l'amiable provoque une multiplication des accords bilatéraux. Ce phénomène est particulièrement frappant en regard des accords conclus entre l'Italie et des musées américains (MET, Metropolitan Museum of Modern Art (MoMa), Cleveland Museum, Getty Museum, Minneapolis Institute of Art, etc.). De plus, il est redoublé par le choix opéré notamment par la Suisse et les Etats-Unis de conclure des accords bilatéraux fondés sur les lois respectives de mise en œuvre de la Convention UNESCO 1970; accords bilatéraux qui peuvent être conclus potentiellement avec tous les Etats parties à la Convention UNESCO 1970. Si ces derniers accords sont clairement de nature publique et engage la responsabilité internationale des Etats, les accords conclus par exemple entre l'Italie et des musées privés américains sont de nature privée et soumettent d'ailleurs les litiges qui peuvent survenir quant à leur application à des clauses d'arbitrage (voir l'accord de l'Italie et du MET).

On peut s'inquiéter ici, malgré les sources communes dont s'inspire ces accords (principes cadres, mesures techniques, conventions internationales), des variations infinies susceptibles d'être générées, des litiges potentielles qu'il faudra résoudre selon des voies différentes et pas forcément adéquates (arbitrage commercial)[51], de la mise à égal niveau de la figure de l'Etat et des entités privées financièrement puissantes.

Cette multiplication d'accords bilatéraux participe très certainement aux difficultés de coordination et d'organisation formelle du droit international, non seulement entre des domaines de spécialité, mais peut-être au sein même de ces domaines. Cette "fragmentation" entraîne très certainement aussi des difficultés d'application synchrone des normes d'harmonisation ou d'uniformisation; en particulier, si l'on considère que tous ces accords sont des accords de coopération culturelle au même titre que les conventions inter-

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50 MAINETTI, *L'intérêt culturel* (*cit.* n. 38), p. 89, mention d'une thèse qui étudie les accords bilatéraux de coopération culturelle ("nébuleuse de plusieurs centaine d'accords").

51 Sur les difficultés de résolution d'un litige survenant à propos de ces accords, même appréhension de PALMER, *Litigation* (*cit.* n. 47), par exemple, p. 280 (accord de médiation).

nationales en la matière relève de la coopération culturelle. De plus, l'Etat semble un acteur parmi les autres dans les litiges transnationaux. Il doit multiplier les négociations et les partenariats avec des entités diverses. Ces collaborations entraînent une forme de porosité de l'Etat qui voit ses prérogatives territoriales et souveraines discutées et morcelées par des transactions, peut-être, trop nombreuses. Enfin, si la coopération entre partenaires aux intérêts communs semblent une inspiration à la fois idéale et logique, pragmatique, on peut tout de même se demander s'il n'y a pas là une forme d'ingérence continuée sur d'autres voies[52].

V. Relation entre la restitution de biens culturels et les solutions de l'échange, du prêt et de la coopération culturelle

A. Contestation du titre de propriété en droit

1. Position générale du litige

Le litige porte sur la propriété du bien culturel. Les positions des parties au litige sont en opposition: le bien culturel est propriété de A ou (alternativement et exclusivement) le bien culturel est propriété de B. Les prérogatives classiques du propriétaire sont en principe la libre disposition du bien.

Les chances d'obtenir en justice la restitution de biens culturels peuvent être quasi nulles: affaire Vallée de la Stour – Musée de la Chaux de Fonds contre personne privée[53] (prescription acquisitive); Affaire des Manuscrits coréens (*jus praede,* non-rétroactivité des conventions internationales); Affaire du Globe terrestre (*jus praede,* non-rétroactivité); Affaire des Fresques de Casenoves (incompétence des tribunaux du lieu d'origine des Fresques); Tête maorie de Rouen (inaliénabilité des collections publiques). Malgré tout, le propriétaire légitime choisit dans ces affaires, sauf Vallée de la Stour, de restituer.

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52 Sur une critique de ces accords, proche de l'idée de "fragmentation", voir FALKOFF STACEY, *Note and Comment: Mutually-Beneficial Agreement: Returning Cultural Patrimony, Perpetuating The Illicite Antiquities Market,* Journal of Law and Policy, Vol. 16, 2007, p. 304.

53 CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Vallée de la Stour - Héritiers de Mme Jaffé et Musée des Beaux-arts de la Ville de la Chaux de Fonds,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

On peut se demander, d'une part, plus précisément, ce qui fait obstacle en droit (nous donnerons deux exemples classiques, ci-après 2.) et, d'autre part, pourquoi les possesseurs ont tout de même restitués dans les affaires citées plus haut, ou, plus précisément, ce qui fait contre poids au droit positif (ci-après 3.).

2. Exemples notoires d'obstacles juridiques en matière de restitution de biens culturels

a) La *lex rei sitae* en matière de trafic illicite

Un bien culturel est volé en Angleterre et vendu en Italie à un acquéreur de bonne foi. Celui-ci l'emporte ensuite en Angleterre pour le revendre. Le propriétaire dépossédé introduit une action en justice. Le juge, en application de *lex rei sitae,* soit de la loi du lieu de la dernière transaction, ici la loi italienne, constate que l'acquéreur de bonne foi est protégé et que son titre est valable. Dès lors, en application du principe *nemo dat quod non habet* (implicite à vrai dire, mais le raisonnement est autrement incomplet), le juge déboute le propriétaire dépossédé. On aura reconnu, en un résumé lapidaire, la fameuse affaire *Winkworth v Christie, Manson and Woods Ltd and another.* Si elle fait les beaux jours de la doctrine en droit de l'art et des biens culturels, c'est qu'elle est particulièrement injuste envers le droit anglo-saxon qui, pourtant, protège avec rigueur, en principe, le propriétaire dépossédé.

La LDIP suisse, en son article 100, procède de façon identique mais avec un résultat bien différent. En effet, l'alinéa premier de l'art. 100 exprime le principe de la *lex rei sitae* appliqué par le juge anglais (*"L'acquisition et la perte de droits réels mobiliers sont régies par le droit du lieu de situation du meuble au moment des faits sur lesquels se fonde l'acquisition ou la perte"*), il en va de même pour le deuxième alinéa (*"Le contenu et l'exercice de droits réels mobiliers sont régis par le droit du lieu de situation du meuble*"), sauf que le droit suisse (lieu de situation du meuble au moment de l'action en justice) connaît l'acquisition de bonne foi. Dès lors, en général, si c'est le premier alinéa qui pose des problèmes pour les actions des Etats fondés sur leur droit public (voir l'arrêt de la pièce d'or géante, ATF 132 III 418), c'est le second alinéa qui pose des difficultés au propriétaire dépossédé (difficulté réduite aujourd'hui grâce à la prolongation du délai pour introduire l'action en revendication portant sur des biens culturels à 30 ans au titre de l'art. 934 CC).

Un juge de *common law* résout donc le litige une fois déterminée la loi applicable selon la *lex rei sitae;* solution en conflit potentiel avec le principe *nemo dat* de son propre droit. Le chaînon faible de la protection juridique des biens culturels repose ainsi sur

l'acquéreur de bonne foi[54]. Des auteurs éminents ont donc proposé de contrôler le trafic illicite de biens culturels par réduction des chances d'acquisition légale: la diminution de la demande rétroagissant sur l'offre[55]. Pour ce faire, on peut évidemment durcir le devoir de diligence de l'acquéreur sans changer les principes. Mais on ne peut éviter ainsi l'évaluation du respect de ce devoir au cas par cas selon un faisceau d'indices (les obligations de l'acquéreur n'étant pas codifiées)[56]. L'harmonisation des législations poursuit cette voie difficile et de longue haleine qui passe aussi par la fertilisation croisée[57] des décisions nationales, le développement des codes de conduite professionnels, des recommandations, la coordination des bases de données des objets volés, etc. L'uniformisation, en revanche, propose une solution toute simple: ériger le principe *nemo dat* en règle. Celle-ci mettrait fin au *forum shopping* avec effet immédiat. Mais la sécurité des transactions n'est pas pour autant éliminée de l'équation (but de l'acquisition de bonne foi), elle est assurée par le délai pour introduire l'action. Enfin, l'acquéreur de bonne foi n'est pas oublié. S'il arrive à démontrer qu'il a accompli ses diligences, il peut réclamer une indemnité. Et la probabilité que celles-ci ne procurent par le résultat escompté est très faible. En effet, ce devoir, comme dans la plupart des droits continentaux, emporte des obligations de recherche et d'information qui laisse peu de chance à une révélation inattendue.

La Convention d'UNIDROIT 1995 distingue ce qui est trop souvent confondu: renvoyer le délai au niveau procédural (et non pas en condition de fond quant à l'acquisition, voir par exemple le droit suisse qui dispose qu'à l'écoulement du délai de l'action en revendication, l'acquéreur de bonne foi est protégé selon les règles de la possession); ériger l'unique règle de principe, qui peut potentiellement mettre fin au *forum shopping,* comme règle de substance; enfin, faire peser la diligence sur les acteurs principaux du marché, qui, s'ils sont de bonne foi, ne risquent pas d'acquérir des objets illicites et, au pire, peuvent se faire rembourser.

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54 SCHÖNENBERGER BEAT, *The Restitution of Cultural Assets: Causes of Action – Obstacles to Restitution – Developments*, Berne 2009, p. 186.

55 LALIVE PIERRE, *Une convention internationale qui dérange: La Convention d'UNIDROIT sur les biens culturels*, in: Témoins de l'histoire: recueil de textes et documents relatifs au retour des objets culturels, UNESCO, Paris 2011, p. 346; GERSTENBLITH, *Ownership* (*cit.* n. 48), p. 211.

56 Pour une analyse des affaires topiques en la matière et de leurs difficultés, voir RENOLD MARC-ANDRÉ, *Oeuvres d'art volées: l'omniprésente question de la bonne foi,* in: Témoins de l'histoire: recueil de textes et documents relatifs au retour des objets culturels, UNESCO, Paris 2011, pp. 331 et seqq.

57 Sur cette notion et son apport pour la matière, voir CHECHI, *The Settlement* (*cit.* n. 40), pp. 285 et seqq.

L'évolution du droit d'harmonisation en la matière se fait peut être au détriment des acteurs principaux du marché de l'art, desquels on exige toujours plus (tenu d'un registre et diligence élevée, assorties de sanctions pénales[58]), sans garantir pour autant la fiabilité des décisions judiciaires qui reposent en matière de diligence sur une appréciation du juge.

b) Le *jus praede* en matière de pillage des biens de l'ennemi: l'exemple de l'Affaire des Manuscrits Coréens

Au moment des pillages des biens culturels coréens par l'Amiral français (1866), il n'existe pas de coutume internationale interdisant le pillage du patrimoine de l'ennemi. Bien au contraire, la règle générale est plutôt celle du pillage des biens du vaincu (*ius praede*)[59]. Il est vrai, qu'à l'époque déjà, des intellectuels éminents s'élèvent contre cette pratique (Victor Hugo, par exemple, dans sa fameuse lettre au capitaine Butler à propos du Palais d'été à Pékin). Mais c'est seulement à partir de 1874 que le juriste Bluntschli considère comme interdit *"le fait d'emporter et de s'approprier les collections scientifiques et artistiques (bibliothèques, galeries de tableaux, instruments)"*[60].

Le Tribunal administratif de Paris a débouté l'Association action culturelle de sa demande en annulation de la décision du Ministre de la culture par laquelle il a refusé de faire droit à la demande de déclassement des manuscrits du domaine public. Celui-ci a notamment refusé de tenir compte des principales conventions internationales applicables en matière de restitution de biens culturels car celles-ci ne sont pas rétroactives ou non ratifiée par la France ou encore non en vigueur entre les parties[61].

Le principe du *jus praede* et la non-rétroactivité des conventions internationales potentiellement applicables en la matière font obstacles à la restitution pure et simple en droit.

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58 Voir par exemple les articles 16 et 25 LTBC.

59 Sur ce sujet, voir l'article détaillé de CARDUCCI GUIDO, *L'obligation de restitution des biens culturels et des objets d'art en cas de conflit armé: droit coutumier et droit conventionnel avant et après la Convention de la Haye 1954. L'importance du facteur temporel dans les rapports entre les traités et la coutume,* Revue générale de droit international public, 2000, pp. 289 et seqq.

60 BLUNTSCHLI JOHANN KASPAR, *Le droit international codifié,* Paris 1895, p. 365.

61 Tribunal administratif de Paris, jugement Association action culturelle contre le Ministre de la culture et de la communication , 18 décembre 2009, n° 0701946.

B. Contestation du titre de propriété en fait

1. Position générale du conflit sous-jacent

Fondamentalement, il ne pourrait pas exister de nations sans représentations de celles-ci. Les œuvres culturelles éminentes du patrimoine national formeraient une des clés de voûte de cette représentation, à la fois comme narration de l'histoire et comme reconnaissance identitaire. Même plus, la privation ou le dépouillement indu de ce patrimoine culturel national empêcherait la nation de cristalliser et de former un système politique moderne. La décolonisation des Etats africains fut suivie de revendications fortes à l'égard du patrimoine emporté par les colonisateurs ou par le trafic illicite auquel les Etats participeraient par des législations peu adaptées. On attribue ainsi la naissance de la Convention UNESCO 1970 à ces revendications[62]. Le débat sur une forme d'autonomie culturelle qui devrait accompagner la souveraineté des Etats et des peuples est toujours d'actualité. On reproche ainsi notamment aux produits culturels industriels leur impérialisme; leur diffusion massive empêcherait et étoufferait les autres formes de cultures. La globalisation des échanges conduit ainsi à une ligne de tension entre uniformité pauvre/unité pacifique et diversité riche/chaos ingérable.

Les litiges portant sur la propriété des biens culturels renvoient ainsi à un conflit sous-jacent sur l'autonomie des peuples à se constituer selon leurs propres vus et leur propre histoire. La gravité des atteintes au patrimoine par le cautionnement discret des pratiques illicites ou le cautionnement ouvert des industries culturelles monopolistiques rétroagit sur les revendications patrimoniales: ce cautionnement n'est-il pas le signe d'une volonté de domination?

Ce présupposé plus ou moins admis par les parties, la conclusion d'accords encadrés par des principes de coopération culturelle ne vise rien de moins que le changement de perception des parties l'une sur l'autre (défense protectionniste *versus* attaque invasive) et par suite l'enclenchement de nouvelles relations sur le mode de la collaboration.

2. Le temps du conflit et le lieu du litige (la forme et la substance des biens culturels)

La Convention UNESCO 2005 formule expressément pour la première fois la double nature des biens culturels. Mais la définition des biens culturels donnée par la Convention Unesco 1970 repose déjà sur cette double nature. En effet, les biens culturels ce sont les biens importants pour l'archéologie, la préhistoire, l'histoire, la littérature, l'art ou la science. En d'autres termes, la définition du bien culturel est tributaire du renvoi à la

62 Voir M'BOW AMADOU-MAHTAR, *Le temps des peuples,* Paris 1982.

culture, si difficile à déterminer, et qui est ici laissé à charge des sciences spécialisées en qualité (importance) et quantité (domaine de spécialisation). Le bien matériel, palpable, et auquel une valeur économique peut être attribuée (son inauthenticité ou sa disparition diminuant ou annulant toute valeur), est doublé d'une part immatérielle, impalpable, auquel il renvoie sans s'épuiser, sa destruction ne terminant pas sa connaissance (d'où le drame aussi des disparitions de biens archéologiques qui ne sont jamais connus parce qu'abîmés ou détruits).

Le droit ne peut pas épuiser la part culturelle qu'enferme le bien culturel et celui-ci ne peut pas être réduit à une valeur monétaire. En raison de cette double nature si particulière, les litiges ne peuvent se terminer par l'attribution d'un droit de propriété, certes *erga omnes,* mais qui réduit le bien culturel à sa part palpable, alors que les biens culturels ouvrent probablement sur un dialogue ininterrompu de nos humanités. Chaque litige portant sur un bien culturel est une chance de dialoguer sur nos cultures. Faut-il donc saluer des accords qui allègent les droits pour autoriser le dialogue? Faut-il donc considérer la propriété comme un détail pourvu que la possession soit échangée ou la collaboration établie autour des expertises, de l'information et de l'éducation?

Si les litiges sont souvent résolus à l'amiable et font la sourde oreille aux droits des parties, c'est que le droit est sourd à la réalité immatérielle affectée aux biens culturels. En matière de trafic illicite de biens culturels, la Convention UNIDROIT 1995 est un phare que malheureusement bien peu sont encore prêts à suivre.

VI. Conclusion

A. Soit l'un, soit l'autre (alternativité)?

La représentation commune que l'on donne de la voie judiciaire et des modes de résolution des litiges tels la négociation, la médiation ou encore l'arbitrage, l'une par rapport aux autres, est celle de l'alternatif. Ce qui fait pression sur les parties au cours d'une négociation ce sont les risques, le coût, ou encore la durée d'une procédure judiciaire (BATNA[63]). Mais l'inverse est aussi vrai dans la mesure où un accord transactionnel peut devenir la meilleure solution alternative à une décision judiciaire (voir par exemple, l'Affaire *Portrait of Wally* dans laquelle les risques de laisser un jury décider du sort de la cause sont devenus trop grands pour le Musée Leopold).

63 Best Alternative to a Negotiate Agreement.

Il y aurait donc d'un côté la voie judiciaire qui épouserait la cause de l'une des parties au détriment de l'autre (*win-lose:* attribution de la propriété à l'une ou l'autre des parties) et, de l'autre côté, les voies alternatives de résolutions des litiges qui, basées notamment sur la négociation raisonnée, permettraient de dégager des solutions aux bénéfices mutuels (*win-win*). Le litige viendrait se résoudre en recherche d'intérêts communs et en création de solutions aptes à surmonter les antagonismes, mais toujours sous l'épée de Damocles d'une procédure judiciaire qui, par hypothèse, apparaît comme BATNA ou *ultima ratio*. Ce serait soit l'un soit l'autre; et le droit en dernier recours (pour solde de tous comptes).

B. Ou l'un *et* l'autre?

La réalité semble plus complexe. En effet, des négociations peuvent successivement échoués (*Affaire Machu Picchu – Pérou et Yale*[64]); une décision judiciaire de la plus haute instance peut être rendue sans pour autant empêcher les parties de conclure un accord (*Affaire Collection Varenne – Varenne et Ville de Genève*[65]); des actions en justice peuvent être tentées sans pour autant influer sur le sort de la cause (*Affaire des Manuscrits Coréens*); une procédure judiciaire peut être suivie d'un accord portant sur une partie des biens culturels litigieux, lui-même suivi d'un refus de restitution par une Commission nationale pour le reste des biens culturels revendiqués, décision confirmée par un tribunal puis, au final, avec l'assouplissement de la loi nationale, la signature d'un accord qui met fin au litige (*Affaire 200 tableaux – Goudstikker et les Pays-Bas*[66]), etc.

Au regard de la complexité des affaires réelles, qui comportent souvent plusieurs acteurs et facilitateurs, des complexes de faits et de droits très riches, nous préférons décrire la résolution des litiges en matière de biens culturels comme un processus de circulation et d'interrogations, qui n'est pas en tension entre négociation raisonnée et décision judiciaire, mais qui fait plutôt coopérer les différentes instances et/ou institutions en charge de ces questions (qu'elles soient judiciaires, *ad hoc* ou alternatives formelles ou informelles ou mêmes politiques). La vision alternative des litiges trace des frontières et des oppositions là où il faudrait plutôt voir des coordinations. Les accords transactionnels en

64 CHECHI ALESSANDRO/AUFSEESSER LIORA/CONTEL RAPHAEL, *Case Machu Picchu Collection – Peru and Yale University*, plateforme ArThemis (https://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, octobre 2011.

65 CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Collection Varenne - Héritiers Varenne et Ville de Genève,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

66 BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case 200 Paintings – Goudstikker Heirs and the Netherlands,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

matière de restitution de biens culturels ne sont-ils pas un indice qu'une question sans réponse circule et cherche sa détente?

C. La circulation des litiges et la circulation des biens culturels: la fabrique narrative de la justice?

En matière de trafic illicite de biens culturels, la Convention UNESCO 1970 n'a pas été ratifiée par tous les Etats. Quant à la Convention UNIDROIT 1995, les Etats dits importateurs ne l'ont pas ratifié; ce qui la rend pour une part impropre à atteindre les buts proposés: insérer les normes d'uniformisation dans les législations des Etats justement importateurs. La Convention UNESCO 1970 est un traité multilatéral d'harmonisation; ce qui implique des variations dans les mises en œuvres. De plus, les législations nationales de mise en œuvre, qui ne sont pas forcément obligatoires ou tout simplement laissées en friche (cas par exemple de la France), peuvent introduire à leur tour la possibilité d'adopter des accords bilatéraux. Le réseau d'obligations se dissémine, se ramifie, se construit aussi selon des visées différentes. Sans compter que les tribunaux nationaux, et leur culture juridique, doivent *in fine* souvent rendre le droit.

Nous n'avons donné ici qu'un bref aperçu des modes de différentiation potentielle de résolution juridique d'une problématique internationale. Mais nous pouvons encore le compléter par la constatation, comme nous l'avons vu dans cette étude, que de nombreux litiges en matière de restitution de bien culturels sont résolus à l'amiable, en particulier par la négociation et la conclusion d'accords bilatéraux qui peuvent concerner des Etats ou des Etats et des institutions privée ou même des particuliers. Ces modes de résolution alternative des litiges participent très certainement à des formes de dérégulation de l'Etat. En effet, n'est-ce pas la figure de l'Etat de droit elle-même qui est ici questionnée? N'est-ce pas l'incapacité des régulations étatiques qui génère, par compensation, des résolutions à l'amiable? Si chaque litige doit être résolu dans un *mano* à *mano* entre parties selon les variations potentiellement infinies du cas d'espèce, comment ne pas questionner l'égalité devant le droit et, plus gravement encore peut-être, l'idée même d'efficacité de l'ordre juridique en son entier[67]?

Si le droit international public est un système ou un ordre, il est au moins largement décentralisé; d'où la difficulté de coordonner et d'organiser les normes et les compétences, les domaines de spécialité et les jonctions. Sans évoquer l'idée d'une communauté internationale, l'interrelation des activités humaines est devenue patente. Si aux révolutions du XIX^{ème} siècle semblent avoir répondu l'idée de l'Etat de droit, nous sommes en difficulté aujourd'hui quant à la fabrique d'un système centralisé et hiérarchique de

67 Comme le conçoit KELSEN.

résolution des problèmes et des tensions sociales (qui sont devenus en grande partie internationaux); ce que l'Etat de droit semblait accomplir jusqu'aux deux guerres mondiales. Nous assistons, tout au contraire, à des différenciations multipliées pour résoudre des questions communes à nos humanités. A la facilité d'une réponse hiérarchique fondée sur de potentielles valeurs communes, il faut constater les résistances qui officient ici partout. Les solutions à l'amiable sont une étape dans un long processus d'ajustements successifs, de questionnements différés des instances de régulation (internationales, transnationales, nationales, privées), qui intensifient la circulation des litiges et autorisent tant bien que mal la circulation des biens culturels.

ANNE LAURE BANDLE*

11. The Impact of Politics on the Resolution of Art Restitution Claims

Abstract

Art restitution claims have frequently become a political issue, triggering governments to intervene. The purpose of this paper is to identify the main political stakeholders and the interests they are pursuing when partaking in such claims. While international treaties have recognized the necessity and advantages of governmental intervention in specific contexts, some states have not awaited such legal encouragement for playing an active role in art restitution claims. In the main, this paper elaborates on the means of governmental action and its impact on the settlement of the dispute with regards to priorities and dialogue, flexibility and temporality as well as quality of the obtained solution. It argues that politics are advantaged as they may initiate a dialogue through the diplomatic channel and provide greater as well as more flexible outcomes to a dispute in lesser time. However, political action may also entail certain drawbacks which may have negative repercussions not only on the dispute resolution process, but also on the cultural property object at stake.

Synthèse

Les demandes de restitution de biens culturels soulèvent souvent des questions d'ordre politique, incitant ainsi les gouvernements à agir. Le but de cet article est d'identifier les principaux acteurs politiques et les intérêts qu'ils poursuivent lorsqu'ils interviennent dans le cadre de ces revendications. Bien que les traités internationaux reconnaissent la nécessité et les avantages d'une intervention gouvernementale dans certains contextes spécifiques, de nombreux Etats n'ont pas attendu cette reconnaissance conventionnelle pour jouer un rôle actif dans les demandes de restitution de biens culturels. Cet article développe principalement les moyens de l'action gouvernementale d'une part, et d'autre

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part, l'impact de ces interventions sur le règlement des différends, plus particulièrement quant aux priorités et au dialogue, à la flexibilité et la temporalité, et, enfin, quant à l'issue même du litige. Cette recherche constate que l'avantage d'une intervention étatique réside en cela qu'elle permet d'initier un dialogue par la voie diplomatique et qu'elle est ainsi en mesure d'offrir des solutions aux litiges qui sont plus étendues et plus flexibles dans des délais plus courts. Toutefois, l'action gouvernementale peut aussi présenter des inconvénients qui ont des répercussions négatives non seulement sur le processus de règlement des différends, mais aussi sur le bien culturel en jeu.

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I. Introduction

Whether Napoleon removed cultural property from Italy around 1800, German archaeologists excavated rare finds on African sites in the 19th century or Nazi officials looted artworks from Jewish collectors during the Second World War, the awareness of an overall insufficient protection for illicit takings and transfers of art and cultural property[1] has particularly risen in the last 50 years. Governments are asked today to intervene in restitution demands which may relate to far-distant events. They have done so with increasing enthusiasm and are not afraid to use aggressive pressure means on possessors to obtain the return of disputed objects. In parallel, the growing willingness of organisations and commissions to address art restitution issues has contributed to a greater political consciousness leading states to be more responsive to some of the claimants' concerns[2]. While numerous restitution claims involving governments met with approval, the state actors in charge have been criticized for turning art into *"ambassadors"* or *"political pawns"*[3].

Given the often widely differing and delicate interests at stake, the conveniences of the diplomatic channel may be very benefitting when seeking discussions with the opposing party. Thereby, state actors may access alternative ways of solving disputes, including the initiation of negotiation or mediation proceedings, the qualities of which are subject to the *ArThemis* research of the Geneva Art-Law Centre.

Specifically, governmental representatives may intervene at the very beginning of the dispute, as a facilitator or even a requesting party, like in the case of the Nataraja Idol. When the Indian government learned about the sale to the Norton Simon Foundation of an ancient bronze statue, previously removed from a temple in India and illegally export-

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1 "Cultural property" refers to artifacts, antiquities, and works of art of archaeological, historical, and ethnological significance. See MERRYMAN JOHN HENRY, *Two Ways of Thinking About Cultural Property,* in: MERRYMAN JOHN HENRY (ed.), *Thinking About The Elgin Marbles: Critical Essays On Cultural Property, Art and Law,* 2nd ed., The Netherlands 2009, p. 143.

2 See BITTERMAN AMY, *Settling Cultural Property Disputes,* Rutgers School of Law, Research Paper No. 95, 22 August 2011, p. 4, available at: http://ssrn.com/abstract=1914606 (02.03.2012).

3 See WOLFGANG EICHWEDE, *Trophy Art as Ambassadors: Reflections Beyond Diplomatic Deadlock in the German-Russian Dialogue,* International Journal of Cultural Property, Vol. 17, Issue 2, 2010, pp. 387 et seqq; KIMMELMAN MICHAEL, *When Ancient Artifacts Become Political Pawns,* The New York Times, 23 October 2009, available at: http://www.nytimes.com/2009/10/24/arts/design/24abroad.html?pagewanted=all (02.03.2012).

ed to the United States, it immediately sued for restitution[4]. Claiming parties may also turn towards the government when first attempts of restitution requests have failed, exemplified by the story of the Nazi-looted painting by Emil Nolde (*"Blumengarten"*, 1917)[5]. While the long-lasting negotiations between the Swedish Modern Museum and the heirs of the Holocaust victim had not brought any conclusive results, the family besought the Swedish Culture Minister for an intervention.

What is the impact of such governmental action on the process of resolution and on the quality of its outcome? Does it lead to the employment of other means than those available to non-state actors? What are the negative side effects of conflict resolution regarding cultural property through the diplomatic channel? Based on the *ArThemis* case study research, the present article examines some aspects of the "politicisation" in the resolution of art restitution claims. It endeavours to evaluate whether government intervention may improve the chances of success for a settlement or lead to preferable solutions.

Starting by identifying the main involved political actors and their interests, the paper then addresses the legal sources and reasons in practice prompting governmental action (II). In the main, it aims to elaborate on the means of governmental action and its impact on the settlement of the dispute with regards to dialogue and priorities, flexibility and temporality as well as quality of the obtained solution (III). The examination of the dispute resolution process under these factors leads to an overall assessment of the efficiency of politics when addressing art restitution claims (IV).

II. Contextualisation of Politics in Art Restitution Claims

Art restitutions claims become a political issue mainly by the intervention of governmental actors, and occasionally when non-governmental and intergovernmental institutions partake in the dispute resolution process (A.). Several international treaties refer to them in identifying different causes of action (B.).

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4 See CHECHI ALESSANDRO/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Case Nataraja Idol – India and the Norton Simon Foundation,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, October 2011.

5 BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Blumengarten – Deutsch Heirs and Moderna Museet Stockholm,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, June 2012.

A. Main Actors and Interests

Issues regarding art and cultural property can be argued solely between the two opposing parties or, third party individuals and institutions may intervene to a lesser or greater extent and facilitate the settlement process. Depending on the context of the dispute, different actors in the range of politics may come into play. The political branches addressed in the present article primarily refer to the executive and marginally to the legislative branch of a government. This restriction in the scope of the study does however not imply that the judiciary branch may not be political; decisions by court judges may in fact also be politically motivated, but its examination entails a whole new set of considerations[6].

1. Governmental Bodies, Politicians and Embassies

The political aspect of art restitution claims is obvious when a governmental body is involved, such as the government's cultural ministry[7] or the chief minister of the state[8]. They may act as the primary requesting party for the restitution of cultural property, when pursuing the protection of the state's national heritage[9]. On the other hand, they may be solicited by a claiming party to intervene and facilitate an ongoing dispute resolution process. It may also occur that politicians i.e. members of a state's parliament are engaged in the resolution of art restitution claims and support either side in the dispute.

Moreover, diplomatic influence may be exerted through state representatives abroad, namely ambassadors, as exemplified by the case about 101 drawings from the *Kunsthalle* Bremen. The collection was transferred for safekeeping from the *Kunsthalle* Bremen to Russia in 1945 by a Soviet soldier. Negotiations began in 1991, when the drawings were

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6 See for instance JENNINGS PERETTI TERRI, *In Defense of a Political Court,* Princeton 1999.

7 See for instance the case regarding a painting by Hoare of Bath hit by an export bar when the Qatar Museums Authority bought it at Christie's. It involved the Reviewing Committee on the Export of Works of Art & Objects of Cultural Interest (RCEWA), which advises the Department for Culture, Media and Sport (DCMS) of the United Kingdom (see BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Ayuba Suleiman Diallo – Qatar Museums Authority and the United Kingdom,* Platform ArThemis, Art-Law Centre, University of Geneva, March 2012).

8 See for instance the case on the return of Korean manuscripts from France, settled by an agreement between the French and Korean presidents (see CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Manuscrits Coréens – France et Corée,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, June 2012).

9 See the reasons developed *infra,* pp. 224 et seqq.

deposited at the German embassy in Moscow waiting for export papers[10]. Embassies can be the first point of contact in a country once a party seeks to cooperate with a foreign state.

a) Primary Party

When governments are the primary party to a dispute, the well-known differentiation between *"market nations"*[11] and *"source nations"*[12] may provide a basic appreciation of the distinct interests they pursue[13]. Both argue the validity of art restitution claims by a different approach. On the one hand, "cultural internationalism" defends the idea that everyone has a legitimate interest in the preservation and enjoyment of cultural property, regardless of its origins and provenance[14]. It finds support by market states such as Japan, Switzerland and the United States[15].

Conversely, *"cultural nationalists"* advocate an approach conferring a national character to objects, *"independently of their location or ownership"*[16], hence legitimizing *"na-*

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10 See BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case Sammlung 101 – City of Bremen, Kunsthalle Bremen and Russia,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, April 2012.

11 Market nations may be defined as states which are purchasing cultural objects, see ROEHRENBECK CAROL A., *Repatriation of Cultural Property – Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments,* International Journal of Legal Information, Vol. 38, Issue 2, Summer 2010, p. 189.

12 In source nations or "art-rich nations", the "supply of desirable cultural property exceeds the internal demand" (MERRYMAN, *Thinking About the Elgin Marbles, cit.* n. 1, p. 83).

13 As illustrated by Japan, a country may be both a source and a market nation (see *ibid,* p. 143).

14 See MERRYMAN JOHN HENRY, *Two Ways of Thinking About Cultural Property,* American Journal of International Law, Vol. 80, 1986, p. 831; ROEHRENBECK, *Repatriation of Cultural Property* (*cit.* n. 11), p. 187; see also PARKHOMENKO KONSTANTIN, *Taking Transnational Cultural Heritage Seriously: Towards a Global System for Resolving Disputes over Stolen and Illegally-Exported Art,* Art Antiquity and Law, Vol. 16, July 2011, p. 149; CUNO JAMES, *Who Owns Antiquity? Museums and the Battle over Our Ancient Heritage,* Princeton 2008, pp. 15, 138 et seqq.

15 Market nations are also called "importing nations", see PROTT LYNDEL V./O'KEEFE PATRICK J., *National Legal Control of Illicit Traffic in Cultural Property,* UNESDOC CLT-83/WS/16, Paris, 11 May 1983, p. 2, n° 004. See also MERRYMAN, *Thinking About the Elgin Marbles* (*cit.* n. 1), p. 143.

16 MERRYMAN, *Two Ways of Thinking About Cultural Property* (*cit.* n. 14), p. 832. According to MERRYMAN, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 "emphasizes the interest of states in the "national cultural heritage" […]"(*ibid.*), as it requires an importing nation to obtain an export license from the country of origin for the importation of cultural property. Similarly, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict exemplifies

tional export controls and demands for the repatriation of cultural property"[17]. Source countries, e.g. Italy, Greece, China and Mexico, generally aim at retaining cultural property found within their borders[18]. Based on "*national interests, values and pride*"[19], cultural nationalism drives most source nations to a fierceful engagement for the return of what they claim to be illicitly exported or state property. In the past and present, art has contributed to the ideological need of developing states and ethnic groups to shape their own national identity[20]. However, they generally motivate restitution claims by different reasons: (a) deterring further illicit trafficking of stolen or illegally exported cultural property; (b) replacing the object in its original, historical, sacred or traditional context, including the integrity of a complex cultural object (*"ensemble"*[21]); (c) assuring the object's ritual or religious use, for instance, of an aboriginal community; (d) conducting research on or about the object to obtain more information such as on its historical or ritual aspects; and (e) enjoying the object's aesthetic value[22].

Cultural property from source nations is likely to be exported to market nations to the demand of art collectors and museums[23]. Market countries thus favour the liberal trade

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"cultural internationalism" with regards to its preamble stating that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind" and "the preservation of the cultural heritage is of great importance for all peoples of the world". See also GILLMAN DEREK, *The Idea of Cultural Heritage,* 2nd ed., Cambridge et al. 2010, pp. 41 et seqq.

17 *Ibid*.

18 A third category not developed here are "transit nations", "through whose territories the object are transported", the prime example being Switzerland (see PROTT/O'KEEFE, *Control of Illicit Traffic, cit.* n. 15, p. 2).

19 ROEHRENBECK, *Repatriation of Cultural Property* (*cit.* n. 11), p. 187.

20 JAYME ERIK, *Symposium: International Legal Dimensions of Art and Cultural Property: Keynote Lecture: Globalization in Art Law: Clash of Interests and International Tendencies*, Vanderbilt Journal of Transnational Law, Vol. 38, 2005, p. 933.

21 SCOVAZZI TULLIO, *Diviser c'est détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties,* 15th Session of the UNESCO Committee, Paris, 11–14 May 2009, available at http://portal.unesco.org/culture/en/files/39157/12433501641Scovazzi_E.pdf/Scovazzi _E.pdf (07.03. 2012).

22 See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995 (UNIDROIT Convention), art. 5(3); UNESCO Convention 1970, Preamble; see also WOLKOFF JOSHUA S., *Transcending Cultural Nationalist and Internationalist Tendencies: the Case for Mutually Beneficial Repatriation Agreements,* Cardozo Journal of Conflict Resolution, Vol. 11, Spring 2010, pp. 722 et seqq (referring to COHAN JOHN ALAN, *An Examination of Archaeological Ethics in the Repatriation Movement Respecting Cultural Property, Part Two,* Environmental Law and Policy Journal, Vol. 28, 2004, pp. 104 et seqq).

23 See PROTT/O'KEEFE, *Control of Illicit Traffic* (*cit.* n. 15), p. 2.

of art and cultural property without any restrictions linked to the history of an object[24]. Allegedly, freely and openly trading and sharing these objects would undermine underground and illicit trafficking. The reasoning by market nations in favour of a globalized commodification of cultural property stands in direct opposition with the rationale of source states, which believe that commerce with art and cultural property encourages the looting of archaeological sites and illegal trade[25].

Market nations have often claimed their museums to be safe repositories for cultural property where their care and protection against destruction would be assured[26]. In addition, they share the source nations' interest to provide access to researchers and to the general public regarding objects located in their respective territory[27].

b) Facilitator

State authorities and official representatives may intervene as an intermediary in the dispute resolution process in terms of a facilitator or formal mediator. The Swiss Confederation, for example, assigned a formal mediation team that came to help in a dispute between two Swiss Cantons[28]. In 1712, war spoils had been transferred from Saint-Gall to Zurich during the religious battle of Vilmergen[29]. While negotiations between the Cantons of Zurich and Saint-Gall failed, the mediation team was able to lead the parties towards a creative settlement. In general, a facilitator helps the disputing parties in an unbiased way to identify their specific needs and avenues for a settlement.

2. Public Museums

Public museums may be targeted by restitution claims which are likely to be problematic if they concern objects listed by national laws as being of importance to the state. In accordance, they have to be permanently vested in a state museum or collection[30]. Any transfer of title regarding an object of national importance generally requires the authori-

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24 See BAUER ALEXANDER A., *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, Fordham International Law Journal, Vol. 31, 2008, p. 693 et seqq.

25 *Ibid*.

26 *Ibid*.

27 *Ibid*.

28 As provided by the Swiss Constitution of 1999, art. 44(3).

29 BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Ancient Manuscripts and Globe – Saint-Gall and Zurich,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

30 See the definition of "public collection" in the UNIDROIT Convention, art. 3(7).

zation or a formal law by the designated authority[31]. Illustratively, the Museum of Art and History of Geneva successfully resolved a restitution request of Casenoves Frescoes by entering a loan agreement with the French government[32]. The loan was ultimately converted into a donation, which required a formal decision by the City of Geneva so that the frescoes could be duly relinquished from the city's public collection.

Major museums enacted own retention policies for objects held in their permanent collection, constraining them from deliberately disposing of such objects. The British Museum Act 1963, for instance, provides for very limited scenarios which legitimize the *"deaccession"*[33] of objects held in the museum's collection[34]. For Holocaust-spoliation related art restitution claims, the British Museum Trustees are enabled to determine whether they abide by the recommendation of the United Kingdom Advisory Panel, if approved by the Secretary of State, to transfer an object from the museum's collection to the claimant[35]. The recent change in the policy of the British Museum follows up on a decision of the High Court[36] that foreclosed the museum to comply with an application

31 See CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Tête Maorie de Rouen – France et Nouvelle-Zélande,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

32 CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Fresques de Casenoves – Musée d'Art et d'Histoire de la Ville de Genève et France,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

33 "Deaccessioning" is the official removal of an object from a museum or art gallery for its sale, an exchange, the destruction of irretrievably damaged or decayed objects and more recently, for the return of human remains to their country of origin and for the restitution of Nazi-looted art (MANISTY EDWARD/SMITH JULIAN, *The Deaccessioning of Objects from Public Institutions: Legal and Related Considerations,* Art Antiquity and Law, Vol. 15, April 2010, pp. 1 et seqq.).

34 Art. 5(1) of the British Museum Act 1963 provides that "The Trustees of the British Museum may sell, exchange, give away or otherwise dispose of any object vested in them and comprised in their collection if (a) the object is duplicate of another object, or (b) the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a copy made by photography or a process akin to photography is held by the Trustees, or (c) in the opinion of the Trustees the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students".

35 See British Museum Policy on De-Accession of Registered Objects From the Collection, 4 March 2010, art. 3.7.

36 *Attorney-General v The Trustees of the British Museum,* Chancery Division Sir Andrew Morritt VC, (2005) EWHC 1089 (Ch), (2005) Ch 397.

for the restitution of four Nazi-looted drawings from the Arthur Feldmann Collection[37]. The court concluded that neither the Trustees nor the Attorney General had the authority to dispose of the requested drawings in order to meet with a moral obligation; such a divergence from the museum's statutes would instead require an Act of Parliament[38].

Some museums have adhered to Codes of Ethics, such as the "ICOM Code of Ethics"[39], the "Code of Ethics for Museums" of the American Association of Museums (AAM)[40], or the "Code of Ethics for Museums" of the Museums Association of the United Kingdom[41], which provide a framework for the acquisition, preservation and restitution of cultural property. They encourage museums to address restitution requests and to seek an open dialogue with claiming parties on a non-political or governmental level in order to find a solution[42].

When restitution claims are directed against objects temporarily on loan in a museum, they may collide with the host nation's immunity from seizure guarantees[43]. Such a claim was made in 1993 regarding two paintings on loan in French state owned museums by the heir of art collector Sergei Ivanovich Shuchkin, whose collection had allegedly been nationalized during the Bolshevik revolution[44]. In response to this claim, France

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37 See BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case 4 Old Master Drawings – Feldmann Heirs and the British Museum,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

38 *Ibid*.

39 ICOM Code of Ethics for Museums of 1986 (revised in 2004), available at: http://icom.museum/ethics.html (02.03.2012).

40 American Association of Museums Code of Ethics for Museums (2000), available at: http://www.aam-us.org/museumresources/ethics/coe.cfm (02.03.2012).

41 Museums Association Code of Ethics for Museums (2002), available at: http://www.museumsassociation.org/ethics/code-of-ethics (02.03.2012).

42 See for instance art. 6.2. of the ICOM Code of Ethics, stating that "Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level".

43 See for instance on the German, Australian, Irish, and Swiss anti-seizure statutes, WELLER MATTHIAS, *Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the Liechtenstein Litigation*, Vanderbilt Journal Transnational Law, Vol. 38, 2005, pp. 997 et seqq.

44 *Shchukin v Le Centre National d'Art et de Culture George Pompidou and others* (Tribunal de Grande Instance, 1ème Ch., 1 Sect., 16 July 1993). The French court considered itself unable to pronounce any measures against the Russian Federation in view of its sovereign immunity. On appeal, the claim was dismissed on the grounds that the artworks had already left France.

enacted anti-seizure legislation[45] for publicly owned artworks, the application of which, however, requires for each case a joint order by the Minister of Culture and the Minister of Foreign Affairs[46].

3. Non-Governmental and Intergovernmental Organisations

Non-governmental organisations (NGOs) such as the International Council of Museums (ICOM) and Intergovernmental Organisations (IGOs) including the World International Property Organization (WIPO) and United Nations Educational, Scientific and Cultural Organization (UNESCO) may partake in political discussions on the subject of art restitution claims[47]. NGOs and IGOs may also collaborate with each other on specific issues. For example, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (UNESCO Convention of 1970)[48] explicitly foresees that UNESCO may *"call on the co-operation of any competent non-governmental organization"* to obtain the required information (art. 17.3).

Particularly Intergovernmental Organisations offer governments a forum through which they can "campaign" for their interests[49]. In the 1960s, the United Nations General As-

45 Article 61, Loi No. 94-679 of 8 August 1994. The law is "protecting from seizure all cultural objects lent by a foreign power, local authority or cultural institution to the French State or any other legal person designated by the French State, for public exhibition in France" (REDMOND-COOPER RUTH, *Disputed Title to Loaned Works of Art: The Shchukin Litigation,* Art Antiquity and Law, Vol. 1, 1996, p. 76).

46 See REDMOND-COOPER, *Disputed Title* (*cit.* n. 45), p. 76.

47 See for instance article 23 of The Hague Convention of 1954 as well as art. 35 and 36 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, providing for the mediation or conciliation procedures with the help of the Protecting Powers and of UNESCO's Director-General. A complete list of pertinent organisations in the field of restitution of cultural property would exceed the scope of this article. Relevant organisations in this area are the World Trade Organization (WTO), United Nations Office for Drugs and Crime (UNODC), UNIDROIT, INTERPOL and national special police units including the FBI Art Theft Program (USA), the Italian *Carabinieri,* the French *Office central de lutte contre le trafic des biens culturels* (OCBC) and the Antiquities Unit of Scotland Yard – Metropolitain Police (UK). For a more extended list, see STAMATOUDI IRINI A., *Cultural Property Law and Restitution – A Commentary to International Conventions and European Union Law,* IHC Series in Heritage Management, Cheltenham et al. 2011, pp. 178 et seqq.

48 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Paris, 14 November 1970.

49 Discussions for instance regarding the tradition knowledge debate within the institutional forums of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional

sembly of UNESCO and regional organisations repeatedly allowed for source nations to insist upon market nations to enforce source nation restrictions on the export of cultural property[50]. At present, the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP)[51] primarily provides a negotiating forum for member states of the UNESCO Convention "aimed at facilitating bilateral negotiations and agreements for the return or restitution of cultural property, particularly that resulting from colonisation and military occupation to its countries of origin, either when all the legal means have failed, or where bilateral agreements have proved unsuccessful"[52]. Hence, it may act in good offices[53] for cases which do not fall under the scope of the UNESCO Convention of 1970. In respect of a Makonde Mask that was stolen in 1984 from the Tanzanian National Museum (*Dar Es Salaam Museum*), the Republic of Tanzania and Switzerland both called on the ICPRCP when negotiations between the parties were in a stalemate. The discussions were subsequently resumed and an agreement was found[54]. While the committee is not a political actor as such, its involvement in a restitution claim automati-

Knowledge and Folklore (IGC) has been criticized for being "member-driven" by including indigenous representatives as observers, hence not having the possibility to vote. Moreover, such forums would "either advance assumptions that emanate from their mandates, try to fit the issues into these mandates, or politicize these issues in order to either garner opposition or exclude them from the agenda" (KAMAU MAINA CHARLES, *Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums,* International Journal of Cultural Property, Vol. 18, 2011, p. 157).

50 MERRYMAN, *Two Ways of Thinking* (*cit.* n. 1), p. 143.

51 The ICPRCP was set up in 1978 by Resolution 20 C4/7.6/5 at the 20th Session of the UNESCO General Conference of UNESCO; see also A Brief History of the Creation by UNESCO of an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Museum International, Vol. 31, Issue 1, 1979, pp. 59 et seqq. Similarly in the context of armed conflict and cultural property, the Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 implemented the Intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict monitoring the operation of the Protocol.

52 SHYLLON FOLARIN, *The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration*, Revue droit uniforme – Uniform Law Review, N.S. 5, 2000, p. 222.

53 "Good offices" may be defined as an "action taken by a third party to bring about, or initiate, or cause to be continued, negotiations without the third party actively participating in the discussion of the dispute" (STAMATOUDI, *Cultural Property Law and Restitution* [*cit.* n. 47], p. 199; see also art. 17.5 UNESCO Convention of 1970).

54 See BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Affaire Masque Makondé – Tanzanie et Musée Barbier-Mueller,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

cally implies that the disputed countries are recommended to solve their issues through the diplomatic channel.

4. Advisory Panels and Commissions

Several countries have set up advisory panels and commissions with the task of dealing with restitution claims in the context of Holocaust-Era looted art, such as the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value in the Second World War[55], the Spoliation Advisory Panel of the United Kingdom[56], and the German Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution[57]. These panels and commissions have been established for the purpose of identifying art that was confiscated by the Nazis[58]. Moreover, regarding cultural property held in state museums, they assist victims by addressing their ownership claims and may provide recommendations, which are possibly followed by governments, thus falling under the scheme of conciliatory dispute resolution[59].

A telling example is the recommendation rendered in 2005 by the Dutch Restitution Commission[60] on the restitution claim of Marei von Saher, sole heir of the grand art dealer Jacques Goudstikker, who lost many artworks by Nazi lootings during the Second World War. Following the end of the war, numerous works of art from the Goudstikker collection were returned to the Dutch government in accordance with the policy of external restitution – the practice of returning art objects to their country of origin rather than

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55 See Restitutions Committee, http://www.restitutiecommissie.nl/en (07.03.2012).

56 See Department of Culture Media and Sport: Spoliation Advisory Panel, http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx (02.03.2012).

57 *Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturguts, insbesondere aus jüdischem Besitz*, also known as the "Looted Art Commission" ("*Raubkunstkommission*"), see Lost Art Koordinierungsstelle Magdeburg: Beratende Kommission, http://www.lostart.de/nn_6044/sid_004660D8E1239CCDFA53B7BF74CE93CB/nsc_true/Webs/DE/Kommission/Index.html?__nnn=true (02.03.2012).

58 See Washington Conference Principles on Nazi Confiscated Art, 3 December 1998, Principle n° 10.

59 Conciliation may be defined as "a process whereby, subject to their prior consent, the parties concerned submit their dispute with respect to restitution or return of cultural property to a constituted organ for investigation and for efforts to effect an amicable settlement of their dispute" (Rules of Procedure for Mediation and Conciliation in Accordance with Article 4, paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, adopted during the ICPRCP's 16th session, Paris, 21–23 September 2010, art. 2.3).

60 Dutch Restitution Commission – Recommendation Regarding the Application by *Amsterdamse Negotiatie Compagnie* NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection (Case number RC 1.15), 19 December 2005.

to the individual owner – and kept in national museums ever since. The Dutch government ultimately complied with the Committee's advice on the return of mainpaints of 200 paintings to the heir[61]. Besides issuing recommendations, the Dutch Restitution Committee also delivers binding opinions on spoliated art claims, a procedure which requires the consent of both parties.

Other commissions have been founded for claims relating to indigenous cultural heritage, such as the American Graves Protection and Repatriation Review Committee[62]. The Review Committee hears disputes between American Indian tribes, Native Hawaiian organisations, and Alaska Native villages and corporations against an American museum, or the U.S. Federal Agency as to cultural property or human remains. By this means, the New York State Museum and the Onondaga Indian Nation came to an agreement pursuant to the Review Committee's recommendation, according to which the ancestral remains of 180 individuals held in the museum's collection since 1988 were returned to the American Indian tribe[63].

In parallel to rendering recommendations, the Committee's work also focuses on dispute avoidance, as it greatly contributes to the interpretation of ambiguities held in the Native American Graves Protection and Repatriation Act (NAGPRA)[64] and facilitates draft repatriation approaches in order to prevent disputes from the outset[65].

B. Legal Sources and Practical Causes for Governmental Action

International treaties have recognized the need to protect cultural property in the context of armed conflicts and of illicit trade, export and import. While it is beyond the scope of this article to consider the pertinent international legal regime in its entirety, the follow-

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61 See BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case 200 Paintings – Goudstikker Heirs and the Netherlands,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

62 See National NAPGRA, http://www.nps.gov/nagpra/review/index.htm (02.03.2012).

63 See Native American Graves Protection and Repatriation Review Committee Findings and Recommendations Regarding Cultural Items in the Possession of the New York State Museum, Fed. Reg. Vol. 74, No. 41 (4 March 2009), 9427 et seqq.

64 Native American Graves and Protection Act, NAGPRA of 16 November 1990, 25 U.S.C. 3001 et seqq.

65 See PATERSON ROBERT K., *Resolving Material Culture Disputes: Human Rights, Property Rights, and Crimes Against Humanity,* in: NAFZIGER JAMES A.R./NICGORSKI ANN M. (eds.), Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce, Leiden 2009, pp. 385 et seqq.

ing section identifies the most evident international conventions in relation to four primary causes for governmental action.

1. National Cultural Property Agenda

Attempts by governments to regulate the movement of cultural property may be found in the late nineteenth and early twentieth centuries, such as in Greece (1834), Italy (1872) and France (1887)[66]. Ever since, governments have engaged into legislative and practical efforts aiming to serve their national cultural property agenda. By means of national export restrictions and state ownership regulation, nations may reclaim what they consider being their national cultural property from foreign museums and states. The UNESCO Convention of 1970 for instance defines five categories of what *"forms part of the cultural heritage of each state"*, relying for instance on the nationality of the artist and on the territory within which the object was found (art. 4)[67].

One the one hand, states desire to protect cultural property by submitting their exportation to strict limitations[68]. More recent national export controls have been implemented based on the UNESCO Convention of 1970, which requires states to take *"necessary measures, consistent with national legislation"* to regulate the export of cultural property (art. 7.a). Consequently, some countries such as Spain and the United Kingdom have defined certain cultural objects prohibited from exportation, while others, including Turkey and Greece, restricted the exportation for a wide range of cultural property[69].

Operating on a state-to-state level only, the UNESCO Convention of 1970 purports international co-operation as *"one of the most efficient means of protecting each country's cultural property"* from the import, export and transfer of ownership in contravention of the provisions of other signatory states (art. 2 and 3). When contracting state parties seek the return and recovery of property in cases where the exportation, importation, or the transfer of ownership title of that property has occurred in a manner infringing upon their national provisions, the Convention explicitly privileges *"diplomatic offices"* (art. 7.b.ii)[70], but if consistent with the national law of the requested state, restitution

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66 See O'KEEFE PATRICK J., *Commentary on the 1970 UNESCO Convention,* 2nd ed., Leicester 2007, p. 3.

67 These criteria are however not uncontested (see for instance JAYME, *Globalization in Art Law* [*cit.* n. 20], p. 934).

68 MERRYMAN JOHN HENRY, *A Licit Trade in Cultural Objects,* International Journal of Cultural Property, Vol. 4, 1995, p. 19.

69 FORREST CRAIG, *International Law and Protection of Cultural Heritage*, New York 2010, p. 153.

70 According to O'KEEFE, art. 7(b ii) may involve the seizure by the requested State of the disputed objects pending a decision by a competent authority (O'KEEFE, *Commentary* [*cit.* n. 66], p. 60).

may also be claimed at court (art. 13.c)[71]. The channel of diplomatic offices presupposes a request by the State party of origin to the importing state. Hence, the viability of a claim from an institution in the exporting state will much depend on the commitment and capability of its own national government[72]. Moreover, the political climate between the two states may be of great importance in such bilateral requests, as in case diplomatic relations are breached when the stolen property has been recovered or is suspected to be found in the importing state, the chances of successful diplomatic negotiations are likely to be low[73].

Similarly, the UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention)[74] protects the interests of a state requesting the restitution of stolen (art. 3 and 4) or the return of illicitly exported cultural property (art. 5 to 7). The latter claim may only be filed by states, whereas restitution request for stolen cultural objects are also provided to individuals and legal entities. The distinction correlates with the governmental monopoly on the designation of the cultural property which needs an export license to leave the state's territory or may not be exported at all[75]. While the UNIDROIT Convention admits restitution claims for any *stolen* cultural item including uninventoried objects from private parties, cultural property subject to *export restrictions* has to be designated by national legislation. In the latter case, the requesting state has to show that *"the removal from its territory significantly impairs"* one or more of the interests listed in the Convention (art. 5).

The UNIDROIT Convention also provides requesting parties with an alternative to court proceedings, namely the possibility to submit their dispute to *"the courts or other competent authorities of the Contracting State"*, which, largely interpreted, include the Ministry of Culture, as well as advisory panels and commissions (art. 8.1 and 8.2)[76]. Furthermore, the parties may agree to initiate arbitration proceedings (art. 8.2).

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71 According to the Report of the United States Delegation to the Special Committee of Governmental Experts to examine the Draft Convention of Cultural Property, UNESCO House, Paris, 13–14 April 1970, n° 18, considered art. 13(c) to impose an obligation of procedural nature, i.e. "to provide a judicial remedy for the vindication of a property right if one exists" (as quoted in O'KEEFE, *Commentary* [*cit.* n. 66], p. 84).

72 See O'KEEFE, *Commentary* (*cit.* n. 66), p. 60.

73 *Ibid*.

74 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995.

75 See PROTT LYNDEL V., *Commentary on the UNIDROIT Convention on Stolen and Illegaly Exported Cultural Objects 1995*, Leicester 1997, p. 26.

76 *Idem,* p. 71.

In Europe, the European Directive on the Return of Cultural Objects[77] sets out a procedure following which member states may apply for the return of objects which are part of a public collection and classified as *"national treasure"*[78]. Objects labelled as national treasure are generally inalienable; also qualified as *res extra commercium*[79]. Export controls vary according to the legislation of each state. National laws may, for instance, determine that the scheme for national treasures applies to specifically designated objects (such as in France[80]) or to entire categories of objects (such as in Italy[81]). Generally, the exportation of such goods must be authorised beforehand by the competent state authority.

Ultimately, governments have codified national laws which vest the ownership of defined cultural property in the state itself, including by declarations of state ownership through forfeiture[82]. The material scope of these laws provides for the types of objects the states desire to protect, which may vary from country to country. In the same way, national legislation may designate inventoried objects to be inalienable, *res extra commercium* or subject to an export license. With regards to the dispute resolution process, the government, being the owner of the reclaimed cultural property object, intervenes as a primary requesting party.

2. Lack of Supportive Regulation

Where legal regulation is not clear or unavailable, requesting parties may seek the assistance of governments. Restitution claims may be time barred, especially in the context of Nazi-era related claims or have no sustainable legal basis at all, as for transfers of property which occurred before the enactment of export restrictions. Having no tenable chance of success at court, governmental action may be the sole possibility to obtain the restitution of lost cultural property. Interestingly, requests for cultural property *"lost as a*

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77 Council Directive 93/7/EEC of 15 March 1993, On the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State 1993 O.J. (L 074), p. 74.

78 The export restrictions for national treasures comply with the principle of free market circulation as set out in the Treaty on the Functioning of the European Union (TFEU, European Economic Union [EEC] Treaty, Council Regulation [EEC] 2603/69, 20 December 1969, OJ 1969 L 324/25, formerly "Treaty establishing the European Community" [TEC]). In fact, the treaty allows for such protection, as exports of cultural goods may be restricted on grounds of "protection of national treasures possessing artistic, historic or archaeological value" (art. 36 TFEU).

79 See JAYME, *Globalization in Art Law* (*cit.* n. 20), p. 934.

80 See article L112-11 of the Heritage Code (*Code du patrimoine*).

81 See *Legislative Decree no. 42 of 22 January 2004*, Code of the Cultural and Landscape Heritage, *Ministero per i beni e le attività culturali, Roma, Giugno 2004,* article 1.2–1.5).

82 See *infra,* p. 232.

result of colonial or foreign occupation or as a result of illicit appropriation"[83], which do not fall under the scope of application of the UNESCO or UNIDROIT Conventions, may be referred to the ICPRCP[84].

In other contexts, restitution claims are given consideration by governments embracing a moral obligation to do so, such as for Nazi-looted art or indigenous art related claims[85]. The enforceability of these specific claims which relate to remote dispossessions, generally fails at court due to statutes of limitations and missing evidence. Given the highly ethical, sacred and emotional issues at stake, Nazi-looted art and indigenous art restitution claims are, however, very likely to become political matters, triggering governments to intervene.

In the context of Holocaust-era related claims, states have even formally recognized their moral duty on several occasions, resulting in an understanding on a set of principles. An international conference on the matter of Nazi-looted art has resulted in the drafting of the Washington Conference Principles[86]. The subsequent Terezin Declaration, which reinforced the Washington principles, called on nations to facilitate restitution claims and reach *"just and fair solutions (...) based on the facts and merits of the claims"*[87]. The issue had continuously gained awareness amongst states, initiating efforts to investigate within public collections for objects which might have been looted during World War II[88]. As a consequence, some states established specialized committees for the purpose of responding to restitution claims filed by Nazi-looted art victims[89]. In spite of these recent developments, Nazi-looted art restitution claims still encounter difficulties to gain the mercy of the political branch[90].

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83 Art. 3(2) of the ICPRCP Statutes.

84 UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, see *supra,* p. 222. See also SCOVAZZI, *Diviser c'est détruire* (*cit.* n. 21).

85 The imposition of a moral obligation on Nazi-looted art owners is, however, not uncontested; see for instance RAUE PETER, *Probleme der Restitution – Neue Lösungsmöglichkeiten,* in: MOSIMANN PETER/SCHÖNENBERGER BEAT (eds.), Kunst & Recht, Schriftenreihe Kultur & Recht, Vol. 1, Bern 2011, pp. 119 et seqq.

86 44 governments participated at the Washington Conference on 3 December 1998, http://www.bak.admin.ch/themen/raubkunst/index.html?lang=en&download=NHzLpZeg7t,lnp6I0NTU042l2Z6ln1ad1IZn4Z2qZpnO2Yuq2Z6gpJCDeIR_g2ym162epYbg2c_JjKbNoKSn6A-- (02.03. 2012).

87 Terezin Declaration, issued by 46 states on 30 June 2009.

88 See also *infra,* pp. 237 et seqq.

89 As foreseen by Washington Conference Principle n° 10; see also *supra,* p. 223.

90 See ANGLIM KREDER JENNIFER, *State Law Holocaust-Era Art Claims and Federal Executive Power,* Northwestern University Law Review Colloquy, Vol. 105, 2011, p. 329.

The right of indigenous peoples to maintain their cultural traditions and customs, and to reclaim their cultural property taken without their consent has been formally acknowledged by the international community when approving the United Nations Declaration on the Rights of Indigenous Peoples[91]. The Declaration stipulates that states have to provide effective mechanisms developed together with indigenous peoples in respect of their cultural, spiritual, intellectual, religious interests and needs (art. 11.2). Moreover, states are expressly asked to *"enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned"* (art. 12.2). Effective measures shall be taken to ensure that indigenous peoples *"can understand and be understood in political, legal and administrative proceedings"* (art. 13.2). The Declaration evidences the overall sensitivity regarding indigenous art related claims, which progressively meet with approval from states thanks to ethical considerations based on the fundamental guiding principle of human dignity, respect for other cultures and beliefs[92].

3. Unpersuasive Evidence or Provenance

When claims are crystal clear in terms of their underlying facts and legal requirements, claimants will directly recourse to courts. Conversely, if the claiming party either lacks of sufficient evidence to back up his claim or cannot persuasively establish the provenance[93] of the requested object, he may want to seek the diplomatic channel fearing that his claim is likely to be dismissed at court[94]. When such key information is missing, it is very difficult for the requesting party to argue a valid claim. Politics may give some leeway for consideration of a demand and allow for its appreciation based on its merits and despite lacking validity on procedural grounds. The difficulty of yielding evidence has particularly hindered Holocaust-era victims to file claims, given that documents

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91 United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), adopted on 13 September 2007, available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. See in particular art. 11 (07.03.2012).

92 See Rapport n° 482 (2008–2009) by Philippe Richert, Sénat, 23 June 2009, p. 17, available at: http://www.senat.fr/rap/l08-482/l08-4821.pdf (21.02.2012). Relating to the Maori warrior heads case involving France and New-Zealand; see also CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Tête Maorie de Rouen – France et Nouvelle-Zélande,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

93 The provenance of an object is "its core biographical information, i.e. when it was found, where it was found, and who has owned the object since it was found" (MEALY NATE, *Mediation's Potential Role in International Cultural Property Disputes*, Ohio State Journal on Dispute Resolution, Vol. 26, 2011, p. 174, n. 25.

94 See STAMATOUDI, *Cultural Property Law and Restitution* (*cit*. n. 47), p. 189.

providing for the claimants ownership were lost over time and witnesses have passed away.

The stakeholders attempting to obtain the infamous Sevso treasure have similar difficulties in establishing as to which part of the Roman Empire the hoard of silver objects stemmed from. Until now, Lebanon, Hungary and Croatia have claimed ownership over the treasure but yet failed to provide conclusive information proving that the objects had been illicitly excavated and exported from their respective territory[95].

4. Diplomatic Necessity and Armed Conflicts

The necessity for states to address an ongoing dispute may result from stalled negotiations, an armed conflict, emergency situations and where an intervention is eagerly expected because of high public pressure.

To begin with, the parties may solicit the attention of governments for escalated conflicts, for instance because neither negotiation nor litigation have brought satisfying results. Overall, ways of dispute resolution alternative to court proceedings through the governmental channel are suggested by several international treaties[96] and national laws[97].

In the event of an armed conflict, the Hague Convention of 1954[98] codified in very broad terms a conciliation procedure, according to which *"protecting powers shall lend their good offices in all cases where they may deem it useful in the interest of cultural property"* (art. 22.1). For this purpose, state representatives and their respective cultural property authorities shall meet together for discussions chaired by a third party, the conciliator, who may either belong to a neutral power or be nominated by the Director-General of UNESCO (art. 22.2)[99].

Under the UNESCO Convention of 1970, governments *"whose cultural property is in jeopardy from pillage of archaeological or ethnological materials, may call upon other*

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95 BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Sevso Treasure – Republic of Lebanon et al. v Marquess of Northampton,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

96 See *supra,* pp. 225 et seqq.

97 See for instance art. 44(3) of the Swiss Constitution, which submits disputes between Swiss cantons or between a canton and the Swiss Confederation to negotiations and mediation (Swiss Constitution, RS 101, 18 April 1999).

98 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 (The Hague Convention of 1954).

99 See also art. 35 and 36 of the Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, 26 March 1999.

State Parties who are affected" (art. 9). In such circumstances, states may be required to *"participate in a concerted effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned"* as well as *"provisional measures"*[100].

By ratifying the UNESCO Convention of 1970, states have dissimilarly enabled their head of government to intervene in emergency matters. The Swiss Cultural Property Transfer Act (CPTA)[101] provides for the intervention of the Federal Council (*Conseil fédéral*) on the export, transit or import of cultural property, in order *"to protect a state's cultural heritage jeopardized by exceptional events"* (art. 8.1a CPTA). Under the Cultural Property Implementation Act (CPIA)[102], the president of the United States may act on his or her own initiative where an *"emergency condition applies with respect to archaeological or ethnological material of any State party",* and wholly deny the importation of that material into the United States (§ 2603 a and b CPIA)[103].

III. Impact of Politics on the Resolution of Art Restitution Claims

The influence governments exert on art restitution claims can be evaluated on two different levels, namely in terms of the available means they may resort to (A) and the quality of the resolution process and of the provided solution (B).

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100 Not developed in the present paper is article 11 of the UNESCO Convention of 1970 regarding exportations and transfers of ownership due to the occupation of a country. The article is of relevance especially for states which are not party to The Hague Convention of 1954 (see O'KEEFE, *Commentary* [*cit*. n. 66], p. 78).

101 Federal Act on the International Transfer of Cultural Property, RS 444.1, 20 June 2003.

102 The CPIA is codified at 19.U.S.C. §§ 2601–2613, 2006.

103 The material is required to be "(1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation; (2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or (3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; and application of the import restrictions set forth in section 2606 of this title on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation." (19 U.S.C. § 2603); see art. 9 UNESCO Convention 1970.

A. On the Means of Governmental Action

Beyond the possibility of referring art restitution claims to court or initiating negotiations, governments can avail themselves of various pressure means. They may enforce protective cultural property laws, or threaten a party by using the media or by imposing a cultural embargo against a museum or a state. Such measures are usually unavailable to private parties or at least not to the same extent[104].

1. National Regulation

An option for states to obtain the recovery of cultural property held in another country is by adopting national laws which reinforce restitution claims of original owners – being either the requesting state itself or a private party.

a) Nationalisation of Cultural Property

The first scenario refers to the adoption by governments of what Merryman pejoratively calls cultural patrimony *"retentionist laws"*[105], which may either determine export restrictions or vest ownership of cultural property in the state. The former rules may not only apply to state patrimony, but also to privately owned cultural property. The latter laws "nationalise" cultural property and provide proprietor states with ownership rights which enjoy enhanced universal recognition. In fact, whereas courts are not obliged to respect another states export regulations, all national legal systems prohibit theft and state courts generally recognize foreign property laws subject to conflict of laws analysis[106]. Ownership rights yet have to comply with nationally differing limitation periods and good faith purchase rules[107].

By means of national laws, states may declare themselves owners of specific cultural property including objects such as archaeological goods which have not been discovered so far[108]. Source states have made great usage of ownership provisions to retain certain

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104 Press reports may support an individual's restitution claim (most probably generating lesser interest than in case of government intervention). However, a private person is foreclosed from employing the remaining means developed in the following section.

105 MERRYMAN, *A Licit Trade* (*cit.* n. 68), p. 19.

106 See GERSTENBLITH PATTY, *Schultz* and *Barakat: Universal Recognition of National Ownership of Antiquities,* Art Antiquity and Law, Vol. 14, April 2009, p. 21 et seqq; MERRYMAN, *A Licit Trade* (*cit.* n. 68), pp. 18 et seqq (concluding on the difference between stolen and illicitly exported cultural property by "there can be no licit trade in stolen cultural objects").

107 See MERRYMAN, *A Licit Trade* (*cit.* n. 68), pp. 18 et seqq.

108 See FORREST, *International Law* (*cit*. n. 69), p. 153.

cultural objects they want to hold. Italy for instance had passed draconian cultural heritage protection laws already in the beginning of the 20th century, which declared that all *"movable and immovable objects which are at least 50 years old"* and of *"historical, archaeological, paleo-anthropological interest"* to be subject to the government's protection[109]. The rule, which found its way into actual applicable law, enables the Italian government to regulate the exportation, the transfer of title, or restoration of such cultural property including the possibility to purchase any such item if it is privately sold[110]. For these purposes, a special unit within the country's national police force has been established in 1969[111]. Ever since, Italy has recovered about 203,000 Italian works of art, including 8,032 abroad[112].

As a result, the licit exportation of every object that is more than 50 years old is subject to a release form by the Cultural Ministry[113]. Moreover, a law passed in 1939[114] subordinates all artefacts excavated in Italy after 1902 to the ownership of the Italian government[115]. Italian laws on cultural property protection enabled the country to pursue crimi-

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109 Legge 20 giugno 1909, No. 364 (GU No. 150 del 28/06/1909) *che stabilisce e fissa norme per l'inalienabilità delle antichità e delle belle arti* (law of 20 June 1909, No. 364 establishing and determining the applicable rules for the inalienability of antiquities and fine arts); *Regolamento in esecuzione alle leggi 20 giugno 1909*, No. 364 e 23 giugno 1912, No. 688, *per le antichità e le belle arti* (Regulation on the implementation of the laws of 20 June 1909, No. 364 and 23 June 1912, No. 688 on antiquities and fine arts).

110 See Code of the Cultural and Landscape Heritage, Legislative Decree No. 42 of 22 January 2004, *Ministero per i beni e le attività culturali Roma,* June 2004, art. 70.

111 The *Comando Carabinieri Ministero Publica Instruzione – Nucle Tutela Patrimonio Artistico* (The Special Unit for the Protection of Cultural Heritage or Artistic Patrimony); WOLKOFF, *Transcending Cultural Nationalist* (*cit*. n. 22), p. 715.

112 WOLKOFF, *Transcending Cultural Nationalist* (*cit.* n. 22), p. 715 (referring to GRUNER STEPHANIE, *Italy's Special Carabinieri Unit Fights Art Looting,* The Wall Street Journal, 10 April 2006, available at: http://www.patrimoniosos.it/rsol.php?op=getarticle&id=19660 [02.03.2012]).

113 See PROVOLEDO ELISABETTA, *Italy Defends Treasures (and Laws) With a Show,* The New York Times, 7 October 2008, available at: http://www.nytimes.com/2008/10/08/arts/design/08heri.html?fta=y (02.03.2012).

114 Legge 1 giugno 1939*,* No. 1089*,* (G. U. 8 agosto, 1939 No. 184), *Tutela delle cose di interesse artistico e storico* (Protection of Things of Artistic or Historic Interest), amended and consolidated by D. Legge 29 ottobre 1999, No. 490, *Testo unico delle disposizioni legislative in materia di beni culturalie ambientali, a norma dell'articolo I della legge 8 ottobre, No. 352* (G. U. 27 dicembre 1999, No. 302, Supp. ord. No. 229).

115 KAYE LAWRENCE M., *Art Wars: The Repatriation Battle,* New York University Journal of International Law and Politics, Vol. 31, 1998, p. 92. The finder obtained in return a fee amounting to 25% of the discovered antiquity's value (Legge 1 giugno 1939, No. 1089, *ibid*., art. 44).

nal investigations on an international level, targeting in particular major auction houses and the curators of American museums for the illicit trade of antiquities[116].

Negotiations between the J. Paul Getty Museum and the Italian government escalated when criminal proceedings were initiated in 2005 against the Getty curator, Marion True, by an Italian prosecutor for allegedly dealing with stolen art. As reported by the press, the Getty Museum subsequently attempted to subject a return of the requested antiquities to the dropping of charges against True, which was refused by the Italians[117]. A Roman judge, however, ultimately dismissed the charges by ruling that the statute of limitations had expired[118]. Meanwhile, in August 2007, the Getty Museum and the Italian government reached a compromise and agreed for the return of 40 ancient treasures instead of the demanded 51 to Italy[119]. Although the Italian government has never declared so, the trial against Marion True suggests, on retrospective examination, the government's concern *"either to make an example of her or to pressure the museum into returning more antiquities, rather than to punish her for misdeeds"*[120].

In view of the broad Italian statutory scheme protecting national patrimony, the Italian regime has met with criticism by art dealers and museums[121]. Similar to Italy, Turkey has

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116 See WOLKOFF, *Transcending Cultural Nationalist* (*cit.* n. 22), p. 711; ISMAN FABIO, *Justice Is Slow, but Italy Has Not Given Up the Fight,* The Art Newspaper, Vol. 229, November 2011, p. 45.

117 See also ANGLIM KREDER JENNIFER, *Behind Italy's Recent Successes in Cultural Patrimony Recovery,* Art & Cultural Heritage Law Newsletter, ABA Section of International Law, Vol. 1, Issue 1, Winter 2008, p. 3.

118 FELCH JASON, *Charges Dismissed against ex-Getty Curator Marion True by Italian Judge [updated],* The Los Angeles Times, 13 October 2010, available at: http://latimesblogs.latimes.com/culturemonster/2010/10/charges-dismissed-against-getty-curator-marion-true-by-italian-judge.html (02.03.2012).

119 Similarly, Marion True was also accused by a Greek prosecutor of acquiring a stolen ancient gold wreath for the Getty museum, just to be discharged by a Greek appeals court considering the claim to be time barred. Again, the requested object was returned to Greece during the trial against True, precisely eight months before the court's verdict (see CARASSAVA ANTHEE, *Greek Court Dismisses Case Against Ex-Curator,* The New York Times, 28 November 2007, available at: http://www.nytimes.com/2007/11/28/arts/design/28true.html [02.03.2012]).

120 KLINE THOMAS R., *Finding Marion True and/or the J. Paul Getty Museum – The Descent into Criminality and Chaos at the World's Wealthiest Museum, and the Trip Back*, KUR Journal, Vol. 6, 2011, p. 176 (challenging the Italian prosecutor's lack of consideration to the statute of limitations of the case). This is vigorously denied by Paolo Giorgio Ferri, Italy's public prosecutor who tried Marion True, the art dealer Robert Hecht and the antiquities dealer Giacomo Medici; see ISMAN (*cit*. n. 116), p. 45.

121 See PROVOLEDO ELISABETTA, *Italy Defends Treasures* (*cit.* n. 113), reporting on a statement by Domenico Piva, president of the Italian federation of art dealers, criticising the laws as they "led to

adopted a cultural property protection agenda, first by enacting a decree and later on, in 1983, by passing a law on the protection of cultural and natural antiquities[122].

Moreover, many national laws allow for the forfeiture of cultural property which has been illicitly exported, or attempted to be illegally exported, by transferring ownership to the state[123]. Cultural property may not be owned by the state prior to its exportation, but become vested in state ownership by its forfeiture, such as in New Zealand[124]. Foreign courts may, however, consider such simple assertions of state ownership insufficient to be enforceable and require in addition their seizure and possession by the requesting state[125]. In fact, much depends on the laws foreign courts have to comply with[126].

Aside from any retentionist and protectionist intentions, a state's cultural property agenda may also simply be guided by the *"desire to keep important or valuable objects from leaving the national territory even though they have no significant relation to the nation's history or culture"*[127] as illustrated by the widespread nationalisation of war spoils which has occurred in Russia. The Russian parliament passed a "Law on Cultural Valuables" in 1998 stating that all cultural property displaced to the USSR as a result of the Second World War and located on the Russian territory are considered being national property[128]. Russia has increasingly shielded cultural property located on its territory, one of the most prominent examples being the ongoing battle of the Chabad-Lubavitch organi-

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the creation of an entirely internal and provincial art market and restricted the profile of modern Italian artists abroad".

122 *Kültür ve Tabiat Varlıklarını Koruma Kanunu* (Cultural and Natural Heritage Protection Act), Law No. 2863, 21 July 1983; see PARK SUE J., *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering its Antiquities,* University of Pennsylvania Journal of International Economic Law, Vol. 23, 2002, p. 931.

123 See FORREST, *International Law* (*cit.* n. 69), p. 153.

124 Customs and Excise Act 1996 No. 27 (4 June 1996), art. 237.

125 See FORREST, *International Law* (*cit*. n. 69), p. 153, (referring to *Attorney General of New Zealand v Ortiz,* [1984] AC. 1 [HL], where the English House of Lords dismissed New Zealand's claim for ownership for five Maori heads which had been illicitly exported on the grounds that they had never been seized or in the possession of the State.

126 *Ibid*.

127 MERRYMAN, *A Licit Trade* (*cit.* n. 68), p. 19. Merryman calls this approach "Naked retentionism".

128 Russian Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation, N 64-FZ, 15 April 1998, translation by AKINSHA KONSTANTIN/VISSON LYNN, *Project for Documentation on Wartime Cultural Losses,* available at: http://docproj.loyola.edu/rlaw/r2.html (02.03.2012). Another translation can be found in: FIEDLER WILFRIED, *Documents – Russian Federal Law of 13 May 1997 on Cultural Values that have been Displaced to the U.S.S.R. as a Result of World War II and are to be Found in the Russian Federation Territory,* International Journal of Cultural Property, Vol. 7, No. 2, 1998, pp. 514 et seqq.

sation[129]. The non-profit Jewish cooperation has gone through many different means of dispute resolution, including arbitration, legal proceedings and the diplomatic channel in seeking the return from Russia of a large collection of invaluable books and religious documents. The collection had been seized partly during the Bolshevik Revolution and Russian Civil war between 1917 and 1925, partly in Poland by Nazi officials during the Second world war and subsequently by the Soviet army, which brought them to Russia where they are kept ever since[130].

In the 1980s, several objects transferred to the Soviet Union following the revolution and war were located at the Lenin State Library (the Russian State Library today)[131]. Over the years, representatives of the Chabad organisation were able to identify and examine the manuscripts and books held in Russia until officials of the Lenin Library foreclosed them from accessing the Library[132]. In the following, the Lenin Library refused to comply with an order of the Soviet President Mikhail Gorbachev for the return of the collection to the Chabad organisation, and appealed against an arbitral verdict of the court of the Russian Soviet Federative Socialist Republic (RSFSR)[133], on the grounds that the collection had been nationalised[134]. The intervention of several American presidents at least succeeded as they obtained from Russia the release of eight volumes of the collection[135].

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129 See also EICHWEDE, *Trophy Art as Ambassadors* (*cit.* n. 3), pp. 387 et seqq (on the Russian-German relationship regarding spoils of war held in Russia).

130 See *Agudas Chasidei Chabad of United States v Russian Federation, et al.,* 466 F. Supp. 2d 6, 10-14 (D.D.C. 2006), *aff'd in part, rev'd in part,* 528 F.3d 934 (D.C. Cir. 2008), 381 U.S. App. D.C. 316, *amended by* 729 F. Supp. 2d 141.

131 BAZYLER MICHAEL J./GERBER SETH M., *Chabad v Russian Federation: A Case Study in the Use of American Courts to Recover Looted Cultural Property,* International Journal of Cultural Property, Vol. 17, 2010, pp. 364, 366.

132 *Ibid*.

133 On arbitration courts in Russia, see O'DONNELL NEIL F./RATNIKOV KIRILL Y., *Dispute Resolution in the Commercial Law Tribunals of the Russian Federation: Law and Practice,* North Carolina Journal of International Law and Commercial Regulation, Vol. 22, 1997, pp. 795 et seqq.

134 Russia held its sovereign immunity against the Chabad claim, see FISHMAN JOSEPH P., *Locating the International Interest in Intranational Cultural Property Disputes,* The Yale Journal of International Law, Vol. 35, 2010, p. 386, available at: http://www.yjil.org/docs/pub/35-2-fishman-intranational-cultural-property.pdf (02.03.2012); JA 1:0137-0138, *Chabad, the religious Jewish Hasidic Lubavitch Community v V.I. Lenin State Library,* Decision dated 8 October 1991 of the State Arbitration Tribunal of the RSFSR, Case No. 350/13 as reported in: BAZYLER/GERBER, *Chabad v Russian Federation* (*cit.* n. 131), p. 366.

135 *Chabad, the religious Jewish Hasidic Lubavitch Community v V.I. Lenin State Library*, as reported in: BAZYLER/GERBER, *Chabad v Russian Federation* (*cit*. n. 134), pp. 369 et seqq.

Despite the fact that the taking of cultural property from the state owner without its consent, i.e. theft, is a crime prohibited by most nations' penal codes, universal recognition may fail at the outset. The legislative declaration of state ownership may not be accepted by foreign courts. In the Chabad case, the Court of Appeals for the District of Columbia found that the Lenin Library's seizure of the archives occurred in breach of international law[136]. National laws vesting ownership in the state will be measured by foreign courts against their own standards of clarity and validity[137]. *"Courts ordinarily will not enforce the laws of foreign states that prohibit the export of all cultural property (...). Generally, the courts have ruled that such ordinances are functions of the purely internal "police powers" of the foreign nation, which no other nation is bound to enforce"*[138].

In spite of the weaknesses of national retention laws, states seem to have increased in readiness to give effect to them and to return the requested objects[139]. By implementing other nation's patrimony laws, the enforcing state may *be "acting to preserve, as well as show respect for, their cultures and monuments"*[140]. If nothing else, such legal barriers have not prevented countries like Italy and Turkey from pursuing their art restitution agenda by other means.

b) Enhancement of Individual Art Restitution Claims

The second scenario relates to the strengthening of ownership rights of private parties by states which sympathize with their claim. Recently, the Californian state passed the contended "Holocaust-Era Claims Provision" (by implementing § 354.3 Californian Code of Civil Procedure, CCP), which suspended the limitation of claims for the restitution of

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136 *Agudas Chasidei Chabad of United States v Russian Federation, et al.,* (*cit.* n. 130). See for instance The Hague Convention of 1907 which prohibited taking artistic and scientific works from the enemy as spoils of war, irrespective of who bore responsibility for the war.

137 See FORREST, *International Law* (*cit*. n. 69), p. 151. Governments have therefore a great incentive to enter inter-state agreements explicitly providing for restrictions on the transfer of ownership, exportation and importation of cultural property (see PARK, *The Cultural Property Regime in Italy* [*cit.* n. 122], p. 941).

138 KAYE, *Art Wars* (*cit.* n. 115), p. 80. Criminal sanctions have also been criticized for lacking of fairness and consistence (referring to China's implementation of its criminal sanctions for art thieves) and of efficiency (as the offender simply has to avoid entering the territory of the prosecuting country in order to avoid criminal prosecution); see PARKHOMENKO, *Taking Transnational Cultural Heritage Seriously* (*cit.* n. 14), p. 157.

139 See FORREST, *International Law* (*cit.* n. 69), p. 159.

140 BAUER, New Ways of Thinking About Cultural Property (*cit*. n. 24), p. 700.

Holocaust looted art if the action was filed on or before 31 December 2010[141]. The provision came under close scrutiny by Californian courts when the heir of the grand Dutch collector Jacques Goudstikker attempted to obtain two paintings still held in the Norton Simon Museum[142]. However, both the district court and the court of appeals ruled that § 354.3 CCP would violate, on the one hand, the foreign affairs doctrine by applying also to looted art objects situated outside the Californian state's territory and, on the other hand, the federal government's exclusive power to make and resolve war, which includes the resolution of war claims[143]. Such a change of law would instead pertain to the authority of the federal government[144].

A more successful example consists of the Austrian law passed in December 1998 on the restitution of looted artworks and other movable cultural property held in state museums and collections[145]. The law encourages the gratuitous return of looted artworks to their rightful owners who had been coerced to donate them in exchange for export permits following the Second World War (§ 1) and authorizes the Federal Ministries for Education, the Arts and Culture, for Economical Affairs and for National Defence to take an active role in identifying the original owners and in returning to them the respective objects (§ 2.1). The legislative change had again a direct impact on an ongoing restitution request, namely by the niece of an art collector prosecuted by Nazis. The niece,

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141 According to § 354.3, "any owner, or heir or beneficiary of an owner, of Holocaust-era artwork[141], may bring an action to recover Holocaust-era artwork from any [museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance]", which "shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010."

142 See BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Cranach Diptych – Goudstikker Heirs and Norton Simon Museum,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, June 2012.

143 *Von Saher v Norton Simon Museum of Art at Pasadena,* 592 F.3d 954 (9th Cir. 2010), No. 07-56691, 2010 U.S. App. LEXIS 1019 at 11.

144 A further attempt to amend the limitation periods was made in 2010 by the introduction of California Assembly Bill 2765, which was ultimately also declared being unconstitutional by the United States District Court for the Central District of California, in *Cassirer v Kingdom of Spain*, 616 F.3d 1019; 2010 U.S. App. LEXIS 16707, cert. denied, 2011 U.S. LEXIS 4928, (S.Ct. June 27, 2011); on remand sub nom *Cassirer v. Thyssen-Bornemisza Collection Found*., slip. op., No. 05-CV-3459-GAF (C.D. Cal. May 24, 2012).

145 *Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen,* BGBl. I Nr. 181/1998. The scope of application of the law was extended in 2009 to movable cultural property held in Austrian state museums and collections (BGBl. I Nr. 117/2009; *Bundesgesetz, mit dem das Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen geändert wird).*

Maria Altmann, is well known for her ultimately successful battle against the Republic of Austria leading to the recovery of five Gustav Klimt masterpieces by means of litigation, negotiation and arbitration[146]. In order to apply the 1998 restitution law, the arbitral court had to establish whether the Austrian state had acquired ownership of the paintings. Ultimately, the arbitral award confirmed the government's ownership title over the paintings and along with the 1998 restitution law, ordered their return to Maria Altmann[147].

2. Media Coverage

Unlike the discretion provided by confidential negotiations, some disputes may be referred to the media by governments with the intention to step-up pressure[148]. In particular for disputes dividing a source and a market country, identity politics can lead to partial and persuasive media coverage[149]. Dealers complain that media has become *"anti-collecting"*[150] corrupting the public opinion on collecting, which would thus reduce it to *"nothing more than a status symbol"*[151].

Targeted by the press, it is most likely that an entity, individual, or a state will have to respond publicly in some manner. Media can play a powerful role in the change of perception regarding the justifiability of a restitution claim[152]. As an example, a letter by a reader to a newspaper from Saint-Gall generated a public debate and extensive local media coverage on the legitimacy of the Canton of Zurich's ownership title on cultural

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146 See RENOLD CAROLINE/BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case 6 Klimt Paintings – Maria Altmann and Austria,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

147 Arbitral Award, *Maria V. Altmann and others v Republic of Austria,* 6 May 2004, available at: http://bslaw.com/altmann/Zuckerkandl/Decisions/decision.pdf (02.03.2012).

148 See art. 5(g) UNESCO Convention of 1970 stating that governments have to see "that appropriate publicity is given to the disappearance of any items of cultural property".

149 See KIMMELMAN MICHAEL, *When Ancient Artifacts Become Political Pawns*, The New York Times, 23 October 2009, available at: http://www.nytimes.com/2009/10/24/arts/design/24abroad.html?pagewanted=all (02.03.2012) (stating that "[t]he forces of nationalism love to exploit culture because it's symbolic, economically potent and couches identity politics in a legal context that tends to pit David against Goliath").

150 See MARKS PETER, *Dealers speak, in: Who Owns the Past? Cultural Policy, Cultural Property, and the Law,* FITZ GIBBON KATE (ed.), New Brunswick, NJ 2005, pp. 194 et seqq (interviewing Michael Ward, antiquities dealer).

151 *Ibid*.

152 See for instance ROBINSON PIERS, *Theorizing the Influence of Media on World Politics: Models of Media Influence on Foreign Policy,* European Journal of Communication, Vol. 16, 2010, pp. 523 et seqq, available at: http://ics.leeds.ac.uk/papers/pmt/exhibits/1848/robinson2.pdf (02.03.2012) (on the importance of news media in shaping foreign policy).

goods, which had remained in Zurich following a religious war between the two Swiss cantons almost 300 years earlier. The debate led the Cantonal Executive Council of Saint Gall to initiate negotiations with his counterpart in Zurich[153].

Italy's triumph over the restitution of thousands of artefacts and art objects is not least due to the high propagation of its claims by the international press[154]. As a pioneer of aggressive repatriation campaigns, Italy has organized a show entitled *"Rovine e rinascite dell'arte in Italia"* (Ruins and the Rebirth of Italy) in 2008, exhibiting about sixty artefacts that were looted from Italy and recovered thanks to the *Carabinieri* and to the pressure brought by the government to bear on United States museums[155]. It showed, for instance, a statue from the first century, the so-called Marching Artemis (*Maricante Artmemis*), which was illegally excavated and sold to Swiss art traffickers around 1994[156]. In an attempt to set the police on the wrong track, the traffickers created a copy of the statue by commissioning a Roman monument maker[157]. The subsequent deal of the original to Japanese and American collectors failed when the *Carabinieri* identified the looted artefact. Both the copy and its original were on view at the 2008 show. By evidencing the efficiency of Italy's cultural property protection agenda, critics considered the exhibition to be a "veiled threat"[158] to all remaining holders of Italian antiquities[159].

3. Cultural Sanctions

Unlike an individual person, governments may enhance the pressure of their art restitution claim by threatening to impose cultural sanctions. In fact, they are empowered to disrupt existing scientific collaborations or enforce a cultural embargo on museums or states holding art objects and cultural property which the requesting states claim to be theirs.

The relationship between Russia and the United States is currently troubled by Russia's ongoing art loan ban on United States museums in response to a request from the Chabad-Lubavitch organisation, mentioned above[160]. Bearing in mind Russia's refusal to

153 See BANDLE/CONTEL/RENOLD, Case Ancient Manuscripts and Globe (*cit*. n. 29).

154 See WOLKOFF, *Transcending Cultural Nationalist* (*cit*. n. 22), p. 710.

155 Official Event Announcement, *Rovine e rinascite dell'arte in Italia* (Ruins and the Rebirth of Italy), 21 December 2009, available at: http://www.beniculturali.it/mibac/export/MiBAC/sito-MiBAC/Contenuti/MibacUnif/Eventi/visualizza_asset.html_1456551264.html (02.03.2012).

156 See PROVOLEDO, *Italy Defends Treasures* (*cit.* n. 113), available at: http://www.nytimes. com/2008/10/08/arts/design/08heri.html?fta=y (02.03.2012).

157 *Ibid*.

158 WOLKOFF, *Transcending Cultural Nationalist* (*cit*. n. 22), p. 709.

159 *Ibid*.

160 See *supra,* pp. 235 et seqq.

comply with court and Presidential orders for the return of the Chabad collection, the country fears that art lent to the United States could be confiscated as a potential leverage[161]. Notwithstanding the guarantees made by museums directors and American officials not to seize any of the Russian works on loan, Russia has cancelled all transfers of artworks to the United States[162]. Affected by the ban, Museums have not been able to conduct the exhibitions as planned and have in return, annulled loans to Russian museums[163]. The museums in question had not been directly informed on the art loan ban by the Russian government[164]. Instead, Russia besought the United States Department of State to initiate direct negotiations about this case[165].

Following years of unsuccessful restitution claims, Turkey has also hardened its strategy. The country threatened to terminate German and French excavation licences for Turkish archaeological digs should the requested objects not be returned[166]. A few months later, Germany surrendered and reluctantly relinquished a Hittite statue known as the Bogazköy Sphinx that was brought for restoration purposes to Berlin in 1917 by German archaeologists where it had not left ever since[167]. Similarly, Turkey currently seeks to obtain an Ottoman tile panel from the Louvre after longstanding negotiations[168]. These recent examples show that cultural sanctions may trigger the respective parties including states to address their issues and enter into negotiations.

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161 See TAYLOR KATE, *Met Cancels Plans to Loan Works to Moscow's Kremlin Museum,* The New York Times, 11 August 2011, available at: http://artsbeat.blogs.nytimes.com/2011/08/11/met-cancels-plans-to-loan-works-to-moscows-kremlin-museum/ (02.03.2012).

162 *Ibid*.

163 The Metropolitan Museum for instance has called off a loan to the Moscow museum, despite having sent to Moscow, "as a gesture of goodwill", some scenic backdrop material of a former exhibition (*ibid*).

164 See TILLMAN ZOE, *New Filings in Chabad Suit Show Russian Ban on Art Loans Prompted Government Interest,* The BLT: The Blog of Legal Times, 17 May 2011, available at: http://legaltimes.typepad.com/blt/2011/05/new-filings-in-chabad-suit-show-russian-ban-on-art-loans-prompted-government-interest-.html (02.03.2012).

165 *Ibid*.

166 See GÜSTEN SUSANNE, *Turkey Presses Harder for Return of Antiquities,* The New York Times, 25 May 2011, available at: http://www.nytimes.com/2011/05/26/world/europe/26iht-M26C-TURKEY-RETURN.html?pagewanted=all (02.03.2012).

167 See CHECHI ALESSANDRO/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Case Bogazköy Sphinx – Turkey and Germany,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, October 2011.

168 See GÜSTEN, *Turkey* (*cit.* n. 166).

4. Direct Negotiation

Despite available unilateral pressure means, parties seeking the restitution of cultural property via the political channel will inevitably have to initiate bilateral discussions. Formally, discussions may be conducted by means of mediation[169] or negotiation[170], which both result from the parties' consent to co-operate and submit their dispute to an alternative mean of resolution instead of court proceedings. However, they may also run in parallel to a court action that will enhance the pressure on the parties to settle. In view of the high litigation costs and the decision-making process, which is entirely off their hands, the parties have an even greater incentive to rapidly reconcile their differences[171].

Unlike court proceedings and arbitration[172], mediation and negotiation can be very advantageous to the resolution process of a dispute as they may be conducted irrespective of the applicable law *"in the sense of strict legal doctrine"*[173] or other legal considerations. In fact, these mechanisms enable the parties to address claims which would be barred at court for instance because of statutes of limitations[174].

Negotiations solely involve the parties in the dispute and do not need to be formalized by a certain procedure or format[175]. However, especially in state related disputes, it may occur that experts and diplomats, who understand the specific issue at stake and the cultural differences, intervene to counsel one party. In mediation, the parties can choose

169 Mediation may be defined as "an informal procedure in which a mediator helps parties to settle their dispute through facilitating dialogue and helping identifying their interests but without imposing any decision" (BANDLE ANNE LAURE/THEURICH SARAH, *Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre,* Journal of International Commercial Law and Technology, Vol. 6, No. 1, 2011, p. 30).

170 Negotiation is a "direct [dispute resolution] process which involves only the parties in the dispute" (STAMATOUDI, *Cultural Property Law and Restitution* [*cit.* n. 47], p. 202).

171 See STAMATOUDI, *Cultural Property Law and Restitution* (*cit.* n. 47), pp. 198 et seqq.

172 If the parties decide to submit their dispute to arbitration, "an arbitrator renders a final and binding decision (arbitral award) on the parties' dispute that is internationally enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)" (BANDLE/THEURICH, *Alternative Dispute Resolution* [*cit.* n. 169], p. 30).

173 STAMATOUDI, *Cultural Property Law and Restitution* (*cit.* n. 47), pp. 198 et seqq.

174 See BANDLE/THEURICH, *Alternative Dispute Resolution* (*cit.* n. 169), p. 30.

175 *Idem,* pp. 202 et seqq.

the person of the mediator, such as a third state or a neutral individual third party, who will act as a facilitator in the dispute resolution process[176].

Both of these dispute resolution mechanisms provide for a flexible forum, in which the parties may address legal as well as delicate non-legal issues[177]. Hence, they may take into account concerns of public policy, or aspects which are of a social, ethical, sacred, or scientific nature[178]. With the entire goodwill of both negotiating parties, they may agree on consequential restitution or collaboration programmes in respect of these concerns.

Many art restitution claims have been settled by direct negotiation and some by mediation, such as the return from Italy to Ethiopia of the Axum Obelisk[179], the very comprehensive restitution programme between Greenland and Denmark entitled *"Utimut"*[180] or the mediated agreement between the Natural History Museum London and the Tasmanian Aboriginal Centre essentially providing for the return of 17 aboriginal human remains[181].

B. On the Quality and Outcome of the Dispute Resolution Process

The peculiarity of political action in the process of resolution for art restitution claims may be measured by different factors, some of which shall be addressed in the following.

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176 According to STAMATOUDI, the Swiss authorities intervened as informal mediators in the dispute between the governments of Turkey and Germany regarding the Bogazköy Sphinx, see STAMATOUDI, *Cultural Property Law and Restitution* (*cit.* n. 47), p. 199.

177 See BANDLE/THEURICH, *Alternative Dispute Resolution* (*cit.* n. 169), p. 30.

178 See STAMATOUDI, *Cultural Property Law and Restitution* (*cit.* n. 47), pp. 193 et seqq; BANDLE/THEURICH, *Alternative Dispute Resolution* (*cit.* n. 169), p. 30.

179 See CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Obélisque d'Axoum – Italie et Ethiopie,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

180 See BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case Utimut Process – Denmark and Greenland,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

181 See BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case 17 Tasmanian Human Remains – Tasmanian Aboriginal Centre and Natural History Museum London,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

1. Dialogue and Priorities

In essence, when engaging in a dispute, requesting governments generally seek a closer dialogue with the opposite party. In doing so, they may benefit from a diplomatic climate which demands collaboration and coordination. Mediation and negotiation allow for discussions in respect of state sovereignty all in promoting interparty political and ideological understanding.

Through these alternative media, discussions may be based on mutual esteem and on the recognition of national regulation and values, regardless of any findings of fault or wrongdoing[182]. They can lead to constructive discussions if the parties assume that they may resolve their issues[183]. Thereto, the parties need to be aware that they possibly have a different cultural, sociological, historical or economical background and start a dialogue in consideration of the opposite party's assumptions.

Mainly, mediation and negotiation focus on each party's interests which underlie the conflict. Interests may relate to past events, such as the reparation of losses suffered at war, present urges, as the protection of a cultural object, or future aims, such as the development of archaeological research. When states are trying to solve a conflict, they must consider the interest of subordinate stakeholders, which are affected by the outcome of the dispute. Museums are concerned about the integrity of their collection that they wish to preserve and enrich, for instance through donations, purchases and loans[184]. A religious group may wish to obtain recognition for the harm caused or for the legitimacy of its restitution claim. In practice, such concerns may be taken into consideration by including the stakeholder or a representative in the negotiations.

Discussions are likely to be power-based when the parties have not identified their interests and needs and instead insist on firm positions. Aggressive campaigning, disproportionate demands and the resort to court litigation by a requesting government will most probably lead to the frustration of the dialogue between the parties, the targeted entity being thus less willing to cooperate[185]. Negotiations between Russia and Germany on war spoils have tightened and hardened as the specific needs on each side had not been

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182 See BITTERMAN, *Settling Cultural Property Disputes* (*cit.* n. 2), p. 9, referring to the agreement between the Republic of Turkey and the Metropolitan Museum of Art, that had been reached without subjecting the museum's "acquisition policies to judicial scrutiny"; MEALY, *Mediation's Potential Role* (*cit.* n. 95), p. 201.

183 See BEHRENDT LARISSA, *Cultural Conflict in Colonial Legal Systems: An Australian Perspective,* in: BELL CATHERINE/KAHANE DAVID (eds.), Intercultural Dispute Resolution in Aboriginal Contexts, Vancouver 2004, p. 124.

184 See BAUER, *New Ways of Thinking About Cultural Property* (*cit*. n. 24), pp. 705 et seqq.

185 See WOLKOFF, *Transcending Cultural Nationalist* (*cit*. n. 22), p. 711.

adequately met. The German government had been criticised for failing to offer any kind of compensation in return for the requested objects, which would have tempered the humiliation sensed on the Russian side since the dissolution of the Soviet Union[186]. Instead, Germany's insistence on international public law has contributed to Russia's toughened position.

The example shows the difficulties of seeking dialogue and setting the right priorities when conducting negotiations, susceptible to be burdened by emotions and national pride[187]. Even if the political branch is seriously committed to resolve the issue, it may be ill-prepared to lead efficient and structured discussions, which take account of all involved interests and needs.

Regarding the Russian-German inter-state dialogue, the cultural department of the German Ministry of Interior has been criticised for being *"overtaxed in many ways with respect to competence, knowledge, and personnel. It was neither prepared for international and bilateral negotiations, nor did it possess the instruments to carry out within the Federal Republic the necessary research on losses and provenance"*[188]. Given the underlying interest in cultural property, which, as aforementioned, may be of non-legal nature, including emotional, ethical, historical, moral, political, religious or spiritual concerns, arising disputes tend to have broader and weightier implications, which need to be addressed in a sensitive and cognitive manner.

In terms of priorities, the parties should distinguish the concerns which are of greatest importance and elaborate how they may be combined with the counterparty's interests. Possible disagreements should be positioned in the long run. Requested states may well be "losing" a cultural object by endorsing a restitution claim, but can instead maintain goodwill and build on relationships with source nations[189]. Museums in particular may have great interest in acquiring goodwill with art-rich nations, possibly opening important new avenues for extensive and mutually beneficial collaboration.

When acting as a third party, state authorities can draw attention to a specific dispute and give a party the opportunity to express its views and support its claim. Governmental facilitators, including commissions and advisory panels, may de-escalate a conflict by providing the parties with guidance and a neutral forum for discussions.

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186 See DITTRICH KATHINKA, *Über die Anfänge des Beutekunstdialogs, Unsere Regierungen waren nicht begeistert*, in: Osteuropa, 56. Jg. 1-2/2006, p. 313; EICHWEDE, Trophy Art as Ambassadors (*cit*. n. 3), pp. 387 et seqq.

187 JAYME, *Globalization in Art Law* (*cit.* n. 20), p. 933, stating that "national pride motivated states to retain important artworks in their home countries".

188 EICHWEDE, *Trophy Art as Ambassadors* (*cit.* n. 3), p. 390.

189 See BITTERMAN, *Settling Cultural Property Disputes* (*cit*. n. 2), p. 13.

2. Flexibility and Temporality

Governments may surpass the possibilities available to private parties when dealing with art restitution claims in terms of flexibility and temporality. They may for instance revert to the legal and practical means developed above, including the implementation of national provisions and cultural embargos, which are foreclosed to non-state parties.

As aforementioned, states exercise their sovereignty to control the entry and exit of cultural property from their territory by requiring import and export permits for such transfers. The need for such permission in France proved the undoing of the Londoner Weiss Gallery that was barred by the French ministry of culture from bringing a painting located in Paris back to its Londoner premises[190]. According to the ministry, the painting in question, "The Carrying of the Cross" by Nicolas Tournier, was stolen in 1818 from the Augustins Museum in Toulouse and was not allowed to leave the country, given that it was in the French public collection and therefore "inalienable"[191]. Subsequently, the gallery saw no other option than to relinquish the artwork[192]. Especially when states are primary party to the dispute, an authoritative intervention may have decisive consequences on the resolution process and on its outcome, leaving the opposite party little room for negotiation.

Moreover, state authorities may benefit from a range of options when drafting a solution that exceeds not only the entitlements provided by the applicable law but also the material, financial, and collaborative means of private parties[193]. The executive branch of the United States, for example, has been criticized for trespassing constraining legal authority with regards to the cross-border movement of ancient coins[194]. Discussions on extending bilateral agreements between the United States and Cyprus, respectively China, regarding the importation of ancient cultural property had resulted in restrictions which

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190 See NOCE VINCENT, *Un "portement de croix" pas très orthodoxe,* Libération, 7 November 2011, available at: http://www.liberation.fr/culture/01012369986-un-portement-de-croix-pas-tres-orthodoxe (02.03.2012).

191 See French Ministry of Culture and Communication Press Release, *Frédéric Mitterrand, ministre de la Culture et de la Communication, se félicite de la remise volontaire à l'État du tableau de Nicolas Tournier, "le Portement de Croix", par la Galerie Weiss*, 10 November 2011.

192 *Ibid*.

193 See EICHWEDE, *Trophy Art as Ambassadors* (*cit.* n. 3), p. 391, narrating that "[i]t was good to know that international law was on one's side, but this did not by any means replace politics and diplomacy".

194 URICE STEPHEN K./ADLER ANDREW L., *Unveiling the Executive Branch's Extralegal Cultural Property Policy,* Miami Law Research Paper Series, No. 2010–20, University of Miami School of Law, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658519 (02.03.2012); see also CUNO, *Who Owns Antiquity?* (*cit.* n. 14), pp. 40 et seqq.

would not comply with the Cultural Property Implementation Act (CPIA)[195]. Affected by the seizure of imported ancient Chinese and Cypriot coins, the Ancient Coin Collectors Guild filed suit against the U.S. Customs to test the legal viability of the bilateral agreements; the claim was ultimately dismissed in August 2011[196].

Flexibility of governments in terms of intervention means and solutions may have an impact on the duration of a dispute resolution process. In fact, a party that offers several options to end a dispute increases the likeliness to meet the opposite party's interest more rapidly. Especially when governments refer to experts with the necessary knowhow for dealing and facilitating in art restitution issues, their assistance may be very beneficial to the obtainment of a settlement.

For these purposes, an expert body has been set up in Switzerland, the Specialized Body for the International Transfer of Cultural Property at the Swiss Federal Office of Culture (FOC). It regularly intervenes in art restitution claims with success, as exemplified by a case concerning the Ethnographical Museum in Geneva. A private collector who sought to transfer several Chilean and Peruvian human remains to the museum contacted its curator. Elaborate negotiations between the owner and the museum, which suggested contacting embassies in Peru and Chile, lasted for about five years and led to no conclusive result. In the following, the parties sought the help of the FOC, which guided the parties to a settlement arrangement within a year[197].

3. Quality of the Outcome

Bilateral negotiations or mediation between a state and another private or public party have often led to the signing of comprehensive agreements providing for an end to their dispute. However, top-down decisions may entail several drawbacks. Internal dissidents and powerful outsiders may not agree to implement and accept the solution found by means of politics, considering it as imposed on them[198]. Moreover, a precise conflict (i.e.

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195 Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (2005); 18 U.S.C. §§ 2314–2315.

196 *Ancient Coin Collectors Guild v U.S. Customs and Border Protection, Department of Homeland Security, et al.* Civil Action No. CCB-10-322 (D. Md., 8 August 2011). The case is now on appeal to the Fourth Circuit Court of Appeals; see also the related case *Ancient Coin Collectors Guild v United States Dep't of State,* 641 F.3d 504 (D.C. Cir., 2011).

197 See BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Affaire 4 momies – Chili et Personne privée,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

198 See RUBENSTEIN RICHARD E., *Conflict Resolution and Power Politics – Global Conflict After the Cold War: Two Lectures,* Working Paper 10, Institute for Conflict Analysis and Resolution, George

for a particular object) may be resolved, but not the underlying problem generating the conflict. "Peace" may hence only be temporary. As mentioned above, Germany and Russia are involved in an ongoing dispute on War loots displaced from Germany to Russia subsequent to World War II[199]. Even if punctual settlements have been reached, such as an exchange including 101 drawings of the *Kunsthalle* Bremen, nothing has been decided on the overall problem.

Notwithstanding the fact that specific restitution agreements often ignore the more complex questions of the case, they may give rise to further accords on cultural property. In fact, as the parties have found a common ground of understanding, further negotiations may follow the same route. Some states and collecting museums can report on a pleasant trend towards cultural collaborations, i.e. extensive programmes on scientific and cultural exchanges including joint exhibitions, research studies and the transfer of staff and interns. They have entered into *"partage"* arrangements for their excavation sites, which enable the museum's archaeologists to access and obtain legally excavated cultural property through purchase from or *"partage"* with the respective government[200]. In exchange, the museum may share education and the outcomes of its research[201]. Egypt and the Boston Museum of Fine Arts entered into a collaboration agreement on sponsoring digs in Cairo[202]. Italy reached comprehensive accords with several North American institutions, such as with the Princeton University Art Museum, the Metropolitan Museum of Art and Yale University, including research opportunities at Italian excavations sites, cooperation on exhibitions, loan arrangements and other transfers of cultural property[203].

Mason University, January 1996, p. 2. See also the ongoing refusal of the Lenin Library regarding the claim of the Chabad Organisation to comply with Presidential orders (*supra,* pp. 235 et seqq.).

199 See *supra,* pp. 235-236, 244-245.

200 See BAUER, *New Ways of Thinking About Cultural Property* (*cit*. n. 24), p. 720.

201 *Idem,* pp. 707, 720.

202 See BITTERMAN, *Settling Cultural Property Disputes* (*cit*. n. 2), p. 13.

203 See RENOLD CAROLINE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Murals of Teotihuacan – Fine Arts Museums of San Francisco and Mexican National Institute of Anthropology and History,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012; CONTEL RAPHAEL/CHECHI ALESSANDRO/SOLDAN GIULIA, *Case Euphronios Krater and Other Archaeological Objects – Italy and Metropolitan Museum of Art,* Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, June 2012; GERSTENBLITH PATTY/ROUSSIN LUCILLE, *Art and International Cultural Property,* International Lawyer, Vol. 42, 2008, pp. 729, 734.

Given the far-reaching extent of such collaborations, they usually require the consent of the respective governments. Embedded in cultural diplomacy, they exemplify how restitution claims can turn into comprehensive and mutually benefiting agreements.

IV. Conclusion: An Appraisal

Prompted by expectations of international institutions or following their own national interests, political actors increasingly partake in dispute resolution processes for art restitution claims. They have done so in several ways, reaching from enacting national laws over exerting media pressure and threatening cultural sanctions to engaging in direct negotiation. While the present article attempts to address some aspects on the rationale and impact of their involvement, it allows for some overall evaluative conclusions.

Politics may be used as a bargaining tool to enhance the pressure on art restitution claims, or – if used appropriately – give rise to new and faster possibilities to solve such claims. *"Legal and institutional forms can be conceived in a multitude of ways, if only the negotiating partners so desire, and each side avoids ossifying its position into dogmatism"*[204]. If political actors do not operate within a collaborative and constructive spirit, their involvement may cause more harm than good to the dispute resolution process. The benefits of interstate collaboration has been recognized in the Preamble of the UNESCO Convention of 1970, *"considering that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation"*, regardless of whether source or market nations are involved. Valuable impact of politics does not depend on the nation's power or wealth, but on the parties' willingness to collaborate.

Governmental action may add authority to the issue and inspire global awareness. Should governments seek to satisfy related interests, the impact on the resolution process and on cultural property must not necessarily be negative. It may be so, if the objects are merely used for connected interests, particularly of an economical nature. An illustrative example may be provided by the recent agreement between Korea and France on a long-term loan of Korean manuscripts by France that was coupled with a deal to construct a French high-speed train in Korea. Such deals may only be desirable if the cultural objects are released into adequate conditions of security and conservation[205]. Governments may

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204 EICHWEDE, *Trophy Art as Ambassadors* (*cit.* n. 3), p. 401.

205 SHAW THURSTAN, *Whose Heritage? – Restitution of Cultural Property: Elements for the Dossier*, Museum: From the Past to the Present, No. 149, Vol. 38, 1986, p. 47; see also URICE STEPHEN K.,

facilitate discussions towards a settlement and arrange for creative solutions. In order to do so, it is essential that governmental action be exerted in the interest of the cultural property at stake. If diplomatic interests trump over preservation needs, it is the art or cultural object that suffers. As explicitly provided in The Hague Convention of 1954, states may not conclude any special agreement *"which would diminish the protection afforded by this present Convention to cultural property and to the personnel engaged in its protection"* (art. 24).

Finally, the greater involvement by source states in art restitution claims has undeniably led to the decline of improvident collecting practices by market nation museums, some of which have rethought their practices and adopted new acquisition policies[206]. Signal achievement has been reached also on state level, with the adoption of import restrictions by market states imposed on cultural property originating from source states, pursuant to the UNESCO Convention of 1970 (art. 3)[207].

While the power of political action as such is not questioned here, political expediency may well be served all in benefitting the preservation and protection of the cultural object. While this seems very optimistic, practice shows that it may perfectly work. The *ArThemis* platform provides many examples[208].

The Beautiful One has come – To Stay, in: MERRYMAN JOHN HENRY (ed.)*, Imperialism, Art and Restitution,* New York 2006, p. 146.

206 See for instance Policy Statement, Acquisitions by the J. Paul Getty Museum, Adopted by the Board of Trustees of the J. Paul Getty Trust on 23 October 2006, http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf (02.03.2012); see also KLINE, *Finding Marion True and/or the J. Paul Getty Museum* (*cit.* n. 120), pp. 171 et seqq.

207 See GABUS PIERRE/RENOLD MARC-ANDRÉ, *Commentaire LTBC – Loi fédérale sur le transfert international des biens culturels,* Zurich 2006, art. 7 n° 4. See for instance the import restrictions imposed by the United States government in 2001 regarding artefacts originating from Italy: "Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy", 19 January 2001, available at: http://exchanges.state.gov/heritage/culprop/itfact/pdfs/it2001mou.pdf (02.03.2012).

208 Platform ArThemis (http://www.unige.ch/art-adr), Art-Law Centre, University of Geneva.

MARIE CORNU* ET MARC-ANDRÉ RENOLD**

12. La mise en forme d'un intérêt commun dans la propriété culturelle: des solutions négociées aux nouveaux modes possibles de propriété partagée

Synthèse

La résolution classique des litiges portant sur la revendication d'un bien culturel par la voie judiciaire amène soit à la victoire du propriétaire originaire, soit à celle du nouvel acquéreur. Toutefois, l'observation de la pratique en la matière laisse apparaître que des voies médianes sont possibles. En effet, les moyens alternatifs de résolution des litiges peuvent permettre la conciliation des divers intérêts en tension et la sauvegarde de l'*intérêt culturel commun*. Cet article examine le concept d'*intérêt culturel commun* à travers, d'une part, l'analyse d'exemples démontrant le découplage entre la propriété et la possession de biens culturels et, d'autre part, l'étude des nouvelles formes de jouissance ou de gestion communes de biens culturels.

Abstract

The resolution of disputes concerning the restitution of cultural objects through litigation normally leads to the victory of either the original owner or the current possessor. However, recent practice demonstrates that parties can achieve intermediate solutions. The means of dispute settlement alternative to litigation can lead to solutions whereby the competing interests can be reconciled and a common cultural interest *can be safeguarded. This article examines the concept of* common cultural interest *through the analysis of cases demonstrating that ownership and possession can be distinguished, on the one hand, and enabling new forms of a common control or management of cultural objects, on the other hand.*

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I. Introduction

Les litiges classiques en matière de restitution de biens culturels touchent à la propriété de ceux-ci: le propriétaire dépossédé en réclame la restitution sur la base de son droit de premier propriétaire et le possesseur actuel rejette celle-ci en faisant valoir des arguments soit positifs (acquisition de bonne foi, prescription acquisitive, etc.) soit négatifs (absence de propriété originaire du premier propriétaire, prescription extinctive, etc.). Le juge saisi tranchera dans un sens ou dans l'autre, le plus souvent sans pouvoir proposer de solutions médianes. Pourtant, l'observation de la pratique en la matière (médiations et solutions négociées) laisse apparaître que de telles voies médianes sont possibles.

La résolution classique de litiges portant sur la revendication d'un bien culturel amène soit à la victoire du propriétaire originaire soit à celle du nouvel acquéreur. Un exemple du premier cas est celui de la revendication par les descendants de Monsieur Gentili di Giuseppe de la propriété d'œuvres d'art spoliées qui se trouvaient au Louvre. Par décision du 2 juin 1999, la Cour d'appel de Paris confirma la restitution de cinq tableaux aux descendants de Frédéric Gentili di Giuseppe, tableaux qui avaient fait l'objet en 1941 de ventes forcées en l'absence des héritiers de Monsieur Gentili di Giuseppe, qui avaient dû fuir Paris en raison de leur confession juive[1]. En sens inverse, lorsqu'il y a un acquéreur de bonne foi selon le droit applicable à l'acquisition ou la perte de la propriété, les tribunaux auront tendance à reconnaître cette nouvelle acquisition en suivant le principe de l'application de la *lex rei sitae;* tel fut le cas dans la décision classique *Winkworth v Christie's* jugée en Angleterre en 1979[2].

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1 Arrêt de la Cour d'appel de Paris du 2 juin 1999, RG n° 1998/19209, 1999, n° 37, pp. 535 et seqq.

2 *Winkworth v Christie, Manson and Woods Ltd and another* [1980] 1 All ER 1122 (Queen's Bench, Chancery Division).

Il existe également des cas dans lesquels la question de la propriété a été tranchée par une sorte de jugement de Salomon: ainsi dans l'affaire déjà ancienne des fresques murales de Teotihuacàn, l'accord auquel sont parvenues les parties impliquait qu'au minimum 50% des fresques en question soit restitué au Mexique et que le reste serait conservé au Musée de San Francisco[3]. En fin de compte ce sont quasiment 70% des fresques qui furent restituées, même si les pièces qualitativement les plus exceptionnelles demeurèrent à San Francisco[4].

Or on voit aujourd'hui que les modes de résolution de ce type de conflits évoluent dans un certain nombre d'hypothèses vers des solutions plus complexes dans lesquelles sont parfois entendus et reçus comme légitimes les intérêts des uns et des autres[5]. Par conséquent, la reconnaissance d'une pluralité d'intérêts peut faire partie de l'économie même de la solution, comme si l'on admettait l'idée qu'un même bien puisse avoir plusieurs liens possibles de rattachement diversement fondés (liens d'origine, filiation culturelle, possession prolongée, soins apportés à la conservation et la restauration, etc.). Ces liens trouvent des expressions multiples: droit d'accès, droit d'étude, pouvoir de contrôle sur certains actes, etc.

Dans cette mise en forme, la question n'est plus seulement de concilier les intérêts en tension, mais aussi de ménager un *intérêt culturel commun*. Cette perspective ouvre vers de nouvelles formes d'appréhension de la propriété culturelle dans ses rattachements multiples. Nous sortons ici de la seule étude des litiges pour nous intéresser plus largement aux modalités de la propriété ou de la possession d'objets d'intérêt commun, y compris les formes d'appropriation réalisées sur un mode volontaire.

Nous allons examiner des cas récents qui se sont fondés sur le découplage "*propriété/possession*" (II) pour nous demander s'il n'y a pas lieu – en nous appuyant sur quelques exemples dans d'autres domaines – de tendre vers des formes plus ou moins abouties d'aménagement de jouissance ou de gestion partagée de biens culturels (III).

L'idée centrale sur laquelle repose cette étude est l'existence d'un *intérêt culturel commun* permettant de résoudre les litiges en matière de restitution de biens culturels, voire de développer des solutions propres en dehors de tout litige en la matière.

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3 Voir l'Accord Bilatéral Principal conclu entre le Fine Art Museum of San Francisco et l'Institut National d'Anthropologie et d'Histoire du Mexique le 7 décembre 1981, RENOLD CAROLINE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Murals of Teotihuacan – Fine Arts Museums of San Francisco and Mexican National Institute of Anthropology and History,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

4 BERRIN KATHLEEN, *San Francisco, le Mexique et les peintures murales de Teotihuacan,* Museum International, No 235, 2007, p. 17.

5 CORNU MARIE/RENOLD MARC-ANDRÉ, *Le renouveau des restitutions de biens culturels: les modes alternatifs de résolution des litiges*, Journal du Droit International, No. 2, 2009, p. 495.

II. Vers des solutions négociées fondées sur le découplage propriété/possession

La pratique des accords négociés en matière de restitution de biens culturels est de plus en plus riche en exemples démontrant un découplage entre la propriété et la possession de biens culturels[6].

A. Le découplage "propriété/possession" dans la pratique

L'exemple peut-être le plus élémentaire de solution distinguant entre la possession et la propriété est celui de la "restitution" des statuettes Nok et Sokoto par la France au Nigéria en 2002. Ayant établi que ces statuettes avaient été volées au Nigéria, mais qu'elles avaient été acquises de bonne foi, l'accord entre les deux pays prévoit la reconnaissance de la propriété nigériane, mais il consacre un prêt des statuettes par le Nigéria à la France, comme une sorte de reconnaissance de sa bonne foi[7]. Les biens culturels en question sont donc toujours en France, exposés au Musée du Quai Branly. Sous un angle purement pratique il n'y a aucune différence entre la situation avant et la situation après l'accord en question.

Un cas où une telle dissociation a eu lieu, mais cette fois avec un prêt en faveur de l'État revendiquant est le cas récent de la restitution, sous la forme juridique d'un prêt, des manuscrits coréens *Uigwe* par la France à la République de Corée du Sud. S'agissant de la question de la propriété, elle n'a pas fait l'objet d'une décision, la France se refusant à restituer, en particulier à cause de l'appartenance des manuscrits au patrimoine culturel national[8].

En Suisse, une telle dissociation a également été prévue lors de la résolution par médiation du litige relatif aux manuscrits anciens entre les cantons de Zurich et de Saint-Gall: les manuscrits, emportés par l'armée zurichoise victorieuse en 1712, ne furent restitués qu'en 2006 sous la forme d'un prêt à long terme à Saint-Gall, adopté à l'occasion d'une médiation entre les deux cantons sous l'égide de la Confédération. Quant au globe cé-

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6 Voir à ce sujet les riches informations contenues dans la plateforme *ArThemis* (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève.

7 Voir CORNU/RENOLD, *Le renouveau des restitutions de biens culturels* (*cit*. n. 5), p. 520, n° 75.

8 Voir la décision du Tribunal administratif de Paris, 18 décembre 2009 n° 0701946, CONTEL RAPHAEL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Manuscrits Coréens – France et Corée du Sud,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, juin 2012.

leste et terrestre, datant du 16ème siècle, il a également pu être conservé par Zurich, à charge de celle-ci d'exécuter à ses frais une copie de bonne qualité du Globe et de l'offrir à Saint-Gall[9]. L'existence d'un intérêt culturel commun aux deux parties ressort de clauses de l'accord de médiation qui traitent de la reconnaissance de l'importance culturelle des manuscrits pour la région saint-galloise, tout en soulignant le rôle de conservation joué par Zurich pendant les presque trois cents ans durant lesquels ils ont été en sa possession.

B. Un début de mise en place de l'intérêt culturel commun

L'existence d'un intérêt culturel commun ressort peut-être le mieux dans l'accord conclu entre l'Université de Yale et le Pérou à propos des objets provenant du Machu Picchu. Le Pérou revendiquait depuis fort longtemps la restitution de nombreux objets précolombiens emportés par Hiram Bingham, professeur à l'Université de Yale, entre 1912 et 1916, lors de sa redécouverte du site inca du Machu Picchu. Après de longues négociations et l'ouverture d'une procédure judiciaire par le Pérou aux États-Unis, les deux parties ont signé un accord (*Partnership Agreement*) le 11 février 2011 qui prévoit la restitution au Pérou des pièces archéologiques en question, dans le cadre d'un accord cadre beaucoup plus large prévoyant la création d'un Centre international commun à l'Université de Yale et à l'Universidad Nacional de San Antonio Abad del Cusco pour l'étude du Machu Picchu et de la culture inca. Ce Centre sera administré en commun par les deux institutions universitaires, il contiendra des surfaces d'exposition et des locaux pour la conservation des objets et un laboratoire. Il y aura également des échanges académiques entre les deux institutions et des prêts d'objets seront effectués en faveur du Musée de l'Université de Yale[10].

Ce dernier exemple est dans un certain sens assez similaire au cas des accords signés entre plusieurs musées nord-américains et l'Italie, dont il est question ailleurs dans le présent ouvrage[11], et prévoyant la restitution de biens archéologiques provenant de fouilles clandestines dans le cadre d'accords de coopération culturelle plus large.

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9 BANDLE ANNE LAURE/CONTEL RAPHAEL/RENOLD MARC-ANDRÉ, *Case Ancient Manuscripts and Globe – Saint-Gall and Zurich,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

10 CHECHI ALESSANDRO/AUFSEESSER LIORA/RENOLD MARC-ANDRÉ, *Case Machu Picchu Collection – Peru and Yale University,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, octobre 2011.

11 Voir notamment la contribution de MANLIO FRIGO, infra, pp. 131 ss ; voir également CORNU/RENOLD, Le renouveau des restitutions de biens culturels (*cit*. n. 5), p. 518, nº 66 et seqq.

L'on signalera enfin que l'intérêt commun auquel les parties à un litige peuvent se référer peut également être l'intérêt d'un tiers. Ainsi, dans le cadre d'un litige aux États-Unis relatif à l'acquisition d'un tableau de Degas qui avait fait l'objet d'une spoliation, les parties (le propriétaire actuel et les descendants de la victime de la spoliation) se sont entendues pour répartir par moitié leur intéressement dans l'œuvre, chacun décidant ensuite d'un transfert (à titre gratuit contre avantage fiscal dans un cas ; moyennant paiement dans l'autre) de sa part à l'Art Institute de Chicago[12].

Ces cas démontrent que les parties en litige, lorsqu'elles arrivent à éviter d'aller au procès, peuvent souvent s'entendre sur une solution tournant autour d'un intérêt culturel qui leur est commun. Et cet intérêt amènera souvent à un découplage de la propriété face à la possession du ou des biens culturels en question.

III. Nouveaux modes de jouissance partagée

Le fait qu'un même bien puisse être le siège de droits multiples gouvernant son usage ou sa jouissance, soulève la question des modèles juridiques disponibles pour mettre en harmonie cette pluralité. La plus grande difficulté vient de ce que, en règle générale, les biens culturels sont appropriés privativement. La figure du droit exclusif de propriété domine y compris dans le champ de la propriété publique. C'est précisément ce qui a conduit, dans un certain nombre d'espèces citées plus haut, à raisonner à l'intérieur de ce cadre propriétaire, en l'aménageant de telle sorte que d'autres que le propriétaire puissent retirer une utilité du bien. D'où les méthodes contractuelles de découplage de la propriété et de la jouissance débouchant sur la mise en forme d'un intérêt commun. Dans le prolongement de ce phénomène qui marque une évolution dans la perception même de la propriété culturelle vers des modes de jouissance partagée, on peut se demander si certaines figures juridiques ne sont ou ne pourraient être sollicitées, soit du côté de la copropriété ou de la propriété collective, soit encore du point de vue des patrimoines d'affectation.

A. La constitution d'une propriété collective

Avant d'éprouver la pertinence des modalités de propriété susceptible de ménager un intérêt commun dans le champ qui nous occupe, il peut être utile d'en faire un rapide

12 BANDLE ANNE LAURE/CHECHI ALESSANDRO/RENOLD MARC-ANDRÉ, *Case Landscape with Smokestacks – Friedrich Gutmann Heirs and Daniel Searle,* plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève, mars 2012.

inventaire. Elles ne sont pas très nombreuses. Le droit français, comme d'autres, est rétif aux modes d'organisation collective de la propriété, résumant le plus souvent la relation du propriétaire à sa chose à un pouvoir exclusif, sans partage à quelques exceptions près. La copropriété est une voie possible, entendue comme *"modalité de la propriété dans laquelle le droit de propriété sur une même chose ou un ensemble de choses appartient à plusieurs personnes dont chacune est investie privativement d'une quote-part accompagnée sur le tout, en concurrence avec les autres copropriétaires, de certains droits"*[13]. L'intérêt commun prospère ici aux côtés des droits privatifs s'exerçant sur les quotes-parts[14]. En quoi l'on peut discuter de sa qualification en propriété collective. D'autres figures sont intéressantes qui, parce qu'un bien est par nature collectif, instituent une propriété commune sur celui-ci. Ce sont de véritables propriétés collectives en ce que le lien d'appartenance renvoie à un groupe et non à un individu. C'est, par excellence, l'exemple de la propriété commune des auteurs sur l'œuvre de collaboration (art. L.113-3 du Code de propriété intellectuelle en France; art. 7 de la Loi fédérale sur les droits d'auteur et les droits voisins en Suisse), objet indivisible marqué de l'empreinte collective de plusieurs auteurs sur lequel ils exercent leurs droits d'un commun accord[15].

En voisinage, certaines formes de propriété collective ont persisté, par exemple en matière communale[16] ou en matière rurale[17]. Il faut, dans ce tour d'horizon, évoquer encore les réalités multiples des propriétés communautaires des peuples autochtones, tant dans

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13 CORNU GÉRARD, *Vocabulaire juridique*, collection Thémis, Paris 2011.

14 En ce sens, il ne s'agit pas d'une propriété collective, compte tenu de cette persistance de droits privatifs. Sur cette analyse, voir notamment SALORD GÉRALDINE, *La propriété collective des œuvres, contribution du modèle du droit d'auteur au droit commun,* thèse Université Paris 2, 2007; ZÉNATI-CASTAING FREDERIC, *La propriété collective existe-t-elle?*, in: Mélanges en l'honneur du Professeur Gilles Goubeaux*,* 2009, p. 589.

15 Sur l'essence et la structure de ces propriétés, SALORD GÉRALDINE, *Propriété collective et exclusivité: proposition d'une conciliation des contraires,* in: Modèles propriétaires au XXI^e^ siècle, Colloque international organisé par le CECOJI en hommage au Professeur Henri-Jacques Lucas (10–11 décembre 2009), Université de Poitiers, sous presse, 2012.

16 Voir notamment YOLKA PHILIPPE, *La propriété publique, éléments pour une théorie*, Bibliothèque de droit public, tome 191, p. 508, qui cite l'exemple de la propriété intercommunale des bâtiments scolaires: la loi du 30 octobre 1886 sur l'organisation de l'enseignement primaire prévoyait en effet que plusieurs communes puissent contribuer à l'établissement et à l'entretien d'une même école.

17 Pour un exemple éclairant d'organisation d'une jouissance commune, voir CLÉMENT-FONTAINE MÉLANIE, *Le renouveau des biens communs, des biens matériels aux biens immatériels,* in: Modèles propriétaires (*cit.* n. 15), qui évoque le cas du marais de la Brière; voir aussi sur l'origine des communs et de la propriété collective, LESNÉ-FERRET MAITÉ, *La terre et l'appropriation collective: approche historique,* in: Modèles propriétaires au XXI^e^ siècle (*cit.* n. 15).

le champ de la création[18] que dans celui des choses tangibles, la terre, les ressources de la nature, les biens culturels notamment. Ces modes d'appropriation collective sont, *a priori,* très étrangers à nos systèmes propriétaires construits sur le modèle exclusiviste de la propriété privée. Pourtant, très récemment, la Cour d'appel de Nouméa a reconnu à un clan kanak un droit foncier collectif d'un genre inédit: *"Attendu que le clan détenteur de droits d'une unité familiale élargie ne se résume pas à la somme des individualités qui le composent: qu'il défend des intérêts collectifs dignes d'être protégés",* les juges rappelant le préambule de l'accord de Nouméa qui fait valoir que *"l'identité kanak était fondée sur un lien particulier à la terre. Chaque individu, chaque clan, se définissait par un rapport spécifique avec une vallée, une colline, la mer […]"*[19].

Ces propriétés, sous des réalités diverses, font place à l'intérêt commun, ménageant des droits d'usage, des droits d'accès, des pouvoirs de gestion, d'exploitation ou de disposition exercés en commun. Revenant à l'idée de patrimoines partagés, on peut se demander en quoi ces modalités pourraient utilement servir l'organisation d'un mode de jouissance en commun des biens culturels.

Une première difficulté se présente qui tient au régime d'indisponibilité de certains biens, par exemple lorsqu'ils relèvent de la domanialité publique ce qui est le cas, en droit français et en droit suisse, des biens culturels des collections publiques. L'affectation, condition de base dans la reconnaissance de ce régime propriétaire, est-elle compatible avec la propriété plurale?

Si, en soi, cette mécanique de l'affectation ne s'y oppose guère[20] (on pourrait même soutenir qu'elle assoit la dimension collective du bien), se trouve soulevée, en amont, la question de la qualité des propriétaires, nécessairement personnes publiques en application des droits nationaux. On pourrait concevoir une pluri-propriété entre l'État et les entités locales ou encore entre institutions publiques nationales. Le levier pourrait être pertinent relativement aux prix pratiqués sur le marché de l'art et en termes de circula-

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18 Sur le thème de la propriété intellectuelle collective, voir notamment à propos de la création de certaines communautés aborigènes et la dimension collective et patrimoniale de ces propriétés, PURI KAMAL, *La protection des expressions autochtones dans le Pacifique,* Bulletin international du droit d'auteur, Vol. XXXIII, n° 4, octobre-décembre 1999, pp. 6 et seqq.

19 CA Nouméa, 22 août 2011, 10/00532.

20 En droit français, une partie de la doctrine considère que ce statut n'est pas compatible avec celui de la copropriété, invoquant l'argument selon lequel la condition d'affectation pourrait se trouver contrariée par ce régime spécial, en particulier avec la règle d'insaisissabilité. D'autres sont plus nuancés et évoquent de possibles aménagements. Ainsi YOLKA se pose en particulier la question de savoir s'il serait possible de faire pénétrer la copropriété dans la domanialité publique.

tion et d'accès dès lors qu'une œuvre peut intéresser plusieurs institutions[21]. En 1995, la Commission des communautés européennes suggérait, parmi les actions communautaires dans le champ de la culture, d'encourager, à titre expérimental, l'acquisition et la cogestion d'œuvres d'art majeures, *"par plusieurs partenaires européens afin de les préserver et de les présenter au public partout en Europe",* prévoyant d'y consacrer un budget substantiel dans le cadre du programme Raphaël[22]. Mais le Comité des régions consulté sur ce programme, attira l'attention sur le fait que *"l'introduction d'un système de copropriété des œuvres d'art (risquait) d'induire une source de litiges juridiques dont l'effet serait paralysant et néfaste aux projets liés à ces acquisitions"*[23]. Le Comité, sans refouler la suggestion, appelait à la prudence, jugeant utile, dans l'évaluation de ce type d'actions, *"d'inclure une attention spécifique aux conséquences éventuelles de la copropriété"*. Pour finir, la proposition a disparu dans la version finale du programme[24].

Quoi qu'il en soit, le régime de domanialité publique exclut que le dispositif puisse fonctionner en dehors du territoire. En quoi, la solution n'apporte guère soit en matière de résolution des litiges portant sur des patrimoines partagés, soit encore comme mode d'acquisition d'œuvres, dès lors que sont concernés plusieurs États. La difficulté se concentre ici sur la délimitation de l'entité communautaire et de la capacité à l'instituer en titulaire de droits collectifs. À cela aussi notre droit est rétif.

Une autre perspective mérite sans doute d'être approfondie, qui consiste à travailler sur un modèle de propriété privée. Certains musées se sont engagés dans cette voie, à propos de l'acquisition d'œuvres d'art contemporain. Mais en réalité, la propriété commune porte non sur le support matériel mais sur les droits de propriété intellectuelle, régime de propriété privée. La propriété collective pourrait aussi se concevoir entre personnes ou institutions privées. La figure de la propriété collective implique que toute décision con-

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21 Le mode opératoire n'est sans doute pas mûr. Ainsi à propos de l'acquisition de la Fuite en Egypte de Poussin, les crédits mobilisés par le Louvre et le Musée des Beaux arts de Lyon débouchent sur un montage complexe dans lequel le bien est inscrit dans l'inventaire du Louvre et mis en dépôt à Lyon, sachant qu'il ne serait pas impossible que survienne un transfert de propriété vers le Musée des Beaux arts de Lyon, voir *infra* sur la notion d'affectation.

22 L'action de la communauté européenne en faveur de la culture, communication de la commission au Parlement européen et au Conseil de l'Union européenne, proposition de décision du Parlement européen et du Conseil établissant le programme d'action communautaire dans le domaine du patrimoine culturel-Raphaël, 29 mars 1995, COM (95) 110 final.

23 Avis sur la proposition de décision du Parlement européen et du Conseil établissant le programme d'action communautaire dans le domaine du patrimoine culturel-Raphaël, *JOCE* 2 avril 1996 – n° C 100, p. 119.

24 Décision n° 2228/97/CE du Parlement européen et du Conseil du 13 octobre 1997 établissant un programme d'action communautaire dans le domaine du patrimoine culturel – programme Raphaël.

cernant la jouissance ou la disposition du bien se prenne en commun. L'institution d'une propriété collective obéit sans aucun doute à une mécanique complexe sur le double plan juridique et pratique. Dans cette idée de ménager l'intérêt commun, d'autres modes d'organisation et de gestion de la ressource restent à explorer, qui peuvent être fondés non pas tant sur une propriété commune que sur une affectation à une utilité collective.

B. L'affectation à une utilité collective

Plusieurs exemples sont intéressants de ce point de vue. D'une part, on pourrait soutenir que le régime de domanialité publique est une forme de propriété affectée à une utilité publique, puisée plus spécialement dans la nature des biens culturels en ce qui concerne le domaine public mobilier en droit français. Au lendemain de la révolution, c'est la Nation propriétaire qui est le titulaire des droits collectifs sur le patrimoine, donc une forme de propriété collective, mais en réalité, le régime évolue vers un régime propriétaire entre les mains de l'État. Reste que ces biens, parce qu'ils revêtent un intérêt sur le plan historique ou artistique, doivent être affectés à la communauté.

Constitue un autre exemple de propriété affectée, les propriétés en lien avec le groupe familial, dans lesquelles le commun prend une place singulière. La notion de *souvenirs de famille,* construction des juges français permet de préserver le patrimoine familial des dispersions d'héritage, en les soustrayant des règles du partage. Le droit suisse connaît une notion tout à fait similaire, celle des *papiers de famille* faisant l'objet d'une disposition particulière en droit des successions (art. 613 du Code civil). Tant les souvenirs que les papiers de famille ne peuvent être vendus si la communauté familiale s'y oppose (l'opposition peut venir d'un seul au nom de l'intérêt collectif) et la garde en revient, en principe au dépositaire le plus à même d'assurer cette fonction. Les analyses de cette forme de propriété divergent dans la doctrine française. La famille en est assurément le support. ZÉNATI et REVET y voient une propriété *"véritablement collective, contrairement à l'indivision, car la chose commune n'est pas soumise à des droits de propriété individuels et concurrents, mais à un seul droit de propriété, exercé de manière communautaire"*[25]. En ce sens, le détenteur investi de la fonction de garde serait simple dépositaire et non propriétaire. D'autres analysent ce patrimoine familial comme une propriété individuelle affectée[26]. La communauté exerçant une forme de droit moral sur ces choses marquées par l'histoire familiale, l'analyse est en bonne cohérence avec la dimension personnelle de ces biens qui les rapprochent doublement du cercle des œuvres de l'esprit

25 ZÉNATI-CASTAING FRÉDÉRIC/REVET THIERRY, *Les biens*, collection droit fondamental, 3ème éd., 2008, p. 77, n° 36.

26 En ce sens, BARBIÉRI JEAN-FRANÇOIS, *Les souvenirs de famille, mythe ou réalité juridique,* 1984, I. 3156.

et des biens relevant du patrimoine culturel[27]. La famille par exemple tire de ce droit la possibilité d'exiger la conservation dans le patrimoine familial des archives et encore leur non-dispersion. Dans certains arrêts, a également été reconnu aux membres de la famille qui ne sont pas en possession de l'objet, un droit de copie ou d'accès. Sous un jour plus institutionnel, on pourrait également songer à des formes d'organisation de la jouissance du bien structurées autour de la création d'une personne morale, ou s'inspirant d'institutions telles que le trust, la fiducie ou encore le waqf[28].

De ces différentes formes, peuvent se dégager des modes d'organisation de l'intérêt commun. Sous cette perspective, il est utile d'isoler le périmètre attendu de cette utilité collective. Elle peut à la fois concerner le bien lui-même et le besoin de le conserver dans sa substance. L'obligation de conservation matérielle et juridique, en particulier l'interdiction de porter atteinte à l'intégrité du bien ou de le soustraire juridiquement à cette utilité en le cédant. De ce point de vue, l'idée d'un droit moral proche des propriétés intellectuelles ou familiales peut être un ressort intéressant. D'une certaine façon, c'est un peu ce levier qui transparaît dans la déclaration des droits des peuples autochtones à propos des sites et objets rituels et culturels, pour lesquels non seulement les États ont un devoir de conservation (art. 13 notamment) et de protection du droit des peuples autochtones, tandis que les communautés disposent d'un droit d'accès et d'utilisation sur les biens qui n'auraient pas fait l'objet d'une restitution ou d'un rapatriement[29]. Dans le Code de déontologie de l'ICOM pour les musées, l'attention portée aux intérêts des communautés est également très présente, évoquée à plusieurs reprises soit à propos des collections en général, soit, plus spécialement, lorsqu'il est question des matériels sensibles ou des restes humains. Un certain nombre de dispositions prévoient, outre le respect de certains droits moraux[30], une obligation de coopération[31]. L'idée est

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27 D'autres arguments cette fois-ci juridiques militent en faveur de cette notion de patrimoine affecté, notamment la question de la transmission des biens à la mort du détenteur, les règles de saisie qui ne sont pas en l'espèce paralysées.

28 Pour une exploration des emprunts possibles à ces figures, voir MAGET ANTOINETTE, *Collectionnisme public et conscience patrimoniale, les collections d'antiquités égyptiennes en Europe,* collection droit du patrimoine culturel et naturel, 2008, p. 545, qui, tout en estimant inadaptés ces outils, engage à une réflexion sur un nouvel outil de gestion partagée s'inspirant de ces figures.

29 Déclaration des Nations unies sur les droits des peuples autochtones, Résolution adoptée par l'Assemblée générale le 13 septembre 2007.

30 Par exemple, à propos du matériel sensible (art. 2.5): "Les collections composées de restes humains ou d'objets sacrés ne seront acquises qu'à condition de pouvoir être conservées en sécurité et traitées avec respect. Cela doit être fait en accord avec les normes professionnelles et, lorsqu'ils sont connus, les intérêts et croyances de la communauté ou des groupes ethniques ou religieux d'origine." (Voir aussi art. 3.7 et 4.3). Par ailleurs (art. 3.7): "les recherches sur des restes humains et sur des objets sacrés doivent s'effectuer selon les normes professionnelles dans le respect des intérêts et des croyances de la communauté, du groupe ethnique ou religieux d'origine." (Voir aussi art. 2.5 et 4.3).

que ces patrimoines *"ont un caractère dépassant la propriété normale, pouvant aller jusqu'à de fortes affinités avec l'identité nationale, régionale, locale, ethnique, religieuse ou politique"*[32], dont le musée doit tenir compte.

Sur le registre de la jouissance, les conditions d'accès, de détention, d'exploitation peuvent aussi être pensées sur un mode collectif. Les réflexions engagées autour de la gestion des ressources naturelles pourraient sans doute alimenter la réflexion, en particulier dans la mise en forme de l'accès et de l'utilisation.

D'un point de vue prospectif, il faut aussi suivre les réflexions sur la propriété grevée d'un droit d'accès au profit de tiers *"fondée sur l'idée centrale de l'existence d'un patrimoine collectif dont personne ne doit être exclu"* et qui concernerait les biens vitaux ou encore les biens d'humanité[33]. Le mode de partage est ici conçu plus largement au service de la communauté, idée qui trouve un point d'appui dans la formulation d'un intérêt général de la culture universelle par la Cour européenne des droits de l'homme[34].

IV. Conclusion

La propriété de l'un ou de l'autre n'est peut-être plus la solution privilégiée à poursuivre. C'est de toute évidence une solution écartée dans un nombre croissant d'hypothèses. Et peut-être doit-on même considérer que les termes de l'équation ne peuvent plus contenir

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31 En vertu de l'art. 6.1: "Les musées doivent promouvoir le partage des connaissances, de la documentation et des collections avec les musées et les organismes culturels situés dans les pays et les communautés d'origine. Il convient d'explorer les possibilités de développer des partenariats avec les pays ou les régions ayant perdu une part importante de leur patrimoine."

32 Article 6 (Principe) du Code de déontologie de l'ICOM pour les musées, 2006.

33 Théories de Macpherson pour le droit de non-exclusion et de Rifkin pour le droit d'accès, évoqués par ROCHFELD JUDITH, *Les grandes notions du droit privé*, collection Thémis, 2011, p. 326, qui indique que "même si l'idée paraît encore à l'état de prospective juridique, elle n'en marque pas moins, déjà, certains régimes juridiques".

34 CEDH, arrêt *Beyeler,* 5 janvier 2000, à propos de la détention par un État d'un tableau d'un auteur étranger: "Lorsqu'il s'agit d'une œuvre d'art réalisée par un artiste étranger, la Cour note que la Convention de l'UNESCO de 1970 favorise, dans certaines conditions, le rattachement des œuvres d'art à leur pays d'origine (voir l'article 4 de cette Convention; *supra* para. 73). Elle constate cependant que n'est pas en cause, en l'espèce, le retour d'une œuvre d'art dans son pays d'origine. La Cour admet par ailleurs le caractère légitime de l'action d'un État qui accueille de façon licite sur son territoire des œuvres appartenant au patrimoine culturel de toutes les nations et qui vise à privilégier la solution la plus apte à garantir une large accessibilité au bénéfice du public, dans l'intérêt général de la culture universelle."

la propriété, du moins au sens classique et romain du terme, du droit d'*usus et abusus*. Dans ce sens, il y a lieu de relever le très intéressant commentaire que fait BERRIN, l'une des participantes aux longues négociations entre le Musée de San Francisco et l'Institut d'anthropologie mexicain: *"Démontrant une grande sensibilité culturelle et politique, toutes les parties finirent par s'accorder à dire qu'elles n'arriveraient pas [...] à s'accorder sur la question de la propriété. Nous nous entendions pour reconnaître, en revanche, l'importance de la collection et la nécessité de travailler ensemble afin de la protéger et de la conserver; c'est donc sur cette base que se fit notre collaboration"*[35]. Mais alors sur quoi doit-on se baser? Certes le découplage entre la propriété et la possession peut être une façon pragmatique d'arriver à une solution, mais elle est parfois teinte d'une certaine hypocrisie, comme cela est ressorti de l'affaire des manuscrits *Uigwe* coréens. En effet, même s'il s'agit officiellement d'un prêt, personne ne mettra en question la restitution des manuscrits par la France à la Corée du Sud et des déclarations officielles tout à fait explicites ont même été faites à l'époque de la signature de l'accord de prêt[36]. Il y a donc peut-être lieu d'explorer plus avant de nouvelles formes de propriété ou de jouissance partagées. Nous en avons isolées quelques-unes et amorcé la discussion, mais il nous apparaît important que la réflexion soit poursuivie sur ce thème à plus grande échelle dans un proche avenir.

35 BERRIN KATHLEEN, *San Francisco, le Mexique et les peintures murales de Teotihuacan*, Museum International, Vol. 235, 2007, p. 13

36 Voir les déclarations de JACK LANG à l'époque de la restitution des manuscrits, reproduites par exemple dans l'Article Yonhap News Agency, 11 juin 2011, plateforme ArThemis (http://unige.ch/art-adr), Centre du droit de l'art, Université de Genève (voir aussi http://french.yonhapnews.co.kr/sportsculture/2011/06/11/0800000000AFR20110611000400884.HTML [09.04.2012]).

RAPHAËL ROIG*

13. Une perspective muséale, le point de vue de l'ICOM

Synthèse

Les litiges concernant le retour ou la restitution des biens culturels font régulièrement la une de la presse spécialisée. L'expérience des dernières années nous prouve que le phénomène prend de plus en plus d'ampleur. Nombreux sont de nos jours les pays qui clament le retour d'une partie ou de l'ensemble de leur patrimoine culturel. Ces requêtes sont devenues la source de conflits, parfois âpres, et de débats de fond sur la place et le rôle des biens culturels.

Ces discussions positionnent les différents acteurs concernés par la question sur le terrain de l'éthique et des pratiques professionnelles, un terrain jalonné par un jeu de principes complexes tels que la morale, le droit, l'universalité ou encore la nationalité des biens culturels. En tant qu'institutions chargées de la protection, la documentation et la promotion du patrimoine culturel, les musées sont les détenteurs de nombreux biens faisant l'objet de litiges quant à leur retour ou leur restitution à leurs entités proclamées détentrices. Ainsi, les musées se retrouvent *de facto* au cœur de la question des retours et restitutions des biens culturels.

Le Conseil international des musées (ICOM), en tant qu'organisation professionnelle représentant la communauté muséale mondiale, est par conséquent une des premières organisations concernées par la question.

Cet article tente avant tout de démontrer l'intérêt des musées à sortir du jeu épineux des principes afférent à la question du retour et de la restitution des biens culturels, et à se positionner du côté du dialogue interculturel, dans le respect du cadre légal et des principes éthiques proposés par le Code de déontologie de l'ICOM pour les musées. Il présente par la suite l'action concrète de l'ICOM dans la promotion d'un cadre légal optimal pour les acquisitions de biens culturels, mais aussi dans sur le terrain du règlement des litiges concernant les demandes de retour ou de restitution des biens culturels.

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Abstract

Disputes concerning the return and restitution of cultural property often make the headlines of specialized press. This is the result of the increasing number of restitution claims made by States and other stakeholders. These claims trigger bitter conflicts and debates over the place and role assumed by cultural property.

These debates involve important issues about ethics and professional practice, which, in turn, are influenced by complex principles such as morality, law, universality and nationality of cultural property. As institutions in charge of the protection, documentation and promotion of cultural heritage, museums hold many artefacts that form the subject-matter of return or restitution disputes. Consequently, museums are at the heart of the debate.

The International Council of Museums (ICOM) is a professional organization that represents the global museum community and, therefore, is directly concerned with the issue of return and restitution of cultural property.

This paper attempts to emphasise that museums are interested in detaching themselves from the controversial principles pertaining to the issue of the return and restitution of cultural property and in fostering an intercultural dialogue based on the legal framework and ethical principles set forth by the ICOM Code of Ethics for Museums. This study also examines ICOM's specific efforts regarding the promotion of an adequate legal framework on the acquisition of works of art and the establishment of effective processes for the resolution of return and restitution claims.

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I. Introduction

Le retour et la restitution des biens culturels sont au cœur de nos actualités. Les articles de presse sur les cas les plus connus défraient régulièrement la chronique. Pour tous les professionnels du patrimoine, c'est un phénomène de premier plan, sujet à des débats de fonds et des polémiques épineuses, portés par des enjeux éthiques, mais aussi par des argumentaires variés mêlant la morale au droit, opposant les notions d'universalité et de nationalité.

De nos jours, les affaires les plus connues questionnent le passé sur le terrain de la morale et de l'éthique. L'histoire des peuples est jalonnée de pillages, occasionnels ou systématiques, durant lesquels on prenait acquisition, à l'encontre ou non du droit coutumier, d'une partie de ce que nous appellerions aujourd'hui le patrimoine d'une société. C'est la raison pour laquelle certains ont pu parfois comparer l'engagement pour le retour des biens culturels à leurs pays d'origine à une lutte contre les fantômes de l'impérialisme culturel. Mais la question du retour des biens culturels ne se limite pas aux marbres du Parthénon. Elle est aussi jonchée de cas localisés qui ne déchainent pas l'opinion publique, mais qui ne manquent pas pour autant d'intérêt dans le débat qui nous réunit.

La problématique du retour et de la restitution des biens culturels soulève donc bon nombre de questions, notamment sur l'héritage que détiennent les musées occidentaux au sein de leurs collections. La question de la résolution des litiges y afférant touche ainsi de très près le secteur muséal. Les musées sont régulièrement montrés du doigt, pour leur détention de biens culturels réclamés par des entités proclamées détentrices légitimes de ces biens.

II. Les musées au cœur du jeu des principes

A. Le jeu des principes

En 1991, le *Native American Graves Protection and Repatriation Act* (NAGPRA)[1] déboucha sur la demande faite à des centaines de musées américains de faire l'inventaire et de retourner une grande partie de leurs collections aux communautés indiennes. Ce fut le point de départ d'un des plus vastes projets de l'histoire en termes de restitution de collections muséales à leur communauté d'origine.

1 Disponible sur: http://www.cr.nps.gov/local-law/FHPL_NAGPRA.pdf (28.02.2012).

Dans le champ du retour et de la restitution des biens culturels, les musées jouent indéniablement un rôle central, tout simplement du fait qu'ils sont souvent détenteurs des biens réclamés. Les peintures de Gustave Klimt, les marbres du Parthénon, le buste de Néfertiti, la pierre de Rosette, le sphinx de Bogâzköy, toutes ces pièces ont été réclamées à des musées. La place éminente qu'ils occupent au sein de ce débat implique une multitude de discussions autours de principes clés que nous n'aurions pas le temps de mener ici. Nous pouvons néanmoins en identifier quatre principaux: la nationalité, le droit, la morale et l'universalité.

La nationalité: la nationalité d'un bien est l'un des arguments majeurs qui sous-tend les demandes de retours de biens culturels. Il consiste à affirmer que toutes les œuvres d'art appartiennent à des patrimoines nationaux, indépendamment de leur localisation, et que cette appartenance légitime les demandes de retour. Les Etats évoquent ainsi fréquemment la nationalité d'un bien afin de demander le retour de ce qu'ils considèrent comme leur patrimoine national. Or, ces biens réclamés sont bien souvent destinés à être exposés dans les institutions muséales de leur pays ou de leur localité d'origine. Dans ce contexte, les musées – à travers les collections qu'ils hébergent – seraient les lieux où s'exprime pleinement, où se cristallise l'identité nationale ou locale d'une propriété culturelle.

Le droit: Si l'on considère que les biens culturels mobiliers sont par présomptions la propriété de ceux qui les détiennent, il est préalablement impératif d'appliquer le droit en la matière et d'argumenter que les biens illégalement acquis doivent être restitués à leur propriétaire légal. Cependant, la question est épineuse. L'acquisition des biens culturels au cours de notre histoire fut bien souvent antérieure à l'établissement des règles partagées de droit. Et si le droit s'est aujourd'hui développé, et ce grâce aux actions des Etats et des organisations internationales, il n'est pas encore homogène. En outre, le droit est bien souvent difficile à mettre en œuvre en matière de résolution des litiges, notamment faute de preuves en ce qui concerne l'origine du bien, l'assurance de la bonne foi ou encore le manquement à l'obligation de diligence, ou encore dans les cas antérieurs à la date de création de la règle de droit (notamment la Convention de 1970 concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels[2]). Enfin, les décisions de justice, lorsqu'elles sont prises, sont souvent difficiles à faire appliquer.

La morale: Si le droit en matière de restitution s'est forgé au fil du temps, la morale est quant à elle un argument utilisé de longue date. Les pillages effectués lors des campagnes napoléoniennes trouvaient déjà à l'époque leurs détracteurs parmi les intellectuels

[2] Disponible sur: http://portal.unesco.org/fr/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (28.02.2012).

européens. Alors que les partisans de la rétention ont tendance à refuser l'argument éthique en l'opposant justement au droit, les défenseurs de l'argument moral estiment au contraire que les procédures légales ne doivent être menées qu'en dernier recours, et que l'éthique peut se substituer au droit lorsque celui-ci n'est pas utilisable. La réalité nous montre d'ailleurs que les considérations éthiques prennent bien souvent le pas sur le droit en matière de restitution. Il arrive assez fréquemment qu'une institution décide de rendre un bien à son propriétaire originel sans passer par une procédure judiciaire.

Dans le cas des musées, la morale et l'éthique ne peuvent se contenter d'être implicites. C'est pourquoi plusieurs règles de déontologie, cadres juridiques non contraignants mais dans lesquels on s'engage à agir, ont été codifiées. Encore faut-il à présent trouver le moyen le plus efficace de les faire respecter par ceux qu'elles visent.

L'universalité de la propriété culturelle: ce quatrième argument émet l'idée que chacun trouve un intérêt dans la préservation de la propriété culturelle, indépendamment de sa localisation et de son origine. C'est ainsi que, dès 1954, la Convention de La Haye pour la protection des biens culturels en cas de conflits armés faisait référence au *"patrimoine culturel de l'humanité entière"*[3]. Cette vision universaliste de la propriété culturelle sous-tend d'autres principes universels primant les intérêts de chacun: la préservation, la recherche scientifique ou encore l'accès au patrimoine pour tous.

Pourtant, si le concept d'universalité est sous-jacent aux principes de l'UNESCO, qui peut encourager le retour des biens culturels à leurs pays d'origine, et qui fut à l'origine des textes de droit international fondateurs en matière de transfert de propriété culturelle, c'est aussi l'argument qu'utilisèrent en 2002 18 grands musées lorsqu'ils signèrent la "Déclaration sur l'importance et la valeur des musées universels"[4]. Ils y clamaient l'immunité de leurs collections face aux demandes de retour. Pour corroborer leur postulat, ils indiquaient que, si chaque cas devait être traité indépendamment, il était nécessaire de reconnaître que les musées ne servent pas les citoyens d'une seule nation, mais les peuples de toutes les nations.

B. La nécessité de sortir du jeu

Ces quatre principes constituent généralement les piliers du cadre idéologique qui balise le débat sur la restitution et le retour des biens culturels à leurs pays ou à leur propriétaire d'origine. Ce sont les plus fréquemment utilisés, les acteurs de ce débat choisissant tour à tour de donner plus ou moins d'importance à l'un ou l'autre de ces principes, selon leurs

3 Disponible sur: http://portal.unesco.org/fr/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html (28.02.2012).

4 Disponible sur: http://www.tomflynn.co.uk/UniversalMuseumsDeclaration.pdf (28.02.2012).

objectifs. Le retour d'un bien à un pays en proie à l'instabilité satisfera le principe de la nationalité de ce bien mais provoquera des inquiétudes légitimes quant à sa conservation. La possession d'œuvres pillées à une époque où aucune règle de droit ne les protégeait, si elle offense la morale, ne peut être qualifié d'illégale. La conservation d'une œuvre dans un musée "universel" optimisera l'accès aux scientifiques et au public, mais ira à l'encontre du principe de nationalité et limitera l'accessibilité à cette œuvre pour le public issu de son pays d'origine.

Finalement, le jeu des principes lié à la problématique des retours et restitutions est aussi variable qu'imprévisible, et il sert avant tout d'outil rhétorique soutenant le discours et la narration à un instant t. Nous prenons pour exemple celui du retour en Ethiopie de la stèle d'Axoum, œuvre monumentale dont le rapatriement fut une véritable prouesse technique. Si le retour de ce monument sur ses terres d'origine ne saurait questionner la légitimité morale, l'événement eut un écho sans précédent en Ethiopie. Il fut présenté comme une victoire de la nation éthiopienne face à l'ancien colon italien, et fut utilisé pour servir la propagande nationaliste du régime actuellement au pouvoir. Dans un autre contexte politique, l'événement aurait pu être présenté d'une façon toute autre et servir des intérêts totalement différents.

Ces principes, s'ils peuvent tous être défendables, nous donnent l'impression d'être figés, et ne laissent souvent que peu de place au dialogue. Or, l'histoire nous montre qu'ils sont bien au contraire mouvants, malléables, et qu'ils ne peuvent être pris pour principe suprême faisant foi pour la conduite ou le refus du retour d'un bien culturel. Si l'on regarde les cas de retours et de restitutions répertoriés durant ces quatre dernières années, plusieurs milliers de pièces ont été rendues à des pays comme la Grèce, le Pérou, la Chine, l'Italie, le Kenya ou encore la Libye. La grande diversité des pays concernés par ces cas et les différents enjeux et contextes qui les caractérisent nous montrent – bien au contraire – qu'il n'y a pas de règle immuable en matière de restitution ou de retour d'un bien culturel.

Les musées sont encore aujourd'hui au cœur de multiples débats sensibles inhérents au retour des biens culturels et un grand nombre de cas continueront de les concerner au premier plan. Ils se retrouveront régulièrement embarrassés par des enjeux politiques, diplomatiques et financiers qui dépassent leurs prérogatives premières en tant que lieux de conservation et d'exposition.

La question du retour et de la restitution des biens culturels est loin d'être réglée. A une époque où les prêts d'œuvres se font de plus en plus difficilement et où la tendance au protectionnisme culturel continue de se développer, les musées continueront à être pris dans ce jeu mouvant des principes propres à cette problématique. A moins qu'ils ne décident de s'en extirper et de redonner une priorité au dialogue interculturel, à la compréhension et à l'intégration des intérêts de chacun. Ce n'est qu'à travers le dialogue, la

discussion et l'établissement de relations de confiance que la communauté muséale mondiale pourra avancer sur la question – ô combien sensible – des retours et des restitutions de biens culturels et qu'elle développera des moyens innovants de régler les litiges.

III. Le rôle du Conseil international des musées

Le Conseil international des musées représente la communauté muséale mondiale. Il ne porte pas la voix d'un musée ni d'un groupe de musées, mais de tous ses musées membres, quels que soient leur taille ou leur localisation géographique. L'ICOM, en tant qu'organisation représentant la communauté muséale internationale, fait son possible pour représenter les intérêts de tous ses membres et a une position impartiale et neutre sur la question du retour des biens culturels. Le rôle d'une organisation culturelle comme l'ICOM n'est pas de formuler une position de principe et généraliste, mais de se positionner du côté du droit existant et de la recherche de solutions pragmatiques qui entrent concrètement dans la spécificité unique de chaque cas de figure.

A. La lutte contre le trafic illicite de biens culturels

La restitution des biens culturels est intimement liée à leur trafic illicite. Depuis plusieurs années, et à l'aune des stipulations de la Convention internationale de 1970 concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels[5], l'ICOM a fait de la lutte contre ce trafic une priorité, afin d'encourager l'acquisition de biens culturels, notamment par les musées, dans un cadre légal optimal et de prévenir l'amplification future des demandes de restitution par les entités concernées.

Tournons-nous d'abord vers ce que nous dit le Code de déontologie de l'ICOM, développé au cours des années 80 et adopté en 2004 dans sa version restructurée, intitulé Code de déontologie de l'ICOM pour les musées[6]. Il définit les normes minimales en termes de pratiques professionnelles et de performance des musées et de leur personnel. Il reflète les principes appréhendés par la communauté muséale internationale comme ligne de fond des normes du secteur muséal dans le monde entier. Le code de l'ICOM ne cherche pas à dépasser les codes nationaux, il établit plutôt les bases déontologiques acceptées au niveau international. L'ICOM dispose en outre d'un Comité pour la déontologie, constitué de professionnels de musées et du droit de plusieurs pays, qui est réguliè-

5 *Cit.* n. 3.

6 Disponible sur: http://archives.icom.museum/ethics_fr.html (28.02.2012).

rement appelé à se prononcer sur des cas concrets pour réfléchir et proposer des solutions à de nombreuses questions d'éthique muséale.

Le code de déontologie de l'ICOM n'est pas un instrument normatif ayant une portée juridique obligatoire. Comme organisation internationale, l'ICOM est soumis au principe de subsidiarité, n'a pas autorité légale sur ses membres et ne dispose pas des moyens coercitifs les obligeant à respecter ce code. Néanmoins, chacun des membres s'engage à agir professionnellement et risque l'exclusion s'il ne le respecte pas. Les lignes directrices du code ont force de norme professionnelle et il appartient aux autorités compétentes de leur donner, ou non, un cadre légal. Le cas échéant, l'ICOM ne peut que soutenir les lois qui reprennent les principes dictés par son code de déontologie.

Le Code en question nous fournit plusieurs règles éthiques sur le terrain du trafic illicite de biens culturels, notamment dans ses articles 2.2 et 2.3.

2.2. Titre valide de propriété

"Aucun objet ou spécimen ne doit être acquis […] si le musée acquéreur n'est pas certain de l'existence d'un titre de propriété en règle. Un acte de propriété, dans un pays donné, ne constitue pas nécessairement un titre de propriété en règle".

La dernière phrase de cet article, en relativisant la valeur d'un titre de propriété, implique une obligation de diligence lors de l'acquisition d'un bien. Sur cette obligation, justement, l'article suivant nous dit:

2.3 Provenance et obligation de diligence

"Avant l'acquisition d'un objet […] tous les efforts doivent être faits pour s'assurer qu'il n'a pas été illégalement acquis […]. À cet égard, une obligation de diligence est impérative pour établir l'historique complet de l'objet depuis sa découverte ou création".

Le code de l'ICOM, dans son article 2.4, prohibe aussi l'acquisition de biens issus de fouilles archéologiques illégales ou de découvertes non déclarées aux autorités compétentes. Cette disposition est capitale, quand on sait le rôle des fouilles illégales dans l'alimentation du trafic illicite de biens culturels.

A travers ses articles 7.1 et 7.2, le code soumet enfin les musées au respect des dispositions du droit national et international, à savoir les conventions majeures, qui peuvent servir de norme à l'interprétation du code:

La Convention pour la protection des biens culturels en cas de conflit armé (Convention de La Haye, premier Protocole, 1954 et second Protocole, 1999)[7];

La Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (UNESCO, 1970)[8];

La Convention UNIDROIT sur les biens culturels volés ou illicitement exportés (Rome, 24 juin 1995)[9];

La Convention sur le patrimoine culturel subaquatique (UNESCO, 2001)[10];

La Convention pour la sauvegarde du patrimoine culturel immatériel (UNESCO, 2003)[11].

Outre la promotion des principes de son code de déontologie, l'ICOM entreprend son action contre le trafic illicite de biens culturels sur trois fronts majeurs. D'abord, à travers un engagement sur la longue durée dans le domaine de la sensibilisation. C'est pourquoi l'ICOM continue de condamner les pillages et les vols de biens culturels, qui sont commis à l'encontre de l'intégrité culturelle des communautés et des lois d'Etats souverains.

Ensuite, par le développement d'instruments et d'actions adéquates. C'est aujourd'hui le cœur de l'action de l'ICOM, qui continue à utiliser son expertise dans plusieurs domaines et développe des outils utiles à la lutte contre le trafic illicite de biens culturels. L'ICOM a ainsi développé deux instruments pratiques que sont les fameuses Listes Rouges et la série des 100 Objets disparus.

Les Listes Rouges sont avant tout un outil de prévention contre le trafic illégal. Elles répertorient, pour un pays donné, les catégories de biens culturels les plus exposées au trafic illicite, et ce afin de faciliter leur identification. Dix Listes Rouges ont été publiées à ce jour. Destinées aux professionnels du marché de l'art, des musées, et aux forces de l'ordre, ces listes ont rendu possible bon nombre de saisies à travers le monde ces dernières années. Un bon exemple est celui de l'utilisation de la Liste Rouge afghane, qui a permis aux douanes britanniques de saisir des centaines d'antiquités venues

7 Disponible sur: http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf#page=66 (08.02.2012); http://unesdoc.unesco.org/images/0013/001306/130696fo.pdf (28.02.2012).

8 *Cit.* n. 3.

9 Disponible sur: http://www.unidroit.org/french/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-f.pdf (28.02.2012).

10 Disponible sur: http://portal.unesco.org/fr/files/13179/106621614512nov2001.pdf/2nov2001.pdf (28.02.2012).

11 Disponible sur: http://unesdoc.unesco.org/images/0013/001325/132540f.pdf (08.02.2012).

d'Afghanistan. Ainsi, en 2009, le gouvernement britannique a rendu au musée de Kaboul 3,4 tonnes d'antiquités afghanes volées, soit plus de 1'500 pièces, qui avaient été saisies à l'aéroport d'Heathrow. Il en va de même pour la série des 100 objets disparus, ouvrages énumérant, pour une région donnée, les biens culturels majeurs portés disparus. Ils ont aussi permis la localisation de biens culturels illégalement acquis, comme ce fut le cas en 2006, lorsque plus de 6'000 objets préhispaniques furent interceptées aux Etats-Unis et en Equateur.

La publication des Listes Rouges donne en outre lieu à la conduite de formation pour les professionnels concernés par le trafic illicite de biens culturels. Durant ces formations sont abordés la question générale du trafic illicite et les différents moyens de lutte existant. L'utilisation des Listes Rouges et de la norme minimale d'inventaire Object ID y est aussi promue. Car, afin de se prémunir contre la dépossession illégale de leurs biens, la première mesure, tant pour les particuliers que pour les institutions, demeure l'élaboration d'inventaires précis.

En tant que membre du groupe d'experts reconnus par les Nations Unies dans le domaine de la lutte contre le trafic illicite de biens culturels, l'ICOM participe aussi à l'élaboration des grandes orientations de la communauté internationale en la matière. Elle est en collaboration étroite et permanente avec ses partenaires, et met à disposition son expertise dans le cas de suspicions d'acquisition illégale d'un bien.

Enfin, l'ICOM soutient activement l'amélioration des instruments légaux et juridiques. L'organisation promeut la ratification et l'application de mécanismes légaux internationaux, comme la Convention de La Haye de 1954 et ses deux Protocoles[12], la Convention de 1970 de l'UNESCO[13] et la Convention de 1995 d'UNIDROIT[14]. Mais elles ne suffisent pas, c'est pourquoi l'ICOM continue d'encourager les Etats à améliorer leurs législations nationales et à adopter des instruments bilatéraux efficaces visant à mieux protéger leur patrimoine culturel.

Si l'ICOM a depuis longtemps décidé d'agir en amont en prenant des mesures concrètes dans le cadre de la lutte contre le trafic illicite de biens culturels, l'organisation muséale internationale prend acte du fait que le retour et la restitution des biens culturels sont des enjeux majeurs pour la communauté qu'elle représente, et a fait de ces questions une de ses préoccupations.

12 *Cit.* n. 8.
13 *Cit.* n. 3.
14 *Cit.* n. 10.

B. Retour et restitution

De manière générale, l'ICOM encourage les négociations bilatérales entre les parties intéressées par un cas de demande de retour ou de restitution de biens culturels, et offre le cas échéant ses bons offices pour le règlement d'un litige y afférent.

Sur le terrain des retours et des restitutions, le Code de déontologie de l'ICOM nous donne par ailleurs quelques éclairages. Il énumère des directives assez précises, en commençant par l'article 6.1:

6.1 Coopération

"Les musées doivent promouvoir le partage des connaissances, de la documentation et des collections avec les musées et les organismes culturels situés dans les pays et les communautés d'origine. Il convient d'explorer les possibilités de développer des partenariats avec les pays ou les régions ayant perdu une part importante de leur patrimoine".

La coopération entre les musées est un point essentiel. Or, nous ne pouvons que constater que la tendance muséale actuelle n'est pas à la facilitation de l'échange des œuvres. L'ICOM encourage le dialogue entre les parties et les pays. Ce dialogue peut être au gré des accords entre parties parfois imaginatif, allant de solutions aussi diverses et différentes que le prêt, l'échange, le partage ou le transfert entier de la propriété des biens culturels. Ce qu'il est intéressant de noter, c'est que le code préconise cette pratique au niveau professionnel, c'est à dire entre les institutions, plus qu'au niveau strictement politique, interétatique. Il est par ailleurs utile de souligner que le code préconise le développement de partenariats avec les pays ou les régions ayant perdu une part importante de leur patrimoine. Pour l'ICOM, la coopération muséale ne se limite donc pas à des relations entre pays disposant d'un patrimoine riche et de collections muséales importantes.

Sur le point du retour des biens culturels, les articles 6.2 et 6.3 du code de l'ICOM incitent les musées à être prêts à engager un dialogue en vue du retour de ces biens vers leurs pays d'origine, et ce de façon impartiale, sur la base de principes scientifiques, professionnels et humanitaires, et dans le respect des règles de droit. Dans le cas où un bien s'avèrerait avoir été transféré en violation des principes des conventions internationales et nationales, et faire partie du patrimoine culturel ou naturel du requérant, l'ICOM demande aux musées de prendre les mesures nécessaires pour la restitution de ce bien. Enfin, le code de déontologie de l'ICOM dissuade les musées d'acquérir des biens culturels provenant de territoires occupés.

Au-delà des indications fournies par le code de déontologie, l'ICOM promeut, par tous les outils de communication dont l'organisation dispose, les retours et les règlements

positifs des litiges concernant les demandes de restitutions de biens culturels. Il faut savoir enfin que l'ICOM encourage les échanges au sein du Comité intergouvernemental pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale, crée en 1978[15]. L'ICOM participe d'ailleurs, à titre consultatif, aux réunions de ce Comité.

En 2011, le Conseil international des musées a décidé de concrétiser son action dans le cadre du règlement des litiges concernant les demandes de retour ou de restitution des biens culturels en mettant sur place un instrument efficace destiné à tous les acteurs concernés par le phénomène.

C. Le développement de nouveaux outils, une nécessité

La problématique des retours et restitutions des biens culturels, nous l'avons vu, met en exergue un rapport de force entre des principes dont il est nécessaire de comprendre les dynamique, mais duquel il est utile de s'extirper si l'on souhaite apaiser le débat et espérer une amélioration de la situation. Tout en promouvant le respect du droit national et international, l'ICOM encourage le respect des normes déontologiques établies afin de favoriser la coopération internationale sur le terrain des retours et des restitutions.

Au regard de l'aspect sensible de cette question, et des possibilités offertes par les législations nationales et internationales, l'ICOM considère que chaque cas doit être regardé comme un événement singulier, ayant sa propre dynamique et portant des enjeux uniques. Le dialogue volontaire entre les parties concernées, en prenant en compte les intérêts de chacun, demeure aujourd'hui la solution la plus efficace afin de promouvoir une issue heureuse aux demandes de retours et de restitutions de biens culturels. L'exemple du don du masque Makondé par le Musée Barbier-Mueller au gouvernement de Tanzanie nous l'a bien montré. Ce don fut l'heureux dénouement de plus de vingt années de négociations et d'efforts fournis par les deux parties concernées, cela notamment grâce au soutien de l'ICOM.

La réalité nous montre d'ailleurs que dans beaucoup de cas de restitution, le biais juridique ne prime pas forcément et qu'il est même parfois source d'échec. Nous en trouvons un exemple frappant dans l'affaire des fresques de Casenoves. Durant 34 ans, sept décisions de justice ont été rendues dans cette affaire. Le litige ne fut réglé qu'en juillet 2007, lorsque le musée d'art et d'histoire de la ville de Genève et le Ministère français de la culture – qui réclamait leur retour – ont signé un accord qui prévoyait que les fresques

15 Voir http://portal.unesco.org/culture/fr/ev.php-URL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html (28.02.2012).

seraient prêtées à l'Etat français sur des périodes de six mois renouvelables. Le prêt fut finalement transformé en don en mars 2003.

En outre, quand bien même un jugement est rendu en la matière, l'application des décisions de justice comporte souvent des difficultés supplémentaires. Enfin, les procédures judiciaires sont souvent lourdes, complexes et coûteuses.

C'est pourquoi l'ICOM, en tant qu'organisation représentant la communauté muséale mondiale, a fait le choix de créer, en collaboration avec l'Organisation mondiale de la propriété intellectuelle (OMPI), une procédure de Médiation en art et patrimoine culturel[16]. Cette procédure est un adjuvant à des discussions ou négociations compliquées et favorise leur dénouement. Elle peut aussi, entre autres nombreux sujets, toucher à la question des retours et restitutions en prenant en compte les différentes problématiques qui l'animent.

Elle présente de nombreux autres avantages. C'est une procédure volontaire et non contraignante, où la responsabilité de la résolution du litige repose sur les parties. Elle est adaptée, et s'appuie sur le Code de déontologie de l'ICOM pour les musées, et sur les expertises respectives et complémentaires de l'ICOM et de l'OMPI. Elle assure l'intervention de médiateurs professionnels, impartiaux et indépendants. Elle garantit la prise en compte de la multiplicité des enjeux et de la complexité inhérentes, de façon singulière, à chaque cas de demande de retour ou de restitution. Elle propose une procédure claire pour les deux parties et leur offre en outre la confidentialité, élément primordial dans la bonne conduite d'une procédure de médiation.

Sur le terrain du retour, de la restitution et du règlement des litiges, de nombreux progrès restent à faire. Ce n'est que par le dialogue et l'échange de pratiques que nous pourrons identifier et développer des voies d'issue innovantes afin de satisfaire le plus grand nombre de membres de la communauté muséale. Prenons pour dernier exemple celui de de la Ville de la Chaux-de-Fonds, qui, accusée d'avoir acquis un bien spolié (en l'occurrence un tableau de John Constable), décida, en invoquant la bonne foi lors de l'acquisition de l'œuvre, de ne pas la restituer mais de rendre public la spoliation afin de satisfaire les deux parties.

La médiation est certainement une piste innovante qui peut permettre de faire avancer les acteurs du patrimoine qui se verraient bloqués ou freinés au regard de leurs intérêts et enjeux respectifs. Elle offre une fluidification de l'espace de dialogue nécessaire à la prise en compte des intérêts de chacun et à l'orientation des parties vers des issues satisfaisantes.

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16 Voir http://icom.museum/que-faisons-nous/programmes/mediation-en-art-et-patrimoine-culturel/mediation-icom-ompi-en-art-et-patrimoine-culturel/L/2.html (28.02.2012).

MONICA DUGOT*

14. Nazi-Looted Art Restitution and the Art Market

Abstract

The consequences of Nazi-era confiscations of art continue to resonate on today's art market and present a significant challenge to its stakeholders. It has given rise to new industries like title insurance and more rigorous due diligence standards in response to the concerns of aware buyers and sellers. By setting up specialized restitution departments, auction houses manifest their commitment in helping Nazi looted art victims to find and identify lost objects and in ensuring that they do not knowingly sell spoliated art. Beyond the practical difficulties of provenance research, the verification procedure of lots by auction houses is continuously challenged as it misses a centralized organisation that gathers all available information. Moreover, the art market lacks of a consensus on standards for restitution, which has led to the emergence of various ways to deal with the resolution of restitution issues. By means of several examples involving Christie's, this article shows how auction houses intervene in Nazi-era art claims and how they may be successfully resolved without litigation.

Résumé

Les conséquences des confiscations d'œuvres d'art qui ont eu lieu pendant l'ère nazie continuent à raisonner aujourd'hui sur le marché de l'art et présentent un défi considérable pour tous ses acteurs. Cela a encouragé la création de nouvelles industries telles que les assurances titres, et les standards de due diligence ont été durcis en réponse aux inquiétudes des acheteurs et vendeurs soucieux. En créant des départements spécialisés en matière de restitution, les maisons de vente aux enchères témoignent de leur engagement envers les victimes d'œuvres spoliées en les aidant à retrouver et identifier leurs objets perdus et en s'assurant qu'elles n'en vendent pas sciemment. Au-delà des difficultés pratiques inhérentes aux recherches sur la provenance des œuvres, la procédure de vérification des lots par les maisons de vente aux enchères est continuellement remise en

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question puisqu'il n'existe pas d'organisation centrale regroupant toutes les informations disponibles. De plus, le marché de l'art souffre d'un manque de consensus quant aux standards applicables à la restitution, ce qui a entraîné l'émergence de nombreuses approches de résolution. Aux travers d'exemples impliquant Christie's, cet article illustre la manière dont les maisons de vente aux enchères interviennent dans les revendications d'œuvre d'art spoliées et la façon dont elles peuvent être résolues avec succès hors procédure judiciaire.

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I. Introduction

I am the International Director of Restitution at Christie's, coordinating our work on Nazi-era restitution and other provenance issues globally. I am privileged to have worked in the restitution field from the start of the renewed interest in the subject in the mid-nineteen nineties, first at the New York State Banking Department's Holocaust Claims Processing Office for eight years, and now at Christie's for the past seven years.

In this article, I intend to elaborate a little on the role of the art market with regard to Nazi-era art claims and how they can be resolved without litigation.

II. Due Diligence in the Art Market

The identification and restitution of looted art presents a considerable challenge to the art market on many levels – commercial, ethical, moral, as well as legal. Resolving looted art claims is not a field where the art market can or should sit on the side-lines.

The art market is a multi-billion dollar industry. The art market is also global – consignors, purchasers, dealers from around the world converge literally and now even virtually through our sales rooms.

We have seen in the last few years an industry spring up around title insurance and title experts to research the provenance of collections and consignments. Information about stolen works of art – not just from our area of restitution but "regular" theft, illegal export, cultural property and so on – is more easily circulated and searchable through organisations like the Art Loss Register[1]. As it concerns World War II restitution issues, there are now more than a dozen databases of spoliated artwork and many more online resources.

There are more questions than ever from savvier consignors and buyers, and well-informed claimants. The provenance of lots we publish in our catalogues for sale is scrutinized by potential buyers to a higher degree than the year before, given the growing awareness of the importance of good provenance free of any taint whatsoever that could surface in the future.

The due diligence we undertake as a result has a twofold intention: to vet what we offer for sale so that we are able to convey good title, and to protect our reputation as an honest agent in the global market place. In terms of Nazi-era spoliation, our prime aim is to offer works of art for sale that, as far as we are aware, were not spoliated or if spoliated, remain unrestituted – we do not want to compound the original theft or loss.

And ultimately, it is not just about money or financial worth. The art objects themselves typically carry cultural meaning or have a significant personal value. We are as concerned with works of nominal financial value that may have personal significance such as a favourite book or tea service that may have been looted, as we are with the "big name", high-value paintings.

1 For more information on the Art Loss Register, see http://www.artloss.com/en (17.05.2012).

III. Vetting Lots & Difficulties

We have over the last decade developed a method of verifying the works of art consigned to us and their provenance for spoliation "flags". This essentially means checking the provenance of what we sell for sensitive names – victims, perpetrators, notorious middlemen – and for signs that a work may have changed hands between 1933 and 1945.

We try to be as thorough as possible but the expectations of the marketplace often underestimate in great part the challenge in researching provenance: the lack of documentation, the changes in attribution, copies or multiple editions, the opaque nature of the art market covering past sales. These problems are dramatically magnified by war and displacement. While we use databases and sources of information on looted art to check our consignments and we also work closely with experts, claimants, and their representatives to research items where we have identified possible concerns, new information comes to light regularly about what was lost by whom and how.

Beyond the difficulties of provenance research, there are perhaps two other central hurdles. Firstly, that information is coming to light and being published is a good thing. But the information is also less organized, more fragmented in its presentation. There is no one single central database of looted art, no umbrella organization or international focal point for drawing the threads together.

Secondly, a common framework for defining "looted art" and generally accepted standards for hearing and resolving claims are lacking. There are often competing agendas and local and international differences of approach. While general principles have been established, particularly through conferences such as that in Washington in 1998[2] or the more recent Prague meeting in 2009[3], there is no common interpretation or implementation of these guidelines at an individual, institutional, national and international level. This lack of consensus on standards for restitution means the guidelines that do exist are reinterpreted when it comes to their application in the context of any particular claim.

While this lack of a clearly defined framework is understandable, the art market would benefit from greater clarity and a broader consensus on standards. But the lack of consensus has also meant that a myriad of innovative ways have been put forward to tackle the resolution of restitution issues.

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2 44 governments participated at the Washington Conference on 3 December 1998 and issued the *Washington Conference Principles on Nazi-Confiscated Art,* available at: http://www.state.gov/p/eur/rt/hlcst/122038.htm (17.05.2012).

3 During the meeting, on 30 June 2009, 46 states approved the so-called "Terezin Declaration".

IV. Christie's Guidelines

It is inevitable that we will have to deal with claims when they arise and do so in a way that is sensitive and responsive to both claimant and current holder. As part of our drive to make how we deal with issues and claims, clear, transparent, and accessible, we published our internal guidelines on the "process" two years ago[4]. These guidelines essentially lay out that we will share information concerning a claim between consignors and claimants so that as much is out in the open as possible, leading to better and more informed decisions. We are not adviser to one side or another but can help, for example, with access to research and expertise and fundamentally, our role is as a conduit for dialogue. We can bring our experience to bear but we do not act as a judge of the merit of the arguments put forward nor do we dictate an outcome.

By acting as an intermediary and outside the courts, we can assist in resolving cases – for example, in suggesting fair, amicable, and practical solutions like restitution of the object or settlements involving a split of sale proceeds. We sidestep some of the common frustrations of litigation: costs, delays, risks, technical defences, and argument over jurisdiction, choice of law or burden of proof that often characterise the pursuit of a restitution claim through the courts. Indeed, what we hope to achieve is more speedy, fair, and just solutions to claims. For most of the claims we handle, litigation is rarely an option also given the costs and risks involved for both sides. Facilitating a practical dialogue, as we try to do at Christie's, allows us to suggest a sensible way forward where compromise and mutual respect guide the outcome.

The success of Christie's approach is in being a well-informed and well-intentioned intermediary, as exemplified by the many cases where we have been able to assist. What these illustrate also is the diversity of claimants. Although the majority of claims we handle are for artworks looted from Jewish collections, we also have worked with museum and institutional claimants from Germany, Russia, and Poland, with aristocratic families dispossessed by the Red Army or through the post-war division of Germany.

4 *Christie's Guidelines for Dealing with Nazi-Era Art Restitution Issues,* June 2009, available at: http://www.christies.com/pdf/services/2010/christies-guidelines-for-dealing-with-restitution-issues.pdf (17.05.2012).

V. Restitution Examples

A. By Means of Negotiation

1. Restituted Art at Christie‘s

Restitution issues may concern high-profile artworks just as objects of low financial value, as illustrated by the following examples. The painting “Christ Blessing” by Benozzo Gozzoli was returned to the heir of Hans Hasso Baron von Veltheim in 2011, who had been expropriated during the Soviet Military Administration of Sachsen-Anhalt in 1945[5]. Two majolica dishes from the mid-16th century were restituted through Christie’s and the efforts of the Art Loss Register to the Gotha Kunstsammlungen[6]. About 40 majolica dishes of the Museum Foundation’s collection had disappeared in 1945 and were registered to be lost with the Art Loss Register in 1997[7].

The Egon Schiele painting *“Herbstsonne”* was restituted to the family of the Jewish Viennese art dealer and collector, Karl Gruenwald. It was thought lost during the war but rediscovered and identified by Christie’s, which was also involved in the negotiations and settlement on the question of its ownership[8]. The Paul Cezanne landscape *“Vue sur l’estaque”* was sold by Christie’s in May 2011 as part of a settlement between the heirs of Margarethe Oppenheim and a collector from Berlin, again negotiated by Christie’s[9].

The painting “Virgin and Child with Saint Francis and Saint Jerome” by Rocco Zoppo was appraised by a Christie’s colleague during a normal pre-consignment visit to a client’s house and identified as having once been in the collection of Federico Gentili di

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5 The panel was subsequently sold by the heir at Christie’s Old Master Paintings sale on 26 January 2012.

6 See The Art Loss Register Press Release, *The Art Loss Register (“ALR”) successfully recovers two Italian Majolica dishes on behalf of the Castle Friedenstein Foundation in Gotha, Germany more than 65 years after their loss,* available at: http://myemail.constantcontact.com/Press-release---Recovery-of-two-Italian-Majolica-Dishes.html?soid=1101979756048&aid=N4e-jiGWqJs (17.05.2012).

7 For more information, see Magazin GOTHA, *Rückgabe zweier italienischer Majolikaschälchen,* available at: http://www.gotha-info.de/node/66 (17.05.2012).

8 The painting was sold at Christie’s evening sale of Impressionist and Modern Art on 20 June 2006 for about £11.7 m, see Christie’s Press Release, *Impressionist and Modern Art Evening Sale at Christie’s totals £87 million / $160 million / €127 million,* available at: http://www.christies.com/presscenter/pdf/06202006/18312.pdf (17.05.2012).

9 Christie’s, “Impressionist and Modern Evening Sale”, New York, 4 May 2011 (sale no. 2437, lot no. 37).

Giuseppe, an Italian businessman of Jewish descent living in Paris, and a representative of the Italian Finance Ministry in France. He died in April 1940, shortly before the fall of France. His sons fled for the US and in their absence, the art collection was auctioned off by an administrator appointed by the court in Nazi-occupied France. Although the estate received the sale proceeds, the art collection was lost. In 1999, after a lengthy legal battle, the French Court of Appeal finally overturned the validity of the 1941 sale, ruling that the sons had fled to escape persecution and had had no control over the auction[10]. This court decision paved the way for the restitution of a number of paintings by museums. Fortunately, when we discovered the Zoppo, we were able to move swiftly and explain the situation and background to the then-current holder. We then served as a bridge to between the consignor and the Gentili family and successfully concluded a settlement addressing the claim. In fact, the painting was offered by Christie's in Paris in June 2011, a few short weeks after the discovery of its history[11].

And most recently, the gold panel by Taddeo di Bartolo entitled "The Resurrection" was restituted to the heir of Jacques Goudstikker, after Christie's had worked with Larry Kaye (the Goudstikker heir's legal counsel) and helped act as a bridge with a consignor, who was initially deeply averse to entering into any dialogue on this issue.

These are clear examples of the role the art market can play in helping to resolve claims for such Nazi-looted art in an amicable way that helps all parties and keeps the market clear of art with unresolved issues.

2. The Jaffé Collection

The success of non-litigious claim resolution can be well illustrated by means of the Jaffé Collection. John and Anna Jaffé had been a part of the English community on the French Riviera from the late nineteenth century and had built a diverse and impressive art collection. John Jaffé passed away in 1933 and Anna in 1942 believing their legacy was safe, but this was not to be the case. The pro-Nazi Vichy regime in the South of France was quick to follow the lead of the Nazi occupiers in the North in seizing and selling off Jewish collections. In 1943, the Nazi office of Jewish affairs decreed that the Jaffé collection had to be sold. The proceeds from this forced sale were certainly never received by Anna's three nephews.

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10 *Christiane Gentili di Giuseppe et al v Musée du Louvre*, Court of Appeal Paris, decision of 2 June 1999, n. 1998/19209.

11 Christie's, "Old Master Paintings and 19th Century Sale", Paris, 21 June 2011 (sale no. 1011, lot no. 43).

At least three works from the Jaffé collection ended up in Hitler's "Linz" collection[12]. The painting *"Le Grand Canal avec le Palais Bembo"* by Francesco Guardi was restituted by the French Ministry of Foreign Affairs to the Jaffe family from the *Musée des Augustins* in Toulouse in 2005[13]. About at the same time, the David II Teniers *"Prince sur une galère en train d'appareiller"* was returned by the Louvre[14]. Both these restitutions were as a result of the French courts overturning the validity of the 1943 sale, a case where the courts recognised the iniquitous way in which the family had been deprived of the collection.

However, the Teniers painting is, in fact, one of three companion pieces by the same artist and the family was keen to locate and recover the other two: "The Engagement Between Spanish Galleys Commanded by Don Juan of Austria and a Turkish Fleet" and "The Arrival of Don Juan of Austria Off Genoa". With this in mind, the heirs contacted Christie's in 2005, as we had unwittingly sold the former in 1996. With our help, the family was also able to recover the second Teniers in time for their sale as a pair at auction[15]. The story doesn't end there though. We were recently also able to identify the third piece in a consignment in 2011 – "The Embarkation of Don Juan of Austria" – and successfully facilitated a compromise between the current holder and the Jaffé family, which has lead to its sale at Christie's in December 2011[16].

The spirit of open-minded engagement has been shown to work well both in the commercial and museum world. The William Turner painting "Glaucus and Scylla", also

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12 The so-called "Linz Collection" comprised about 4,700 works of art Adolf Hitler and his agents purchased and looted (*"Sonderauftrag Linz"*, Special Commission: Linz) between 1933 and 1945 in view of a planned museum in Linz. The works have been inventoried by the German Historical Museum (*Deutsches Historisches Museum*). On the Linz Collection and to access the database, see ENDERLEIN ANGELIKA/FLACKE MONIKA/LÖHR HANNS CHRISTIAN, *Database on the Sonderauftrag Linz (Special Commission: Linz),* available at: http://www.dhm.de/datenbank/linzdb/einleitunge.html (17.05.2012).

13 See Musée Nationaux Récupération (MNR) Database, MNR no. 286, http://www.culture.gouv.fr/documentation/mnr/MnR-accueil.htm (17.05.2012); Musée des Augustins Database, *Catalogue des œuvres – Base de données*, http://www.augustins.org/fr/ collections/bdd/zoom.asp?num=D+1952+2 (17.05.2012); RYKNER DIDIER, *Le Grand Canal de Guardi Restitué par le Musée des Augustins a été acquis par le Getty Museum*, La Tribune de l'Art, 19 July 2005, http://www.latribunedelart.com/em-le-grand-canal-em-de-guardi-restitue-par-le-musee-des-augustins-a-ete-acquis-par-le-getty-museum-article00718.html (17.05.2012).

14 See Musée Nationaux Récupération (MNR) Database, MNR no. 731, http://www.culture.gouv.fr/documentation/mnr/MnR-accueil.htm (17.05.2012).

15 Christie's, "Important Old Master Pictures Sale", London, 8 July 2005 (sale no. 7067, lot no. 49).

16 Christie's, "Old Master & British Paintings Evening Sale", London, 6 December 2011 (sale no. 8007, lot no. 5).

from the Jaffé collection, was returned to the family in 2006 from the Kimbell Art Museum in Fort Worth, Texas. Unlike the paintings returned by the French museums, it had entered the art market post-war and had been purchased by the Kimbell in 1966. The Kimbell approached the claim in line with AAM Guidelines[17] and it was returned without recourse to the courts. In fact, the museum reacquired it at auction in 2007 through a transparent transaction and at a price established by the market.

It is, of course, also the prerogative of museums to defend against claims and many American museums have done so robustly – even in seeking pre-emptive declaratory judgments on title. In my opinion, this highlights the confusing, even contradictory, situation for claimants, collectors and museums alike[18].

B. By Means of Mediation

While these are examples of successfully resolved cases, increasingly, mediation is coming to the fore as another route for bringing together the parties when facilitation and negotiation have stalled. In the last two years, we have seen mediation proposed for a number of claims when the parties' positions have become entrenched. We are keen to explore how it might be used to resolve otherwise seemingly intractable cases since mediation brings in a neutral party, i.e. the mediator, to help the parties understand the risks and the possible costs and benefits of their disputes. Mediators are also skilled in suggesting a variety of alternatives to resolving a dispute. Christie's facilitation can only take its intermediary role so far in the absence of sufficient good will on the part of the claimant and consignor and the outside agency of an informed mediator may yet still resolve this particular dispute without litigation.

What mediation offers in theory is a way of keeping dialogue alive in the spirit of amicable settlement of a dispute consistent with the aforementioned international principles on Nazi-era claims resolution[19]. Mediation offers a neutral and authoritative forum to resolve claims that can put aside the judicial and adversarial courtroom setting.

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17 See AMERICAN ASSOCIATION OF MUSEUMS (AAM), *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era of November 1999,* amended April 2011, available at: http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm (17.05.2012).

18 More examples of restituted art can be found on Christie's website, *Christie's Restitution*, http://www.christies.com/services/restitution/restituted-art.aspx (17.05.2012).

19 See *supra* section III.

VI. The Broadening Arena

Finally, I think it is also interesting to remark how the lessons of identifying and resolving claims around Nazi-era looted art are finding a wider application. Broader cultural property issues are being increasingly recognized within the institutional and commercial worlds. Again, mindful of laws against illegal export and the trade in stolen cultural artefacts, these are claims which will not just be answered through international law and diplomacy but also through the willingness of individual museums and collectors to participate in vigilance and negotiation.

In conclusion, tackling the issues raised by spoliated art is much more than a question of due diligence or protection. It is at the heart of the integrity and moral responsibility of the art market to deal with these issues openly, honestly and responsively. By that, I do not mean to say that there is not scope for debate, discussion, friendly dialogue – that is a prerequisite. But committing ourselves, as Christie's has done, to on-going engagement with how best to deal with the legacy of the Nazi's actions and to share in designing ways and means to deal with it, is key to a successful way forward.

MARC-ANDRÉ RENOLD*

Conclusion : *ArThemis* – How We Got There and Whereto From Now

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I. The Origins of *ArThemis*

The origins of the *ArThemis* research and database go back quite some years. In 1997, the Art-Law Centre organised a Symposium on the topic of Resolution Methods for Art-Related Disputes which led to a publication[1] and ever since then it has been a topic of interest to the Centre's team. Others have also shown keen interest: the Institute of Art and Law, also since 1997[2], and the Permanent Court of Arbitration in 2003[3], to name but a few.

One of the motivations behind this interest was that the 1995 Unidroit Convention contained, for the first time in the history of the law of cultural property, a provision giving effect to arbitration in the field. Art. 8.2 of the Convention states that **"**The parties may agree to submit the dispute to any court or other competent authority or *to arbitration***"**. And many commentators thought at the time this might be the beginning of an impressive career for the international arbitration of cultural property disputes. In fact it was not

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1 BYRNE-SUTTON QUENTIN/GEISINGER-MARIÉTHOZ FABIENNE (eds.), *Resolution Methods for Art-Related Disputes*, Zurich, 1999.

2 *Conference Reports: Dispute Resolution in Art and Antiquity Claims,* Art Antiquity and Law, 1997 (II/3), 318.

3 INTERNATIONAL BUREAU OF THE PERMANENT COURT OF ARBITRATION (ed.), *Resolution of Cultural Property Disputes*, The Hague, 2004.

and, as Teresa Giovannini points out[4], we are somehow still waiting for the tidal wave of international arbitration in this field to reach us.

On the other hand, three other approaches to dispute resolution in the field are used more and more: classical litigation (1), mediation (2) and negotiation (3).

(1) *Litigation*: a certain number of recent cases have been solved by litigation, which still remains a major avenue for resolving restitution disputes relating to cultural property. One can cite the Venus of Cyrene[5] or the Odyssey Marine[6] cases as examples.

(2) *Mediation*: as a general rule mediation has become one of the new "magic" formulas for solving disputes in all fields, and cultural property has also followed suit. A major Swiss case, the Ancient Manuscript and Globe case[7], was solved following mediation by the Swiss federal government. Interestingly, international organisations, such as UNESCO on the one hand and ICOM-WIPO on the other, have developed specific mediation procedures for art-restitution cases[8].

(3) *Negotiation*: one would not be complete if negotiation were not mentioned as a tool for solving disputes. Here also, complex cases involving long-pending restitution claims were finally solved by negotiation. The case of the Korean manuscripts, involving the Republic of Korea and France[9], as well as the an-

4 See *supra* pp. 21 et seqq.

5 See the case note by CHECHI ALESSANDRO/ BANDLE ANNE LAURE /RENOLD MARC-ANDRÉ, *Case Venus of Cyrene – Italy and Lybia*, Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, January 2012

6 See *Odyssey Marine Exploration Inc. v. The Unidentified Shipwrecked Vessel, Kingdom of Spain, Republic of Peru et al.*, decided September 21, 2011 (US Circuit Court, 11th Cir.).

7 See the case note by BANDLE ANNE LAURE/CONTEL RAPHAËL/RENOLD MARC-ANDRÉ, *Case Ancient Manuscript and Globe – Saint-Gall and Zurich*, Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, March 2012.

8 See the contributions to the present book by Sarah Theurich (pp. 31 et seqq.), Samia Slimani (pp. 51 et seqq.), Sophie Delepierre (pp. 65 et seqq.), and Kathryn Zedde (pp. 107 et seqq.).

9 See the case note by CONTEL RAPHAËL/BANDLE ANNE LAURE/RENOLD MARC-ANDRÉ, *Affaire Manuscrits coréens – France et Corée du Sud*, Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, June 2012.

tiquities returned to Italy by several North American Museums[10] spring to mind.

Seeing this, we decided that a research covering not only the *methods* used, but also the *results* reached in each particular case would be useful and we applied for a research grant to the Swiss National Research Foundation. A grant for an initial period of two years, later extended for one more year, was awarded to the Art-Law Centre, which enabled the hiring of three part-time scholars[11], a voluntary doctoral student[12] and a certain number of research auxiliaries[13]. Work started in July 2010 and it soon became clear that a structured database was going to be necessary so the team focused, with the help of the appropriate services of the University of Geneva, on selecting the appropriate tool.

One of the important initial decisions was selecting a name for our database and it appeared quite naturally that since we were "hunting" for cases in the field of Art and the Law, the name *ArThemis*, would be perfect, as a contraction of Artemis, the Greek goddess of Hunting, and of Themis, the god of Justice[14].

And then we realised the real scope of the work we had initiated, as we found literally hundreds of cases which we thought must figure on the database. So the team first listed relevant cases and then started documenting them. After a few months we decided to formalise our work and to proceed more systematically: the team therefore established a protocol which would be used for all of the files we were creating. It was thus decided that each file would contain a detailed case note followed by all usable reference documents; the case notes would all have the following sub-headings: I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources. The notes would all be reviewed by members of the team and possibly by external experts before being inserted in the database and eventually published.

Simultaneously, we thought of research tools and decided that all referenced cases should be classified according to broad categories and should be found also thanks to specific keywords. The selected categories are the following: temporal context, type of dispute

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10 See among others the case note by CONTEL RAPHAËL/SOLDAN GIULIA/CHECHI ALESSANDRO, *Case Euphronios Krater and other Archaeological Objects – Italy and the Metropolitan Museum of Art*, Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, June 2012.

11 Initially Anne Laure Bandle, Marie Boillat and Raphaël Contel, the latter two being subsequently replaced by Alessandro Chechi and Ece Velioglu.

12 Sarah Theurich, who was simultaneously working for WIPO at its Arbitration and Mediation Center.

13 They helped in particular with the revision of the files entered into the database. We benefited of the input of four auxiliaries: Liora Aufseesser, Caroline Renold, Giulia Soldan and Malorie Buttler.

14 Credit for this idea should be given to Ria Kechagia, a Greek researcher working at the time for the Art-Law Centre.

resolution process, legal issue, adopted solution and type of object. The key words were listed within these broad categories and defined[15].

By November 2011, we had reached the number of 36 case notes and as of today we have nearly doubled this figure. By the completion of the project we hope to have more than one hundred.

II. *ArThemis*: Some Results

So far we can say that at least four notable results come out of this research: the impressive number of cases (1); the diversity of dispute resolution mechanisms followed (2); the institutionalisation of some of the processes (3) and, finally, the diversity and pragmatism of the adopted solutions (4).

(1) The *number of cases*: when we first started our "journey", we were slightly anxious that we would not dispose of enough material. Well, at this stage of the research we can clearly state the opposite: Now that we have been researching and "hunting" seriously for some time, we note the great number of cases that go to court, before mediators or are subject to direct negotiations between the parties. So the issue has become much more a question of selecting the appropriate cases rather than actually finding them.

One of the difficulties in this respect is that of the confidentiality of most agreements and we would tend to make ours the thought that parties have a duty to the public to make their agreements known[16]. On the other hand, parties would probably not negotiate as easily if they knew that their agreement might become public.

In this regard I would like to underline here the importance of the *network*: the database would clearly not be as rich as it is without the network of colleagues, both from academia and from practice, who keep us informed of the cases they know of, pending or finalised, confidential or public, that have been solved through litigation, arbitration, mediation or negotiation. In this respect I fully approve the comments made by Manlio Frigo on the development of an international network in this field[17].

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15 See the list on *ArThemis*' website: http://unige.ch/art-adr.

16 See the crisp wording of Judge Rakoff's decision in the New York Case *Julius Schoeps v. the Andrew Lloyd Webber Art Foundation*, settled in January 2010.

17 See pp. 142 et seqq.

(2) Another relatively clear result is the *modest role played by international arbitration*, at least until today. Clearly arbitration plays a marginal role in the dispute resolution process, probably because the adversarial process is too passionate when it comes to cultural heritage and that the parties cannot agree to arbitrate. In addition, most cases where a claim is made are not based on an existing agreement which might contain an arbitration clause. We have also noted that in many jurisdictions, there are quite a few cases that are litigated before courts. And we have also noticed that negotiation was very often resorted to, especially at the diplomatic level, when one or several States are concerned.

(3) A further noticeable trend – and which the present publication is a witness of – is the *institutionalisation* of the dispute resolution process in our field. Two sets of new procedural rules are discussed in this book, those relating to the WIPO-ICOM mediation system and those relating to the UNESCO mediation and conciliation process. Both are extremely interesting evolutions and we look forward to seeing what use private parties in the first case and States in the second one will make of these new opportunities.

(4) But by far the most striking result of our research is the extreme *diversity* of the solutions found in practice to resolve a dispute relating to a cultural good. We have pointed this out elsewhere[18] and it does not seem appropriate, at this stage, to revert to this diversity in detail. Suffice it to kindly suggest that the interested reader take a look at the selection of case notes taken from *ArThemis* and reproduced in the annex of this book.

III. The Future of *ArThemis*

Now that we have come that far, what comes next? Where is the *ArThemis* adventure leading us to? Is the "hunt" going to reveal something unexpected to us?

The fear of the researcher, or should I say my fear as a researcher, is to end up alone and with a useless tool in my hands. Well, clearly I am not alone and this is one of the most comforting aspects of the present state of things: *ArThemis* has been very generous and

[18] CORNU MARIE/RENOLD MARC-ANDRÉ, *Le renouveau des restitutions de biens culturels: les modes alternatifs de résolution des* litiges, Journal du Droit International, 2009, pp. 493 et seqq., p. 495; see also the contribution of the same authors in the present publication, pp. 251 et seqq., as well as the chapters by Alessandro Chechi (pp. 147 et seqq.), Raphaël Contel (pp. 175 et seqq.) and Anne Laure Bandle (pp. 211 et seqq.).

the hunt has been very successful. But, above all, it has enabled magnificent encounters with young and promising scholars.

But what is to become of *ArThemis*? Will it be, when the research grant terminates mid-2013, just one more of these quickly forgotten and "dusty" databases, which become with time outdated and useless?

If this is to be avoided, the database must be known to the public (1), user-friendly (2) and somehow grow into something else, broader and more permanent (3).

(1) A *publicly available* tool. The decision was quite soon taken that, although this entailed certain risks, *ArThemis* was to be a publicly available database. After all the public funding received made it logical that the results of our work be made available on an open-source basis. So everything was organised in order that on 11 November 2011 the data be available on *ArThemis*' website. This was the date of the international conference of which the present book is the result. It was the first major step of the adventure.

(2) A *user-friendly* tool. After having researched all the available options we had selected a particular program for the organisation of the data, which we were continuing to collect simultaneously. It soon turned out that the presentation would have to be rethought and we sought the cooperation of a specialised web-designer. The second step, the "new" presentation of *ArThemis*, will be publicly available sometime in November 2012.

(3) A *useful* tool. The last step, it is hoped, will occur in the time that we have got left, more or less one year (and more if we can manage to obtain additional funding from other sources). The idea is that the database be enlarged to something broader and more permanent, which could be directly useful to those who are seeking a solution to a case relating to a cultural object. This will not be an additional arbitration centre, that is certain: first we have noted the relatively limited success of arbitration in the field up to now and, second, we know that there are simply too many of these specialised arbitration centres and we do not believe that this would be useful. Now, what we hope to set up is some form of an *international platform* to which those who have a particular issue with a cultural object could turn, in order to find the appropriate method and avenue for the resolution of that issue. The proposal for such a platform was made for the first time in February 2011[19], but the Art-Law Centre's team is now going to

[19] We formulated this idea for the first time when we drafted the "Geneva Declaration" concluding the international symposium "Patrimoine universel / revendications locales" held at the University of

concentrate on its feasibility and, if decided that it is timely and appropriate, on setting it up.

To put it in few rather than in many words, as so vividly said by Freddie Mercury, "*the show must go on"*.

Geneva on 10 and 11 February 2011: http://www.unige.ch/communication/archives/2011/patrimoine-declaration-geneve/Geneva-Declaration20110211.pdf.

Annexes

ArThemis Case Notes
Fiches ArThemis

Contents / Table des matières

Nazi-looted art
Spoliations nazies

Caroline Renold
Alessandro Chechi
Anne Laure Bandle
Marc-André Renold

March 2012

Reference: Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case 6 Klimt Paintings – Maria Altmann and Austria," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case 6 Klimt Paintings – Maria Altmann and Austria

Maria Altmann – Austria/Autriche – Austrian National Gallery/Galerie nationale autrichienne – Artwork/œuvre d'art – Nazi-looted art/spoliations nazies – Institutional facilitator/facilitateur institutionnel – Conciliation – Judicial claim/action en justice – Judicial decision/décision judiciaire – State immunity/immunité des Etats – Ownership/propriété – Arbitration/arbitrage – Arbitral award/décision arbitrale – Unconditional restitution/restitution sans condition

Maria Altmann brought suit in the United States against the Republic of Austria and the Austrian National Gallery to recover six paintings by Gustav Klimt that the Nazis took during the Second World War from her Jewish uncle, Ferdinand Bloch-Bauer. Although the Supreme Court of the United States lifted Austria's jurisdictional immunity, the disputants reached an agreement to end the litigation and submit the dispute to arbitration in Austria. The arbitration panel ruled that Austria was obliged to return five of the Klimt's masterpieces to Maria Altmann.

I. Chronology

Nazi looted art

- Ferdinand and Adele Bloch-Bauer owned the following paintings by Gustav Klimt: *Buchenwald* (1903), *Adele Bloch-Bauer I* (1907), *Schloss Kammer am Attersee III* (1910), *Adele Bloch-Bauer II* (1912), *Apfelbaum I* (1912), *Häuser in Unterach am Attersee* (1916), *Amalie Zuckerkandl* (1917-1918).
- **1925**: **Adele Bloch-Bauer died**. She left a will "kindly" requesting Ferdinand Bloch-Bauer to consider donating the Klimt paintings to the Austrian National Gallery. Ferdinand Bloch-Bauer acknowledged that he would have fulfilled Adele's wish. However, he was not legally bound by it as he also owned the paintings.
- **1936**: Ferdinand Bloch-Bauer donated *Schloss Kammer am Attersee III* to the Austrian National Gallery.
- **1938**: Following the annexation of Austria to Nazi Germany, **Ferdinand Bloch-Bauer fled Austria**. Under the pretext of initiating tax evasion proceedings, the authorities of the German Reich **confiscated** his estate, his sugar factory and his personal property which included the paintings.
- **1939**: **Dr. Führer** – temporary administrator of the estate – gave the paintings *Adele Bloch-Bauer I* and *Apfelbaum I* to the Austrian National Gallery in return for *Schloss Kammer am Attersee III*. He sold the latter to Gustav Ucicky, a son of Gustav Klimt.
- **1942**: Dr. Führer sold *Buchenwald* to the City of Vienna Collection.
- **1943**: Dr. Führer sold *Adele Bloch-Bauer II* to the Austrian National Gallery and kept *Häuser in Unterach am Attersee* for himself. The painting *Amalie Zuckerkandl*, which was given by Ferdinand Bloch-Bauer to the Zuckerkandl family, was sold by Hermine Müller-Hofmann (the daughter of Amalie Zuckerkandl) to Viktoria Künstler (director of the "Neue Galerie") for 1,600 Mark. Viktoria Künstler bequeathed this painting to the Austrian National Gallery in March 1988.
- **November 1945**: **Ferdinand Bloch-Bauer died**. In his will, he did not mention the paintings, which, to his knowledge, had been confiscated by the Austrian State through Nazi laws. However, he included a clause according to which his wealth should be handed over to his nephew Robert and his nieces Louise and Maria.
- **1946**: The Austrian Government passed the **Annulment Act**.[1] This act was designed to annul all transactions motivated by the discriminatory Nazis ideology that occurred from 1938 to 1945.
- **1948-1949**: The Bloch-Bauer heirs – through their lawyer **Dr. Rinesh** – obtained the **restitution of most of the collection and export permits** for the United States, where they lived. Under the Annulment Act, the Jews that wanted to leave Austria were required to "donate" valuable artworks – in favour of Austrian public museum and in the name of preserving national heritage – as a condition of receiving export permits for other valuable items. Dr. Rinesh agreed to donate the paintings *Häuser in Unterach am Attersee*, *Adele*

[1] Federal Law on the annulment of contracts and other legal acts that occurred during the German occupation of Austria of 15 May 1946, Federal Law Gazette 1946/106.

Bloch-Bauer I, *Adele Bloch-Bauer II*, *Apfelbaum I*, which were already in the State's possession. In addition, Dr. Rinesh relinquished the paintings *Buchenwald* and *Schloss Kammer am Attersee III.*

- **1998**: The painting *Portrait of Wally*, by Schiele, was confiscated in New York while on loan from the Austrian National Gallery.[2] As a result, allegations emerged that the Gallery possessed looted art. In response to such allegations the Austrian Government opened up its archives to permit research on the provenance of the national collection. An Austrian journalist uncovered documents proving that Ferdinand Bloch-Bauer never freely donated the Klimt paintings. He also discovered documents revealing that the Gallery knew that it possessed looted art.[3]
- **September-December 1998**: In response to these revelations, the Austrian Government passed the **Restitution Act**.[4] This law allows the restitution of works of art that owners had been forced to donate in exchange for export permits pursuant to the Annulment Act of 1946. It also set up an advisory body (the "Restitution Committee") tasked with the responsibility to respond to restitution requests.
- **Maria Altmann** – one of the two nieces of Ferdinand Bloch-Bauer – settled in California in 1938 and became a United States citizen in 1945. She formally requested the restitution of the Klimt paintings under the Restitution Act. Specifically, Maria Altmann requested the restitution of *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II, Apfelbaum I*, *Buchenwald*, *Häuser in Unterach am Attersee* and *Amalie Zuckerkandl*. The request was rejected in **1999** by the Restitution Committee. As a result, Maria Altmann challenged the decision before Austrian courts. However, she withdrew the claim because of the costly legal fees required by Austrian law (1,2% of the litigated value, i.e. around $ 1.6 million). She thus sued the Republic of Austria and the Austrian National Gallery in the Central District of California, alleging expropriation of property in violation of international law.
- **2000**: Austria moved for dismissal alleging lack of subject matter jurisdiction, lack of venue, failure to join indispensable parties and the doctrine of *forum non conveniens*.
- **2000**: The **Federal District Court**[5] denied the defendants' motion for dismissal pursuant to the Foreign Sovereign Immunities Act (FSIA).[6]
- **2002**: The **Court of Appeal affirmed**.[7]
- **7 June 2004:** The **United States Supreme Court** determined conclusively that the FSIA applied to events that occurred before the Act's enactment in 1976, thereby overruling the jurisdictional immunity of the Republic of Austria.[8]
- **May 2005**: The Republic of Austria and Maria Altmann reached an **agreement** to end litigation and submit the dispute to binding **arbitration** in Austria.

[2] See Raphael Contel, Giulia Soldan, Alessandro Chechi, "Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.
[3] *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S.677 (U.S. 2004), 5.
[4] Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections of 4 December 1998, Federal Law Gazette 1998/181.
[5] *Maria V. Altmann v. Republic of Austria, et al.*, 142 F. Supp. 2d 1187 (CD Cal. 2001).
[6] Foreign Sovereign Immunity Act, October 21, 1976, 90 Stat. 2891.
[7] *Maria V. Altmann v. Republic of Austria, et al.*, 317 F. 3d 954 (9th Circle, 2002), as amended, 327 F. 3d 1246 (2003).
[8] *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S.677 (U.S. 2004).

- **2006**: The **arbitral panel ruled** that Austria was obliged to **return** the paintings *Birkenwald*, *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Apfelbaum I* and *Häuser in Unterach am Attersee* to Maria Altmann, but not *Amalie Zuckerkandl*.[9]
- **2006**: Maria Altmann **sold** the Klimt paintings at auction.[10]

II. Dispute Resolution Process

Institutional facilitator – Conciliation – Judicial claim – Judicial decision – Arbitration – Arbitral award

- At first, **Maria Altmann** sought restitution of the Klimt paintings through the **Restitution Committee** established by the 1998 Restitution Act. The request was rejected on the ground that Adele's will had transferred the paintings to the Austrian National Gallery prior to German occupation.[11] The Committee only recommended the restitution of 16 other Klimt drawings and 19 porcelain pieces not included in Adele's will.[12]
- **Maria Altmann** then **proposed** to submit the dispute to **arbitration**, a proposal which was **refused** by the Republic of Austria.
- Accordingly, Maria Altmann decided to resort to legal **means**. She introduced **legal proceedings in the United States** because Austrian legislation required an advance payment of a percentage of the litigated amount. In the United States, the Supreme Court overruled the jurisdictional immunity of the Austrian State on the basis of the expropriation exception of the FSIA, but the case did not reach the merits. Confronted with the prospect of a long and expensive litigation, the Republic of Austria accepted to resort to **arbitration** in order to avoid another defeat in court.
- The parties agreed to establish a panel of three Austrian arbitrators and to accept the decision of the panel as final and without any right of appeal. Pursuant to the arbitration agreement, the panel had to rule on the ownership situation of the Klimt paintings and determine whether the 1998 Restitution Act was applicable. The parties further agreed that the arbitration tribunal was to apply Austrian substantive and procedural law. In legal terms, its decision was based solely on the facts presented to it by the parties.[13] All costs were to be covered by the Republic of Austria.

[9] Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, May 6, 2004, 7, 12-13, accessed June 16, 2011, http://bslaw.com/altmann/Zuckerkandl/Decisions/decision.pdf.
[10] *Adele Bloch-Bauer I* was bought by Ronald Lauder for the Neue Galerie for $135 million; *Adele Bloch-Bauer II* was sold for $87,9 million; *Birch Forest* went for $40,3 million; *Houses at Unterach on the Attersee* sold nearly for $31,4 million; *Apple Tree I* sold for $33 million. Eileen Kinsella, "Gold Rush," *ARTnews*, January 2007, accessed June 22, 2011, http://www.artnews.com/issues/article.asp?art_id=2193.
[11] Cf. Article 1 of the Federal Law of 15 May 1946.
[12] Beat Schönenberger, *The Restitution of Cultural Assets* (Berne: Stämpfli Publishers Ltd., 2009), 210.
[13] Gunnar Schnabel and Monika Tatzkow, *Nazi Looted Art, Handbuch Kunstrestitution weltweit* (Berlin: Proprietas-Verlag, 2007), 313.

III. Legal Issues

State immunity – Ownership

- **Decision of the United States Supreme Court on the issue of immunity**. The principle of State immunity entails that acts performed by a State in the exercise of its sovereign authority (*jure imperii*) attract immunity from the jurisdiction of foreign domestic courts and from enforcement proceedings. This principle is rooted in the independence and sovereign equality of States, a basic principle of international law enshrined in Article 2, paragraph 1, of the Charter of the United Nations.
- The FSIA contains an expropriation exception that expressly exempts from immunity all cases involving "rights in property taken in violation of international law provided the property has a commercial connection to the United States or the agency or instrumentality that owns the property is engaged in commercial activities in the United States".[14] *In casu* Maria Altmann relied upon the expropriation exception of the FSIA because: (i) the paintings were taken in violation of international law (stolen by the Nazis); (ii) the paintings were in possession of an agent of the Government of Austria at the time of the case (the Austrian National Gallery); and (iii) the Austrian Gallery was engaged in commercial activity in the United States (publishing and advertising activities of the Klimt paintings).[15]
- The Supreme Court limited itself to considering the question of whether the expropriation exception of the FSIA afforded jurisdiction over claims against foreign States based on conduct that occurred before the Act's enactment in 1976. The Supreme Court admitted an exception to the **principle of non-retroactivity** and held that the FSIA applied to facts occurred before 1976.[16] Thus, the California Court maintained subject matter jurisdiction and Maria Altmann's suit was allowed to proceed.

- **Decision of the arbitration panel on the ownership of the paintings *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Häuser in Unterach am Attersee*, *Apfelbaum I* and *Buchenwald***.[17] The arbitral panel had to first decide whether Adele's will was binding. The panel concluded that the will was not legally binding for Ferdinand Bloch-Bauer. More specifically, the arbitral panel held that the clause regarding the Klimt paintings was merely a request which Ferdinand Bloch-Bauer had publicly agreed to fulfil.[18] Consequently, the declaration made by Ferdinand Bloch-Bauer that he would fulfil Adele's request was merely an expression of his desire to respect her wish. The panel also took into account that the paintings belonged to Ferdinand Bloch-Bauer before Adele's death.[19]

[14] §1605(a) (3) United States, Foreign Sovereign Immunity Act, October 21, 1976, 90 Stat. 2891. For more details on the district court decision see John Henry Merryman, *Law, Ethics and the Visual Arts* (The Netherlands: Kluwer Law International, 2007, 5th edition), 42-50.
[15] Schönenberger, *The Restitution of Cultural Assets*, 211.
[16] *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S.677 (U.S. 2004), 13-21.
[17] Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, January 15, 2004, 14, accessed June 16, 2011, http://bslaw.com/altmann/Klimt/award.pdf.
[18] Ibid., 15-17.
[19] In application of the *praesumptio Muciana*. Ibid., 17-20.

- Since the will was not legally binding for Ferdinand Bloch-Bauer, the Gallery had no valid ownership to the paintings *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* and *Apfelbaum I*. In addition, the sale of *Buchenwald* to the City of Vienna Collection falls under the Annulment Act of 1948. Moreover, the Republic did not automatically acquire ownership when Ferdinand Bloch-Bauer died since the Republic only had a claim against the heirs (legacy) but not an automatic right to the paintings.
- In 1948, Dr. Rinesh recognised – in the name of the heirs – that the ownership title had passed to the Republic of Austria by acknowledging the validity of Adele Bloch-Bauer's will. He did so in order to obtain an export permit for the rest of the estate. The transfer of the paintings therefore falls under the 1998 Restitution Act.
- In sum, the Republic of Austria was under an obligation to return the five Klimt paintings pursuant to the conditions of the Restitution Act, which in this case were met.

- **Decision of the arbitration panel on the ownership of *Amalie Zuckerkandl***.[20] The painting was bought by Ferdinand and Adele Bloch-Bauer from Amalie Zuckerkandl in the 1920s. However, it is unclear how the painting came back into the hands of the Zuckerkandl family between 1938 and 1942. The Zuckerkandl heirs and the Republic of Austria claimed that it was donated by Ferdinand Bloch-Bauer with the help of Dr. Führer; Maria Altmann claimed that it was transferred following an unlawful act by Dr. Führer.
- Because of the little evidence available, the arbitration panel held that the most probable factual situation was that **Ferdinand Bloch-Bauer gave the painting** to the Zuckerkandl family to provide **financial help**. He most likely benefited from the help of Dr. Führer in executing the donation. Dr. Führer had already helped him to export a Kokoshcka painting to Switzerland. The panel adopted this decision also because: (i) the heirs of Ferdinand Bloch-Bauer had never requested the restitution of this painting and (ii) the Bloch-Bauers had previously helped the Zuckerkandl family.
- The arbitration panel also held that **the sale of the painting *Amalie Zuckerkandl* to Viktoria Künstler was not a coerced sale**, even though the price was very low. The panel maintained that the price was not disproportionate due to the special circumstances of the case: (i) the friendship between the buyer and the seller; (ii) the risk for the buyer; (iii) the ongoing Nazi repression; and (iv) the state of necessity of the seller.[21] Therefore, Viktoria Künstler was entitled to donate *Amalie Zuckerkandl* to the Austrian National Gallery and the **Restitution Act of 1998 did not apply**.

[20] Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, May 6, 2004, accessed June 16, 2011, http://bslaw.com/altmann/Zuckerkandl/Decisions/decision.pdf.
[21] Ibid.

IV. Adopted Solution

Unconditional restitution

- The arbitral held that the paintings *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Buchenwald*, *Häuser in Unterach am Attersee* and *Apfelbaum I* were to be handed over to Maria Altmann, and that the painting *Amalie Zuckerkandl* was the property of the Republic of Austria. Austria paid the cost of the arbitration.

V. Comment

- Austria acknowledged that the Klimt paintings belonged to the Bloch-Bauer heirs only fifty-eight years after Ferdinand Bloch-Bauer fled from the country. More distressing than that is the attitude of the Republic of Austria. The post-war coercion on emigrating families to make donations to a State that persecuted them is of such appalling moral standing that one would have expected a different attitude from the Austrian authorities. Moreover, it appears that Austria only accepted to submit the case to arbitration because of the prospect of a long and costly procedure in the United States.
- The ruling of the United States Supreme Court was a breakthrough. The Court reversed well established jurisprudence and encouraged claimants of Nazi-looted art to seek redress against foreign nations in the courts of the United States.[22] Notwithstanding the importance of the decision, its implications are not as revolutionary as it appears at first glance. Indeed, the Supreme Court merely issued a "statutory holding" that is both narrow and case specific and did not rule out other specific defences that could be used by foreign States such as the Act of State doctrine.[23]
- According to Beat Schönenberger, the commercial activity link is examined very superficially by United States courts and the analysis of the Supreme Court reflects the aim to achieve a substantive desired result.[24]
- The *Altmann* case is widely considered as an ideal settlement because the claimant achieved restitution. In reality, it should be noted that, because of the lengthy and costly procedure, Maria Altmann did not keep the paintings but sold them in order to pay litigation costs. Considering the emotional attachment of the claimant to the paintings, as well as the emotional strain of the protracted procedure, this settlement emphasises the necessity to increase awareness among Holocaust victims about the advantages of alternatives to litigation for the recovery of looted art.

[22] Sue Choi, "The Legal Landscape of the International Art Market after *Republic of Austria v. Altmann*," *Northwestern Journal of International Law & Business* 26 (2005): 175.
[23] Ibid., 175-176.
[24] Schönenberger, *The Restitution of Cultural Assets*, 213.

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March 2012

Reference: Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case 200 Paintings – Goudstikker Heirs and the Netherlands," Platform ArThemis (http://unige.ch/art-adr), Centre of Art-Law, University of Geneva.

Case 200 Paintings – Goudstikker Heirs and the Netherlands

Jacques Goudstikker – Netherlands/Pays-Bas – Artwork/œuvre d'art – Nazi-looted art/spoliations nazies – Conciliation – Institutional facilitator/facilitateur institutionnel – Judicial claim/action en justice – Negotiation/négociation – Settlement agreement/accord transactionnel – Ownership/propriété – Repurchase/rachat – Request denied/rejet de la demande – Unconditional restitution/restitution sans condition

The art collection of Jacques Goudstikker was acquired by the Nazi commander Hermann Göring under suspicious circumstances during the Second World War. A large part of the collection was recovered by the Allied Forces after the war and it was subsequently returned to the Netherlands where it was labelled "Dutch national property". The first part of these items was bought back by Goudstikker's wife under a settlement agreement of 1952. The Dutch Government returned the second part – 200 paintings – to Marei Von Saher (the only surviving heir of Jacques Goudstikker) in 2006 based on a recommendation of the Dutch Restitution Committee.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

I. Chronology[1]

Nazi looted art

- **Jacques Goudstikker** was one of the wealthiest art dealers in Europe in the early 1900s specialized in Dutch and Flemish Master paintings. He was married to a Viennese Opera singer, **Désirée von Halban-Kurz**. On **14 May 1940**, the Germans invaded the Eastern parts of the Netherlands. The Goudstikker family fled to England, however, Jacques Goudstikker died during the trip at sea. Immediately after the invasion, the Germans tried to get a hold of Goudstikker's artworks as **Hermann Göring**, Commander-in-Chief of the German Luftwaffe, was very interested in the collection.
- The trustee appointed by Jacques Goudstikker to take care of his business and collection died the day after his own death. His employees, A.A. Ten Broek and J. Dik, asked German banker and businessman **Alois Miedl** to take over the management of the Gallery. By a sale agreement dated **1 July 1940**, Miedl purchased all of Goudstikker's assets, together with the trading name of the company. Shortly afterwards, Miedl's purchase agreement was overruled by Hermann Göring. Ultimately, **two sale agreements** were concluded on **13 July 1940**:
    - **the first between Goudstikker** (represented by his employee Ten Broek) **and Miedl**, regarding Goudstikker's real estate, company name and co-ownership of the meta-paintings[2], for NLG 550,000;
    - **the second between between Miedl and Göring**, on all art objects belonging to Goudstikker's collection located in the Netherlands on 26 June 1940, for NLG 2,000,000. They agreed to split up the collection into two parts, providing further for a right of first refusal on the meta-paintings in favour of Göring. He subsequently acquired 13 of these meta-paintings, and took most of the collection to his mansion near Berlin.

- Goudstikker's employees received NLG 400,000 and Goustikker's Jewish mother, Mrs Goudstikker-Sellisberger, received the protection of Miedl from anti-Semitic persecution.[3]
- After the war, the Allied Forces assembled hundreds of art objects formerly owned by Göring. They faced the difficult task of returning these items to their owners. They set up collecting points to reassemble and identify the objects.
- The process of restitution for looted items was organized according to the "**policy of external restitution**": looted art objects were not returned directly to the dispossessed owners, but to their country of nationality. In the Netherlands, the return was administrated

[1] This section is based on a presentation by Bert Dermasin, Postdoctoral Researcher at K.U. Leuven Law School hold at the Conference "Art and Cultural Heritage Law: Developments and Challenges in Past and Presents" in Maastricht, March 27 and 28, 2011.

[2] The paintings referred by Jacques Goudstikker in his papers as "meta-paintings" were those (21 in number) which he co-owned with others at the time he had to flee (see Dutch Restitution Commission, Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection (Case number RC 1.15), n. 14).

[3] Alois Miedl kept his word: the mother of J. Goudstikker remained in her home and was not prosecuted. Some of the family's money invested in stocks remained untouched and was returned to Désirée when she got back to the Netherlands in 1946.

by the Dutch Art Property Foundation ("*Stichting Nederlands Kunstbezit*"). Of all the paintings returned to the Netherlands, 300 were from the Goudstikker collection.

- Désirée Goudstikker still possessed the **black notebook** of her husband, listing all the items that he possessed: "J. Goudstikker Business stock – 1113 paintings in stock". This document facilitated the research of the lost paintings and the voluntary restitution of paintings from museums and private collectors in Europe, Israel and the United States.
- In **early 1946**, Désirée Gouddstikker asked the Dutch government for the restitution of the collection.
- On **1 August 1952**, after a 7-year long legal battle, Désirée Goudstikker entered into a **settlement agreement** with the Dutch Government on the restitution of a part of the Goudstikker collection. The remaining objects, qualified as "National property of the Netherlands", were divided amongst Dutch State museums.
- In **January 1998**, **Marei Von Saher**, the only surviving heir of Jacques Goudstikker (Désirée Goudstikker died in 1996), **submitted** to the Court in The Hague **an application for the restitution** of all artworks that were part of the transaction between Miedl and Göring in 1940. The Dutch Minister turned down the request in a decision in **March 1998** considering that the agreement of 1952 was final.
- The Court in The Hague upheld the Government's decision on **16 December 1999**.
- In **January 2002**, the Dutch Government established a Restitution Committee with the task of investigating restitution claims arising out of the Holocaust. The Goudstikker heirs addressed their claim regarding 267 art objects to this Committee in **2004**.
- In **December 2005**, the Restitution Committee recommended the **restitution of 202 out of 267 paintings** taken by Göring to the heirs. The Committee assessed that 40 could not be related to Jacques Goudstikker; 21 were Miedl's paintings which were covered by the 1952 accord; and 4 paintings were either lost or missing.[4] However, arguing that the 1952 settlement agreement only referred to Miedl's share of the 1940 transaction with Göring, the Committee recommended returning the 202 paintings.
- On **6 February 2006**, based on the advice of the Restitution Committee, the Dutch government decided to return **200 paintings** to the Goudstikker heirs.[5] As a sign of their gratitude, the heirs donated one returned painting, Bartholomeus Van der Helst's 1645 *Child on Deathbed*, to the Dutch state.[6]

[4] See Dutch Restitution Commission, Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection (Case number RC 1.15), n. 4.

[5] "*Informatie over het verzoek tot teruggave Goudstikker collectie*," (Information regarding the Restitution Request of the Goudstikker collection, trans. by the author) Dutch Ministry of Education, Culture and Science, DCE/06/5640, February 6, 2006, accessed March 20, 2012, http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2006/02/06/informatie-over-het-verzoek-tot-teruggave-goudstikker-collectie.html.

[6] Herrick, Feinstein LLP Press Release, "Five Paintings from the Goudstikker Collection to Stay in the Netherlands," accessed March 20, 2012, http://www.herrick.com/siteFiles/News/348BE2B3003D0184D9843D5803C288A0.pdf.

II. Dispute Resolution Process

Conciliation – Institutional facilitator – Judicial claim – Negotiation – Settlement agreement

- Between Désirée Goudstikker and the Dutch Government: after the end of the war, Désirée Goudstikker negotiated with different Dutch authorities to recover part of her deceased husband's property (Miedl's share in the 1940 transaction). The parties ultimately came to a settlement agreement in 1952. Désirée Goudstikker waived her rights regarding Göring's share (i.e. the works purchased by Göring in 1940).
- Between the Goudstikker heirs and the Dutch Government: the Court of The Hague rejected the heirs' application for restitution. She subsequently addressed her concern to the Dutch Restitution Commission, which issued a recommendation in 2005 following long investigations on the matter. The recommendation was confidential pending a final decision by the Dutch Government.[7] It ultimately followed the Committee's recommendation for the most part, by ordering the restitution of 200 paintings.

III. Legal Issues

Ownership

- Several aspects complicated the restitution of the Goudstikker paintings. Among them, it is worth considering the following two issues. First, Désirée Goudstikker had waived her restitution rights regarding all objects not included in the 1952 settlement. Second, the restitution claim of the Goudstikker heirs was barred by the Dutch statute of limitations, as found by the Court of The Hague. In fact, the limitation term for post-war restitution rights was set on 1 July 1951. The Court also held that, notwithstanding the formal concerns of admissibility of her claim, there was no pertinent reason to grant *ex officio* restoration of rights.
- The Dutch Restitution Commission examined whether Jacques Goudstikker's loss of property could be qualified as involuntary. The main concern was the fact that Goudstikker's employees received money in exchange for his property.

[7] Lawrence M. Kaye, "The Netherlands: The Return of the Goudstikker Collection," *Holocaust Art Restitution Symposium Presented by Christie's and Union Internationale des Avocats (UIA)*, Milan, June 23, 2011, accessed October 20, 2011, http://www.christies.com/pdf/services/2011/lawrence-m-kaye.pdf, 13.

IV. Adopted solution

Repurchase – Request denied – Unconditional restitution

- With the settlement agreement of August 1952, Désirée Goudstikker and the Dutch Government determined that she would buy back from the Dutch State 300 artworks, which constituted a part of the Miedl share of the 1940 transaction.[8] As for the remaining artworks delivered to Miedl during the war, Désirée Goudstikker waived her ownership rights. However, she reserved all rights with respect to the artworks delivered to Göring during the war.[9]
- In 2006, subsequent to the recommendation of the Dutch Restitution Committee, the Dutch Government finally returned 200 paintings from State museums to the Goudstikker heirs.

V. Comment

- This claim encouraged many European museums to investigate their own collections in order to verify whether they were holding paintings formerly part of the Goudstikker stock. As a result, in 2006, the Goudstikker heirs received two paintings from the Museum Wallraf-Richartz of Cologne and a Master painting from the Dresden State Art Collections (*Staatliche Kunstsammlungen Dresden*).[10]

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[8] See Dutch Restitution Commission, Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection (Case number RC 1.15).
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Reference: Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case Landscape with Smokestacks – Friedrich Gutmann Heirs and Daniel Searle," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case Landscape with Smokestacks – Friedrich Gutmann Heirs and Daniel Searle

Friedrich Gutmann – Daniel Searle – Artwork/oeuvre d'art – Nazi-looted art/spoliations nazies – Judicial claim/action en justice – Negotiation/négociation – Settlement agreement/accord transactionnel – Ownership/propriété – Repurchase/rachat – Co-ownership/co-propriété

The heirs of Holocaust victims Friedrich and Louise Gutmann, Nick and Simon Goodman and Lili Gutmann, filed a claim against the art dealer Daniel Searle. Searle was the owner of the painting "Landscape with Smokestacks" by Edgar Degas and was a Trustee of the Art Institute of Chicago, where the painting was on loan. The painting was allegedly looted by the Nazis during the Second World War. After four years of litigation, the parties agreed to share the ownership of the painting. The Gutmann heirs' interest in the ownership was bought by the Art Institute of Chicago.

I. Chronology

Nazi-looted art

- **1932**: The wealthy art collectors Friedrich and Louise Gutmann acquire the painting by Edgar Degas, "Landscape with Smokestacks" (1890), from a French collector.[1] Their collection comprises artworks by renowned artists such as Degas, Renoir, Botticelli and Franz Hals.
- **1939**: Friedrich Gutmann sends the painting to the Parisian dealer Paul Graupe to be put in storage for safekeeping.
- **During World War II**: Massive confiscations by the Nazis target Jewish art collectors. The couple dies in Nazi concentration camps: Louise in Auschwitz; Friedrich in Theresienstadt (**1943**). All their belongings are dispersed or disappear. The Degas is transferred to the Swiss dealer Hans Wendland, who, it was said, had good connections to Nazi officials.[2]
- **1951**: "Landscape with Smokestacks" is purchased by a New York collector (Emile Wolf).
- **1987**: **Daniel Searle**, Trustee of the Art Institute of Chicago and pharmaceutical magnate **buys** the painting for $ 850,000. From then on, the painting is on **loan** at the **Art Institute of Chicago**.
- **1994**: The painting is on display at the Art Institute of Chicago's **exhibition** "Degas Landscapes".[3]
- **1995**: The Gutmann heirs (Lili and two of her nephews, Nick and Simon, whose surname had been changed into Goodman) send a **request for the restitution** of the painting to Daniel Searle by **mail**.
- **1996**: The heirs **file suit against Daniel Searle** claiming for the restitution of the Degas painting.[4]
- **1998**: The case raises great public attention urging the members of the **Association of Art Museum Directors** to delve into their collections for Nazi-looted art.[5] Several restitution claims by Holocaust victims have been met since then by various institutions such as the Museum of Fine Arts in Boston, the Seattle Art Museum and the North Carolina Museum of Art.[6]
- **August 1998**: Daniel Searle and the Gutmann heirs settle their dispute out-of-court.
- **2000**: Daniel Searle's attorney, Howard J. Trienens, publishes a book entitled "Landscape with Smokestacks: the Case of the Allegedly Plundered Degas", in which he divulges his feeling that his client "didn't get a fair shake in the court of public opinion", and his

[1] See Ron Grossman, "Tracing Histories – How A Family's Degas Traveled From Their Estate To The Center Of Controversy," *Chicago Tribune*, January 28, 2001, accessed July 15, 2011, http://articles.chicagotribune.com/2001-01-28/news/0101280384_1_art-institute-art-and-antiques-smokestacks.
[2] Judd Tully, "Landscape with Plunder," *artnet.com Magazine*, accessed July 15, 2011, http://www.artnet.com/magazine_pre2000/news/tully/tully8-30-96.asp.
[3] Ibid.
[4] *Goodman v. Searle*, Complaint, No. 96-6459 (N.D. Ill. 1996).
[5] See Ron Grossman, "Tracing Histories."
[6] Ibid.

frustration that "the media uncritically took the claimants' side, portraying the dispute as a morality play starring an insensitive big businessman and the ghosts of Holocaust victims."[7]

II. Dispute Resolution Process

Judicial claim – Negotiation – Settlement agreement

- Both sides called upon **expert witnesses** at trial. The Gutmann heirs referred to the author and Nazi-looting expert Lynn Nicholas; Searle on the other hand mandated the art appraiser Hermine Chivian-Cobb.[8] During the four years of litigation, the dispute mainly focused on the question of ownership (see Legal Issues below). The court rejected Daniel Searle's motion for summary judgment.[9]
- Seeking a settlement, the Gutmann heirs besought Hector Feliciano, author and Nazi-looted art expert, who has helped locate thousands of missing works of art. According to Feliciano, the heirs had already **spent $ 200,000 in legal fees** at that point.[10] Feliciano then approached the director of the Art Institute of Chicago, James Wood, to inquire whether a settlement could possibly be reached between the parties.[11]
- **A previous settlement proposal** between the claimants and the Art Institute was not successful. The parties were **strongly motivated to resolve their issues in view of the approaching cost and time consuming trial**.
- Ultimately, the parties settled their dispute on the eve of the trial.

III. Legal Issues

Ownership

- Litigation mainly focused on the issue of the restitution claim's limitation period and the possible application of the good faith doctrine to Searle's acquisition of the painting also in view of a conflict of law analysis.
- In essence, the parties disagreed on Friedrich Gutmann's motive for transferring the painting to Paris; Searle claimed Gutmann sold the Degas at the beginning of World War II because of financial pressure, whereas the heirs alleged it was sent to Paris for safekeeping. A clarification of the facts on this matter was, however, imperative in order to determine whether the purchaser of the Paris dealer acquired good title to the painting. This may only be said if the painting had been in fact sold by the Paris dealer to the subsequent possessor, notwithstanding any compensation paid to Friedrich Gutmann for the sale.[12]

[7] Ibid.
[8] Ibid.
[9] See Patty Gerstenblith, "Acquisition and Deacquisition of Museum Collections and the Fiduciairy Obligations of Museums to the Public," *Cardozo Journal of International and Comparative Law* 11 (2003): 440.
[10] See Hector Feliciano, "1999 Symposium: Theft of Art During World War II: Its Legal and Ethical Consequences – The Aftermath of Nazi Art Looting in the United States and Europe: The Quest to Recover Stolen Collections," *DePaul University Journal of Art and Entertainment Law* 10 (1999): 4.
[11] Ibid.
[12] See Patty Gerstenblith, "Acquisition and Deacquisition of Museum Collections," 439.

- Evidence to this regard was missing. In fact, there is no bill of sale or other document which could confirm any of the sales which occurred during and subsequent to the war.[13] The first undoubted entry on the list of purchasers dated back to 1987, when Searle bought the Degas from the art dealer "Hans Wendland, Paris".[14] For the Goodmans, "Wendland was a notorious Nazi collaborator [and] a key operative in disposing of looted art"[15]. Searle's attorney derided this as a false accusation.[16]
- These questions were never satisfactorily answered.[17]

IV. Adopted Solution

Repurchase – Co-ownership

- The Gutmann heirs and Searle agreed to equally divide the ownership of the painting. Searle then transferred his share to the Art Institute of Chicago, where he was a Trustee. In turn, the Art Institute bought the heirs' interest at fair market value, as assessed by an independent expert.[18]
- The Institute agreed to credit both families by placing a label commemorating the misappropriation next to the displayed painting. It was firstly exhibited for a limited period starting 9 October 1998, and since then rotated with other paintings.
- The Gutmann heirs ultimately received about $ 500,000.[19]
- Both parties bore their own legal fees. According to the family, the amount received only just covered the costs of litigation.[20]

V. Comment

- The family, who ultimately sold its interest in the painting to the Art Institute was compelled to do so given the high legal fees they had to bear.
- The financial burden of litigation could have been avoided had the parties been able to negotiate their dispute in the first place. There was in fact a first proposal to negotiate which did not succeed. Instead, the decisive motivating factor to initiate an amicable dispute resolution process arose on the eve of the trial. In fact, the costly and legnthy court proceedings might have convinced the parties to settle their dispute amicably.

[13] As reported by Howard J. Trienens, Searle's attorney, in his book, *Landscape with Smokestacks: the Case of the Allegedly Plundered Degas* (Evanston (Illinois): Northwestern University Press, 2000).
[14] The dealer who acted in 1951 in the purchase of the painting on behalf of Emilie Wolf refused to confirm that she was involved in the sale transaction. See Judd Tully, "Landscape with Plunder," and Ron Grossman, "Tracing Histories."
[15] Ibid.
[16] On the person of Wendland, see for instance Thomas Buomberger, *Raubkunst – Kunstraub: Die Schweiz und der Handel mit gestohlenen Kulturgütern zur Zeit des Zweiten Weltkriegs* (Orell Füssli Verlag: Zürich, 1998), 194 et seqq.
[17] *See* Patty Gerstenblith, "Acquisition and Deacquisition of Museum Collections," 440.
[18] Norman Palmer, "Memory and Morality: Museum Policy and Holocaust Cultural Assets," *Art Antiquity and Law* Vol. 6 Iss. 3 (September 2001): 278-279.
[19] Ron Grossman, "Battle Over War-Loot Degas Comes to Peaceful End," *Chicago Tribune*, August 14, 1998, accessed July 15, 2011, http://articles.chicagotribune.com/1998-08-14/news/9808140105_1_art-institute-daniel-c-searle-nick-goodman.
[20] See Ron Grossman, "Tracing Histories."

- The case raised awareness on the issue of Holocaust-looted art amongst US art museums. In fact, subsequent to the commencement of the lawsuit, the Association of Art Museum Directors encouraged its members to begin thoroughly examining the provenance of the artworks held in their collections. The Art Institute of Chicago has since then proceeded to systematically verify the provenance of artworks which are likely from the Holocaust era.
- In 2000, to the irritation of the heirs, Searle's attorney published a book narrating his viewpoint on the case. As conclusive evidence was still missing, the book was criticized by the heirs for simply reviving the debate without bringing any new information on the merits of the case.[21]
- Alternative dispute resolution brings the advantage of enabling the parties to circumvent questions on the substantial merits of the case and to focus instead on the interests of those involved. It is therefore surprising that one of the protagonists has revisited the case after its settlement.

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Reference: Anne Laure Bandle, Raphael Contel, Marc-André Renold, "Case Auschwitz Suitcase – Pierre Lévi Heirs and Auschwitz-Birkenau State Museum Oswiecim and Shoah Memorial Museum Paris," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case Auschwitz Suitcase – Pierre Lévi Heirs and Auschwitz-Birkenau State Museum Oswiecim and Shoah Memorial Museum Paris

Michel Lévi-Leleu – Auschwitz-Birkenau State Museum Oswiecim – Shoah Memorial Museum Paris – Nazi-looted art/spoliations nazies – Judicial claim/action en justice – Negotiation/négociation – Settlement agreement/accord transactionnel – Ownership/propriété – Loan/prêt

After an initial unsuccessful attempt to negotiate the dispute regarding a suitcase between the heirs of the Holocaust victim Pierre Lévi and the Auschwitz Birkenau State Museum in Oswiecim, the heirs decided to file a restitution claim against the Museum. The parties eventually settled with the help of the Shoah Memorial Museum in Paris and agreed to a long-term loan of the suitcase at the Shoah Memorial Museum.

I. Chronology

Nazi looted art

- **2004**: A suitcase from the collection of the **Auschwitz-Birkenau State Museum** was loaned to the **Shoah Memorial Museum in Paris** for a permanent exhibition "The Fate of

Jews from France during World War II". Both museums agreed in writing that the suitcase shall be returned to the Auschwitz-Birkenau State Museum by **30 June 2005**. The suitcase is labeled as "suitcase belonging to Pierre Lévy, deported from France to Auschwitz".

- **February 2005**: During a visit of the Paris exhibition, Michel Lévi-Leleu, retired engineer, and his daughter, Claire, discovered that the exhibited suitcase undoubtedly belonged to his father, Pierre Lévi, as it was tagged with his father's name, the last address of his family in Paris and his father's prisoner reference.
- **Following the exhibition**: With the agreement of the Shoah Memorial Museum, Michel Lévi-Leleu made the **request** to the Auschwitz-Birkenau State Museum via the Parisian museum that the suitcase shall remain in Paris permanently, as he did not want it to "repeat the journey that it had already made to Auschwitz".
- **28 February 2005**: Both parties exchanged letters. The Auschwitz Museum insisted on the importance of the suitcase for the history and proof of existence of the Auschwitz camp. The director of the Museum, Piotr Cywinski, feared a "risk of precedent" - that the return of the suitcase might generate many other restitution claims. A letter from the **Polish Minister for Foreign Affairs and president of the International Auschwitz Committee** was sent to the former Minister of Social Affairs and Health and president of the European Parliament, **Simone Veil,** as well as to Michel Lévi-Leleu. The director of the Shoah Memorial Museum, Jacques Freidj, intervened in order to obtain an amicable settlement.
- **August 2005**: The International Auschwitz Council[1] **approved the extension of the loan for another 6 months** until January 2006. At the end of the loan, no other agreement had been reached.
- **December 2005**: Michel Lévi-Leleu brought an action for restitution against the Auschwitz-Birkenau State Museum before the *Tribunal de grande instance* in Paris. The court ordered for the immediate confiscation and sequestration of the suitcase by the Parisian authorities pending a final court decision on the matter. The settlement efforts between the two Museums were subsequently interrupted. In the meantime, the suitcase was still on view at the Shoah Memorial Museum.
- The Tribunal refused an interim injunction for the return of the suitcase to Poland at the end of the Paris exhibition.
- **4 June 2009**: A **settlement** ended the lawsuit between the Auschwitz-Birkenau State Museum and Michel Lévi-Leleu.

II. Dispute Resolution Process

Judicial claim – Negotiation – Settlement agreement

- **First negotiations** between Michel Lévi-Leleu and the two Museums failed and were then followed by a **trial** in Paris. The President of the Shoah Memorial Museum acted unsuccessfully as an **intermediary** as he tried to convince the parties to settle. The parties seemed to be deadlocked in their positions.

[1] The International Auschwitz Council advises the Auschwitz Birkenau State Museum in its various activities, including on questions concerning Holocaust memorabilia. For more information, see "The International Auschwitz Council," Memorial and Museum – Auschwitz-Birkenau website, accessed February 5, 2012, http://en.auschwitz.org/m/index.php?option=com_content&task=view&id=278&Itemid=14.

- Michel Lévi-Leleu contended against the return of the suitcase from Paris to Auschwitz, where the awful events took place. The International Auschwitz Council in turn insisted on reassembling everything left from the camp as an "inviolate and integral"[2] whole, as communicated by a letter of the Council's chairman sent to Michel Lévi-Leleu.[3]
- Both parties ultimately settled before the "Tribunal de Grande Instance" in Paris rendered a decision.
- Throughout the lawsuit, the Auschwitz-Birkenau State Museum was represented *pro bono* by two lawyers from Gide Loyrette Novel as well as by a partner in Warsaw.

III. Legal Issues

Ownership

- Michel Lévi-Leleu filed a claim with the Parisian *Tribunal de grande instance* claiming ownership to the suitcase. An option for the Auschwitz Memorial Museum under French law could have been to assert acquisitive prescription (art. 2258 French Civil Code)[4], which requires a continuous possession as owner of the chattel (art. 2261 French Civil Code)[5]. Such an acquisition of property regarding the suitcase was not at stake here, as the Museum always considered that the object had belonged to Pierre Lévy.

IV. Adopted Solution

Loan

- According to the settlement, the suitcase will be **loaned** to the Shoah Memorial Museum in Paris **on a long-term basis** where it was exhibited at the time of its discovery by Michel Lévi-Leleu. In turn, he renounced all claims and the suitcase remains in the property of the Auschwitz Birkenau State Museum.

V. Comment

- Coming to terms with history: In the present case, Michel Lévi-Leleu's request did not substantiate the common conflict in Nazi-Looted art claims between individual and collective ways to reappraise the past. Michel Lévi-Leleu had not demanded the restitution of the suitcase or a monetary compensation. Instead, he requested that it had to be publicly shown in a specific location, namely in Paris as a replacement for Auschwitz-Birkenau.

[2] Auschwitz-Birkenau State Museum Press Communiqué, "Settlement Reached over Auschwitz Suitcase," June 4, 2009, accessed March 9, 2011, http://en.auschwitz.org.pl/m/index.php?option=com_content&task=view&id=630&Itemid=8.
[3] Ibid.
[4] "La prescription acquisitive est un moyen d'acquérir un bien ou un droit par l'effet de la possession sans que celui qui l'allègue soit obligé d'en rapporter un titre ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi."
[5] "Pour pouvoir prescrire, il faut une possession continue et non interrompue, paisible, publique, non équivoque, et à titre de propriétaire."

- In view of the relatively weak ethical and legal claim the Auschwitz-Birkenau State Museum could possibly assert, their insistence against a return of the suitcase seems surprising.
- Mainly, the Museum was against the return as it feared that similar suits would emerge emptying the musuem of all its exhibited objects. The Museum's reasoning, the restitution might cause a "risk of precedence" may most probably miss the point, given the objects at stake (low value, owners difficultly traceable, etc.). The Museum justifies holding these objects as it is an institution devoted to the memorial of the murders committed in the concentration camps during World War II.
- Interestingly, the parties seek guidance and help within their own government (state representatives), as their dispute is converted into a political conflict.
- While the Shoah Memorial Museum has acted as an intermediary, its objectivity may be questionable. It may in fact have a personal interest in the long-term exhibition of the suitcase and in the publicity generated by the case.

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Spoils of war
Butins de guerre

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March 2012

Reference: Anne Laure Bandle, Raphael Contel, Marc-André Renold, "Case Ancient Manuscripts and Globe – Saint-Gall and Zurich," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case Ancient Manuscripts and Globe – Saint-Gall and Zurich

Canton of Zurich/Canton de Zurich – Canton of Saint-Gall/Canton de Saint-Gall – Antiquity/antiquités – Spoils of war/butins de guerre – Ad hoc facilitator/facilitateur ad hoc – Mediation/médiation – Negotiation/négociation – Settlement agreement/accord transactionnel – Ownership/propriété – Loan/ prêt – Copy/copie

Thanks to the Swiss Confederation who acted as a mediator, the dispute between the Cantons of Zurich and Saint-Gall over cultural objects displaced during the religious wars of 1712, was ultimately settled in 2006 by an inventive agreement.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

I. Chronology

Spoils of war

- **1712**: Religious wars between Catholic and Reformed Cantons – the so-called "**Battles of Villmergen**". A number of cultural objects that previously belonged to the **Abbey Library of Saint-Gall** are transferred to Zurich.
- **15 June 1718**: **Peace Treaty** between the Cantons of Saint-Gall and Zurich signed in Baden (hereafter the Peace Treaty of Baden). Zurich agrees to **return** most of the cultural objects taken from the Abbey of Saint-Gall, except for some 100 items, such as manuscripts, books, paintings, astronomical devices and the **Prince-Abbot Bernhard Muller's cosmographical Globe**.

- **5 August 1718**: Ratification of the Peace Treaty of Baden.[1] In the following years, the possibility of further returns was proffered by representatives on the Zurich side.[2]
- **1735**: Further requests by Saint-Gall addressed to Zurich for the return of the remaining books and manuscripts and in particular of the Terrestrial and Celestial Globe. Zurich subsequently denied taking these objects.[3]
- **1996**: Letter by a reader to the editor of a journal from Saint-Gall, claiming for the canton's ownership of the cultural goods that had remained in the Central Library and National Museum in Zurich. The letter raised a public debate, which induced the involvement of the **Cantonal Executive Council of Saint-Gall**.
- Beginning of formal negotiations by a **request** from the Council of Saint-Gall to the Canton of Zurich for the return of the cultural goods. The claim was based on legal considerations, asserting that the objects had never been validly acquired by Zurich in view of the applicable federal law on war, which already prohibited the robbery of cultural goods. Zurich in turn insisted on its legitimate acquisition of property under the relevant international law provisions. Moreover, given the signed Peace treaty and the resultant restitution of objects, any claims would be forfeited or at least time-barred and therefore void.[4]
- After unsuccessful negotiations efforts, request by both parties for the **Confederation's intervention as a mediator** in the dispute.
- **27 April 2006**: (Public) Settlement agreement reached through mediation.[5]

II. Dispute Resolution Process

Ad hoc facilitator – Mediation – Negotiation – Settlement agreement

- The parties tried for eight years to negotiate their dispute – without success. It was only with the help of the Confederation acting as a mediator (as provided by the Swiss Constitution of 1999, art. 44 (3)) that the parties set aside their legal positions and instead focused on their mutual interests.
- A **mediation-team** assigned by the Swiss Government assisted in the **settlement** between political representatives from both Cantons and the responsible bodies of the concerned libraries.

III. Legal Issues

Ownership

[1] See Rainer J. Schweizer, Kay Hailbronner and Karl Heinz Burmeister, *Der Anspruch von St. Gallen auf Rückerstattung seiner Kulturgüter aus Zürich* (Zürich et al: Schulthess, 2002), 103.
[2] Ibid, 104 et seq.
[3] Ibid, 107 et seq.
[4] See Beat Schönenberger, *The Restitution of Cultural Assets* (Bern: Stämpfli Verlag AG, 2009), 10 et seq.
[5] Mediation agreement between the Canton of Saint-Gall and the Catholic representative on the one hand, and the Foundation of the Central Library in Zurich as well as the Canton and City of Zurich on the other hand, April 27, 2006, accessed October 2, 2011, http://www.news.admin.ch/NSBSubscriber/message/attachments/2567.pdf.

- The two main considerations regarding the issue of ownership were:
  1 – On the property right transfers in the 18th century: have the parties purposely left out the remaining cultural objects in the Peace Treaty of Baden?
    - Art. 81 of the Peace Treaty of Baden encloses an obligation to rescind all transfers of possession which occurred as a consequence of the war.[6] It does not, however, explicitly refer to the cultural objects. The opinions are divided between those asserting that a transfer of ownership to Zurich requires an agreement between the parties or a court decision and those alleging that all changes of property in favour of Saint-Gall have to be explicitly stated in the Peace Treaty.
    - According to Schweizer/Hailbronner/Burmeister[7], the circumstances and statements by the parties when signing the Peace Treaty and subsequent to their agreement suggest that they provided for the return of the cultural property objects. Saint-Gall for instance certified that the demand for restitution would not be dismissed, but put on hold until the ratification of the treaty.[8] The ratification of the Peace Treaty and subsequent return of a large amount of objects may be considered "the incomplete performance of a recognized duty"[9], requiring the restitution of all objects. Saint-Gall on the other hand has never renounced the remaining objects; the Canton indeed repeatedly requested their restitution in the 18th and 19th centuries.[10]

  2 – On the actual ownership title of the cultural objects: Has the property title been validly transferred to Zurich or was Saint-Gall entitled to the restitution of all cultural objects? If so, is the restitution claim time-barred?
    - Many of the international treaties recognizing the protection of illicitly taken cultural heritage in the event of armed conflict were not applicable to the battle of Vilmegen (such as the Hague Convention of 1907[11] concerning the Laws and Customs of War on Land (art. 23 (g); art. 27 and 56 of its annex) and the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (art. 4)[12] and its two protocols.[13] The main argument in favour of restitution is the consideration that the requested items are part of an ensemble which should remain together (cf. art. 69 (2) of the Swiss Constitution[14] requiring the

[6] See Schweizer et al., *Der Anspruch von St. Gallen auf Rückerstattung seiner Kulturgüter aus Zürich*, 93 et seq.
[7] Ibid, 94 et seqq.
[8] Ibid, 100.
[9] Ibid, 106.
[10] Ibid, 117 et seq.
[11] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, accessed August 10, 2011, http://www.icrc.org/ihl.nsf/full/195.
[12] UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 (The Hague Convention of 1954), accessed August 10, 2011, http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.
[13] Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict 1954, The Hague 14 May 1954, accessed August 10, 2011, http://portal.unesco.org/en/ev.php-URL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html; Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, The Hague, 26 march 1999, accessed August 10, 2011, http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201. html.
[14] Federal Constitution of the Swiss Confederation of April 18, 1999, SR 101, accessed August 10, 2011, http://www.admin.ch/ch/e/rs/1/101.en.pdf.

Confederation to "support cultural activities of national interest"[15]), also in view of the designation of the Abbey Library of Saint-Gall as UNESCO World Cultural Heritage in 1982.[16] Therefore, it may well be argued that, in disregard of formal considerations such as limitation-periods, the restitution of these objects responds to international public law and to the interests of the Swiss Confederation.

IV. Adopted solution

Copy – Loan

- The mediation agreement provides the following settlement:
  - **Mutual acknowledgment**: Saint-Gall accepts Zurich's ownership of the cultural objects which are located at the National Museum and the Central Library in Zurich ever since the end of the war (art. 1). Zurich in return recognizes the importance of the objects for Saint-Gall's cultural identity (art. 2).
  - **Loan**: Zurich offers Saint-Gall an unpaid and indefinite loan regarding 35 manuscripts that belong to the Central Library Foundation in Zurich (art. 4). Moreover, Zurich has agreed to lend the original Cosmographical Globe to Saint-Gall to be exhibited for 4 months (art. 3). The exhibition of the manuscripts took place in September 2006 at the Abbey Library, which were in the following included in a special exhibition between December 2006 and February 2007.
  - **Copy**: Zurich approved the production of an exact replica of the cosmographical Globe at its own expense and to donate it to Saint-Gall (art. 3). The original is kept at the Swiss National Museum. The replica was welcomed at the Abbey Library in Saint-Gall accompanied by a celebration in August 2009.
  - **Amendment or termination of the loan agreement**: Any amendment or termination of the loan agreement can be made only after 38 years by a joint request from the highest executive of each party (art. 6-7).

V. Comment

- The Cantons probably failed in their negotiations as they were too entrenched in their legal positions, rather than focusing on a mutually beneficial plan.
- Interestingly, public pressure, particularly from the media has brought the issue back to the headlines. Only then did it become a concern for both cantons which apparently had forgotten about the matter long ago.
- Although both Saint-Gall and Zurich made considerable concessions (the copy of the Globe cost Zurich a great amount of money), some in Saint-Gall do not seem satisfied by the agreement,[17] claiming that the original Globe belongs to Saint-Gall and the Abbey Library would be a much better fit for its exhibition.

[15] It may be a national interest that cultural property is kept in its historical context and as an ensemble.
[16] See Schweizer et al., *Der Anspruch von St. Gallen*, 199 et seqq.; see also Tullio Scovazzi, "Diviser c'est détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties," *UNESCO*, 2008.
[17] See Wolfgang Eisenbeiss, "Nachwehen im Streit um Himmelsglobus," *Neue Zürcher Zeitung*, March 15, 2007, accessed October 2, 2011, http://www.nzz.ch/2007/03/15/br/articleezp44_1.128067.html.

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Affaire Cloche de Shinagawa – Ville de Genève et Japon

Ville de Genève – Japan/Japon – Antiquity/antiquités – Spoils of war/butins de guerre – Diplomatic channel/voie diplomatique – Ownership/propriété – Exchange/échange

En 1930, la Ville de Genève décide de restituer une cloche au Japon. En échange, le Japon cède une lanterne en granit de forme Zendoji. En 1991, le Japon cède à Genève une réplique de la cloche en signe de reconnaissance.

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I. Historique de l'affaire

Butins de guerre

- **Au XVIIème siècle,** la cloche du temple Honsen-ji de Shinagawa est coulée dans le bronze et décorée avec six scènes sculptée probablement par Kosai[1]. Ce temple se trouve sur la voie du Tokaido avant Edo (Tokyo).
- **En 1867,** à la chute du régime féodal, le Temple Honsen-ji est incendié et la cloche, seule rescapée du sinistre, disparaît[2]. Elle a peut-être été présentée lors des Expositions universelles de Paris et de Vienne[3].
- **En 1873**, la cloche est découverte et acquise par le collectionneur genevois Gustave Revilliod à la fonderie Rüetschi d'Aarau[4]. La cloche est installée dans le parc de l'Ariana à Genève.
- **En 1890,** la cloche fut **léguée** par Gustave Revilliod avec tous ses biens à la Ville de Genève[5].
- **Aux alentours de 1919,** un étudiant découvre la cloche du Honsen-ji dans le parc du Musée de l'Ariana. Cette information est confirmée par le secrétaire aux Affaires étrangères Yuzo Ishimaru lors d'une session de la Société des Nations.
- **L'évêque du** Honsen-ji, Junkei Wajo, à l'annonce de la nouvelle, écrit les lignes suivantes : « Au Japon, la cloche n'annonce pas seulement les heures… Elle contribue aussi à la richesse de la vie intérieure des gens. Ses sons inspirent une croyance. Pendant qu'on coule une telle cloche […], les gens prient et font des vœux ; quant au fondeur, il se purifie le corps avant de s'appliquer à mettre au monde un chef d'œuvre. »[6]
- **En 1929,** le Conseil Municipal de la Ville de Genève décide d'accepter la restitution de la cloche à son lieu d'origine. La cloche retourne à Shinagawa l'année suivant.
- **En avril 1930,** la cloche est de retour à Tokyo. [7] On lui construit un clocher et on l'a déclare monument national. [8]
- **Pendant la seconde guerre mondiale,** la cloche est sauvée par l'évêque Junkai Wajo.[9]
- **En 1990,** une réplique de la cloche du Honsen-ji est réalisée par la commune de Shinagawa et à ses frais. Elle est offerte à la Ville de Genève. Le baptême de celle-ci à lieu à Shinagawa, en présence des autorités de la Ville de Genève.
- En **1991,** un pavillon est construit dans le parc de l'Ariana et une cérémonie d'installation de la nouvelle cloche est conduite. Elle donne aussi lieu à la signature d'une Charte d'amitié entre Genève et Shinagawa.

[1] *Genève-Shinagawa Shinagawa-Genève*, sous la direction d'Eric Burkhard, Marie-Thérèse Coullery, Didier Grange, André Klopmann, Genève, 1996, p. 16.
[2] Ibid., p. 18. Voir aussi le témoignage du Révérand Junkai Nakad, cité p. 34.
[3] Ibid., p. 19.
[4] Ibid., p. 20.
[5] Ibid., p. 23.
[6] Ibid., p. 23.
[7] Ibid., p. 27.
[8] Ibid., p. 27.
[9] Ibid., p. 27.

II. Processus de résolution

Voie diplomatique

- Le Japon a procédé par la voie diplomatique. En effet, le Ministre de la culture japonais a adressé une lettre au Conseil administratif de la Ville de Genève par l'intermédiaire du Consul impérial à Genève et de la légation du Japon à Berne. Le Ministre de la culture avait lui-même été saisi par le ministère des Affaires étrangères sur requête du Temple de Shinagawa.

III. Problèmes en droit

Propriété

- Le testament du donateur ne semble pas soulever de problème puisqu'il ne contient pas de clause interdisant l'aliénation des objets cédés[10].

IV. Résolution du litige

Echange

- Le litige est résolu par une double donation : donation de la cloche du Temple de Shinagawa par la Ville de Genève et donation d'une lanterne à la Ville de Genève par le Japon.
- Quelques années plus tard, une réplique de l'original est effectuée par le donataire sans demande et sans frais pour le donateur.
- Le 9 septembre 1991, une d'Association d'amitié Genève-Shinagawa est créée dans le prolongement de la signature d'une Charte d'amitié par les maires de Genève et de Shinagawa (arrondissement de Tokyo). Les buts de l'association sont l'échange et l'accueil de jeunes gens et de citoyens de la commune de Shinagawa ; l'échange d'activités culturelles, plus particulièrement d'expositions, de concerts, de voyages, etc. ; et le soutient à toutes actions ponctuelles ou permanentes favorisant les relations d'amitié et de paix entre les villes de Genève et Shinagawa. [11]

[10] Mémorial du Conseil Municipal, p. 343.
[11] Voir le site Internet de l'association Amitiés Shinagawa – Genève : http://www.geneve-shinagawa.ch/cloche.html (consulté le septembre 2011).

V. Commentaire

- Dans cette affaire apparaît en filigrane à la fois l'importance de la dimension immatérielle du bien culturel en question et le sentiment d'appartenance et/ou d'identification qui lui est rattaché et toute la relativité de cette importance. En effet, lors des guerres du shogunat, le temple fut brûlé à l'exception de la cloche (pur hasard probablement). La destruction des biens de l'ennemi et/ou des trophées de guerre était à l'époque, et pas seulement au Japon, une pratique fort répandue. Pour des raisons de politique guerrière, l'importance d'un bien même culturel peut donc être réduite à néant. Mais une fois le bien « sorti » de son contexte, il peut aussi « perdre » toute sa dimension immatérielle et être perçu comme un bien ordinaire : La cloche est une masse à fondre. Ce qui sauve la cloche est le coup d'œil heureux de l'amateur d'art. En l'espèce, le retour de la cloche fait sens pour le revendiquant, car ce qui est **réactualisé** est toute la dimension immatérielle : historique, culturelle *lato sensu* et surtout **cultuelle**. Dans la balance entre prérogatives du propriétaire à des fins de conservation et de mise en valeur des collections (bien muséal public) et revendication par le propriétaire « immatériel » du bien culturel, il est difficile de faire peser la simple mise en valeur (voir les discussions du Conseil Municipal de la Ville de Genève au Mémorial) ; ce d'autant, que dans le cadre de la restitution, un échange est proposé qui enrichit la collection du Musée.

VI. Sources

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Affaire Manuscrits Coréens – France et République de Corée

France – Republic of Korea/République de Corée – Archives – Spoils of war/butins de guerre – Judicial decision/décision judiciaire – Negotiation/négociation – Settlement agreement/accord transactionnel – Ownership/propriété – Inalienability/inaliénabilité – Cultural cooperation/coopération culturelle – Loan/prêt

En 1866, l'Amiral Roze entreprend une expédition punitive en Corée. A cette occasion, de nombreux biens culturels sont détruits et certains emportés. Le 7 février 2011, la France et la République de Corée signent un accord portant sur le prêt à la République de Corée des archives royales.

I. Historique de l'affaire ; II. Processus de résolution ; III. Problèmes en droit ; IV. Résolution du litige ; V. Commentaire ; VI. Sources.

I. Historique de l'affaire

Butins de guerre

- **En 1831** est créé le vicariat apostolique (circonspection ecclésiastique établie dans les régions et pays qui n'ont pas encore de diocèse) de Corée occupé par trois missionnaires catholiques français.
- **En 1839,** ces trois prélats furent condamnés à mort et décapités en raison de leur religion.
- **En 1866**, neuf prêtres français et de nombreux fidèles coréens (environ 8000) furent massacrés.[1]
- **En 1866**, l'Amiral français Roze entreprit une expédition punitive contre la Corée. Dès le début de l'expédition, l'Amiral s'empare de l'île de Kanghwa. Sur cette île se trouve un **dépôt d'archives royales** exceptionnelles: les « Oekyujanggak Uigwe ». Ces archives consistent en une collection de manuscrits en relation avec la Dynastie Joseon (1392-1910). Le commandant Osery en fait entreprendre aussitôt l'inventaire pour expédition vers la France.[2]
- Maurice Courant, dans sa *Bibliographie Coréenne* en trois volumes (1894-1897), évoque la donation de manuscrits « Uigwe » à la Bibliothèque Nationale de France (BnF).
- **En 1975**, le Dr. Byeng-sen Park découvre les manuscrits au dépôt de Versailles de la BnF (répertoriés en tant qu'ouvrages « chinois »). [3]
- **En 1991**, le Prof. Taejin Yi en coopération avec le Prof. Choong-Hyun Paik, tous les deux de l'Université de Séoul, demandent au Gouvernement de la République de Corée d'entamer des négociations.[4]
- **En 1993,** le Président François Mitterrand retourne un seul manuscrit à la République de Corée. [5]
- **En 2000**, des négociations sont menées par des experts. Un accord basé sur une solution d'échange n'est pas ratifié. [6]
- **En 2005,** le cinéaste Ha Junso réalise un film critique consacré aux manuscrits : « Corée 2495 ».
- **En 2007,** les « Oekyujanggak Uigwe » sont inscrits sur le registre de l'UNESCO relatif à la mémoire du monde.[7]

[1] Sur l'expédition de l'Amiral Roze et le contexte historique, lire VERNET Jacques, *Corée – L'affaire de Kwang Hwa de 1866*, *in* Revue historique des armées, n°230, 2003.
[2] VERNET, op. cit.
[3] Voir l'intervention de LEE Keun-Gwan, Université de Séoul, lors du Symposium international tenu à l'Université de Genève, Patrimoine Universel/Revendications locales, 9-10 février 2011, disponible en ligne : https://mediaserver.unige.ch/search?q=patrimoine+universel (consulté le 7 juin 2011).
[4] Ibid.
[5] Voir *L'affaire des manuscrits royaux de Corée, in* Le Point, 15 décembre 2010, disponible en ligne : http://www.lepoint.fr/culture/l-affaire-des-manuscrits-royaux-de-coree-15-12-2010-1275616_3.php (consulté le 5 juillet 2011).
l'article du Point *L'affaire des manuscrits royaux de Corée* (le précédent Mitterand).
[6] LEE Keun Gwan, op. cit. ; DUROY Stéphane, *Le déclassement des biens meubles culturels et cultuels, in* Revue du droit public et de la science politique en France et à l'Étranger, 20 novembre 2010, n° 1, p. 55 ss.

- **La même année**, une association non gouvernementale coréenne engage une procédure judiciaire en France.
- **Le 14 mars 2008,** une trentaine de copies numériques sont remises aux autorités coréennes.[8]
- L'ONG est déboutée le **18 décembre 2009** par le Tribunal administratif de Paris.[9]
- **Le 7 février 2011**, les Présidents français et coréen signent un accord qui prévoit principalement le prêt des manuscrits à la République de Corée.
- **Le 27 mai 2011**, la totalité des manuscrits se trouve sur le sol de la République de Corée. Jack Lang, ancien Ministre français de la culture, aurait déclaré à cette occasion : « Personnellement, j'interprète ce retour comme un dépôt de longue durée. Ces manuscrits sont sur le sol coréen, ils sont ici dans leur patrie d'origine. Je n'imagine pas personnellement un seul instant qu'un gouvernement français puisse ne pas renouveler cette décision jusqu'au jour où on finira par pérenniser par une loi et je suis optimiste. […] Ils sont là durablement, ils sont chez vous ». [10]

II. Processus de résolution

Décision judiciaire – Négociation – Accord transactionnel

- Dès la découverte des manuscrits en 1975 par le Dr. Byeng-sen Park, différentes tentatives pour négocier le retour des manuscrits sont amorcées. Celles-ci sont initiées par les milieux académiques ainsi que par des experts.[11] En 2007, l'Association action culturelle introduit une procédure judiciaire. Toutes ces tentatives échouent.
- Les présidents français François Mitterrand et Nicolas Sarkozy ont tous les deux saisi la question des manuscrits royaux comme élément d'une négociation plus ample, concentrée sur les marchés coréens, dont notamment, la construction du TGV en République de Corée. La restitution d'un manuscrit puis de l'ensemble des manuscrits (à titre de prêt ou de « dépôt durable ») détenus par la France semble

[7] Site de l'UNESCO, Mémoire du monde : http://www.unesco.org/new/fr/communication-and-information/flagship-project-activities/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-9/uigwe-the-royal-protocols-of-the-joseon-dynasty/ (consulté le 5 juillet 2011).
[8] DUROY, op. cit., p. 55 ss.
[9] LEE Keun-Gwan, op. cit. Voir aussi, KUN-JONG, *Séoul ne renonce pas aux manuscrits Uigwe, in* Courrier international, 14 janvier 2010, disponible en ligne : http://www.courrierinternational.com/article/2010/01/14/seoul-ne-renonce-pas-aux-manuscrits-uigw (consulté le 5 juillet 2011) : « Le tribunal a, selon l'ONG, justifié son rejet par le fait que, étant conservés à la Bibliothèque nationale de France, ces manuscrits appartiennent à l'Etat français ; le contexte et les conditions dans lesquels ils ont été saisis ne changent rien à l'affaire. » ; Association action culturelle contre le Ministre de la culture et de la communication, Jugement du Tribunal administratif de Paris, 18 décembre 2009, n° 0701946.
[10] JEONG-HUN Oh, *Ces manuscrits sont maintenant sur le sol coréen durablement, in* Yonhap News Agency, 11 juin 2011, disponible en ligne : http://french.yonhapnews.co.kr/sportsculture/2011/06/11/0800000000AFR20110611000400884.HTML (consulté le 5 juillet 2011).
[11] HYUNG-EUN Kim, *The Battle to Retrieve Korea's Old Records, in* JoongAng Daily, 8 décembre 2008, disponible en ligne : http://joongangdaily.joins.com/article/view.asp?aid=2898272 (consulté le 5 juillet 2011).

trouver sa raison en opportunité, c'est-à-dire dans les stratégies politiques et économiques de la France.[12]

III. Problèmes en droit

Propriété – Inaliénabilité

- Au moment des pillages des biens culturels coréens par l'Amiral français (1866), force est de reconnaître qu'il n'existe pas de coutume internationale interdisant le pillage du patrimoine de l'ennemi.[13] Bien au contraire, la règle générale est plutôt celle du pillage des biens du vaincu (*ius praede*).[14] Il est vrai qu'à l'époque déjà des intellectuels éminents s'élèvent contre cette pratique (Victor Hugo, par exemple, dans sa fameuse lettre au capitaine Butler à propos du Palais d'été à Pékin). Mais c'est seulement à partir de 1874 que le juriste Bluntschli considère comme interdit « le fait d'emporter et de s'approprier les collections scientifiques et artistiques (bibliothèques, galeries de tableaux, instruments) ». [15] Néanmoins, les biens culturels coréens sont une catégorie singulière de biens culturels, c'est-à-dire des archives. Un régime spécial semble s'appliquer aux archives, dont on trouverait déjà des traces au Moyen-âge et dans le Traité de Westphalie (1648), et qui prévoit l'imprescriptibilité et l'inaliénabilité des archives et partant l'impossibilité de les confisquer et l'obligation corrélative de les restituer. [16]
- Dans sa décision du 18 décembre 2009, le Tribunal administratif de Paris a débouté l'Association action culturelle de sa demande en annulation de la décision du Ministre de la culture par laquelle il a refusé de faire droit à **la demande de déclassement** des manuscrits du domaine public. Le Tribunal estime que les manuscrits sont bien

[12] PELLETIER Benjamin, *Les cultures nationales à l'assaut des musées universels*, *in* Gestion des Risques Interculturels, 1er mai 2010, disponible en ligne : http://gestion-des-risques-interculturels.com/risques/les-cultures-nationales-a-lassaut-des-musees-universels-1ere-partie (consulté le 5 juillet 2011) : « François Mitterrand avait promis à la Corée du Sud la restitution de ce trésor national coréen. Ce fut d'ailleurs un appât pour conclure en 1993 un contrat portant sur l'achat du TGV par Séoul. »

[13] Dans le même sens, jugement du Tribunal administratif de Paris, op. cit. : « […] il ne ressort cependant pas des pièces du dossier qu'une coutume internationale, pratique générale considérée comme étant le droit, prévalait alors. »

[14] CARDUCCI Guido, *L'obligation de restitution des biens culturels et des objets d'art en cas de conflit armé : droit coutumier et droit conventionnel avant et après la Convention de la Haye 1954. L'importance du facteur temporel dans les rapports entre les traités et la coutume*, *in* Revue générale de droit international public, n. 2, 2000, p. 289 ss. ; BELHUMEUR Jeanne, MIATELLO Angelo, SEVERINO Roberto, *Les atteintes aux biens culturels italiens pendant les conflits armés*, *in* « Les aspects juridiques du commerce international de l'art », Kluwer Law and Taxation 1996, p. 185 ss. ; NAHLIK Stanislaw, *La protection internationale des biens culturels en cas de conflit armé*, Recueil des Cours, The Hague Academy of International Law, vol. 120, The Hague (Martinus Nijhoff Publishers) 1967, p. 66; Voir cependant BUGNION François, *La genèse de la protection juridique des biens culturels en cas de conflit armé*, *in* Revue internationale de la Croix-Rouge, vol. 86, n. 854, 2004, p. 314, sur l'interdiction du saccage, en particulier, des lieux sacrés et de culte (et ceci depuis l'antiquité). L'histoire enseigne aussi la répétition des oppositions : à la devise « *Delenda est Cartago* » de Caton l'Ancien s'oppose la devise « *sei-satu* » des seigneurs féodaux japonais (sur ceci voir aussi BUGNION, p. 314 ss.).

[15] BLUNTSCHLI Johann Kaspar, *Le droit international codifié*, trad. Lardy, 5ème éd., Paris (F. Alcan) 1895, p. 365 ; Sur ceci voir CARDUCCI, op. cit., p. 299 ss.

[16] Voir COX Douglas, p. 416 ss., en particulier la critique sur ce point du jugement du Tribunal administratif de Paris.

incorporés dans le domaine public. En effet, l'autorité les détient depuis plus de 140 ans. De plus, ils sont bien affectés à l'usage du public. Enfin, les manuscrits sont des trésors nationaux qui restent propriété inaliénable de l'Etat. Par ailleurs, le Tribunal refuse de tenir compte des principales conventions internationales applicables en matière de restitution de biens culturels car celles-ci ne sont pas rétroactives ou non ratifiée par la France ou encore non en vigueur entre les Parties.

- Le principe d'inaliénabilité des collections publiques n'est pas en droit français un obstacle absolu à la restitution. Il est possible de saisir la commission scientifique dont l'avis favorable permet de rendre possible un déclassement administratif. Ce cas de figure surviendra en principe si le bien culturel n'est plus d'intérêt scientifique ou encore si les conditions d'acquisition sont irrégulières et postérieures à 1997 (date de la ratification de la Convention UNESCO 1970 par la France). [17] Si tel n'est pas le cas, le législateur peut intervenir et autoriser par exemple le déclassement sans préavis de la commission (voir affaire de la Tête Maori de Rouen). [18] On évoque alors des motifs éthiques ou politiques. Enfin, la restitution peut aussi s'opérer de façon **atypique**[19] et pour des motifs économiques et politiques. Tel est le cas pour la restitution d'un des manuscrits coréens en question par François Mitterrand. A ce propos, le poète Edouard Glissant nous apprend que « [lorsque] François Mitterrand avait décidé de prendre un des manuscrits pour le montrer au président coréen, on emmena un conservateur pour escorter ledit manuscrit. En voyant le document, le président de la Corée s'est tellement exclamé de joie que le président Mitterrand lui en a fait présent. Terrassé par ce geste inattendu, l'histoire dit que le conservateur en charge du manuscrit s'est évanoui »[20]. Il en va de même pour l'ensemble des manuscrits coréens « prêtés » par Nicolas Sarkozy. En effet, l'accord intervenu a suscité de vives réactions dans les milieux muséaux[21]. Néanmoins, il semble que la restitution, même atypique, ne soulève pas la réprobation de l'opinion publique, bien au contraire. [22]

[17] DUROY, op. cit., p. 55 ss.
[18] DUROY, op. cit., p. 55 ss.
[19] Ibid.
[20] BnF, Actes du colloque *Chemins d'accès : Les nouveaux visages de l'interculturalité*, 18 novembre 2004, p. 41.
[21] Voir, La pétition, *Déclaration personnels BnF sur Manuscrits coréens*, 18 novembre 2010, disponible en ligne : http://www.jesigne.fr/declaration-personnels-bnf-sur-manuscrits-coreens (consulté le 5 juillet 2011).
[22] Voir Association pour la réunification en Corée du Sud du Fonds documentaire des protocoles royaux de la dynastie Joseon a été créée le 21 avril 2010, http://www.journal-officiel.gouv.fr/association/index.php?ACTION=Rechercher&HI_PAGE=1&HI_COMPTEUR=0&original_method=get&WHAT=coree+protocoles (consulté le 6 juillet 2011) ; Voir aussi commentaire de GLISSANT Edouard, dans BnF, op. cit., p. 41 : « Terrassé par ce geste inattendu, l'histoire dit que le conservateur en charge du manuscrit s'est évanoui. Mais au fond, sur les cent, il n'en perdait qu'un ! Le milieu de la conservation s'offusque assez facilement de ce genre de pratiques. Remarquons que ce manuscrit tout de même avait bien été conservé chez nous pendant plus de trois siècles ! Et que l'attitude normale est de rendre les manuscrits et de former des gens à la conservation ! » ; Sur l'interprétation « large » du principe d'inaliénabilité par les conservateurs, voir DUROY, op. cit., p. 55 ss.

IV. Résolution du litige

Coopération culturelle – Prêt

- L'accord signé entre la République de Corée et la France relatif aux manuscrits royaux de la Dynastie Joseon n'a pas été rendu immédiatement public en son entier. Néanmoins, le Prof. Lee de l'Université de Séoul en a divulgué quelques extraits lors d'une Conférence à l'Université de Genève (10 et 11 février 2011). L'accord a finalement été publié au Journal officiel le 18 mai 2011. [23]
- En son Préambule, l'accord annonce que les manuscrits issus du protocole royal sont partie de l'identité du peuple coréen et constituent un élément fondamental de la mémoire de la Corée.
- L'art. 1 prévoit un prêt pour une période de cinq ans renouvelable.
- L'art. 4 prévoit que cette opération revêt un caractère unique, non susceptible d'être reproduite en une quelconque autre circonstance et ne crée en rien un précédent.
- Pour le surplus (art. 4 et 5), l'accord garanti un accès au manuscrit pour la Bibliothèque national de France (BnF) et une digitalisation des manuscrits par la BnF *via* des fonds coréens.
- L'art. 8 prévoit que tout différend relatif a l'interprétation ou a l'application du présent accord est réglé par voie de consultation ou de négociation entre les Parties.

V. Commentaire

- Quelle que soit la qualification juridique du pillage, que celui-ci soit formellement interdit ou non, et le temps écoulé depuis celui-ci, la possession de certains des manuscrits par la France était perçue par la République de Corée et le peuple coréen comme une situation difficile à tolérer.
- A tous égards, ces manuscrits sont d'une valeur exceptionnelle. Qui plus est, la République de Corée est apte à gérer ceux-ci selon les mesures les plus appropriées. Sur ces deux points, il suffit de lire le rapport édifiant concernant les « Uigwe » inscrit au registre de la mémoire du monde de l'UNESCO. [24] Pour rappel, les manuscrits pillés par l'Amiral français furent découvert en 1975 au dépôt de la BnF étiqueté comme d'origine chinoise.
- En application des dix critères suivants[25] : prix payé au moment de l'acquisition (nul), légitimité de l'achat (nul), degré de liberté (nul), rareté (immense), dimension artistique (immense, cf. les peintures qui accompagnent les archives), ancienneté du déplacement (long), opportunité liée au risque politique (nul), coût des fouilles (nul),

[23] Décret n°2011-527 du 16 mai 2011 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Corée relatif aux manuscrits royaux de la Dynastie Joseon (ensemble une annexe), signé à Paris le 7 février 2011.
[24] Registre de la mémoire du monde, *Les uigwe*, protocoles royaux de la dynastie Joseon**,** Réf. n° 2006-48, disponible en ligne : http://portal.unesco.org/ci/en/ev.php-URL_ID=22331&URL_DO=DO_TOPIC&URL_SECTION=201.html (consulté le 7 juin 2011).
[25] Ces critères ont été proposés par M. Metin Arditi lors du Symposium international tenu à l'Université de Genève, Patrimoine Universel/Revendications locales, 9-10 février 2011, disponible en ligne : https://mediaserver.unige.ch/search?q=patrimoine+universel (consulté le 7 juin 2011).

lien émotionnel (nul avec la France / immense avec la République de Corée), lien plastique (nul pour la France / immense pour la République de Corée) – le retour définitif des manuscrits peut s'imposer. Il en va de même en regard des critères développés aux articles 4 de la Convention UNESCO 1970 et 5 al. 3 de la Convention Unidroit 1995.

- L'accord conclu entre les présidents fut très critiqué[26], notamment en France, en particulier sur la base d'une soi-disant impossibilité légale de sortir les manuscrits des collections publiques (inaliénabilité des collections publiques[27]).
- Lors de la 17ème réunion du Comité Intergouvernemental UNESCO pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale, la délégation française a signalé que cet accord prévoyait uniquement un prêt renouvelable et non pas la *restitution* des manuscrits, puisque le titre de propriété demeure entre les mains de la BnF. Par ailleurs, la délégation a souhaité clarifier qu'il s'agissait en l'espèce de 297 volumes d'archives[28].
- Cette restitution s'inscrit dans le cadre de négociations commerciales entre la France et la République de Corée (TGV). La solution intervient ainsi peut-être dans un cadre inapproprié qui empêche la reconnaissance en tant que telle de la valeur des biens culturels, spécialement dans leur dimension immatérielle. Il est légitime de se demander, même si en l'espèce une restitution pour des motifs politiques ou éthiques (à l'exclusion de motifs économiques) est justifiée, si le cadre juridique dans lequel une telle restitution a lieu n'est pas également important.

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[26] Voir notamment HARRIS Gareth, *Sarkozy criticised for loaning French manuscripts to Korea, in* The Art Newspaper, 23 décembre 2010, disponible en ligne : http://www.theartnewspaper.com/articles/Sarkozy+criticised+for+loaning+French+manuscripts+to+Korea/22149 (consulté le 7 juin 2011).

[27] Voir cependant l'Affaire de la Tête Maorie de Rouen (cf., point VII de la présente fiche).

[28] Voir Rapport Final de la 17ème réunion du Comité Intergouvernemental pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale, Paris, 30 juin – 1 juillet 2011, CLT-2011/CONF.208/COM.17/6, page 2.

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Affaire Obélisque d'Axoum - Italie et Ethiopie

Italy/Italie – Ethiopia/Ethiopie – Antiquity/antiquités – Spoils of war/butins de guerre – Negotiation/négociation – Diplomatic channel/voie diplomatique – State responsibility/responsabilité internationale des Etats – Cultural cooperation/coopération culturelle – Unconditional restitution/restitution sans condition

En 1937, Mussolini ordonne l'enlèvement de l'obélisque d'Axoum et son transport en Italie. Il faudra attendre 2007 pour que l'obélisque retrouve le site d'Axoum.

I. Historique de l'affaire ; II. Processus de résolution ; III. Problèmes en droit ; IV. Résolution du litige ; V. Commentaire ; VI. Sources.

I. Historique de l'affaire

Butins de guerre

- **En 1937,** ensuite de l'annexion de l'Ethiopie par l'Italie, le second obélisque le plus massif d'Axoum est enlevé par les forces armées italiennes et transporté par route puis par bateau en Italie. L'Obélisque, brisé en cinq morceaux et âgé environ de 1700 ans, pèse 150 tonnes et mesure 24 mètres de long.
- **Le 31 octobre 1937,** le régime fasciste de Mussolini inaugure l'érection de l'obélisque sur la Piazza di Porta Capena à Rome.
- **Le 10 février 1947** est conclu un Traité de Paix entre l'Italie et les Puissances Alliées et Associées (dont fait notamment partie l'Ethiopie). Selon l'art. 37 du Traité « dans un délai de dix-huit mois à compter de l'entrée en vigueur du présent Traité, l'Italie restituera toutes

les œuvres d'art, tous objets religieux, archives et objets de valeur historique, appartenant à l'Ethiopie ou à ses ressortissants, et transportés d'Ethiopie en Italie depuis le 3 octobre 1935 ».

- **Le 5 mars 1956** est signé à Adis Abeba un accord concernant le règlement des questions économiques et financières découlant du Traité de Paix de 1947 et la collaboration économique entre l'Ethiopie et l'Italie. Trois annexes à l'accord font état de la mise en œuvre de l'art. 37 du Traité de Paix (objets déjà rendus, objets à rendre s'ils sont retrouvés et obélisque d'Axoum). En l'annexe C, l'Italie reconnait que le grand obélisque d'Axoum, actuellement érigé à Rome, doit être restitué à l'Ethiopie.
- **Le 4 mars 1997,** l'Ethiopie et l'Italie ont signé une déclaration conjointe sur le retour de l'obélisque d'Axoum.
- **Le 18 novembre 2004,** l'Ethiopie et l'Italie ont signé un protocole d'accord relatif à la restitution de l'obélisque.
- **En avril 2005,** l'obélisque a été transporté à Axoum avec des avions Antonov (les plus gros avions cargos disponibles).
- **En juin 2007,** les travaux de remise en place de l'obélisque ont débuté. Ceux-ci ont été réalisés par une entreprise italienne mandatée par le Comité du patrimoine mondial de l'UNESCO. Le financement des travaux a été réalisé par une contribution extraordinaire de l'Italie au budget de l'UNESCO.

II. Processus de résolution

Négociation – Voie diplomatique

- Négociation de la prise en charge du transport de l'obélisque par l'Italie et ceci jusqu'à Axoum ainsi que de son érection, y compris les frais relatifs à l'opération.
- Négociation d'un contrat aux fins d'exécution de la remise en place de l'obélisque par une entreprise de construction italienne. Ce contrat est conclu entre le Comité du patrimoine mondial de l'UNESCO et l'entreprise italienne. Néanmoins, le financement est assuré par l'Italie grâce à une contribution extraordinaire au budget de l'UNESCO.

III. Problèmes en droit

Responsabilité internationale des Etats

- L'appropriation de l'obélisque par l'Italie peut-elle être considérée comme illégale ? En d'autres termes, cette appropriation est-elle constitutive de la violation d'une règle de droit international ? Si oui, qu'elle en est la sanction ?
- Bien que l'Italie soit Partie au moment des faits à la Convention (II) de La Haye de 1899 qui interdit expressément le pillage (art. 47 de l'Annexe) et toute saisie, destruction ou dégradation intentionnelle de monuments historiques, d'œuvres d'art et de science (art. 50 de l'Annexe), tel n'est pas le cas de l'Ethiopie. L'Ethiopie est Partie (mais pas l'Italie) à la Convention (IV) de La Haye du 18 octobre 1907 concernant les lois et coutumes de la guerre sur terre et son Annexe: Règlement concernant les lois et coutumes de la guerre sur terre qui reprend à l'identique les articles 47 et 56 de l'Annexe de la Convention (II). Il ressort expressément de l'art. 2 de ladite Convention (IV) que celle-ci ne s'applique qu'entre

Parties contractantes. On peut néanmoins encore alléguer que l'interdiction de saisir des biens culturels en cas de conflit armé relève d'une coutume de droit international. Quoiqu'il en soit, la qualification juridique de l'annexion de l'Ethiopie par l'Italie est problématique, à savoir si les conditions d'application des règles relatives aux conflits armés sont remplies (y compris celles relatives à l'occupation) ou au contraire si l'Etat italien a valablement succédé à l'Etat Ethiopien (le 9 mai 1936, Benito Mussolini proclame le roi d'Italie Victor-Emmanuel III nouvel Empereur d'Éthiopie). La Société des Nations a considéré que l'invasion italienne était illégale et contrevenait à l'art. 12 de ses statuts. Partant, il est possible de considérer que la prise de l'obélisque est aussi illégale.

- Le mécanisme juridique, qui voudrait associer à la règle violée (conventionnelle ou coutumière) l'obligation de réparation (en l'espèce le retour du bien culturel), est distendu par les événements de la seconde guerre mondiale. En effet, c'est au nom du Traité de Paix de 1947 que l'Italie est sommée en vertu de l'art. 37 du Traité « dans un délai de dix-huit mois [de restituer] toutes œuvres d'art, tous objets religieux, archives et objets de valeur historique, appartenant à l'Ethiopie ou à ses ressortissants, et transportés d'Ethiopie en Italie depuis le 3 octobre 1935 ».
- Néanmoins, il faudra différents instruments de droit international public et de droit privé pour que cette obligation puisse être mise en œuvre et exécutée.

IV. Résolution du litige

Coopération culturelle – Restitution sans condition

- Un premier traité bilatéral entre l'Ethiopie et l'Italie (Traité du 5 mars 1956) permettra de régler plus en détail les restitutions de biens culturels et notamment le cas de l'obélisque d'Axoum (Annexe C) : « Reconnaissant qu'il doit être restitué à l'Ethiopie, le Gouvernement italien s'engage à desceller le grand obélisque d'Axoum, actuellement érigé à Rome, et à en assurer le transport f.o.b. à Naples en vue de son transfert en Ethiopie. Le descellement et le transport f.o.b. à Naples devront être terminés dans un délai de six mois à dater de l'entrée en vigueur de l'Accord dont le présent document constitue l'annexe C. Les frais de l'opération seront à la charge du Gouvernement italien qui prendra les mesures nécessaires pour que ledit obélisque soit livré f.o.b. à Naples avec l'armature et l'emballage nécessaires pour pouvoir être acheminé vers l'Ethiopie ». Au titre de cette Annexe C, les obligations de l'Italie s'étendent à la remise de l'obélisque à Naples et aux frais consécutifs à cette remise napolitaine.
- Le 4 mars 1997 une déclaration conjointe des deux Etats est signée qui annonce, notamment, que la délégation éthiopienne se félicite de la volonté de l'Italie d'assumer la responsabilité du retour de l'obélisque à Axoum.
- Un protocole d'accord est signé le 18 novembre 2004 dont la teneur est la suivante : « Le Gouvernement italien transportera les trois sections de l'obélisque d'Axoum d'Italie en Éthiopie. Il veillera également à ce que le transport par voie aérienne des trois sections de l'obélisque de l'aéroport de Fiumicino jusqu'à l'aéroport d'Axoum soit effectué dans les meilleures conditions de sécurité (article I). Le Gouvernement italien sera responsable de toutes les opérations liées au déchargement des trois sections de l'obélisque de l'avion à l'aéroport d'Axoum (article II). Le Gouvernement italien s'engage à financer la remise en place et la restauration de l'obélisque au site archéologique Axoum, qui seront exécutées par

l'UNESCO avec l'assistance technique d'experts italiens en collaboration avec la partie éthiopienne (article VI). » Le protocole d'accord met à charge de l'Italie l'entier des frais et le rapatriement de l'obélisque. La responsabilité de l'Italie est même étendue puisque celle-ci assume aussi l'érection de l'obélisque alors qu'il se trouvait au sol lors de la saisie. L'accord prévoit aussi l'intervention de l'UNESCO. Ce qui peut s'expliquer par l'inscription du site d'Axoum au patrimoine mondial de l'humanité déjà en 1980 (http://whc.unesco.org/fr/list/15).

- Un contrat de droit privé est conclu entre l'entreprise de construction italienne et l'UNESCO. Le financement de l'opération est néanmoins assumé par l'Italie *via* une contribution extraordinaire au budget de l'UNESCO.

V. Commentaire

- L'obligation de retour à charge de l'Italie de l'obélisque à Axoum est-elle fondée sur une obligation de droit international coutumier ou sur la mise en œuvre du Traité de Paix de 1947 ? Quoiqu'il en soit de la résolution en droit de la problématique, l'historique de l'affaire montre le processus complexe comme la lenteur (nécessaire) à la cristallisation d'une solution acceptable aujourd'hui. Il semble même que l'Empereur Hailé Selassié ait consenti à échanger l'obélisque, sous forme de don, contre un hôpital dans les années 1970[1].
- L'obélisque est un bien culturel exceptionnel à plus d'un titre. Mais dans la perspective du retour, il ne faudrait pas sous-estimer les conditions techniques extraordinaires qui ont été nécessaires pour réussir le retour et leurs corollaires : le coût des opérations.
- La reconnaissance de l'importance de l'obélisque pour l'Ethiopie par l'Italie n'est pas évidente. En effet, le retour n'est pas simplement imposé par le Traité de Paix de 1947 mais aussi assumé par le truchement de la valeur culturelle d'un bien pour un peuple. Elle semble d'ailleurs un pré requis quant à toute négociation sur la propriété d'un bien culturel. Enfin, l'inscription d'Axoum sur la liste du patrimoine mondial est aussi très certainement un facteur important pour la création d'un contexte favorable au retour. L'Italie ne retourne pas seulement un bien culturel illégalement emporté, mais permet l'érection d'un obélisque sur un site rattaché au patrimoine mondiale de l'humanité ; érection qui d'ailleurs n'aurait jamais pu être réalisée sans l'intervention technique et financière de l'Italie. Ce qui compte au final c'est peut-être moins la règle de droit génératrice d'obligation de réparation que le lent processus de réconciliation qui passe notamment par des « entreprises » de retour multidimensionnelles.
- On pourrait reprocher à l'Italie d'avoir repousser d'un demi-siècle l'exécution d'une obligation qui lui incombait extensivement : retour à Axoum et frais y relatifs. Mais le Traité de 1956 ne le prévoyait pas. Quant à la charge reposant sur l'Ethiopie de procéder au retour à Axoum depuis Naples, elle excède très certainement le besoin culturel et politique lié au retour de l'obélisque.

[1] BELHUMEUR Jeanne, MIATELLO Angelo, SEVERINO Roberto, *Les atteintes aux biens culturels italiens pendant les conflits armés*, *in* « Les aspects juridiques du commerce international de l'art », BRIAT Martine et FREEDBERG Judith A., La Haye (Kluwer Law and Taxation) 1996, vol. 5, p. 185 ss.

- On ne saurait aussi oblitérer l'importance de la figure originale (contrat avec une entreprise italienne) qui a permis l'intervention de l'UNESCO. Il faudrait aussi pouvoir mesurer l'impact de la société civile (voir l'implication du Prof. Pankhurst).
- Le retour de l'obélisque est bien plus qu'une réparation. Le processus a très certainement permis la sédimentation d'une mémoire positive de l'humanité.

VI. Sources

a. Doctrine

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b. Documents (accords, etc.)

- Traité de Paix de 1947 entre l'Italie et les Puissances Alliées et Associées.
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- Déclaration conjointe de l'Italie et de l'Ethiopie du 4 mars 1997.
- Protocole d'accord entre l'Italie et l'Ethiopie du 18 novembre 2004.
- Contrat de droit privé entre l'UNESCO et une entreprise de construction italienne.

c. Législation

- Convention (II) de La Haye du 29 juillet 1899 concernant les lois et coutumes de la guerre sur terre et son Annexe : Règlement concernant les lois et coutumes de la guerre sur terre.
- Convention (IV) de La Haye du 18 octobre 1907 concernant les lois et coutumes de la guerre sur terre et son Annexe: Règlement concernant les lois et coutumes de la guerre sur terre.

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Reference: Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case Sammlung 101 – City of Bremen, Kunsthalle Bremen and Russia," Platform ArThemis (http://www.unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case Sammlung 101 – City of Bremen, Kunsthalle Bremen and Russia

Kunsthalle Bremen – Russia/Russie – City of Bremen – Artwork/oeuvre d'art – Spoils of war/butins de guerre – Diplomatic channel/voie diplomatique – Ad hoc facilitator/facilitateur ad hoc – Negotiation/négociation – Settlement agreement/accord transactionnel – Ownership/propriété – Exchange/échange

In the 1990s, Russia and the City of Bremen began to negotiate for the return of "Sammlung 101", a collection of 101 drawings. The drawings were transferred from the Kunsthalle Bremen (Bremen Art Museum) to Russia in the aftermath of the Second World War by a Soviet soldier. The negotiation resulted in the return of "Sammlung 101" to Bremen in exchange for a Florentine mosaic and a chest of drawers from the Amber Chamber. Both handover ceremonies took place in April 2000.

I. Chronology

Spoils of war

- **1943**: During the Second World War, the entire collection of the **Kunsthalle Bremen** (Bremen Art Museum) was evacuated to **the Castle of Karnzow** near Berlin for safekeeping (50 paintings, 1,715 drawings and about 3,000 graphic prints). The collection included the so-called **Bremen leaves collection** ("**Sammlung 101**"), which was comprised of 101 Old Master drawings (45 drawings and 56 prints) by Albrecht Dürer, Edouard Manet, Eugène Delacroix, Francisco de Goya and Henri de Toulouse-Lautrec.
- **1945**: The collection was found in a depository at the Castle of Karnzow by **Pjotr Barykin**, a former soviet soldier, who subsequently brought it to Moscow.
- **9 November 1990**: The Federal Republic of Germany and the former Soviet Union signed a **Treaty on Good Neighbourliness, Partnership and Cooperation**. Article 16(2) of the Treaty states that both parties "agree that lost or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their successors"[1].
- **16 December 1992**: The German and Russian Governments signed an **Agreement of Cultural Cooperation.** They confirmed their commitment to return all cultural objects which were lost or unlawfully transferred into their territory to their rightful owners or their legal successors (Article 15)[2].
- **1993**: **Sammlung 101** was handed over to the German Embassy in Moscow, awaiting an export permit[3].
- **21 April 1995**: The State Duma of the Russian parliament enacted a moratorium on further restitutions of cultural treasures brought to Russia as a result of the Second World War on the grounds that spoils of war transferred to Russia from Germany are Russian property[4]. The moratorium was valid until the implementation of Russian legislation regulating the matter accordingly[5].
- **1997**: The **Russian** Parliament passed the **Law on Cultural Valuables**. This declared that all cultural materials transferred to Russia as a result of the Second World War are **Russian national property**[6]. The law was adopted notwithstanding a veto by Boris Yeltsin,

[1] Treaty between the Federal Republic of Germany and the Union of Soviet Socialist, Republics on Good-Neighbourliness, Partnership and Cooperation, signed in Bonn, November 9, 1990, *ILM* 30 (1991): 504 et seq.
[2] Treaty between the Federal Republic of Germany and the Russian Federation on Cultural Cooperation (*Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Russischen Föderation über kulturelle Zusammenarbeit*) signed in Moscow, December 16, 1992, *Bundesgesetzblatt* Teil II (1993): 1256, accessed July, 28 2011, http://archiv.jura.uni-saarland.de/BGBl/TEIL2/1993/19931256.2.HTML.
[3] See Wolfgang Eichwede, "Trophy Art as Ambassadors: Reflections Beyond Diplomatic Deadlock in the German-Russian Dialogue," *International Journal of Cultural Property* 17 (2010): 395.
[4] Decree of the State Duma of the Federal Assembly of the Russian Federation, "On a moratorium on the return of cultural valuables displaced in the years of the Great Fatherland [Second World War]," April 2, 1995, no. 725-I GD. *Sobranie zakonodatel'stva* RF, 1995, art. 6. Ref. and transl. Patricia Kennedy Grimsted, F.J. Hoogewoud and Eric Ketelaar, *Returned From Russia: Nazi archival plunder in Western Europe and Recent Restitution Issues* (Pentre Moel, Crickadarn, UK: Institute of Art and Law, 2007), 300.
[5] Grimsted, Hoogewoud and Ketelaar, *Returned From Russia*, 300.
[6] Russian Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation, N 64-FZ, April 15, 1998, transl. by Konstantin Akinsha and Lynn Visson, "Project for Documentation on Wartime Cultural Losses," accessed August 8, 2011, http://docproj.loyola.edu/rlaw/r2.html.

president of Russia at that time[7]. Boris Yeltsin then took the law to the Russian Constitutional Court to have its conformity reassessed. Yeltsin argued that the law was incompatible with various provisions of the Russian Constitution and with international law, namely: (i) the principle of cooperation and the principle *pacta sunt servanda*; (ii) Article 4(3) of the UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict* of 1954 and Article I(3) of its First Protocol; (iii) the UNESCO *Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property* of 1964; and (iv) Article 11 of the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 1970.

- In the meantime, the mosaic panel **"Sense of Smell and Touch"** (1716) from Florence and a **chest of drawers** (18th century), which were probably looted during the Second World War in "Peter the Great's Amber Room" of the Catherine the Great Palace near St. Petersburg (Amber Chamber), were discovered and confiscated in Bremen and Berlin[8]. The discovery opened new ways for negotiation.
- **6 April 1998**: The **Russian Constitutional Court** rendered its decision stating that the President was obliged to sign the "**Federal Law on Cultural Valuables** Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation"[9]. The Court however did not completely foreclose "good-will gestures and exceptions to the rule" [10]. Boris Yeltsin signed the law on **15 April 1998.**
- **October 1999**: Negotiations between the Russian (including President Putin) and German governments regarding **Sammlung 101** began. A first attempt to exchange the art objects failed. The German Ministry for Foreign Affairs and the German Ministry for Media and Culture prevented the City of Bremen from acting unilaterally and insisted that Bremen should wait for contractual provisions from the federal level[11].

Another translation can be found in Wilfried Fiedler, "Documents - Russian Federal Law of 13 May 1997 on Cultural Values that have been Displaced to the U.S.S.R. as a Result of World War II and are to be Found in the Russian Federation Territory," *International Journal of Cultural Property* 7 No. 2 (1998): 514 – 525.

[7] Fiedler, "Documents - Russian Federal Law of 13 May 1997," 512. Decree of the Constitutional Court of the Russian Federation: "On the matter of the decision in the conflict between the Council of the Federation and the President of the Russian Federation, between the State Duma and the President of the Russian Federation on the imperative for the President of the Russian Federation to sign the approved Federal Law On cultural valuables displaced to the USSR as a result of the Second World War and located on the territory of the Russian Federation," (transl. Grimsted, Hoogewoud and Ketelaar, *Returned From Russia*, 300 , 6th April 1998, no. 11-P. *Sobranie zakonodatel'stva* RF, 1998, no. 16 (20 April), st. 1879, 3624-3628, accessed August 8, 2011, http://www.libfl.ru/restitution/law/law11.html.

[8] The mosaic was offered for sale at auction in Bremen on behalf of Hans Achtermann, the son of a former German soldier at the Eastern front, who obtained the mosaic in unknown circumstances (see Konstantin Akinsha, "Why Can't Private Art "Trophies" Go Home From the War?," *International Journal of Cultural Property* 17 (2010): 268). The Amber panels were allegedly looted from the Catherine the Great Palace by Hitler in 1941, brought to Germany and disappeared when they were stored in 1945 for safekeeping from the Russian invasion. Until their discovery in the 90s, their whereabouts remained unknown. The panel at stake in this case was stolen by a German soldier at the end of the war (see Jeanette Greenfield, *The Return of Cultural Treasures*, 3rd ed. (Cambridge: Cambridge University Press, 2007), 185 – 186).

[9] Translated by Konstantin Akinsha and Lynn Visson, "Project for Documentation on Wartime Cultural Losses" Accessed August 8, 2011, http://docproj.loyola.edu/rlaw/r2.html.

[10] See Eichwede, "Trophy Art as Ambassadors," 395.

[11] See Akinsha, "Why Can't Private Art "Trophies" Go Home From the War?," 269.

- **29 April 2000**: Trumping over federal diplomacy, Bremen organised an exchange. The **return ceremony for the confiscated Florentine mosaic** took place between the Director of the Palace-Museum of Tsarskoe Selo (Ivan P. Sautov), the German Minister for Media and Culture (Michael Naumann) and the Russian Minister of Culture (Mikhail E. Shvydkoi)[12].
- **30 April 2000**: The **101 drawings were handed over to** the custodian of **the Kunsthalle Bremen** (Willy Athenstädt) by the director of the Research Centre for East European Studies at the University of Bremen (Wolfgang Eichwede), who was involved in the negotiations[13].

II. Dispute Resolution Process

Diplomatic channel (Russia, Germany) – Ad hoc facilitator ("*Forschungsstelle Osteuropa*" headed by Wolfgang Eichwede) – Negotiation – Settlement agreement

- The restitution process of Sammlung 101 was very lengthy, mainly due to the uncooperative attitude of the Russian and German governments. **Russia openly denied the existence of the trophy art** until the early 1990s[14]. Until then, Germany was unaware of their location[15].
- During negotiations, both governments changed their attitudes. At first, Russia was cooperative and flexible on the terms of restitution. Germany insisted on affirming the illegitimate possession of the drawings on the part of Russia and on the legitimacy of its restitution claim. With the development of Russia as a nation, the country's politics hardened in the mid 1990s. It considered trophy art to be a rightful compensation for the losses sustained during the Second World War. At the same time, Germany increasingly realized there to be a need to adopt a more flexible position in order to obtain a settlement[16].
- A first step towards bilateral negotiations regarding the trophy art was the **bilateral treaties of 1990 and 1992**. By signing these treaties, both countries expressed their desire to "transform earlier confrontation and demarcation into a reliable partnership and to build a future in which the two countries [...] can develop forward-looking bilateral relations that fit smoothly into a merging, democratic Europe"[17]. Although the content of both treaties

[12] The Amber Room was restored in time for the city of Saint Petersburg 300th anniversary in 2003, funded to one-third by German corporate sponsorship. The opening ceremony was attended by President Vladimir Putin and Chancellor Gerhard Schröder (see Greenfield, *The Return of Cultural Treasures*, 186 and 188).
[13] Ibid; see also Kunsthalle Bremen Press Release, "Bremen – Moskau – Bremen. Die Sammlung 101. 1943 ausgelagert – zurückgekehrt 2000, " accessed August 12, 2011, http://www.kunsthalle-bremen.de/upload/Presse/Texte/PM_Sammlung101_neu.pdf.
[14] Lina M. Monten, "Case Notes and Comments: Soviet World War II Trophy Art in Present Day Russia: The Events, the Law and the Current Controversies," *DePaul Journal of Art and Entertainment Law* 15 (2004): 64.
[15] Ibid.
[16] See Osteuropa, "Freundschaft ja, Dürer nein. Wolfgang Eichwede über die Abgründe des Beutekunstrechtsstreits zwischen Russland und Deutschland," *Osteuropa* 56 (January – February 2006): 76.
[17] Armin Hiller, "The German-Russian Negotiations over the Contents of the Russian Repositories," in *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, ed. Elizabeth Simpson (New York: Harry N. Abrahams, Inc., 1997), 179.

somehow reiterated the content of existing international conventions, they served as an important basis for the German-Russian negotiations over looted cultural property[18].

- Very early, the Kunsthalle Bremen and the Federal State Government of Bremen realized that Russia could not be persuaded to return the stolen objects without Bremen giving something in return[19]. Therefore, they **commissioned the research institute "*Forschungsstelle Osteuropa*" of the Bremen University**, to study cultural war losses suffered by the Soviet Union[20]. The research also extended to losses caused by other countries than Germany.
- The German Federal Government favoured an opposite approach. This was based on the assumption that the cultural objects retained by Russia were unlawfully removed and hence should be returned to Germany without having to deliver something in return[21]. Ingrained in this attitude, the German Government missed several occasions to settle in the 1990s[22].
- Wolfgang Eichwede, head of the "*Forschungsstelle Osteuropa*", intervened in the negotiations on the Bremen side. He contacted the Russian Minister of Culture and asked how Bremen should proceed in order to obtain the return of the drawings. In its reply, the Russian Government required Bremen to prove their property title of the drawings[23]. When Bremen informed the German Federal Government on the initiation of confidential negotiations with Russia, the Federal Government stated that it would "remain outside"[24].
- Negotiations became increasingly difficult as Russia's approach toughened, following the implementation of a national law on cultural valuables[25]. Experts and diplomats realized the negative influence of the Russian law on negotiations and warned the German Government, but it was to no avail[26]. A settlement had to be found without triggering negative reactions from Russian nationalists.
- By finding the mosaic and the chest of drawers in 1997, the German Government obtained a valuable bargaining tool.
- The former head of *Deutsche Bank*, Wilhelm F. Christians, suggested "an informal, highly confidential round of talks"[27] between Germany and Russia and that the resulting settlement should be financially supported by German companies[28]. Two years later, in July 1999, the German firm *Ruhrgas* offered to bear the restoration costs for the Amber Chamber[29].
- In October 1999, diplomatic negotiations started between the Senate of Bremen and the Russian Ministry of Cultural Affairs regarding Sammlung 101. An agreement was reached in 2000[30] through Bremen's initiative and a legal backdoor[31].

[18] Ibid.
[19] Osteuropa, "Freundschaft ja, Dürer nein," 72.
[20] Ibid.
[21] Ibid, 73.
[22] Ibid, 74 and 76.
[23] See Akinsha, "Why Can't Private Art "Trophies" Go Home From the War?," 269.
[24] Ibid.
[25] Russian Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation, translated by Konstantin Akinsha and Lynn Visson, "Project for Documentation on Wartime Cultural Losses," accessed August 8, 2011, http://docproj.loyola.edu/rlaw/r2.html.
[26] Osteuropa, "Freundschaft ja, Dürer nein," 76.
[27] Eichwede, "Trophy Art as Ambassadors," 391.
[28] Ibid.
[29] Ibid.
[30] See Eichwede. "Trophy Art as Ambassadors," 395.

III. Legal Issues

Ownership

- The prevalent legal issue in this case was the **ownership title** to the loot held in both countries as a result of the spoliation carried out during the Second World War.

The German Position Based on International Law and on the Bilateral Treaties

- Germany argued that Russia's confiscation of art occurred in violation of international law[32]. In particular, Germany based its restitution claim on the Hague Convention of 1907[33]. It prohibited the seizure or destruction of cultural assets during war time (Article 23(g)). Therefore, Germany insisted on obtaining an unconditional restitution, considering that public international law had to be strictly observed[34].
- In addition, the two Russian-Germany treaties required the return of "lost or unlawfully transferred art treasures" (Article 16 of the Good Neighbourliness Treaty of 1990[35] and Article 15 of the Cultural Cooperation Agreement)[36]. However, the two States had a different understanding of the concepts "lost cultural property" and "unlawfully transferred"[37].
- Germany countered Russia's contention to retain cultural property on grounds of (unilateral) compensation with its unlawfulness according to international law, especially Article 53 in connection with Article 56 of the Hague Convention of 1907[38], Article 4 of the Hague Rules of 1954[39] and Article I(3) of the First Protocol of the Hague Convention of 1954[40]. It is,

[31] See chapter III below.
[32] See Monten, "Case Notes and Comments: Soviet World War II Trophy Art in Present Day Russia," 65.
[33] Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, October 18, 1907, accessed August 10, 2011, http://www.icrc.org/ihl.nsf/full/195.
[34] Osteuropa, "Freundschaft ja, Dürer nein," 76.
[35] Treaty between the Federal Republic of Germany and the Union of Soviet Socialist, Republics on Good-Neighbourliness, Partnership and Cooperation, signed in Bonn, 9 November 1990, *ILM* 30 (1991): 504 et seq.
[36] Treaty between the Federal Republic of Germany and the Russian Federation on Cultural Cooperation (*Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Russischen Föderation über kulturelle Zusammenarbeit*) signed in Moscow, 16 December 1992, *Bundesgesetzblatt* Teil II (1993): 1256, accessed 28 July 2011, http://archiv.jura.uni-saarland.de/BGBl/TEIL2/1993/19931256.2.HTML.
[37] See Hiller, "The German-Russian Negotiations over the Contents of the Russian Repositories," 177.
[38] Art cannot be seized as means of compensation (see Wilfried Fiedler, "Legal Issues Bearing on the Restitution of German Cultural Property in Russia," in *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, ed. Elizabeth Simpson (New York: Harry N. Abrahams, Inc., 1997), 178; Susanne Schoen, "Die Rückgabe der kriegsbedingt nach Russland verbrachten Fenster der Marienkirche aus politischer Sicht," in *Der Antichrist. Die Glasmalereien der Marienkirche in Frankfurt (Oder)*, ed. Ulrich Knefelkamp et al. (Leipzig: Edition Leipzig, 2008), 199. In 1939, the Hague Convention of 1907 "was the only comprehensive multilateral international agreement in effect in Europe dealing with the protection of cultural property during wartime" (Larry Kaye, Laws in Force at the Dawn of World War II: International Conventions and National Laws," in *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, ed. Elizabeth Simpson (New York: Harry N. Abrahams, Inc., 1997), 102).
[39] The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954. Art. 4 (3) commits contracting states to "undertake to prohibit, prevent and, if necessary, put a stop to any form of theft,

however, to be noted that the Hague Convention of 1954 and its Protocol are not applicable to events which occurred prior to their entry into force[41]. Moreover, Germany asserted that the idea of unilateral compensation was retained neither in Article 16 nor in Article 15 of the Treaties of 1990 and 1992[42].

The Russian Position Based on the National Law on Cultural Valuables

- Prior to the enactment of the Law on Cultural Valuables[43], Russia refused to relinquish cultural property considering the Soviet expropriation measures performed between 1945 and 1949 to be "part of the denazification, demilitarization and democratization plan of Germany"[44]. By signing the bilateral treaty of 1990, Germany and which Germany conceded being irreversible in singing the bilateral treaty of 1990; a contention which, however, has no foundation[45].
- The Russian Government's position is clearly evidenced by the content of the Law on Cultural Valuables. It justified the appropriation of looted objects as a compensation for the losses suffered during the war[46].
- Basically, according to Article 6 of Law on Cultural Valuables, "[a]ll displaced cultural valuables imported to the U.S.S.R in realization of its right to compensatory restitution and located on the territory of the Russian Federation […] **are the property of the Russian Federation and are federally owned**". The actual property prevails "irrespective of the actual possessor and the circumstances leading to this actual possession" (Article 3).
- One of the provided exceptions allowed Germany to file a claim for restitution if it showed that it "presents evidence of having filed a claim before [February 1, 1950]" (Article 8 (1)). In the present case, the German Government was unaware of the location of the drawings until 1990 and was therefore unable to file a claim in due time[47].
- The law merely guarantees the ownership rights of certain countries which were victims of German aggressions during the Second World War, namely Belarus, Latvia, Lithuania,

pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party."

[40] Ibid. Art. I(3) explicitly forbids the retention of cultural property as war reparation.

[41] See Andrea Gattini, "Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War," *European Journal of International Law* 7 (1996): 83.
Greenfield, Jeanette. *The Return of Cultural Treasures*, 3rd ed. Cambridge: Cambridge University Press, 2007.

[42] See Fiedler, "Legal Issues Bearing on the Restitution of German Cultural Property in Russia,"178.

[43] Russian Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation, N 64-FZ, April 15, 1998, transl. by Konstantin Akinsha and Lynn Visson, "Project for Documentation on Wartime Cultural Losses," accessed August 8, 2011, http://docproj.loyola.edu/rlaw/r2.html. Another translation can be found in Wilfried Fiedler, "Documents - Russian Federal Law of 13 May 1997 on Cultural Values that have been Displaced to the U.S.S.R. as a Result of World War II and are to be Found in the Russian Federation Territory," *International Journal of Cultural Property* 7 No. 2 (1998): 514 – 525.

[44] Gattini, "Restitution by Russia of Works of Art," 79 (referring to *Die vertraglichen Vereinbarungen zwischen Deutschland und Russland zur Ruckfiihrung kriegsbedingt verbrachter Kulturguter - Die Rechtslage aus deutscher Sicht,* Veröffentlichung des Ausw. Amtes (1994) n. 13-22).

[45] Ibid.

[46] See Monten, "Case Notes and Comments: Soviet World War II Trophy Art in Present Day Russia," 67-68; see also Osteuropa, "Freundschaft ja, Dürer nein," 76.

[47] Note that the time limitation has been abandoned with the amendment of the law on May 25, 2000 (Federal Law No 70-FZ 2000).

Moldova, Ukraine and Estonia (Article 7). Germany was excluded from the list of potential beneficiary countries.

- According to Wolfgang Eichwede, Director of the research institute "*Forschungsstelle Osteuropa*", who also intervened in the negotiations, both the Russian position based on the right to be compensated and the German position based on public international law deserved appreciation. During negotiations they were however played off against each other[48]. Russia alleged that its idea of compensatory restitution occurred not *during* the Second World War but *outside* the war, and would therefore not be governed by the Hague Convention of 1907[49]. Paradoxically, the Soviet Government made it difficult to ascertain the legitimacy of its ownership over German "trophy art", given its attitude of complete secrecy as to the existence and location of these cultural objects during almost 50 years since the end of the Second World War[50]. Its attitude has been criticized for being "not easily reconciled with the current will to regard the removed German cultural property as legitimately owned as reparations"[51].
- Ultimately, in the context of Sammlung 101, **the Russian Constitutional Court's decision** of 6 April 1998 indirectly facilitated the exchange by implementing three exceptions to the nationalization of cultural property in the 1998 law (Article 8). It explicitly reinforced property titles of states which were not allied with Germany, of religious organizations or private charitable institutions, and of individuals and private institutions which had suffered national socialist reprisal, such as the Kunsthalle Bremen, which is privately held since 1849[52].
- Russia officially accepted the exchange with the Kunsthalle by underlying that it was making an exception since the drawings "were stolen by an individual and not removed by Stalin's official teams of art-robbers"[53].

IV. Adopted solution

Exchange

- Germany returned the Florentine mosaic "Sense of Smell and Touch" (1716) and a chest of drawers (18th century), originally from the Amber Chamber of the Yekaterina Palace, to Russia. The Amber Chamber, heavily damaged during the war, was reconstructed thanks to the generous contribution of the German company *Ruhrgas*[54].

[48] See Osteuropa, "Freundschaft ja, Dürer nein," 76.
[49] See Amelia Borrego Sargent, "New Jurisdictional Tools for Displaced Cultural Property in Russia – From "Twice Saved" to "Twice Taken"," in *Yearbook of Cultural Property Law 2010*, ed. Sherry Hutt et al. (Walnut Creek: Left Coast Press, 2010), 190.
[50] Gattini, "Restitution by Russia of Works of Art," 82.
[51] Ibid.
[52] Sebastian Preuss, "Privatbesitz gilt wieder was in Russland," *Berliner Zeitung*, May 2, 2000, accessed August 12, 2011, https://www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2000/0502/feuilleton/0003/index.html.
[53] Ian Traynor, "Russian to Return Looted Art, But Not to Germany," *Guardian*, April 21, 2000, accessed August 12, 2011, http://www.guardian.co.uk/world/2000/apr/21/russia.iantraynor.
[54] See Sylvia Hochfield, "The German-Russian Stalemate," *ARTnews*, February 1, 2011, accessed March 5, 2012, http://www.artnews.com/2011/02/01/the-german-russian-stalemate/.

- In exchange, Russia returned Sammlung 101 to the Kunsthalle Bremen. In the agreement between the Russian Ministry of Culture and the City of Bremen, it was "specified that the panel would go back to Russia and that simultaneously the Russian side would give their permission for the drawings in the German Embassy to be returned to Germany legally"[55].

V. Comment

- Despite the overall diplomatic standstill between Russia and Germany on the issue of lost or displaced cultural property as a result of the Second World War, the return of Sammlung 101 was possible thanks to Bremen's local authorities[56]. They considered the case of Sammlung 101 as the first step for further negotiations regarding other looted artworks, such as the Baldin collection[57].
- During the years of negotiations, the German and Russian Governments had internal disagreements. The Duma repeatedly defeated the resistance of Boris Yeltsin. Bremen had to convince not only the Russian Government, but also the German Ministry for Foreign Affairs and the Naumann-office (Ministry for Media and Culture).
- The outcome of the dispute under consideration constitutes an interesting solution. However, the German Government did not want to make this case seem like an exchange[58]. As Eichwede communicated at the beginning of the negotiations, "[i]t wasn't an exchange but two independent developments at the same time"[59]. Later on, he admitted that he had denied the idea of an exchange in order to avoid any confrontation with the German Government and in particular with the Foreign Office[60]. Russia, on the other hand, suggested the exchange but was cautious not to evidence a reduction of its opposition to the restitution of war spoils.
- Russia is unlikely to return any additional trophy art, as it is doubtful whether Germany is in possession of Russian cultural property to offer in exchange.
- In November 2005, the Kunsthalle Bremen joined the initiative "*Deutsch-Russischer Museumsdialog*"[61]. It gathers 80 German museums and encourages the exchange of information, collaboration and access to the collections held in the museums of both

[55] Akinsha, "Why Can't Private Art "Trophies" Go Home From the War?," 269.
[56] Eichwede, "Trophy Art as Ambassadors," 388.
[57] To date, the two governments have not found an agreement regarding the Baldin Collection, which encompasses 362 drawings and two paintings from the Kunsthalle Bremen. Similarly to the present case, the artworks were secured by a Soviet officer, Baldin, during the Second World War and brought to Moscow. The representatives of the Russian and German governments were very close to reach an agreement, but protests by the Russian media and the Duma prevented them from doing so (See Eichwede, "Trophy Art as Ambassadors," 396; see also Konstantin Akinsha and Grigorii Kozlov, *Beutekunst: Auf Schatzsuche in russischen Geheimdepots* (Munich: Deutscher Taschenbuch Verlag, 1995), 289 et seqq.).
[58] Sebastian Preuss, "Privatbesitz gilt wieder was in Russland."
[59] Akinsha, "Why Can't Private Art "Trophies" Go Home From the War?," 269.
[60] Ibid.
[61] "Die Initiative Deutsch-Russischer Museumsdialog," Kulturstiftung der Länder, accessed August 12, 2011, http://www.kulturstiftung.de/aufgaben/deutsch-russischer-museumsdialog/.

States[62]. Collaboration would be intensified by the organisation of joint exhibitions and Russian museums hosting German experts[63].
- According to Wolfgang Eichwede, Germany could have reached a far more advantageous agreement regarding the other art objects retained by Russia, if it had been more cooperative in the beginning of the negotiations[64].

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[62] See Kunsthalle Bremen Press Release, "Bremen – Moskau – Bremen. Die Sammlung 101. 1943 ausgelagert – zurückgekehrt 2000," accessed August 12, 2011, http://www.kunsthalle-bremen.de/upload/Presse/Texte/PM_Sammlung101_neu.pdf.
[63] Ibid.
[64] Osteuropa, "Freundschaft ja, Dürer nein," 76.

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b. Court decisions

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c. Legislation

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Pre 1970 restitution claims
Demandes de restitution pre 1970

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October 2011

Reference: Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case Boğazköy Sphinx – Turkey and Germany," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case Boğazköy Sphinx – Turkey and Germany

Turkey/Turquie – Germany/Allemagne – Archaeological object/objet archéologique – Pre 1970 restitution claims/demandes de restitution pre 1970 – Ownership/propriété – Institutional facilitator/facilitateur institutionnel – Negotiation/négociation – Settlement agreement/accord transactionnel – Cultural cooperation/coopération culturelle – Unconditional restitution/restitution sans condition

In 2011, Germany decided to conclude the long running dispute concerning the "Boğazköy Sphinx" by voluntarily transferring to the Turkish Government the title of the sculpture. Turkey had submitted a restitution request with the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) in 1986.

I. Chronology

Pre 1970 restitution claims

- **1910s**: Over 10,000 cuneiform tablets and two Hittite statues of stone sphinxes were **discovered** at the Turkish archaeological site of Boğazköy under the auspices of the German Archaeological Institute.
- **1917**: These objects were **temporarily** sent to Germany to be cleaned, restored and catalogued. Between the two World Wars many items were sent back to Turkey, including one of the two sphinxes, but several others remained in Berlin at the Museum of the Ancient Near East (*Vorderasiatisches Museum*) and at the Pergamon Museum.
- **1986**: Turkey filed a restitution request with the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (**ICPRCP**).
- **1987**: The then German Democratic Republic **returned** 7,400 cuneiform tablets, but not the second so-called "Boğazköy Sphinx".
- **1987-2011**: **Negotiations** between the German and Turkish Governments regarding the sphinx intensified thanks to the "good offices" of the **ICPRCP**. The latest recommendation was adopted in **September 2010**, when the ICPRCP invited the parties "to hold comprehensive bilateral negotiations as soon as possible with a view to bringing this issue to a mutually acceptable solution".[1]
- **May 2011**: The parties reached an **agreement**. Following expert meetings in Ankara and Berlin in April and May 2011, Germany and Turkey signed a **memorandum of understanding** according to which "the statue will be handed over to Turkey as a voluntary gesture of friendship". The Boğazköy Sphinx had to be transferred to Turkey before 28 November 2011 to comply with the agreement.[2]
- **27 July 2011**: The Boğazköy Sphinx arrived in Istanbul.[3]

II. Dispute Resolution Process

Institutional facilitator (UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation) – Negotiation – Settlement agreement

- The Turkish Government had sought the return of the Boğazköy Sphinx uniquely by resorting to inter-governmental negotiation. In this sense, it filed a formal restitution request

[1] Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Sixteenth session, Paris, 21-23 September 2010, Doc. CLT-2010/CONF.203/C0M.16/5, Recommendation No. 2.
[2] Press and Information Office of the Federal Government Press Release, Turkey to Receive Hittite Sphinx, 13 May 2011.
[3] "Boğazköy Sphinx Finally Returns to Turkey after Decades in Germany," *Daily News*, July 28, 2011, accessed September 4, 2011, http://www.hurriyetdailynews.com/n.php?n=bogazkoy-sphinx-finally-returns-to-turkey-after-decades-in-germany-2011-07-28.

with the ICPRCP in 1987. Created in 1978, this permanent body is entrusted with the task of assisting UNESCO Member States in dealing with cases falling outside the framework of existing conventions, such as the disputes concerning historical cases of cultural objects lost as a result of colonial occupation. Although not endowed with jurisdictional powers, the ICPRCP may offer a framework for bilateral negotiations. The preference for negotiation derives from the belief that each claim is unique and can only be dealt with extra-judicially on a case-by-case basis.

- However, during negotiations the Turkish Government insisted that the statue be returned by threatening Germany with the disruption of existing scientific projects. This led a German archaeologist to say that excavations "had fallen victim to the ministry's 'extortionate demands' over the [Boğazköy] sphinx".[4] Therefore, it can be argued that it was the adoption of this aggressive strategy that convinced the German Ministry to return the Sphinx.

III. Legal Issues

Ownership

- The restitution claim of the "Boğazköy Sphinx" involved little legal questions. This is due to the fact that, although the origin of the statue was uncontested, many documents as to its provenance had been lost during the Second World War. Accordingly, neither of the parties could prove actual ownership, that is, whether the Sphinx was part of a *partage* agreement,[5] or whether it was transferred to Germany only temporarily for restoration and cataloguing purposes.

IV. Adopted Solution

Cultural cooperation – Unconditional restitution

- The agreement concluded in May 2011 by Germany and Turkey is similar to the accords with which other States have settled disputes over cultural objects. It provided that **the "Boğazköy Sphinx" had to be brought back to Turkey**. In particular, the agreement established that the statue would arrive in Turkey before 28 November 2011. This date is relevant for Turkey as it corresponds to the 25th anniversary of the inscription of Boğazköy as "Hattusha the Hittite Capital" on the List of the 1972 World Heritage Convention. Moreover, the agreement comprised a package of **bilateral cooperation** between the two States in the museum sector and on archaeological projects.[6] Instead, the earlier proposals to use replicas were rejected: "Germany proposed keeping the original Sphinx and having a replica made to give to Turkey. Turkey proposed the return of the Sphinx to Turkey and

[4] Susanne Güsten, "Turkey Presses Harder for Return of Antiquities," *The New York Times*, May 25, 2011, accessed July 25, 2011, http://www.nytimes.com/2011/05/26/world/europe/26iht-M26C-TURKEY-RETURN.html.
[5] According to *partage* agreements western museums and archaeologists were allowed by the host country to take a portion of the objects found in the course of an excavation for the reason that they had financed the mission.
[6] Press and Information Office of the Federal Government Press Release, Turkey to Receive Hittite Sphinx.

giving a replica to Germany. Neither proposal was accepted. The truth is that [...] only the original [work of art] has the aura or magic".[7]

- On the other hand, the agreement under consideration is dissimilar from most inter-States accords in that the German Government purposely avoided the use of the terms *return* or *restitution*. The agreement, in fact, simply provided that "the statue will be handed over to Turkey as a **voluntary gesture of friendship**".[8] The reason is that the German State did not want use terms that could entail that the statue had been wrongfully removed and that, accordingly, it bore the legal responsibility to return it.[9]

V. Comment

- The strategy used by Turkey to obtain the restitution of the "Boğazköy Sphinx" resembles the Italian aggressive campaign launched by the Italian Minister of Culture against US museums in the period 2006-2008. As recalled, not only had the Italian Ministry proposed to negotiate for the pending restitution requests. He also: (i) used the media to stress the wrongful removal of countless art objects from the Italian soil; (ii) underlined the unethical behaviour and the responsibilities of the US museums involved; and (iii) threatened to break off cultural relations with the museums unless disputed objects were returned. Eventually this strategy paid off. Quite clearly, this is due to the fact that loans and exchanges are the lifeblood of the international museum community. They constitute important means for museums to fulfil their educational mission and, above all, a major source of income.
- Similarly, the Turkish Government sought the return of the "Boğazköy Sphinx" by filing a request with the ICPRCP. As it is well known, this permanent body has no jurisdictional power to rule in disputes between States. Rather, it may act in an advisory capacity, thereby offering a framework for discussion and bilateral negotiations. In parallel, the Turkish Government stepped up its restitution campaign against Germany (and other market States). It did not threaten a cultural embargo. Turkey's Culture Ministry threatened Germany with the disruption of existing scientific projects, for instance the termination of excavation licenses. This occurred at the beginning of 2011, when the German Archaeological Institute lost its dig in the ancient Roman town of Aizanoi in western Turkey. This episode was seen by archaeologists and experts "as a warning shot in the restitution battle".[10]
- For Turkey, the return of the "Boğazköy Sphinx" symbolizes an important victory in the larger effort for the repatriation of the antiquities that had been removed in the distant past. However, this case must be distinguished from other inter-State disputes over cultural objects because the German Government has always been willing to settle the dispute. This is demonstrated by the fact that the German Government had proposed the use of replicas and that it had never rebuffed Turkish requests by relying on the arguments that are routinely used by market States and museums: the Turkish Government was not legitimized to request the return of the statue as the Turkish State was established only in 1922; the

[7] See Report of the Rapporteur Mr. Folarin Shyllon to the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, Sixteenth Session, Paris, 21-23 September 2010, Doc. CLT-2010/CONF.203/COM.16/8, October 2010, 2.
[8] Press and Information Office of the Federal Government Press Release, Turkey to Receive Hittite Sphinx.
[9] Federal Government Commission for Culture and the Media, personal communication, July 2011.
[10] Güsten, "Turkey Presses Harder for Return of Antiquities".

creators were not the ancestors of the claimants; the repatriation of cultural objects may undermine or limit their public accessibility and security.

- In light of the above considerations, it appears that the case of the "Boğazköy Sphinx" was not settled earlier due to a complex array of reasons, chiefly the lack of documentation and historical events – such as the two World Wars and the Cold War (the museum where the Sphinx was stored was in East Berlin).[11] These factors made the issue of restitution a difficult one at a time when the climate of cooperation that nowadays pervades inter-State relations with respect to cultural heritage had not yet developed.

VI. Sources

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Reference: Alessandro Chechi, Liora Aufseesser, Marc-André Renold, "Case Machu Picchu Collection – Peru and Yale University," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case Machu Picchu Collection – Peru and Yale University

Peru/Pérou – Yale University – Archaeological objects/objet archéologique – Pre 1970 restitution claims/demandes de restitution pre 1970 – Ownership/propriété – Statute of limitation/prescription – Ad hoc facilitator/facilitateur ad hoc – Diplomatic channel/voie diplomatique – Judicial claim/action en justice – Negotiation/négociation — Settlement agreement/accord transactionnel – Cultural Cooperation/coopération culturelle – Conditional restitution/restitution sous condition

Between 1912 and 1916, Hiram Bingham, a history professor at Yale University, shipped to the United States several artefacts that had been excavated at the Machu Picchu site with the authorization of the Peruvian Government. Peru formally requested restitution in 1918 and 1920, but to no avail. In 2001, negotiations between Peru and Yale University resumed. However, the resulting accord discontented the Peruvian Government. As a result, Peru filed suit in the United States against Yale University seeking the return of the collection and damages. In November 2010, the parties signed an agreement on the return of the Machu Picchu collection to Peru. As part of that accord, Yale University and the Universidad Nacional de San Antonio Abad del Cusco (UNSAAC) established the UNSAAC-Yale University International Centre for the Study of Machu Picchu and Inca Culture.

I. Chronology

Pre 1970 restitution claims

- **1911 and 1915**: **Hiram Bingham III**, an explorer and history professor at Yale University, conducted **three archaeological expeditions** in the archaeological site of **Machu Picchu** with the support of **Yale University** and of the **National Geographic Society** of the United States and the **authorization of the Peruvian Government**.[1] From the Peruvian Government, Bingham also received free use of the State telegraph system, duty free entry into Peru, and a Peruvian military escort.[2] Between 1912 and 1916, Bingham shipped to the US several crates containing **over 4,000 artefacts** (including mummies, bones, jewellery and pottery). Ever since, the relics have been in the possession of Yale University's Peabody Museum of Natural History.[3]
- **1918-1920**: The Peruvian Government **requested the return of the artefacts** exported by Bingham with two formal claims, dated 22 November 1918 and 26 October 1920, addressed to the National Geographic Society.[4]
- **1921**: **Yale returned** some artefacts, although "the most valuable and archaeologically significant artefacts [...] remain[ed] in the custody [...] of Yale".[5]
- **2001:** The Peruvian Government **requested the return of the Machu Picchu collection** by approaching both Yale University and the National Geographic Society. While the latter was favourable to the return of the collection, Yale refused and launched a touring exhibition on "Machu Picchu: Unveiling the Mystery of the Incas" in **2003**.[6]
- **14 September 2007**: The Government of Peru and Yale University reached an **agreement**.[7] However, **it was not finalized**.
- **December 2008**: As the 2007 agreement fell through, **Peru filed suit in the District of Columbia District Court** seeking the return of the collection and damages. Peru's claim relied on seventeen causes of action, including violation of Peruvian law, breach of contract, unjust enrichment and fraud.[8]
- **July 2009**: The **case was dismissed on procedural grounds** as the District Court of Columbia upheld Yale University's claim that it had no jurisdiction.[9] Accordingly, the **lawsuit was transferred to the District Court for the District of Connecticut** where Yale University's campus is located.[10]

[1] During the first expedition no excavation was conducted, the visit mainly served to clean, photograph and document the site. Rosemary Listing, "The Treasure Quest: Peru, Machu Picchu and the Yale Peruvian Expedition of 1911-1916," *Art Antiquity and Law* (2011): 67, 70.
[2] Stephanie Swanson, "Repatriating Cultural Property: The Dispute between Yale and Peru Over the Treasures of Machu Picchu," *San Diego International Law Journal* 10 (2008-2009): 469, 471-473.
[3] Ibid., p. 470.
[4] *Republic of Peru v. Yale University*, First Amended Complaint, No. 1:08-CV-02109, 20 April 2009, paras. 114-119.
[5] Ibid., para. 121.
[6] Listing, "The Treasure Quest," 76.
[7] Memorandum of Understanding between the Government of Peru and Yale University, September 14, 2007.
[8] *Republic of Peru v. Yale University*, No. 1:08-CV-02109, Original complaint, 5 December 2008.
[9] *Republic of Peru v. Yale University*, No. 1:08-CV-02109, Order granting motion to transfer the case to Connecticut, 30 July 2009.
[10] *Republic of Peru v. Yale University*, 3:09-cv-01332, 8 November 2009.

- **February 2010**: Peru withdrew six of its seventeen charges against Yale University. The 6 dismissed charges accused Yale University of fraud and conspiracy with Bingham for deceiving Peru into believing the artefacts would be returned. The remaining charges alleged unlawful export, wrongful retention of the works and, above all, **unjust enrichment**: Peru intended to recover the objects contested as well as the commercial and financial profits gained by Yale through the exploitation of the Machu Picchu collection.[11]
- **23 November 2010**: The Republic of Peru and Yale University signed a **Memorandum of Understanding** thanks to the intervention of US Senator Christopher Dodd.[12] According to this agreement Yale undertook to return all artefacts to Peru upon completion of an inventory.[13]
- **December 2010:** A series of meetings were held between Yale and the Universidad Nacional de San Antonio Abad del Cusco (UNSAAC) "to guide the return of the Materials and to ensure their preservation and the continuation of scientific research through a program of ongoing collaboration".[14]
- **11 February 2011**: Yale University and the Universidad Nacional de San Antonio Abad del Cusco (UNSAAC) signed a **partnership agreement establishing the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture**.[15]

II. Dispute Resolution Process

***Ad hoc* facilitator – Diplomatic channel – Judicial claim – Negotiation – Settlement agreement**

- The Peruvian Government has been concerned with the restitution of the Machu Picchu collection from the very beginning. In 1918 and 1920, it sought the return of the collection by submitting formal requests based on Peruvian laws.[16] Although the collection was not repatriated, the Peruvian Government submitted a new request only in 2001. However, while the National Geographic Society was favourable to return the collection, Yale refused, saying it had fully complied with Peruvian legislation.[17]
- Between 2003 and 2007, the Peruvian Government reinforced its efforts to negotiate. This was due to the determination of the then Peruvian President Alejandro Toledo**,** who made it a priority to pressure Yale University to release the pieces. In addition, the Peruvian claim gained momentum from to the wave of disputes launched by the Italian Government to

[11] Egidio Di Benedetto, "Peru Drops Six Charges in Suit," *Yale Daily News*, March 22, 2010, accessed November 3, 2011, http://www.yaledailynews.com/news/2010/mar/22/peru-drops-six-charges-in-suit/.
[12] Listing, "The Treasure Quest," 78; see also John Christoffersen, "Senator Christopher Dodd Says Artifacts Held by Yale Belong to Peru," *Artdaily.org*, June 10, 2010, accessed June 30, 2010, http://www.artdaily.com/index.asp?int_sec=2&int_new=38572.
[13] Memorandum of Understanding Regarding the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture, February 11, 2011.
[14] Ibid.
[15] Ibid. See also Andrew Princz, "Machu Picchu Collection Is Peru-Bound," *The Art Newspaper*, March 7, 2011, accessed March 31, 2011, http://www.theartnewspaper.com/articles/Machu+Picchu+collection+is+Peru-bound/23368.
[16] *Republic of Peru v. Yale University*, First Amended Complaint, No. 1:08-CV-02109, 20 April 2009, paras. 114-116.
[17] Rupert Cornwell, "Peru Tells Yale It Wants Its Machu Picchu Treasures Back (after 100 Years)," *The Independent*, February 3, 2006, accessed July 14, 2011, http://www.independent.co.uk/news/world/americas/peru-tells-yale-it-wants-its-machu-picchu-treasures-back-after-100-years-465452.html.

recover prized classical antiquities from certain US museums.[18] As a result, a preliminary settlement agreement was concluded in 2007,[19] whereby the University undertook to transfer legal title to all the artefacts to Peru, while retaining possession of some of them. However, despite broad statements of cooperation and good will from both sides, this agreement was not implemented. The Peruvian Government affirmed that it was unfavourable to the country and its cultural heritage.[20] It also did not accept Yale's insistence that the University had valid title and that the return was the result of a magnanimous act on its part. More precisely, the parties failed to agree on which artefacts could remain at the Peabody Museum.[21] In effect, Yale had unilaterally introduced in its draft agreement the criterion of "museum quality" of the pieces in order to select the objects that could be returned.[22]

- Following the failure of the 2007 agreement, Peru formally withdrew from negotiations and filed suit at the District Court for the District of Columbia alleging that Yale University's continued possession of the Machu Picchu artefacts violated Peruvian Law.[23]
- However, in late 2010, Peruvian stance changed as the Government dropped the lawsuit and returned to the negotiation table. This was mostly due to the intervention of Christopher Dodd, a US Democratic Senator of Connecticut, member of the Senate Foreign Relations Committee and chairman of its subcommittee on Latin America. He met many times with Peruvian President Alan Garcia and other government officials as well as with Yale representatives to facilitate a settlement of the dispute.[24] Crucially, in a statement Senator Christopher Dodd said: "These artifacts do not belong to any government, to any institution or to any university – they belong to the people of Peru. I plan to work with both parties to resolve this dispute quickly, amicably, and return the artifacts to their rightful owners".[25] His intervention led to the conclusion of the Memorandum of Understanding of 23 November 2010 and to the Partnership Agreement of 11 February 2011. With the latter, the parties agreed on the establishment of the UNSAAC-Yale University International Centre for the Study of Machu Picchu and Inca Culture in Cusco, Peru.

III. Legal Issues

Ownership – Statute of limitation

- The controversy over the Machu Picchu collection between Peru and Yale University was something of a test case as it did not originate from the classical events of theft, illicit exportation or spoliation under foreign domination, i.e. colonization or armed occupation.

[18] Hugh Eakin, "Inca Show Pits Yale against Peru," *The New York Times*, February 1, 2006, accessed November 3, 2011, http://www.nytimes.com/2006/02/01/arts/design/01mach.html?pagewanted=all.
[19] Memorandum of Understanding between the Government of Peru and Yale University, September 14, 2007.
[20] Swanson, "Repatriating Cultural Property," 491-492.
[21] Ibid., 486-491.
[22] Ibid.
[23] *Republic of Peru v. Yale University*, No. 1:08-CV-02109, Original Complaint, 5 December 2008.
[24] Christoffersen, "Senator Christopher Dodd Says Artifacts Held by Yale Belong to Peru."
[25] Daniel Hernandez, "Yale Agrees to Return Machu Picchu Artifacts to Peru, Ending Dispute," *Los Angeles Times*, November 22, 2010, accessed November 3, 2011, http://latimesblogs.latimes.com/laplaza/2010/11/peru-yale-artifacts-dispute-inca.html.

Moreover, this dispute raised interesting questions pertaining to, *inter alia*, recognition of sovereign authority over national cultural heritage and limitation periods.

- The **first legal issue** that is necessary to discuss is that of **ownership**. This issue should be examined in light of the pertinent Peruvian legislation. At the time of the Bingham expeditions, the most relevant legal texts were the Civil Code of 1852 and the Supreme Decree of 27 April 1893.
    - Article 522 of the Civil Code provided that all treasures and other buried objects that are found on vacant or public property belong to the finder.[26]
    - The Supreme Decree of 1893 was aimed to preserve the archaeological objects found in the territory of the Republic of Peru. Its Article 1 acknowledged that its aim was to prevent the mutilation, excavation and removal of artefacts from Peruvian sites. Further, Article 6, part 2, of the Decree forbade exploration or excavation of archaeological sites in Peru. It also declared that any site which may be found within the national territory was declared national monument. Finally, Articles 3 and 4 of the 1893 Decree established that permission to conduct excavations in Peru could be granted only by the National Conservation Commission.[27]
    - The above-mentioned Article 6, part 2, was added to the 1893 Supreme Decree with a Decree of 2 September 1911, issued by the then President of Peru Augusto Leguia. The decree of 1911 declared all Incan monuments to be "national property" and that only duplicates of objects could be taken out of the country.[28]
    - Bingham was allowed to conduct excavation with a Decree of 31 October 1912, issued by the then President of Peru Guillermo Billinghurst. The Decree acknowledged that the permission requested was contrary to the 1893 Decree, but allowed Bingham to conduct the excavations in the Department of Cuzco as an exception (and retrospectively), until December 1912. The Decree also contained certain conditions. The most important of these was that the Government of Peru reserved to itself the right to request from Yale University and the National Geographic Society the return of the unique specimens and duplicates. Furthermore, a "working agreement" was annexed to the 1912 Decree. This constituted an official contract according to which Bingham had to place at the disposal of the Consul of Peru in New York all archaeological or geological specimens that have been exported from Peru within two years of the date of their arrival.[29]
    - On 17 January 1916 a new decree was issued. This concerned the exportation of the artefacts found during Bingham's third expedition, which took place between 1914 and 1915. This decree stated "that all the excavated materials would be brought to Lima for examination at the National Museum before anything was shipped to Yale, and that all materials would be recognized as national property of Peru and would be returned upon request".[30] Therefore, this Decree allowed the exportation of the objects excavated after 1912, notwithstanding the terms of the decree of 1911. However, the 1916 decree also established that such materials constituted national

[26] Swanson, "Repatriating Cultural Property," 483.
[27] Listing, "The Treasure Quest," 69-70.
[28] Ibid.
[29] Ibid., 74-75.
[30] Swanson, "Repatriating Cultural Property," 480.

property of Peru and that Yale University and the National Geographic Society "pledge to return, in the term of eighteen months from [the date of issue], the artefacts whose export had been authorized".[31]

- In light of the above, it is clear that Peru did have laws in force at the time of Bingham expeditions governing archaeological finds and vesting ownership of any artefacts unearthed from Peruvian soil in the State.
- In spite of the above, Yale rebuffed all restitution requests. At first, Yale simply postponed a response. Subsequently, it asserted that all artefacts exported by Bingham had been repatriated at the beginning of the 1920s. Next, Yale claimed that the artefacts have been permanently transferred to Yale University pursuant to Article 522 of the 1852 Civil Code, which provided that all treasures and other buried objects that are found on vacant or public land belong to the finder. In addition, the University argued that both the 1911 and 1912 decrees were invalid because they were based on the 1893 decree that had been previously voided.[32]
- Peru countered the argument that ownership had passed to Yale by asserting that the items had been simply loaned and subject to a demand for return at will. It did so by continuously upholding the validity of the decrees of 1911, 1912 and 1916.[33]

- The **second legal issue** to be pointed out concerns the **timeliness of the legal action**. It was evident that the relevant statutes of limitations barred Peru's legal action in the courts of Columbia and Connecticut, since the artefacts were removed prior and after 1916.[34] However, this issue was never discussed in court as the lawsuit was discontinued.

IV. Adopted Solution

Cultural Cooperation – Conditional restitution

- The Memorandum of Understanding of 23 November 2010 and the Partnership Agreement of 11 February 2011 were functional to the repatriation of the collection. As they stand, these agreements offer concrete incentives for both sides. On the one hand, they offer the opportunity to enter into a partnership to help protect and study Peruvian cultural heritage. On the other hand, the agreements help enrich American cultural life through research, educational programs and loans.
- In concrete terms, the parties did not simply agree on the restitution of the contested artefacts: Yale University and the Universidad Nacional de San Antonio Abad del Cusco **established the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture**. This jointly administered Center includes a museum exhibition space, a storage site for archaeological artifacts, a laboratory and a research area. The accord outlines the essential functions of the Center, which include the preservation of the artefacts, making the objects available for study and to the public and promoting research through

[31] Ibid.
[32] Ibid., 483-484.
[33] Ibid.
[34] In particular, Connecticut has a fifteen-year statute of limitations regarding adverse possession and a six-year statute of limitations for breach of contract (ibid.).

conferences. The agreement also creates a framework for academic exchange between Yale University and UNSAAC, including fellowships and support for visiting scholars. Finally, the accord establishes that, in recognition of Yale's historic role in the scientific investigation of Machu Picchu, the Center will loan a small number of artefacts for display at the Yale Peabody Museum of Natural History.[35]

V. Comment

- From a strictly legal point of view, the case of the Machu Picchu collection was quite straightforward: although the Peruvian legislation in force at the relevant time vested title to the artefacts unearthed from Peruvian soil in the State and provided for the return of the objects exported by Bingham, Peru had no legal means to oblige Yale to return the contested artefacts because of the relevant statutes of limitation had elapsed.
- Moreover, the treaties adopted under the aegis of UNESCO, that is, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (1970 UNESCO Convention) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 (1995 UNIDROIT Convention), were inapplicable *rationae temporis*.
- In spite of the above, it was evident that Yale's manifest disregard of Peruvian legislation was inconsistent with the trend of repatriation which developed at the beginning of the 2000s mostly as a result of UNESCO's standard-setting activity – regardless of the fact that legal technicalities allowed it to retain the collection.
- It is interesting to note that the stance maintained by Yale University was at variance with the principles contained in the 1970 UNESCO Convention and 1995 UNIDROIT Convention. First, one of the recitals of the 1970 UNESCO Convention reads: "cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles". Second, Article 2 of the 1970 UNESCO Convention states that, besides the illicit import or export of cultural property, the "impoverishment of the cultural heritage of the countries of origin of such property" is also caused by the "transfer of ownership". Third, Article 3(2) of the 1995 UNIDROIT Convention states that "a cultural object which has been [...] lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place".
- Moreover, although Peru had no legal means to oblige Yale to return the collection, there existed several arguments that compelled the University to repatriate Peru's cultural heritage. Apart for the public sentiment – the movement for repatriation had spurred popular protests and initiatives in both Peru and the United States – there were ethical considerations. In this respect it is worth mentioning that the International Council of Museums (ICOM) Code of Ethics establishes that museums must not acquire "by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held" (Principle 2.2). It further provides that museums should be prepared to develop partnerships and "to initiate dialogues for the return of cultural property to a country or

[35] See Memorandum of Understanding Regarding the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture, February 11, 2011.

people of origin" (Principles 6.1 and 6.2). This is particularly important when it "can be demonstrated [that cultural objects] have been exported or otherwise transferred in violation of the [law], and shown to be part of that country's or people's cultural or [...] heritage" (Principle 6.3). Still with regards to ethics, it is worth considering that Bingham as well as the National Geographic Society of the United States did not support Yale's retentionist approach as they had affirmed that the contested objects belonged to the Peruvian Government.[36] In this regard, it is also worth mention that the preamble and Article 2 of the 1970 UNESCO Convention stress that "international co-operation constitutes one of the most efficient means of protecting each country's cultural property".

- In summary, it can be argued that Yale ultimately agreed to resolve the case by negotiating an accord in order to avoid reputational harm and build a *cooperative partnership* based on mutual benefit. In effect, the creation of the UNSAAC-Yale University International Center appears to be an ideal compromise. Richard C. Levin, President of Yale University, explained that "[t]his agreement ensures the expanded accessibility of these Machu Picchu collections for research and public appreciation in their natural context and with the guidance of two great universities".[37] In addition, the agreement reached by the parties also represents a suitable solution to recognize Yale's custodianship of the pieces, that is, of the funds and efforts poured into preservation, study and exhibition over the past ninety years. One can only agree with Richard Burger, a Yale University professor, that "[...] the courts were not the best venue to decide this [case]" and "that the agreement will be a milestone in international archaeological restitution cases, and that the resulting academic, scientific and institutional outcomes could be emulated in similar situations".[38]

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[36] Listing, "The Treasure Quest," 67 and 76.
[37] Christoffersen, "Yale Agrees to Return Incan Artifacts to Peru."
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Raphael Contel
Marc-André Renold

March 2012

Reference: Caroline Renold, Raphael Contel, Marc-André Renold, "Case Murals of Teotihuacan – Fine Arts Museums of San Francisco and Mexican National Institute of Anthropology and History," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case Murals of Teotihuacán – Fine Arts Museums of San Francisco and Mexican National Institute of Anthropology and History

Fine Arts Museums of San Francisco – De Young Museum – Mexican National Institute of Anthropology and History – Mexico/Mexique – Archaeological object/objet archéologique – Pre 1970 restitution claims/demandes de restitution pre 1970 – Judicial decision/décision judiciaire – Negotiation/négociation – Settlement agreement/accord transactionnel – Illicit excavation/fouille illicite – Enforcement of foreign law/applicabilité du droit public étranger – Cultural cooperation /coopération culturelle – Shared custody/Co-possession

Illegally exported murals from Teotihuacán were bequeathed to the Fine Arts Museums of San Francisco in 1976. After an unfruitful litigation in the United States, negotiations were conducted in order to find an acceptable solution on moral, ethical and legal grounds for the museums involved. An agreement was reached in 1984 that provided for joint custody and scientific collaboration between the museums for the conservation of the murals.

I. Chronology

Pre 1970 restitution claims

- **1934**: Mexico enacts the *Ley sobre protección y conservación de monumentos arqueológicos e históricas, poblaciones tipicas y lugares de belleza natural*[1], according to which all archaeological goods found on Mexican territory are the property of the federal State.
- **1960s**: **Murals coming from Teotihuacán[2] bought in Mexico by Harold Wagner**, a San Francisco architect and collector who fell in love with Mexico. As under the 1934 law, the Murals were Mexican national property. **Wagner** needed permission to export the Murals, but no trace of an export permit could be found.[3]
- **1971**: Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties[4].
- **1972**: US Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals[5], and Mexican *Ley federal sobre monumentos y zonas arqueológicos, artísticos e históricas*[6](replacing the 1934 *Ley federal*).
- **1976**: **Death of Harold Wagner**. His will contains a **bequest of the Murals to the de Young Museum, one of the Fine Arts Museums of San Francisco,** under the condition that they pay for the cost of his estate (an illegal request under US inheritance law).
- **July 1978**: Aware of the legal and ethical complications regarding the ownership of the mural, the de Young Museum – through its director, Mr. Seligman – contacts the Mexican authorities to discuss possible solutions, through the Consul General in San Francisco, who puts the National Institute of Anthropology and History (INAH) in touch with the San Francisco museums.
- **1978**: **The Mexican government requests the US Attorney General to block the probation of the will** in California Courts by proceedings in US Federal District Courts requesting the return of the Murals to Mexico under the 1971 Treaty of Cooperation[7].
- **Late 1978**: **US Federal District Courts reject the Mexican demand to block the probation of the will**, refusing to retroactively apply the Treaty of Cooperation to the

[1] Mexico, *Ley sobre protección y conservación de monumentos arqueológicos e históricas, poblaciones tipicas y lugares de belleza natural*, January 9, 1934, 82 D. O. J25.
[2] Teotihuacán is a world-famous archaeological site, just outside Mexico City. The name means 'City of the Gods' and the civilization dates back to 0 A.D – 600 A.D.
[3] For a very complete overview of the history of the murals and of how they came into Harold Wagner's possession, see Ron Russel, "Looted: Rare Murals from Mexico, plundered from an ancient site, were donated to the de Young Museum by an intriguing S.F. character", *San Francisco Weekly* 25, no. 31 (August 30, 2006): 17-23, accessed June 23, 2011, http://www.sfweekly.com/content/printVersion/321933/.
[4] Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, 22 U.S.T.S. 494, T.I.A.S. n. 7088, 1971.
[5] U.S. Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, October 27, 1972, Public Law n. 92-587, 19 U.S.C. §§ 2091ff, 1972.
[6] Mexico, *Ley federal sobre monumentos y zonas arqueológicos, artísticos et históricas*, May 6, 1972, D.O. May 6, 1972.
[7] *Ibid.*

export of the Murals which took place in the sixties[8]. The will is thus probated in California States Courts and the Attorney General fails to move the issue to Federal Courts.

- **Late 1978: Probation of the will**. The other heirs do not contest the bequest on the basis of the need to pay the costs of the estate, because of the legal and ethical problems involved. The Murals become the property of the County of San Francisco, and thus cannot be given away without obtaining something of equivalent value according to the San Francisco City Charter.
- **Late 1978**: **Negotiations** with the INAH are pursued (mutual visits to Mexico and to San Francisco, expertise of the murals, etc.)
- **1979**: **Agreement on a ten-point approach** between INAH and the Fine Arts Museums of San Francisco concerning: the joint care of the Murals, the voluntary return to Mexico of some of the Murals, possibility of a series of joint educational and exhibition programs with INAH[9].
- **May 1979: Final draft of an agreement** with INAH's lawyer.
- **May 1979 to February 1980**: **INAH is out of contact.**
- **February 1979**: García Cantú, **Director General of INAH, sends a letter to the de Young Museum requesting the return of all Murals at the cost of the San Francisco museum** – in opposition to all previous negotiations. In Thomas K. Seligman's interpretation, the negotiated solution was not defendable in Mexico for the INAH administration that thus had to propose an alternative solution[10].
- **7 December 1981**: **New agreement in four points** whereby the San Francisco museums agrees to voluntarily return to Mexico a minimum of fifty percent of the Murals "to create a positive moral climate and precedent"[11]. INAH is to pay for transportation. Educational programs are to be developed in San Francisco, Murals to be exhibited in Mexico and the US with credits noting each other's participation, and future joint exhibitions will be organised[12].
- **Late 1982: Change in government in Mexico**, the new INAH administration shows little interest in the case of the Murals.
- **January 1984**: Meeting between M. Seligman and Dr. Florescano – new Director of INAH – who recognised the validity of the agreement.
- **May 1984:** First joint exhibition in San Francisco which includes a viewing of the restoration process. Conservators from Mexico come to work in San Francisco.
- **1984-1985:** Disagreements on the conservation technique for the Murals.
- **February 1986:** Both parties agree on the conservation technique and **60/70% of the Murals are returned to Mexico**. The best pieces were however kept in the US. This was

[8] Printed decision unavailable.
[9] Thomas K. Seligman, "The Murals of Teotihuacán: A Case Study of Negotiated Restitution", in *The Ethics of Collecting Cultural Property*, ed. Phyllis Mauch Messenger (New Mexico: University of New Mexico Press, 1999, 2nd edition), 79.
[10] *Ibid*, 79.
[11] *See* Seligman, "The Murals of Teotihuacán: A Case Study of Negotiated Restitution", 80.
[12] Seligman, "The Murals of Teotihuacán: A Case Study of Negotiated Restitution", 80. Text of the Agreement under IV. Adopted Solution.

because Mexico already had many important pieces not available to the general public, whilst the US had few important pieces of Teotihuacán.[13]

- **February 1986**: Ten years to the death of Harold Wagner, Mexico inaugurates an exhibition on the Teotihuacán Murals.

II. Dispute Resolution Process

Judicial decision – Negotiation – Settlement agreement

- The Mexican government first tried to claim ownership of the Murals by **litigating** in the US Courts under the US-Mexico Cooperation agreement. The failure of this litigation – due to lack of legal rights under US law – pushed the Mexican government to negotiate with the administration of the Fine Arts Museums of San Francisco, who had by then acquired ownership under US law.
- Negotiations lasted from 1978 to 1984 and involved flexibility and mutual understanding from both parties. The Fine Arts Museums of San Francisco decided to negotiate with INAH on a purely voluntary basis as under US law they were the rightful owners of the Murals. The main reason behind this decision was that the museum felt that the complicated ethical and moral situation exceeded the legal dispute, and that they had a duty to find an acceptable compromise which would ensure the best preservation and possibilities for studying the Murals[14].

III. Legal Issues

Illicit excavation – Enforcement of foreign law

- **Issue of the ownership of the Murals**: Under a 1934 Mexican Law, all archaeological goods automatically became the property of the Mexican State wherever they were found[15] : "(a)ll immovable archaeological monuments belong to the nation. Objects which are found (in or on) immovable archaeological monuments are considered as immovable property, and they therefore belong to the Nation"[16]. Private ownership of the Murals was not prohibited and an export permit was needed to take them out of Mexico. No trace of this permit was ever found. Under US law, the will was valid and the Fine Arts Museums of San Francisco therefore became the rightful owner of the Murals. The question of ownership could not be

[13] Kathleen Berrin, "San Francisco, le Mexique et les peintures murales de Teotihuacán", *Museum International* 235 (2007): 15-16, accessed June 23, 2011, http://portal.unesco.org/culture/en/files/34885/11974725625235FR.pdf/235FR.pdf.

[14] John Henry Merryman, Albert E. Elsen and Stephen K. Urice, *Law, Ethics and the Visual Arts* (The Netherlands: Kluwer Law International, 2007, 5th edition), 367.

[15] Mexico, *Ley sobre protección y conservación de monumentos arqueológicos e históricas, poblaciones tipicas y lugares de belleza natural* (1934), quoted in Francisco Arturo Schroeder Cordero, "Legislación protectora de los monumentos y zonas de monumentos en México", accessed June 29, 2011, http://www.bibliojuridica.org/libros/2/700/43.pdf, 672; María del Refugio González, "La protección de los bienes arqueológicos en México y su relación con la jurisprudencia", in *Arqueología y derecho en México*, ed. Luis González R et al. (Mexico City : Universidad Nacional Autónoma de México, 1980), 76.

[16] Quoted in United States, Court of Appeal decision, *United States of America v. Patty McLain et al*, January 24, 1977, 545 F. 2d 988, § 36.

solved even through negotiation. Indeed, under US law, a public entity cannot give away public property, and under Mexican law, the Murals would remain the property of Mexico. Therefore the issue of ownership was circumvented and both museums arranged for a joint custody arrangement.

- While the case presented a **complicated legal situation at the international level, there was no possible legal action in the US.** Indeed, the **Treaty of Cooperation of 1971**[17] concerning the recovery and return of archaeological, historical and cultural property provided under art. 11 § 3 that the US Attorney-General could file a civil action in US district court on behalf of the Government of Mexico. The Treaty does not modify US law but provides the Attorney General with the possibility to demand application of US law, *in casu* the 1972 Statute prohibiting the importation of illegally exported monumental and archaeological pre-Columbian art from Mexico and Central America to the US[18].
  However, Harold Wagner seemed to have foreseen this issue and had prepared a sworn affidavit that the Murals had entered the US in the sixties and had witnesses declare they had seen them in San Francisco during that time[19]. Thus neither the treaty nor the Statute could be applied to the case.

IV. Adopted Solution

Cultural cooperation – Co-ownership

Text of the Agreement[20]:
"Agreement Relating to the Return of the Teotihuacán Murals
Declarations

I. 'The Institute' [the National Institute of Anthropology and History] declares that it is the organism of the Mexican Government which, by virtue of the Federal Law relative to Archaeological, Artistic an Historical Monuments and Zones, is charged with the conservation, protection and study of the archaeological and historical monuments of Mexico. In accordance with the authority vested by the Institute's Organic Law, the Institute, acting by and through its General Director, possesses the legal capacity to enter into this agreement.

II. 'The Museum' [the Fine Arts museums of San Francisco] declares that it is the department of the City and County of San Francisco responsible for the care and management of the City's art museum and their collections and that its Director possesses the legal authority to represent the museum in this agreement.

III. 'The Museum' declares that it acquired the Teotihuacán Murals which are the subject of this agreement as a testamentary legacy from Mr. Harold Wagner.

IV. 'The Institute' declares the Teotihuacán Murals that were willed to the Museum are originally from the San Juan Teotihuacán archaeological zone and are authentic archaeological monuments according to the determinations made by the archaeological expert appointed for the purpose of authentication.

[17] Treaty of Cooperation between the United States of America and the United Mexican States (1971).
[18] U.S. Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals (1972); Merryman, Elsen and Urice, *Law, Ethics and the Visual,* 367.
[19] Merryman, Elsen and Urice, *Law, Ethics and the Visual,* 367.
[20] Quoted Merryman, Elsen and Urice, *Law, Ethics and the Visual*, 368.

V. 'The Institute' and 'The Museum' together declare that, within the scope of their respective powers, they shall unite their efforts and respective capacities for the purpose of preserving these Teotihuacán Murals and reintegrating those which have an essential sociocultural value into the cultural patrimony of which they are a part in accordance with the study on the principles, conditions and means for the restitution or return of cultural property in view of reconstituting dispersed heritages prepared for UNESCO by the Ad Hoc Committee appointed by the Executive Council of ICOM, a copy of which is attached hereto and is referred to hereafter as the UNESCO report.

In consideration of the declarations, the parties […] agree to the following:

FIRST – 'The Museum' agrees to return to the Institute a minimum of 50% of the Teotihuacán Murals which were donated by way of Mr. Harold Wagner's testamentary legacy. The selection of the Murals to be returned to the Institute shall be made by the Museum in accordance with the principles set forth in the UNESCO report and in consultation with representatives of the Institute and other scholars. The Institute will be responsible for the cost of packing and shipping the Murals which will be returned.

SECOND – 'The Institute' agrees to send to the Museum persons who are qualified in the subject of restoration, for the purpose of assisting the Museum in restoring the Murals.

THIRD – 'The Museum' agrees to pay the expenses of the restoration of the Murals if funds can be raised for this purpose. The Institute will loan the Museum experts who will train people to perform the restoration. The living expenses of the experts who will be selected by the Institute for travel to San Francisco for the restoration work shall be included as a cost of the restoration.

FOURTH – 'The Institute' agrees to exhibit the Teotihuacán Murals that are returned to Mexico in a location which will provide maximum protection and public accessibility for the Murals and to give credit for said return to the Fine Arts Museums of San Francisco.

FIFTH – 'The Museum' agrees that it shall exhibit the Murals retained in San Francisco and that it shall give suitable credit to the Institute for its assistance with the restoration of the Murals"

V. Comment

- The San Francisco museum considered it had no legal obligation to return the Murals, but felt it had a moral obligation to negotiate an agreement with Mexico. The parties felt that the process was successful because it was completed outside of the political process and was between museums whose primary concern was how best to conserve the Murals[21]. This open attitude to moral claims coming from museums in the US should be commended as favouring alternative resolution of disputes. In all fairness, the de Young Museum probably also knew that it was in its best interest to negotiate directly with Mexico in order to avoid costly legal procedures in the US.

[21] Merryman, Elsen and Urice, *Law, Ethics and the Visual,* 368.

- Moreover, the collaboration between INAH and the de Young Museum was the beginning of a very fruitful collaboration[22]. This collaboration has led to joint exhibitions, loans, archaeological and academic collaborations as well as joint educational and research projects. Therefore, the case of the Teotihuacan Murals had a huge impact on the perspective of San Francisco museums regarding the acquisition of pre-Columbian artwork as well as on the place of these museums in international relations and on the international art market.[23]
- The agreement purposely did not decide which Murals would go to Mexico or stay in the US in order to ensure an identical conservation effort[24].

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Post 1970 restitution claims
Demandes de restitution post 1970

Anne Laure Bandle
Raphael Contel
Marc-André Renold

March 2012

Reference: Anne Laure Bandle, Raphael Contel, Marc-André Renold, "Case Ayuba Suleiman Diallo – Qatar Museums Authority and the United Kingdom," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre - University of Geneva.

Case Ayuba Suleiman Diallo – Qatar Museums Authority and the United Kingdom

United Kingdom – Qatar Museums Authority – National Portrait Gallery – Artwork/œuvre d'art – Post 1970 restitution claims/demandes de restitution post 1970 – Negotiation/négociation – Settlement agreement/accord transactionnel – Illicit exportation/exportation illicit – Cultural Cooperation/coopération culturelle – Loan/prêt

Hit by an export bar in the United Kingdom after being bought by the Qatar Museums Authority (QMA) at Christie's, the painting "Ayuba Suleiman Diallo" by Hoare of Bath (1733) will be exhibited at the Londoner National Portrait Gallery and in Qatar according to an agreement between the National Portrait Gallery and the QMA in early 2011.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

I. Chronology

Post 1970 restitution claims

- **8 December 2009**: Sale of the portrait by a private collector at Christie's "Old Master & 19th Century Paintings, Drawings & Watercolours Evening Sale" for £ 541'250 ($

889'815) to the **Qatar Museums Authority (QMA)**. The painting portrays **Ayuba Suleiman Diallo**, called Job Ben Solomon, by **Hoare of Bath, 1733**.

- **March 2010**: Temporary export bar by the British Government with the purpose of giving the opportunity to a British Museum to buy it. **The Reviewing Committee on the Export of Works of Art (RCEWA)**[1] has judged this painting to be "of outstanding significance for the study of the history of the development of non-European portraiture in Britain, and of evolving responses within Britain to other cultures" [2]. It is in fact regarded as "the earliest known British oil portrait of a freed slave and the first portrait to honour an African subject as an individual and an equal" [3]. Consequently, the RCEWA has decided to defer its decision on the export licence application for an initial period of two months. During that period, the **National Portrait Gallery (NPG)** London expressed its strong interest in the painting.
- **May/June 2010**: Subsequent to the NPG serious intentions to purchase the paintings, the RCEWA extended the deferral period for another 3 months.
- **7 July – August 2010**: Acquisition campaign by the NPG regarding the painting aiming to raise £ 100'000: Launch of an appeal with the support of the Heritage Lottery Fund (HLF) and the Art Fund. Both Funds have donated £ 300,000 respectively £100'000 to support the appeal. At the end of the second deferral period, the **NPG submitted a firm purchase offer**. The **QMA refused this offer** and withdrew its application for an export permit.[4]
- **19 January 2011**: **Negotiation of a cooperative agreement** between **the Department of Culture, Media and Sport** and Roger Mandle, executive director of the QMA. The agreement covers the loan, conservation and research into the history of the painting.
- **20 January – 30 July 2011**: Exhibition of the painting at the NPG in London, with the indication "Property of Qatar Museums Authority".
- **2013**: Prospective exhibition of the painting in Doha, Qatar.

[1] For more information on the Reviewing Committee on the Export of Works of Art (RCEWA), refer to http://www.culture.gov.uk/what_we_do/cultural_property/3290.aspx and http://www.mla.gov.uk/what/cultural/export/reviewing_cttee, accessed May 12, 2011.

[2] Department for Culture, Media and Sport (DCMS), Museums Libraries & Archives (MLA), 56th Report of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, 1 May 2009 – 30 April 2010 (December 2010): 31, accessed June 8, 2011, http://www.mla.gov.uk/what/cultural/export/~/media/Files/pdf/2010/AELU/RCEWA/MLA%20Export%20of%20Objects%20of%20Cultural%20Interest%20200910%20tagged; see also National Portrait Gallery News Release, "First British Portrait of a Black African Muslim and Freed Slave Goes on Display," January 19, 2011, accessed May 12, 2011, http://www.npg.org.uk/about/press/ayuba-suleiman-diallo-display.php.

[3] As reported in National Portrait Gallery, "Ayuba Suleiman Diallo," description of the painting, accessed May 13, 2011, http://www.npg.org.uk/whatson/display/2011/ayuba-suleiman-diallo.php; see also Maev Kennedy, "Temporary export bar for portrait of freed slave after £530,000 sale," *The Guardian*, January 19, 2011, accessed June 8, 2011, http://www.guardian.co.uk/artanddesign/2011/jan/19/portrait-freed-slave-stays-britain.

[4] See Department for Culture, Media and Sport (DCMS), Museums Libraries & Archives (MLA), 56th Report of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, 31.

II. Dispute Resolution Process

Negotiation – Settlement agreement

- Negotiations were conducted between the responsible authority for export controls on objects of cultural interest – the Department of Culture, Media and Sport and Roger Mandle, executive director of the QMA.
- These negotiations ultimately led to the conclusion of an extensive cooperation agreement which also affected the NPG. The NPG is a so-called "non-departmental public body" (not integrally part of a government department but performs governmental functions and is financially supported by the government) sponsored by the Department of Culture, Media and Sport.

III. Legal Issues

Illicit exportation

- The main issue raised by the present case is the prohibition of the export of specific cultural objects due to the great interest in their protection and the wish to secure their staying within the government. In fact, the **Treaty on the Functioning of the European Union (TFEU)**[5], which was renamed by the Treaty of Lisbon signed by all Member States on 13 December 2007 (formerly "Treaty establishing the European Community, TEC), allows for such protection, as exports of cultural goods may be restricted on grounds of "protection of national treasures possessing artistic, historic or archaeological value" (art. 36 TFEU). The UK Export of Cultural Interest (Control) Order of 2003 subjects to a licence the export of "[a]ny objects of cultural interest manufactured or produced more than 50 years before the date of exportation"[6].
- Hence, the "Statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export license" issued by the Department of Culture, Media and Sport (RCEWA Guidelines hereafter)[7] provides for practical guidance regarding the issue.
- The decision of consideration for national importance is conferred to one of the expert advisers within the Department of Culture, Media and Sport. **Three Waverley criteria** have to be taken into consideration (no. 11 RCEWA Guidelines): Connection of the object to the history and national life of the UK in such a way, that "its departure would be a misfortune for our history and national life" (1); whether the

[5] European Economic Union (EEC) Treaty, Council Regulation (EEC) 2603/69, December 20, 1969, OJ 1969 L 324/25. See consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal C 83 of 30.3.2010.*

[6] Art. 1 and 2 Export of Cultural Interest (Control) Order of 2003. The order was amended in 2009 following the implementation of the TFEU.

[7] See Department of Culture, Media and Sport, "Export Controls on Objects of Cultural Interest – Statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export license", November 2005, accessed 21 Mai 21, 2011, http://www.culture.gov.uk/images/publications/Export_Controls_on_Objects_of_Cultural_Interest_Statutory_Guidance_Nov05.pdf.

object is of "outstanding aesthetic importance" (2); outstanding significance of the object for research purposes (3). The latter criteria covers, as said by the Reviewing Committee, "a wide number of disciplines e.g. art history, archaeology, ethnography, anthropology, palaeontology (subject to definition of 'fossils') science, engineering, architecture or literature, etc"[8] (no. 12 RCEWA Guidelines).

- Interestingly, the RCEWA Guidelines (no. 12) list some of the cases that fell under one of these criteria:
    - Waverley criterion no. 1 items include: "the deposit from the 'royal' ship burial from Sutton Hoo, the Middleham jewel, the Lutterell psalter, The Dog of Alcibiades, a portrait miniature of Henry Stuart, Lord Darnley, the archive of manuscripts relating to the editing of Newton's *Principia Mathematica,* decorations awarded to Sir William Carnegie in connection with the battle of Trafalgar, Lewis Carroll's photographs of Alice Liddell (the Alice of *Alice in Wonderland*)".
    - The Elgin Marbles held in the British Museum, or *Venus and Adonis* by Titian and *The Holy Family with the Infant St. John* by Fra Bartolommeo have been defended under Waverley criterion no. 2.
    - Waverly criterion no. 3 has been decisive for "a lady's secretaire by Thomas Chippendale, mathematical instruments associated with Charles, Earl Stanhope, ledgers and account books of Messrs Fribourg and Treyer".
- Solely the three Waverley criteria have to be considered when deciding whether to make an objection. The decision process must not be affected by other interests or factors such as an expert advisor's own interest in acquiring the object for his/her own institution (no. 14 RCEWA Guidelines). **In the present case, the RCEWA has found that the painting met the second and third Waverley criteria**.[9]
- Should the Reviewing Committee advise that **one or more criteria is satisfied**, "it will recommend that a decision on the **licence application is deferred for a specified period** (normally two to six months, although any length of deferral can be recommended) to provide an opportunity for a compensating purchase offer to purchase to be made to the owner. The Committee "will recommend the fair market price at which an offer should be made" (no. 18 RCEWA Guidelines).
- Should the owner refuse an offer to purchase made from a public source (such as the NPG) during the deferral period, "the Secretary of State will normally refuse to grant a licence" (no. 21 RCEWA Guidelines). In addition, should an application be withdrawn after an offer to purchase has been made from a public source, the application is normally considered as being refused (no. 24 RCEWA Guidelines). Hence, in case the applicant **files a subsequent licence permit request** it must not satisfy the Waverley criteria (no. 26 RCEWA Guidelines). Should the subsequent application be made "within 10 years or so of a licence being refused", and still meet one or more Waverley criteria, and should there be no change of circumstances since the previous request, "the Secretary of State will normally **refuse an export licence without a deferral period**" (no. 27 RCEWA Guidelines).

[8] Complementary information as provided by no. 12 RCEWA Guidelines.
[9] See Department for Culture, Media and Sport (DCMS), Museums Libraries & Archives (MLA), 56th Report of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, 31.

IV. Adopted solution

Cultural Cooperation – Loan

- Loan of the painting by the QMA to the NPG for a five year period.[10]
- Programme organised by the NPG on the research, conservation and interpretation of the painting, funded by the QMA. The outcome of this research may be shared on an international basis.[11]
- As part of the programme, the NPG offers an intern from Qatar to spend time working at the Museum.[12]
- Probable exhibition at several UK regional galleries (such as Leicester, Liverpool and the North-East) before going on view in 2013 in Doha, Qatar. Following the exhibition, the painting shall return to Britain.[13]
- The director of the National Portrait Gallery, Sandy Nairne, welcomes the agreement: "This is a good example of international cooperation between museums, which will extend the opportunities for people to understand the importance of Ayuba Suleiman Diallo. It is a portrait that sheds new light on cultural and intellectual exchanges in the first half of the eighteenth century. We are extremely grateful to all those people who were so enthusiastic about the appeal, and we will be following-up to return funds. I am very pleased that everyone will be able to see this fascinating painting on the walls of the Gallery and on tour."[14]

V. Comment

- The RCEWA Guidelines provide, in cases where a Waverley criteria is met, that the Reviewing Committee shall advise to defer its decision on the licence application in order to allow a purchase offer to be made to the owner. Even though, in the present case, the NPG was able to raise the sufficient amount to purchase the painting and offered to do so, the parties agreed for a 5-year loan. Interestingly, this outcome is not provided by the RCEWA Guidelines.
- As allowed by the RCWA Guidelines, the QMA refused the purchase offer of the NPG.[15] Nonetheless, without an export permit, the painting may not leave the country.
- The parties' outset position is rather unbalanced. In fact, as the NPG was willing to purchase the painting during the export licence deferral period, the chances of QMA to

[10] Qatar Museums Authority Press Communiqué, "QMA lends first British portrait of a black African Muslim and free slave to National Portrait Gallery," January 20, 2011. Accessed May 12, 2011, http://www.qma.com.qa/eng/index.php/qma/news_item/167.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] As reported in National Portrait Gallery News Release, "First British Portrait of a Black African Muslim and Freed Slave Goes on Display."
[15] See Department for Culture, Media and Sport (DCMS), Museums Libraries & Archives (MLA), 56th Report of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, 31.

obtain an export licence were scarce if not impossible. The QMA had hence no real alternative to a settlement.

- As conclusive information on the parties' incentive to opt for negotiation and on the content of their agreement is missing, the case leaves room for speculations. It is particularly questionable whether an export licence will be issued at the expiry of the loan. Maybe the parties came to an understanding regarding the later issue, failing which they would merely postpone the problem. It seems however that the NPG desires to keep the painting permanently in its collection.[16] Should the QMA have formally dropped its request to export the painting even though a public museum (NPG) agreed to purchase it, it is very unlikely that a subsequent application will be successful within the next ten years.[17]

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[16] See Maev Kennedy, "Temporary export bar for portrait of freed slave after £530,000 sale."
[17] *Ibid*.

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Reference: Raphael Contel, Giulia Soldan, Alessandro Chechi, "Case Euphronios Krater and Other Archaeological Objects – Italy and Metropolitan Museum of Art," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Case Euphronios Krater and Other Archaeological Objects – Italy and Metropolitan Museum of Art

Italy/Italie – The Metropolitan Museum of Art – Archaeological object/objet archéologique – Post 1970 restitution claims/demandes de restitution post 1970 – Illicit excavation/fouille illicite – Illicit exportation/exportation illicite – Criminal offence/infraction pénale – Ownership/propriété – Procedural issue/limites procédurales – Diplomatic channel/voie diplomatique – Negotiation/négociation – Settlement agreement/accord transactionnel – Conditional restitution/restitution sous condition – Cultural cooperation/coopération culturelle – Loan/prêt

In February 2006, the Italian Ministry for Cultural Heritage and Activities and the Metropolitan Museum of Art (MET) of New York entered into a landmark agreement with which the ownership title to the Euphronios Krater and other archaeological artefacts was transferred to the Italian Government.

I. Chronology

Post 1970 restitution claims

- **November 1972:** The **Metropolitan Museum of Art (MET)** of New York **acquired** the **Euphronios Krater** for $ 1.2 million. The Krater it is a rare huge urn for mixing wine with water, 12 gallons worth, dating to around 510 BC, signed by the painter Euphronios.[1] **Thomas Hoving** told the New York Times reporter who compiled the story that the Krater had been purchased from a private English collector. Thomas Hoving refused to reveal the identities of the vase's previous owner and of the dealer who sold it to the MET. However, no sooner was the news about the acquisition made public, than suspicions about the possibly illicit origin of the vase erupted. Many specialists were sceptical about Hoving's account; they doubted that a vase by Euphronios could have lain for half a century unknown in a private collection.[2]
- **1973**: The New York Times published a number of articles arguing that the vase had been illicitly exported from Italy and attacking the official version of the Krater's acquisition, which appeared to be inconsistent in many ways.[3] However, the **Italian Government** could not prove the origin of the vase, the bad faith of Thomas Hoving, or any other element that would justify an official restitution request.
- **August-September 1995**: During a routine investigation over illicit trafficking, the Italian ***Carabinieri*** (Cultural Heritage Protection Office) discovered an **organizational chart** showing how the clandestine network was arranged through Italy and elsewhere, i.e. who was in the hierarchy and how they were related to each other, who supplied whom, which areas of Italy were supplied by which middlemen, and what their links were to international dealers, museums and collectors. The chart identified an Italian art dealer, **Giacomo Medici**, as being a senior figure responsible for bringing archaeological objects out of Italy.[4] Subsequently, the Italian and Swiss Police raided the warehousing facility of **Giacomo Medici** at the **Geneva Free Port**. The warehouse contained vases, statues, mosaics, photographs and documents, including shipment invoices. This evidence confirmed that Medici had exported out of Italy several objects and that he was in close relationship with *tombaroli* in Italy, prominent museums and collectors in Europe and the United States, and art-dealers, including **Robert Hecht**.[5] In turn, Hecht's apartment in Paris was raided by the police in 2001. This permitted to uncover other documents describing the excavation of the

[1] Thomas Hoving, "Super Art Gems of New York City: The Grand and Glorious 'Hot Pot' - Will Italy Snag It?" Artnet, June 29, 2001, accessed August 17, 2011, http://www.artnet.com/Magazine/FEATURES/hoving/hoving6-29-01.asp. Thomas Hoving, MET's Director from 1967 to 1977, wrote a series of articles on Artnet about the negotiation and the purchase of the Krater, where he also admitted that he had strong suspicions that it had been illegally dug up and smuggled.

[2] Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), xi.

[3] John Hess, "The Vase: Not Easy To Piece Together," *The New York Times*, February 25, 1973. See also Nicholas Gage, "How the Metropolitan Acquired 'The Finest Greek Vase There Is'," *The New York Times*, February 19, 1973; and Nicholas Gage, "Met's Evidence Backs Vase Dillon Says," *The New York Times*, June 27, 1973.

[4] Peter Watson and Cecilia Todeschini, *The Medici Conspiracy*, 10–18.

[5] Ibid., 19–23. See also David Gill and Christopher Chippindale, "From Malibu to Rome: Further Developments on the Return of Antiquities," *International Journal of Cultural Property* 14 (2007): 206.

Krater in a necropolis north of Rome in late **1971**, the exportation from Italy and proving that Hecht was the dealer who sold it to the MET.[6]

- **21 February 2006**: The Italian Ministry for Cultural Heritage and Activities and the MET signed an **agreement** which provided for the **return** of the Krater and of other archaeological objects.[7]
- **January 2008**: The Krater was shipped to Rome, together with other 21 artefacts.[8]

II. Dispute Resolution Process

Diplomatic channel – Negotiation – Settlement agreement

- Although it did not have the elements of proof to demand restitution or to initiate a lawsuit in the years following the MET's purchase, Italy never abandoned the idea of recovering the Euphronios Krater. On the other hand, the MET's representatives regularly criticized and rejected all arguments and doubts put forward by the New York Times articles as to the illicit origin of the Krater.
- After the raids in Giacomo Medici's warehouse at Geneva and Robert Hecht's apartment in Paris, Italy obtained the proof of the illicit removal of the Krater. Thanks to this evidence, Italian authorities could question the MET's ownership and reach an agreement on the return of the Krater and of other masterpieces which would otherwise not have been achieved. As it has been reported, "the short time between the Italian government's request and the deaccessioning of the objects suggests that the evidence was overwhelming".[9]
- Importantly, the agreement was also the result of the aggressive strategy of the Italian Government, which threatened to deny art loans to museums that refuse to return or that buy illicitly exported cultural objects.[10]

III. Legal Issues

Illicit excavation – Illicit exportation – Criminal offence – Ownership – Procedural issue

- The illicit traffic in archaeological objects and the destruction of archaeological sites are two major issues for cultural heritage law. As no government can police every archaeological site in its country in an attempt to keep looters away, nor can it monitor every border crossing to enforce export controls, it is evident that archaeological objects and

[6] Jason Horowitz, "How Hot Vase It?" *The New York Observer*, 20 February 2006, accessed August 17, 2011, http://observer.com/2006/02/how-hot-vase-it/.
[7] Elisabetta Povoledo, "Italy and U.S. Sign Antiquities Accord," *The New York Times*, February 22, 2006, accessed August 17, 2011, http://www.nytimes.com/2006/02/22/arts/design/22anti.html?_r=1&pagewanted=print.
[8] Elisabetta Povoledo, "Ancient Vase Comes Home to a Hero's Welcome," *The New York Times*, January 19, 2008, accessed August 11, 2011, http://www.nytimes.com/2008/01/19/arts/design/19bowl.html.
[9] David Gill and Christopher Chippindale, "From Boston to Rome: Reflections on Returning Antiquities," *International Journal of Cultural Property* 13(2006): 323.
[10] See, e.g., Hugh Eakin, "Italy Using Art Loans to Regain Antiquities," *The New York Times*, January 10, 2006, accessed August 11, 2011, http://www.nytimes.com/2005/12/27/arts/27iht-loans.html.

archaeological sites cannot be easily protected in terms of law. Another problematic aspect is that States are generally reluctant to recognize or enforce foreign laws.

- Italy has a strict legal regime based on a 1939 law vesting ownership in the State for all objects of artistic, historical, archaeological or ethnological interest found in the ground during excavations or by chance, and rendering it illegal to export such items without an export license.[11] This law allows Italy to make reasonable cases for restitution in the event of illicit removal or cultural materials.
- In the case under consideration, Italy could not have officially requested the restitution of the Krater, or launch a legal action against the MET, on the basis its right to ownership under the national vesting laws without clear and convincing evidence as to the clandestine provenance of the Krater itself. Only when the evidence emerged demonstrating trafficking operations that linked Medici and Hecht to the MET and the Krater, Italy was enabled to demand restitution and initiate criminal proceedings against the persons involved. For instance, Medici was found guilty of dealing in stolen goods in 2004, and sentenced to 10 years in jail and fined € 10 million.[12] Instead, the trial against Robert Hecht collapsed in January 2012 when the statutes of limitations on the charges had elapsed.[13]

IV. Adopted Solution

Conditional restitution – Cultural cooperation – Loan

- The Italy-MET agreement[14] – which should be considered as a contract rather than an international treaty[15] – appears to be a model that could be replicated in similar cases. This is also due to the fact that the agreement was made public. The most important terms of the agreement are the following.
- The Italy-MET agreement regulates the transfer of title to all requested items (Article 2). In exchange for the restitution, Italy undertook to make four-year loans to the MET on a rotating basis of a selection of archaeological objects or objects of equivalent beauty and artistic or historical significance (Article 4.1). Finally, with the agreement the Italian Government waived the right to initiate a legal action against the MET, whether civil or criminal, for any of the requested objects (Article 8.3).
- Furthermore, the agreement is a model of international collaboration because it establishes a forty-year long programme of cultural cooperation (Article 8.1) including exchange of students, professors and cooperation in the fields of restoration, research and excavation.

[11] Law No 1089 of 1 June 1939 (Gazzetta Ufficiale, No 184 of 8 August 1939) on the protection of objects of artistic and historic interest.

[12] Medici appealed the 2004 verdict. In June 2009, the Appeal Court partly upheld the original decision (smuggling charges were dismissed because the statute of limitations had expired) and reduced the sentence to 8 years in jail. Medici appealed against this decision, which however was rejected by the Court of Cassation. Fabio Isman and Gareth Harris, "Smuggler's Final Appeal Fails," *The Art Newspaper*, March 2012, 8.

[13] Jason Felch, "Robert Hecht Jr. Dies at 92," *Los Angeles Times*, February 9, 2012, accessed March 1, 2012, http://articles.latimes.com/2012/feb/09/local/la-me-robert-hecht-20120209.

[14] Agreement between the Ministry of culture of the Italian Republic and the Metropolitan Museum of Art (MET) of New York, February 21, 2006.

[15] Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties," *Rivista di diritto internazionale* (2010): 380.

- Interestingly, the Italy-MET agreement does not contain a conflict of law clause (it is possible that the parties did not manage to agree on this point), whereas it contains a provision on dispute settlement, according to which, "[i]f the Parties are unable to reach a mutually satisfactory resolution to their dispute, the disputed issues shall be settled in private by arbitration on the basis of the Rules of Arbitration and Conciliation of the International Chamber of Commerce by tree arbitrators appointed in accordance with said Rules" (Article 9.2).

V. Comment

- The Italy-MET agreement can be seen as an efficient out-of-court settlement. Apart from the restitution of various precious archaeological objects and the establishment of a continuing program of cultural cooperation, the accord is noteworthy in that it permitted to avoid litigation and the legal expenses and the negative publicity associated to it, on the one hand, and to emphasise that Italian authorities were no longer willing to turn a blind eye to the acquisition of illicitly excavated relics, on the other hand.
- It can be argued that the agreement under consideration cannot be easily replicated due to several factors, including: (i) the great value of the Euphronios Krater; (ii) Italy's commitment to restore its cultural heritage and to fight the illicit trafficking through an aggressive strategy encompassing both diplomatic means and legal actions; (iii) the existence of a bilateral agreement between Italy and the United States; and (iv) the evidence demonstrating that chain of people involved in illicit trafficking of archaeological objects from Italy to the MET and other leading museums.
- In the light of the above discussion, it can be affirmed that the Italy-MET agreement is not easily replicable. Nevertheless, this should be seen as a model of international collaboration that, even if it cannot set a legal precedent, it has affected the climate of the art world. As a result, it should not be surprising that various source countries have embraced with success the "cultural diplomacy" strategy inaugurated by the Italian Government and that several similar bilateral agreements have been concluded between art-rich States and leading museums since 2006.[16]

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Affaire Masque Makondé – Tanzanie et Musée Barbier-Mueller

Tanzania/Tanzanie – Musée Barbier-Mueller – Indigenous object/objet autochtone – Post 1970 restitution claims/demandes de restitution post 1970 – Institutional facilitator/facilitateur institutionnel – Negotiation/négociation – Ownership/propriété – Conditional restitution/restitution sous condition

En 2010, le Musée Barbier-Mueller et la Tanzanie mettent fin à un litige qui aura duré plus de 20 ans par la donation du Masque Makondé par le Musée Barbier-Mueller à la Tanzanie. Le litige fut porté devant le comité intergouvernemental de l'UNESCO. L'Office fédéral suisse de la culture (OFC) est aussi intervenu.

I. Historique de l'affaire

Demandes de restitution post 1970

- **1984** : Lors d'un **cambriolage au musée national de Tanzanie** (Dar Es Salaam Museum), le Masque Makondé ainsi que 16 autres objets sont volés. Le musée en informe les autorités nationales et internationales, tels qu'**INTERPOL** et le **Conseil international des musées (ICOM)**.[1]
- **Septembre 1985** : Le **Musée Barbier-Mueller (BM)** de Genève **acquiert le masque** à Paris.

[1] Dossier de presse de l'ICOM du 10 mai 2010, *Masque Makonde - Signature d'un accord pour le don du Masque Makonde au Musée Barbier-Mueller de Genève au Musée national de Tanzanie*, disponible en ligne : http://archives.icom.museum/press/MM_Dossierdepresse_fr.pdf (consulté le 2 août 2011).

- **1990** : Le Musée BM est **averti du cambriolage** par un professeur italien, Prof. Enrico Castelli de l'Université de Perugia.[2] Subséquemment, le musée s'adresse à l'**ICOM** afin de lui annoncer qu'il détient le masque.[3]
- Sur la base notamment du code de déontologie de l'ICOM, le musée envisage une éventuelle restitution du masque rituel au gouvernement tanzanien.[4] Différents échanges entre les parties s'ensuivent. Le musée BM propose à la Tanzanie un **prêt à long terme** du masque.[5]
- **2002** : Le Musée BM propose officiellement à la République de Tanzanie la conclusion d'un **accord** portant sur la restitution du masque dont les termes ne nous sont pas connus. Les parties ne trouvent pas un terrain d'entente et les négociations échouent.
- **31 mai 2006** : La Tanzanie saisit formellement le **Secrétariat du Comité intergouvernemental de l'UNESCO pour la promotion et le retour des biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégitime** (Comité intergouvernemental de l'UNESCO). Cette démarche interrompt toutes les négociations entres les parties.[6]
- Subséquemment, **le Musée BM** et **l'Office fédéral de la culture** déposent officiellement **plainte** conjointement contre la République unie de Tanzanie **auprès du Comité intergouvernemental de l'UNESCO.**
- **5 mai 2009** : La Tanzanie déclare pouvoir assurer la protection du masque si celui-ci devait lui être retourné.[7]
- **Août 2009** : Le Ministère des ressources naturelles et du tourisme de Tanzanie annonce son intention au musée BM **d'accepter les conditions** proposées par le musée BM en février 2002.
- **6 novembre 2009** : La Tanzanie et le musée BM se rencontrent à Genève pour négocier la restitution du masque.
- **10 mai 2010 :** La Tanzanie et le Musée BM concluent un **accord** portant sur la donation du masque par le musée BM à la Tanzanie. Cet accord est confidentiel.

[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Voir AGACHE Lucie, *Le musée Barbier-Mueller rend un masque Makonde à la Tanzanie*, *in* Connaissance des arts, 10 mai 2010, disponible en ligne : http://www.connaissancedesarts.com/archeologie/actus/breves/le-musee-barbier-mueller-rend-un-masque-makonde-a-la-tanzanie-84322.php (consulté le 2 août 2011).
[6] Cf. Comité intergouvernemental pour la promotion du retour des biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale, Rapport du Secrétariat, 15ème session, Paris, Siège de l'UNESCO, 11-13 mai 2009, CLT-2009/CONF.212/COM.15/2, disponible en ligne : http://unesdoc.unesco.org/images/0018/001822/182210F.pdf (consulté le 2 août 2011).
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II. Processus de résolution

Négociation – Facilitateur institutionnel (l'Office fédéral de la culture (Suisse), l'ICOM, le Comité intergouvernemental de l'UNESCO)

- Le processus de résolution du litige a fait l'objet de **négociations** entre les représentants du Musée BM et la délégation gouvernementale de la Tanzanie.
- Durant le processus de résolution, différents intermédiaires sont intervenus. Lorsque le musée BM apprend en 1990 que le Masque a été volé, il en informe **l'ICOM**. Le soutien de l'ICOM a joué un rôle clé dans le processus de négociations. Sous l'égide de l'ICOM, **l'Office fédéral de la culture** (suisse) est intervenu en tant que **facilitateur** dans les négociations.[8]
- Malgré les efforts consacrés par les deux parties à cette affaire durant plusieurs années, elles ne parviennent pas à s'entendre. La Tanzanie décide alors de s'adresser au **Comité intergouvernemental de l'UNESCO** en formulant une demande de restitution auprès de son Secrétariat. A cet effet, la Tanzanie a remplis le « formulaire type pour les demandes de retour ou de restitution »[9] du Comité intergouvernemental de l'UNESCO avec toutes les pièces justificatives correspondantes. Le Comité a ensuite transmis cette demande et tous les documents y relatifs à la Suisse.[10]
- En réponse à cette demande de résolution devant le Comité, le musée BM dépose une **plainte conjointement avec l'Office fédéral de la culture** contre la Tanzanie auprès du Comité intergouvernemental de l'UNESCO.
- Les négociations ont été reprises fin 2009 entre la Tanzanie, le Musée BM et les autorités suisses et avec l'encouragement du Comité intergouvernemental de l'UNESCO.[11] Ces négociations ont abouti à un accord qui a permis le retour du Masque.

III. Problèmes en droit

Propriété

- Principalement, le gouvernement tanzanien remet en question la **validité de l'acquisition** du masque Makondé par le Musée BM. Notamment, le musée BM pourrait ne pas être protégé

[8] Voir Comité intergouvernemental pour la promotion du retour des biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale, Rapport du Secrétariat, 16ème session, Paris, Siège de l'UNESCO, 21-23 septembre 2010, CLT-2010/CONF.203/COM.16/2 Rev, disponible en ligne : http://unesdoc.unesco.org/images/0018/001875/187506F.pdf (consulté le 2 août 2011), recommandation no.3.

[9] « Formulaire type pour les demandes de retour ou de restitution », Comité intergouvernemental pour la promotion du retour des biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale, Janvier 1986, disponible en ligne : http://portal.unesco.org/culture/fr/files/24701/11032757403formef.pdf/formef.pdf (consulté le 2 août 2011).

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par la bonne foi.. En effet, l'ICOM et INTERPOL ont été avertis du cambriolage immédiatement après sa survenance. Le musée BM aurait pu s'informer sur la provenance du masque auprès de ces deux organisations, ce qu'il n'a pas fait. Par conséquent, on pourrait lui reprocher de ne pas avoir respecté son devoir de diligence pour autant qu'un devoir de se renseigner puisse être exigé. Dans l'hypothèse d'une acquisition de **mauvaise foi**, le droit suisse permet au propriétaire antérieur de revendiquer l'objet « en tout temps » (art. 936 al. 1 CC[12]).

- En revanche, dans l'hypothèse d'une acquisition de bonne foi par le Musée BM, le délai de péremption de l'action en revendication aurait été probablement échu (art. 934 al. 1 CC). Au moment des faits, le délai en vigueur était de 5 ans depuis la dépossession. Ce délai a été prolongé à 30 ans par l'entrée en vigueur de la Loi fédérale sur le transfert international des biens culturels[13] du 20 juin 2003 (art. 934 al.1bis CC), sans pour autant s'appliquer rétroactivement (art. 33 LTBC).

IV. Résolution du litige

Restitution sous condition

- Les négociations qui auront duré plus de 20 ans ont finalement abouti à un accord entre la Tanzanie et le Musée BM. Grâce à cet accord, le masque a été remis le 10 mai 2010 aux représentants du gouvernement tanzanien (Dr Donatius M. K. Kamamba et Caroline J. M. Mchome) par Monique Barbier-Mueller et Laurence Mattet en présence de Julien Anfruns, directeur de l'ICOM et de représentants de l'UNESCO.
- L'accord « de donation » est sujet à conditions, notamment que le masque soit correctement conservé.[14]
- Durant cette cérémonie de restitution et dans son dossier de presse, l'ICOM a rappelé l'importance de son Code de déontologie.

V. Commentaire

- Cette affaire est particulièrement intéressante à la vue du nombre et de la qualité des intervenants qui sont intervenus lors de sa résolution. En effet, des institutions non-gouvernementales mais aussi des autorités officielles ont eu un rôle d'intermédiaire « facilitateur » dans les négociations. En ce qui concerne les autorités suisses, ce rôle les a menés jusqu'au dépôt d'une plainte conjointe avec le Musée BM contre la Tanzanie.
- Il convient de noter que les négociations entre les parties ont été suspendues jusqu'à leur reprise qui est intervenue suite à une plainte déposée par le musée BM conjointement avec l'Office fédéral de la culture auprès du Comité intergouvernemental UNESCO.
- Dans cette affaire, il est intéressant de constater que le musée BM a opté pour la voie de la transparence puisqu'il a annoncé sa possession du masque auprès de l'ICOM et a par la suite

[12] Code civil suisse (CC) du 10 décembre 1907, RS 210.
[13] RS 444.1.
[14] Voir AGACHE Lucie, *Le musée Barbier-Mueller rend un masque Makonde à la Tanzanie*, *in* Connaissance des arts, 10 mai 2010, disponible en ligne : http://www.connaissancedesarts.com/archeologie/actus/breves/le-musee-barbier-mueller-rend-un-masque-makonde-a-la-tanzanie-84322.php (consulté le 2 août 2011).

contacté la Tanzanie. En vue de la justiciabilité de l'acquisition du masque par le Musée BM, l'initiative du musée BM de contacter les différentes institutions et d'exposer le masque était probablement la meilleure voie à suivre.[15] En effet, dans l'hypothèse d'une poursuite en justice, certains éléments juridiques (voir ci-dessus chapitre III) auraient pu remettre en question la validité de l'acquisition du masque par le Musée BM. Une entente à l'amiable était visiblement préférable aux deux parties.

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