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-

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, nº 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

"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

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

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.

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.