The Means for the Settlement of International Cultural Property Disputes: An Introduction

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I. Introductory Remarks

International disputes over cultural property seem to be on the increase. The unfortunate increase in armed conflicts in areas which are rich in cultural heritage provide fertile ground for plunder and pillaging. Later, in peacetime, this may prove instrumental in giving rise to international disputes over stolen and trafficked pieces of cultural property. At the same time, a greater number of disputes in the field may also be taken as a positive sign; namely, as an indicator of successful criminal investigations leading to new discoveries of artworks stolen in the past and illegally exported. Such discoveries are often the outcome of enhanced international cooperation between domestic investigation agencies.

This paper gives an introduction on the methods used to settle international cultural property disputes. The slant and purpose of the paper draws from a point made a few years ago by the international law practitioner and scholar, Professor Shabtai Rosenne, who was concerned about the knowledge of international law by domestic lawyers. He made the following remark:

> "I do not think that an attorney can be fully qualified if he or she is unable to identify an international law element in a client's problem. I do not expect every attorney to be able to solve that international law problem. […] But the least that can be expected is that the attorney will identify that the international law problem is part of the complex to be resolved […]".[1]

This remark applies no less to international cultural property disputes.

This paper is organised in five sections with some concluding remarks. The first section illustrates briefly the generally recognised means of dispute settlement under international law and at the level of different national jurisdictions. The second section covers the issue of the scope of the subject matter of the kind of disputes in question, with special regard to the concept of "cultural property". The third section considers possible combinations of disputing parties according to their public or private legal personality. The fourth section refers to the highly diversified legal frameworks that provide the grounds upon which any given cultural property dispute may be addressed. The fifth section provides examples of how the international and domestic legal means of dispute settlement can operate concretely.

II. The Means of Dispute Settlement under International Law and of International Law Related Disputes

First, it is useful to recall the generally recognised means of dispute settlement. Since this paper is addressing international disputes, it seems appropriate to draw initially from Article 33 of the UN Charter which refers to: "negotiation, enquiry, mediation, conciliation, arbitration, [and] judicial settlement".[2] Article 33 of the UN Charter envisages inter-State disputes. However, many of the same mechanisms operate

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[1] A.V.M. Struycken, "The Hague Prize for International Law 2004 Awarded to Professor Shabtai Rosenne", December 2004, 51 NILR 475, 482.

[2] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art. 33(1).

in domestic jurisdictions with regard to disputes between private actors of different nationalities *inter se*, and between private actors and States or State entities.

This point anticipates the twofold character of the disputes addressed in this paper: international ones proper and so called transnational ones. The former pertain to disputes involving States, while the latter involve disputes between private parties of different nationality. A significant number of disputes of the kind under consideration here occur between origin or source States and foreign museums or individual collectors, whereas disputes between private parties are usually between individual original owners and museums or auction houses. As will be seen, there are seldom fully fledged inter-State disputes over cultural property or heritage.

Negotiation is the principal non-adjudicative means of dispute settlement, not just in inter-State disputes, through diplomacy. As domestic attorneys know full well, national and transnational disputes alike are prevailingly settled out of court. Also, negotiation is overarching with respect to the other non-adjudicative means of dispute resolution. It bears noting that all third-party non-adjudicative mechanisms – good offices, enquiry, mediation, and conciliation – are geared towards facilitation of a negotiated settlement of a dispute. And sometimes, the same can be said of adjudication, when litigation is used as a power tool. Indeed, negotiations frequently run parallel to court action, which may exert pressure for the settled closure of the case.

Good offices are not spelt out in the UN Charter, but are very much in use in international practice. They represent the lightest involvement of a third party with a view to facilitating negotiations. This tool is confined to simply promoting communication between the disputing parties.

In complex and highly technical disputes, enquiry, or fact-finding, by an expert third party may clarify the objective terms of the dispute. This would sensibly ease negotiated settlement. In this field, one could think of the art, history and administrative law expert assessment of the origin, authenticity, ownership, commercial value and provenance of a given disputed artefact.

Mediation goes a step forward. Mediators present each party's proposal to the other party, emphasising actual or potential common ground, if any, between the two or more parties. This may cajole the parties towards agreement. Further, conciliation is a process that encompasses elements of fact-finding, mediation, and possibly the submission to the parties of an independently crafted formula for the settlement. Such an end-product of the conciliatory process may be hortatory or binding, according to the terms of the agreement of the parties to submit the dispute to conciliation.

Each of the mentioned third-party non-adjudicative mechanisms does not necessarily operate in sealed compartment separation from the others.

For purposes of this discussion, special mention should be made of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (the "ICPRCP"). It was created in 1978 and vested primarily with mediation functions.[3] For good or bad, its intergovernmental nature needs to be emphasized, as it is composed of 22 UNESCO Member States, elected for a four-year mandate.[4]

A forum and an actor, at the same time, which is partly alternative and partly complementary to UNESCO in the good offices and mediation functions in this field, is the International Council for Museums ("ICOM"). Established in Paris in 1946, ICOM is characterised by its non-governmental nature.[5]

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[3] UNESCO <http://www.unesco.org/eri/committees/Committees_and_Organs_GC.asp?code=+1+8&language=E>.

[4] *Id.*

[5] "International Council of Museums", Observatory Illicit Traffic <https://www.obs-traffic.museum/international-council-museums>.

Nonetheless, it maintains formal relations with intergovernmental institutions, such as UNESCO itself, and enjoys a consultative status with the United Nations Economic and Social Council. It partners with the World Intellectual Property Organization, the International Criminal Police Organization ("INTERPOL"), and the World Customs Organization.[6]

As for conciliation, the Permanent Court of Arbitration (the "PCA") has adopted its own Optional Conciliation Rules,[7] which are based primarily on the United Nations Commission in International Trade Law Conciliation Rules (the "UNCITRAL Conciliation Rules").[8] In fact, the PCA can administer conciliation proceedings under the UNCITRAL Conciliation Rules. The PCA is likewise equipped to assist in enquiry or fact-finding proceedings.

As for adjudication, in inter-State litigation under public international law, there is no such thing as compulsory jurisdiction, which is the rule in domestic legal systems. Usually, States consent to adjudication before the International Court of Justice (the "ICJ") or to arbitration with regard to potential disputes through the acceptance of treaty clauses or optional protocols to such treaties. For the purpose of this paper, this explains the importance of giving full consideration to the applicable treaties concerning – directly, or indirectly – the regulation of cultural property and heritage. Multilateral agreements on dispute settlement or bilateral treaties between States on the mutual treatment of their nationals could also apply. Furthermore, States may make unilateral declarations of acceptance of the jurisdiction of the ICJ, under Art. 36(2) of the ICJ Statute.[9] Such expressions of consent operate on a reciprocity basis. Thus, for our purposes, it is key that any given pair of disputing States have expressed their consent to the ICJ jurisdictional competence, which encompasses, or does not exclude, cultural property or heritage.

As for arbitration, in 2012 the PCA set out its revised Arbitration Rules. They are particularly relevant for our purposes as they are designed for the arbitration of disputes involving various combinations of States, State-controlled entities, intergovernmental organizations, and private parties. The text of the Optional Rules, as well as model arbitration clauses that may usefully be adopted in international contracts, treaties and other arrangements, may be found on the PCA website.[10] The website also describes the assistance the PCA may provide with regard to enquiry (or fact-finding), mediation and conciliation.

Since dispute settlement is not only a matter of procedural law, this paper will now address the nature of the kind of disputes under consideration and then reference the possible substantive law parameters for the settlement of this kind of disputes, mostly depending on the different combinations of disputing parties.

III. The Scope of the Subject Matter of International Disputes Related to Cultural Property

The concept of "cultural property" is not easily defined as a legal concept. The very question as to whether in any given case the dispute bears on an issue of "cultural property" may be itself disputed. The point at issue is key to the determination of the legal framework applicable to any given dispute. It is worth emphasising that the same definitional issue is not only relevant for purposes of assessing rights of ownership but also for cultural objects circulation disputes, particularly under European Union ("EU") legislation.

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[6] *Id.*; "Memorandum of Understanding Between The International Criminal Police Organization - INTERPOL and The International Council of Museums on Countering the Theft of And Trafficking in Cultural Property", ICOM (adopted 11 April 2000).

[7] PCA Optional Conciliation Rules, 1 July 1996, <https://pca-cpa.org/wp-content/uploads/sites/6/2016/01/Permanent-Court-of-Arbitration-Optional-Conciliation-Rules.pdf>.

[8] UNCITRAL Conciliation Rules, 4 December 1980, <https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rulese.pdf>.

[9] United Nations, *Statute of the International Court of Justice*, 18 April 1946, 3 Bevans 1179; 59 Stat. 1031, art. 36(2).

[10] PCA Arbitration Rules, 17 December 2012, <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>; "Model Clauses and Submission Agreements", <https://pca-cpa.org/model-clauses-and-submission-agreements/>.

National heritage legislations employ a fair variety of definitions, which reflect to some extent different ideological approaches. For example, EU Regulation 116/2009 on the Export of Cultural Goods confirms the competence of the Member States of the EU to designate a higher or lower number of goods as "cultural".[11]

International treaties also lack a perfectly uniform definition, but they seem to provide grounds for their interpretation under the interpretive principle of harmonisation, according to a 2006 report of the United Nations International Law Commission, which reads as follows: "It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations".[12]

Leaving aside the initial instruments on the laws of warfare, in modern times the matrix of the legal definition of "cultural property" in an international treaty can be traced back to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the "1954 Hague Convention") adopted under the aegis of UNESCO. It comprises immovable as well as movable property "of great importance to the cultural heritage of all peoples of the world".[13] It provides a non-exhaustive list encompassing collections of artefacts, manuscripts, books and archives, religious and secular monuments, archaeological sites, and groups of buildings.

Further, and most pertinent to this discussion, is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (the "1970 UNESCO Convention"). It refers to "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science".[14] It provides a list of categories.[15] Most importantly, for an artefact to qualify as cultural property, the Convention also requires that it be so designated by the State authorities.

A fair degree of common ground in the field has been enhanced by the adoption in 1995 of the Convention on Stolen or Illegally Exported Cultural Objects (the "1995 UNIDROIT Convention") under the aegis of the International Institute for the Unification of Private Law ("UNIDROIT").[16] It bears noting that this instrument addresses the same categories of cultural property identified by the 1970 UNESCO Convention, without including the requirement of governmental designation. Having regard to the factual and legal circumstances out of which a cultural property dispute may arise, there is sufficient common ground to state that it can arise out of return, restitution or repatriation of stolen or illegally exported artefacts, loan and deposit, acquisition, intellectual property, insurance of art works, digitalization, donation, droit de suite or misappropriation of traditional cultural expressions.

In sum, while an appreciable degree of uncertainty remains as to the definition of "cultural property" based on the various international and comparative legal parameters, it is arguable that by and large sufficient elements may be inferred from such parameters that allow for a fair degree of jurisprudential convergence.

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[11] Council Regulation (EC) No 116/2009 on the Export of Cultural Goods [2008] OJ L39/1, art. 1.

[12] "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", 2006, Yearbook of the International Law Commission, Vol. II, Part Two, 177, 178.

[13] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954 and 26 March 1999, 249 UNTS 240.

[14] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 UNTS 231, art. 1.

[15] *Id.*

[16] *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 24 June 1995, 2421 UNTS 457.

IV. The Variable Combinations of Disputing Parties

From what has been discussed so far, two major indications emerge that are key to illustrating international cultural property disputes. The first one pertains to the wide spectrum of potential combinations of disputing parties. The second indication shows that such a wide range of combinations of disputing parties inevitably affects the normative parameters for settling the disputes in question.

In case of litigation, which is the scenery most familiar to attorneys, one would refer to the applicable law to the dispute based on the law governing the relationship that bears on the disputed cultural object. It bears stressing, however, that the assessment of the governing legal framework or frameworks of any given dispute may be relevant, if not key, also for the operation of non-adjudicative means of dispute resolution. In fact, the applicable legal parameters will strengthen, or weaken, the position of any given disputing party involved in negotiation, mediation or conciliation, and will significantly determine the extent of the range of the gains and concessions between the parties.

As to the first point, there may be States, or State entities and institutions, including State-owned museums, disputing *inter se*. These would be disputes between the States of origin, or source States, which claim the return of a disputed cultural object, on the one hand, and the States where the cultural object is located or subject to jurisdiction and control, on the other hand. There may also be cultural property disputes between States and private actors, such as individual collectors, antiquaries, auction companies, or, most frequently, private museums.

International dispute over cultural property may also occur between private parties having different nationalities. However, it is possible that, given the public interest of the cultural nature of the disputed artefact, a long lasting dispute of this kind before the domestic courts of the State where the disputed object is located would trigger the involvement of the State of nationality of the claimant, possibly on the diplomatic level, thus creating a multi-layered dispute arising out of the same circumstances. This is a rather recurrent pattern in inter-State disputes generally.

Having, again, regard to litigation, disputes between private parties will be governed by domestic law, which may include its conflict of law rules which may incorporate foreign domestic law. However, given the public interest relevance of the nature of cultural property disputes, *ordre public* considerations could apply. Most importantly, one is to consider on a case by case basis, whether the domestic applicable law, or the *lex fori,* belong to a State which is a party to an international convention which addresses cultural property disputes.

The issue of the applicable law is closely linked to that of the jurisdictionally competent forum. Clearly, disputes between private parties may be brought before competent domestic judges or before an arbitral tribunal. Domestic judiciaries may be involved in cultural property disputes also indirectly through their criminal courts by persecuting the crime of theft and/or of illicit trafficking of cultural property. Criminal proceedings – including the stage of criminal investigations – may well be considered in terms of State versus private party dispute. As already alluded to, misapplication, or abusive application, of the international law rules on the domestic plane can trigger an inter-State dispute.

V. The Variable Combinations of Legal Frameworks for Dispute Settlement

Again, based on the consideration that dispute settlement is not only a matter of procedural law and mechanisms, this paper sets out a few basic considerations about the substantive law on the basis of which a cultural property dispute may arise and would be settled.

When the disputing parties are two States – generally, but not exclusively – the dispute is governed by international law proper, *i.e.*, international treaties and customs. As already anticipated, however, it bears noting that it is rarely the case that inter-State cultural property/heritage disputes are brought before an international adjudicative body. Even though a few examples of the kind will be briefly referred to below, the main inter-State dispute settlement mechanism in the field of cultural property/heritage is diplomacy, just as between private actors.

Disputes between the authorities of one State and a private party – such as a museum, an auction company or a collector – may well be governed by the civil or penal law of one or more States. That does not exclude the actual or potential international law relevance of that dispute. In fact, most States are parties to a significant number of treaties that bear – directly, or indirectly – on the exercise of their domestic jurisdiction through negative and positive due diligence obligations relevant to cultural property or simply to the treatment of foreign nationals.

That is to say that a domestic law dispute involving a foreign individual, or company – or even a foreign State directly or through a State instrumentality – may also amount to, or become, an inter-State dispute. One such example is provided by a dispute between Lichtenstein and Germany, which was brought by the former before the ICJ in 2001.[17] There, Lichtenstein acted in diplomatic protection on behalf of a national whose cultural property had been confiscated during World War II. Lichtenstein did so precisely after resort to the German domestic courts by the individual who suffered the confiscation had proved to no avail.[18]

On the other hand, in a transnational domestic judicial, or commercial arbitration, context between private parties of different nationalities – individuals or companies, private or State-owned – the dispute would be decided on the basis of the national applicable law, including its rules on conflict of laws. That is why claimants often chose the national competent forum precisely based on the substantive applicable law. Such law would not only consist of its conflict of law rules but also, as already mentioned, of the public international law rules of which the forum State is a recipient.

Nevertheless, for purposes of the assessment of the legal framework for dispute settlement of any given cultural property case, a distinction is to be made between international law on the protection of cultural property/heritage in peacetime, on the one hand, and in times of armed conflict, on the other.

Having regard to facts that occurred in times of armed conflict, international humanitarian law and international criminal law apply according to which destruction or plundering of cultural property – both movable and immovable – are recognized as war crimes or even crimes against humanity. Such crimes involve the international criminal responsibility of the individuals concerned. This would afford the States Parties to the International Criminal Court (the "ICC") a specific title of criminal jurisdiction. But if any such State proved "unwilling or unable" to prosecute the crime in question, the crime would be prosecuted under the ICC's criminal jurisdiction.[19] The same criminal conduct, however, may engage the international responsibility of a State "that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity".[20]

While a large part of cultural property disputes are addressed in peacetime, many of them arose out of facts that occurred during an armed conflict. Therefore, many disputes addressed in peacetime are governed by elements of international law pertaining to the protection of cultural property during armed conflicts. Against this background, one is, thus, to recall the 1954 Hague Convention and its two Protocols of 1954 and 1999, ratified, respectively, by 133, 110 and 82 States. The normative core of such conventional instruments consists of prevention, registration, other due diligence and compensation obligations for States Parties. Therefore, their violation by a State party could give rise to a dispute between that State and another

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[17] *Case Concerning Certain Property (Liechtenstein v. Germany)*, 10 February 2005, Preliminary Objections, 2005 I.C.J. Reports 6, 10, para. 1.

[18] *Id.* at para. 16.

[19] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, art. 17, para. 1(a).

[20] UN General Assembly, *UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage*, 17 October 2003, 32 C/Resolution, section VI.

State Party, or even between that State and a national, or company, of a State Party to the Convention or the relevant Protocol, primarily before its domestic courts.

Much the same normative features characterise the already mentioned conventional instruments envisaged to apply in peacetime, with special regard to the 1970 UNESCO Convention and 1995 UNIDROIT Convention. It is key to note that the 1995 UNIDROIT Convention was encouraged by UNESCO precisely in view of the possibility that illicit import, export and transfer of ownership of cultural property may occur despite the import or export State having adopted all the due diligence measures required by the 1970 UNESCO Convention, or where the lack of due diligence of the import or export State cannot be proved. The focus is, therefore, on the domestic legal framework of the State where the disputed object is located or of the State having otherwise jurisdiction under its rules in force. It is worth noticing that, next to relying on the competent domestic courts, the 1995 UNIDROIT Convention safeguards, or even encourages, arbitration upon agreement by the parties.

VI. A Few Examples of Means of Cultural Property Dispute Settlement in Action and Lessons Learned

Despite the public interest involved in cultural property, inter-State disputes are infrequent. This is seemingly so due to the fact that the public interest in question prevailingly lies in the so-called source State, *i.e.*, the State claiming restitution. Whereas in the State where the disputed object is located, the opposing party – the possessor – is usually a private party, be it a collector, an auction house or, most frequently, a private museum. However, museums can also be State-owned, or under State control in different forms.

Even though, as repeatedly recalled, inter-State litigation over cultural property seldom occurs, two landmark cases in the field deserve mention. The first one, between Cambodia and Thailand, was brought to the ICJ and lead to two judgments, respectively in 1962 and in 2013, the latter judgment interpreting the former upon request by Cambodia, which had been the winning party.[21] There, the appropriateness of an adjudicative means of dispute settlement depended on the fact that the dispute over cultural property was subservient to the territorial delimitation of the area where a historical Temple (Preah Vihear) was located, and from which a number of traditional religious artefacts claimed by Cambodia had been removed by the Thai authorities.[22]

The second one is a contentious case between Eritrea and Ethiopia, which, *inter alia,* led to two arbitral decisions, in 2004 and 2009, awarding Eritrea the costs of restauration incurred by it for the damages caused by Ethiopia to the Stela of Matara when Ethiopia had been the occupying power, between 1997 and 2000.[23] Here, the reason for the adjudicative settlement of this particular cultural property dispute – which was administered by the PCA – depended on the fact that such a dispute drew from one of a host of mutual claims pending between the two countries, which arose out of the aforementioned conflict. It may be stressed that it was through diplomacy that the two countries agreed to resort to arbitral settlement of a significant number of pending reciprocal claims.

Nevertheless, when there is a governmental interest in the continued possession of the disputed object in a State other than the State of origin, negotiation – *i.e.*, diplomacy – appears as the preferred means of dispute settlement. Another example is the three treaty instruments of 1956, 1997 and 2004 painstakingly negotiated between Italy and Ethiopia, which led to the restitution in 2008 – at the expense of Italy, including

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[21] *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 15 June 1962, Merits, 1962 I.C.J. Reports 6; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 11 November 2013, Judgment, 2013 I.C.J. Reports 281.

[22] *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 15 June 1962, Merits, 1962 I.C.J. Reports 6, p. 14 at 12.

[23] *Eritrea-Ethiopia Claims Commission*, PCA Case No. 2001-02, Partial Award, 28 April 2004; Final Award, 17 August 2009.

restoration costs – of the Obelisk d'Axoum taken to Italy in 1937.[24] As anticipated, negotiation is an overarching means of dispute resolution. Indeed, its operational contours are often mixed with other non-adjudicative means of dispute settlement in which the same actors may assume different roles.

Given the international character of the kind of disputes under consideration, governmental diplomacy has often been involved in cultural property disputes, particularly between source governments and foreign museums. For example, there is a well-known case between Peru and Yale University that concerned cultural objects taken at the beginning of the last century from Machu Picchu by an archaeology scholar from Yale.[25] After long attempts at reaching a mutually agreeable settlement, in 2008 Peru withdrew from negotiations and filed a lawsuit in the United States of America ("U.S.") against the University. A U.S. Senator met repeatedly with Peruvian President Alan García and other government officials as well as with Yale representatives to facilitate a settlement of the dispute.[26] Finally, in 2010, the lawsuit was dropped and the parties reached an agreement.[27]

The dispute was actually resolved through two separate but entangled agreements. The first one, between the Peruvian government and Yale, requiring the University to return all of the objects by the end of 2012.[28] The second agreement identified San Antonio Abad University in Cuzco as the actual recipient of the disputed objects and established a partnership between the latter University and Yale.[29] Such a partnership expressly provided for shared stewardship of the collection – including organisation of exhibitions and collaboration on academic research. Keeping the antiquities in a scholarly setting proved key to the settlement.

Procedure wise, from the perspective of the disputing parties in the litigation before the U.S. judiciary – the Government of Peru and Yale University – the role of the U.S. Senator appears as one of a third-party non-adjudicative mechanism, namely mediation. If we assume that the U.S. Government would bear a degree of responsibility under international law over foreign cultural property held by Yale University, the role of the U.S. Senator falls within the framework of bilateral intergovernmental negotiation. In fact, it may be recalled that Peruvian President Alan García had written a letter to U.S. President Barack Obama "to request his help in recovering the artefacts".[30]

A *caveat*, however, applies here, in the sense of the need for testing the case-specific cultural and political sensibility of the nationalities involved. For in the case between Italy and the Getty Museum, initially involving a total of 52 objects, the involvement of the U.S. ambassador in Rome, Ronald Spogli, created tensions between the two sides since it was perceived by the Italian side as an attempt to politicize the negotiations involving a US museum.[31]

Be that as it may, it is worth noting that the above settlement between the Government of Peru and Yale University represents one of many success stories, which constructively overcame the tension between

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[24] "The Aksum Obelisk: the return trip", 24 October 2008, Ministry of Foreign Affairs of Italy < https://www.esteri.it/mae/en/sala_stampa/archivionotizie/approfondimenti/2008/10/20082024_obeliscoaxum.html>.

[25] Alessandro Chechi, Liora Aufseesser, and Marc-André Renold, "Case Machu Picchu Collection – Peru and Yale University", October 2011, Arthemis Art-Law Centre University of Geneva 1, 1 <https://plone.unige.ch/art-adr/cases-affaires/machu-picchu-collection-2013-peru-and-yale-university/case-note-2013-machu-picchu-collection-2013-peru-and-yale-university>.

[26] *Id.* at 2.

[27] *Id.* at 4.

[28] *Id.* at 3.

[29] *Id.* at 6.

[30] Maria Shehade and Kalliopi Fouseki, "The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes. International Journal of Cultural Property" (2016) 23 International Journal of Cultural Property 357, 370.

[31] *Id.*

a national ownership and possession approach and an approach focused on the international circulation and fruition of cultural property. Similarly negotiated settlements basically reflect the outcome of a *quid-pro-quo* formula consisting of the restitution of cultural property to the source State in combination with cooperation and circulation between the formerly disputing States and entities. This approach seems to fit well into a win-win, no zero-sum game theory, model, which has been successfully pursued elsewhere, to the extent that one would find it to represent a consistent trend, if not yet an established pattern, in the field of cultural property disputes.

Among the non-adjudicative third-party means of dispute settlement aimed at facilitating agreement, mediation stands out as the preferred one, often in combination with other third-party tools, including fact-finding and expert assessment. Special mention in that respect is to be made to the useful functions that may be performed, on the intergovernmental level, by UNESCO and, on the non-governmental level, by ICOM. Also, it would be fair to say that the ICPRCP assists governments in recovering claimed artefacts.

The role of the ICPRCP can be illustrated by two recently settled cases. The first one pertains to the Sphinx of Boğazköy, an object disputed between the Governments of Turkey and Germany since 1975. The case was resolved in 2011 through a Memorandum of Understanding (the "MoU") reached thanks to the mediation assistance of the ICPRCP. The latter provided that "the statue [would] be handed over to Turkey as a voluntary gesture of friendship". [32] This language reflects Germany's wish to avoid suggesting its legal responsibility for wrongful appropriation of the disputed goods, which could be evoked by the terms "return" or "restitution".[33] In fact, apart from the lack of documentation of the goods in question, the Turkish State was established in 1922, *i.e.*, after the discovery and removal of the good in question for conservation and exhibition purposes in 1910.[34] It is worth noting that the MoU also provided for the cultural cooperation between the two Governments in the museum sector and on archaeological projects.[35] This reproduces the *quid-pro-quo* formula, which allows to overcome the basic clash between a nationalist and an internationalist approach, even though still mildly favouring the former.

Among the success stories of the good offices/mediation functions performed by the ICPRCP, many pieces of literature indicate the case of the Makonde mask. The case was settled in June 2010 when the Barbier-Mueller Museum of Geneva returned to the National Museum of Tanzania the mask by way of "donation".[36] This wording reflects the same rationale as the MoU between Germany and Turkey. In fact, the Swiss museum had bought the mask in Paris in 1985, a year after it was stolen from the Dar Es Salam Tanzania National Museum.[37] After negotiations, which had started in 1990, came to a stalemate, the Government of Tanzania filed a request for return of the artefact with the ICPRCP in 2006.[38] However, it is fair to say that the mediation process came to a successful end with the significant non-governmental support from ICOM, which focuses on cultural property disputes involving museums.[39]

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[32] Alessandro Chechi, Liora Aufseesser, and Marc-André Renold, "Case Boğazköy Sphinx – Turkey and Germany", October 2011, Arthemis Art-Law Centre University of Geneva 1, 2 < https://plone.unige.ch/art-adr/cases-affaires/bogazkoy-sphinx-2013-turkey-and-germany/case-note-2013-bogazkoy-sphinx-2013-turkey-and-germany>.

[33] *Id.* at 4.

[34] *Id.* at 1, 5.

[35] *Id.* at 4.

[36] Press file, "Makonde Mask – Signing of an agreement for the donation of the Makonde mask from the Barbier-Mueller Museum of Geneva to the National Museum of Tanzania", 10 May 2010, ICOM 1, 3 <http://archives.icom.museum/press/MM_PressFile_eng.pdf>.

[37] *Id.*

[38] *Id.* at 4.

[39] *Id.* at 3.

VII. Concluding Remarks

In sum, international and transnational cultural property disputes tend to involve a wide range of parties, both States and non-State actors, such as museums, auction houses or individual dealers, or collectors. Such disputes may revolve around claims of titles of ownership, restitution, repatriation or recognition of a historical injustice. Such claims may happen to be invoked in combination. Restitution claims can arise when the disputed objects have been traded in peacetime – *i.e.*, exported in breach of national laws, through theft, illicit excavation of archaeological sites or unlawful retention of lawfully excavated sites – or removed during war time, occupation or colonization.

The sources of the applicable law may change according to different international or transnational contexts, whether the alleged conduct occurred in time of war or peace, the variable combinations of disputing parties, and the civil or criminal qualification of said conduct. There is no denying the appreciable degree of differences between relevant domestic legislations, or even between different international conventions, on the subject matter under consideration. At the same time, there appears to be sufficient common ground to promote the application of such legislative and conventional instruments to any given dispute of the kind in question according to interpretive principles that allow for converging, even though not yet inescapably uniform solutions, including on the adjudicative level. The increasing trend towards cooperative dispute resolution formulas shown by the non-adjudicative dispute settlement practice only adds to said common ground.

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