

Journal of Law and Policy

Volume 16

Issue 1

SCIENCE FOR JUDGES IX

Article 9

2008

Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market

Stacey Falkoff

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J. L. & Pol'y (2007).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol16/iss1/9>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**MUTUALLY-BENEFICIAL REPATRIATION
AGREEMENTS:
RETURNING CULTURAL PATRIMONY,
PERPETUATING THE ILLICIT ANTIQUITIES
MARKET**

*Stacey Falkoff **

INTRODUCTION

“I began to reflect: What’s the best way out?”—Phillipe De Montebello, director of the Metropolitan Museum of Art in New York, explaining that he only became interested in negotiating with the Italian government for the return of antiquities when he concluded that the issue “would not go away.”¹

A flush of repatriation claims brought in the past two years against several American museums has drawn much attention to extrajudicial mutually beneficial repatriation agreements (“MBRAs”) as an answer to cultural property disputes. The stage was set in February 2006, when the Republic of Italy and the Metropolitan Museum of Art in New York (the “Met”) entered into a reciprocity that has been hailed as a “landmark agreement”²

* Brooklyn Law School Class of 2008; B.A. McGill University, 2003. Thanks to my mom and dad for their unyielding love, encouragement, and support. Thanks also to the members of the Journal of Law and Policy Editorial Board for their editing assistance.

¹ Randy Kennedy & Hugh Eakin, *Met Chief, Unbowed, Defends Museum’s Role*, N.Y. TIMES, Feb. 28, 2006, at E1.

² Sharon Flescher, *News and Updates*, 8 IFAR J. 4 (2005/06).

and a “blueprint for future negotiations with other museums that own artifacts with . . . disputed provenance[s].”³ The Met agreed to return twenty-one likely looted and illegally exported artifacts to Italy in three installments over a four-year period,⁴ and, in exchange, the Italian Ministry of Culture (hereinafter referred to as “Italy”) promised the Met long-term loans⁵ of works of “equivalent importance and beauty.”⁶

Not long after this prominent MBRA, in April 2006, the director of the Boston Museum of Fine Arts (the “BMFA”) traveled to Italy to engage in similar discussions regarding the provenance of certain objects that the museum purchased between the early 1970s and the late 1990s.⁷ Six months later, the BMFA and the Italian government entered into an analogous agreement, whereby the museum voluntarily returned thirteen Greek and Roman antiquities to the Italian government,⁸ and Italy promised to lend the BMFA works for two upcoming exhibitions.⁹

This trend continued in July 2006, when the J. Paul Getty

³ Elisabetta Povoledo, *Italy Makes its Choices of Antiquities to Lend Met*, N.Y. TIMES, Mar. 15, 2006, at E2.

⁴ Flescher, *supra* note 2. These works included the Euphronios krater, purchased by the Met in 1972 for \$1 million, and the Morgantina Collection, consisting of fifteen pieces purchased in two lots in 1981 and 1982 for \$2.75 million. Andrew L. Slayman, *The Trial in Rome*, ARCHAEOLOGY, Feb. 6, 2006, <http://www.archaeology.org/online/features/italytrial/index.html>.

⁵ Under Italian law, state museums may loan works to foreign institutions for a maximum of three years. Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Objects*, 38 VAND. J. TRANSNAT’L L. 1067, 1094 (2005).

⁶ Elisabetta Povoledo, *Met to Sign Accord in Italy to Return Vase and Artifacts*, N.Y. TIMES, Feb. 21, 2006, at E2.

⁷ Ralph Frammolino & Jason Felch, *Boston Museum Returns 13 Antiquities to Italy*, L.A. TIMES, Sept. 29, 2006, at A4. These included a marble statue dating back to A.D. 136, a candelabrum, ancient Greek water jugs, and classical vessels, for which the BMFA paid a total of \$834,000. Peter Popham, *US Museum Returns Looted Antiquities as Italians Stand up for Lost Heritage and Pride*, THE INDEPENDENT, Oct. 1, 2006, at 55.

⁸ Popham, *supra* note 7.

⁹ Pursuant to the agreement, the Italian Culture Ministry will lend antiquities to the BMFA for upcoming exhibits about Renaissance Venice and artistic treasures from Naples. Frammolino & Felch, *supra* note 7.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 267

Museum in Los Angeles (the “Getty”) announced that it would return a sixth-century gold funerary relief and a fourth-century grave marker purchased in 1955 and 1993, respectively, alleged to have been illegally exported from Greece.¹⁰ The Minister of Culture for the Hellenic Republic issued a formal statement several months later, indicating that, in exchange, “the Ministry [will] work with the Getty . . . to establish a broad framework for cultural cooperation in areas of common interest, including loans of important artifacts and periodical exhibitions.”¹¹ Most recently, in July 2007, after more than three years of negotiations, the Getty agreed to return forty prized artifacts to Italy,¹² including a life-sized statue of Aphrodite dating from the 5th century B.C., a sculpture called “Griffons Attacking a Fallen Doe,” and a statue of Apollo.¹³ In exchange, Italy promised to drop civil charges against the Getty’s former curator of antiquities, Marion True, who is accused of trafficking looted art.¹⁴ Additionally, Italy agreed to allow the museum to keep the sculpture of Aphrodite until 2010, and the parties resolved to establish a “heightened level of cooperation [with one another,] enabling them to borrow each others’ artworks . . . far more liberally than in the past.”¹⁵

Willingness on the part of American museums to repatriate artifacts without legal mandates is not unprecedented,¹⁶ and

¹⁰ Hugh Eakin, *Getty Museum Agrees to Return Two Antiquities to Greece*, N.Y. TIMES, July 11, 2006, at E1.

¹¹ Press Release, Hellenic Republic Ministry of Culture and the J. Paul Getty Trust Issue Joint Statement (Dec. 11, 2006), http://www.getty.edu/news/press/center/statement06_getty_greek_joint_release_121106.html.

¹² Jason Felch & Ari Bloomekatz, *Getty’s Accord Removes Shadow; The Specter of Recent Scandals is Starting to Lift from the Museum and its Programs on News of an Agreement to Return Antiquities to Italy*, L.A. TIMES, Aug. 3, 2007, at B1.

¹³ *Returning Stolen Treasure*, THE CANBERRA TIMES, Aug. 11, 2007, at A8.

¹⁴ Felch & Bloomekatz, *supra* note 12.

¹⁵ *Returning Stolen Treasure*, *supra* note 13.

¹⁶ For example, in 1996, the Met returned two illuminated palm-leaf manuscript folios to Calcutta. Norman Palmer, *Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities*, in *THE RECOVERY OF STOLEN ART* 9 (Norman Palmer ed., 1998). In 1996, “the Court of the First

repatriation resulting from deals struck between art-rich source nations and museums is hardly novel.¹⁷ Nevertheless, the repatriation movement is steadily gaining momentum,¹⁸ as both public notions of propriety evolve and as art-rich nations gain a greater awareness of “the dual scientific and economic justifications for expending resources to recover their plundered past[s].”¹⁹ The accords reached in the last year suggest that MBRAs are likely to become the new protocol for resolving cultural property disputes.²⁰

Instance of Genoa in Italy ordered the restitution of 87 archaeological pieces to Ecuador, and in 2000, 59 pre-Colombian artifacts were returned to Peru from Canada. UNESCO Home Page, <http://portal.unesco.org> (follow “Culture” hyperlink; then follow “Normative Action” hyperlink; then follow “Heritage” hyperlink; then follow “Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation” hyperlink; then follow “Information Kit on Restitution” hyperlink) (last visited Nov. 12, 2007).

¹⁷ For example, in 1974, the Norton Simon Museum in Los Angeles agreed to return a statue of the Natarja to India. In return, India promised to withdraw its lawsuit against the museum, to allow the museum to retain the statue for ten years before its official return, and to lend the museum other objects in the near future. JOHN HENRY MERRYMAN, ALBERT E. ELSSEN & STEPHEN K. URICE, *LAW, ETHICS AND THE VISUAL ARTS* 340 (5th ed., Kluwer Law Int’l 2007) (1979). In 1986, the M.H. de Young Memorial Museum in San Francisco agreed to repatriate 35 pre-Colombian murals to Mexico after reaching a bilateral agreement with the Instituto Nacional de Antropología e Historia concerning their “custody, conservation, and exhibition.” JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 269 (2d ed. 1996).

¹⁸ John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL’Y J. 1, 6 (2004).

¹⁹ Michael J. Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities*, 14 DICK. J. INT’L L. 31, 45 (1995).

²⁰ Reni Gertner, *Litigators of the Lost Art: Museums to Avoid Lawsuits over Antiquities by Proof of Their Provenances*, MISSOURI LAWYERS WEEKLY, Aug. 28, 2006, at NEWS; see also Robert K. Paterson, *The “Caring and Sharing” Alternative: Recent Progress in the International Law Association to Develop Draft Cultural Material Principles*, 12 INT’L J. OF CULTURAL PROP. 62, 65 (2005) (“While . . . there have been some instances of refusal to consider requests for the return of sensitive cultural material to its place of origin, far more common have been instances of some sort of compromise solution.”).

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 269

While recognizing that MBRAs have the potential to confer distinct benefits, this Note will argue that they are nonetheless undesirable. Part I will lay the foundation for the discussion by providing an overview of the problem of the illicit antiquities market, as well as the fundamental arguments proffered in support of repatriation. Part II will examine the MBRA reached between the Met and Italy last year, acknowledging both the primary and subsidiary benefits that MBRAs can yield. Part III will then assume a more global perspective, revealing that, unfortunately, MBRAs inadvertently encourage museums to continue to acquire objects of questionable provenance and detract from the formation of much-needed legal precedent in the field. Part III will additionally provide an analysis of the hurdles and general uncertainties that source nations face when they seek to repatriate their cultural property under international law. By juxtaposing the benefits and drawbacks of MBRAs, this Note will demonstrate that, while MBRAs may eventually provide an ideal means for resolving cultural property disputes, their use at this point only functions to ensure the continuance of the black market.

I. BACKGROUND

A. *The Need to Curb the Illicit Antiquities Market*

The illicit antiquities trade is thriving.²¹ Attaching a precise financial value to such a secretive trade is difficult, but it is frequently purported to be second only to drug trafficking in the

²¹ Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 382 (1995) (“International antiquities smuggling has become an epidemic, affecting Europe, the Middle East, Africa, Asia, Latin America, North America, and virtually every nation.”); see also Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 446 (2003) (“The problem of antiquities looted directly from archaeological excavations is now recognized as one of considerable monetary magnitude and of worldwide scope.”).

hierarchy of lucrative underground markets.²² From 1972 to 1990, its profits are said to have doubled from one billion to two billion dollars,²³ and recent studies estimate that the trade currently generates approximately six billion dollars per year.²⁴ While thousands of artifacts enter the trade every day,²⁵ recovery prospects remain bleak. Only between five to ten percent of objects that are illegally excavated and/or exported in contravention of national patrimony and national export laws are recovered.²⁶ Moreover, the average recovery of such illicit antiquities is estimated to be a slow 13.4 years.²⁷ The vast majority of these objects eventually enters the legitimate art market.²⁸

Realistically, a number of factors render it improbable that the illicit antiquities trade will ever cease to exist.²⁹ Discrepancies

²² Jane Warring, *Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 234 (2005).

²³ Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective in Stemming the Illicit Trade in Art*, 70 IND. L.J. 985, 986 (1995).

²⁴ David N. Chang, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 HOUS. J. INT'L L. 829, 832 (2006). The trade largely operates with tomb robbers searching out these artifacts, and selling them to middlemen, who enjoy significant profits when they resell the works to private buyers or institutions. Sue J. Park, *The Cultural Property Regime in Italy: An Industrialized Nation's Difficulties in Retaining and Recovering its Antiquities*, 23 U. PA. J. INT'L ECON. L. 931, 931 (2002).

²⁵ See Chauncey D. Steele IV, *The Morgantina Treasure: Italy's Quest for the Repatriation of Looted Artifacts*, 23 SUFFOLK TRANSNAT'L L. REV. 667, 683 (2000).

²⁶ Sarah S. Conley, *International Art Theft*, 13 WIS. INT'L L.J. 493, 493 n.6 (1995). National patrimony laws vest ownership of all cultural property of a particular age in the state, including that which has not yet been discovered. National export laws generally restrict the export of cultural objects. Jessica Eve Morrow, *The National Stolen Property Act and the Return of Stolen Cultural Property to its Rightful Owners*, 30 B.C. INT'L & COMP. L. REV. 249, 252 (2007).

²⁷ Chang, *supra* note 24.

²⁸ Christa L. Kirby, *Stolen Cultural Property: Available Museum Responses to an International Dilemma*, 104 DICK. L. REV. 729, 730–31 (2000).

²⁹ See Chang, *supra* note 24.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 271

between national laws can be used to launder works of tainted title;³⁰ the physical dimensions of the objects often allow them to be easily removed from their countries and resold; and the nature of the antiquities market³¹ espouses secrecy as the norm for both legitimate and illegitimate international transactions.³² In addition, notwithstanding the enormous profits the trade yields, corresponding criminal penalties are relatively mild, and certainly serve as less of a deterrent than those associated with similarly lucrative black markets, such as arms and drug trafficking.³³

Despite the trade's inevitability, the nations of the world have a shared interest in curbing it to the greatest extent possible. The illegal excavations and looting upon which the black market depends have disastrous, irreparable effects.³⁴ They "destroy[] important aspects of the cultural heritage of source nations,"³⁵ thereby creating sizeable gaps in source nations' senses of identities.³⁶ Moreover, whether performed by professional or inexperienced looters, the search for objects with "particular

³⁰ Steven F. Grover, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1441 (1992).

³¹ McCord, *supra* note 23, at 989.

³² Warring, *supra* note 22, at 240 (citing Barry Meier & Martin Gottlieb, *An Illicit Journey Out of Egypt, Only a Few Questions Asked*, N.Y. TIMES, Feb. 23, 2004, at A1) (quoting Ricardo J. Elia) ("[P]eople think that there is an illicit market and a legitimate market . . . [i]n fact, it is the same.").

³³ Borodkin, *supra* note 21, at 378 nn.8 & 9 ("Americans routinely receive mandatory prison sentences for possession and sale of narcotics. By contrast, a typical punishment for smuggling archaeological artifacts is a fine, a suspended sentence, and community service.").

³⁴ Borodkin, *supra* note 21, at 382–83 ("Once a site has been worked over by looters in order to remove a few salable objects, the fragile fabric of its history is largely destroyed.").

³⁵ Cohan, *supra* note 18, at 7.

³⁶ Cohan, *supra* note 18, at 7; accord Laura M. Siegle, *United States v. Schultz: Putting Cultural Property in its Place*, 18 TEMP. INT'L & COMP. L.J. 453, 471 (2004) (stating that "spatial relations among archaeological remains" can convey much information that is lost in illicit excavations); see also Jonathan S. Moore, 97 YALE L.J. 466, 469 (1988) (stating that anthropological archaeologists can learn a great deal about the habits and cultures of ancient civilizations through undisturbed sites).

aesthetic or perhaps historical attraction that will have a high monetary value on the international art market” exerts tangible effects.³⁷ Archaeological sites incur considerable damage,³⁸ and objects presumed to be of lesser monetary value are often destroyed.³⁹ The value of the very objects that are sought, “discovered,” and sold on the black market is diminished as well. Their irreversible decontextualization⁴⁰ dramatically reduces their archaeological, anthropological, and art historical significances.⁴¹ Additionally, their market worth is frequently lessened by “hasty and inexpert extraction and handling during the various illegal transactions that inevitably occur before the[y] . . . finally come[] to rest in a collector’s hands or a museum’s vault.”⁴²

Commentators such as renowned cultural property law expert John Merryman contend that the illicit antiquities market is a positive phenomenon fueled by an appreciation for the works it traffics, a desire to preserve them, and a corresponding belief that they can best be taken care of by museums and private collectors.⁴³

³⁷ Merryman, Elsen & Urice, *supra* note 17, at 220.

³⁸ Cohan, *supra* note 18; Park, *supra* note 24 (stating that tomb robbers often work “hastily and crudely”); Siegle, *supra* note 36 (stating that “[i]t is important to preserve archaeological sites and their contents so that people can understand how, when, and why the objects in them were created.”).

³⁹ Merryman, Elsen & Urice, *supra* note 17, at 220.

⁴⁰ Borodkin, *supra* note 21, at 399 (“[N]o court-made remedy can replace lost archaeological information once an artifact has been dismembered, defaced, or isolated from its context.”).

⁴¹ NEIL BRODIE, *Export Deregulation and the Illicit Trade in Archaeological Material*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES 85 (Jennifer R. Richman & Mario P. Forsyth eds., 2004); *see also* Park, *supra* note 24, at 932–33 (“The antiquity, removed from its site without proper evaluation, becomes nothing more than a decorative or aesthetic item with little or no historical significance. Even if the item is recovered, the loss of history cannot be.”).

⁴² Kelly, *supra* note 19, at 33.

⁴³ *See, e.g.*, John Henry Merryman, *Cultural Property Internationalism*, 12 INT’L J. CULTURAL PROP. 11, 32 (2005) (stating that “a system, [such as that] dictated by the preferences of retentive source nations and zealous archaeologists . . . does not provide optimal conditions for the preservation of the cultural heritage of all mankind or its optimal distribution for access, study, and enjoyment”).

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 273

According to such logic, “many pieces would be ignored or ruined if left in place.”⁴⁴ It is indeed conceivable that a particular ancient object might be better attended to in a controlled environment, such as on a pedestal in a major museum, than it would if left virtually unknown in an underground tomb. But, as already noted, that object’s journey through the black market would likely entail a significant amount of damage,⁴⁵ including the permanent loss of information regarding that very object and the annihilation of any number of other objects that were inadvertently unearthed in its illicit excavation.⁴⁶ In sum, “what the market purports to do best—protect the integrity of individual objects—does not always succeed, due to both intentional and unintentional damage.”⁴⁷

B. Defining “Repatriation” and its Variations

Cultural property repatriation is “the return of cultural objects,” whether “to [their] nations of origin,” “to the nations whose people include the cultural descendants of those who made the objects,” or “to the nations whose territory includes their original sites or the sites from which they were last removed.”⁴⁸ The repatriation movement, and repatriation claims in general, rely on two interconnected principles, namely, that cultural property belongs in its source country, and that works that currently reside abroad in museums and collections as the result of plunder, theft, removal by colonial powers, illegal export, or exploitation should be returned.⁴⁹

When a museum uses the prospect of voluntary repatriation as a bargaining chip, the act of repatriation tends to be accompanied

⁴⁴ Kelly, *supra* note 19, at 52.

⁴⁵ Moore, *supra* note 36.

⁴⁶ Merryman, Elsen & Urice, *supra* note 17, at 220.

⁴⁷ Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L. 197, 205–06 (2001) (providing as an example that tomb raiders and site looters frequently destroy objects, either for ease of transportation or out of ignorance).

⁴⁸ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 845 (1986).

⁴⁹ *Id.*

by a promise on the part of the source nation not to institute legal proceedings, and often includes a public statement clearing the museum's name.⁵⁰ Other terms that are commonly negotiated for include split custody of the object at issue and the transfer of title to the source nation while the object remains housed in the museum.⁵¹ The parties may agree to a return schedule that allows the museum to exhibit the work before relinquishing it, or, as has been a popular feature of the recent MBRA's, the source nation may promise to lend the museum comparable works in the near future.⁵²

The need to closely examine the utility of MBRA's as a variation of voluntary repatriation is pressing. Numerous repatriation claims were brought or threatened over the past two years: Italy is currently in negotiations for the return of objects residing at both the Princeton University Art Museum⁵³ and the Cleveland Museum of Art,⁵⁴ and has suggested that it may soon lay claims to works at the Toledo Museum of Art, the Minneapolis Institute of Arts, and the Virginia Museum of Fine

⁵⁰ For instance, the repatriating nation might publicly state that it does not believe that the museum acquired the object at issue knowing of its questionable provenance, and that the museum was highly cooperative in rectifying the situation once informed. Palmer, *supra* note 16.

⁵¹ For example, in 2002, France and Nigeria entered into an agreement wherein France recognized Nigeria's title to the sculptures at issue, and in return, Nigeria agreed to allow those objects to remain at a certain museum in France for a renewable period of 25 years. Such leases provide an alternative to outright restitution, allowing the market nation to keep the cultural object so long as it pays the source nation, in some desirable form, to do so. Warring, *supra* note 22, at 293-94.

⁵² This was the case in three of the most prominent MBRA's reached in 2006 (those between Italy and the Met, Italy and the BMFA, and Greece and the Getty), all of which contained provisions specifying that the repatriating nations would lend the repatriating nations works in the future. See Flescher, *supra* note 2, at 4-5; Frammolino & Felch, *supra* note 7; Press Release, Hellenic Republic Ministry of Culture and The J. Paul Getty Trust Issue Joint Statement, *supra* note 11.

⁵³ Patty Gerstenblith & Bonnie Czeglédi, *International Cultural Property*, 40 INT'L LAW. 441, 449 (2006).

⁵⁴ Steven Litt, *Report Says Italy may Press Art Museum for Antiquities*, PLAIN DEALER, Oct. 2, 2006, at D6.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 275

Arts.⁵⁵ Additionally, Egypt has recently claimed a mask possessed by the St. Louis Art Museum and has had a long-standing request to Germany for the return of the bust of Nefertiti.⁵⁶ Finally, in September 2007, Yale University agreed to return thousands of Inca artifacts to the Peruvian government that were illegally removed from Machu Picchu nearly a century ago, but the parties have not yet finalized the terms of the return.⁵⁷ Although by no means exhaustive, this list illustrates the copious number of MBRAs that may be reached in the proximate future.

C. *The Desirability of Repatriation*

Any analysis of the utility of MBRAs must necessarily begin with an examination of whether repatriation is desirable, either as a means or an end. This subsection will articulate five primary arguments in favor of repatriation and assess the validity of their critiques, in order to show that repatriation of select cultural property is desirable, both as a remedy for the detrimental effects of the illicit antiquities trade and to deter its continuation and growth.

1. *Comporting with Morals*

In many situations repatriation may simply seem to be the morally appropriate course of action.⁵⁸ This may be because it would remedy the effects of an unfortunate historic event.⁵⁹ For example, the object at issue may have been plundered in time of

⁵⁵ Gerstenblith & Czegledi, *supra* note 53.

⁵⁶ Flescher, *supra* note 2, at 5.

⁵⁷ Flescher, *supra* note 2, at 5.

⁵⁸ See David Rudenstine, *Cultural Property: The Hard Question of Repatriation, The Rightness and Utility of Voluntary Repatriation*, 19 CARDOZO ARTS & ENT. L.J. 69, 70 (2001) (“[S]elective repatriation of cultural patrimony may be the right thing to do in that it responds to a[] historical episode that, in the opinion of many, should not have occurred and which remains a source of bitter contention today.”).

⁵⁹ *Id.*

war or while the source nation was under colonial rule.⁶⁰ It may also be because, as a result of losing its cultural property, the source nation has become economically deprived.⁶¹ That is, cultural property draws tourists, which in turn, boost economies.⁶² By repatriating cultural patrimony, source nations whose people or ancestors created the objects receive this benefit, rather than market nations⁶³ whose people obtained them illegally.⁶⁴

Instead of contesting whether repatriation is the “right” course of action in cultural property disputes, anti-repatriationists tend to respond by seeking to invalidate the source nation’s title. Their rationales may be temporal based, asserting that the current possessor of the object has had it for such a long period that it has effectively become part of the patrimony of the society in which that possessor is located.⁶⁵ Alternatively, they may be historically based. For instance, it has been argued that the “rights of claimants have been abrogated . . . [in situations where the] group from which the property originated no longer exists.”⁶⁶ Finally, it is frequently asserted that the institution in which a stolen artifact is housed should be entitled to maintain it because it is responsible for the degree to which the artifact has been preserved.⁶⁷

These contentions, however, are highly problematic. While the first counter-argument relies upon the inaccurate notion that the passage of time necessarily functions as a statute of limitations, the second ignores the many benefits that may be gained from

⁶⁰ See, e.g., Christine K. Knox, *They’ve Lost Their Marbles*, 29 SUFFOLK TRANSNAT’L L. REV. 315, 330 (2006) (Ethiopia and Italy reached a deal for the return of an enormous 1,700 year old obelisk taken while Ethiopia was under colonial rule in 1937. In 2004, Italy dismantled the obelisk and was working on transporting it back.).

⁶¹ See Kelly, *supra* note 19, at 46.

⁶² See Kelly, *supra* note 19, at 46.

⁶³ Although not necessarily distinct from one another, market nations may be thought of as those that have the largest markets for illicit antiquities, and source nations as those that tend to supply the market.

⁶⁴ Kelly, *supra* note 19, at 46.

⁶⁵ Rudenstine, *supra* note 58, at 79.

⁶⁶ Cohan, *supra* note 18.

⁶⁷ See Greenfield, *supra* note 17.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 277

recontextualizing artifacts, even if they are not returned to the direct descendants of their creators. The significance of returning cultural patrimony is not necessarily that it “is . . . something owned by a people, but [rather, that it is] something of them, a part of their defining collective identity.”⁶⁸ Additionally, the third counter-argument relies upon the untenable presumption that the object would have been damaged or destroyed were it not stolen, and that this hypothetical situation should therefore trump the rights of the original owner. In short, the moralistic grounds for repatriation continue to hold validity as a reason for returning illicit cultural property.

2. Positive Social Effects

Repatriation also has the potential to exert positive social effects. As recent MBRAs demonstrate, “generosity can forge bonds between nations and foreign institutions and encourage future collaboration[s].”⁶⁹ One of the driving forces behind the MBRA reached between the Getty and Italy in 2006 was the Getty’s desire to establish a new working relationship with Italy.⁷⁰ In some cases, MBRAs may explicitly require parties to maintain a cooperative rapport with one another. For example, under the terms of the February 2006 MBRA between the Met and Italy, the Met must respect the negotiated return dates for the objects in the Morgantina Collection and the Euphronios krater, while Italy will be obliged to follow through on its promise to provide the museum with long-term loans.⁷¹ Moreover, in a more general sense,

⁶⁸ Rudenstine, *supra* note 58, at 76; *see also* Cohan, *supra* note 18, at 104 (“The development of culture is a continuous process; it is hard to draw distinct lines separating a people’s sense of cultural heritage from the distant past to the present.”).

⁶⁹ Warring, *supra* note 22, at 295.

⁷⁰ Tracy Wilkinson, Jason Felch & Ralph Frammolino, *Getty to Return Artworks to Italy*, L.A. TIMES, June 22, 2006, at A1 (quoting an attorney negotiating on behalf of the Getty as saying, “[w]e are not just arguing over objects, but we are working on a long-term relationship between the Getty and its natural partner, Italy, with respect to antiquities”).

⁷¹ *New Era Opens for Looted Art*, ANSA ENGLISH MEDIA SERVICE, Nov.

repatriation may be seen as an expression of respect, potentially leading to improved international relations between the source nation and the nation in which the object is located.

Not all commentators agree that such positive social effects should dictate the use of repatriation. Rather, some focus on the need to protect cultural property, and specifically, on the wealth of resources that museums in market nations have at their disposal to ensure the preservation of artifacts, contrasted with the lack thereof possessed by many source nations.⁷² Accordingly, these commentators argue that when the institution housing the work in a market nation provides a superior facility to that available in the source nation, the object should not be subject to repatriation.⁷³ Essentially, these arguments paternalistically equate a museum's ability to care for art with its right to do so, asserting that museums are entitled to retain cultural property at issue because "source nations lack or fail to provide human and financial resources and the organizational structure needed to deal adequately with their cultural resources."⁷⁴

But even conceding that market nations may, in certain instances, be better equipped to preserve artifacts than source nations, the above counter-argument ultimately maintains the status quo. There is little chance that source nations will ever possess resources that rival those of market nations if their riches continue to be plundered, and they continue to be forced to spend funds on recovery that otherwise could be spent on preservation and exhibition. Moreover, the belief that market nations deserve to retain illicitly acquired artifacts simply because they have superior means to care for such works is unabashedly supremacist and imperialist. One need only consider the logical extension of such arguments—that discrepancies in monetary wealth justify the looting and retention of all valuables, man-made and natural, from

30, 2006 (Italy has already loaned the Met a Greek calyx under the agreement).

⁷² See, e.g., David Lowenthal, *Why Sanctions Seldom Work*, 12 INT'L J. OF CULTURAL PROP. 393, 396 (2005) ("Italy is so stuffed with treasure that only a small fraction of it is catalogued or adequately cared for, let alone open to the public. Things are much the same the world over.").

⁷³ *Id.*

⁷⁴ Merryman, Elsen & Urice, *supra* note 17, at 417–18.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 279

non-first world nations—an obviously indefensible proposition.

3. *Mitigating the Effects of the Black Market*

Repatriationists also argue that the process helps mitigate the loss of information and tangible destruction that stem from the black market.⁷⁵ As previously discussed, the search for artifacts to supply the black market results in losses on multiple levels, and decontextualization can diminish, if not annihilate, the meaning of certain works of art.⁷⁶ By returning looted and illegally-exported objects to their source nations, repatriation provides the potential for them to be “put[] . . . in the correct geographic and sociological context to better interpret their meaning and significance.”⁷⁷

In response, anti-repatriationists contend that such recontextualization rarely actually occurs, but rather, that repatriated cultural property tends simply to be transferred from a museum in the market nation to one in the source nation.⁷⁸ In such situations, it is asserted, the return of the artifact provides little, if any, enrichment to its original cultural context, and the work often is less accessible to viewers than it was in its previous location.⁷⁹ But even in situations where repatriated objects are not returned to their original find-site, their greater proximity to it “can provide more information and convey greater meaning to historians, archaeologists, and tourists.”⁸⁰

⁷⁵ See Kelly, *supra* note 19, at 46.

⁷⁶ John E. Bersin, *The Protection of Cultural Property and the Promotion of International Trade in Art*, 13 N.Y.L. SCH. J. INT’L & COMP. L. 125, 136 (1992); see also Kelly, *supra* note 19, at 54 (“As more mosaics are torn from their walls by torchlight, more artifacts are looted from burial chambers by moonlight and more paintings and tapestries are ripped from their mountings by thugs and thieves, science loses the ability to place the piece in its historical context, thus, never adding to the world’s knowledge information about the lost civilization that produced it.”).

⁷⁷ Kelly, *supra* note 19, at 46.

⁷⁸ Rudenstine, *supra* note 58, at 77.

⁷⁹ Rudenstine, *supra* note 58, at 78–79.

⁸⁰ Siegle, *supra* note 36 (“[O]bserving an artifact in its proper context can provide more information and convey greater meaning to historians, archaeologists, and tourists The number of cultural objects and their

4. *The Possibility of a Comparatively Free Cultural Property Market*

Repatriation additionally has the potential to exert a positive effect on the legitimate art market.⁸¹ The cultural property retention schemes⁸² of source nations are often criticized as overbroad, nondiscriminatory, and self-defeating.⁸³ As both a symbol of a unified effort in the fight against the illicit antiquities trade and as material assistance in remedying its effects, the repatriation of artifacts may encourage source nations to adopt more moderate policies, thereby leading to a comparatively free cultural property market.⁸⁴ In other words, “[v]oluntary repatriation may well stimulate an era of good feeling which, in turn, may prompt art source nations to reconsider their ownership and exportation policies.”⁸⁵

Anti-repatriationists assert that source nations excessively hoard their cultural property, “indiscriminately retain[ing] duplicates of objects beyond any conceivable domestic need, while [obstructing the free market by] refusing to make them available to museums, collectors, and dealers abroad.”⁸⁶ The same argument,

spatial relationships among archaeological remains tells archaeologists much about the habits of ancient civilizations.”).

⁸¹ Rudenstine, *supra* note 58.

⁸² The term “cultural property retention scheme” refers to the various laws, including national patrimony laws and national export laws, enacted in attempts to retain cultural patrimony.

⁸³ Rudenstine, *supra* note 58, at 81

[T]he definition of cultural property subject to these restrictions is exceedingly broad and results in the accumulation, within the art source nation, of an overwhelming amount of cultural property that far and away outstrips any reasonable needs or interests it may have [Additionally,] the restrictive policies contribute to a black market in antiquities that leads to the destruction of unexcavated archaeological sites, the destruction of artifacts themselves, and the inability to further the information of knowledge about the past.

Id.

⁸⁴ Rudenstine, *supra* note 58.

⁸⁵ Rudenstine, *supra* note 58, at 81.

⁸⁶ Merryman, *supra* note 48, at 847. Note that by the term “duplicates,”

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 281

however, can be made against the retention of these works by museums in market nations. It is commonly conceded that “[m]ajor western museums are so laden with objects of every kind that there are not the facilities for them to be permanently or properly exhibited, and [that] much material is simply stored, never to be viewed by the public.”⁸⁷ Moreover, whether a certain antiquity should be considered a duplicate or “surplus” should be a determination made by the source nation, which has the opportunity to engage in a “close, systematic inspection [that] might reveal small but significant points of dissimilarity,”⁸⁸ as well as the legitimate prerogative to decide that the retention of duplicates is desirable. Significantly, even if repatriation claims do stem from “excessive hoarding,” using this observation as an excuse for retaining illicit antiquities will likely lead source nations to adopt retention schemes that are even more stringent; both history and logic indicate that, as the black market grows, art-rich nations respond by further tightening their export laws pertaining to cultural property.⁸⁹

5. Attaining Cultural Nationalist Goals

Finally, in many situations, repatriation may be appropriate because the cultural property at issue is intrinsic to its source nation’s cultural heritage.⁹⁰ That is, “[w]orks of art, unique geological structures[,] and other objects laden with significance by

commentators do not refer to works that are indistinguishable from one another, but rather, to works that date from the same period, which possess very similar aesthetic value, design, and function.

⁸⁷ Greenfield, *supra* note 17, at 298.

⁸⁸ “[W]ithout a full and proper examination, it is not an easy task to decide what may be ‘redundant’. The decision cannot be made on stylistic criteria alone.” Brodie, *supra* note 41, at 86.

⁸⁹ Kelly, *supra* note 19, at 54.

⁹⁰ Merryman, *supra* note 48, at 831–32; *see also* Greenfield, *supra* note 17, at 297 (“[C]ultural property is most important to the people who created it or for whom it was created or whose particular identity and history it is bound up with. This cannot be compared with the scholastic or even inspirational influence on those who merely acquire such objects or materials.”).

the duration of their exposure, [are frequently] patriotic symbols of national pride.”⁹¹ This idea, termed “cultural nationalism,” “gives [source] nations a special interest [in their cultural property], implies the attribution of national character to objects, independently of their location or ownership, and legitimizes both national export controls and demands for . . . repatriation.”⁹²

In opposition to cultural nationalists, anti-repatriationists and market nations have a propensity to invoke cultural internationalist arguments, characterized by the notion that cultural property should be considered to be “components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”⁹³ To the cultural internationalist, “everyone has [a somewhat equivalent] interest in the preservation and enjoyment of cultural property,”⁹⁴ and the opportune location for works should be determined by factors such as where they would be best preserved and accessible to the largest audiences.⁹⁵

Facially, cultural nationalist and cultural internationalist goals are dichotomous and seem to lead in inconsistent directions: Whereas cultural nationalism has been described as “nationalist” and “retentive,” cultural internationalism as been lauded as “cosmopolitan” and “protective.”⁹⁶ In practice, however, they are not mutually exclusive, and thus it is not necessary to evaluate them against one another.⁹⁷ As the following section will elaborate, theoretically, both cultural nationalist and cultural internationalist goals can be attained through compromises such as MBRAs. As such, cultural internationalist theories are more aptly construed as reminders of certain considerations that should be taken into account in any international cultural property dispute than they are

⁹¹ Bersin, *supra* note 76, at 138.

⁹² Merryman, *supra* note 48, at 831–32.

⁹³ Merryman, *supra* note 48, at 831–32.

⁹⁴ Merryman, *supra* note 43, at 11.

⁹⁵ Siegle, *supra* note 36, at 454.

⁹⁶ Merryman, *supra* note 48, at 836.

⁹⁷ Eminent scholar John Merryman has suggested that, when incompatible, cultural internationalists’ goals should trump those of cultural nationalists. Merryman, *supra* note 48, at 853.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 283

per se arguments weighing against repatriation.

II. THE UTILITY OF MUTUALLY BENEFICIAL REPATRIATION AGREEMENTS

Repatriation of select illicit cultural property will clearly diminish the illicit antiquities market and the damage it exerts. Here, however, the focus will be on whether entrance into MBRAs, as a variation of “pure”⁹⁸ repatriation, is a desirable method. In the early 1980s, Professor Paul Bator suggested that it was, writing that, “museums [should] consider arrangements with foreign museums and governments that involve reciprocal measures, rather than simply repatriation of objects to their countries of origin.”⁹⁹ Over two decades later, some of the most esteemed American museums appear to be heeding Professor Bator’s advice. Using the February 2006 MBRA reached between Italy and the Met as a reference point, this section will focus on both the contractual and incidental benefits that can potentially flow from such compromises.

To start with the tangible, negotiated benefits of the 2006 agreement, the terms of the MBRA will benefit the Met in several ways. First, the return will occur in three phases, beginning with the return of four classical Apulian vases,¹⁰⁰ as soon as possible.¹⁰¹ Then, in 2008, the Met will return the Euphronios krater, credited as “one of the finest existing examples of Greek vessels from the

⁹⁸ I use this term to refer to situations where the museum or other possessor of the disputed object agrees to repatriate it without receiving anything in return.

⁹⁹ Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 364 (1982).

¹⁰⁰ More specifically, the vases consist of a 6th Century Laconian *kylix* acquired by the Met in 1999, a red-figured *Apulian Dinos* dating from between 340-320 B.C. and acquired by the Met in 1984, a red-figured *psykter* decorated with horsemen, ca. 520 B.C., acquired by the Met in 1996, and a red-figured Attic amphora by the Berlin painter, ca. 490 B.C., acquired by the Met in 1985. Press Release, Statement by the Metropolitan Museum of Art on its Agreement With the Italian Ministry of Culture (Feb. 21, 2006), http://www.metmuseum.org/Press_Room/index.asp (follow “Press Release Archive” hyperlink; then follow “February 2006” hyperlink).

¹⁰¹ Kennedy & Eakin, *supra* note 1.

sixth century B.C.,”¹⁰² which the museum purchased in 1972 for \$1 million.¹⁰³ The return will be completed in 2010, when the Met will relinquish the fifteen-piece silverware set known as the Morgantina Collection, which the museum purchased in two lots in the early 1980s for approximately \$2.75 million.¹⁰⁴ This schedule is especially beneficial for the Met because it will enable the museum to exhibit the Euphronios krater for nine months in its Greek and Roman galleries, which opened in April 2007.¹⁰⁵

Additionally, the agreement will protect the Met’s reputation, as it contains particular clauses specifying that the Met acquired the artifacts in good faith and waives Italy’s right to pursue any form of legal action against the museum for these works.¹⁰⁶ Finally, Italy has promised the Met long-term loans of works of equal beauty and importance.¹⁰⁷ Although precisely which works will be loaned has not been finalized,¹⁰⁸ the significance of this promise and its role in encouraging the Met to return the works that were at issue must not be downplayed. Indeed, the Director of the Met publicly stated that, “[the museum] is particularly gratified that, through this agreement, its millions of annual visitors will continue to see comparably great works of ancient art on long-term loan from Italy to this institution.”¹⁰⁹

Italy undoubtedly reaps the principle tangible benefit of this agreement insofar as it will have its cultural property and heritage

¹⁰² Anthee Carassava, *Greek Officials Planning to Bring Charges Against Ex-Curator*, N.Y. TIMES, May 5, 2006, at A3.

¹⁰³ Slayman, *supra* note 4.

¹⁰⁴ Maura Singleton, *Plunder: The Theft of the Morgantina Silver*, U. VA. MAG., Spring 2006, available at <http://www.uvamagazine.org/site/> (then follow “Back Issues” hyperlink; then follow “The Theft of the Morgantina Silver” hyperlink).

¹⁰⁵ Press Release, Statement by the Metropolitan Museum of Art on its Agreement With the Italian Ministry of Culture, *supra* note 100.

¹⁰⁶ Flescher, *supra* note 2.

¹⁰⁷ Povoledo, *supra* note 6, at E5.

¹⁰⁸ In the same month that the MBRA was signed, Italy announced its selection of objects to lend, but the Met has not yet announced which objects it will accept. Flescher, *supra* note 2.

¹⁰⁹ Press Release, Statement by the Metropolitan Museum of Art on its Agreement With the Italian Ministry of Culture, *supra* note 100.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 285

back in its possession. In addition, while the Euphronios krater and the artifacts in the Morgantina Collection remain on exhibit at the Met, they are accompanied by labels reading “Lent by the Republic of Italy.”¹¹⁰ This association will thus publicize the works, and quite plausibly bolster tourism to see them once they have been returned.

Apart from negotiated benefits such as these, other significant advantages stem from MBRAs. First and foremost, they allow parties to avoid the costs, time, and risks associated with civil litigation, which has been called “the dispute mechanism of last resort.”¹¹¹ The expense of repatriation litigation tends to be “astronomical,”¹¹² and at times, may outweigh that of the object at issue.¹¹³ MBRAs also allow source nations to avoid the “insurmountable obstacles and . . . procedural pitfalls [of litigation that] are often impossible for dispossessed owners to overcome.”¹¹⁴ Moreover, as with all settlements, compromises such as MBRAs skirt the “winner-takes-all” approach of litigation. This conciliatory approach is especially preferable given that disputes over cultural restitution often arouse deep-seated emotions,¹¹⁵ and “delicate moral and cultural issues.”¹¹⁶

In addition, willingness to enter into an MBRA reflects constructively upon both parties in terms of public relations. For a museum like the Met, a press release stating that it has agreed to repatriate an object from its collection pursuant to an MBRA suggests both that it is eager to “do the right thing,” and that it

¹¹⁰ Flescher, *supra* note 2.

¹¹¹ Thomas Kline, *Conference: Neutrality, Morality, and the Holocaust*, 14 AM. U. INT’L L. REV. 243, 248 (1998) (speaking generally with regard to civil litigation).

¹¹² McCord, *supra* note 23, at 996.

¹¹³ Warring, *supra* note 22, at 289.

¹¹⁴ These include choice of law conflicts, statutes of limitations, and antiquities that predate the government claiming ownership. Cohan, *supra* note 18, at 69.

¹¹⁵ Bersin, *supra* note 76, at 134.

¹¹⁶ Paterson, *supra* note 20, at 74 (quoting the ILA Committee Report’s Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material).

lacked culpability in acquiring the object. For source nations, MBRAs suggest a keenness to compromise that may attract more sympathy for their efforts to repatriate works, limit looting, and curb illegal exportation, than would a display of steadfast entitlement.¹¹⁷ On a related note, MBRAs may also benefit international relations,¹¹⁸ as they require source nations and purchasers in market nations to find a common ground, rather than become adversaries.

Further, MBRAs negate the aforementioned idea that cultural nationalism and cultural internationalism are dueling, irreconcilable philosophies with mutually exclusive goals.¹¹⁹ MBRAs function to return objects of cultural patrimony to their source nations, thereby providing the cultural descendants of their creators with the opportunity to recontextualize them and fulfilling the cultural nationalist's agenda.¹²⁰ At the same time, when MBRAs include a term promising that the source nation will provide the museum bestowing restitution with future long-term loans, the source nation maintains a presence within the museum and market nation, furthering the cultural internationalist's agenda. As physical substitutes for the repatriated works, the works on loan become the new "cultural ambassadors"¹²¹ for the source nation, and the advantages that stem from the international distribution of cultural property¹²² are not forfeited. In the words of UNESCO's 1976 Recommendation Concerning the International Exchange of Cultural Property, MBRAs are "enriching to all parties [and] also lead to a

¹¹⁷ Warring, *supra* note 22, at 291 ("[R]equests for restitution are [often] marked [by] a sense of entitlement and . . . unwillingness to compromise on both sides.").

¹¹⁸ Warring, *supra* note 22, at 243–44. If the "illicit acquisition of foreign national patrimony by U.S. citizens strains the United States' relations with source countries," James E. Sherry, 37 *GEO. WASH. INT'L L. REV.* 511, 512 (2005), presumably the return of such works will have a neutralizing effect.

¹¹⁹ Cohan, *supra* note 18, at 62.

¹²⁰ Merryman, *supra* note 48, at 832.

¹²¹ Borodkin, *supra* note 21, at 408 (The "international circulation of antiquities serves legitimate interests because art objects can act as cultural ambassadors, overcoming prejudices and national parochialism.").

¹²² Merryman, Elsen & Urice, *supra* note 17, at 417–18.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 287

better use of the international community's cultural heritage which is the sum of all the national heritages."¹²³ In effect, MBRAs account for the cultural nationalists' view that nations have a special interest in maintaining their cultural property, and also "provide the countries of origin with an opportunity to ensure that their cultural and artistic legacy will continue"¹²⁴ beyond their borders.

As a related benefit, MBRAs circumvent the oft-cited concern that voluntary repatriation on behalf of museums will eventually lead to the depletion of their antiquities collections.¹²⁵ Some commentators have suggested that this notion is unrealistic.¹²⁶ Admittedly, antiquities are unique works and cannot be equated with one another, but by agreeing to long-term loans "of equal beauty and importance,"¹²⁷ source nations such as Italy provide a form of compensation that mitigates the effects of the repatriation.

Finally, when MBRAs include a promise on the part of source nations to loan future works to the repatriating institutions, the agreements help counterbalance retention schemes consisting of highly restrictive national patrimony laws and export prohibitions.¹²⁸ In general, such schemes are controversial and

¹²³ Cohan, *supra* note 18, at 58; *see also* Merryman, Elsen & Urice, *supra* note 17, at 417 (The "international distribution of works of a nation's earlier cultures or of its more recent artists is in the nation's interest.").

¹²⁴ Kirby, *supra* note 28, at 744.

¹²⁵ Rudenstine, *supra* note 58, at 76.

¹²⁶ Rudenstine, *supra* note 58, at 76; *see also* Constance Lowenthal and Stephen E. Weil, *A Dialogue on Provenance and Due Diligence*, 3 IFAR J. 10, 14 (2000) (When asked whether she was concerned that, "if we start by returning a few objects now, we will be getting onto a slippery slope and that over the next century or so museums will be emptied out completely," Constance Lowenthal, the Director of the Commission for Art Recovery, responded, "I don't really think that's going to be possible even if it were someone's goal. And I don't know whose goal it might be."). But even if this apprehension does have some merit, it is rendered immaterial with MBRAs, which mitigate the "pinch" of repatriation so that a diminution of the museum's collection does not necessarily result.

¹²⁷ Jason Felch, *Getty Might Return Some Antiquities*, L.A. TIMES, May 17, 2006, at E1.

¹²⁸ Rudenstine, *supra* note 58, at 80.

widely criticized.¹²⁹ By adopting them, source nations are accused of “fail[ing] to spread their culture[s], . . . fail[ing] to exploit such objects as a valuable resource for trade[,] and . . . contribut[ing] to the cultural impoverishment of people in other parts of the world.”¹³⁰ Additionally, many commentators suggest that such schemes are self-defeating,¹³¹ functioning not to effectively limit the trade in cultural property, but simply to cordon off the legitimate market and expand its illicit counterpart.¹³² Italy’s national retention scheme provides a typical example, comprised of both a national ownership law¹³³ vesting ownership in the state of any artifacts found in its soil since 1902, and various other regulations generally forbidding the export of any cultural property created over half a century prior.¹³⁴ The breadth of these laws lends heightened value to Italy’s pledged long-term loans to the Met and the BMFA under the MBRAs reached last year. Moreover, as a result of the loans, the museums may have a lesser “need” or inclination, however minimal, to acquire antiquities in the near future.

III. MBRAS PERPETUATE THE ILLICIT ANTIQUITIES TRADE

Notwithstanding the benefits that flow from repatriation and MBRAs in particular, entrance into MBRAs is not the ideal means for solving cultural property disputes. By minimizing the inherent risks and padding any possible losses, MBRAs encourage museums to continue to acquire works of questionable provenance.

¹²⁹ See Merryman, *supra* note 48, at 847.

¹³⁰ Merryman, *supra* note 48, at 847.

¹³¹ Warring, *supra* note 22, at 277 (“UNESCO should stop towing the line and acknowledge that strict national retention only hurts the source nations’ cause.”).

¹³² Merryman, *supra* note 48, at 848 (“Historically, the tighter the export control in the source nation, the stronger has been the pressure to form an illicit market [M]ore controls produce more illegal trade, which calls for more controls, and so it escalates.”).

¹³³ *United States v. An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir. 1999).

¹³⁴ Park, *supra* note 24, at 940.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 289

At the same time, as a form of settlement, MBRAs detract from the formation of much-needed legal precedent that would inform source nations as to the strength of their prospective legal claims and deter museums from participating in the illicit antiquities market.

A. MBRAs Encourage Museums to Continue to Acquire Works of Questionable Provenance

Before the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (the “UNESCO Convention”) was adopted in 1970, the United States was famous for overlooking the importation of looted and illegally exported cultural property and bore a corresponding reputation as the largest market for illicitly obtained cultural property.¹³⁵ Many commentators assert that, since 1970, American museums have exercised greater self-control in terms of collection expansion,¹³⁶ have increasingly started to inquire into donors’ identities before accepting gifts of questionable origin,¹³⁷ and have become more careful about researching the origins of artifacts before purchasing them.¹³⁸ Others note that the illicit antiquities trade has grown since the UNESCO Convention,¹³⁹ and contend that, regardless of the more

¹³⁵ Claudia Caruthers, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM. L. & POL’Y 143, 151 (1998).

¹³⁶ *Id.* (explaining that many museums in the United States have adopted formal acquisition policies requiring legal title, proof of compliance with the UNESCO Convention’s export provisions, and information on provenance). *Contra* Sherry, *supra* note 118, at 515–16 (quoting the director-general of UNESCO, who conceded that, “thirty years after the adoption of the UNESCO Convention . . . theft, looting, and illicit excavation continue on an appalling scale, thereby causing an endless depletion of peoples’ cultural treasures.”).

¹³⁷ Kelly, *supra* note 19, at 36–37.

¹³⁸ Kelly, *supra* note 19, at 31–32; Caruthers, *supra* note 135, at 169 n.42 (quoting former Director of the Met, Thomas Hoving, as saying that in the 1960s, the museum’s general acquisition policy was to “not ask anybody where [antiquities] came from. If [the museum] like[d] them, [the museum] bought them.”).

¹³⁹ Warring, *supra* note 22, at 232, 236.

stringent, ethically-sound acquisition policies museums may purport to practice, they remain complicit in their ways.¹⁴⁰

Regardless, it is undeniable that western museums are a major player in the art and antiquities market,¹⁴¹ and at least until relatively recently, they freely purchased works of questionable provenance.¹⁴² Consequently, some of the most prominent American museums currently house “some of the most high profile pieces of allegedly stolen artifacts.”¹⁴³ To illustrate, an estimated 350 items at the Getty, worth approximately \$100 million, are said to be of dubious provenance.¹⁴⁴ As source nations accumulate the evidence, means, and willpower to bring repatriation claims for some of these works, museums essentially react by voluntarily returning the object at issue, by refusing to acknowledge the claim in hope that it will disappear, and if not does not do so, litigating the dispute, or finally, by attempting to reach an MBRA with the source nation.

When faced with strong evidence indicating that objects in their collections were illicitly excavated and/or illegally exported from identifiable source nations, museums should employ the first option and voluntarily repatriate those works. Voluntary repatriation allows museums to act as “stewards” for the public good, transferring works with questionable provenance from the

¹⁴⁰ Steele IV, *supra* note 25, at 685 (“[D]espite their virtuous public stance, most museums continue to turn a blind eye toward evidence tending to illuminate the illicit origins of the objects they seek or have already acquired.”).

¹⁴¹ McCord, *supra* note 23, at 987.

¹⁴² Alia Szopa, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55, 83 (2004).

¹⁴³ Warring, *supra* note 22, at 238. *See also* Steele IV, *supra* note 25 (“The vast majority of the world’s plundered and illegally exported antiquities sits in the homes of private collectors and in the halls of museums.”).

¹⁴⁴ These items were identified by an internal review conducted by the Getty Trust. Additionally, there are 52 artifacts that the Italian government is attempting to repatriate from the Getty. These objects include “many of the most prestigious and striking exhibits at the . . . recently reopened Getty Villa . . . [and] include a sculpture of two griffins, a marble and limestone sculpture of the Greek goddess Aphrodite and a bronze known as Victorious Youth.” Dan Glaister, *Getty Museum Admits 350 More Treasures May Be Looted*, THE GUARDIAN (LONDON), June 19, 2006, at 23.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 291

private to the public realm, where they can be studied, publicized, and preserved while their legal standing is researched.¹⁴⁵ Instead, however, museums often choose to employ the second option: ignoring source nations' inquiries and claims until it becomes impossible to do so,¹⁴⁶ intentionally refraining from calling attention to disputed works through exhibition,¹⁴⁷ and relying upon procedural defenses when faced with lawsuits.¹⁴⁸ As long as museums believe that the foreign governments do not have enough evidence to prove ownership claims, they tend to "fight hard to retain [the] objects."¹⁴⁹

The first and third options—voluntarily returning the works or the employment of MBRAS—are encouraged by intergovernmental organizations, such as the Association of Art Museum Directors ("AAMD"), the International Council of

¹⁴⁵ JAMES CUNO, WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 151 (Kate Fitz Gibbon ed., Rutgers Univ. Press 2005). See also James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L.J. 83, 92 (2001).

¹⁴⁶ For example, Turkey struggled to repatriate the 363 sixth-century artifacts known as the Lydian Hoard for over 25 years despite the Met being aware from the time of acquisition that the artifacts had recently been illegally excavated. Only after Turkey brought suit against the Met in United States federal district court, and the court denied the Met's motion to dismiss the claim based on the statute of limitations, did the Met agree to return the entire collection. Gerstenblith, *supra* note 21, at 410.

¹⁴⁷ Gerstenblith, *supra* note 21, at 409.

Because of the Met's fears of discovery, the acquisition of [the Lydian Hoard] was not announced and most of the objects remained in storage in the basement unavailable to scholars and the public. In 1984, several of the vessels were put on display, but were [deliberately] mislabeled as 'East Greek' in origin so as to confuse any who would attempt to search out the collection's true origin.

Id.

¹⁴⁸ Once the Lydian Hoard works were finally exhibited and Turkey was able to bring its claim, the Met filed a motion to dismiss based on the expiration of the statute of limitations, notwithstanding its aforementioned knowledge that the objects had indeed been illicitly excavated and exported. *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990).

¹⁴⁹ Gertner, *supra* note 20.

Museums (“ICOM”), and the American Association of Museums (“AAM”).¹⁵⁰ AAMD recommends that museums thoroughly “investigat[e] provenance and return[] art acquired through questionable means.”¹⁵¹ Additionally, ICOM and AAM propose that museums cooperate with repatriation requests from countries of origin,¹⁵² and have even “promulgated rules and guidelines designed to help museums either avoid provenance disputes or [to] handle their consequences.”¹⁵³ For example, in 1979, the ICOM Executive Committee concluded the following after it adopted a Study on the Principles, Conditions, and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritages (“ICOM Study”):

In cases where the methods of acquisition . . . may be considered unethical by standards either [when the work was acquired] or by standards since, museums should weigh both legal and ethical considerations when considering requests for repatriation . . . [as well as] the value and benefit of such objects to their public mission [as compared to] the interests of the requesting party.¹⁵⁴

However, neither ethical codes nor guidelines such as the ICOM

¹⁵⁰ Shirley Foster, *Prudent Provenance—Looking Your Gift Horse in the Mouth*, 8 UCLA ENT. L. REV. 143, 148 (2001); Kirby, *supra* note 28, at 739–40. See also ICOM Code of Ethics for Museums, 2006, <http://icom.museum/ethics.html> (last visited Nov. 12, 2007).

¹⁵¹ Foster, *supra* note 150, at 148.

¹⁵² See Kirby, *supra* note 28, at 739–40.

¹⁵³ Kirby, *supra* note 28, at 744; see, e.g., ICOM Ethics of Acquisition, <http://icom.museum/acquisition.html> (last visited Nov. 12, 2007) (directing its member museums, *inter alia*, to observe the highest ethical standards “. . . in the very important process of acquisition,” and providing that “[i]f a museum is offered objects, the licit quality of which it has reason to doubt, it will contact the competent authorities of the country of origin in an effort to help this country safeguard its national heritage”); see, e.g., American Association of Museums Code of Ethics for Museums, <http://www.aam-us.org/museumresources/ethics/coe.cfm> (last visited Nov. 12, 2007) (directing museums to handle “competing claims of ownership that may be asserted in connection with objects in its custody . . . openly, seriously, responsively and with respect for the dignity of all parties involved.”).

¹⁵⁴ Cohan, *supra* note 18, at 83–84.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 293

Study are binding.¹⁵⁵ Consequently, although museums may purport to follow them generally, they “have no [great] incentive to [do so in cases where it] would mean parting with a valued object from their permanent collections.”¹⁵⁶

Although groups such as AAMD, ICOM, and AAM specifically address the utility of MBRAs in their advocacy of returning illicit art, MBRAs are distinctly disadvantageous when compared with pure repatriation or litigation. MBRAs lack a deterrent effect, encouraging museums to continue to acquire works of questionable provenance by padding the risk that would otherwise accompany investing funds in works to which title might be tainted.¹⁵⁷ The reality for museums becomes that, even in the very worst of situations, they will be able to exhibit and profit from the illicit work for a number of years. Then, when the time comes to return the work, museums will be given a concession, perhaps in the form of long-term loans of other works to which they might not otherwise be entitled, and will gain positive publicity for their cooperation, thereby counteracting any reputational damage. As such, museums are not forced to “feel” the loss of works that they wrongly acquire or the repercussions of their having done so, and acquiring such works becomes well worth the gamble. Since museums are major players in the illicit art market, it follows that MBRAs have the potential to inadvertently perpetuate its existence.

*B. MBRAs Detract from the Formation of Much-Needed
International Legal Precedent*

Although “current [international] law unquestioningly assumes that repatriation is a good end in and of itself,”¹⁵⁸ it does not

¹⁵⁵ See Kirby, *supra* note 28, at 744.

¹⁵⁶ See Kirby, *supra* note 28, at 744.

¹⁵⁷ James Cuno, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: U.S. Art Museums and Cultural Property*, 16 CONN. J. INT’L L. 189, 195 (2001).

¹⁵⁸ Andrea Cunning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT’L L. 449, 451 (2004).

provide much practical assistance in encouraging voluntary repatriation. Moreover, the relevant laws are characterized by numerous flaws, including limitations on applicability, financial burdens, ambiguous language, and a lack of uniformity in their application. These obstacles “create[] uncertainty for museums, true owners, and countries of origin.”¹⁵⁹ Faced with virtually “no meaningful legal remedy available to them as they consider how to secure the return of their cultural heritage”¹⁶⁰ and unable to evaluate the strength of their prospective legal claims, claimant nations are often compelled to enter into extrajudicial agreements.

At the same time, without the threat of being subject to a viable cause of action, museums are ostensibly less inclined to voluntarily repatriate disputed objects or to discontinue exploiting the inadequacies of the current system by acquiring works of questionable provenance. This subsection will examine the two modern international conventions that pertain to the return of cultural property looted and/or illicitly exported in peacetime—the UNESCO Convention and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Objects (the “UNIDROIT Convention”)—in order to show that flaws in the governing laws ultimately bolster MBRA, which, as already discussed, have the potential to perpetuate the illicit antiquities trade.

1. *The UNESCO Convention*

Widely considered the most significant international convention today pertaining to cultural property,¹⁶¹ the UNESCO Convention “views the repatriation of all archaeological artifacts as a moral

¹⁵⁹ Kirby, *supra* note 28, at 734. See generally Evangelos I. Gegas, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 OHIO ST. J. ON DISP. RESOL. 129, 134 (1997) (explaining that national courts’ interpretations of the provisions of international conventions have differed).

¹⁶⁰ Rudenstine, *supra* note 58, at 81.

¹⁶¹ The UNESCO Convention has more “depth” than the 1954 Hague Convention because it covers cultural property beyond wartime and also has more market nation signatories than the UNIDROIT Convention. Warring, *supra* note 22, at 250.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 295

imperative,”¹⁶² and “tend[s] to favor . . . repatriation . . . under all circumstances.”¹⁶³ However, the UNESCO Convention has been largely unsuccessful “in furthering the restitution of stolen works of art,”¹⁶⁴ and sadly, is “widely viewed as a weak, cumbersome, and unenforceable jumble of rhetoric.”¹⁶⁵

At the outset, the UNESCO Convention poses several hurdles that may render it entirely ineffectual as a means of repatriation. First, both parties involved in a cultural property dispute must be members of the convention in order for its provisions to apply. Although the UNESCO Convention boasts more signatories than the UNIDROIT Convention, few of them are market nations.¹⁶⁶ Additionally, the UNESCO Convention only provides a public right of action.¹⁶⁷ Therefore, claims are dealt with on a state-to-state level, and private dispossessed owners are left without a cause of action. Finally, the UNESCO Convention is of limited utility because it is not retroactive.¹⁶⁸ It only applies to material stolen or illegally exported “after both the nation where the

¹⁶² Cohan, *supra* note 18, at 61.

¹⁶³ Cuning, *supra* note 158, at 490.

¹⁶⁴ Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: the Case of Italy*, 39 COLUM. J. TRANSNAT'L L. 657, 665, 700 n.29 (2001) (explaining that only a few market nations have ratified the UNESCO Convention, and the federal legislation in the United States enacting it only implements two of its articles).

¹⁶⁵ Kelly, *supra* note 19, at 44; *see also* Sherry, *supra* note 118, at 515 (“Since the UNESCO Convention’s adoption, a scholarly consensus has emerged that the convention, although well-intentioned, has failed to provide the effective protections envisioned by its framers.”).

¹⁶⁶ Japan, the United Kingdom, and the United States are the only major market nations that are state parties. UNESCO Legal Instruments, <http://www.unesco.org/> (follow “Legal Instruments” hyperlink; then follow “Conventions” hyperlink; then follow “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970” hyperlink; then follow “States Parties” hyperlink) (last visited Nov. 26, 2007).

¹⁶⁷ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Ownership of Cultural Property art. 7(b)(ii), Nov. 14, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention].

¹⁶⁸ Chang, *supra* note 24, at 857.

property is currently located and the nation from which the property was stolen have adopted [the convention]”¹⁶⁹ and enacted implementing legislation.¹⁷⁰ This creates a great hurdle for repatriating nations. For example, despite being one of the first nations to ratify the UNESCO Convention, the United States did not become a member until 1983, when Congress enacted the Convention on Cultural Property Implementation Act (the “CPIA”).¹⁷¹ Accordingly, a repatriating nation has no cause of action against the United States under the UNESCO Convention for any cultural property that was stolen and/or illegally exported before 1983.

Additionally, the UNESCO Convention places a heavy financial burden on claimant nations.¹⁷² Article 7(b)(ii) provides that once a nation of origin requests the return of an object that was illegally exported, the nation where the object is housed must “take all the necessary steps to recover and return the object to the requesting nation.”¹⁷³ However, the requesting nation is required to “furnish, at its expense[,] the documentation and other evidence necessary to establish its claim for recovery and return” and is obliged to “pay just compensation to an innocent purchaser or to a person who has valid title to that property.”¹⁷⁴ Furthermore, the claimant nation must bear “all expenses incident to the return and delivery of [the] property.”¹⁷⁵ In the aggregate, these sums can be substantial, particularly since the UNESCO Convention does not provide any guidance insofar as what constitutes just compensation. As a result, claimant nations with limited funds are confronted with the intimidating prospect that the enforcing court will interpret the clause to require them to provide compensation beyond their means.

¹⁶⁹ William H. Kenety, *Who Owns the Past? The Need for Legal Reform and Reciprocity in the International Art Trade*, 23 CORNELL INT’L L.J. 1, 10 (1990).

¹⁷⁰ Greenfield, *supra* note 17, at 188.

¹⁷¹ Cuning, *supra* note 158, at 470; 19 U.S.C. §§ 2601–13.

¹⁷² Kirby, *supra* note 28, at 735.

¹⁷³ Kirby, *supra* note 28, at 735.

¹⁷⁴ UNESCO Convention, *supra* note 167.

¹⁷⁵ UNESCO Convention, *supra* note 167.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 297

Even when these initial limitations are not entirely prohibitive, source nations may still be deterred from bringing their repatriation claims under the UNESCO Convention because its ambiguous language leaves unclear what works are covered and “promotes inconsistency . . . in the courtroom where it is subject to judicial interpretation.”¹⁷⁶

Two of the most significant examples of the UNESCO Convention’s vagueness can be found in Articles 1 and 7. Article 1 provides an inclusive list of what constitutes “cultural property,” and the section explicitly states that the term encompasses “products of archaeological excavations (including regular or clandestine) or of archaeological discoveries,” and “antiquities more than one hundred years old.”¹⁷⁷ The list, however, is prefaced by a clause defining cultural property as that which has been “specifically designated by each State as being of importance.”¹⁷⁸ Accordingly, even where the cultural property at issue has been stolen and exported illegally, so long as the claimant nation failed to ever document its specific existence, the UNESCO Convention does not impose an obligation on state parties to recover and return it.¹⁷⁹

Additionally, the application of Article 7, which provides for repatriation, is unclear as to artifacts plundered from archaeological sites.¹⁸⁰ Article 7 only states that coverage extends to inventoried cultural property stolen from museums or religious or secular public monuments or similar institutions.¹⁸¹ In sum, “proving that an undiscovered object falls within the UNESCO Convention’s definition [of cultural property] and that the convention should govern poses an uphill [and often dispositive] battle for a nation petitioning for the repatriation of the looted object.”¹⁸²

Finally, although signatories to the UNESCO Convention agree

¹⁷⁶ Claudia Fox, *The Unidroit Convention on Stolen or Illegally Exported Objects*, 29 AM. U.J. INT’L L. & POL’Y 225, 251 (1993).

¹⁷⁷ UNESCO Convention, *supra* note 167, at art. 1.

¹⁷⁸ UNESCO Convention, *supra* note 167, at art. 1.

¹⁷⁹ Cohan, *supra* note 18, at 50.

¹⁸⁰ Cohan, *supra* note 18, at 6.

¹⁸¹ UNESCO Convention, *supra* note 167, at art. 7.

¹⁸² Chang, *supra* note 24, at 841.

to cooperate and act in a timely manner in returning cultural property,¹⁸³ the CPIA imposes detailed statutes of limitations that greatly diminish its utility in the United States. Essentially, the sub-clauses of 19 U.S.C.A. § 2611(2)¹⁸⁴ extinguish source nations' causes of actions in any of four situations, which take into account the following factors: the number of years that the museum has possessed the object, whether the museum was a bona fide purchaser, whether the museum publicized the object, and, if so, how recently, and whether the claimant party knew or should have known of the object's location.¹⁸⁵ These statutes of limitations each provide a notice requirement, but fail to acknowledge the complex evidentiary burdens that the UNESCO Convention may impose on claimant nations. Even if a source nation is aware of the location and possessor of its cultural property, it may take several years for it to accumulate sufficient evidence to bring a repatriation claim, by which time a subdivision of § 2611(2) may render the cultural property exempt.¹⁸⁶ In many situations, the statute forces a source nation seeking to repatriate its cultural property to choose

¹⁸³ UNESCO Convention, *supra* note 167, at art. 13(b) & (c).

¹⁸⁴ Convention on Cultural Property Act, 19 U.S.C.S. § 2611(2)(A)-(D) (1983).

¹⁸⁵ Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents*, 64 *FORDHAM L. REV.* 49, 83-84 (1995). Specifically, the statutes of limitation have run: (1) when the object has been held for at least three years by a museum or similar institution in the United States that purchased it in good faith, reported the acquisition in certain publications, displayed it to the public for at least one year, and made it available to the public for a minimum of two years; (2) when the object has been held for at least ten consecutive years and been publicly exhibited for at least five; (3) when the object has been held for at least ten consecutive years and the claimant party received or should have received notice of its whereabouts; and (4) when the object has been held for at least twenty consecutive years and the possessor can prove that it was a bona fide purchase. Convention on Cultural Property Act, 19 U.S.C.S. § 2611(2)(A)-(D).

¹⁸⁶ For example, Italian authorities became aware that the Met had the Morgantina Collection in its possession as early as 1987. Slayman, *supra* note 4. Nevertheless, it was not until nine years later that the Italian government felt it had sufficient proof of the works' origins that it started to make appeals to the Met, and it was only after certain evidence was discovered in 2005 that the museum became willing to enter into talks with Italy. *Id.*

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 299

between bringing its claim prematurely, or losing its cause of action altogether.

Notwithstanding the gravity of these flaws, it is imperative that the UNESCO Convention is utilized by claimant nations to judicially delineate its meaning. As enforcing courts interpret the UNESCO Convention, it will become more clear how just compensation should be calculated, the degree of detail that is needed for the specific designation requirement to be met, and the quantum of proof that a claimant nation must provide in order to prevail. With this information at their disposal, source nations will likely be able to better comprehend and weigh the relative merits of their repatriation options. At the same time, litigation under the UNESCO Convention will become a viable threat, thereby deterring institutions and private collectors that finance the illicit antiquities market from continuing to purchase works of questionable provenance. Only when both sides are supplied with equal information and knowledge will entrance into MBRA's truly be a desirable alternative to litigation.

2. The UNIDROIT Convention

Twenty-five years after UNESCO Convention was passed, UNESCO requested that the International Institute for the Unification of Private Law draft the UNIDROIT Convention¹⁸⁷ in order “to establish a new [complementary] framework to govern the restitution of stolen cultural objects.”¹⁸⁸ Credited as being the most “restitution centered”¹⁸⁹ of the conventions, the UNIDROIT Convention “fight[s] against the illicit trade of cultural objects by establishing common, minimal rules for the return and restitution of cultural objects between contracting states.”¹⁹⁰ However, bringing a claim pursuant to the UNIDROIT Convention was not a viable

¹⁸⁷ Warring, *supra* note 22, at 252.

¹⁸⁸ Fox, *supra* note 176, at 256.

¹⁸⁹ Warring, *supra* note 22, at 291–92.

¹⁹⁰ Emily A. Maples, *Holocaust Art: It Isn't Always "Finders Keepers, Losers Weepers": A Look at Art Stolen During the Third Reich*, 9 TULSA J. COMP. & INT'L L. 355, 373 (2001).

alternative for the claimant nations that reached MBRA with American museums earlier this year because the United States, along with other major market nations,¹⁹¹ has neither signed nor ratified the Convention.¹⁹² Even if the United States were to do so, these nations would likely still be inclined to enter into MBRA rather than face the various obstacles and vague language currently presented by the UNIDROIT Convention.

At first read, the UNIDROIT Convention appears to address several of the UNESCO Convention's fundamental flaws. Unlike the UNESCO Convention, Chapter II of the UNIDROIT Convention provides for a private right of action, enabling parties other than states to bring their claims.¹⁹³ Moreover, although the UNIDROIT Convention adopts the same definition of cultural property as the UNESCO Convention, it does not require states to specifically designate cultural property in order for it to be protected.¹⁹⁴ Yet despite its superficially uncompromising nature, the UNIDROIT Convention is heavily qualified by its various provisions pertaining to repatriation, limitations, and compensation.

First, Article 4(1) of the UNIDROIT Convention clearly provides that "[t]he possessor of a stolen cultural object [shall be] require[d] to return it."¹⁹⁵ But this unequivocal language only extends to property that is either "unlawfully excavated or

¹⁹¹ Chang, *supra* note 24, at 859 (noting that the UNIDROIT Convention lacks impact because it lacks participation of major market nations such as the U.S., the U.K., and Japan).

¹⁹² That is, the United States was not a signatory to the UNIDROIT Convention and did not enact implementing legislation. Sherry, *supra* note 118, at 517.

¹⁹³ Palmer, *supra* note 16, at 16. *Contra* Kathleen Andersen, *The International Theft and Illegal Export of Cultural Property*, 8 NEW ENG. INT'L & COMP. L. ANN. 411, 428 (2002) (noting that, in actuality, the process for the restitution of illegally-exported cultural property in Chapter III very closely resembles public law).

¹⁹⁴ UNIDROIT Convention on Stolen or Illegally Exported Objects art. 3(2), June 24, 1995, 34 I.L.M. 1322, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm> [hereinafter UNIDROIT Convention].

¹⁹⁵ *Id.* at art. 4(1).

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 301

lawfully excavated but unlawfully retained.”¹⁹⁶ The repatriation of illegally exported cultural property is addressed separately under Article 5, which imposes a heightened burden on the claimant state:

The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory *significantly impairs* one or more of the following interests: (a) the physical Preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information . . . ; (d) the traditional or ritual use of the object by a tribal or indigenous community, or . . . that the object is of significant cultural importance for the requesting State.¹⁹⁷

The text does not, however, define what constitutes “significant impairment,” but rather, leaves the issue entirely within the discretion of the enforcing court. As such, until a substantial amount of case law has interpreted the term of art, claimant nations will have little information from which to gage whether they will be able to meet this standard.

Insofar as the statutes of limitations, the UNIDROIT Convention’s are more complex than those of the UNESCO Convention. Article 3 creates a tri-part system: Pursuant to Article 3(3), “[a]ny claim for restitution [must] be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case[,] within a period of fifty years from the time of the theft.”¹⁹⁸ However, Articles 3(4) and 3(5) carve out two major exceptions to this temporal framework. Notwithstanding Article 3(3), restitution claims pertaining to works “forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor,”¹⁹⁹ and “any

¹⁹⁶ *Id.* at art. 3(2).

¹⁹⁷ *Id.* at art. 5(3) (emphasis added).

¹⁹⁸ *Id.* at art. 3(3).

¹⁹⁹ UNIDROIT Convention, *supra* note 194, at art. 3(4).

Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law.”²⁰⁰ In addition to the aforementioned evidentiary requirements, these temporal requirements can amount to heavy, and at times, defeatist burdens.

Moreover, pursuant to Article 4 of the UNIDROIT Convention, claimant nations are required to provide “fair and reasonable compensation” to the possessor party, so long as the “possessor neither knew nor ought reasonably to have known that the object was stolen [or illegally exported],” and the possessor “can prove that it exercised due diligence when acquiring the object.”²⁰¹ Article 4(2) attempts to hold dealers responsible for this compensation, stating that “reasonable efforts shall be made to have the person who transferred the cultural object to the possessor” be liable.²⁰² Realistically, however, Articles 4(1) and 6(1)²⁰³ closely resemble the compensation provision of the UNESCO Convention. In effect, the UNIDROIT Convention “grant[s] [the original owner] an option to repurchase the artwork.”²⁰⁴

The compensation provisions of the UNIDROIT Convention also resemble those of the UNESCO Convention in that they are plagued by vague terms and phrases.²⁰⁵ The UNIDROIT

²⁰⁰ UNIDROIT Convention, *supra* note 194, at art. 3(5).

²⁰¹ The due diligence requirement only applies in cases involving stolen property. UNIDROIT Convention, *supra* note 194, at arts. 4(1), 6(1).

²⁰² UNIDROIT Convention, *supra* note 194, at art. 4(2).

²⁰³ UNIDROIT Convention, *supra* note 194, at arts. 4(1), 6(1) (Article 4(1) provides that “[t]he possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.” Article 6(1) provides that “[t]he possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reason [sic] compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.”).

²⁰⁴ Grover, *supra* note 30, at 1455.

²⁰⁵ Gegas, *supra* note 159, at 145–47.

MUTUALLY-BENEFICIAL REPATRIATION AGREEMENTS 303

Convention recognizes that its terms and provisions must be judicially interpreted by each Contracting Party's national courts.²⁰⁶ Most prominently, what constitutes reasonable compensation is never explained, but rather, is left entirely to the discretion of the state litigating the case.²⁰⁷ The resulting uncertainty is exacerbated by the fact that common law and civil law nations may be prone to "interpreting the same provisions in much different manners"²⁰⁸ because common law courts adhere to the *nemo dat* rule that a thief cannot convey valid title²⁰⁹ and because civil law courts favor the bona fide purchaser over the dispossessed original owner.²¹⁰ As such, a common law court might be inclined to find, under its national laws, that no compensation need be provided,²¹¹ whereas a civil law court might require the claimant nation to compensate the possessor for the full purchase price.²¹² Similarly, civil and common law courts may reach disparate conclusions as to whether the possessor exercised due diligence²¹³ because the UNIDROIT Convention does not specify the weight to be afforded to the factors that constitute due diligence or whether the list is exhaustive.²¹⁴

²⁰⁶ Gegas, *supra* note 159, at 148.

²⁰⁷ Gegas, *supra* note 159, at 148–49.

²⁰⁸ Gegas, *supra* note 159, at 148–49; *see* UNIDROIT Convention, *supra* note 194 for language.

²⁰⁹ Doyal, *supra* note 164, at 668 (explaining that civil law systems tend to afford greater protection to the purchaser of stolen property).

²¹⁰ Doyal, *supra* note 164, at 668.

²¹¹ Gegas, *supra* note 159, at 145–49.

²¹² Gegas, *supra* note 159, at 150.

²¹³ Gegas, *supra* note 159, at 148–49.

²¹⁴ UNIDROIT Convention, *supra* note 194, at art. 4(4).

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

Id.

As the UNIDROIT Convention now stands, its application and interpretation are dependent upon the jurisdiction in which it is being invoked.²¹⁵ Accordingly, as with the UNESCO Convention, repatriation claims must be brought pursuant to the UNIDROIT Convention in order for “[c]rucial issues, standards and terms . . . to be clarified by judicial interpretation.”²¹⁶ As cases are brought and decisions are handed down, what tends to constitute “significant impairment” and “fair and reasonable compensation” will become evident, and source nations will be in a better position to evaluate the strength of their legal claims. Until such case law is on the books, however, MBRAs will detract from the formation of such precedent, leaving claimant nations in pursuit of a legal remedy with burdens that are simultaneously intimidating and unclear.

CONCLUSION

Notwithstanding the diversity of views within the repatriation discourse, few would dispute that repatriation provides a remedy to minimize the damage caused by the illicit antiquities trade and that it is necessary to curb its existence. But as a variation of pure repatriation, MBRAs have the counter effect. By padding the corresponding risks and possible losses, MBRAs encourage museums and other institutions to continue to acquire works of questionable provenance. At the same time, MBRAs detract from the formation of much-needed judicial precedent interpreting international conventions that would better inform source nations as to the strengths of their prospective legal claims and render MBRAs a genuine alternative.

²¹⁵ Gegas, *supra* note 159, at 150.

²¹⁶ Gegas, *supra* note 159, at 150.