

# TRANSCENDING CULTURAL NATIONALIST AND INTERNATIONALIST TENDENCIES: THE CASE FOR MUTUALLY BENEFICIAL REPATRIATION AGREEMENTS

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## INTRODUCTION

In October 2008, in the midst of a surging repatriation<sup>1</sup> campaign, the Italian Ministry of Culture memorialized more than a century's worth of strict patrimony regulations and retrieval efforts when it unveiled an exhibition entitled *Ruins and the Rebirth of Italy*.<sup>2</sup> The show was billed as a testament to Italy's success in defending its artistic heritage and featured approximately sixty artifacts, including terracotta, bronze, and marble statuary.<sup>3</sup> Works of once uncertain provenance were returned to their rightful place on Italian soil.<sup>4</sup> Or were they?

On the surface, the event commemorates the anniversary of a 1909 statute enacted to safeguard Italian antiquities.<sup>5</sup> When

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<sup>1</sup> Repatriation is characterized as "the return of cultural objects to nations of origin (or 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)." John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 845 (1986).

<sup>2</sup> See Press Release, Ministry of Cultural Heritage, *Rovine e rinascite dell'arte in Italia [Ruins and Rebirth of the Art of Italy]* (Aug. 1, 2007), available at <http://archeoroma.beniculturali.it/node/545>; see also Elisabetta Povoledo, *Italy Defends Treasures (and Laws) With a Show*, N.Y. TIMES, Oct. 7, 2008, at C6.

<sup>3</sup> See Press Release, Ministry of Cultural Heritage, *Rovine e rinascite dell'arte in Italia [Ruins and Rebirth of the Art of Italy]* (Aug. 1, 2007), available at <http://archeoroma.beniculturali.it/node/545>.

<sup>4</sup> The exhibit displayed numerous artifacts that were looted from Italian soil and later recovered by the Carabinieri (Italy's national police force). One such example is the *Marciante Artmemis* [Marching Artemis], which was illegally excavated by Swiss traffickers, only to be intercepted by the Carabinieri. See Elisabetta Povoledo, *Italy Defends Treasures (and Laws) With a Show*, N.Y. TIMES, Oct. 7, 2008, at C6.

<sup>5</sup> See Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy*, 39 COLUM. J. TRANSNAT'L L. 657, 679 (2001) (citing L. 20 giu. 1909, n. 364 - Per L'antichità e l'arte, implemented by R.D. 30 gen. 1913, n. 363 - Regolamento di

couched in deliberate symbolism, the show accomplishes much more. The Roman Republic once propagandized its message of power and grandeur to enemies and citizens alike through the public display of statuary.<sup>6</sup> These evocative images have yet again assumed their apotropaic role. *Ruins and the Rebirth of Italy* made a spectacle of the Carabinieri's most recent conquests and called attention to the laws that have guided the Ministry's recent cultural property agenda. The placement of the exhibition in the Roman Coliseum, that crumbling but magnificent testament to a once thriving civilization, only underscores the Italian government's message: the heart of an empire still beats—curators and museumgoers beware.

The exhibition's timing coincides with a period of considerable controversy. Italy has ignited serious tension in the art world through its vigorous and highly publicized demands, calling on the world's cultural institutions to repatriate countless works of art and artifacts.<sup>7</sup> In addition to its chiding public relations campaign and seeming recalcitrance,<sup>8</sup> the Italian government has upped the ante

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esecuzione delle leggi 20 giugno 1909, n. 364 e 23 giugno 1912, n. 688 - Per le antichità e le belle arti (G. U. 5 giu. 1913, n. 130)). That statute empowered the Italian government with the authority to protect "all manner of things movable or immovable" that are at least 50 years old and "of historical, archaeological, [or] paleo-anthropological interest." *Id.* This law was later incorporated into Italy's constitution in 1948.

<sup>6</sup> See generally N. HANNSTAD, *ROMAN ART AND IMPERIAL POLICY* (1986) (discussing the Republic's use of statuary and architecture as propaganda).

<sup>7</sup> In this context, Italy's recent show appears to be nothing short of a veiled threat. In fact, the exhibition was organized into five parts and culminated with a section called "Counter-Trend, Heritage Protection Today." It was designed to show "how Italy has upped its efforts to nab tomb raiders and traffickers and forged accords for the return of priceless antiquities, most notably from a range of US museums." *How Italy Learned to Save Its Heritage*, <http://www.elginism.com/20081004/1391/> (last visited Oct. 4, 2008).

<sup>8</sup> See *infra* Part II. The author would also like to point out that just six months prior to the opening of *Ruins and the Rebirth of Italy*, Greece and Italy co-sponsored a similar exhibition titled *Nostoi: The Recovered Masterpieces*, which displayed the spoils of "successful negotiations" and repatriation demands. The exhibit featured repatriated works that were formerly housed in the Princeton Museum of Art, the J. Paul Getty Museum, the Museum of Fine Arts, Boston, and the Metropolitan Museum of Art. For a discussion of the *Nostoi* exhibition, see Elisabetta Povoledo, *After Legal Odyssey — Homecoming Show for Looted Antiquities*, N.Y. TIMES, Dec. 18, 2007, available at <http://www.nytimes.com/2007/12/18/arts/design/18trea.html> (noting that "[f]or Italian cultural officials and negotiators, the show is a declaration of victory in their long and often contentious negotiations for the return of such artifacts."); see also Sarah Delaney, *There's No Place but Home For This Stolen Italian Art*, THE WASHINGTON POST, Dec. 19, 2007, at C01 (in a press conference, then Culture Minister, Francesco Rutelli said "the objects had 'come home after an odyssey,' a concept evoked by the title of the show . . . 'Nostoi' is a Greek word used in epic poems to describe a long voyage to one's homeland. . . . [T]he objects in the show had been 'dug out from the bowels of the earth, deprived of their identity and taken to other countries.'").

by pursuing criminal investigations and prosecuting American museum curators for their roles in the illicit trade of antiquities.<sup>9</sup>

The Italian government's recent crusade to regain possession of its cultural patrimony merits critical attention. All too often a work's true provenance is uncertain at best, and legitimate stakes in ownership are whittled by the passage of time. Absent a bona fide right to assume title and possession, repatriation demands have the dangerous consequence of tarnishing the good will and legitimacy of the world's most respected cultural institutions. Moreover, strict concessions to requests by source nations constitute a disservice to the beneficiaries of these objects—the general public—whose ease of access to important works of art will undoubtedly be diminished.

Source nations that make onerous unilateral demands and resort to criminal tribunals will simply increase the gap between them and public institutions by frustrating dialogue and decreasing an entity's willingness to voluntarily repatriate works of art. Such tactics have broader and perhaps weightier implications. Museums are of paramount social import. In one sense, they reduce cultural intolerance, inspire global awareness, and encourage scholarship. Purguing these institutions of their valued assets deprives the public of a fundamental cultural benefit. As Dr. James Cuno once remarked, “[a]n understanding that ancient and living cultures belong to all of us could contribute to greater respect for the differences among us and serve as a counterargument to the call for cultural purity that flames sectarian violence.”<sup>10</sup> Yet this argument should not extend so far as to completely deny source nations their prized cultural patrimony. The dichotomy between collective ownership and nationalistic tendencies can be reconciled.<sup>11</sup> It is in this spirit that this Note advocates for an alternative form of cul-

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<sup>9</sup> The J. Paul Getty Museum in Los Angeles became the subject of an embittered dispute over the return of fifty-two works of art. It has been alleged that many of the Getty pieces were looted from Italian soil and traded illegally on the black market. Negotiations for their return were compromised when a Getty curator, Marion True, was indicted by the Italian government on criminal charges that she conspired with dealers trafficking in stolen art. In another hostile move, Italy abruptly broke off talks with the Getty, stating that no agreement could be reached unless the Getty returned the famous “Bronze Statue of Victorious Youth.” The Italian government maintained that if the Getty did not agree to these terms, it would be subject to a “cultural embargo.” See *infra* Part II; see also Jason Felch & Livia Borghese, *Italy, Getty End Rift*, L.A. TIMES, Sept. 26, 2007, at E-1.

<sup>10</sup> James B. Cuno, *Who Owns the Past*, YALE GLOBAL ONLINE, April 21, 2008, <http://yale.global.yale.edu/content/who-owns-past>.

<sup>11</sup> For an elaboration on this dichotomy, see *infra* Part II.C.

tural property dispute resolution: mutually beneficial repatriation agreements (“MBRAs”).<sup>12</sup>

This Note will proffer a critical evaluation of the Italian government’s current tactics for reclaiming its patrimony and argue that MBRAs are the most desired framework for resolving repatriation disputes, as they give rise to lasting collaborative relationships between source nations and cultural institutions and strive to keep valued works in the “public trust” without diminishing traditionally insular cultural identities.<sup>13</sup> Thus, successful negotiations must account for competing interests including, *inter alia*: (i) the emotional currency of the object as assessed from the perspective of the source nation; (ii) the institution’s desire to keep disputed works within the public sphere; (iii) a concern for the object’s continued well being; and (iv) the overall strength of a claimant’s “legal” right to assume possession. Balancing these equities requires source nations and museums to make important concessions, and most of all, to transcend their cultural nationalist and internationalist tendencies.<sup>14</sup> This Note will unpack the weighty considerations that must be addressed in order to forge a lasting MBRA.<sup>15</sup> Part I of this Note will examine the Italian cultural property laws that have provided a framework for its current campaign, while Part II will assess the nature and scope of the campaign. Part III will highlight the ever-increasing need for MBRAs and provide a model framework for ameliorating such cultural property disputes. Fi-

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<sup>12</sup> The term “mutually beneficial repatriation agreement” (“MBRA”) first appears in Stacey Falkoff, Note, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL’Y 265, 269 (2007). Ms. Falkoff argues against MBRAs, suggesting that they encourage museums to engage in illicit antiquities trade and create a void of legal precedence. For purposes of consistency in scholarship, I will adopt the same phraseology; however, a later segment of this Note will address and rebut some of the arguments advanced by Ms. Falkoff.

<sup>13</sup> For a discussion on the nature and obligations of museums with regard to the public, see 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, 411–15 (2003).

<sup>14</sup> See *infra* Part III.

<sup>15</sup> Cultural property disputes, particularly those between source nations and cultural institutions, implicate a number of intricate legal issues. For example, issues concerning laches, conflict-of-law rules, international law, theft, property rights, and application of both civil and criminal liability will often factor into a thorough legal analysis of such disputes. Moreover, calls for repatriation necessarily implicate a source nation’s ability to regulate illicit trafficking on its own turf. Although this Note refers to these ideas in the abstract for comparative purposes, the primary goal of this Note is to evaluate the application of extrajudicial *voluntary agreements* as an alternative form of dispute resolution. Thus, I will primarily limit my discussion to those issues that arise *after* a museum obtains a work of questionable provenance.

nally, Part IV will address certain preemptive measures that should be implemented to avoid patrimonial conflicts.

## I. HISTORICAL OVERVIEW OF ITALIAN PATRIMONY POLICY

When it comes to reclaiming its cultural patrimony, perhaps no nation is more committed or contentious than Italy. At one time, the peninsula's soil was practically infused with precious patrimony.<sup>16</sup> *Tombaroli*, Italian Tomb Raiders, looking to add fodder to the illicit antiquities market, have left much of the landscape barren.<sup>17</sup> In the last decade of the twentieth century, the country observed a dramatic increase in property losses.<sup>18</sup> The extent to which Italy remains vulnerable with respect to its rich cultural stock is offset by its early role in the development of cultural patrimony laws and the continued vigilance of Italian law enforcement, most notably the Carabinieri Art Squad.<sup>19</sup> The development of It-

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<sup>16</sup> By some estimates, sixty percent of the world's art can be found in Italy. See Clyde Haberman, *Italy Fears That Its Art Treasures Will Scatter in a Unified Europe*, N.Y. TIMES, Mar. 5, 1990, at A1; cf. Clyde Haberman, *Pop v. Patrimony in Italy*, N.Y. TIMES, Aug. 5, 1989. Although this oft-quoted statistic may not be entirely accurate, it illustrates the historical magnitude of Italy's cultural output. Italy also has more UNESCO World Heritage Sites than any other nation. UNESCO, World Heritage List Statistics, <http://whc.unesco.org/en/list/stat> (last visited Mar. 16, 2010).

<sup>17</sup> See Alexander Stille, *Art; Art Thieves Bleed Italy's Heritage*, N.Y. TIMES, August 2, 1992, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE0D71339F931A3575BC0A964958260&sec=&spon=&pagewanted=all> (noting that "[t]he country with the highest concentration of art in the world is losing the equivalent of a museum a year, not even counting the objects that disappear most frequently, those dug up and looted from archeological sites."); see also Neil Brodie, Jenny Doole & Peter Watson, *Stealing History: The Illicit Trade in Cultural Material* 8–10 (McDonald Inst 2000), available at [http://www.mcdonald.cam.ac.uk/iarc/research/illicit\\_trade.pdf](http://www.mcdonald.cam.ac.uk/iarc/research/illicit_trade.pdf). The authors observe that:

In Italy, archaeological sites are being destroyed at an alarming rate. As early as 1962, a survey of a single Etruscan cemetery at Cerveteri showed that 400 out of 550 tombs had been looted since the end of World War Two. Between 1970 and 1996 the Italian police recovered more than 300,000 antiquities from clandestine excavations; these must constitute only a portion of the total. In January 1997 Swiss police sealed four warehouses in Geneva Freeport which were found to contain approximately 10,000 antiquities from sites all over Italy. They were valued at about £25 million. Then, late in 1998, a police raid on a villa in Sicily revealed more than 30,000 Phoenician, Greek and Roman antiquities worth more than £20 million, thought to have been taken from the ruins of Morgantina, in central Sicily.

*Id.*

<sup>18</sup> Then Director General of the Ministry of Culture, Francesco Sisinni reported, "[Italy] ha[s] gone from 12,000 objects a year in the early 1980's to 20,000 in 1988 to 28,000 for 1991." Stille, *supra* note 17.

<sup>19</sup> For a discussion on the Carabinieri, see *infra* Part I.B.

aly's regulatory framework provides context for the current reparation debate.

### A. Development of Italian Cultural Property Laws

Italian cultural property law can be traced back to the nineteenth century, when in 1820, in response to the plundering and deprecation of property caused by the French Occupation, Cardinal Bartolomeo Pacca conferred legal standing to patrimony situated within the territories of the Church.<sup>20</sup> The Pacca Code established mechanisms for cataloguing and protecting such property.<sup>21</sup> In 1909, in the wake of Italian Unification, the newly formed state enacted a groundbreaking statute, which made it the province of the government to control "all manner of things movable or immovable" that are at least fifty years old and "of historical, archaeological, [or] paleo-anthropological interest."<sup>22</sup> Similarly, the so-called "In the Ground Statute" of 1939 vests ownership of unearthened ancient artifacts discovered after 1902 with the State.<sup>23</sup> Thus, any item discovered during a dig belongs to the

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<sup>20</sup> Doyal, *supra* note 5; see also Marco Grassi, *Who Owns the Past*, 25 *THE NEW CRITERION* 4, 49–51. Grassi notes:

That Italy should have always been considered a home for art is hardly surprising. More of it was created there, brought there, and exported from there, over the last three millennia, than anywhere else. Put another way, Italy is the ultimate source country. Quite understandably, it was in Italy—in the Vatican State to be precise—that the concept of artistic patrimony was first given legal standing in 1820.

*Id.*

<sup>21</sup> Grassi, *supra* note 20.

<sup>22</sup> L. 20 giu. 1909, n. 364. For a discussion of Italy's cultural property legislation, see Paulo Monari, *The Creation of the Regional Architectural and Cultural Heritage Superintendency*, <http://www.emiliaromagna.beniculturali.it/index.php?en/125/la-nascita-delle-soprintendenze-in-emilia-romagna> (last visited Jan. 31, 2010).

<sup>23</sup> *Id.*

While Law no 364 of 1909 had proved a solid instrument of conservation, especially following the former unsatisfactory 185 of 1902, the new law no 1089 of 1939 was an extremely effective tool in the defence of Italy's artistic heritage. Unlike its predecessors, it was not exclusively geared to defending through prohibition like the Papal decrees. Despite its strict provisions, the new law was open to reconciling the need to safeguard the country's artistic and historical heritage with other public and private interests. The advent of the war prevented its full application. Subsequently, however, in the second half of the 20th century the law proved its great effectiveness.

*Id.* A current reading of the "In the Ground" statute states:

The things . . . found underground or in sea beds by whomsoever and howsoever, shall belong to the State and, depending on whether they be immovable or movable, shall become part of government property or of its inalienable assets, pursuant to articles 822 and 826 of the civil code.

State, and anything found after 1939 may leave the country.<sup>24</sup> Remarkably, the government encourages compliance with cultural property laws by awarding a finder's fee of twenty five percent of an uncovered work's value.<sup>25</sup> Collectively, these laws comprise Italy's National Heritage Code and have created a broad statutory scheme by means of which the government continues to enforce its domestic and international patrimony policies.

## B. The Carabinieri

The Carabinieri's effort to enforce the National Heritage Code has mitigated what would otherwise constitute substantial property loss.<sup>26</sup> In 1969, the *Comando Carabinieri Ministero Pubblica Istruzione - Nucle Tutela Patrimonio Artistico* [The Special Unit for the Protection of Cultural Heritage or Artistic Patrimony] was established to foil and prosecute art thieves, and more importantly, to facilitate the recovery of illicitly traded art.<sup>27</sup> Since 1970 the Carabinieri has recovered more than 202,924 Italian works of art; 8,032 of these were recovered abroad.<sup>28</sup> In 2008 alone, authori-

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United Nations Educational, Scientific and Cultural Organization (UNESCO), Legislative Decree no. 42 of 22 January 2004, Code of the Cultural and Landscape Heritage (2004), available at [http://portal.unesco.org/culture/fr/files/25850/11095449593Codice\\_in\\_inglese.pdf/Codice+in+inglese.pdf](http://portal.unesco.org/culture/fr/files/25850/11095449593Codice_in_inglese.pdf/Codice+in+inglese.pdf).

<sup>24</sup> Paulo Monari, *The Creation of the Regional Architectural and Cultural Heritage Superintendency*, <http://www.emiliaromagna.beniculturali.it/index.php?en/125/la-nascita-delle-soprintendenze-in-emilia-romagna> (last visited Jan. 31, 2010); United Nations Educational, Scientific and Cultural Organization (UNESCO), Legislative Decree no. 42 of 22 January 2004, Code of the Cultural and Landscape Heritage (2004), available at [http://portal.unesco.org/culture/fr/files/25850/11095449593Codice\\_in\\_inglese.pdf/Codice+in+inglese.pdf](http://portal.unesco.org/culture/fr/files/25850/11095449593Codice_in_inglese.pdf/Codice+in+inglese.pdf).

<sup>25</sup> Derek Fincham, *Commemorating Italy's 1909 Antiquity Law*, ILLICIT CULTURAL PROPERTY, Oct. 9, 2008, <http://illicit-cultural-property.blogspot.com/2008/10/commemorating-italys-1909-antiquity-law.html>. Creating an incentive for discoverers to operate within the bounds of the law makes for smart public policy. This kind of law becomes particularly important for countries that are struggling to combat looting. Encouraging disclosure creates an opportunity for works to be shared with the public, rather than have looters sell their wares in the secondary market. It also provides academics with an opportunity to study an artifact in its proper archeological context. For an argument in favor of finder's fees, see Peter T. Wendel, *Thinking Outside the Fee Simple Box*, 76 *FORDHAM L. REV.* 1015 (2007).

<sup>26</sup> Stephanie Gruner, *Italy's Special Carabinieri Unit Fights Art Looting*, *WALL STREET JOURNAL*, Apr. 10, 2006, available at <http://www.opinionjournal.com/la/?id=110008219>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; see also Lieutenant Gian Luigi Nanni, Commander of the Fakes and Contemporary Art Unit for the Carabinieri, Regional Meeting for the Prevention of Illicit Traffic and Other Illegal Actions Related to Cultural Properties, available at [www.suzkn.gov.mk/dokumenti/Ohrid2006\\_en/Gian%20Luigi%20Nanni.pdf](http://www.suzkn.gov.mk/dokumenti/Ohrid2006_en/Gian%20Luigi%20Nanni.pdf).

ties reclaimed works whose value totaled \$243 million—this figure is more than double the amount obtained in 2007 from such recoveries.<sup>29</sup> The unit maintains a database of more than 240,000 objects that have been stolen from Italy, and through alliances with Interpol and other foreign entities, the Carabinieri force continues to intercept art traffickers.<sup>30</sup>

### C. Bilateral Agreements With Foreign Nations

In recent years, Italy has looked abroad for assistance, soliciting commitments from foreign nations in regulating the illicit antiquities market.<sup>31</sup> Notable accords have been forged with Switzerland, the United States, and Greece.<sup>32</sup> On the surface, these bilateral agreements reflect the importance of cooperation between sovereign entities. Border control, coastal policing, and intra-boarder investigations are tasks best handled by independent state actors; it would be impossible for Italy to administer the same degree of leverage as their international counterparts can on their own turf. The treaty between the Swiss Confederation and the Republic of Italy, for example, clarifies import and export requirements with respect to both parties and, in the event of a

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<sup>29</sup> Steve Scherer & Adam L. Freeman, *Italy Cracks Down on Stolen Art, Doubling Recoveries*, BLOOMBERG, Jan. 13, 2009, <http://www.bloomberg.com/apps/news?pid=20601088&sid=atqxYAbRWf58&refer=muse>. These figures do not include works voluntarily returned to Italy by foreign museums and collectors.

<sup>30</sup> Saving Antiquities for Everyone, Policing Antiquities in Italy: The Carabinieri Art Squad, available at <http://www.savingantiquities.org/Carabinieri.doc>.

<sup>31</sup> See, e.g., Agreement Between the Swiss Federal Council of the Swiss Confederation and the Government of the Republic of Italy on the Import and Repatriation of Cultural Property, Switz.-Italy, Oct. 20, 2006, available at <http://www.nb.admin.ch/bak/themen/kulturguetertransfer/01985/index.html?lang=EN&download=M3wBPgDB>.

<sup>32</sup> *Id.* In the 2001 U.S.-Italy Memorandum of Understanding, for example, the U.S. agreed to adopt import restrictions on categories of archaeological material representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy. The parties agree to:

- (1) promot[e] agreements for long-term loans of objects of archaeological or artistic interest, for as long as necessary, for research and education, agreed upon, on a case by case basis . . .
- (2) encourag[e] American museums and universities jointly to propose and participate in excavation projects authorized by the Ministry of Culture, with the understanding that certain of the scientifically excavated objects from such projects could be given as a loan to the American participants through specific agreements with the Ministry of Culture.

United States-Italy Agreement between the Government of the U.S. and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy (Memorandum of Understanding), art. 1, 40 ILM 1031, 1032 (2001) [hereinafter Italy MOU].

repatriation dispute, prescribes the obligations of the host nation to care for the object during the pendency of the dispute.<sup>33</sup> In spite of these accords, it is unlikely that Italy will remain idle and wait for other countries to act; rather, in the last ten years, Italy has independently engaged public institutions and private collectors for the return of its patrimony.<sup>34</sup>

#### D. International Legal Precedent

Italy's cultural property law gained considerable bite on the international antiquities front, following the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (the UNESCO Convention).<sup>35</sup> Prior to the UNESCO Convention, institutional oversight was virtually non-existent, as curators appeared to engage in willful blindness when contemplating a purchase.<sup>36</sup> The agreement gives international recognition to sovereign state laws, such as those developed in Italy, by "prevent[ing] museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention" and to "recover and return any such cultural property."<sup>37</sup> UNESCO cultural patrimony receives specific treatment under Article 9, providing that State Parties "whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other State Parties . . . to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports

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<sup>33</sup> Agreement Between the Swiss Federal Council of the Swiss Confederation and the Government of the Republic of Italy on the Import and Repatriation of Cultural Property, Switz.-Italy, *supra* note 31, at art. III(4)(d).

<sup>34</sup> Italy has recently pursued numerous claims including claims against the University of Virginia, Princeton University, The Metropolitan Museum of Art, the J. Paul Getty Museum, and Japan.

<sup>35</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 10 I.L.M. 289 [hereinafter 1970 UNESCO Convention].

<sup>36</sup> Claudia Caruthers, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM. L. & POL'Y J. 143, 169 n.42 (1998) (quoting then director of the Metropolitan Museum of Art, Thomas Hoving, who stated that back then, "you did not ask anybody where antiquities came from. If you like (sic) them, you bought them.").

<sup>37</sup> 1970 UNESCO Convention art. 7, Nov. 14, 1970, 10 I.L.M. 289, 291.

and international commerce.”<sup>38</sup> As its language suggests, UNESCO’s application extends only to acquisitions of stolen patrimony made by public museums, and only State signatories may enforce the terms of the convention.<sup>39</sup> Although the efficacy of the UNESCO Convention is frequently disputed, it nevertheless marks a significant transition from previous international sentiments toward cultural property regulation.<sup>40</sup>

### E. Comparative Success

The scope of Italy’s campaign and its perceived success is likely attributed to the country’s developed status. As a source nation, Italy is in a unique position and can wield enormous international political and financial clout.<sup>41</sup> By contrast, emerging nations, such as Peru, Mexico, or China, cannot exert the same degree of international pressure or conduct similarly elaborate public relations schemes with comparable efficacy.<sup>42</sup>

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<sup>38</sup> *Id.* at art. 9.

<sup>39</sup> *Id.* Private actors are afforded protection through the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *reprinted in* 34 I.L.M. 1330 [hereinafter UNIDROIT Convention]. Italy is a signatory to both UNESCO and UNIDROIT, having ratified these conventions in 1978 and 1999 respectively.

<sup>40</sup> See Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Objects*, 38 VAND. J. TRANSNAT’L L. 1067, 1077–78 (2005) (noting that “[w]here, as in most countries, implementing legislation is missing, the UNESCO Convention does not work properly and there is no obstacle to international art trade . . . . Hence, it can be said that the UNESCO Convention is hardly an efficient obstacle to international art trade.”). Other critics have argued that the UNESCO Convention has no substantive provisions for enforcement mechanisms. See, e.g., Spencer A. Kinderman, Note, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT’L L. REV. 457, 470–71 (1993).

<sup>41</sup> Italy is a member of the G8. Furthermore, according to the International Monetary Fund, World Bank, and CIA World Fact Book, Italy is ranked 7th in the world for the largest Gross Domestic Product (GDP). International Monetary Fund, World Economic and Financial Surveys, available at <http://www.imf.org/external/pubs/ft/weo/2008/02/pdf/text.pdf>.

<sup>42</sup> Peru, for example, is currently waging its own repatriation campaign and maintains a GDP that ranks 54th in the world. *Supra* note 41. As of November 2008, Peru has drawn out negotiations with Yale for the return of thousands of artifacts constituting patrimony from Macchu Picchu reached an impasse, leading Peru to file suit. For a discussion on the details of this dispute, see *infra* Part III.B.2.

## II. THE SURGE IN CLAIMS FOR REPATRIATION

The Italian government has recently intensified requests for the return of artifacts based on allegations and evidence<sup>43</sup> of illicit acquisitions made by public museums and private collectors.<sup>44</sup> And in the past six years alone, renowned institutions including New York's Metropolitan Museum of Art, Boston's Museum of Fine Arts, and California's J. Paul Getty Museum have all answered the call.<sup>45</sup> The Ministry of Culture has not restricted its claims to American institutions;<sup>46</sup> these disputes, however, have garnered the most intense media attention and inform the primary focus of this Note. Coverage of the aforementioned institutions may be attributed to their prominence, in addition to the historical and intrinsic value of the antiquities at the center of the dispute.

Amidst a litany of patrimony claims, perhaps the most divisive and publicized standoff arose between Italy and the J. Paul Getty Museum. In 2005, then Getty curator, Dr. Marion True, was indicted by Italy on charges of conspiracy in the illicit antiquities market.<sup>47</sup> If convicted, she could face up to eight years in prison.<sup>48</sup> Simultaneously, the Getty and Italy, led by then Minister of Cultural Heritage, Francesco Rutelli, engaged in nearly two years worth of tumultuous negotiations.<sup>49</sup> While it appears the parties

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<sup>43</sup> Such evidence includes Polaroids which were recovered from the warehouse of convicted art dealer Medici, linking him to Getty curator Marion True. See PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS 196-98* (Public Affairs 2007).

<sup>44</sup> This Note limits its analysis to repatriations made by public institutions, as opposed to those made by private collectors.

<sup>45</sup> See Povoledo, *supra* note 8; see also Delaney, *supra* note 8.

<sup>46</sup> According to Italy's antiquities prosecutor, Maurizio Fiorilli, "It is not only American museums we are investigating. We started with the U.S. because an American curator is on trial. That was our source of new evidence. But we have dossiers on museums and collections all over the world." Interview by Suzan Mazur, *Italy's Antiquities Prosecutor* (Dec. 28, 2006), <http://www.scoop.co.nz/stories/HL0612/S00370.htm>. In January 2007, Japan's Miho Museum became the subject of a patrimony. Hisane Masaki, *Is Japan a Cultural Looter?*, Jan. 21, 2007, <http://www.zmag.org/znet/viewArticle/2245>; see also Looting Matters, <http://lootingmatters.blogspot.com> (last visited Jan. 19, 2008) (reports indicate that Italy is negotiating with the New Carlsberg Glyptotek Museum in Copenhagen, Denmark for the return of antiquities and Italy's campaign will turn to Northern Europe and the Far East).

<sup>47</sup> *Ex-Getty Curator Appears in Court*, BBC, Nov. 16, 2008, <http://news.bbc.co.uk/2/hi/entertainment/4443686.stm>.

<sup>48</sup> *Id.*

<sup>49</sup> Former Minister of Culture Francesco Rutelli played a major public role in Italy's quest. He was succeeded by Sandro Bondi in May 2008. It does not appear that a change in leadership will signify a change in cultural policy. Rather, the Ministry announced that "he has reconstituted the 'Committee for the Restitution of Cultural Property,' which has the task of examining

have reached an agreement regarding the placement of approximately forty works with questionable provenances,<sup>50</sup> the fate of a curator continues to hang in the balance.<sup>51</sup>

Setting aside the issue of culpability, the trial of Dr. True is significant for a number of reasons. On the surface, it illustrates the great lengths to which Italy is willing to go to accomplish its goals. The curator is a downstream entity in the antiquities transactional scheme and beholden to the board of trustees.<sup>52</sup> A piece of art typically exchanges hands numerous times before it ends up as a fixture in an exhibit.<sup>53</sup> Moreover, it can generally be assumed that a curator acts on behalf of a museum and perhaps even at its behest.<sup>54</sup> In any event, it seems that Italy is using the threat of criminal charges as significant leverage in bargaining for the return of the disputed works. One wonders whether the Getty would have been so willing to accede to the aforementioned repatriation agreement if criminal charges had not been levied.

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all the questions relating to the recovery of Italian works of art that are found in other countries, within the overall political context of cooperation and cultural exchange.” CultureGrrl, [http://www.artsjournal.com/culturegrrl/2008/06/italys\\_new\\_culture\\_minister\\_si.html](http://www.artsjournal.com/culturegrrl/2008/06/italys_new_culture_minister_si.html) (last visited June 23, 2008); *Ricostituito il “Comitato per la Sestituzione dei Beni Culturali,”* June 19, 2007, available at <http://www.beniculturali.it/sala/dettaglio-comunicato.asp?nd=ss,cs&Id=2655> (translated using Google Translator).

<sup>50</sup> The essential terms of the agreement are as follows:

The Getty will transfer 40 objects to Italy, including the *Cult Statue of a Goddess* . . . with the exception of the *Cult Statue of a Goddess*, which will remain on display at the Getty Villa until 2010; The parties agree to defer further discussions on the *Statue of a Victorious Youth* until the outcome of ongoing legal proceedings which are now underway in Pesaro, Italy; Italy and the Getty agree to broad cultural collaboration that will include loans of significant art works, joint exhibitions, research, and conservation projects.

Press Release, J. Paul Getty Museum, Italian Ministry of Culture and J. Paul Getty Trust Reach Agreement (Aug. 1, 2007), [http://www.getty.edu/news/press/center/italy\\_getty\\_joint\\_statement\\_080107.html](http://www.getty.edu/news/press/center/italy_getty_joint_statement_080107.html).

<sup>51</sup> In the wake of the agreement and subsequent return of the artifacts, civil charges against True were dropped. However, as of January 2009, the criminal component of the case is still active. There is some indication that Italy will not actively pursue these charges to the fullest extent of the law. This simply reinforces the argument that the criminal charges were a semi-illusory threat, initiated merely as a bargaining chip. See Jason Felch & Livia Borghese, *Italy, Getty End Rift*, L.A. TIMES, Sept. 26, 2007, at E-1.

<sup>52</sup> See generally Gerstenblith, *supra* note 13.

<sup>53</sup> For a discussion on antiquities trafficking, see Christine L. Greene, Note, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 VILL. SPORTS & ENT. L.J. 35, 56 (2007).

<sup>54</sup> Generally, museums are said to be institutions held in the “public trust.” See generally Gerstenblith, *supra* note 13; David Rudenstine, *Cultural Property: The Hard Question of Repatriation: The Rightness and Utility of Voluntary Repatriation*, 19 CARDOZO ARTS & ENT. L.J. 69, 71 (2001) (acknowledging that museums “occupy important positions of public trust in a democracy”).

More importantly, a high profile criminal investigation reinforces Italy's desire to maintain its patrimonial campaign as a public spectacle.<sup>55</sup> Making such an example undoubtedly sends a clear warning to other art institutions to be more mindful of its acquisitions. Similarly, the threat of criminal prosecution may lead museums to voluntarily repatriate works as a sign of good will, even where provenance and desert is questionable.

It is hardly surprising that shortly after Dr. True's indictment, a slew of institutions entered into arrangements to return various artifacts. Some have even done so of their own volition.<sup>56</sup> In the subsequent months, "the Museum of Fine Arts, Boston (MFA) transferred 13 antiquities to Italy and signed an agreement with the Italian Ministry of Culture."<sup>57</sup> In October 2007 the Princeton University Museum agreed to repatriate eight antiquities to Italy,<sup>58</sup> while retaining title to seven objects.<sup>59</sup> According to the agreement, any gaps in the museum's collection would ostensibly be fil-

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<sup>55</sup> Elisabetta Povoledo, *Italy Sends A Warning With Getty Trial*, INT'L HERALD TRIBUNE, Nov. 16, 2005, available at <http://www.iht.com/articles/2005/11/16/news/getty.php> ("It is not every day that an American museum curator goes on trial, but for Italian prosecutors, the spectacle is part of the point.").

<sup>56</sup> Maxwell Anderson, *Why Indianapolis Will No Longer Buy Unprovenanced Antiquities*, THE ART NEWSPAPER, Apr. 30, 2007, available at <http://www.elginism.com/20070430/723/>. Anderson, the curator of the Indianapolis Museum of Art, explaining his museum's decision to no longer buy unprovenanced antiquities:

Our collective goal should be to persuade art-rich countries to join Great Britain, Japan, Israel, and other nations in the creation of a legitimate market in antiquities. Archaeologically rich countries could use funds realized from the open sale of documented antiquities to bolster their efforts to police archaeological sites, and to support research, conservation, and interpretation in museums, while sharing their heritage the world over.

*Id.*

<sup>57</sup> Press Release, Joint Statement from the Museum of Fine Arts, Boston and the Italian Ministry of Culture (Sept. 28, 2006), available at <http://www.mfa.org/press/sub.asp?key=82&subkey=3444>.

<sup>58</sup> Press Release, Princeton University Art Museum and Italy to Sign Agreement Over Antiquities (Oct. 26, 2007), available at <http://www.princeton.edu/main/news/archive/S19/34/26K47/index.xml?section=topstories>. The press release discloses that:

As a result of those discussions, Princeton will keep seven objects and transfer title to eight. Of the eight objects whose ownership will transfer to Italy, half . . . will remain on loan to the museum for four years. In addition, the Italian ministry has agreed to lend to the Princeton museum a number of additional works of art of great significance and cultural importance. Also as part of the agreement, Princeton students will be granted unprecedented access to excavation sites managed by the Italian ministry for the purposes of archaeological study and research.

*Id.*

<sup>59</sup> *Id.*

led by “a number of additional works of art of great significance and cultural importance.”<sup>60</sup>

### A. Exploring Italy’s Underlying Motives for Reclaiming its Cultural Heritage

*Governments can use antiquities—artifacts of cultures no longer extant and in every way different from the culture of the modern nation—to serve the government’s purpose. They attach identity with an extinct culture that only happened to have shared more or less the same stretch of the earth’s geography. The reason behind such claims is power.*<sup>61</sup>

From a general sociological perspective, a cultural group’s desire to have a particular piece of patrimony returned is typically rooted in at least six factors: (1) the length of time that a group possessed the object; (2) the historical connection of a work to a group’s past; (3) shared cultural identity; (4) the intentions of the ancestors; (5) the sacred or spiritual significance of an object; and (6) the aesthetic value of a work.<sup>62</sup>

Broadly speaking, Italy’s aforementioned reclamation efforts are focused on returning works to their purported nation of origin. It may be said, for example, that such restoration policies enable Italian citizens to reconnect with their ancestral past. The paradigm known as “cultural nationalism recognizes that patrimony carries significant emotional clout, especially for those whose identity” runs concomitantly with a particular object’s past.<sup>63</sup> But this justification only goes so far.

As noted above, Italy is widely recognized as a cauldron for cultural property.<sup>64</sup> And while a number of source nations struggle to preserve connections to fading civilizations, ancient monuments continue to decorate the Italian landscape, and artifacts still pour from the corridors of national archives.<sup>65</sup> When a particular piece

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<sup>60</sup> *Id.*

<sup>61</sup> Cuno, *supra* note 10.

<sup>62</sup> John Alan Cohan, *An Examination of Archaeological Ethics in the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL’Y J. 1, 104–06 (2004) (noting that “[t]he 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”).

<sup>63</sup> See Merryman, *supra* note 1, at 845–46; for a further discussion of the cultural nationalist and internationalist dichotomy, see *infra* Part II.C.

<sup>64</sup> See Stille, *supra* note 17.

<sup>65</sup> *Id.*

is removed from Italian soil by looters, it is difficult for Italy to allege a strong emotional attachment to a work it never knew existed. Additionally, spiritual or ritualistic arguments become particularly weak justifications for repatriation. Many of the “religious” artifacts in question may be identified with the polytheism of the Etruscans and early Greco-Roman civilizations, whose practices are wholly distinct from contemporary Italian Roman Catholicism.<sup>66</sup> While illicit acquisitions are regrettable and must be eliminated, it would be naïve to assume that preservation of identity is the sole source of motivation for the Ministry of Culture. Rather, a campaign predicated on frequent and extensive demands, and fueled by pervasive media exposure, surely must have another ambition in mind: to deter the illicit trade of antiquities.<sup>67</sup>

Italy appears to be cutting off market demand not at the source, but at the back end. The argument suggests that with the potential threat of civil and even criminal liability, curators will exact greater scrutiny in identifying potential acquisitions. As incentives to purchase illicit antiquities evaporate, so too will the incentive for looters to harvest these artifacts from archeological sites.<sup>68</sup> Thus, it appears that Italy is compensating for its inability to regulate patrimony theft on its own soil by making demands and pursuing claims against organizations abroad.

### B. Why Is This Position Problematic?

The Italian government’s stance has garnered sharp criticism from art pundits, who view the artistically rich country as hoarding its wealth.<sup>69</sup> For instance, Dr. Cuno contends that “[w]hat’s at stake is the world’s right to broad and general access to its ancient heritage.”<sup>70</sup> While most agree that museums need to reevaluate their acquisition policies going forward, many argue that Italy can afford

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<sup>66</sup> See, e.g., DONALD WHITE ET AL., GUIDE TO THE ETRUSCAN AND ROMAN WORLDS AT THE UNIVERSITY OF PENNSYLVANIA MUSEUM OF ARCHAEOLOGY AND ANTHROPOLOGY 30 (2002) (“The Etruscans knew many kinds of gods, from spirits of nature and the underworld and invisible sky gods to deities who took on human form. Some of the Etruscan gods who were seen and depicted in human form were shared with Romans and Greeks.”).

<sup>67</sup> The Illicit Cultural Property Blog, *Protection, Preservation and Commodification*, July 22, 2008, <http://illicit-cultural-property.blogspot.com/2008/07/protection-preservation-and.html>.

<sup>68</sup> *Id.*

<sup>69</sup> See *infra* note 70; *infra* note 71.

<sup>70</sup> Drake Bennett, *Finders, Keepers*, THE BOSTON GLOBE, Feb. 10, 2008, available at [http://www.boston.com/bostonglobe/ideas/articles/2008/02/10/finders\\_keepers/?page=full](http://www.boston.com/bostonglobe/ideas/articles/2008/02/10/finders_keepers/?page=full) (quoting James B. Cuno).

to make extensive long-term loans.<sup>71</sup> As Lee Rosenbaum notes, “The fact is that source countries, possessing more high-quality artifacts from their ancient pasts than they can adequately display, don’t need to get everything back.”<sup>72</sup> Underlying this argument is the desire to preserve important works in the public trust for as long as possible, so that others may benefit from them.<sup>73</sup>

From a practical standpoint, regulating domestic antiquities theft through requests for repatriation seems to belie the underlying problem: source nations need to improve domestic controls for regulating patrimony. There is little evidence to suggest that decreasing an institution’s appetite for precarious artifacts will reduce the number of lootings that occur.<sup>74</sup> If Italy’s ultimate goal is to eviscerate the illicit art market by attacking supply and demand, then asking museums to voluntarily return portions of their collections seems counterintuitive. That is, draining museums of their assets may in fact create an incentive to engage in the very thing the source nation is trying to prevent. Empty spaces in a collection must ultimately be filled. More importantly, Italy’s recalcitrance unnecessarily inflames tensions with foreign institutions and frustrates the possibility for future endeavors.

### C. Balancing Cultural Nationalist and Internationalist Perspectives

The heart of the repatriation debate exposes two principles that seem to be mutually exclusive and yet lurk behind almost all cultural property disputes that arise between museums and source nations. In his influential paper, *Two Ways of Thinking About Cultural Property*, Professor John Henry Merryman draws a distinction between the “cultural nationalist perspective” and the “cultural internationalist perspective.”<sup>75</sup> He writes, “One way of thinking about cultural property—i.e., objects of artistic, archaeological, ethnological or historical interest—is as components of a common human culture, whatever their places of origin or present

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<sup>71</sup> See Lee Rosenbaum, *Make Art Loans, Not War*, L.A. TIMES, Jan. 21, 2008, available at <http://www.latimes.com/news/opinion/la-oe-roosenbaum21jan21,0,3267772.story?coll=la-opinion-righttrail>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See Merryman, *supra* note 1, at 848.

<sup>75</sup> *Id.*

location, independent of property rights or national jurisdiction.”<sup>76</sup> By contrast: “Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the ‘repatriation’ of cultural property.”<sup>77</sup>

Groups that continue to cling to fleeting identities and ideologies such as national sovereignty must face the harsh reality that they can no longer claim to be the sole proprietors of their beloved patrimony. As the planet shrinks with the rising tide of globalization, so too must we adjust our conception of cultural property to acknowledge that works from a hallowed past can and should transcend borders. These two values need not be sacrificed. Rather, it is possible to reconcile the cultural nationalist and internationalist paradigms that fuel repatriation disputes. Agreements can and must be forged to account for these otherwise competing interests.

### III. MUTUALLY BENEFICIAL REPATRIATION AGREEMENTS

#### A. What Is a Mutually Beneficial Repatriation Agreement?

Mutually beneficial repatriation agreements (“MBRAs”) are highly amorphous extrajudicial arrangements between source nations and cultural institutions.<sup>78</sup> In recent years, they have emerged as an important tool for resolving issues of ownership and possession of cultural property.<sup>79</sup> MBRAs offer an alternative to the strict repatriation scheme, which historically advocated for the unconditional return of works at the demands of claimants. Although the terms of these agreements vary, MBRAs strive to incorporate both cultural nationalist and internationalist perspectives. This may be achieved, for instance, by awarding nations a proprietary interest in a disputed work of art or artifact, while ensuring that museums and the public have continued access to same or similar exhibits. The flexibility of MBRAs make them highly promising for creating long-term collaborations. But as promising as they

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<sup>76</sup> *Id.* at 831.

<sup>77</sup> *Id.* at 832.

<sup>78</sup> See Falkoff, *supra* note 12.

<sup>79</sup> See Falkoff, *supra* note 12.

may seem, their continued effectiveness is conditioned upon the willingness of source nations and institutions to make important concessions.

## B. Examples of MBRAs

Recently, MBRAs have garnered serious attention and seem to mark a significant departure from the hostility that ensues from traditionally aggressive calls for repatriation. Although MBRAAs are not entirely novel,<sup>80</sup> their increasing prevalence is in part a response to the concerted flux of claims that have surfaced in the last decade. Their appeal lies in their flexibility—MBRAAs can adapt to our evolving conceptions of the “universal museum” (as opposed to one’s exclusive right to patrimony).<sup>81</sup> Interestingly, Italy has participated in some notable MBRAAs, including a landmark agreement with the Metropolitan Museum of Art (the Met); however, because their repatriation policies continue to be plagued by inconsistencies, there is substantial room for improvement.<sup>82</sup> The Met-Italy accord nevertheless set the stage for future arrangements, and

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<sup>80</sup> For example, in the 1970s, Mexico and the M.H. de Young Memorial Museum in San Francisco entered into an MBRA regarding the placement of pre-Columbian mural fragments and ceramics that appeared to be ahead of its time. Extrajudicial negotiations led to a joint-custody arrangement in which fifty percent of the works were repatriated in exchange for commitments from both sides to work together to restore and widely display the works. For a discussion, see John Merryman, *The Teotihuacan Murals: Joint Custody*, in JOHN H. MERRYMAN, ALBERT E. ELSER, & STEPHEN K. URICE, *LAW, ETHICS AND THE VISUAL ARTS* 366–69 (5th ed. 2007).

<sup>81</sup> The encyclopedic museum may have reached its zenith in the 20th century. In 2001, directors of eighteen international museums, including the Louvre, the Met, Museum of Fine Arts, Boston, and the J. Paul Getty Museum, signed the “Declaration on the Importance and Value of Universal Museums,” which took a hard-line stance against repatriation. The declaration states, in pertinent part:

[W]e should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source. The universal admiration for ancient civilizations would not be so deeply established today were it not for the influence exercised by the artifacts of these cultures, widely available to an international public in major museums. . . . Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. . . . To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all.

Press Release, Cleveland Museum of Art, Declaration on the Importance and Value of Universal Museums (Dec. 11, 2002), available at <http://www.clemusart.com/ASSETS/37CD35CFA0F6454EAFE2C5EAA2714919/UniversalMuseums.pdf>. From this prior model, a new format is likely to emerge, based on both conceptions of increased cultural sensitivity as well as accessibility. See *infra* Part III.D.

<sup>82</sup> See *infra* Part III.B.1.

certainly served as a model for the ensuing dispute between Yale and Peru.<sup>83</sup> These agreements are discussed below.

### 1. The Met-Italy Agreement and its Progeny

In February 2006, Italy and the Met negotiated the return of the famed *Euphronios Krater*, one of the finest examples of red-figure amphora, in addition to fifteen pieces of Hellenistic silver, drinking vessels and various vases, in what the parties dubbed a “Long-Term Cultural Cooperation Agreement.”<sup>84</sup> Interestingly, the *Euphronios Krater* was originally acquired under curious circumstances. It was sold to the Met in 1972 by a vendor whose dubious dealings were already under investigation.<sup>85</sup> Italy, the U.S. Federal Bureau of Investigation, and lawyers on both sides of the Atlantic scrutinized the Met’s acquisition policies, as it was believed that the piece had originally been looted from an Etruscan tomb.<sup>86</sup>

It has been suggested that, despite the existence of concrete and circumstantial evidence, Italy did not have a strong legal claim to the krater under American law.<sup>87</sup> For example, the Second Circuit has held that in order to hold a curator or art dealer criminally liable for illicit acquisitions under the National Stolen Property Act, the acquiror must have acted with knowledge of a work’s illegal provenance.<sup>88</sup>

Nevertheless, the parties aptly avoided the exhaustive and polarizing legal route by opting for an extrajudicial MBRA. Some key elements of the agreement include:

<sup>83</sup> Sharon Flescher, *News and Updates*, 8 IFAR J. 4 (2005/06).

<sup>84</sup> The Metropolitan Museum of Art-Republic of Italy Agreement of February 21, 2006, reprinted in 13 INT’L J. CULTURAL PROP. 427, 429 (2006) [hereinafter “Agreement”]. According to the text, the agreement was drafted “to ensure the optimum utilization of the Italian cultural heritage, and as part of the policy of the Ministry to recover Italian archaeological assets;” see also Elisabetta Povoledo, *Italy Makes its Choices of Antiquities to Lend Met*, N.Y. TIMES, Mar. 15, 2006, at E2 (remarking that “[t]he accord with the Met has been hailed here as a blueprint for future negotiations with other museums that own artifacts with a disputed provenance”).

<sup>85</sup> Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, at A1.

<sup>86</sup> *Id.*

<sup>87</sup> See e.g., Paige S. Goodwin, *Mapping the Limits of Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 690 (2008).

<sup>88</sup> U.S. v. Schultz, 333 F.3d 393, 410 (2d Cir. 2003) (noting that “[t]he *mens rea* [intent] requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations”).

(I) The Museum, rejecting any accusation that it had knowledge of the alleged illegal provenance . . . of the assets claimed by Italy, has resolved to transfer the Requested Items in the context of this Agreement. This decision *does not constitute any acknowledgment* on the part of the Museum of any type of civil, administrative or criminal liability for the original acquisition or holding of the Requested Items. The Ministry . . . waives any legal action on the grounds of said categories of liability in relation to the Requested Items . . . .

#### 4. The Euphronios Krater

4.1 The Museum shall transfer title . . . to . . . the Italian Republic under the following procedures:

a) The Euphronios krater shall remain at the Museum on loan until January 15, 2008, and shall be exhibited with the legend: ‘Lent by the Republic of Italy.’

b) To make possible the continued presence in the galleries of the Museum of cultural assets of equal beauty and historical and cultural significance to that of the Euphronios Krater, the Parties agree that . . . the Italian Republic shall make four-year loans to the Museum on an agreed, continuing and rotating basis selected from . . . archaeological artifacts, or objects of equivalent beauty and artistic/historical significance, *mutually agreed upon*, in the same context where possible.<sup>89</sup>

The language of the agreement certainly expresses the parties’ willingness to participate in long-lasting cultural collaborations. Waiving all liability on the part of the museum and recognizing Italy’s free and clear title constitute critical concessions. Only time will tell if the void left by the *Euphronios Krater* can be sufficiently filled. Interestingly, Professor Merryman’s cultural property dichotomy finds its way into the parties’ positional statements at the beginning of the agreement.<sup>90</sup> Italy proclaims its responsibility for “the institutional protection, preservation and optimum utilization of the Italian archaeological heritage, which is the source of the *national collective memory* and a resource for historical and scientific research.”<sup>91</sup> Whereas the Met asserts the following:

The Museum believes that the artistic achievements of all civilizations should be preserved and represented in art museums, which, uniquely, offer the public the opportunity to en-

<sup>89</sup> See Agreement, *supra* note 84, at 429–30 (emphasis added).

<sup>90</sup> See Merryman, *supra* note 1, at 845.

<sup>91</sup> See Agreement, *supra* note 84, at 427 (emphasis added).

counter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The interests of the public are served by art museums around the world working to preserve and interpret our *shared cultural heritage*.<sup>92</sup>

Despite the acknowledged differences in the parties' agendas, the Met-Italy accord is a step in the right direction. The agreement not only reflects a sensitivity toward Italy's collective cultural identity, but it also remains attentive to the museum's obligation to serve the public trust—proof that reconciliation of the competing paradigms is possible.<sup>93</sup> What is especially promising about this MBRA is the fact that Italy permitted the Met to select a variety of replacements for the repatriated artifacts—albeit from a fixed list.<sup>94</sup> Permitting museums to retain a degree of autonomy in voluntary MBRAs will hopefully encourage other institutions to seek similar arrangements.

Shortly after the Met-Italy agreement was reached, numerous museums engaged in MBRA negotiations.<sup>95</sup> It seems that the Met paved the way for the Getty, the Museum of Fine Arts, Boston, the Princeton University Art Museum, the Indianapolis Museum of Art, and the Cleveland Museum of Art to exchange Italian antiquities for future loans.<sup>96</sup> Yet, despite these agreements, once the works were returned to Italian soil, they joined other repatriated artifacts in the very public *Nostoi* exhibition.<sup>97</sup> The show flaunted antiquities like spoils of war,<sup>98</sup> clearly undermining the spirit of the MBRAs and giving the appearance that Italy was trying to make an example out of cooperating museums.

<sup>92</sup> *Id.* at 428.

<sup>93</sup> Jason Felch & Livia Borghese, *Italy Exhibits its Recovered Masterpieces*, L.A. TIMES, Dec. 18, 2007, at A-12.

<sup>94</sup> See Agreement, *supra* note 84.

<sup>95</sup> See *supra* note 8.

<sup>96</sup> See *supra* note 8.

<sup>97</sup> Elisabetta Povoledo, *After Legal Odyssey, Homecoming Show for Looted Antiquities*, N.Y. TIMES, Dec. 18, 2007, available at <http://www.nytimes.com/2007/12/18/arts/design/18trea.html>. For an interview with Italian Minister of Culture, Francesco Rutelli, and Director of the Metropolitan Museum of Art, Philippe de Montebello, see *NewsHour: Rome's 'Nostoi' Marks Homecoming of Italian Artwork* (PBS television broadcast Feb. 18, 2008) (transcript available at [http://www.pbs.org/newshour/bb/europe/jan-june08/returnhome\\_02-18.html](http://www.pbs.org/newshour/bb/europe/jan-june08/returnhome_02-18.html)).

<sup>98</sup> See generally Elisabetta Povoledo, *After Legal Odyssey, Homecoming Show for Looted Antiquities*, N.Y. TIMES, Dec. 18, 2007, available at <http://www.nytimes.com/2007/12/18/arts/design/18trea.html>; *NewsHour: Rome's 'Nostoi' Marks Homecoming of Italian Artwork* (PBS television broadcast Feb. 18, 2008) (transcript available at [http://www.pbs.org/newshour/bb/europe/jan-june08/returnhome\\_02-18.html](http://www.pbs.org/newshour/bb/europe/jan-june08/returnhome_02-18.html)).

## 2. The Yale-Peru Dispute

The recent Yale-Peru dispute illustrates how sensitive and volatile extra-judicial disputes can be. Professor Hiram Bingham's 1911 discovery of Machu Picchu yielded hundreds of ancient Incan artifacts, including jewelry, vessels, and silver statuary.<sup>99</sup> At the time of the excavation, Peru provided the authorization for the items to travel to Yale for a twelve-month loan; however, the exact details of the arrangement are not entirely clear today.<sup>100</sup> Yale believed it had complied with the terms of the original archeological agreement, asserting that the University only retained possession of those works to which it had clear title.<sup>101</sup> Unfortunately, Peru saw it differently, and, in 2006, nearly one hundred years after their discovery, the country sought the return of its indigenous patrimony.<sup>102</sup>

Yale offered to divide possession, while Peru's principle demand was for Yale to recognize Peru as the sole owner of the artifacts.<sup>103</sup> The conflict seemed ripe for negotiation. Both parties appeared willing to come to an agreement.<sup>104</sup> In September 2007 it appeared that Yale and Peru had devised an MBRA with great potential.<sup>105</sup> In fact, the parties announced that a deal had been struck.<sup>106</sup> The core components of the agreement indicated that:

1. [Y]ale and the Government of Peru will co-sponsor an exhibition that will travel internationally, featuring objects from the Hiram Bingham expeditions in Cusco and Machu Picchu, dioramas and multimedia materials developed at Yale.

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<sup>99</sup> Arthur Lubow, *The Possessed*, N.Y. TIMES MAGAZINE, June 24, 2007, available at <http://www.nytimes.com/2007/06/24/magazine/24MachuPicchu-t.html?amp;ei=5124&en=bde6f4842110ba04&ex=1340337600&adxnml=1&partner=permalink&expod=permalink&pagewanted=all&adxnmlx=1182762571-nlim+qF9v8DZCzwmRTqUfg>.

<sup>100</sup> Danna Harman, *90 Years Later, Peru Battles Yale Over Incan Artifacts*, THE CHRISTIAN SCIENCE MONITOR, Dec. 29, 2005, available at <http://www.csmonitor.com/2005/1229/p01s03-woam.html>.

<sup>101</sup> Lubow, *supra* note 99; Randy Kennedy, *Yale Officials Agree to Return Peruvian Artifacts*, N.Y. TIMES, Sept. 17, 2007, available at <http://www.nytimes.com/2007/09/17/arts/design/17peru.html?ref=design>.

<sup>102</sup> Harman, *supra* note 100. Unlike Italy, Peru's interest seems much more clearly rooted in the cultural nationalist perspective. According to the regional director of Peru's National Culture Institute (INC), "[t]his is our patrimony. This is everything to us—proof that even though today we are poor, our ancestors lived great and proud." *Id.*

<sup>103</sup> See Press Release, Joint Statement by the Government of Peru and Yale University (Sept. 14, 2007), available at <http://opa.yale.edu/news/article.aspx?id=2376>.

<sup>104</sup> Kennedy, *supra* note 85.

<sup>105</sup> *Id.*

<sup>106</sup> Press Release, *supra* note 103.

2. The traveling exhibit will be curated by Yale and Peru's National Institute of Culture scholars and will include additional pieces loaned by the Government of Peru.
3. Yale will acknowledge Peru's title to all the excavated objects including the fragments, bones and specimens from Machu Picchu.
4. Peru will share with Yale rights in the research collection, part of which will remain at Yale as objects of ongoing research. Once the Museum and Research Center is ready for operation in late 2009, the museum quality objects will return to Peru along with a portion of the research collection.
5. The Government of Peru will undertake to build a new Museum and Research Center in Cusco, for which Yale will serve as advisor, and where the proposed exhibition will be installed following its tour.<sup>107</sup>

The agreement had enormous potential. It acknowledged Peru's collective cultural right to retain title—a critical gain for Peru, as the government's motivation appeared to be marked by a desire to restore its patrimony.<sup>108</sup> Moreover, the agreement provided for joint research and educational programs, a novel and exciting feature for an MBRA.<sup>109</sup> The notion that two seemingly opposed parties were willing to unite for future collaborations was a major gain for Yale and the public trust. By not shutting its doors, Peru seemed willing to provide more loans with greater flexibility, perhaps even in perpetuity.

But negotiations crumbled when, in December 2008, Peru quietly filed suit against Yale University seeking the return of the Macchu Picchu objects.<sup>110</sup> The complaint alleged, *inter alia*, that "Yale has wrongfully exercised custody of artifacts exported from Peru by Bingham," and made a demand for replevin, claiming breach of contract, breach of fiduciary duties, and fraudulent mis-

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<sup>107</sup> *Id.*

<sup>108</sup> See Harman, *supra* note 100.

<sup>109</sup> *Id.*

<sup>110</sup> For a discussion on the decision to take legal action, see The Illicit Cultural Property Blog, <http://illicit-cultural-property.blogspot.com>, Nov. 10, 2008, available at <http://illicit-cultural-property.blogspot.com/2008/11/peru-to-lawyer-up.html>; for an op-ed by Peru's former first lady, see Eliane Karp-Toledo, *The Lost Treasure of Machu*, N.Y. TIMES, Feb. 23, 2008, available at [http://www.nytimes.com/2008/02/23/opinion/23karp-toledo.html?\\_r=1&ref=todayspaper&oref=slogin](http://www.nytimes.com/2008/02/23/opinion/23karp-toledo.html?_r=1&ref=todayspaper&oref=slogin). There is some indication that this op-ed piece actually thwarted discussions, as it marked the increasing politicization of the dispute. For a discussion on the impasse see Paul Needham, *Times Column Exacerbates Yale-Peru Negotiations*, YALE DAILY NEWS, Feb. 25, 2008, available at <http://www.yaledailynews.com/articles/view/23724>.

representation.<sup>111</sup> Despite the breakdown of the negotiations, the proposed agreement provides a model framework for prospective MBRAs. Its features can easily be adapted to future disputes that arise between institutions and source nations, such as those embarked upon by the Italian government.

### C. Making the Case for Mutually Beneficial Repatriation Agreements

The Italian Ministry of Culture has failed to institute consistent policies with regard to the retrieval of its patrimony and continues to engage in a divisive public relations campaign, leaving curators and the public guessing as to the future of its permanent collections.<sup>112</sup> Italy and public institutions should instead actively seek MBRA arrangements for a number of reasons. Empirical studies indicate that leasing antiquities yields sustainable economic gains for source nations.<sup>113</sup> Thus, failure to actively engage in non-hostile MBRAs may jeopardize Italy's ability to profit from potential long-term leases.<sup>114</sup> Moreover, if Italy appears willing to extend an open hand, it may encourage other institutions to come forward and voluntarily repatriate works through a flexible MBRA.

Similarly, museums have a strong incentive to enter into MBRAs. Aside from avoiding serious legal consequences, cultural institutions can strengthen their collections by negotiating for long term, rotating leases, thus providing the public with a constant stream of new exhibits. The presumed rejuvenative effects that precipitate from frequent exchanges would undoubtedly increase a museum's visibility and scholastic impact. Furthermore, because these agreements are typically pursued after incriminating evidence of illicit acquisitions surfaces, respected institutions can avoid a blemished public image by arranging for MBRAs.<sup>115</sup>

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<sup>111</sup> Complaint at 88, *Republic of Peru v. Yale University*, No. 08-02109 (D.D.C. Dec. 5, 2008).

<sup>112</sup> See *supra* note 8.

<sup>113</sup> An empirical study by economists from Harvard and MIT argues that long-term leases of antiquities would raise revenue for the country of origin while preserving national long-term ownership rights. By putting antiquities into the hands of the highest value consumer in each period, leases would generate incentives for the protection of objects. Michael Kremer & Tom Wilkening, *Protecting Antiquities: A Role for Long-Term Leases?* (Sept. 11, 2007) (unpublished research paper) (on file with author).

<sup>114</sup> *Id.*

<sup>115</sup> WATSON & TODESCHINI, *supra* note 43.

The private, extrajudicial nature of MBRAs comport with the overall goals of alternative dispute resolution: to facilitate an efficient and inexpensive mechanism for reaching agreements, while preserving the claimants' autonomy.<sup>116</sup> To this end, MBRAs sidestep the often complex, costly, and uncertain nature of litigation. When parties turn to the Courts to intercede in cultural property disputes, choice of laws, absence of evidence, and financial resources are almost certainly implicated.

### 1. Choice of Law Rules

Courts, both domestic and abroad, presiding over replevin actions must choose which jurisdiction's laws should govern a given dispute.<sup>117</sup> Traditionally, jurisdictions adopt the doctrine of *lex situs*—the law of the location in which the transaction occurred—to resolve disputes over chattel.<sup>118</sup> The policy behind applying *lex situs* is simple: it provides parties with a predictable outcome.<sup>119</sup> Nevertheless, it has been suggested that the application of this default rule is misguided.<sup>120</sup> Often it is impossible to determine the location of the faulty transaction, leaving a party without a legal claim.<sup>121</sup> A number of scholars have sharply criticized the *lex situs* rule, suggesting that it gives rise to too many inequities for either good faith purchasers or original possessors.<sup>122</sup> MBRAs, of course, avoid this problem entirely.

### 2. Insufficient Evidence

Perhaps the most difficult hurdle in adjudicating cultural property disputes involves the lack of sufficient evidence to establish such claims.<sup>123</sup> Difficulties in proving a case may, in itself, be enough of an incentive for source nations to seek bilateral agree-

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<sup>116</sup> See generally STEPHEN GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (5th ed. 2007).

<sup>117</sup> See, e.g., *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, No. 105575/00, 2001 N.Y. Misc. LEXIS 693, at \*1 (N.Y. Sup. Ct. 2001).

<sup>118</sup> Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, COLUM. J.L. & ARTS (forthcoming Spring 2009) (on file with author).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See *Winkworth v. Christie, Manson & Woods, Ltd.*, [1980] 1 Ch. 496 (U.K.).

<sup>122</sup> See, e.g., Kremer, *supra* note 113; Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1432–33 (1992).

<sup>123</sup> See, e.g., Cronaca, <http://www.cronaca.com> (last visited Dec. 21, 2005); cf. Tracy Wilkinson & Livia Borghese, *Documents Give View of Curator's Ties to Smuggler*, L.A. TIMES, Dec. 17, 2005, at A-6.

ments. Without a reliable record of title, verifying the chain of ownership is nearly impossible.<sup>124</sup> In the case of illicit antiquities, clear provenance is almost certainly non-existent and the line between good faith purchasers and illicit traffickers may not be delineated.<sup>125</sup> Moreover, without clear dates establishing either the illicit excavation or exportation of an object, demonstrating that a claim comports with the statute of limitations can be especially difficult to prove. By entering into an MBRA, parties can escape difficult burdens of proof. Litigating uncertain claims will either lead to retention or repatriation; but by bargaining for joint collaborations, parties can strike a balance that is consistent with general principles of equity.

### 3. Financial Constraints

It is no secret that litigation is a costly enterprise with unpredictable results. MBRA's present an efficient alternative to the massive expenditures associated with filing a lawsuit to resolve a cultural property dispute.<sup>126</sup> And when economically feeble source nations are involved, bilateral agreements may be the only viable option for reclaiming stolen objects.<sup>127</sup>

#### D. Concessions and Considerations for Creating Mutually Beneficial Repatriation Agreements

As we have seen, successful MBRA's circumvent the adjudicatory process, and neither party walks away from the bargaining table empty-handed. But museums and source nations must provide

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<sup>124</sup> See Simon R.M. Mackenzie, *Dig a Bit Deeper: Law, Regulation and the Illicit Antiquities Market*, 45 *BRIT. J. CRIMINOLOGY* 249, 253 (2005) (explaining that "documentary evidence of a past chain of ownership [is notably absent] from most transactions in the antiquities market, . . . [making it] impossible for purchasers to tell whether the object that they buy has been recently looted, or [whether it] has been circulating in the market for many years.").

<sup>125</sup> A good faith purchaser is "one who buys a stolen work without notice of circumstances that would put a person of ordinary prudence on inquiry as to the seller's title." 77 *Am. Jur. 3d Proof of Facts* 259, § 2 (2008).

<sup>126</sup> For example, Germany paid over \$2 million to have the stolen Quedlinburg medieval treasures returned, but as the nation's Secretary General, who negotiated the deal remarked, "if we had pursued the lawsuit in Dallas, the legal fees would have greatly exceeded the amount we agreed to pay." *And So to Court*, *THE ECONOMIST*, Mar. 30, 1991, at 88 (quoting Klaus Maruice).

<sup>127</sup> See, e.g., Folarin Shyllon, *The Nigerian and African Experience on Looting and Trafficking in Cultural Objects*, in *ART AND CULTURAL HERITAGE LAW* 137, 139 (Barbara T. Hoffman ed., 2006) (noting one reason that African nations are skeptical to pursue cultural property disputes in foreign courts is a result of the massive expenses associated with litigation).

some leeway, since tangible gains are not without concessions. Before constructive discourse can begin, public institutions must dispense with their preconceptions of the “encyclopedic museum.”<sup>128</sup> This means repudiating to some extent the *Declaration on the Importance and Value of Universal Museums* in favor of a more holistic approach that is sensitive to individual cultural identities.<sup>129</sup> In return, this requires source nations, particularly those that are rich in antiquities, to cooperate and, of course, share works of art. Accordingly, negotiations must account for: (i) the assignment of title and possession; (ii) the mitigation of loss; and (iii) the financing exchanges of antiquities.

### 1. Assigning Title and Possession

Source nations remain steadfast in their desire to assume title of disputed artifacts.<sup>130</sup> For countries, such as Peru, whose indigenous citizens might assert a link to the past, title does not simply confer ownership, it is a matter of pride—recognition that that their cultural heritage cannot be subjugated by traffickers, grave robbers, or self-serving archaeologists.<sup>131</sup> In this regard, museums can never claim a comparable stake. Accordingly, where an institution’s interest in a work is strongly rebutted by the ethical and legal rights of source nations, museums must be more willing to concede ownership. By contrast, where a nation’s legal claim against a museum is weakened by seemingly unquestioned provenance, and historical context undoubtedly places the work within the realm of “national patrimony,” museums should be ready to heed the call and arrange for loans. When title cannot be reconciled, parties should entertain the possibility of fractional ownership.<sup>132</sup>

In constructing an MBRA, the drafters may consider distinguishing title from possession. That is, the agreement can assign ownership to the source nation, including all of the accompanying secondary rights (e.g., transferability and alienability), while the *situs* of the work remains with the institution; it can be drafted, for example, as a possessory estate granted to the institution and a future interest conferred upon the nation of origin.<sup>133</sup> For instance,

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<sup>128</sup> See *supra* note 81.

<sup>129</sup> *Id.*

<sup>130</sup> Press Release, *supra* note 103.

<sup>131</sup> *Id.*

<sup>132</sup> See Merryman, *supra* note 80.

<sup>133</sup> For a discussion of possessory estates and future interests with respect to finders and source countries, see Wendel, *supra* note 25.

the Met-Italy accord assigned possession of the *Euphronios Krater* to the Met for two years, after which point, the future interest vested in Italy. Although the Met's possessory estate was arguably cut short, their loss should be softened with the promise of future loans.<sup>134</sup>

## 2. Mitigating Losses

One of the primary functions of the MBRA is to minimize the damage caused by the return of artifacts by encouraging parties to share in the loss, while simultaneously maximizing gains. The hallmark of the MBRA—the long-term loan—requires source nations to recognize that museums have an obligation to serve the public and academic sectors. By replenishing collections with equally beautiful works, both museums and source nations can fulfill their respective missions. Furthermore, losses may be mitigated in a number of ways and the agreement initially proposed in the early stages of the Yale-Peru dispute articulates such possibilities.<sup>135</sup> The proposal constructs a sustainable long-term relationship through cooperative research programs, in which Yale originally promised to take an active role in developing a new museum for Peru.<sup>136</sup> By laying the groundwork for future endeavors, smaller source nations can benefit from the resources of established cultural institutions. Similarly, museums will gain a favorable reputation and goodwill in the eyes of source nations, thus paving the way for future exchanges.

## 3. Financing and Facilitating the Transportation of Antiquities

Lastly when contemplating an MBRA, the parties must anticipate financing and facilitating the transport of goods. In the case of mutually repatriated works, one solution might be to share the burden amongst the parties by using profits generated from joint exhibitions to finance the ultimate return of the goods to the source nation. Concern for the object's well-being must also be factored into the logistics of transportation. It may be argued that frequent exchanges only increase the risk of damage to fragile antiquities; however, this concern must be weighed against the broader need to reduce illicit acquisitions.

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<sup>134</sup> See *supra* Part III.B.1.

<sup>135</sup> See *supra* Part III.B.2.

<sup>136</sup> See *supra* Part III.B.2.

## IV. CONCLUSIONS AND SUGGESTIONS

The main thrust of this Note advocates for an increase in bilateral agreements, as opposed to strict repatriation demands and similarly divisive tactics. The Italian Ministry of Culture, and source nations generally, need to exercise greater awareness when pursuing claims for the return of patrimony, as hostility undermines fruitful dialogue. As an alternative approach, these countries should seek flexible arrangements that anticipate the needs and obligations of cultural institutions, ultimately providing an incentive for museums to voluntarily repatriate. Similarly, when requests are made, museums must be sympathetic to the cultural import of the object and mindful that their assessment of the work's provenance may not be entirely accurate. By entering into mutually beneficial agreements predicated upon long-term loans and collaborative educational efforts, both source nations and museums can curtail the negative impact of repatriating cultural property.

But this really amounts to an *ex post facto* solution to an existing problem—source nations need to exercise more rigorous control over their cultural property sites, and museums need to provide greater oversight and transparency with respect to their acquisition policies. Cultural property scholars have proposed a number of solutions to combat the burgeoning black market, from legitimizing the antiquities trade through relaxed import and export restrictions,<sup>137</sup> to introducing a standardized registry to record antiquities discoveries and exchanges.<sup>138</sup> The truth is that the antiquities trade will always exist.<sup>139</sup> But in order to curb the illicit market, source nations need a more effective approach for monitoring archaeological sites, and they must be more pragmatic when regulating the antiquities trade. Making it prohibitively difficult for honest exchanges to occur merely encourages trafficking in the

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<sup>137</sup> See generally John Henry Merryman, *A Licit International Trade in Cultural Objects*, 4 INT'L J. CULTURAL PROP. 13, 125 (1995); see also Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 714 (2008).

<sup>138</sup> See, e.g., Robin Hardy Villanueva, Note, *Free Trade and the Protection of Cultural Property: The Need for an Economic Incentive to Report Newly Discovered Antiquities*, 29 GEO. WASH. J. INT'L L. & ECON. 547, 575–78 (1995); The Portable Antiquities Scheme, <http://www.finds.org.uk> (last visited Feb. 1, 2010); The Fine Art Registry, <http://www.fineartregistry.com> (last visited Feb. 1, 2010).

<sup>139</sup> Bauer, *supra* note 137.

secondary market. By adopting these remedial measures, source nations can escape embittered repatriation disputes and the need for MBRAs entirely.