

Resolving Cultural Property Disputes in the Shadow of the Law

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ABSTRACT

Legal rules can influence dispute resolution through a variety of means and to a number of results. Cultural property disputes demonstrate that legal rules impact bargaining less in the potential for their enforcement, and more in how they shape the discourse of the dispute resolution process. The possibility of enforcement of cultural property legal rules brings parties to the table. Enforcement is unlikely, and yet the legal rules are still influential in a way that focuses the discourse of the dispute resolution process on rights and power rather than on the interests of the parties, mostly to unproductive consequences. Fortunately, legal rules are malleable and so the very aspects of the law that allow it to shape cultural property dispute resolution in the first place — its enforceability and its influence on discourse — can be reformed for the better. ADR has the potential to increase the focus of the dispute resolution process on parties' interests and to make the resolution of rights claims more productive. Moreover, legal rules themselves can be molded to shape the discourse of cultural property dispute resolution, focusing the dispute resolution process on the interests of the parties. This will require — but will also contribute to — a longer-term shift in the paradigm of cultural property dispute resolution. This shift is one away from a binary understanding of ownership of cultural heritage to an acknowledgment of both some degree of the indeterminacy of cultural property rights claims and the value of the interests of all parties to the dispute.

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I. INTRODUCTION

Cultural property disputes take a variety of forms. The property in dispute may encompass a wide range of materials. One definition used in international law defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.”² Disputes over cultural property may occur among a variety of actors: between sovereign states and other sovereign states;³ between states and sub-state sovereignties, such as indigenous groups;⁴ between sub-state sovereignties;⁵ between states and private actors, both individuals⁶ and institutions;⁷ or between private actors exclusively.⁸ The disputes may also cover a wide range

2. United Nations Education, Scientific & Cultural Commission Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter UNESCO 1970].

3. See, e.g., Michael Kimmelman, *Elgin Marble Argument in a New Light*, N.Y. TIMES, June 24, 2009, at C1, available at <http://www.nytimes.com/2009/06/24/arts/design/24abroad.html?pagewanted=all> (describing Greece's claim against the United Kingdom for the Elgin Marbles).

4. See, e.g., Robert K. Paterson, *Protecting Taonga: The Cultural Heritage of the New Zealand Maori*, 8 INT'L J. CULTURAL PROP. 108 (1999) (describing cultural property disputes between Maori peoples and the New Zealand government).

5. See, e.g., Marie Cornu & Marc-André Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, 17 INT'L J. CULT. PROP. 1, 20 (2010) (describing a dispute between the Swiss cantons of Saint-Gall and Zurich over ancient manuscripts).

6. See, e.g., Bruce Weber, *Robert Hecht, Antiquities Dealer, Dies at 92*, N.Y. TIMES, Feb. 10, 2012, at A18, available at <http://www.nytimes.com/2012/02/10/arts/design/robert-hecht-antiquities-dealer-dies-at-92.html> (describing the Italian government's prosecution of antiquities dealer, Robert Hecht, for antiquities trafficking).

7. See, e.g., *Egypt, Demanding Artifacts' Return, Cuts Ties With the Louvre*, N.Y. TIMES, Oct. 8, 2009, at A7, available at <http://www.nytimes.com/2009/10/08/world/middleeast/08egypt.html> (describing Egyptian claims against the Louvre for the return of certain artifacts).

8. See, e.g., Mike Boehm, *The Getty Museum is in a Legal Fight over Armenian Bible Pages*, L.A. TIMES, Nov. 4, 2011, at D1, available at <http://articles.latimes.com/2011/nov/04/entertainment/la-et-armenian-bible-20111104> (describing an Armenian

of actions concerning cultural property: ownership,⁹ destruction,¹⁰ conservation,¹¹ transfer,¹² plunder,¹³ and many others.

This Article focuses on just one type of cultural property dispute: claims by foreign governments for the restitution of an object from a U.S. museum. Most of the objects involved in this type of dispute are archaeological artifacts. This Article thus uses the terms cultural property, artifacts, and antiquities interchangeably, even though cultural property is a much broader term. This Article examines restitution disputes through a particular lens: how the legal rules implicated by a dispute influence negotiations during the dispute resolution process. Part II.A addresses why this is an important question, both for the law of cultural property and also for negotiation theory. Part II.B explores what these legal rules actually are and how they operate in practice. Part II.C examines how these legal rules influence bargaining in the dispute resolution process, elaborating first on the mechanisms by which they exert this influence and second on how that influence brings parties to the bargaining table while producing an unproductive discourse focused on rights and power rather than interests. Part III proposes several ways to use the mechanisms by which the law exerts an influence on the dispute resolution process to improve that process by focusing the parties involved on interests rather than rights- or power-based discourse.

church's claims against the J. Paul Getty Museum for the return of several Bible pages).

9. See, e.g., John Tierney, *A Case in Antiquities for "Finders Keepers,"* N.Y. TIMES, Nov. 17, 2009, at D1, available at <http://www.nytimes.com/2009/11/17/science/17tier.html> (describing Egyptian claims of ownership of the Rosetta Stone against the British Museum).

10. See, e.g., Steven Lee Myers, *Iraq's Ancient Ruins Face New Looting,* N.Y. TIMES, June 26, 2010, at A1, available at http://www.nytimes.com/2010/06/26/world/middleeast/26looting.html?_r=0 (describing the creation of an antiquities police force to prevent the destruction of archaeological sites in Iraq).

11. See, e.g., Kimmelman, *supra* note 3, at C1 (describing arguments concerning whether Britain or Greece could better conserve the Elgin Marbles).

12. See, e.g., Michael Kimmelman, *Stolen Beauty: A Greek Urn's Underworld,* N.Y. TIMES, July 8, 2009, at C1, available at <http://www.nytimes.com/2009/07/08/arts/design/08abroad.html?pagewanted=all> (describing the raid of one Giacomo Medici's Geneva warehouse, which was believed to have been used for the smuggling of antiquities).

13. See, e.g., Isabel Malsang, *Destitute Greeks Can't Maintain Heritage,* N. TERRITORY NEWS, Apr. 10, 2012, at 26 (describing the increasing number of unlicensed archaeological excavations in Greece during the country's recent financial crisis).

II. THE PROBLEM

A. *Why Are Cultural Property Law and Negotiation Theory Important?*

Professors Robert Mnookin and Lewis Kornhauser laid a theoretical foundation for examining how legal rules shape bargaining strategies in *Bargaining in the Shadow of the Law*.¹⁴ They focused on how the law influenced “private ordering,” the resolution of disputes without adjudication in court.¹⁵ Professors Mnookin and Kornhauser were primarily concerned with how “legal rules and procedures . . . [and] other institutional features of the formal legal system” shaped behavior and outcomes in private ordering.¹⁶ Legal rules may serve a number of functions in dispute resolution, such as determining who is entitled to participate and the form an agreement must take.¹⁷

One could examine these dispute negotiations through the lens of numerous other, non-legal variables long acknowledged as affecting bargaining behaviors, including the economic costs and benefits of continuing to negotiate, parties’ interests in preserving a good relationship, social norms, cultural differences, power disparities, and distrust.¹⁸ Indeed, these are areas of cultural property dispute resolution that are undoubtedly ripe for exploration. This Article addresses some of these variables, but focuses on how legal rules shape bargaining in cultural property disputes. In one sense, this Article answers Professors Mnookin and Kornhauser’s call to analyze areas of law beyond divorce and uncover how parties bargain in the shadow of the law.¹⁹ The primary motivation for this Article’s focus on legal rules, though, is that an analysis of legal rules lends itself to policy recommendations, which this Article provides at a high level in Part III.

Cultural property disputes present an interesting challenge at the intersection of law and negotiation. Cultural property disputes

14. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing the influence of the legal structures surrounding divorce law on private negotiations).

15. *Id.* at 951.

16. Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1494 (1991) (quoting an interview with Professor Mnookin).

17. *Id.*

18. See Omar M. Dajani, *Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks*, 32 YALE J. INT’L L. 61, 66 (2007) (listing such factors influencing bargaining behaviors and corresponding academic articles examining these factors).

19. Mnookin & Kornhauser, *supra* note 14, at 997.

rarely go to court or even reach the point of filing a formal complaint;²⁰ that is, they are largely resolved through private ordering. While an agreement over cultural property, in contrast to a divorce settlement, requires no "rubber stamp" by a court to take effect,²¹ law and legal institutions specific to cultural property exist, operating in the background of cultural property disputes,²² just as divorce law lurks behind the private ordering between separating spouses. Thus, the question of how legal rules affect private ordering is central to understanding cultural property disputes; analyzing cultural property disputes should, conversely, illuminate the relationship between legal rules and private ordering per Professors Mnookin and Kornhauser's call to action.

B. *The Legal Rules of Cultural Property*

Cultural property dispute negotiations seem to mirror the archetypal divorce case understood to involve bargaining in the shadow of the law. But as this Part demonstrates, cultural property disputes are likely more complex because the legal rules at play in cultural property disputes exist and exert their influence at multiple jurisdictional levels. In contrast to divorce cases, which are governed primarily by state law and, to a lesser extent, federal law, rules potentially implicated in cultural property disputes are found not only at the state and federal levels, but also in the domestic laws of foreign governments, in international agreements, and in the law-like policies of large private institutions.²³ With the exception of private policies, this Part examines these various rules, grouping them into international rules and domestic rules. The Part then discusses how these legal rules operate in practice, concluding that despite the extensive and multi-layered legal structure, the likelihood of their enforcement is actually quite low.

20. I obtained much of the anecdotal evidence for this Article through interviews with executive officers of the governing body of a museum with a large antiquities collection [hereinafter Museum Interviews]. In order to ensure a measure of freedom in the comments, interviewees were promised anonymity. See also Irini Stamatoudi, *Mediation and Cultural Diplomacy*, 61 MUSEUM INT'L 116, 117 (2009) (citing numerous examples of out-of-court settlements of a variety of cultural property disputes).

21. This is in contrast to divorce cases, settlement of which typically requires court approval. See Mnookin & Kornhauser, *supra* note 14, at 951.

22. See *infra* Part II.B.

23. For example, many museums have acquisitions policies regulating the provenance documentation required for acquiring objects, and some have protocols for reviewing and investigating claims for the restitution of antiquities. Museum Interviews, *supra* note 20.

1. *International Rules*

The primary international legal convention implicated by museum-foreign government disputes over cultural property is the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970).²⁴ The International Institute for the Unification of Private Law's (UNIDROIT) 1995 Convention on the International Return of Stolen or Illegally Exported Cultural Objects²⁵ (UNIDROIT 1995) is often cited as an important international convention in cultural property disputes,²⁶ but it has not been implemented by the United States and so it is not examined here.²⁷

UNESCO is a leading international organization involved in fighting antiquities trafficking. It is comprised of 195 full members, including the United States.²⁸ UNESCO 1970, to which 124 states, including the United States, are a party,²⁹ provides a broad framework for curbing antiquities trafficking. The Convention encourages states to inventory specific items of cultural property³⁰ for inclusion in the protections the Convention provides and also allows states to

24. See UNESCO 1970, *supra* note 2.

25. International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT 1995].

26. See, e.g., 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, 139–40 (1997).

27. UNIDROIT 1995 was motivated by UNESCO's desire for a complementary "international instrument of an essentially private law character." *Id.* at 139 (citing Marina Schneider, UNIDROIT Research Officer, paper delivered at London Conference on Art Theft: *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* (Nov., 1995)). UNIDROIT 1995 seeks to coordinate its signatories' private law and provides a path for the gradual adoption of uniform rules governing stolen or unlawfully exported cultural property, providing, generally for the restitution of stolen cultural property. *Id.* at 139–40. UNIDROIT 1995 has been signed by forty-three countries and has entered into force in thirty-two. International Institute for the Unification of Private Law (UNIDROIT), *Status of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, <http://www.unidroit.org/english/implementation/i-95.pdf> (last visited Mar. 20, 2012). The United States was involved in the Convention's drafting, but never signed the agreement. Patty Gerstenblith, *Unidroit Ratified*, 51 *ARCHAEOLOGY* 24, 24 (1998).

28. *Member States*, UNESCO, http://portal.unesco.org/en/ev.php-URL_ID=11170&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Nov. 25, 2011).

29. *Illicit Traffic of Cultural Property*, UNESCO, <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/> (last visited Apr. 6, 2012).

30. UNESCO 1970's definition of cultural property is found in Article I of the Convention. UNESCO 1970, *supra* note 2, art. 5(b), 823 U.N.T.S. at 238.

designate entire categories of archaeological or ethnographical material for protection.³¹

Objects that have been so classified are the subject of the remainder of the agreement. Article 7(a) highlights the general thrust of the Convention, obligating signatories to take the necessary measures, consistent with national legislation, to prevent 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.³²

The two key parts of the Convention implemented by the United States have been Articles 7(b) and 9.³³ Under the former part, a signatory may request of another signatory the return of property known to be stolen. Article 7(b)(ii) specifies that a signatory agrees, at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the resulting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The resulting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.³⁴

Article 9 proposes a framework under which signatories can agree, bilaterally or multilaterally, to prohibit the import of entire categories of material, if that type of material is somehow at risk:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and

31. *Id.* at art. 1, 823 U.N.T.S. at 234-36.

32. *Id.* at art. 7(a), 823 U.N.T.S. at 240.

33. *See infra* Part II.A.2.b.

34. UNESCO 1970, *supra* note 2, at art. 7(b)(ii), 823 U.N.T.S. at 240.

imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.³⁵

UNESCO 1970 relies for enforcement on implementation by its signatories. Hence, understanding domestic legal rules is essential to understanding how the Convention operates in practice.

2. Domestic Rules

a. Foreign Domestic Rules

Most countries from which illicit cultural property is exported — often referred to as “source countries” — have laws declaring certain or all categories of antiquities to be property of the state. Such “vesting” statutes are intended to make the removal of cultural property without state approval illegal.³⁶ States sometimes use these laws to prosecute looters and smugglers, and have in the past prosecuted museum officials alleged to have knowingly violated these laws.³⁷ The main impact of these laws for the purpose of this paper is in their interaction with U.S. domestic legal rules, which is explored below.

b. U.S. Domestic Rules

A number of U.S. legal rules are relevant in cultural property disputes. Some rules are rooted in statute, others in common law; some provide for civil remedies, others criminal sanctions; some derive from international law; others are purely domestic in origin.

35. *Id.* at art. 9, 823 U.N.T.S. at 242.

36. John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULT. PROP. 11, 29 (2005). States take two different approaches to such vesting statutes. Under a more expansive approach, the state considers all cultural property not owned privately, undiscovered cultural property, or both to be property of the government. Cyprus' Antiquities Law of 1935, for example, declares that “[a]ll undiscovered antiquities . . . are the property of the Government. . . .” PATRICK J. O'KEEFE & LYNDAL V. PROT, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 60 (1988), available at <http://unesdoc.unesco.org/images/0011/001191/119126eo.pdf>. Under a more reserved approach, source countries claim ownership of only certain categories of cultural property. New Zealand's Antiquities Act 1975, for example, limits claims of state ownership to Maori objects or other non-European-made objects brought to New Zealand before 1902. PATRICK J. O'KEEFE, TRADE IN ANTIQUITIES: REDUCING DESTRUCTION AND THEFT 34 (1997).

37. See, e.g., Elisabetta Povoledo, *Rome Trial of Ex-Getty Curator Marion True Ends*, N.Y. TIMES, Oct. 14, 2010, at C1, available at http://www.nytimes.com/2010/10/14/arts/design/14true.html?_r=0 (describing Italy's abortive prosecution of former Getty Curator Marion True).

The Cultural Property Implementation Act (CPIA)³⁸ implements UNESCO 1970 in the United States. The CPIA prohibits the import of any stolen cultural property that has been documented as part of the inventory of a museum or other public institution located in another nation that is a signatory to UNESCO 1970.³⁹ The Act provides for civil remedies of seizure or forfeiture of cultural property⁴⁰ to be brought by customs officers.⁴¹ Seizure and forfeiture require proving that the disputed property was stolen after January 12, 1983 — the effective date of the CPIA — or after the entry into effect of UNESCO 1970 for the country from whose institution the object was stolen, whichever is later.⁴² Actions under the CPIA are typically initiated by requests from a foreign government, although the law does not require this.⁴³

Cultural property disputes involving U.S. museums also implicate a number of U.S. domestic legal rules unrelated to UNESCO 1970 and not rooted in international law. These other legal rules generally operate in conjunction with foreign claims of ownership of undiscovered or unexcavated antiquities.⁴⁴ Specifically a foreign government's legal claim under these rules begins with the theory that the contested antiquity in a U.S. museum is the property of its country of origin and was wrongfully removed. Therefore, the object is wrongfully in the possession of a museum. The remedy or implication for a museum could be civil or criminal, and based in statute or common law, depending on the specific legal rule applied.

The U.S. government, as in actions initiated through the CPIA, can become involved by virtue of the National Stolen Property Act

38. U.S. Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (2006).

39. 19 U.S.C. § 2607 (2006).

40. See 19 U.S.C. § 2609 (2006).

41. See 19 U.S.C. § 2613 (2006).

42. See 19 U.S.C. § 2610(2)(B) (2006). See also Patty Gerstenblith, *The Acquisition and Exhibition of Classical Antiquities: The Legal Perspective*, in *THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES: PROFESSIONAL, LEGAL, AND ETHICAL PERSPECTIVES* 47, 49 (Robin F. Rhodes ed., 2008).

43. Museum Interviews, *supra* note 20. The CPIA involves the source countries in forfeiture and seizure actions in various ways. The Act, for instance, provides for specific mechanisms by which claimants may request that the U.S. initiate import restrictions under Article 9 of UNESCO 1970. See, e.g., 19 U.S.C. § 2602(a)(3) (2006). The act also requires source countries to compensate the holder of the forfeited or seized item unless equity would normally require not doing so. 19 U.S.C. §§ 2609(c)(2)(A), (B) (2006).

44. See, e.g., *United States v. Schultz*, 333 F.3d 393, 403–04 (2d Cir. 2003) (holding that the NSPA applies to antiquities taken in violation of a foreign national ownership law).

(NSPA).⁴⁵ The NSPA criminalizes, among other activities, the knowing transfer or transport in interstate or international commerce of stolen property, or possession of stolen property thus transferred or transported.⁴⁶ Property proven to have been so transferred, transported, or possessed may be seized and the individual violating the NSPA may be prosecuted.⁴⁷

The U.S. may also become involved in antiquities disputes through its customs powers. U.S. customs statutes prohibit goods imported contrary to U.S. law from entering the country.⁴⁸ Customs powers can be implicated in cases where a smuggler violates rules requiring the declaration of either the value of the goods to be imported or the goods' country of origin,⁴⁹ two pieces of information typically obscured by antiquities smugglers.⁵⁰

Finally, private causes of action may be available to foreign claimants through the common law of stolen property. Here the governing rule is that a thief cannot convey good title to stolen property.⁵¹ As a result of this rule, purchasers of stolen goods are exposed

45. National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2006).

46. *See id.*

47. One of the few appellate antiquities law decisions, *United States v. Schultz*, *supra* note 44, illustrates the operation of the NSPA. In *Schultz*, the Second Circuit upheld the conviction of the defendant-antiquities dealer, Schultz, who was indicted under the NSPA for conspiring to transport and sell antiquities imported from Egypt in violation of Egypt's national antiquities ownership law. *See id.* at 416. Schultz's co-conspirator had used plaster to disguise ancient Egyptian sculptures as tourist souvenirs. *See id.* at 398. After exporting the objects from Egypt, Schultz and his co-conspirator restored the sculptures and attempted to sell them in the U.S. and England, inventing a fake provenance for the pieces to obscure their origins. *See id.*

48. *See* 19 U.S.C. § 1595a(c) (2008); 18 U.S.C. § 545 (2006).

49. Gerstenblith, *The Acquisition and Exhibition of Classical Antiquities*, *supra* note 42, at 54–55.

50. The Second Circuit's decision in *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) illustrates the operation of U.S. customs powers in this regard. A U.S. antiquities collector imported a late fourth-century B.C.E. phiale (the antique platter of gold named in the case title) of Sicilian origin into the U.S. for purchase by Michael Steinhardt, a prominent antiquities collector. The dealer had received the phiale at the border of Switzerland and Italy, and brought it from Switzerland to the U.S. The dealer's customs declaration forms, however, stated that the platter's country of origin was Switzerland, not Italy, and understated the platter's value by about \$1 million. *See id.* at 133. These misstatements were sufficient to allow for seizure of the phiale under the U.S. customs powers. *See id.* at 140. This case is generally cited for the proposition that an antiquity's place of origin, for the purpose of U.S. customs law, is the place where it has been found or excavated in modern times, in this case, Italy. *See, e.g.,* Gerstenblith, *The Acquisition and Exhibition of Classical Antiquities*, *supra* note 42, at 55.

51. Gerstenblith, *The Acquisition and Exhibition of Classical Antiquities*, *supra* note 42, at 49. *See, e.g.,* U.C.C. § 2-403(1) (2007).

to replevin actions brought by the original owner, even if their purchaser bought the item in good faith.⁵²

3. *The Operation of the Legal Rules in Practice*

A number of procedural features of the law and practical considerations of its enforcement shape the operation of these laws. Procedural provisions such as various time limits or burdens of proof contained in the laws described above limit the operation of these rules. The key provisions of UNESCO 1970 and the CPIA, for example, apply only to antiquities imported after a certain time period. Section 7(a) of UNESCO 1970 applies only to property illegally exported after entry into force of the Convention.⁵³ The provision of the CPIA prohibiting the importation of stolen antiquities only applies to objects shown to have been stolen after the effective date of the legislation.⁵⁴ Likewise, statutes of limitations restrict the possible claims, or the effectiveness of claims brought by foreign governments. Most jurisdictions, for example, allow a two- to six-year statute of limitations for replevin actions.⁵⁵ Similarly, a five-year statute of limitations applies to the NSPA.⁵⁶ Therefore, not all objects of mysterious provenance in museums' collections are covered by these laws.

Moreover, the ambiguous provenance of most antiquities involved in cultural property disputes and the pleading or evidentiary burdens placed on a foreign claimant — or, in a criminal matter, a U.S. attorney — lessens the enforceability of the legal rules described above. This is true, not only for criminal actions, which have an already high burden of proof,⁵⁷ but also for civil forfeiture actions,

52. Bert Demarsin, *The Third Time Is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer - The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ARTS & ENT. L.J. 255, 260 (2010).

53. UNESCO 1970, *supra* note 2, art. 7(a), 823 U.N.T.S. at 240.

54. See 19 U.S.C. § 2607 (1983).

55. Demarsin, *The Third Time is Not Always a Charm*, *supra* note 52, at 260.

56. See 18 U.S.C. § 3282 (2003). However, the NSPA makes possession of stolen goods a crime. It has therefore been argued that because the prohibited conduct includes possession of stolen goods, the statute of limitations for an NSPA action might not begin to run until immediately after a museum has parted from the stolen object. Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 158 n. 227 (2010). The exact application of the statute of limitations is uncertain because the possession provision of the NSPA has not been applied in any reported case. *Id.*

57. But see Urice, *supra* note 56, at 132–33 n.54. The United States may bring an *in rem* action under the NSPA under 18 U.S.C. § 981(a) and (c), which provide for civil forfeiture of personal property obtained or possessed in violation of certain federal laws. The civil *in rem* action would require a lower burden of proof (preponderance of the evidence) on the part of the government than in the case of a criminal action.

which impose stringent pleading burdens on claimants.⁵⁸ Compiling enough evidence to overcome this burden can be formidable and expensive for foreign governments.

Finally, anecdotal evidence suggests that the legal rules described above are rarely adjudicated in court for pragmatic reasons. The machinery of the U.S. government may be too slow or cumbersome for foreign governments to attempt to mobilize in their disputes with museums, especially where domestic political pressures in the foreign government and high legal costs favor seeking a swift resolution to the dispute.⁵⁹ That machinery may also be disproportionately powerful to the result sought by foreign governments. Seeking criminal prosecution is often too damaging to the ongoing relationship between the foreign government and the museum to be a realistic alternative.⁶⁰ The same is true for civil seizure and forfeiture remedies under the CPIA.⁶¹

Even though the legal rules described in this Part seem to have a low likelihood of enforcement, the remainder of this paper argues that they are nonetheless significant in cultural property disputes. As the next Part contends, the content of the legal rules, whether enforced or not, shapes bargaining over cultural property.

58. See FED. R. CIV. P. SUPP. R. E(2)(a) (requiring that in a civil forfeiture action the Government set forth its claims in the complaint “with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.”); FED. R. CIV. P. SUPP. R. G(2)(f) (requiring that in a civil forfeiture action the Government “state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.”); *United States v. All Funds on Deposit in Dime Savings Bank of Williamsburg Account No. 58-400738-1 in the Name of Ishar Abdi and Barbar Abdi*, 255 F. Supp. 2d 56, 66-67 (E.D.N.Y. 2003) (the Government’s complaint must “assert specific facts supporting an inference that the property is subject to forfeiture.”). See, e.g., *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504, 2012 U.S. Dist. LEXIS 47012, at *9 (E.D. Mo. June 28, 2012) (dismissing the United States’ forfeiture action on behalf of Egypt against the St. Louis Art Museum because the government failed to state “the who, what, when or where of the alleged events surrounding the alleged ‘stealing[.]’”).

59. Museum Interviews, *supra* note 20.

60. *Id.*

61. *Id.*

C. *The Role of Cultural Property Law in Cultural Property
Dispute Negotiations*

1. *The Theoretical Framework: Bargaining in the Shadow and
Shade of the Law*
 - a. *The Distinction between Bargaining in the Shadow of the
Law and Bargaining in the Shade of the Law*

This Part concerns the impact of legal rules on cultural property dispute resolution. It adapts a well-established theoretical framework developed by Professors Mnookin and Kornhauser regarding bargaining in the shadow of the law, along with a more recent refinement on that theory elaborated by Professor Omar Dajani, which Dajani refers to as bargaining in the “shade of the law.”⁶² As explained further below, the distinction between these two frameworks primarily concerns the prospective enforceability of the legal rules at play. Professors Mnookin and Kornhauser’s “shadow” framework might be characterized as examining how parties bargain knowing that certain legal rules could potentially be enforced by a court. Dajani’s shade framework is useful for examining how legal rules might exert influence over the negotiations absent parties’ belief that those rules might actually be enforced. The distinction is worth noting because parties to the type of cultural property dispute described in this paper might not expect the legal rules concerning cultural property to be actually enforced. This could be, as Part II.B indicated, either because the legal rules exist as non-binding international law, or simply because they are rarely enforced in practice.

- b. *Bargaining in the Shadow of the Law*

There are two perspectives on how the law casts its shadow upon negotiations: an instrumental view and a normative view.⁶³ The former perspective sees legal rules as valuable in reducing transaction costs by increasing the predictability of outcomes or by providing a set of legal solutions to the negotiation problem at hand.⁶⁴ The latter perspective sees legal rules as shaping negotiations by requiring procedural or substantive fairness through the laws’ provision of mandatory rules for the agreements.⁶⁵ This Part elaborates on these views.

62. Dajani, *Shadow or Shade?*, *supra* note 18, at 81.

63. *Id.* at 69.

64. *See id.*

65. *See id.* at 69–70.

The instrumental view identifies three functions of legal rules. First, legal rules clarify a zone of possible agreement, or ZOPA.⁶⁶ Legal rules do this by helping parties to determine their best alternative to a negotiated agreement, or BATNA.⁶⁷ Second, legal rules provide criteria for allocating any bargaining surplus. Legal rules facilitate this by being a point of reference in each party's efforts to persuade the other party to agree to a distributive scheme in a settlement.⁶⁸ Third, legal rules help to fill in any gaps in the parties' privately-reached agreements.⁶⁹ The legal system does this by providing default contractual rules that determine the interpretation of ambiguous terms and enforce terms that, so long as the agreement does not specify otherwise, are viewed as implicit in the resolution of a dispute.⁷⁰

The normative view of legal rules' influence on bargaining emphasizes how the law attempts to inject substantive and procedural fairness into bargaining through the provision of mandatory rules. Mandatory rules, unlike default rules, may not be waived in a settlement contract, and in this sense do not perform the efficient, gap-filling function that default rules provide.⁷¹ Instead, they may disallow deals that parties may prefer to reach, possibly leaving each worse off than they would have been without the rules, in the name of a normative judgment about how bargaining should take place.⁷²

c. *Bargaining in the Shade of the Law*

The functions of legal rules described above all assume a likelihood of enforcement of those legal rules. Legal rules can provide only a very uncertain definition of the zone of possible agreement if legal

66. *Id.* at 69–70.

67. *Id.* at 69.

68. See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791–92 (1999). Legal rules are useful here for two reasons. First, they are based on majority practices, suggesting a best practice or standard to support a deal point within the ZOPA. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 821–26 (1992). Second, legal rules are outside of each party and are therefore useful criteria for evaluating potential agreements. See ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 86–93 (3rd ed. 2011). See generally Dajani, *Shadow or Shade?*, *supra* note 18, at 68.

69. Dajani, *Shadow or Shade?*, *supra* note 18, at 69.

70. *Id.*

71. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989). See also Dajani, *Shadow or Shade?*, *supra* note 18, at 69.

72. Dajani, *Shadow or Shade?*, *supra* note 18, at 69–70. See also Ayres & Gertner, *Filling Gaps in Incomplete Contracts*, *supra* note 71, at 88–89.

enforcement is either so uncommon that possible legal outcomes are not well understood or so unattractive that, though an alternative to a negotiated agreement exists, parties would prefer a variety of deals to legal recourse. The resulting wide zone illuminates little about how parties might behave or what outcome they might reach. Likewise, the legal doctrine may be so underdeveloped as to provide scant criteria to assist in distributing a bargaining surplus. And although default or mandatory rules may sometimes come into play in disputes that are settled before reaching litigation,⁷³ ordinarily parties are free to settle their pending litigation without court approval or review.⁷⁴ This is to say that court intervention in or review of the dispute resolution process to enforce legal rules is not inevitable in some disputes. And it may be the case that the only default or mandatory rules provided by law are so generic that little insight is actually gained into the field of law's impact on bargaining.

To examine the influence of legal rules on these negotiations, it is thus necessary to adopt an even broader view of how legal rules may exert this influence than that provided by the shadow of the law framework. Dajani has suggested that legal rules may influence negotiations through the "normative force of the ideas it embodies and its capacity to legitimize negotiated outcomes in the eyes of other . . . actors and . . . constituencies."⁷⁵ Legal rules may thus influence bargaining not only as a result of the potential for their enforcement — that is, in the rules' "shadow" — but also as a result of the "shade" it offers to negotiators, that is, their ability to persuade "parties to align a negotiated outcome with [the legal rules], even when their ultimate enforcement is unlikely."⁷⁶

Dajani discusses three theories that attempt to account for how the shade of the law exerts influence over bargaining: a normative theory, an institutionalist theory, and a liberal — or what this Article prefers to call a "constituent" — theory.⁷⁷ The normative theory views legal rules as important because discourse about their fairness

73. Examples include settlements involving a minor party, settlement of disputed claims between creditors and debtors in a bankruptcy proceeding, settlements of class action suits, criminal plea agreements, and consent decrees in civil antitrust suits. Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 56 (1999).

74. But see FED R. CIV. P. 41(a) ("[T]he plaintiff may dismiss an action without a court order. . . .").

75. Dajani, *Shadow or Shade?*, *supra* note 18, at 65.

76. *Id.*

77. *Id.* at 83.

is likely to be more persuasive “than rote recitation of norms.”⁷⁸ The institutionalist theory views legal rules as useful in supporting the reaching of and adherence to an agreement by virtue of the legal rules’ linkage with some sort of common affiliation among the parties that provides other benefits and punishes non-compliance in ways unrelated to the enforcement of the legal rules.⁷⁹ The constituent theory posits that legal rules can be persuasive not only to participants in the negotiation, but also to those negotiators’ domestic constituents.⁸⁰

2. *The Shadow and Shade Framework Applied to Cultural Property Disputes*

a. *The Shadow of Cultural Property Law is Weak Enough to Warrant a More Subtle Analysis of Cultural Property Law’s Influence in Disputes.*

Legal rules cast a weak shadow in cultural property disputes. Because UNESCO 1970 and UNIDROIT 1995 rely on their signatories for enforcement, the legal rules that have a role in shaping the ZOPA, surplus distribution, or terms of a cultural property dispute resolution must be domestic legal rules. Given this enforcement structure, either U.S. or foreign domestic legal rules may be at play in casting a shadow over cultural property bargains. Although foreign legal rules have been stringently enforced in some cases,⁸¹ because of time and space constraints, and because this Article examines high-level reforms that the United States could either influence or implement, this Article does not discuss the impact of foreign domestic legal rules beyond their interaction with U.S. domestic legal rules (for example, foreign ownership laws).⁸²

78. *Id.*

79. *See id.*

80. *See id.*

81. For example, the Italian government indicted former Getty Museum curator, Marion True, for antiquities trafficking. See Randy Kennedy, *Trial Over, Former Getty Curator Speaks Out*, N.Y. TIMES ARTSBEAT (Jan. 6, 2011, 1:00 PM), <http://artsbeat.blogs.nytimes.com/2011/01/06/trial-over-former-getty-curator-speaks-out/>.

82. Indeed, it is likely the case that Italy’s prosecution of Marion True did shape the ZOPA of cultural property disputes occurring in the wake of the curator’s indictment, as evidenced by numerous repatriations occurring thereafter from U.S. Museums to Italy. See, e.g., David McKenna, *Museum Returns Artifacts to Italy After Legal Conflict*, DAILY PRINCETONIAN, Feb. 16, 2012, at 1, available at <http://dailyprincetonian.com/news/2012/02/museum-returns-artifacts-to-italy-after-legal-conflict> (Princeton University Art Museum); Elisabetta Povoledo, *Pact Will Relocate Artifacts to Italy From Cleveland*, N.Y. TIMES, Nov. 20, 2008, at C3, available at <http://www.nytimes.com/2008/11/20/arts/design/20arti.html> (Cleveland Art Museum); Elisabetta

Domestic cultural property legal rules do have a zone-defining role in disputes, but that role is weak: the ZOPA the legal rules help to create is so wide that these legal rules do not seem to cast much of a shadow over cultural property disputes. Because legal rules' role in zone definition is related to the rules' shaping of each party's BATNA, it is necessary to examine what impact legal rules have on each party's alternatives. Naturally, a foreign government's BATNA under the legal rules is in large part a product of the facts of the dispute. But whereas the legal rules governing a divorce case provide a number of distributive presumptions pending certain facts, a foreign government is not guaranteed any sort of outcome. Thus, the legal alternative provided sheds little light on a government's behavior in any generalizable sense.

Moreover, what little light is shed is not particularly useful because, beyond bringing museums to the bargaining table, legal recourse is generally a poor alternative. This is reflected in the fact that foreign governments rarely enforce legal rules, especially federal statutes, against museums.⁸³ Indeed, legal action against museums does not seem to be a credible threat; museum personnel view the filing of a request for U.S. intervention under the CPIA, or a criminal complaint under the NSPA, as too extreme an option to be a possibility in the vast majority of cases.⁸⁴ An explanation for this is that

Povoledo, *Getty Agrees to Return 40 Antiquities to Italy*, N.Y. TIMES, Aug. 2, 2007, at E1, available at <http://www.nytimes.com/2007/08/02/arts/design/02gett.html> (J. Paul Getty Museum); Elisabetta Povoledo, *Met to Sign Accord in Italy to Return Vase and Artifacts*, N.Y. TIMES, Feb. 21, 2006, at E2, available at <http://www.nytimes.com/2006/02/21/arts/design/21anti.html> (Metropolitan Museum of Art). It is unclear, however, how the fact of enforcement in this one case did more than simply make apparent to future parties the wide ZOPA in their disputes. This contribution of legal rules to shaping museum-foreign government disputes is acknowledged in the remainder of this subsection. Moreover, the agreements reached during Ms. True's prosecution indicate that the ZOPA is very wide, ranging from simple repatriations, see, e.g., McKenna, *supra*, to repatriations along with cultural exchanges, see, e.g., Povoledo, *Getty Agrees to Return 40 Antiquities to Italy*, *supra*. Thus, the one instance of legal enforcement is likely not very illuminating to behaviors and strategies of the parties within the dispute resolution process.

83. Museum Interviews, *supra* note 20. Indeed, various Lexis searches of either the CPIA or NSPA and the term "museum" returned only one result that actually involved the enforcement of either of these statutes against a museum. The one result was *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009) (Involving a restitution claim against a museum for a painting looted during the Holocaust). Searches were performed on Lexis Nexis on Mar. 31, 2012 in the database "Federal Court Cases, Combined." The search terms used are listed here, with the terms of each individual search performed enclosed in brackets: [CPIA w/p museum], [NSPA w/p museum], [2601 w/p museum], [2606 w/p museum], [2610 w/p museum], [2314 w/p museum], and [2315 w/p museum].

84. Museum Interviews, *supra* note 20.

legal enforcement would greatly harm the relationship between museums and the foreign government seeking the intervention.⁸⁵ This relationship is valuable for foreign governments for a variety of reasons: museums possess other significant cultural objects from the foreign government that are not currently in dispute, museums sometimes help foreign governments in tracking down looted antiquities on the black market,⁸⁶ and museums have conservation, curatorial, and research expertise that may be valuable to the foreign country.⁸⁷

Aside from relationship issues, a number of practical considerations make legal recourse a poor alternative for foreign governments. The prohibitively high costs of litigation may deter foreign governments with limited resources from initiating legal action.⁸⁸ Additionally, the often-opaque provenance of most objects in a dispute would seem to make it difficult for foreign governments to evaluate their likelihood of success at trial. Thus, from the foreign government's perspective, seeking judicial intervention is generally not attractive. Their legal recourse may define a ZOPA by bringing museums to the table, but a wide range of options are generally superior to legal recourse, and hence that zone is quite wide.

A museum's legal alternative is only slightly better. A conventional view is that the possessor of a disputed object of cultural property has a legal advantage in the dispute.⁸⁹ The factors elaborated above with respect to foreign governments support this. Moreover, statutes of limitations inhibit the actions that a foreign government

85. *Id.* But see Kennedy, *Trial Over, Former Getty Curator Speaks Out*, *supra* note 81 (describing Italy's prosecution of former Getty curator Marion True for violating Italian antiquities ownership laws). Indeed, one risk of a system of legal rules that promotes power-based negotiations is the ease with which important interests, such as the relationship between the parties, can be ignored or overridden. *See id.* at 30–31.

86. *See, e.g.,* United States v. One 18th Century Colombian Monstrance, 797 F.2d 1370, 1373 (5th Cir. 1986) (involving a curator of the San Antonio Art Museum who alerted U.S. Customs agents to violations of the NSPA when an antiquities dealer attempted to sell looted items to the museum).

87. *See, e.g.,* *The Cleveland Museum of Art and Italy Agree to Exchange of Antiquities and Scholarship*, ARTDAILY.ORG, http://www.artdaily.com/index.asp?int_sec=2&int_new=27357 (last visited Oct. 9, 2013) ("The two parties have also agreed to organize cooperatively at least one exhibition and create a close association between the Cleveland museum and a cultural institution in Italy for curatorial and research exchanges in areas such as conservation and exhibition design and planning.").

88. Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 IND. L.J. 985, 996 (1995).

89. *See, e.g.,* Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 293–4 (2007); Cornu & Renold, *supra* note 5, at 2.

can bring, and other features of the law provide time bars for some claims, such as the CPIA's limited application to objects exported after its effective date, discussed *supra*. Also, the burden of proof is allocated to foreign government claimants, which is a heavy burden given the prevalence of antiquities in museums' collections with little or no documentation to illuminate their provenance.⁹⁰

These realities suggest that museums would have a stronger BATNA than do foreign governments, perhaps narrowing the ZOPA and thus providing greater insight into the likely behaviors or outcomes of bargaining. Yet, despite museums' structural advantages, museums do repatriate objects in cases in which they would either seem to have a time advantage or in which the provenance of an object is opaque.⁹¹ One explanation for this is that a museum's BATNA is not actually as strong as the analysis above suggests. Indeed, museums, like foreign governments do not have many resources to spend on litigation.⁹² Assuming the paucity of resources is a common problem for museums and foreign governments, in a general case the museum's BATNA would still, on balance, be stronger than that of the foreign government. Thus, where a focus on the legal rules only as

90. See, e.g., JASON FELCH & RALPH FRAMMOLINO, CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUM 55 (2011) (stating that when the Getty Museum was relocating to its current location, it had over 800 antiquities with little or no documentation of provenance).

91. See, e.g., *Case Summary: Peru v. Yale University*, INT'L FOUND. ART RES., http://www.ifar.org/case_summary.php?docid=1184620401 (last visited Apr. 6, 2012) (describing the settlement of *Republic of Peru v. Yale University*, No. 3:09-CV-01332 (D. Conn. Oct. 9, 2009)); Kimberly Alderman, *Yale Agrees to Return Machu Picchu Artifacts to Peru: Ethics-Based Repatriation Efforts Gain Steam*, CULT. HERITAGE AND ARTS REV., Fall/Winter 2010 at 3, 4, available at <http://ssrn.com/abstract=1734420>. (reporting that Yale agreed to repatriate artifacts removed from Peru in the early Twentieth Century); *Case Summary: Mexico Claim Against De Young Museum for Teotihuacan Murals*, INT'L FOUND. ART RES., http://www.ifar.org/case_summary.php?docid=1179733506 (last visited Apr. 6, 2012) (describing the M.H. de Young Museum's granting of joint ownership to Mexico of mural fragments exported to the United States in the 1960s despite a U.S. district court's rejection of Mexico's claim to the murals under a U.S.-Mexico treaty); *Case Summary: Thailand Claim Against Art Institute of Chicago for a Khmer Temple Lintel*, INT'L FOUND. ART RES., http://www.ifar.org/case_summary.php?docid=1179543993 (last visited Apr. 6, 2012) (describing the Art Institute of Chicago's 1988 return to Thailand of antiquities stolen from Bangkok in 1966); McKenna, *supra* note 82 (describing the Princeton University Art Museum's voluntary repatriation of Italian antiquities believed by the museum to have been acquired properly); Kate Taylor, *Met Is to Repatriate to Egypt Objects From King Tut's Tomb*, N.Y. TIMES, Nov. 10, 2010, at C3, available at http://www.nytimes.com/2010/11/10/arts/design/10met.html?_r=0 (describing the New York Metropolitan Museum of Art's repatriation of Ancient Egyptian objects acquired in the early Twentieth Century).

92. Museum Interviews, *supra* note 20.

they might be enforced suggests there should be a narrow ZOPA in cultural property disputes — because foreign governments have a weak BATNA and museums have a relatively strong BATNA — there seems to be other influences at play that seem to widen the zone. These other influences are interests beyond those implicated by litigation (that is, possession of the disputed object and the litigation costs) that shape how attractive an alternative to litigation is for a museum. These interests could include the relationship between the parties, a museum's desire to be "ethical," a desire for future collaboration with the claimant government, a fear of future similar requests, fiduciary duties to trustees, and numerous others.⁹³ Thus, in this way, the enforceability of legal rules in cultural property disputes can be said to exert a weak influence over zone definition, since for both disputants, the legal recourse alternative is a poor one. By extension, the shadow cast by these legal rules is weak; because the legal alternative for both parties is so poor, the ZOPA these legal rules create is a wide one. Thus legal rules are not very predictive of the outcome of cultural property disputes.

An exploration of the instrumental and normative views of the shadow of the law framework beyond zone definition — surplus allocation, gap filling, and provision of mandatory rules — also illustrates the weak shadow that legal rules cast in cultural property disputes. The feebleness of these attributes stems, in part, from the underdevelopment of cultural property legal doctrine that some scholars have observed. For example, Stacey Falkoff has argued that there is a dearth of case law defining numerous key features of cultural property law. There is, for instance, little guidance on what in a cultural property dispute would qualify as "just compensation," something required in some restitution actions under UNESCO 1970 and the CPIA.⁹⁴ This lack of doctrinal specificity provides little basis for distributing bargaining surplus in all but the easiest cases in which antiquities have clearly been illicitly obtained.⁹⁵ Given this doctrinal underdevelopment, legal rules play a weak role in surplus allocation,

93. See generally Tom Mashberg, *No Quick Answers in Fights over Art: Museums' Property Claims Are Not Simply About Evidence*, N.Y. TIMES, July 2, 2013, at C1, available at <http://www.nytimes.com/2013/07/02/arts/design/museums-property-claims-are-not-simply-about-evidence.html> ("[C]alculus of repatriation involves less cut-and-dried measures like the outlook of the museum and its board, the institution's public relations needs at the moment, the identity of the donor of the disputed item and even the identity of the country that is asking for its return.").

94. See Falkoff, *supra* note 89, at 296. See also UNESCO 1970, *supra* note 2, art. 7(b)(ii), 823 U.N.T.S. at 240; 19 U.S.C. § 2609(c)(1) (2006).

95. See, e.g., the facts of *Schultz*, *supra* note 44.

and in that way do not cast a strong shadow over cultural property disputes.

The same can be said for the gap-filling and normative roles of legal rules. Disputes rarely ever progress to the formal filing of a complaint.⁹⁶ There is therefore no need for judicial review of dispute settlements.⁹⁷ As a result, post-settlement, the only gap-filling default rules or mandatory rules that would apply to the settlement agreement derive from non-cultural property law sources such as contract law. Enforcement of more cultural property-specific rules, such as the NSPA or CPIA, would assumedly be waived through the settlement of the dispute through the foreign government renouncing its claim of ownership that would be necessary to trigger application of either statute. Cultural property legal rules thus cast a weak shadow in their role of providing gap-filling default rules or mandatory rules.

The analysis in this Part has demonstrated that, although the shadow of the law framework helps in understanding the role legal rules play in creating a ZOPA, it does not provide much of an explanation for how parties might behave in cultural property dispute resolution or what sorts of outcomes might be reached. The next Part examines what role legal rules might nonetheless play using a refined framework that is sensitive to the subtler effects that legal rules might have on dispute resolution. A separate justification for adopting a refinement on this framework for exploring cultural property dispute resolution is provided by the following question: what influence, if any, does the existence of a corpus of international law that has not been fully implemented in the United States, but to which the United States has expressed its support, and to which many foreign governments subscribe, exert?⁹⁸ The next Part seeks to address this question in understanding what the role of non-enforceable or practically non-enforceable law has on cultural property disputes.

96. Museum Interviews, *supra* note 20.

97. See *supra* Part II.C.1.c.

98. For example, the United States has not fully implemented UNESCO 1970, but it is nevertheless a signatory to the entire agreement and has partially implemented the Convention through the CPIA. See John P. Shinn, *A New World Order for Cultural Property: Addressing the Failure of International and Domestic Regulation of the International Art Market*, 34 SANTA CLARA L. REV. 977, 989 (1994). Likewise, the United States has never ratified UNIDROIT 1995, but it did take an active role in drafting the Convention. Gerstenblith, *Unidroit Ratified*, *supra* note 27, at 24.

b. *The Legal Rules of Cultural Property Provide a Discourse-Shaping Shade*

As Part II.C.1.c, *supra*, explained, legal rules can exert an influence on negotiations independent of their likelihood of enforcement. This influence is related to the various ways in which law contributes to the discourse surrounding the claims at play in a negotiation. The thrust of that Part was not that law itself inevitably produces any specific kind of discourse around or claim in a dispute. Rather, legal rules have a special persuasive value that reinforces claims or encourages modes of discourse in a way that non-codified norms or ideas do not. This seems to be true of cultural property law, as is apparent from an examination of its so-called shade-providing features, categorized above as normative, institutional, and constituent.

With respect to the normative shade-providing features of cultural property law, it is possible to find support for a variety of normative claims that could be asserted in a cultural property negotiation within the legal rules discussed above. The CPIA, for example, supports both the claims that misappropriated cultural policy should be repatriated to its country of origin and also that a bona fide purchaser should not suffer for an innocent acquisition. The former position is supported by the seizure and forfeiture remedies provided that give the source country the first offer for return,⁹⁹ and provisions that allow for seizure or forfeiture even if the defendant in an action is able to establish “valid title to the [disputed object] . . . as against the institution from which the article was stolen. . . .”¹⁰⁰ The latter position is supported by other portions of the CPIA that require payment of just compensation to a defendant in a CPIA action where the defendant is able to establish valid title under applicable law.¹⁰¹

The cultural property legal rules also support a different set of normative claims, namely those that involve different conceptions of cultural heritage and its ownership. There is a strong claim present in international law, for example, that cultural heritage and sovereignty are intertwined and that a state has a resulting right to any cultural property originating from within its territory. Article 4 of UNESCO 1970, for example, elaborates the categories that form a “part of the cultural heritage of each state.”¹⁰² This heritage includes not only “[c]ultural property created by the individual or collective

99. See 19 U.S.C. § 2609(b)(1) (2006).

100. 19 U.S.C. § 2609(c)(1) (2006).

101. See *id.*

102. UNESCO 1970, *supra* note 2, art. 4, 823 U.N.T.S. at 236–38.

genius of nationals of the State concerned,"¹⁰³ but also "cultural property found within the national territory" of each state.¹⁰⁴ In domestic U.S. law, this position is also supported, for example, by a provision of the CPIA that requires positive assent on the part of a source country to the export of designated cultural property from its territory.¹⁰⁵ This claim aligns with a normative position often referred to as "cultural property nationalism," which defends the claims of source countries to total sovereignty over their cultural heritage.¹⁰⁶

A countervailing, cultural property-specific normative claim is supported by the legal rules as well, however. Roughly speaking, this position, known as cultural property internationalism, is in opposition to the cultural property nationalist stance.¹⁰⁷ The general claim that cultural property internationalism advances is that there is value in the exchange of cultural property among states. A related claim is a critique of the nationalist position, namely that cultural heritage is a fluid concept and hence claims to total sovereignty are arbitrary. The position is less that there is no national claim to territorial cultural property, but rather that a balance should be struck between sovereignty and shared access to what is viewed by the cultural property internationalists as a common cultural heritage of humanity.¹⁰⁸ Support for these claims are likewise evident from Article 4 of UNESCO 1970, which includes in the definition of "cultural heritage" both "cultural property which has been the subject of a freely agreed exchange,"¹⁰⁹ and "cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property."¹¹⁰ These provisions seem to reflect an idea that cultural property can be attributed to a cultural heritage beyond the territory of its origin, and also acknowledge a value in protecting other states' provision of access to cultural property of foreign origin.

A question separate from the longstanding debate of whether the law favors the internationalist or the nationalist stance of cultural

103. See *id.* at art. 4(a), 823 U.N.T.S. at 236.

104. See *id.* at art. 4(b), 823 U.N.T.S. at 236.

105. See 19 U.S.C. § 2606 (a) (2006).

106. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 846-50 (1986).

107. See *id.*

108. See Karen J. Warren, *Introduction: A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 1, 24 (Phyllis Mauch Messenger ed., 1999).

109. UNESCO 1970, *supra* note 2, art. 4(d), 823 U.N.T.S. at 238.

110. *Id.* at art. 4(e), 823 U.N.T.S. at 238.

property¹¹¹ is whether it is the case that the existence of support for these normative claims in the law is actually significant in cultural property negotiations. The significance is evident for two reasons: first, the law seems to have intentionally incorporated these normative claims as they were beginning to be asserted elsewhere in cultural property disputes; and second, proponents of the normative claims today make reference to the law in asserting those claims.

Support for the first of these reasons derives from the fact that much of the development of the international cultural property legal structure was contemporaneous with and seemed to respond to the many national self-determination movements of the 1960s and 1970s, which, at the time, were demanding control over their claimed cultural heritage.¹¹² The second proposition is supported by the public discourse of cultural property negotiations. Turkey, for example, has been pressing for repatriation of antiquities, some of which were acquired by U.S. museums before UNESCO 1970 or the CPIA went into force. To support its claim, Turkey has relied on normative claims of its sovereignty, stating that the objects were excavated in contravention of a 1906 national ownership law.¹¹³ Thus the normative positions embedded in cultural property law are not accidental and appear to be useful to parties to a cultural property dispute.

One hypothesis about how these normative, shade-providing features of the law impact cultural property disputes might be that parties stubbornly embrace the normative claims supporting their preferred distributive schemes. This obstinacy does not seem to be the case, however, as disputes are often resolved by agreements that appear to balance opposing claims. Examples of such compromises include agreements that provide for restitution of a specific object accompanied by agreements for further cultural cooperation,¹¹⁴ agreements that provide for formal recognition of the importance of the

111. See, e.g., Falkoff, *supra* note 89, at 281–82.

112. See Kimberly Christen, *Opening Archives: Respectful Repatriation*, 74 AM. ARCHIVIST 185, 195 (2011).

113. Jason Felch, *Turkey Targets Getty, Other Museums*, L.A. TIMES, Mar. 31, 2012, at A1, available at <http://articles.latimes.com/2012/mar/30/entertainment/la-et-turkey-antiquities-20120331>.

114. For example, in exchange for returning the Euphronios Krater, the Italian authorities agreed to make available to the Metropolitan Museum of Art “cultural assets of equal beauty and historical and cultural significance to that of the Euphronios Krater” via long-term loans. JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 408 (5th ed. 2007) (quoting Article 4(1) of the exchange agreement between the Met and Italy).

claimants' cultural identity,¹¹⁵ collective ownership arrangements that recognize a "dual nationality" of the objects,¹¹⁶ and trust-like ownership arrangements of disputed objects in which the museum acts as the "trustee."¹¹⁷ Indeed, a more subtle understanding of the impact of these shade-providing features on cultural property disputes is necessary. The remainder of this Part explores how other shade-providing features of the law explain how this normative feature is not outcome- or behavior-determining. Following that, Part II.D, *infra*, argues that even if the law is not completely determinative, it does influence negotiation by shaping parties' discourse and their approaches to dispute resolution.

Museum associations demonstrate the operation of the institutional shade-providing features of the cultural property law regime. These associations, such as the American Association of Museums, which was founded in 1906,¹¹⁸ have increasingly been incubators for various discourses that refine the internationalist position of sensitivity toward foreign governments seeking to protect their cultural heritage. These include codes of ethics that call for museums to "require sellers, donors, and their representatives to provide all available information and documentation" and "comply with all applicable U.S. law, including treaties and international conventions of which the U.S. is a party."¹¹⁹ Membership in these associations is not mandatory, but does provide some benefits, such as various accreditations or access to peer groups focused on, for example, museum operations.¹²⁰ This all demonstrates the institutional shade-providing

115. In Switzerland, for example, to resolve a dispute between the Cantons of Saint-Gall and Zurich over ancient manuscripts located in Zurich, the objects that were not returned to Saint-Gall were "nonetheless explicitly recognized by Zurich as being of great value to the identity of the Canton of Saint-Gall." See Cornu & Renold, *supra* note 5, at 20.

116. *Id.* at 18.

117. For example, artifacts were held for several years in the Afghanistan Museum-in-Exile in Bubendorf, Switzerland, with the intention of the holder to one day repatriate them when conditions in Afghanistan improved. In an arrangement similar to a trusteeship, UNESCO was given authority to determine when conditions were satisfactory. *Id.* at 22.

118. *Constitution and Bylaws*, AM. ASS'N OF MUSEUMS, art. 1, § 1, http://www.aam-us.org/docs/about-us/aam_constitution_and_bylaws_february_2012_final.pdf (last visited Apr. 6, 2012).

119. *Standards Regarding Archaeological Material and Ancient Art*, AM. ASS'N OF MUSEUMS (July 2008), <http://www.aam-us.org/resources/ethics-standards-and-best-practices/characteristics-of-excellence-for-u-s-museums/collections-stewardship>.

120. See, e.g., *AAM Industry Partner Membership Has Benefits*, AM. ASS'N OF MUSEUMS, <http://www.aam-us.org/join/member-types-and-benefits/museum-membership/museum-membership-benefits-table> (last visited Apr. 6, 2012).

feature of cultural property law: museum adherence to norms generated by practically unenforceable legal rules is an important component of membership in such institutions. In this way, legal rules exert an influence in cultural property disputes, albeit an indirect one.

Cultural property legal rules also have constituent shade-providing features. In major disputes, foreign governments often publicize their claims on disputed objects in U.S. museums to generate public support in the United States for some sort of museum response. Italy, for example, in pursuing the return of the Euphronios Krater from the Metropolitan Museum of Art in New York (the "Met"), publicized evidence that the Krater had been looted, generating a "public relations crisis" for the museum and helping to prompt the Met's return of the Krater.¹²¹ Even though Dajani's conception of the constituent feature of the shade of the law refers to one government appealing to the constituency of another democratic government with reference to legal norms, the effect in the case of museum-foreign government disputes is functionally the same; the museum relies on the support of the American public for both attendance and donations.

Moreover, cultural property legal rules may contain a different sort of constituent shade-providing feature. This may be more of a "reverse-constituency" phenomenon in that sometimes a foreign government will request the intervention of the United States government.¹²² Such an appeal may be rooted in the legality of the claim, although it may not request direct intervention under the NSPA or CPIA.¹²³ In these cases, the pressure on the museum is similar to the appeal to the public described above; the museum relies on the support of the U.S. government, for example, for tax-exempt status.¹²⁴ The United States' support of an international legal regime of cultural property law, as well as its own laws provide a shade in which foreign governments can appeal for its support in a cultural property dispute.

To summarize: the law brings parties to the bargaining table as a result of the possibility, albeit slim, of its enforcement. Independent of its possibility of enforcement, the law influences the strategies and

121. See Adriel Bettelheim & Rachel Adams, *Stolen Antiquities: Should Museums Return Relics to Their Countries of Origin?*, 17 CQ RESEARCHER 313, 315 (2007).

122. Museum Interviews, *supra* note 20.

123. *Id.*

124. See, e.g., Leila John, *Museums and the Tax Collector: The Tax Treatment of Museums at the Federal, State, and Local Level*, 15 U. PA. J. BUS. L. 878, 880-92 (2013).

behaviors of the parties at the table, although no one shade-providing feature of the law seems fully predictive of how parties will approach the negotiation. The next Part examines how the law makes cultural property dispute resolution systems more or less effective.

D. *Evaluating the Role of Cultural Property Law in Cultural Property Dispute Negotiations*

1. *The Power-, Rights-, and Interest-Based Dispute Resolution Framework*

This paper has thus far used the two negotiation frameworks to describe the impact of the law on cultural property disputes, that is, the shadow or shade cast by legal rules over the dispute resolution process. This Part adds a third framework to further describe and also to evaluate the impact of the law. This framework is one that focuses on the discourse of a dispute resolution process, identifying three of types of claims — power-, rights-, or interest- claims — parties may make or on which the dispute resolution process may focus. Using this taxonomy, this Part identifies the sorts of claims or focus promoted by cultural property law, and the resulting impact on the dispute resolution process.

Professor William Ury tells us that parties to a dispute may attempt to “(1) reconcile their underlying interests, (2) determine who is right, and/or (3) determine who is more powerful.”¹²⁵ Interests are the motivations behind the parties’ positions.¹²⁶ Reconciling interests requires “probing for deep-seated concerns, devising creative solutions, and making trade-offs and concessions where interests are opposed.”¹²⁷ Determining who is right involves relying on an independent standard perceived as legitimate or fair.¹²⁸ Some standards are formalized in law; others are socially-accepted norms of behavior.¹²⁹ Determining who is more powerful requires one side to successfully coerce the other to settle on terms more favorable to the coercer.¹³⁰ Power-based approaches to negotiation typically come in two common forms: acts of aggression, and withholding the benefits

125. WILLIAM URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 4-5 (1993).

126. *See id.* at 5.

127. *Id.* at 6 (footnote and citation omitted).

128. *Id.* at 7.

129. *Id.*

130. *See id.* at 8.

that derive from a relationship.¹³¹ The remainder of this Part explores how these various methods of dispute resolution emerge in the shadow and shade of cultural property law, and to what effect.

2. *The Shadow and Shade of Cultural Property Law Promotes a Rights- and Power-Based Discourse*

The legal regime of cultural property dispute resolution promotes a rights-based discourse and facilitates power-based approaches in some cases. It is unsurprising that rights-based discourse is being promoted, given that legal rules are a typical foundation for rights-based claims in dispute resolution.¹³² The shadow cast by the legal rules of cultural property provides a clear example of the production of rights-based discourse. Museums resisting restitution claims have relied on the argument that these claims have been asserted after the expiration of a statute of limitations; likewise foreign governments assert that their claims are not time-barred.¹³³ This is a form of a rights claim because it points to a procedural basis for resolving the dispute based on the museum's right not to be faced with a time-barred claim, or alternately the foreign government's right to assert a claim if it can show the claim is not time-barred.

The normative features of the shade of cultural property law also produce a rights-based discourse in cultural property negotiations. Normative rights claims are pervasive in cultural property negotiations. Foreign government claims for restitution, for example, are often intertwined with rhetoric about national sovereignty, especially as it relates to national, often post-colonial identity.¹³⁴ An example of this is a Turkish Culture Minister's description of Turkey's recent aggressive pursuit of restitution of objects from numerous museums.

131. *Id.* at 9.

132. *See id.* at 7.

133. *See, e.g.,* Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44, 46 (S.D.N.Y. 1990) (holding that Turkey's claims against the Met were not time-barred). *See also* Patty Gerstenblith, *Museum Practice: Legal Issues*, in A COMPANION TO MUSEUM STUDIES 442, 451 (Sharon MacDonald ed., 2011) (noting that Turkey and the Met settled their dispute after the holding that Turkey's claim was not time-barred).

134. Turkey is referred to in the example that follows, although it was formally colonized only briefly following World War I. Nonetheless, scholars have identified three eras of strong post-colonial discourse in Turkey: the Kemalist republic (1923-1938); a period of radical, left-wing movements (the 1960s and 1970s); and the period following the fall of the Soviet Union (1991-2006). *See* Hamit Bozarslan, *Turkey*, in A HISTORICAL COMPANION TO POSTCOLONIAL LITERATURES: CONTINENTAL EUROPE AND ITS EMPIRES 423, 423 (Prem Poddar et al. eds., 2008).

The Minister stated that he believed that “in the end Europe will return all of the cultural treasures that it has collected from all over the world.”¹³⁵ Museums, on the other hand, often rely on normative claims that assert their value in providing access and, in many cases, safety to the disputed cultural object. This, for example, is the justification offered by the British Museum for retaining the Elgin Marbles.¹³⁶ Part II.C has identified sources of support within the legal rules of cultural property for both of these normative claims.

The shade of cultural property law also produces power-based discourse in cultural property disputes. The constituent features of the shade of cultural property law, for example, promote power-based claims: foreign governments’ appealing to the U.S. public is a power-based approach because it seeks to mobilize support against the museum, in effect coercing the museum into repatriating the disputed object. An example of this is the effort of Italian prosecutor, Maurizio Fiorilli, who, in the mid-2000s, sought to persuade the American public “to rethink the ethics of holding onto Italy’s cultural patrimony” while negotiating the return of several objects from major American museums.¹³⁷

Interest-based cultural property dispute resolutions do occur, but they could be either more common or more effective. Contrast, for example, the results of two sets of contemporaneous negotiations between Italy and U.S. museums. Interest-based negotiations seemed to take place in the first set but were either lacking or ineffective in the second set. The first set of negotiations resulted in the Getty Museum’s 2007 agreement with Italy over disputed objects: a “long-term collaboration” with the National Archaeological Museum of Florence consisting of a number of loans between the museums¹³⁸ in exchange

135. Susanne Güsten, *Turkey Presses Harder for Return of Antiquities*, INT’L HERALD TRIB., May 26, 2011, available at <http://www.nytimes.com/2011/05/26/world/europe/26iht-M26C-TURKEY-RETURN.html>.

136. Güsten, *supra* note 135. See also JANET MARSTINE, *NEW MUSEUM THEORY AND PRACTICE: AN INTRODUCTION 2* (2006) (“The [British] museum justifies its claims [to the Elgin Marbles] through a rhetoric of ‘salvage.’ Lord Elgin ‘rescued’ the sculptures through legitimate means some 200 years ago from the politically turbulent Ottoman Empire, and the British are keeping them still to guard against damage from the neglect, earthquakes, and pollution they might face in Greece.”).

137. Suzan Mazur, *Interview: Italy’s Antiquities Prosecutor Fiorilli*, SCOOP (Dec. 28, 2006), <http://www.scoop.co.nz/stories/HL0612/S00370.htm>.

138. *The J. Paul Getty Museum and Museo Archeologico Nazionale Di Firenze Announce Long-Term Cultural Collaboration*, GETTY TRUST (Mar. 23, 2009), http://www.getty.edu/news/press/center/florence_announcement.html; cf. Tom Mashberg and Ralph Blumenthal, *The Met Plans To Return Art To Cambodia*, N.Y. TIMES, May 4, 2013, at A1, available at http://www.nytimes.com/2013/05/04/arts/design/the-met-to-return-statues-to-cambodia.html?gwh=114F888B6490D320B996BBF43DC8783E&_

for the return of forty objects to Italy.¹³⁹ The second set of negotiations occurred between Italy and the Museum of Fine Arts in Boston, and Italy and the Met. These resulted in the two museums simply returning their objects.¹⁴⁰ Although factual detail is lacking on the course of these negotiations, the contrast in their outcomes seems to suggest that value was left on the table in the second set of negotiations, leading to an inference that interests were not fully taken into account in the dispute resolution process. Even if there were significant factual differences between the two sets of negotiations, an aim of this Article is to uncover how more interest-based approaches to dispute resolution can be promoted.

Moreover, cultural property law does little to promote interest-based dispute resolution. For example, UNESCO 1970 and the CPIA only impose obligations on or create rights in signatories and parties to a claim, respectively; the laws provide little guidance, understandably, on how disputes might be resolved, taking interests into account. Some of the rights created, such as the references to “just compensation” in the two laws,¹⁴¹ are based on the interests of the parties. The laws focus on creating these rights, obviously with an eye towards their enforcement, rather than on creating a framework for resolving disputes productively,¹⁴² the latter being a goal that would be worthy of these laws given the reality that enforcement of rights claims in court is rare. This focus on rights is to be expected given the earlier proposition that legal rules are a typical foundation for rights-based claims in dispute resolution. This Article now turns to whether this lack of focus on parties’ interests results in productive dispute resolution, and later will turn to what can be done to reform cultural property law to provide a shadow or shade in which interest-based dispute resolution can more readily occur.

r=0 (describing the Met’s return of purportedly looted material to Cambodia in the context of a collaboration between the museum and Cambodia that includes the exhibition of contemporary Cambodian art at the Met).

139. *Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome*, GETTY TRUST (Aug. 1, 2007), http://www.getty.edu/news/press/center/italy_getty_joint_statement_080107.html.

140. Lee Rosenbaum, *Antiquities Diplomacy, Part II: More Italian Loans to the Getty*, CULTUREGRRRL (Mar. 23, 2009), http://www.artsjournal.com/culturegrrl/2009/03/antiquities_diplomacy_part_ii.html.

141. UNESCO 1970, *supra* note 2, art. 7(b)(ii), 823 U.N.T.S. at 240; 19 U.S.C. § 2609(c)(1) (2006).

142. *But see* UNESCO 1970, *supra* note 2, art. 17(5), 823 U.N.T.S. at 246 (providing that “[a]t the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, [UNESCO] may extend its good offices to reach a settlement between them.”). Note, however, that this provision requires the request of signatories to the convention, which would not include museums.

3. *The Focus of Cultural Property Dispute Resolution on Rights and Power Is Unproductive in Cultural Property Dispute Resolution.*

There are some advantages to rights- or power-based dispute resolution. Dispute resolution based on rights- or power-claims can bring parties to the table or reduce uncertainty about future rights or balances of power.¹⁴³ Rights- or power-based approaches may simply be necessary in instances where the parties' interests are so opposed that agreement is not otherwise possible.¹⁴⁴ While these considerations might be relevant in some cultural property disputes, there seems to be no argument for why adding considerations of interests in the dispute resolution process would be detrimental.

Indeed, cultural property dispute resolution would benefit from a shift away from a rights and power focus. Disputes framed as rights- or power-based disputes are often unproductive. In addition to being costly to resolve, rights- and power-based disputes can damage relationships; parties often can feel as if the negotiation was "a zero-sum win-lose game or . . . a compromise in which neither party feels good about the result but both can co-exist until the next opportunity for conflict and a 'win.'"¹⁴⁵

Specific features of cultural property disputes illustrate other reasons why power- and rights-based approaches are ill suited to cultural property dispute resolution. Power-based approaches, for example, are often unproductive in achieving any apparent goal of cultural property law, or even the goals of the parties to the dispute with respect to the disputed object. For example, one power-based approach enabled by the constituent shade-providing feature of cultural property law — the involvement of the U.S. government in cultural property disputes — illustrates this. Such involvement tends to rope in other diplomatic issues that involve the foreign government and the United States, but not the museum or the cultural priorities of the foreign government. Because cultural property issues are typically low priorities in the foreign relations of the two governments, the resolution of the dispute might be entirely arbitrary with respect to the cultural object, focusing instead on other issues.¹⁴⁶ This may be a

143. URY, *supra* note 126, at 16.

144. *Id.*

145. Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 186 (1998) (citing Ury, *supra* note 125, at 15 (stating that resolving rights or power claims are often contests that harm relationships and results in recurrence of disputes)).

146. Museum Interviews, *supra* note 20.

satisfactory outcome from a power-based standpoint, but is unlikely an aim of the regime of cultural property law.

The discourse of rights-claims promoted by the shade and shadow of cultural property law is also unproductive in the resolution of cultural property disputes. The structure of cultural property disputes makes rights-based approaches especially difficult to implement efficiently. The crux of the dispute typically has to do with a factual record that is expensive to develop to a degree of certainty that could meet a legal burden of proof.¹⁴⁷ Because it is expensive to develop a factual basis sufficient to vindicate a rights claim to the extent that would be required in court — or even in rights-based private ordering relying solely on claims of proper ownership¹⁴⁸ — the rights claims currently deployed in resolving the dispute through private ordering must rely on some broader normative claim regarding a presumption for where an object should be located.

As noted above, such normative claims are typically in the mode of cultural property nationalist or internationalist arguments, which are claims about who should own cultural heritage. The conflict between these two positions is not easily resolved, first, because notions of cultural heritage are fluid, and second, because defining to what state a piece of cultural heritage belongs is often an indeterminate endeavor. For an example of the fluidity of cultural heritage, consider the identification of modern Egyptians with Ancient Egypt and its artifacts. This is a relatively new development, starting in the nineteenth century in response to a wave of Western conquerors of Egypt.¹⁴⁹ Until then, “[t]heir country’s significant history, so its people reasonably believed, began with the advent of Islam.”¹⁵⁰

Cultural heritage is fluid in another sense, namely that artifacts can exhibit hybrid or even multiple cultural identities. This is also the second difficulty in producing a stable claim of who should own a

147. *Id.*

148. For example, several recent returns of items have been based on decisions stemming from extensive (and expensive) investigations of those items’ provenance, relying on such minute indications of improper museum ownership, that the act of returning was based more on “judgment calls” rather than on “definitive” evidence of provenance. See, e.g., Mashberg, *supra* note 93 (describing the recent returns of items from the Met to Cambodia, the University of Pennsylvania to Turkey, and the Getty to Italy).

149. See James Cuno, *Art Museums, Archaeology, and Antiquities in an Age of Sectarian Violence and Nationalist Policies*, in *THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES: PROFESSIONAL, LEGAL, AND ETHICAL PERSPECTIVES* 9, 12 (Robin F. Rhodes ed., 2008).

150. *Id.*

piece of cultural heritage. Most of the Apulian red-figure vases documented in private or museum collections, for example, are believed to have been looted from Southern Italy.¹⁵¹ Despite their physical origin, many scholars classify the vases as Greek art, as they were produced by Greeks, who had colonized Southern Italy, for export to Greece.¹⁵² Of whose cultural heritage are these vases a part? Even known looted items can come to be viewed as a part of the cultural heritage of the looting country. For example, it has been argued that the Elgin Marbles (the sculptures that once adorned the Parthenon in Athens and were removed by Lord Elgin and brought to Great Britain in the early Nineteenth Century) “have become as much a part of British heritage as they have of Greek culture . . . [representing] Britain as the inheritor of democracy from ancient Athens[.]”¹⁵³ Rights-claims are thus not easily resolvable in cultural property disputes, and yet, as the previous Part demonstrated, they are prevalent.

Because cultural property disputes are rarely resolved through adjudication, rights claims seem particularly unproductive in the discourse of cultural property disputes. Even though disputes may eventually settle, the lack of an interest-focus can prolong the dispute, wasting resources, or, as in the examples of the agreements between Italy and the Getty, Met, and MFA, can leave value on the table. This suggests two possible solutions. The first would be to implement a method of dispute resolution that is better adapted to productively entertaining rights discourse than is the current system of negotiation with an unattractive litigation alternative. The second solution would be to use cultural property law to promote a discourse that emphasizes a different sort of claim than rights claims. The remainder of this Part makes the case for why interest-based approaches are best suited for cultural property dispute resolution and thus interest claims should be the sort of claims the law seeks to promote. Part III of this Article argues that both of these approaches — adapting the dispute resolution method to rights claims and promoting an interest-based focus — are desirable, possible, and not mutually exclusive.

151. See Ricardo J. Elia, *Analysis of the Looting, Selling, and Collecting of Apulian Red-Figure Vases: A Quantitative Approach*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* 145, 148–50 (Neil Brodie et al. eds., 2001).

152. See T. H. Carpenter, *Prolegomenon to the Study of Apulian Red-Figure Pottery*, 113 *AM. J. ARCHAEOLOGY* 27, 27 (2009).

153. MARSTINE, *supra* note 136, at 2.

4. *Interest-Based Dispute Resolution Is Well-Suited to Cultural Property Disputes*

A problem with framing disputes in terms of rights is that doing so focuses their resolution on questions aimed at some finding of the "truth." Such questions in the cultural property context include, for example, what is the actual origin of the disputed object, of whose cultural heritage is it a part, etc. These questions, as elaborated above, are not easily resolved or may not even be resolvable. This overemphasis on the truth hinders productive and creative dispute resolution. As the late Professor Roger Fisher has explained:

[t]he truth about the world is that it is complex, chaotic, and confusing. To help us cope with this chaos, we need some partial truths and illuminating distortions, like maps. Although maps are gross distortions of reality, these schematic renditions are extremely useful . . . "veritas" is perhaps more likely to inhibit open inquiry and fresh ideas than to encourage them. Further, there are an infinite number of truths. We can ill afford to waste our finite resources trying to gather them all. On one hand, "the truth" is too restrictive a goal. On the other, it fails to provide any sense of priority among the many truths that are out there.¹⁵⁴

Using interests rather than rights or power to frame cultural property disputes would avoid these problems and would be a more productive way to resolve such disputes. This is the case because, as the discussion in Part II.C.2.b, *supra*, demonstrates, creativity can create value that meets both parties' interests.

Interest-based approaches to dispute resolutions are thought to be superior to rights- or power-based approaches in several other ways. Parties' satisfaction with dispute outcomes largely depends on the extent to which the resolution of their dispute meets the interests that led to their dispute initially.¹⁵⁵ Greater satisfaction with dispute outcomes leads to better relationships between former disputants and a lower likelihood that the dispute will recur.¹⁵⁶ Given that disputes tend to recur between the same parties, promoting a focus on parties' interests is an important addition to the current dispute resolution paradigm. The next Part focuses on how to promote an interest focus, as well as on how to deal with rights claims more productively.

154. Roger Fisher, *Coping with Conflict: What Kind of Theory Might Help?*, 67 NOTRE DAME L. REV. 1335, 1339 (1992).

155. URY, *supra* note 126, at 13.

156. *Id.* at 14.

III. A POTENTIAL SOLUTION

A. Introduction

This Part analyzes high-level approaches that could be adopted to address the problems raised by cultural property law's promotion of rights- and power-based dispute resolution. Proposals have already been made in the ADR literature to "[fit] the [f]orum to the [f]uss,"¹⁵⁷ so to speak, consisting of recommended dispute system designs for cultural property disputes. For example, some believe arbitration to be the ideal dispute resolution mechanism given the often fundamental misalignment of party understandings in cultural property disputes with respect to who owns culture, a confusion enhanced by evolving conceptions of national sovereignty and identity.¹⁵⁸ Others have called for a greater use of mediation to resolve the seemingly intractable values conflicts that result from cultural property disputes, whether the conflicts stem from emotion-laden issues of national identity that tend to arise,¹⁵⁹ or from interests in state sovereignty that are often inconsistent with resolution through binding mechanisms of dispute resolution.¹⁶⁰ A negotiation-based dispute system design option is also imaginable, although has not been explored in the ADR literature in relation to cultural property disputes. Specifically, international agreements could be amended to require the application of collaborative law principles. These principles, which are typically applied in divorce settlement negotiations, require parties to attempt interest-based negotiations in resolving cultural property disputes before initiating litigation.¹⁶¹ Thus a range

157. Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 49 (1994).

158. See, e.g., Gegas, *supra* note 26, at 152–54.

159. The salience of emotion in cultural property disputes is illustrated, for example, by the exclamation by the Greek actress and former culture minister, Melina Mercouri, during Greece's first campaign for the return of the Elgin Marbles from the British Museum in 1983: "[t]his is our history, this is our soul." John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1881 (1985).

160. See Nate Mealy, *Mediation's Potential Role in International Cultural Property Disputes*, 26 OHIO ST. J. ON DISP. RESOL. 169, 196 (2011); see, e.g., Martin Banks, *Join in 'Mediation' with Greece over Elgin Marbles, Unesco Urges Britain*, TELEGRAPH (Oct. 15, 2013) <http://www.telegraph.co.uk/news/worldnews/europe/greece/10381163/Join-in-mediation-with-Greece-over-Elgin-Marbles-Unesco-urges-Britain.html>.

161. In the collaborative law context, interest-based negotiation is often defined as "good-faith negotiations with full, voluntary disclosure on both sides, focused on identifying the overt and hidden interests of the parties, both short and long term, and satisfying them." Dafna Lavi, *Can the Leopard Change His Spots?! Reflections on the "Collaborative Law" Revolution and Collaborative Advocacy*, 13 CARDOZO J. CONFLICT RESOL. 61, 70 (2011) (describing a North Carolina statute defining collaborative law).

of possible mandatory ADR avenues are available additions to cultural property dispute resolution, and at least two have already been analyzed in the ADR literature.

Any of these types of proposals can be characterized as “shadow”-based approaches, relying on the law as something to be enforced by or against either of the parties. That is, under any of these proposals, parties to a cultural property dispute would be bound to attempt ADR before litigating, for example, bringing a claim before an arbitrator, seeking mediation, or negotiating in good faith under some prescribed collaborative law agreement. This Part offers a different sort of approach, but one that is nonetheless consistent with shadow-based additions of ADR to cultural property dispute resolution. This different approach is “shade”-based, relying on the law as something that shapes the discourse of disputes. As elaborated in Part II, the methods by which the law could provide shade in which parties could undertake this are the laws’ normative, institutional, and constituent features. This section, therefore, explores some high-level options for increasing the interest-focus of cultural property dispute resolution using these shade-providing features.

B. *Shade-Based Options and Evaluation*

Returning to the framework under which the laws of cultural property were expounded in II.B, *supra*, potential options are grouped in this Part into those operating at the level of international law and domestic law, with the latter Part focusing exclusively on U.S. law.

1. *International Law*

Scholarly discussions of international law sometimes analyze components of international agreements or institutions under a framework that classifies those components according to the level of the obligation they impose upon the signatories.¹⁶² Those components considered to impose higher degrees of obligation are those that impose explicit duties or requirements upon the signatories, whether mandatory or conditioned on some explicit or implicit term.¹⁶³ Examples of such higher-obligation components include the mandatory undertakings agreed to in the terms of a treaty or a signatory’s explicit

162. See, e.g., Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG 401, 410 (2000).

163. See *id.*

reservations to a treaty.¹⁶⁴ Those components considered to impose lower obligations upon the signatories include such components as an international agreement's hortatory or otherwise non-binding language and norms adopted without law-making authority, such as recommendations and guidelines.¹⁶⁵ Potential options for change to the international law of cultural property are examined within these two categories of high-obligation and low-obligation international law.

a. *High-Obligation International Law*

As mentioned above, other articles have already addressed the case for adding requirements to pursue ADR in cultural property dispute resolution to international agreements, that is, so-called "shadow-based" ADR proposals. Such proposals would add explicit mandatory language to international agreements, and hence are properly characterized as high-obligation international law. This Part does not comprehensively evaluate the merits of these proposals, but rather focuses on one narrow aspect of them, namely the shade-providing effect that the addition of such high-obligation international law requiring the use of interest-based ADR might have.

To the extent that the parties to the international regime of cultural property law could agree to add provisions for implementing any of the shadow-based ADR proposals briefly described above — arbitration mediation, or collaborative law in negotiation — and even if those systems were not fully or effectively implemented, there would be strong support for a different normative claim in cultural property disputes than currently exists: that cultural property disputes are not binary matters and that seeking a settlement that takes both parties' interests into account is valuable. Parties seeking an interest-based dispute resolution process would be able to point to international or congressional agreement over this claim.

Moreover, the addition of one of these ADR proposals would provide institutional and constituent shade for engaging in interest-based dispute resolution. Interest-based dispute resolution would appear to be more of a norm within the international community of which many cultural property disputants are members, and from which they obtain other benefits, such as respect for export controls. Furthermore, appeals by foreign disputants to the constituents of U.S. museums (or appeals to the U.S. government) would be less, and would thus be a less effective power-based approach, in the face of the

164. *See id.*

165. *Id.*

countervailing international or domestic law norm of interest-based dispute resolution.

b. *Low-Obligation International Law*

Even assuming that adding one of the above ADR proposals to the international cultural property law regime proves to be impractical, there could be other means by which the law could be reformed in order to provide shade for interest-based dispute resolution. Indeed, “where norms are contested and concerns for sovereign autonomy are strong, making higher levels of obligation, precision, or delegation unacceptable,”¹⁶⁶ as in cultural property issues, low-obligation international law may be the most practical addition to the international cultural property regime.¹⁶⁷ This Part examines what effect such low-obligation international law might have, namely the effect of the use of hortatory and other non-mandatory language in international agreements and norms adopted without law-making authority by the relevant international organizations.

i. *Hortatory and Other Non-Mandatory Language*

Current international agreements regarding cultural property are replete with hortatory and other non-mandatory language. UNESCO 1970, for example, contains a page-long preamble expressing a range of values underlying the agreement.¹⁶⁸ Moreover, various Articles of UNESCO 1970 include permissive (“should” or “may”) rather than mandatory (“shall”) language, including that each signatory “should, as far as it is able, provide the national services responsible for the protection of its cultural heritage,”¹⁶⁹ and “may call on the technical assistance of [UNESCO],”¹⁷⁰ and that UNESCO “may. . . conduct research and publish studies on matters relevant to the illicit movement of cultural property,”¹⁷¹ and “may . . . make proposals to States Parties to [the] Convention for its implementation.”¹⁷²

Thus one option for using the shade of the law to encourage an interest-based approach to cultural property dispute resolution would be to add to such hortatory and non-mandatory language, additional

166. Abbott, *The Concept of Legalization*, *supra* note 162, at 407.

167. *See id.*

168. UNESCO 1970, *supra* note 2, 823 U.N.T.S. at 232–34.

169. *Id.* at art. 14, 823 U.N.T.S. at 244.

170. *Id.* at art. 17, 823 U.N.T.S. at 246.

171. *Id.* at art. 17(2), 823 U.N.T.S. at 246.

172. *Id.* at art. 17(4), 823 U.N.T.S. at 246.

language that encourages interest-based dispute resolution. For instance, whereas the Convention currently provides normative support for rights-based claims, for example in making reference to the importance of cultural heritage to national sovereignty, or to the value of “interchange of cultural property among nations for scientific, cultural and educational purposes,”¹⁷³ the Convention could be revised to add support for resolving cultural property disputes in a way that takes the interests of all parties into account. An example of this might be a provision simply stating that “there is value to respecting simultaneously both national sovereignty and universal access to cultural heritage.” Additionally, even if international support were insufficient for mandatory mediation or arbitration, as would be necessary under the shadow-based approaches described above, language could be added to the convention stating that signatories “should” or “may” pursue mediation or arbitration in the event of a dispute. Even though this language would be toothless, it would have an expressive function, which could in turn aid a normative claim about the value of interest-based dispute resolution.

ii. *Advisory Opinions and Norms*

Non-binding law could provide shade for interest-based dispute resolution in other ways. For instance, international bodies could produce advisory guidelines promoting interest-based approaches to dispute resolution. UNESCO, for example could promulgate a Recommendation, a non-binding standard-setting instrument,¹⁷⁴ for resolving cultural property disputes that suggests its member states pursue a resolution first through collaborative law, then, failing that, through mediation and then arbitration, before resorting to litigation.¹⁷⁵ Such a Recommendation would be effective, not because it would require implementation in the UNESCO member states (it would not require ratification),¹⁷⁶ but because the representatives of the states that agree to them would also likely have some involvement in cultural property dispute negotiations as representatives of

173. UNESCO 1970, *supra* note 2, 823 U.N.T.S. at 232.

174. UNESCO, STANDARD-SETTING INSTRUMENTS, http://portal.unesco.org/en/ev.php-URL_ID=12024&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Apr. 20, 2012).

175. As an encouraging example, UNESCO has recently “urged” the United Kingdom and Greece to mediate their dispute over the Elgin Marbles, with UNESCO offering to act as mediator. *See* Banks, *supra* note 160.

176. UNESCO, GENERAL INTRODUCTION TO THE STANDARD-SETTING INSTRUMENTS OF UNESCO, http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Apr. 20, 2012).

foreign governments and so might feel bound by the Recommendation as a norm. They would, in effect, carry the values memorialized in the Recommendation into future cultural property negotiations.¹⁷⁷ These guidelines, moreover, would provide an additional source that parties seeking interest-based dispute resolution could point to as either a sword in making a normative claim about the value of interest-based approaches, or as a shield against unproductive rights-claims or power-based approaches.

2. *U.S. Domestic Law*

U.S. law could also potentially be amended to provide shade to parties seeking to engage in interest-based dispute resolution. The U.S. Customs and Border Patrol and the Department of Justice, for example, could promulgate guidelines expressing an unwillingness to bring a CPIA action or NSPA prosecution, respectively, where a foreign government has not attempted to resolve a cultural property dispute in good faith or has not sought mediation first. Likewise, these departments could express an unwillingness to bring these actions where a museum has not attempted to resolve the dispute in good faith. This would reduce the potency of power-based approaches that foreign governments or museums could attempt and would ensure that they both are encouraged to engage in interest-based dispute resolution.

IV. CONCLUSION

Legal rules can influence dispute resolution through a variety of means and to a number of results. Cultural property disputes demonstrate that legal rules impact bargaining less in the potential for their enforcement, and more in how they shape the discourse of the dispute resolution process. The possibility of enforcement of cultural property legal rules brings parties to the table. Enforcement is unlikely, and yet the legal rules are still influential in the way that they focus the discourse of the dispute resolution process on rights and power rather than on the interests of the parties, mostly to unproductive results.

Fortunately, legal rules are malleable and accordingly the shade it casts upon the discourse of cultural property disputes can be molded to focus the dispute resolution process on the interests of parties. This will require — but will also contribute to — a longer-term

177. Cf. Anne-Marie Slaughter, *Everyday Global Governance*, 132 DAEDALUS 83, 85 (2003).

shift in the paradigm of cultural property dispute resolution. This shift is one away from a binary understanding of ownership of cultural heritage to an acknowledgment of both some degree of the indeterminacy of cultural property rights-claims and the value of the interests of all parties to the dispute.