

RESOLVING CULTURAL PROPERTY DISPUTES IN THE SHADOW OF THE LAW
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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 interest 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. Using the aspect of law that is an enforceable set of rules to do so could take the form of the addition of alternative forms of dispute resolution to cultural property disputes. 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. The aspect of law that shapes the discourse of dispute resolution could be molded to help to focus the dispute resolution process on the interests of 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.

CONTENTS

<u>I. INTRODUCTION</u>	<u>2</u>
<u>II. THE PROBLEM</u>	<u>3</u>
A. Why Cultural Property Law? Why Negotiation Theory?	3
B. The Legal Rules of Cultural Property	5
1. <i>International Rules</i>	6
2. <i>Domestic Rules</i>	8
3. <i>The Operation of the Legal Rules in Practice</i>	11
C. The Role of Cultural Property Law in Cultural Property Dispute Negotiations	13
1. <i>The Theoretical Framework: Bargaining in the Shadow and Shade of the Law</i>	13
2. <i>The Shadow and Shade Framework Applied to Cultural Property Disputes</i>	16
D. Evaluating the Role of Cultural Property Law in Cultural Property Dispute Negotiations. 28	
1. <i>The Power-, Rights-, and Interest-Based Dispute Resolution Framework</i>	28
2. <i>The Shadow and Shade of Cultural Property Law Promotes a Rights- and Power-Based Discourse</i>	29
3. <i>The Focus of Cultural Property Dispute Resolution on Rights and Power Is Unproductive in Cultural Property Dispute Resolution.</i>	32
4. <i>Interest-Based Dispute Resolution Is Well-Suited to Cultural Property Disputes</i>	36
<u>III. POTENTIAL HIGH-LEVEL SOLUTIONS</u>	<u>37</u>
A. Introduction	37
B. Shadow-Based Approaches.....	38

1. Overview	38
2. Options and Evaluation	40
C. Shade-Based Approaches	51
1. Overview	51
2. Options and Evaluation	51
IV. CONCLUSION	53

I. INTRODUCTION

Cultural property disputes take a variety of forms. The cultural property in dispute, for instance, may encompass a wide range of material. One definition used in international law, for example, 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.”¹ Disputes over cultural property may occur among a variety of actors: some may be between sovereign states and other sovereign states;² between states and sub-state sovereignties, such as indigenous groups;³ between sub-state sovereignties;⁴ between states and private actors, both individuals⁵ and institutions;⁶ or between private actors exclusively.⁷ The disputes may also cover a wide range actions concerning cultural property: ownership,⁸ destruction,⁹ conservation,¹⁰ transfer,¹¹ plunder,¹² and many others.

¹ 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, Nov. 14, 1970, art. 1, 823 U.N.T.S. 232, 234 [hereinafter UNESCO 1970].

² See, e.g., Michael Kimmelman, *Elgin Marble Argument in a New Light*, N.Y. TIMES, at C1 (Jun. 24, 2009) (describing Greece’s claim against the United Kingdom for the Elgin Marbles).

³ See, e.g., R.K. Paterson, *Protecting Taonga: The Cultural Heritage of the New Zealand Maori*, 8 INT’L J. CULT. PROP. 108 (1999) (describing cultural property disputes between Maori peoples and the New Zealand government).

⁴ 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).

⁵ See, e.g., Bruce Weber, *Robert Hecht, Antiquities Dealer, Dies at 92*, N.Y. TIMES, at A18 (Feb. 9, 2012) (describing the Italian government’s prosecution of antiquities dealer, Robert Hecht, for antiquities trafficking).

⁶ See, e.g., *Egypt, Demanding Artifacts’ Return, Cuts Ties With the Louvre*, N.Y. TIMES, at A7 (Oct. 8, 2009) (describing Egyptian claims against the Louvre for the return of certain artifacts).

⁷ See, e.g., Mike Boehm, *The Getty Museum Is in a Legal Fight over Armenian Bible Pages*, L.A. TIMES, at D1 (Nov. 4, 2011) (describing an Armenian church’s claims against the J. Paul Getty Museum for the return of several Bible pages).

⁸ See, e.g., John Tierney, *A Case in Antiquities for “Finders Keepers,”* N.Y. TIMES, at D1 (Nov. 17, 2009) (describing Egyptian claims of ownership of the Rosetta Stone against the British Museum).

⁹ See, e.g., Steven Lee Myers, *Iraq’s Ancient Ruins Face New Looting*, N.Y. TIMES, at A1 (Jun. 25, 2010) (describing the creation of an antiquities police force to prevent the destruction of archaeological sites in Iraq).

This paper 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 paper thus uses the terms cultural property, artifacts, and antiquities interchangeably, even though cultural property is a much broader term. This paper examines this specific type of dispute through a particular lens: how the legal rules implicated by the dispute influence negotiations during dispute resolution process. Section II.A addresses why this is an important question, both for the law of cultural property and also for negotiation theory. Section II.B explores what these legal rules actually are and how they operate in practice. Section 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 then on how that influence manifests in bringing parties to the bargaining table but producing an unproductive discourse that is focused on rights and power rather than the interests of the parties. Section III proposes several ways to use the mechanisms by which law exerts influence on the dispute resolution process to improve that process by re-focusing it on interests and making its disposition of rights-claims more productive.

II. THE PROBLEM

A. WHY CULTURAL PROPERTY LAW? WHY NEGOTIATION THEORY?

¹⁰ See, e.g., Kimmelman, *supra* note 2, at C1 (describing arguments concerning who of Britain or Greece could better conserve the Elgin Marbles).

¹¹ See, e.g., Michael Kimmelman, *Stolen Beauty: A Greek Urn's Underworld*, N.Y. TIMES, at C1 (Jul. 8, 2009) (describing the raid of one Giacomo Medici's Geneva warehouse, which was believed to have been used for the smuggling of antiquities).

¹² See, e.g., Isabel Malsang, *Destitute Greeks Can't Maintain Heritage*, AUSTRALIAN, at 26 (Apr. 10, 2012) (describing the increasing number of unlicensed archaeological excavations in Greece during the country's recent financial crisis).

Professors Mnookin and Kornhauser laid a theoretical foundation for examining how legal rules shape bargaining strategies in *Bargaining in the Shadow of the Law*.¹³ They focused on how the law influenced “private ordering,” the resolution of disputes without any contested issue being adjudicated in court.¹⁴ Legal rules may serve a number of functions in dispute resolution, for example, determining who is entitled to participate and the form an agreement must take.¹⁵ Professors Mnookin and Kornhauser were primarily concerned, however, with how behavior and outcomes in private ordering were shaped by “legal rules and procedures, as well as by other institutional features of the formal legal system.”¹⁶

One could examine these dispute negotiations through the lens of numerous other, non-legal variables long acknowledged to affect 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.¹⁷ Indeed, these are areas of cultural property dispute resolution that are undoubtedly ripe for exploration. This paper does address some of these variables, but focuses on the effects of legal rules in shaping bargaining in cultural property disputes. In one sense, it does so in answering Professors Mnookin and Kornhauser’s calling that areas of law beyond divorce be analyzed to uncover how parties bargain in the shadow of the law.¹⁸ The primary motivation for this paper’s focus on legal rules, though, is that an analysis of legal rules lends itself to policy recommendations, which this paper provides at a high level in Section III.

¹³ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1978).

¹⁴ *Id.* at 951.

¹⁵ *Id.*

¹⁶ Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1494, 1494 (1990) (quoting an interview with Professor Mnookin).

¹⁷ See generally 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).

¹⁸ Mnookin & Kornhauser, *supra* note 13, at 997.

But why write about the legal rules of cultural property? Cultural property disputes present an interesting challenge at the intersection of law and negotiation. Cultural property disputes rarely go to court or even reach the stage of a filing of a formal complaint;¹⁹ that is, they are largely resolved through private ordering. Although, in contrast to a divorce settlement, an agreement over cultural property requires no “rubber stamp” by a court to take effect,²⁰ law and legal institutions specific to cultural property exist, operating in the background of cultural property disputes,²¹ just as how divorce law lurks behind the private ordering between separating spouses. Thus, the question of how legal rules affect private ordering is a relevant one in cultural property disputes.

B. THE LEGAL RULES OF CULTURAL PROPERTY

At the first glance provided above, cultural property dispute negotiations seem to mirror the archetypal divorce case understood to involve bargaining in the shadow of the law. But as this section demonstrates, cultural property disputes are likely more complex. This is because the legal rules at play in cultural property disputes exist and exert influence at more jurisdictional levels than they do in divorce cases. In contrast to divorce cases, which are governed primarily by state law and to a lesser extent, federal law, rules that could potentially implicate cultural property disputes can be found at the state and federal levels, as well as in the domestic laws of foreign governments, in international agreements, and in the law-like policies of large private

¹⁹ I obtained much of the anecdotal evidence for this article through interviews with the general counsel and the chief executive of a body that operates a large museum with a substantial antiquities collection. In order to ensure a measure of freedom in the comments, interviewees were promised anonymity. For the purpose of citation, I refer to the interviews of the general counsel and chief executive on January 11, 2011 as Museum Interview 1 and Museum Interview 2 respectively. *See also* Irimi Stamatoudi, *Mediation and Cultural Diplomacy*, 61 MUSEUM INTERNATIONAL 116, 117 (2009) (citing numerous examples of out-of-court settlements of a variety cultural property disputes).

²⁰ This is in contrast to divorce cases, settlement of which typically requires court approval. Mnookin & Kornhauser, *supra* note 13, at 951.

²¹ *See* section II.B, *infra*.

institutions.²² With the exception of private policies, this section examines these various rules, grouping them into international rules and domestic rules. The section then discusses how these legal rules operate in practice, concluding that despite the extensive and multi-layered legal structure, the likelihood of these legal rules being enforced is actually quite low.

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).²³ The International Institute for the Unification of Private Law's (UNIDROIT) 1995 Convention on the International Return of Stolen or Illegally Exported Cultural Objects²⁴ (UNIDROIT 1995), is often cited as an important international convention in cultural property disputes,²⁵ but it has not been implemented by the United States and so it is not examined here.²⁶

²² 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 Interview 1, *supra* note 19.

²³ See *supra* note 1.

²⁴ International Institute for the Unification of Private Law (UNIDROIT) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, June 24, 1995, 34 I.L.M. 1322 (1995) [hereinafter UNIDROIT 1995].

²⁵ 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).

²⁶ 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, *The UNIDROIT Convention On Stolen or Illegally Exported Cultural Objects*, paper delivered at London Conference on Art Theft (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 43 countries and has entered into force in 32. International Institute for the Unification of Private Law (UNIDROIT), Status of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects - Signatures, Ratifications, Accessions, <http://www.unidroit.org/english/implement/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).

UNESCO is a leading international organization involved in fighting antiquities trafficking. It is comprised of 195 full members, including the United States.²⁷ UNESCO 1970, to which 122 states, including the United States, are a party,²⁸ provides a broad framework for curbing antiquities trafficking. The Convention encourages states to inventory specific items of cultural property²⁹ for inclusion in the protections the Convention provides and also allows states to designate entire categories of archaeological or ethnographical material for protection.³⁰

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.³¹

The two key parts of the Convention implemented by the United States have been Articles 7(b) and 9.³² 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

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.³³

²⁷ UNESCO, MEMBER STATES (Nov. 25, 2011), http://portal.unesco.org/en/ev.php-URL_ID=11170&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited April 06, 2012).

²⁸ UNESCO, Illicit Traffic of Cultural Property, <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/> (last visited April 06, 2012).

²⁹ UNESCO 1970's definition of cultural property is found in Article I of the Convention. UNESCO 1970, *supra* note 1, art. 5(b), 823 U.N.T.S. at 238.

³⁰ *Id.* at art. 1, 823 U.N.T.S. at 234-36.

³¹ *Id.* at art. 7(a), 823 U.N.T.S. at 240.

³² See Section II.A.2.b, *infra*.

³³ UNESCO 1970, *supra* note 1, art. 7(b)(ii), 823 U.N.T.S. at 240.

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 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.³⁴

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.³⁵ 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.³⁶

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.

³⁴ *Id.* at art. 9, 823 U.N.T.S. at 242.

³⁵ 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 claims either 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 “all antiquities lying undiscovered at the date of the coming into operation of [the] Law in or upon any land shall be the property of the Government.” PATRICK J. O’KEEFE & LYNDEL V. PROTT, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 60 (1988). 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).

³⁶ See, e.g., Elisabetta Povoledo, *Rome Trial of Ex-Getty Curator Marion True Ends*, N.Y. TIMES, at C1 (Oct. 13, 2010) (describing Italy’s abortive prosecution of former Getty Curator Marion True).

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.

The Cultural Property Implementation Act (CPIA)³⁷ implements UNESCO 1970 in the United States. The CPIA prohibits the import of any stolen cultural property that had been documented as part of the inventory of a museum or other public institution located in another nation that is a signatory to UNESCO 1970.³⁸ The Act provides for civil remedies of seizure or forfeiture of cultural property³⁹ to be brought by customs officers.⁴⁰ Seizure and forfeiture requires proving that the disputed property had been stolen after the effective date of the CPIA – January 12, 1983 – or the entry into effect of UNESCO 1970 for the country from whose institution the object was stolen, whichever is later.⁴¹ Actions under the CPIA are typically initiated by requests from a foreign government, although the law does not require this.⁴²

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.⁴³ 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

³⁷ U.S. Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (1988).

³⁸ 19 U.S.C. § 2607.

³⁹ See 19 U.S.C. § 2609.

⁴⁰ See 19 U.S.C. § 2613.

⁴¹ See 19 U.S.C. § 2610(2)(B). 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).

⁴² Museum Interview 1. 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). The act also requires source countries to compensate the holder of the forfeited or seized item unless equity would normally not require doing so. 19 U.S.C. § 2609(c)(2)(A), (B).

⁴³ 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).

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 being applied.

The U.S. government, as in actions initiated through the CPIA, can become involved by virtue of the National Stolen Property Act (NSPA).⁴⁴ 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.⁴⁵ Property proven to have been so transferred, transported or possessed may be seized and the individual violating the NSPA may be prosecuted.⁴⁶

The U.S. may also become involved in antiquities disputes through its customs powers. U.S. customs statutes prohibit goods imported contrary to law from entering the U.S.⁴⁷ Customs powers are implicated in some cases of smuggled antiquities because of violations of rules requiring the declaration of either the value of goods to be imported or the goods' country of origin,⁴⁸ both of which types of information are typically obscured by antiquities smugglers.⁴⁹

⁴⁴ National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (1982).

⁴⁵ *See id.*

⁴⁶ One of the few appellate antiquities law decisions, *United States v. Schultz*, *supra* note 433, 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.*

⁴⁷ 19 U.S.C. § 1595a(c); 18 U.S.C. § 545.

⁴⁸ Gerstenblith, *The Acquisition and Exhibition of Classical Antiquities: The Legal Perspective*, *supra* note 41, at 54–55.

⁴⁹ 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) 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.

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.⁵⁰ As a result of this rule, purchasers of stolen goods are exposed to actions in replevin brought by the original owner, even if their purchaser bought the item in good faith.⁵¹

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 in practice. 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. In the case of UNESCO 1970, section 7(a) applies only to property illegally exported after entry into force of the Convention.⁵² The provision of the CPIA providing for seizure and forfeiture of stolen antiquities only applies to objects shown to have been stolen after the effective date of the legislation.⁵³ Likewise, statutes of limitations limit the possible claims, or effectiveness of claims brought by foreign governments. Most jurisdictions, for example, allow a two- to six-year statute of limitations for actions in replevin.⁵⁴ Similarly, a five-year statute of limitations applies to the NSPA.⁵⁵

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: The Legal Perspective*, supra note 41, at 55.

⁵⁰ Gerstenblith, *The Acquisition and Exhibition of Classical Antiquities: The Legal Perspective*, supra note 41, at 49. See, e.g., U.C.C. § 2-403(1) (2007).

⁵¹ 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).

⁵² UNESCO 1970, supra note 1, art. 7(a), 823 U.N.T.S. at 240.

⁵³ See 19 U.S.C. § 2607.

⁵⁴ Demarsin, supra note 51, at 260.

⁵⁵ See 18 U.S.C. § 3282. The NSPA, however, makes possession of stolen goods a crime and 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). This possession provision of the NSPA has not, however, been applied in a reported case, and so the exact application of the statute of limitations is uncertain. *Id.*

Therefore, not all objects of mysterious provenance in museums' collections are covered by any of these laws.

Moreover, the ambiguous provenance of most antiquities involved in cultural property disputes interacts with the evidentiary burdens placed on the foreign claimant – or in a criminal matter, a U.S. attorney – to lessen the enforceability of the legal rules described above. This is particularly true of criminal actions, which have a higher burden of proof than do civil actions.⁵⁶ 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.⁵⁷ 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.⁵⁸ The same is true for civil seizure and forfeiture remedies under the CPIA.⁵⁹

Even though the legal rules described in this section seem to have a low likelihood of enforcement, the remainder of this paper argues that they are nonetheless significant in cultural property dispute. As the next section contends, the content of the legal rules, whether

⁵⁶ *But see id.* at 132–33 n. 54. The United States may bring a civil forfeiture *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 on the part of the government than in the case of a criminal action.

⁵⁷ Museum Interview 1, *supra* note 19.

⁵⁸ *Id.*

⁵⁹ *Id.*

enforceable or not, shapes bargaining over cultural property. Section III then explains that the legal rules may be changed to affect more productive dispute resolution.

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 section concerns the impact of legal rules on cultural property dispute resolution, adapting a well-established theoretical framework, Professors Mnookin and Kornhauser's metaphor of bargaining in the shadow of the law, along with a more recent refinement on that theory elaborated by Omar Dajani, which he refers to as bargaining in the "shade of the law."⁶⁰ 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. This is a rough characterization, as will soon become apparent, but 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 actually to be enforced. This could be, as Section 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

⁶⁰ Dajani, *supra* note 17, at 81.

There are two perspectives on how the law casts its shadow upon negotiations: an instrumental view and a normative view.⁶¹ The former perspective sees legal rules as being 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.⁶² 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.⁶³ This section elaborates on these views.

The instrumental view identifies three functions of legal rules. First, legal rules clarify a zone of possible agreement, or ZOPA.⁶⁴ Legal rules do this by helping parties to determine their best alternative to a negotiated agreement, or BATNA.⁶⁵ 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 to a distributive scheme in a settlement.⁶⁶ Third, legal rules help to fill in any gaps in the parties' privately-reached agreements.⁶⁷ The legal system does this by providing default contractual rules that determine an interpretation of ambiguous terms or that enforces terms that, so long as the agreement does not specify otherwise, are viewed as implicit in the resolution of the dispute.⁶⁸

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

⁶¹ *Id.* at 69.

⁶² *See id.*

⁶³ *See id.* at 60–70.

⁶⁴ *Id.* at 69–70.

⁶⁵ *Id.* at 69.

⁶⁶ 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 provide useful objective criteria for evaluating potential agreements. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 68 (2d ed. 2011). *See generally* Dajani, *supra* note 17, at 68.

⁶⁷ Dajani, *supra* note 17, at 69.

⁶⁸ *Id.*

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.⁶⁹ Instead, they may disallow deals that parties may prefer to reach, possibly leaving each worse off (without considering an external standard of fairness) than they would have been without the rules, in the name of some normative judgment about how bargaining should take place.⁷⁰

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 for only very wide zone definition if legal enforcement is either so uncommon that possible legal outcomes are not well understood or so unattractive that, though an alternative to a negotiated agreement, parties would prefer a wide 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,⁷¹ ordinarily parties are free to settle their pending litigation without court approval or review.⁷² 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 analyzed regarding its impact on bargaining.

⁶⁹ 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, *supra* note 17, at 69.

⁷⁰ Dajani, *supra* note 17, at 69. See also Ayres & Gertner, *supra* note 69, at 901–02.

⁷¹ 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 L. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 56 (1999).

⁷² *But see*, Fed R. Civ. P. 41(a) (“[A]n action may be dismissed by the plaintiff without order of court ...”).

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.”⁷³ 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.”⁷⁴

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 paper prefers to term a “constituent” theory.⁷⁵ The normative theory views legal rules as important because discourse about their fairness is likely to be more persuasive “than rote recitation of norms.”⁷⁶ 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.⁷⁷ The constituent theory posits that legal rules can be persuasive not only to participants in the negotiation, but also to those negotiators’ domestic constituents.⁷⁸

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

⁷³ Dajani, *supra* note 17, at 65.

⁷⁴ *Id.*

⁷⁵ *Id.* at 83.

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *See id.*

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,⁷⁹ because of time and space constraints, and because this paper examines high-level reforms that the United States could either influence or implement, this paper does not discuss the impact of foreign domestic legal rules beyond their interaction with U.S. domestic legal rules (for example, foreign ownership laws).⁸⁰

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

⁷⁹ 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), <http://artsbeat.blogs.nytimes.com/2011/01/06/trial-over-former-getty-curator-speaks-out/>.

⁸⁰ Indeed, it is likely the case that Italy's prosecution of Marion True did shape the ZOPA of cultural property disputes occurring in the curator's indictment. See, e.g., David McKenna, *Museum Returns Artifacts to Italy After Legal Conflict*, DAILY PRINCETONIAN, at 1 (Feb. 16, 2012); Elisabetta Povoledo, *Pact Will Relocate Artifacts to Italy From Cleveland*, N.Y. TIMES, at C3 (Nov. 20, 2008); Elisabetta Povoledo, *Getty Agrees to Return 40 Antiquities to Italy*, N.Y. TIMES, at E1 (Aug. 2, 2007); Elisabetta Povoledo, *Met to Sign Accord in Italy to Return Vase and Artifacts*, N.Y. TIMES, at E2 (Feb. 21, 2006). 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 in 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 fact of one instance of legal enforcement is not very illuminating to behaviors and strategies of the parties within the dispute resolution process.

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.

To the extent that anything about the legal rules' effects on foreign governments' BATNAs is generalizable, the concept is still not very 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.⁸¹ 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.⁸² An explanation for this is that legal enforcement would greatly harm the relationship between museums and the foreign government seeking the intervention.⁸³ This relationship is valuable for foreign governments for a variety of reasons, including that 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,⁸⁴ and museums have conservation, curatorial, and research expertise that may be valuable to the foreign country.⁸⁵

⁸¹ Museum Interview 1, *supra* note 19. 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].

⁸² Museum Interview 1, *supra* note 19.

⁸³ *Id.* But see KENNEDY, *supra* note 79 (describing Italy's prosecution of former Getty curator Marion True for violating Italian antiquities ownership laws).

⁸⁴ See, e.g., *United States v. One 18th Century Colombian Monstrance*, 797 F.2d 1370, 1373 (5th Cir. 1986) (a curator of the San Antonio Art Museum alerted U.S. Customs agents to violations of the NSPA when an antiquities dealer attempted to sell looted items to the museum).

⁸⁵ See, e.g., *The Cleveland Museum of Art and Italy Agree to Exchange of Antiquities and Scholarship*, ARTDAILY, http://www.artdaily.com/index.asp?int_sec=2&int_new=27357 (last visited Apr. 8, 2012) ("The two parties have

Aside from relationship issues, a number of practical considerations make legal recourse a poor alternative for foreign governments. Often, foreign governments' resources are simply too limited for the government to be able to afford the initiation of legal action.⁸⁶ 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, the alternative of 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 also has a legal advantage in the dispute.⁸⁷ The factors elaborated above with respect to foreign governments support this. Moreover, statutes of limitations inhibit the actions that a foreign government can bring, and other features of the law provide time bars for some claims, for example, 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.⁸⁸

These advantages suggest that museums would have a stronger BATNA than do foreign governments, perhaps narrowing the ZOPA and thus providing greater insight into the likely

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.”).

⁸⁶ See Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 IND. L.J. 985, 996 (1994) (Stating that litigation costs can often exceed the value of cultural property in dispute).

⁸⁷ See, e.g., Cornu & Renold, *supra* note 4, at 2; Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 294 (2007).

⁸⁸ 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 no documentation of provenance).

behaviors or outcomes of bargaining. Yet, despite their 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.⁸⁹ One explanation of 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.⁹⁰ 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 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 litigation for a museum. These interests could include the relationship between the parties, a museum's desire to be “ethical,” a desire for future collaboration, and numerous others. Thus in this way, the enforceability of legal rules in cultural property disputes can be said to exert a weak influence over zone definition, as for both disputants, the legal

⁸⁹ 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); *transferring* No. 1:08-CV-02109 (D. D.C. Jul. 30, 2009) in which 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 80 (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 Objects From King Tut's Tombs to Egypt*, N.Y. TIMES, at C3 (Nov. 10, 2010) (describing the New York Metropolitan Museum of Art's repatriation of Ancient Egyptian objects acquired in the early Twentieth Century).

⁹⁰ Museum Interview 1, *supra* note 19.

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. Some contend that cultural property legal doctrine is underdeveloped. For example, Stacey Falkoff has argued that there is a dearth of case law defining numerous key features of cultural property law. For example, there is 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.⁹¹ 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.⁹² Given this doctrinal underdevelopment, legal rules play a weak role in surplus allocation, 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.⁹³ There is therefore no need for judicial review of dispute settlements.⁹⁴ 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

⁹¹ See Falkoff, *supra* note 87, at 304. See also UNESCO 1970, *supra* note 1, art. 7(b)(ii), 823 U.N.T.S. at 240; 19 U.S.C. § 2609(c)(1).

⁹² See, e.g., the facts of *Schultz*, *supra* note 43.

⁹³ Museum Interview 1, *supra* note 19.

⁹⁴ See Section II.C.1.c, *supra*.

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 section 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 section examines what role legal rules might nonetheless play using a refined framework. 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?⁹⁵ The next section seeks to address this question in understanding what the role of non-enforceable or practically non-enforceable law has on cultural property disputes.

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

As section II.C.1.c, *supra*, explained, legal rules can exert an influence on negotiations independent of their likelihood of enforcement. These influences are related to the various ways in which law contributes to the discourse surrounding the various claims at play in a negotiation. The claim of that section was not that law itself inevitably produces any specific kind of discourse around, or claim asserted 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

⁹⁵ For example, the United States has not fully implemented UNESCO 1970, but 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 (1993). 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 26, at 24.

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,⁹⁶ 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...”⁹⁷ 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.⁹⁸

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 which form a “part of the cultural heritage of each state.”⁹⁹ This heritage includes not only “[c]ultural property created by the individual or collective genius of nationals of the State concerned”¹⁰⁰ but also

⁹⁶ See 19 U.S.C. § 2609(b)(1).

⁹⁷ 19 U.S.C. § 2609(c)(1).

⁹⁸ See *id.*

⁹⁹ UNESCO 1970, *supra* note 1, art. 4, 823 U.N.T.S. at 236.

¹⁰⁰ See *id.* at art. 4(a), 823 U.N.T.S. at 236.

“cultural property found within the national territory” of each state.¹⁰¹ 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.¹⁰² 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.¹⁰³

A countervailing, cultural property-specific normative claim is supported by the legal rules as well, however. Roughly speaking, this is a position in opposition to the cultural property nationalist stance, known as cultural property internationalism.¹⁰⁴ 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.¹⁰⁵ 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,”¹⁰⁶ 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.”¹⁰⁷ These provisions reflect an idea that cultural property can be attributed to a cultural heritage beyond the territory of its origin, and

¹⁰¹ See *id.* at art. 4(b), 823 U.N.T.S. at 236.

¹⁰² See 19 U.S.C. § 2606 (a).

¹⁰³ See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 846–50 (1986).

¹⁰⁴ See *id.*

¹⁰⁵ 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).

¹⁰⁶ UNESCO 1970, *supra* note 1, art. 4(d), 823 U.N.T.S. at 238.

¹⁰⁷ *Id.* at art. 4(e), 823 U.N.T.S. at 238.

also are an acknowledgment of the value in protecting other states' provision of access to cultural property of foreign origin.

A question separate from the longstanding debate of which of these two positions the law tends to favor,¹⁰⁸ 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.¹⁰⁹ The second proposition is supported by the public discourse of cultural property negotiations. Turkey, for example, in pressing for repatriation of antiquities, some of which were acquired by U.S. museums before UNESCO 1970 or the CPIA went into force, has relied on normative claims of its sovereignty, stating that the objects were excavated in contravention of a 1906 national ownership law.¹¹⁰ Thus the normative positions embedded in cultural property law are neither accidental in their inclusion 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 does not seem to be the case, however, as disputes are often resolved by agreements that appear to balance opposing claims. Examples of

¹⁰⁸ See, e.g., Falkoff, *supra* note 87.

¹⁰⁹ See Kimberly Christen, *Opening Archives: Respectful Repatriation*, 74 AM. ARCHIVIST 185, 195 (2011).

¹¹⁰ Jason Felch, *Turkey Targets Getty, Other Museums*, L.A. TIMES, at A1 (Mar. 31, 2012).

this include agreements that provide for restitution of a specific object accompanied by agreements for further cultural cooperation,¹¹¹ agreements that provide for formal recognition of the importance of the claimants' cultural identity,¹¹² collective ownership arrangements that recognize a "dual nationality" of the objects,¹¹³ and trust-like ownership arrangements of disputed objects in which the museum acts as the "trustee."¹¹⁴ Indeed, a more subtle understanding of the impact of these shade-providing features on cultural property disputes is necessary. The remainder of this section explores how other shade-providing features of the law explain how this normative feature is not outcome- or behavior-determining. Following that, Section 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 1906,¹¹⁵ have increasingly been incubators for various discourses that refine the internationalist position towards sensitivity for 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 "to comply with international conventions of which the

¹¹¹ 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).

¹¹² In Switzerland, for example, to resolve a dispute between the cantons of Saint-Gall and Zurich over ancient manuscripts, 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 4, at 20.

¹¹³ *Id.* at 18.

¹¹⁴ 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 make restitution when conditions in Afghanistan improved. UNESCO was designated as the determiner for when conditions were satisfactory for the objects' return, and thus the arrangement was similar to a trusteeship. *Id.* at 22.

¹¹⁵ *About AAM*, AM. ASS'N OF MUSEUMS, <http://www.aam-us.org/aboutaam/index.cfm> (last visited Apr. 6, 2012).

U.S. is a party.”¹¹⁶ Membership in these associations is not mandatory, but does provide some benefit, such as various accreditations or access to peer groups focused on, for example, museum operations.¹¹⁷ This all demonstrates the institutional shade-providing 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, 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.¹¹⁸ 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 more be more of a “reverse-constituency” phenomenon in that sometimes a foreign government will request the intervention of the United States government.¹¹⁹ Such an appeal may be rooted in the legality of the claim, although it may not request direct

¹¹⁶ *Standards Regarding Archaeological Material and Ancient Art*, AM. ASS’N OF MUSEUMS (Jul. 2008), <http://www.aam-us.org/museumresources/ethics/ethics-archaeology.cfm>.

¹¹⁷ See, e.g., *AAM Industry Partner Membership Has Benefits*, AM. ASS’N OF MUSEUMS, http://www.aam-us.org/joinus/benefits/memben_commerce.cfm (last visited Apr. 6, 2012).

¹¹⁸ See Adriel Bettelheim & Rachel Adams, *Stolen Antiquities*, 17 CQ RESEARCHER 313, 315 (2007).

¹¹⁹ Museum Interview 1, *supra* note 19.

intervention under the NSPA or CPIA.¹²⁰ In these cases, the pressure on the museum is similar as in the appeal to the public described above; the museum relies on the support of the U.S. government, for example, for tax-exempt status. 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 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 section examines the effect of the law through the lens of the effectiveness of the dispute resolution system.

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. This section 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 section identifies the sorts of claims or focus promoted by cultural property law, and the resulting impact on the dispute resolution process.

¹²⁰ *Id.*

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.”¹²¹ Interests are the motivations behind the parties’ positions.¹²² Reconciling interests requires “probing for deep-seated concerns, devising creative solutions, and making trade-offs and concessions where interests are opposed.”¹²³ Determining who is right involves relying on an independent standard perceived as legitimate or fair.¹²⁴ Some standards are formalized in law, others are socially-accepted norms of behavior.¹²⁵ Determining who is more powerful requires one side to successfully coerce the other to settle on terms more favorable to the coercer.¹²⁶ Power-based approaches to negotiation typically come in “two common forms: acts of aggression . . . and withholding the benefits that derive from a relationship.”¹²⁷ The remainder of this section 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. The promotion of rights-based discourse is not surprising given that legal rules are a typical foundation for rights-based claims in dispute resolution.¹²⁸ 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

¹²¹ WILLIAM URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 4–5 (1993).

¹²² *Id.* at 5.

¹²³ *Id.* at 6 (footnote and citation omitted).

¹²⁴ *Id.* at 7.

¹²⁵ *Id.*

¹²⁶ *Id.* at 8.

¹²⁷ *Id.* at 9.

¹²⁸ *See id.* at 7.

limitations; likewise foreign governments assert that their claims are not time barred.¹²⁹ 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.¹³⁰ An example of this is a Turkish Culture Minister's description of Turkey's recent aggressive pursuit of restitution of objects from numerous museums. 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."¹³¹ 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 it retaining the Elgin Marbles.¹³² Section II.C has identified sources of support within the legal rules of cultural property for both of these normative claims.

¹²⁹ See, e.g., *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (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*, A COMPANION TO MUSEUM STUDIES 442, 451 (Sharon MacDonald, 2011) (noting that Turkey and the Met settled their dispute after the holding that Turkey's claim was not time-barred).

¹³⁰ Turkey is referred to in the example that follows, although it was only, itself, formally colonized 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).

¹³¹ Susanne Güsten, *Turkey Presses Europe Harder for Return of Antiquities, with Some Success; Germany Will Surrender Sphinx as Ankara Pushes France on a Tile Panel*, INT'L HERALD TRIB., at 504 (May 25, 2011).

¹³² Güsten, *supra* note 131. 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.").

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 efforts 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.¹³³

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 that seem to reflect that interest-based negotiations took 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 museums¹³⁴ in exchange for the return of forty objects to Italy.¹³⁵ 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.¹³⁶ 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

¹³³ Suzan Mazur, *Interview: Italy's Antiquities Prosecutor Fiorilli*, SCOOP (Dec. 28, 2006), <http://www.scoop.co.nz/stories/HL0612/S00370.htm>.

¹³⁴ *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.

¹³⁵ *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/florence_announcement.html.

¹³⁶ 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.

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 paper 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,¹³⁷ are based on the interests of the parties. The laws focus on creating these rights, obviously with an eye towards their enforcement, rather than creating a framework for resolving disputes productively,¹³⁸ a goal that would be worthy of these laws given the reality that enforcement of rights claims in court through the law is rare. This to be expected given the earlier proposition that legal rules are a typical foundation for rights-based claims in dispute resolution. This paper now turns to whether this lack of focus on parties’ interests results in productive dispute resolution, and, later on, 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.

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. Disputes resolution based on rights- or power-claims can bring parties to the table or reduce uncertainty

¹³⁷ UNESCO 1970, *supra* note 1, art. 7(b)(ii), 823 U.N.T.S. at 240; 19 U.S.C. § 2609(c)(1).

¹³⁸ *But see* UNESCO 1970, *supra* note 1, 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.

about future rights or balances of power.¹³⁹ Rights- or power-based approaches may simply be necessary in instances where the parties' interests are so opposed that agreement is not otherwise possible.¹⁴⁰ While these considerations might be relevant in some cultural property disputes, there seems to be no argument for why adding additional 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 because they typically result in suboptimal outcomes in which both parties 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 coexist until the next opportunity for conflict and a 'win.'"¹⁴¹

Specific features of cultural property disputes illustrate other reasons why power- and rights-based approaches are ill-suited for 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. One power-based approach enabled by the constituent shade-providing feature of cultural property law, for example, 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

¹³⁹ URY ET AL., *supra* note 121, at 16.

¹⁴⁰ *Id.*

¹⁴¹ 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 121, at 15 (stating that resolving rights or power claims are often contests that harm relationships and results in recurrence of disputes)).

respect to the cultural object, focusing instead on other issues.¹⁴² This may be a 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 make 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.¹⁴³ Because it is expensive to develop a factual basis sufficient to vindicate a rights claim to the extent that would be required in court, 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 one state's cultural heritage an object 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.¹⁴⁴ Until then, “[t]heir country’s significant history, so its people reasonably believed, began with the advent of Islam.”¹⁴⁵

¹⁴² Museum Interview 1, *supra* note 19.

¹⁴³ *Id.*

¹⁴⁴ 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).

¹⁴⁵ *Id.*

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 piece of cultural heritage. Most of the Apulian red-figure vases that have been documented in private or museum collections, for example, are believed to have been looted from Southern Italy.¹⁴⁶ 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.¹⁴⁷ Of whose cultural heritage are these vases a part? Even known looted items can become 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...”¹⁴⁸ Rights-claims are thus not easily resolvable in cultural property disputes, and yet, as the previous section 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, 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

¹⁴⁶ See R.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).

¹⁴⁷ See T. H. Carpenter, *Prolegomenon to the Study of Apulian Red-Figure Pottery*, 113 *AM. J. ARCHAEOLOGY* 27, 27 (2009).

¹⁴⁸ MARSTINE, *supra* note 132, at 2.

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 section 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. Section III of this paper 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.

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. According to Roger Fisher:

The 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.¹⁴⁹

Using interests rather than rights or power to frame cultural property disputes would escape these problems and would be a more productive way to resolve such disputes. This is the case because, as the discussion in Section 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

¹⁴⁹ Roger Fisher, *Coping with Conflict: What Kind of Theory Might Help*, 67 NOTRE DAME L. REV. 1335, 1339 (1991).

largely depends on the extent to which the resolution of their dispute meets the interests that led to their dispute initially.¹⁵⁰ Greater satisfaction with dispute outcomes leads to a better relationships between former disputants and a lower likelihood that the dispute will recur.¹⁵¹ Given parties seem to have recurrent disputes, promoting a focus on parties' interests is an important addition to the current dispute resolution paradigm. The next section focuses on how to promote an interest focus to achieve this, as well as on how to deal with rights claims more productively.

III. POTENTIAL HIGH-LEVEL SOLUTIONS

A. INTRODUCTION

This section analyzes a variety of approaches that could be adopted to address the problems raised by cultural property law's promotion of rights- and power-based dispute resolution. The approaches explored fall into two broad categories based on how the law would impact the resolution of the dispute. The first category consists of so called "shadow"-based approaches, relying on law as something that could be enforced by or against either of the parties. The options evaluated in this category essentially require parties to attempt alternative dispute resolution before litigating and so that section is largely a discussion of the merits of different dispute resolution systems that could be adapted. The other category consists of so-called "shade"-based approaches, relying on the law as something that shapes the discourse of disputes. These approaches generally seek to use the law to promote interest-based dispute resolution through the influence law exerts that is not related to its enforcement.

The overarching goal of the section is to evaluate what proposals might lead to a more interest-based approach to resolving cultural property disputes. A secondary criteria used in evaluating some of the proposals that introduce a different dispute resolution mechanism

¹⁵⁰ URY ET AL., *supra* note 121, at 13.

¹⁵¹ *Id.* at 14.

entirely, for example, litigation, mediation, and arbitration, is the extent to which these systems resolve rights-based claims more productively than the *status quo*. Implementation issues are also examined at a high-level.

B. SHADOW-BASED APPROACHES

1. Overview

Matching disputes to dispute resolution methods is a vast topic that this paper does not seek to address in great depth. Not only are the significant factors in making this match – the size and complexity of the claim, the relief sought, and the relationship of the parties, to name only a few –¹⁵² numerous, but space and time constraints do not allow for the thorough ground-up analysis necessary to deductively “fit the forum to the fuss.”¹⁵³ Therefore, rather than design a dispute resolution system for cultural property disputes from scratch, this section evaluates general approaches to resolving cultural property disputes that have either been previously proposed (e.g., litigation, arbitration and mediation), or that are used in other disputes (e.g., collaborative law). These proposals are evaluated based on how well the solutions would address the problems diagnosed by the analysis in Section II, which, even in the case of pre-existing proposals, is a novel approach to thinking about a cultural property dispute resolution framework. The intended result is to show what broad frameworks for a cultural property dispute system might be superior to the *status quo*.

¹⁵² See generally FRANK E. A. SANDER ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 434–37 (2d ed. 1992).

¹⁵³ See generally Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION JOURNAL 49 (1994).

This section proceeds from the most to the least binding of dispute resolution systems: litigation, arbitration, mediation, and negotiation. The discussion of the last category, negotiation, involves an examination of how parties might be bound (rather than guided, as advanced in the discussion of “shade”-based approaches) to pursue interest-based negotiation.

2. Options and Evaluation

a. Litigation

Goldberg, Sander, and Rogers state that disputes raising novel and important legal question are often best-suited for adjudication in court.¹⁵⁴ Within this vein, as Section II.C.2.a, *supra*, summarized, some cultural property law commentators have argued that the legal doctrine of cultural property disputes is underdeveloped in numerous areas, and hence many novel legal claims would be presented if more cultural property disputes reached a courtroom.¹⁵⁵ This claim, in fact, has been offered as a critique of using ADR – especially negotiation – to divert cultural property disputes from the courts. The critique posits that agreements reached outside of the courts are overly-advantageous to museums and, therefore, that resolving cultural property disputes outside of the courtroom does nothing to discourage museums’ continued acquisition of illicit antiquities.¹⁵⁶ The proposal that emerges from this critique is that source countries more frequently pursue their claims in court rather than settle them.¹⁵⁷

This proposal does not promote interest-based dispute resolution, especially compared to the *status quo* because courts would evaluate rights claims and not interests in resolving the increased number of disputes litigated. Using this section’s secondary criterion of whether the system resolves rights-claims more productively than the status quo, this proposal does not seem attractive either. Aside from the external critique of rights claims already offered in Section II.D, *supra*, an internal critique of the proposal is available through a simple examination of the interests of foreign governments. If it were the case that foreign governments could gain more favorable precedent by pursuing their claims in court rather than through negotiated settlements, then it is difficult to see why some have not already attempted to seek such a litigation strategy.

¹⁵⁴ *Id.* at 49–50.

¹⁵⁵ *See generally* Falkoff, *supra* note 87, at 293–304.

¹⁵⁶ *See id.* at 269.

¹⁵⁷ *See id.* at 304.

An explanation might be that this litigation strategy would be wrought with free-rider costs; individual plaintiffs would essentially be paying for favorable legal precedent for all possible future legal claimants. There are, however, countries that are already such frequent players in cultural property negotiations, such as Italy, Greece, and China,¹⁵⁸ that their likely benefit from such impact litigation would be high relative to the free rider costs. Perhaps, then, it is not the case that settlement is unfavorable to foreign governments. That these rational actors have not pursued such a strategy indicates that their interests – whether in relationships with museums, conserving resources, or others – are better served through non-litigious dispute resolution. More frequent litigation thus fails either to promote interest-based dispute resolution, or to more productively resolve rights claims than the *status quo*.

b. Arbitration

Arbitration offers several advantages over litigation and the *status quo*: it is better suited to productively disposing rights claims in the cultural property context. It can also promote interest-based dispute resolution.

Arbitration is well-suited for evaluating cultural property rights claims. Arbitration is thought to handle well disputes in which parties have a different view of the legal outcomes if a settlement is not reached.¹⁵⁹ This is presumably the situation of parties to a cultural property dispute, especially where a foreign government would file a complaint in court but for its resource constraints in prosecuting the claim. Even where the dispute does not center on the possible outcome in court, arbitration is cited as advantageous for disputes in which some

¹⁵⁸ On April 7, 2012 a search was performed on the website of the New York Times (<http://query.nytimes.com/search/sitesearch/>) with a date range “All Since 1851.” The search used the following phrase within the curly brackets: {[source country] antiquities museum claim}. A different source country was inserted within the square brackets in different instances of the search. Without any source country, there were 2,990 results. For each of the source countries that were inserted in the square brackets, the search returned the following number of results: Italy, 1,480; Greece, 1,310; China, 957; Egypt, 839; Turkey, 646; Mexico, 506; Iraq, 297; Syria, 2981; Thailand, 171; Cambodia, 145; Guatemala, 107; Armenia, 16.

¹⁵⁹ Sander & Goldberg, *supra* note 153, at 55–56.

fundamental understanding of the parties does not align. In the instance of cultural property disputes, this may often be an understanding of who owns culture, a confusion enhanced by evolving conceptions of national sovereignty and identity.¹⁶⁰

Arbitration also streamlines the presentation and evaluation of rights-claims. For instance, the rules of evidence and procedure need not apply in arbitration, increasing the amount of relevant information that can be provided in support of a rights-claim.¹⁶¹ Depending on how the arbitral body is created, jurisdictional issues that arise in ordinary cultural property disputes may be avoided by the *ex ante* contractual submission of the relevant parties to an arbitrator.¹⁶² The arbitral body will become specialized in its knowledge of cultural property law and will thus be able to understand the long-term impacts of its own decisions, paving a path for better rights-based decisions in future disputes.¹⁶³ Finally, assuming the arbitral body submits its decisions in writing, there will likely be a written record on which future rights claims made within negotiated cultural property dispute settlements can be based compared to the scant, existing case law.¹⁶⁴

Arbitration may also help to focus the dispute resolution process on interests. The arbitral body, as it becomes more specialized in its knowledge of cultural property law and the types of players involved will be able to have a better understanding of the claims raised by the parties and the interests that underlie those claims.¹⁶⁵ Depending on how the body is established, it may be able to operate independently from the influences of national and international politics.¹⁶⁶ This would help to strip the dispute process of some of the power-based claims

¹⁶⁰ Gegas, *supra* note 24, at 152–154.

¹⁶¹ *See id.* at 155.

¹⁶² *See id.* at 156.

¹⁶³ *See id.* at 155–56.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

currently present in cultural property disputes, and to focus the dispute on only the interests at play and not on extraneous interests unrelated to the dispute. Finally, the arbitrator could be able to provide equitable remedies that may not be available in normal judicial proceedings.¹⁶⁷ This could allow for creative dispute resolutions based on the interests of the parties rather than just upon a binary evaluation of rights claims. Arbitration is thus an attractive option for increasing the interest-focus of cultural property disputes. And that it is well-suited to the rights claims asserted in cultural property disputes makes it superior to litigation and the *status quo*.

The main practical difficulties with arbitration lie in establishing an arbitral body and ensuring participation by the typical parties to cultural property disputes. As the advantages to arbitration elaborated above demonstrate, uniformity is important to effective evaluation of rights claims and considerations of party interests. Therefore, it is important that there be only one arbitral body used in these types of disputes in order to prevent inconsistency.¹⁶⁸ The primary question is where this body should be located. An arbitral body that is within the United States would have the advantage, if established by U.S. law, of being able to compel submission to arbitration by U.S. museums. However, to the extent that involving the United States government in cultural property disputes between museums and foreign governments tends to derail value-creating dispute resolution,¹⁶⁹ locating the arbitral body in the United States could be counterproductive or would at least require careful design.

Establishing an international arbitrator is likely a better option for this reason, although doing so will also be complicated. An international arbitrator would have to gain party submission through either implementation of a treaty establishing the body in the United States, or through some other agreement that would bind U.S. museums and foreign governments to

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 154–55.

¹⁶⁹ Museum Interview 1, *supra* note 19.

submit to arbitration. The former option is unattractive given the relatively low level of international cultural property law that has been implemented in the United States, suggesting this might encounter domestic political opposition. The latter option would likely be cumbersome to implement, but could have the added benefit of including non-governmental actors – U.S. museums – in the international cultural property legal regime and associated discourse around the law.

Thus an international arbitrator established through agreements between U.S. museums and foreign governments, for example, under the auspices of UNESCO, could help to streamline the cultural property dispute resolution process and promote interest-based dispute resolution. UNESCO could help to provide the necessary funding and member states of UNESCO 1970 could provide skilled arbitrators.

c. Mediation

Mediation has the potential to focus cultural property dispute resolution on interests. First, mediation of disputes between U.S. museums and foreign governments could help to neutralize the encroachment of international or national political considerations into the dispute. Foreign negotiators can use mediators as a scapegoat, blaming politically unpopular outcomes on pressure applied by the mediator.¹⁷⁰ Mediators may also be persuasive to any constituents of the cultural property negotiators, for example, a museum's board of trustees or the foreign ministry on whose behalf a foreign government's cultural attaché is negotiating, that their power-based claims are untenable or at least value-destroying.¹⁷¹ To the extent a foreign government ropes in other issues of foreign policy not related to the cultural property possessed by the museum, a mediator can make explicit the issue linkage the foreign government is attempting and help to

¹⁷⁰ See Sander & Goldberg, *supra* note 153, at 57.

¹⁷¹ See *id.*

devise an agreement that does not lose sight of the interests surrounding the cultural property at the heart of the initial dispute.¹⁷²

Mediation may also align well with the secondary criterion of productively resolving rights-claims by helping divert some of the energy parties devote to making rights claims to focusing on interests. Mediation is well-suited to “reconciling (or bypassing) the seemingly conflicting values of the disputants by searching for a compromise that satisfies their differing interests.”¹⁷³ In the case of cultural property disputes, these conflicting values could manifest in the form of the cultural property nationalist position versus the cultural property internationalist position. Indeed, such a values conflict can create an emotionally tense environment (or at least an environment in which the relationship is quite strained). This is illustrated, for example, in 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.”¹⁷⁴ Although parties facing such values conflicts can often find agreements themselves, emotions can get in the way, and a skilled mediator may be necessary to finding a creative compromise.¹⁷⁵

Although “a skilled mediator can persuade the parties to put aside their factual dispute while at the same time agreeing on a mutually acceptable resolution of the dispute[,]” in some cultural property disputes determination of the facts may be essential to satisfactorily resolving the conflict. For example, in a case of direct museum involvement in antiquities trafficking,¹⁷⁶ it is unlikely that a process that urges parties to leave behind considerations of the factual

¹⁷² *Id.* at 57–58.

¹⁷³ *Id.* at 57.

¹⁷⁴ Quoted in John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1881 (1985).

¹⁷⁵ See Sander & Goldberg, *supra* note 153, at 57.

¹⁷⁶ *E.g.*, for five years, Italy prosecuted former Getty curator, Marion True, for knowingly purchasing antiquities that had been improperly excavated in and exported from Italy. The trial ended when an Italian court ruled that the statute of limitations on the alleged offenses had expired. Povoledo, *Rome Trial of Ex-Getty Curator Marion True Ends*, *supra* note 35, at C1.

circumstances will be acceptable to the foreign government. In those instances, arbitration or even litigation may be better suited to a fully satisfactory resolution of rights-claims.¹⁷⁷

But mediation may be an easier form of dispute resolution to implement than arbitration because its non-binding nature is thought to best respect state sovereignty.¹⁷⁸ This is important, some argue, because sovereignty concerns have led to resistance to fully implementing protections against trafficking on behalf of the countries to which illicit antiquities are often imported.¹⁷⁹ A non-binding regime would meet this interest of the so-called “market nations”

[b]ecause mediation does not require the application of any particular substantive law (such as the UNESCO Convention) unless the parties agree, market nations can begin mediation with the understanding that no law will force them to do anything to which they do not agree. This is quite different than arbitration or litigation because these mechanisms must apply to some type of binding substantive law.¹⁸⁰

To the extent that the United States shares the typical market nation concern over the international cultural property regime’s encroachment into state sovereignty, implementing mediation as a dispute resolution mechanism would meet the interest of an important third party to cultural property disputes between museums and foreign governments.

Additionally, with respect to implementation, the same question that arose for arbitration arises for mediation: where to locate the mediator? A U.S. government-provided mediator might be problematic for two reasons. First, the mediator might not be perceived as neutral by foreign parties to disputes with U.S. museums. Second, involving a U.S. government mediator would necessarily rope the U.S. government into more cultural property disputes. To the extent that the linkage of extraneous foreign policy issues is detrimental to interest-based dispute resolution, this roping-in might be unproductive.

¹⁷⁷ See Sander & Goldberg, *supra* note 153, at 56.

¹⁷⁸ See Nate Mealy, *Mediation’s Potential Role in International Cultural Property Disputes*, 26 OHIO ST. J. ON DISP. RESOL. 169, 196 (2011).

¹⁷⁹ See *id.*

¹⁸⁰ *Id.* at 196–98 (footnotes omitted).

An international mediator would overcome these disadvantages. The addition to this existing system may take on two possible designs. The first design would simply be to have UNESCO provide trained mediators to be available in museum-foreign government disputes. This might not require a major addition to the Convention as UNESCO 1970 already provides that upon disputing parties' request, UNESCO "may extend its good offices to reach a settlement between them."¹⁸¹ (Note that only states are parties to the convention, and so U.S. museums may not directly ask for assistance.) Adding museums to the parties able to receive assistance is not a major qualitative change either; in many countries museums are primarily nationally controlled, and hence the Convention already contemplates providing assistance in reaching settlements between governments and some museums. To encompass the disputes described in this paper, between U.S. museums, which are mostly privately-controlled, and foreign governments, the Convention would need to be modified to allow for intervention in disputes between a signatory and a private party, presumably still upon request of both parties.

A second design would likely be more controversial: to mandate that signatories making a claim on cultural property use UNESCO-provided mediators to mediate their claims before seeking to enforce the treaty through domestic litigation. There is a preliminary problem with this, namely that the treaty does not cover all cultural property disputes, just those regarding objects exported after 1970. Assuming that the convention could add a provision requiring mediation for any cultural property dispute, the breadth of such a requirement would likely raise sovereignty concerns for states seeking to pursue their bilateral foreign objectives independent of any international requirements. Source countries, however, might be encouraged by the potential benefits that mediation, or even just a more streamlined dispute resolution system could bring, and might be willing to accept such an addition to the convention for that reason. Market

¹⁸¹ UNESCO 1970, *supra* note 1, art. 17(5), 823 U.N.T.S. at 246.

nations, like the United States, might prefer ADR over the litigation threats their museums face, and might be amenable to such a proposal for that reason.

d. Negotiation

A critique that has been offered – and, indeed that has been supported in the preceding sections of this paper – of cultural property dispute resolution is that without the presence of some third party, disputants are unlikely to engage in interest-based negotiation on their own.¹⁸² Although this paper agrees that involving third parties, either through arbitration or mediation would be helpful, this paper diverges from those who are pessimistic about the capacity for cultural property disputants to take an interest-based approach to resolving their dispute through negotiation. The next subsection, on shade-based approaches, will explore some ways that the law might nudge disputants to take such an approach. This section, however, focuses on ways that the law can, through binding means, promote interest-based negotiation.

One way that this might happen is through an agreement or requirement that parties to a cultural property dispute resolve their dispute through collaborative law. Collaborative law negotiations are interest-based negotiations in that they are “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.”¹⁸³ In agreeing to engage in collaborative law, parties, along with their attorneys, agree to make every effort to resolve their dispute in good faith, without resorting to litigation.¹⁸⁴ If the foreign government and museum are unable to reach an agreement and decide to pursue litigation, the collaborative lawyers would withdraw

¹⁸² See, e.g., Mealy, *supra* note 178, at 200 (“[W]ithout the presence of a mediator, disputants have little impetus to discuss their interests in an honest and cooperative manner.”).

¹⁸³ 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).

¹⁸⁴ See *id.* at 65 (describing a North Carolina statute defining collaborative law).

and the foreign government and museum would seek different counsel for court proceedings.¹⁸⁵

Statutes or agreements governing collaborative law often provide for added layers of privilege and confidentiality to apply to the negotiation stage to encourage information sharing to quell parties' concerns about a possibility of litigation down the road. Collaborative law arrangements might provide, for instance, that

without the consent of the parties, any communication, statement, exchange or work product undertaken or arising from the collaborative law process by one of the parties, an attorney or any third-party expert, shall be privileged and inadmissible in any court proceeding thereafter.¹⁸⁶

Collaborative law is typically employed in divorce settlements, but the method of dispute resolution seems well-suited to cultural property disputes. Because cultural property disputes rarely reach any stage of litigation, parties essentially would bind themselves to undertake the full bargain they would be undertaking anyway except entirely in good faith and with a focus on interests. This also gives the addition of collaborative law to negotiation an advantage under the criterion of productively resolving rights-claims; parties will either more thoroughly disclose information such that resolving rights claims is more efficient, or they will, by agreement, set rights claims aside to focus on interests, with the understanding that they could later resolve those rights claims in court if the interest-based approach proves unsuccessful.

Moreover, the current structure of cultural property law could help to facilitate the deployment of collaborative law in cultural property dispute resolution. Countries, like parties to a divorce, could agree to use collaborative negotiation in resolving cultural property disputes.¹⁸⁷ Such an agreement could be universal, covering all future disputes, or *ad hoc*, being finalized

¹⁸⁵ Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1, 25 (2005).

¹⁸⁶ Lavi, *supra* note 183, at 65.

¹⁸⁷ Of course, the implementing agreement would need to take into consideration the different roles and ethical standards expected of lawyers in negotiations in different countries.

only at the outset of each individual dispute. A universal agreement would be difficult to draft or to add on to an existing international convention, such as UNESCO 1970, but would nevertheless have the advantages of covering a wide-array of disputes. This scheme could also be implemented in U.S. law: a party making a claim under the CPIA, for example, could be required to pursue negotiation in good faith before filing a claim in court.

Perhaps a simpler way to add collaborative law to cultural property negotiations could be through bilateral agreements between U.S. museums and foreign governments. A universal approach, in which a museum and foreign government essentially signed a contract stating they would resolve all cultural property disputes using collaborative law, would ensure the parties used interest-based approaches to negotiation into the future. The parties may be reticent to make such a commitment, however. The *ad hoc* approach, in which parties agreed to have collaborative law principles govern just one dispute, could avoid this problem. A challenge with this approach, however, would be in defining the scope of the single dispute the agreement intends to cover as, unlike in a divorce case, there may be no clear beginning or end to a cultural property dispute.

Any reticence on behalf of the parties to multilaterally or bilaterally agree to employ collaborative law in resolving their disputes, universally or *ad hoc*, seems unfounded. Given the low prevalence of litigation in the *status quo*, such collaborative or cooperative negotiation agreements would simply eliminate any of the bluffing, posturing, and boasting about litigation odds that precedes current cultural property dispute settlements. In cases that would otherwise not settle, collaborative law could help parties reach agreement; and in cases that would have settled anyway, parties would save resources that would otherwise be wasted in unproductive initial negotiations.

C. SHADE-BASED APPROACHES

1. Overview

The question this section addresses is in what ways can the law influence parties to engage in more interest-based dispute resolution independently of the law's prospects for enforcement? As elaborated in section 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.

2. Options and Evaluation

To the extent that the parties to the international regime of cultural property law could agree to add provisions for implementing any of the ADR proposals 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, the unproductive appeals foreign disputants make on the constituents of U.S. museums (or appeals to the U.S. government) would be less coercive,

and would thus be a less effective power-based approach, in the face of the countervailing international or domestic law norm of interest-based dispute resolution.

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. One possibility would be to add hortatory language to international conventions, such as UNESCO 1970 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,”¹⁸⁸ 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 “whereas there is value to respecting simultaneously both national sovereignty and universal access to cultural heritage ...” 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.

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 –¹⁸⁹ for resolving cultural property disputes suggests its member states pursue a resolution first through collaborative law, then, failing that, seek mediation and then arbitration, before resorting to litigation. Such a Recommendation would be

¹⁸⁸ UNESCO 1970, *supra* note 1, 823 U.N.T.S. at 232.

¹⁸⁹ UNESCO, STANDARD-SETTING INSTRUMENTS, http://portal.unesco.org/en/ev.php-URL_ID=12024&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited April 20, 2012).

effective, not because it would require implementation in the UNESCO member states (it would not require ratification),¹⁹⁰ 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 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.¹⁹¹ 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.

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 a willingness 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 influenced 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

¹⁹⁰ 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 April 20, 2012).

¹⁹¹ Cf. Anne-Marie Slaughter, *Everyday Global Governance*, 132 DAEDALUS 83, 85 (2003).

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 interest of the parties, mostly to unproductive results.

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. Using the aspect of law that is an enforceable set of rules to do so could take the form of the addition of alternative forms of dispute resolution to cultural property disputes. 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. The main problems with adding different methods of ADR to the existing legal regime have to do with how the methods would be implemented. A more detailed analysis of the hurdles to implementation and how they might be overcome is necessary for recommending a specific dispute system design. Nonetheless, the ADR methods are preferable to the *status quo* from an interest-based dispute resolution standpoint.

The aspect of law that shapes the discourse of dispute resolution could be molded to help to focus the dispute resolution process on the interests of 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.