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## COMMENT

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### THE *DURYODHANA* DILEMMA: *UNITED STATES v. A 10TH CENTURY CAMBODIAN SANDSTONE SCULPTURE* AND A PROPOSED CODE OF ETHICS-BASED RESPONSE TO REPATRIATION REQUESTS FOR AUCTION HOUSES

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### INTRODUCTION

On March 24, 2011, Sotheby's New York unexpectedly removed its showcase lot, the *Duryodhana*,<sup>1</sup> from its Indian & Southeast Asian auction scheduled to occur that same day.<sup>2</sup> This last-minute adjustment occurred in response to a letter received hours earlier from the Secretary General of Cambodia's National Commission for the United Nations Educational, Scientific and Cultural Organization (UNESCO), who alleged that the sculpture had been illegally removed from Cambodia and asked that Sotheby's delete the lot from the auction.<sup>3</sup> One year after Sotheby's voluntarily pulled the lot, the United States government filed a civil forfeiture action in the United States District Court for the Southern District of New York, *United States v. A 10th Century Cambodian Sandstone Sculpture*.<sup>4</sup> By filing this action, the U.S. government aimed to take title to the Khmer sculpture and return it to Cambodia.<sup>5</sup>

*United States v. A 10th Century Cambodian Sandstone Sculpture* is just one example of the repatriation requests from foreign countries that auction houses in the United States face each year. Some scholars report that

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<sup>1</sup> See *infra* Figure 1.

<sup>2</sup> Verified Amended Complaint at 21-22, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Apr. 9, 2013) [hereinafter Verified Amended Complaint]; Ann-Margret Gidley, *Cambodia's Repatriation Campaign*, 13 IFAR J., no. 4, 2012-2013, at 17, 17.

<sup>3</sup> Declaration of Peter G. Neiman in Support of Claimant's Motion to Dismiss, Ex. 4 at 1, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. June 5, 2012) [hereinafter June 5, 2012 Neiman Declaration] (offering as an exhibit a March 24, 2011 letter from Tan Theany, Sec'y Gen., Cambodian Nat'l Comm'n for UNESCO, to Sotheby's N.Y.); see also Verified Amended Complaint, *supra* note 2, at 22.

<sup>4</sup> Verified Complaint at 1-2, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Apr. 4, 2012).

<sup>5</sup> See PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 674 (3d ed. 2012) ("Civil forfeiture provides a flexible and useful tool for the government. . . . Forfeiture transfers title to the government, which, in the case of cultural objects, generally returns the object to its original owner.").

countries such as Cambodia have been mounting more repatriation requests in recent years.<sup>6</sup> Auction houses confronted with these repatriation requests must struggle through the ambiguities and deficiencies in the current law when deciding how to respond. As an alternative to the available legal response to repatriation requests, I propose that auction houses should develop a uniform code of ethics to guide their efforts in replying to these requests. Auction houses should look to the International Council of Museums' (ICOM) Code of Ethics for Museums<sup>7</sup> as a model for fashioning their own code of ethics. If all major auction houses voluntarily agree to adopt a uniform code of ethics, there would be fewer repatriation requests and less uncertainty surrounding compliance with the current complex web of laws and regulations that differ from country to country.

In Part I, I describe the background of the *Duryodhana*, including how the sculpture fits within the Cambodian cultural framework and Cambodian perceptions of property and ownership. I also summarize the litigation and recent settlement surrounding the sculpture, noting the parties' principal contested points that remain unresolved. In Part II, I outline the current legal response for addressing repatriation claims, including its deficiencies. In Part III, I propose that auction houses look to museums for guidance in order to remedy the unsettled and unsatisfactory state of this legal structure. By adopting a uniform code of ethics modeled after the ICOM Code of Ethics for Museums, auction houses will be better situated to avoid repatriation claims. Finally, I conclude by suggesting specific provisions that auction houses might adopt as a starting point for developing a uniform code of ethics.

## I. SOTHEBY'S INTERRUPTED SALE OF THE KHMER SCULPTURE, SUBSEQUENT LITIGATION, AND SETTLEMENT

### A. *Background on the Duryodhana, the Khmer Empire, and Cambodian Cultural Values*

The Khmer sculpture that is the defendant in rem in *United States v. A 10th Century Cambodian Sandstone Sculpture* depicts a Hindu warrior called

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<sup>6</sup> See Robert Bevan, *Playing Hardball with Soft Power*, ART NEWSPAPER, Oct. 2013, at 26 ("One factor [in the increase in repatriation requests from countries such as Cambodia, India, and China] is the growing awareness of the role that cultural artefacts can play in forging national identities. This is especially true where countries are emerging from internal or external conflicts and are looking to culture to provide social cement or to legitimate a cohesive future for a nation-state based on the relics of past greatness.").

<sup>7</sup> INT'L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2013), available at [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code\\_ethics2013\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf).

the *Duryodhana*.<sup>8</sup> The *Duryodhana* comes from the Prasat Chen temple in Koh Ker, an archaeological site located in northern Cambodia.<sup>9</sup> Within the Prasat Chen temple, the *Duryodhana* originally stood face-to-face with a second sculpture called the *Bhima*, placed so as to “depict[] [the warriors] at the moment of preparation for their epic battle.”<sup>10</sup>

Both the *Duryodhana* and the *Bhima* were created during Jayavarman IV’s rule of the Khmer Empire,<sup>11</sup> which lasted from AD 928 to 942.<sup>12</sup> At the Khmer Empire’s peak, the territory reached “from Burma to Indochina and from China to Malaysia.”<sup>13</sup> Jayavarman IV, who transferred the Empire’s capital from Angkor to Koh Ker, favored grand and elaborate styles of art and architecture, which are showcased at Prasat Chen and other temples of Koh Ker.<sup>14</sup> The *Duryodhana*, with its limbs poised for action, embodies the unique Koh Ker style, which one Phnom Penh-based UNESCO agent has admired for its “freedom of sculpting things out of the frame.”<sup>15</sup>

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<sup>8</sup> Gidley, *supra* note 2, at 17-18. The defendant in an in rem action is the sculpture itself. See GERSTENBLITH, *supra* note 5, at 674. Sotheby’s was able to join the in rem proceeding as a claimant “with an interest in the property.” *Id.*

<sup>9</sup> Verified Amended Complaint, *supra* note 2, at 3-4.

<sup>10</sup> *Id.* at 4; see also *infra* Figure 2. For a description of the *Duryodhana*’s original location within Prasat Chen, see Anthony Kuhn, *Cambodia vs. Sotheby’s in a Battle Over Antiquities*, NPR (Oct. 23, 2012, 1:56 PM), <http://www.npr.org/2012/10/23/163007250/cambodia-vs-sothebys-in-a-battle-over-antiquities>, archived at <http://perma.cc/8N9S-JABZ>. The Norton Simon Museum in Pasadena, California acquired the *Bhima* in 1976. Press Release, Norton Simon Museum, Statement from the Norton Simon Museum and the Norton Simon Art Foundation Concerning the “Temple Wrestler” (May 6, 2014), available at <http://www.nortonsimon.org/assets/Uploads/Norton-Simon-MuseumBhima-Press-Release-05-06-14.pdf>. Norton Simon Museum officials visited Cambodia and, in early May 2014, the Norton Simon announced its decision to return the *Bhima*, even though it maintained that a “good faith disagreement” regarding the sculpture’s ownership and Cambodian law still existed. *Id.* Meanwhile, the auction house Christie’s voluntarily returned a Khmer sculpture that it sold to a collector in 2009 and then repurchased with the objective of returning it to Cambodia. Tom Mashberg & Ralph Blumenthal, *Christie’s To Return Cambodian Statue*, N.Y. TIMES, May 7, 2014, at C1.

<sup>11</sup> Verified Amended Complaint, *supra* note 2, at 3-5; see also IAN MABBET & DAVID CHANDLER, *THE KHMERS* 3 (1995) (explaining that the term “Khmer” denotes “both the language of Cambodia and the people who speak it”).

<sup>12</sup> HELEN IBBITSON JESSUP, *ART & ARCHITECTURE OF CAMBODIA* 89 (2004).

<sup>13</sup> William Chapman, “*The Best Laid Schemes . . .*”: *Land-Use Planning and Historic Preservation in Cambodia*, 7 PAC. RIM L. & POL’Y J. 529, 535 (1998).

<sup>14</sup> See JESSUP, *supra* note 12, at 89-91 (“[T]he huge royal complex of Koh Ker is perhaps the embodiment of [Jayavarman IV]’s need to demonstrate great power through large-scale architecture. Everything about Koh Ker . . . is on a massive scale.”); see also Tom Mashberg, *Cambodia Presses U.S. Museums to Relinquish Antiquities*, N.Y. TIMES, May 16, 2013, at C7 (describing how Chan Tani, Cambodia’s Secretary of State, characterized the looting of Koh Ker as “especially crushing because its style of statuary exists nowhere else”).

<sup>15</sup> Kuhn, *supra* note 10.

To more fully understand the significance of the *Duryodhana* to the history of cultural property in Cambodia, it is important to note the distinct aspects of Cambodian constructs of culture and art. The Cambodian culture's values of hierarchy, collective heritage, and ancestry have influenced the country's art and architecture.<sup>16</sup> More specifically, art and architecture from the Khmer Empire were designed to reflect the empire's "'glorious' and 'prosperous' period."<sup>17</sup> Thus, references to the glorious Khmer Era strongly influence Cambodia's cultural identity today.<sup>18</sup> Although Cambodian culture has always placed great value on ancestry and ties to the past, the country did not issue many repatriation claims until recent years,<sup>19</sup> when its political situation stabilized after the Khmer Rouge era and the Second Civil War.<sup>20</sup> As Cambodia's Prince Ravivaddhana Sisowath has admitted, "the preservation of ancient things is not part of [Cambodia's] traditional culture," and it was only after the designation of Angkor as a World Heritage site in 1995 that "a deeper consciousness developed among the people of Cambodia, who began to take pride in their antiquities."<sup>21</sup> The combination of a deeper consciousness regarding Cambodia's patrimony<sup>22</sup> and the stabilization of the country's political situation has contributed to a rise in repatriation requests, such as the request issued to Sotheby's.

### B. *Sotheby's March 2011 Auction*

Sotheby's planned to auction the *Duryodhana* as the centerpiece of its March 2011 Indian & Southeast Asian auction. In 2010, Ms. Decia Ruspoli, a Belgian widow whose late husband bought the *Duryodhana* from a London

<sup>16</sup> Keiko Miura, *From Property to Heritage: Different Notions, Rules of Ownership and Practices of New and Old Actors in the Angkor World Heritage Site*, in *WORLD HERITAGE ANGKOR AND BEYOND: CIRCUMSTANCES AND IMPLICATIONS OF UNESCO LISTINGS IN CAMBODIA* 97, 101-07 (Brigitta Hauser-Schäublin ed., 2011).

<sup>17</sup> Aditya Eggert, *A Cambodian "Leitkultur"?: Cambodian Concepts of Art & Culture*, in *WORLD HERITAGE ANGKOR AND BEYOND: CIRCUMSTANCES AND IMPLICATIONS OF UNESCO LISTINGS IN CAMBODIA*, *supra* note 16, at 73, 75, 77.

<sup>18</sup> *Id.*

<sup>19</sup> Bevan, *supra* note 6, at 26.

<sup>20</sup> See generally JUSTIN CORFIELD, *THE HISTORY OF CAMBODIA* (2009).

<sup>21</sup> Noah Charney, "Preserving Patrimony": Prince Ravivaddhana Sisowath on the Heritage of Cambodian Art, *BLOUIN ARTINFO* (Dec. 26, 2012, 1:06 AM), <http://www.blouinartinfo.com/news/story/846970/preserving-patrimony-prince-ravivaddhana-sisowath-on-the>, archived at <http://perma.cc/3DR4-E2FX>.

<sup>22</sup> For further analysis of the evolution of the public perception of repatriation requests, see Abby Seiff, *How Countries Are Successfully Using the Law to Get Looted Cultural Treasures Back*, *ABA J.* (July 1, 2014, 10:40 AM), [http://www.abajournal.com/magazine/article/how\\_countries\\_are\\_successfully\\_using\\_the\\_law\\_to\\_get\\_looted\\_cultural\\_treasur](http://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasur), archived at <http://perma.cc/6N2X-YFET>.

auction house in 1975, consigned the sculpture to Sotheby's.<sup>23</sup> Sotheby's considered the *Duryodhana* to be so impressive that it featured the sculpture on the cover of the auction catalogue.<sup>24</sup> The catalogue entry, which listed the estimated hammer price at \$2-3 million, described the sculpture as one of the "great masterpieces of Khmer art, unequaled by image from any other period in [its] portrayal of drama and potential action."<sup>25</sup> Cambodia's repatriation request interrupted the potential sale of the *Duryodhana*, and the U.S. government eventually filed a civil forfeiture action against the defendant in rem.<sup>26</sup> Sotheby's joined the suit as a claimant per the terms of its consignment agreement with Ms. Ruspoli.<sup>27</sup>

### C. *Ensuing Litigation*

In its Verified Amended Complaint, the United States offered three main allegations surrounding the *Duryodhana*. First, the government alleged that the sculpture was looted from Prasat Chen in 1972 by a Thai network that transported the sculpture in two pieces (the head and the torso) to a dealer in Bangkok, who then sold the sculpture to a collector.<sup>28</sup> Second, the government alleged that the collector consigned the *Duryodhana* to a British auction house, which knew that the sculpture had been stolen when it sold it to the Ruspolis in 1975.<sup>29</sup> Finally, the government alleged that Sotheby's made inaccurate representations about the *Duryodhana*'s provenance when it attempted to sell the sculpture at auction in 2011.<sup>30</sup>

One of the principal disputed points between the parties, left unresolved by the settlement, is whether Cambodian law effective at the time of the sculpture's removal from the country actually confers ownership of the sculpture on the Cambodian government or whether the law merely functions as a classification order.<sup>31</sup> If the former is true, then the United States would have had a greater chance of successfully invoking the provisions of

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<sup>23</sup> Verified Amended Complaint, *supra* note 2, at 9-11 (describing Sotheby's acquisition of the sculpture).

<sup>24</sup> *Id.* at 20-21.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1.

<sup>27</sup> *Id.* at 11-12; David L. Hall, Partner, Wiggin & Dana LLP, Remarks at the University of Pennsylvania Law School Art, Cultural Heritage & the Law Seminar (Oct. 30, 2013) (notes on file with author).

<sup>28</sup> Verified Amended Complaint, *supra* note 2, at 8.

<sup>29</sup> *Id.* at 8-9.

<sup>30</sup> *Id.* at 22-23.

<sup>31</sup> See *infra* Section II.F.

the National Stolen Property Act (NSPA) had the case not settled.<sup>32</sup> If the latter is true, by contrast, the government would have had a much more difficult time convincing the court to grant the forfeiture.<sup>33</sup>

According to the claimants, Cambodian law did not explicitly claim national ownership of antiquities until 1992.<sup>34</sup> The Cambodian government, on the other hand, alleged that French colonial decrees from 1900<sup>35</sup> and 1925<sup>36</sup> are ownership laws, which would mean that the sculpture was government property when it left Cambodia.

After filing their Joint Answer in May 2013, Sotheby's and Ms. Ruspoli filed a Motion for Judgment on the Pleadings and a Stay of Discovery in September 2013.<sup>37</sup> As part of this motion, the claimants included an affidavit from Professor Alexandre Deroche, a French law professor with expertise in property law that governed French colonies,<sup>38</sup> whom the claimants retained to provide opinions on the 1900 and 1925 decrees pursuant to Federal Rule of Civil Procedure 44.1.<sup>39</sup> The claimants relied upon Professor

<sup>32</sup> See *infra* Section II.F.

<sup>33</sup> See *infra* Section II.F.

<sup>34</sup> See Reply Memorandum of Law in Support of Claimants' Sotheby's Inc. & Ms. Ruspoli di Poggio Suasa's Motion to Dismiss at 9, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Sept. 17, 2012) (describing Cambodia's enactment of a 1992 law making cultural patrimonies property of the state); see also Declaration of Peter G. Neiman in Support of Claimants' Reply Memorandum of Law in Support of Their Motion to Dismiss, Ex. 2 at 1, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Sept. 17, 2012) (noting that Article 4 of the 1992 law explicitly states that "[t]he mineral, cultural and historical patrimonies underground, on the ground . . . are property of this state").

<sup>35</sup> Arrêté du 9 mars 1900 relatif à conservation en Indochine des monuments et objets ayant un intérêt historique ou artistique [Decree of March 9, 1900 Relating to Conservation in Indochina of Monuments and Objects of Historical or Artistic Interest], *JOURNAL OFFICIEL DE L'INDOCHINE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRENCH INDOCHINA]*, 1900, p. 502; June 5, 2012 Neiman Declaration, *supra* note 3, Ex. 8 at 6 (translating Article 17 of the March 9, 1900 order as stating that "ownership of art or archaeological objects . . . which may exist on or in the soil of immovable properties constituting a part of the national domain in Indochina . . . shall be reserved for the domain").

<sup>36</sup> *E.g.*, Arrêté du 16 mai 1925 portant classement des monuments historiques de l'Indochine [Decree of May 16, 1925 on the Classification of the Historical Monuments of Indochina] *JOURNAL OFFICIEL DE L'INDOCHINE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRENCH INDOCHINA]*, 1925, p. 1754; see also Declaration of Prof. Alexandre Deroche at 7, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Sept. 9, 2013) (translating Article 1 of the May 16, 1925 order as stating that "[t]he real estate and tangible moveable items located within the territorial limits of the Indochinese Union . . . are classified among the monuments and historic objects of French Indochina").

<sup>37</sup> Memorandum of Law in Support of Claimants' Motion for Judgment on the Pleadings & for a Stay of Discovery, *United States v. A 10th Century Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Sept. 9, 2013) [hereinafter Sept. 9, 2013 Memorandum of Law].

<sup>38</sup> *Id.* at 2.

<sup>39</sup> See FED. R. CIV. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony . . .").



Deroche's affidavit to argue that the 1925 decree is a classification order.<sup>40</sup> The claimants asserted Professor Deroche's position that the phrase "of French Indochina" in the 1925 decree signifies that the property is "located in" French Indochina rather than "belonging to" French Indochina, as the U.S. government interpreted the phrase.<sup>41</sup>

In addition to the issue regarding the ownership laws, other points of contention between the parties included (1) the date on which the sculpture actually left Cambodia,<sup>42</sup> (2) whether Sotheby's knew that the sculpture was stolen,<sup>43</sup> and (3) whether Cambodia had enforced the French colonial decrees in the past.<sup>44</sup>

#### D. *A Politically Motivated Dispute?*

Another significant aspect of the litigation is that, based on the facts of the case and the applicable law,<sup>45</sup> there is a question as to whether political motives contributed to the United States' decision to initiate this lawsuit. During litigation, the claimants revealed that Sotheby's and the Cambodian government had been involved in negotiating a settlement, which fell apart

<sup>40</sup> See Sept. 9, 2013 Memorandum of Law, *supra* note 37, at 20-21 ("[T]he 16 May [1925] order is a classification order . . .").

<sup>41</sup> *Id.* at 20-21; see also Declaration of Prof. Alexandre Deroche, *supra* note 36, at 7-9 (explaining that the language of the 1925 order describes geographic location rather than asserts ownership).

<sup>42</sup> The United States claimed that the sculpture was looted "[i]n or around" 1972, see Verified Amended Complaint, *supra* note 2, at 8, whereas Sotheby's claimed that it had "located two individuals (neither of whom have any financial interest in the property) both of whom personally saw the Sculpture in London in the late 1960's," Declaration of Peter G. Neiman in Support of Claimants' Motion for Judgment on the Pleadings & for a Stay of Discovery, Ex. 4 at 3, United States v. A 10th Century Cambodian Sandstone Sculpture, No. 12-2600 (S.D.N.Y. Sept. 9, 2013) [hereinafter Sept. 9, 2013 Neiman Declaration] (offering as an exhibit a March 30, 2011 letter from Jane A. Levine, Senior Vice President & Worldwide Dir. of Compliance, Sotheby's, to Anne Lemaistre, UNESCO Rep., Cambodia). The government's claim that the statue was looted "[i]n or around" 1972 is significant because Cambodia ratified the 1970 UNESCO Convention in 1972. See Joint Answer of Claimants Sotheby's, Inc. & Ms. Decia Ruspoli di Poggio Suasa at 10, United States v. A 10th Century Cambodian Sandstone Sculpture, No. 12-2600 (S.D.N.Y. May 6, 2013) [hereinafter Joint Answer of Claimants] (admitting that Cambodia ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property on September 26, 1972).

<sup>43</sup> Compare Verified Amended Complaint, *supra* note 2, at 22 (alleging that "Sotheby's provided inaccurate information regarding its provenance to numerous parties"), with Joint Answer of Claimants, *supra* note 42, at 8 (denying this allegation).

<sup>44</sup> Compare Verified Amended Complaint, *supra* note 2, at 27 (alleging that "in 1924 two Frenchmen . . . were prosecuted and convicted for theft for taking eleven sculptures from a temple in the Angkor region"), with Joint Answer of Claimants, *supra* note 42, at 10-11 (alleging that Cambodia had neither previously sought the return of objects similar to the statue nor "relied upon the legal theory or French colonial decrees discussed in the Verified Amended Complaint").

<sup>45</sup> See *infra* Section II.

at the urging of the U.S. government.<sup>46</sup> After the Secretary General of Cambodia's National Commission for UNESCO sent a letter to Sotheby's requesting that it remove the *Duryodhana* from auction, Sotheby's responded in May 2011 with three potential suggestions for future action: (1) Sotheby's could put the *Duryodhana* up for public auction again that upcoming fall and donate a share of the proceeds to conservation initiatives at Koh Ker; (2) either a private individual or the Cambodian government could purchase the *Duryodhana* through a private sale, after which the purchaser would repatriate the sculpture to Cambodia; or (3) Sotheby's could sell the *Duryodhana* to a museum in a private sale for the purpose of initiating a program of cultural exchange with Cambodian museums.<sup>47</sup> In reply, the Cambodian government expressed its "appreciation of Sotheby's wish to contribute to the cause of preservation and conservation of Khmer cultural heritage" and acknowledged that it was exploring Sotheby's second option, a private sale for the purpose of repatriation to Cambodia.<sup>48</sup>

As the negotiations between Sotheby's and the Cambodian government progressed, a special agent from the Department of Homeland Security emailed an INTERPOL official to express his desire that "prior to the Cambodians getting their hands on it, we should be the vehicle utilized for that return. Not an Auction house."<sup>49</sup> A little over a month later, the special agent wrote to the Director General of the Cambodian General Department of Cultural Heritage, requesting that he "[p]lease stop negotiating with Sotheby's if [he] wish[ed] for [the United States] to successfully finish [its] investigation."<sup>50</sup> Even more puzzling is the Special Agent's April 2011 email to Sotheby's declaring, "We now have probable cause that the item was

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<sup>46</sup> See Sept. 9, 2013 Memorandum of Law, *supra* note 37, at 2 (noting that the U.S. government "ultimately demanded that Cambodia 'stop negotiating with Sotheby's'").

<sup>47</sup> See Sept. 9, 2013 Neiman Declaration, *supra* note 42, Ex. 4 at 3-4 (offering as an exhibit a March 30, 2011 letter from Jane A. Levine to Anne Lemaistre, which outlines three proposed courses of action as a compromise between the sale of the sculpture and the preservation of Khmer sites and artifacts).

<sup>48</sup> *Id.* at Ex. 7 at 2 (offering as an exhibit a May 15, 2011 letter from Him Chhem, Minister of Culture & Fine Arts, Kingdom of Cambodia, to Jane Levine, Senior Vice President & Worldwide Dir. of Compliance, Sotheby's).

<sup>49</sup> *Id.* at Ex. 8 at 3 (offering as an exhibit a May 10, 2011 e-mail from Brenton M. Easter, Special Agent, Dep't of Homeland Sec., to Gloria A. Ford, Program Manager, Cultural Property Crimes Program, INTERPOL).

<sup>50</sup> *Id.* at Ex. 10 at 2 (offering as an exhibit a June 29, 2011 e-mail from Brenton M. Easter, Special Agent, Dep't of Homeland Sec., to Hab Touch, Dir. Gen., Gen. Dep't of Cultural Heritage, Ministry of Culture & Fine Arts, Kingdom of Cambodia).

stolen after Cambodian cultural patrimony laws were enacted.”<sup>51</sup> Yet almost a month later, the Special Agent emailed a law professor asking “[C]an you help us find the actual cultural property laws that protect Cambodian antiquities prior to 1975?”<sup>52</sup> This correspondence suggests that political motivations may have contributed to the government’s decision to pursue this action vigorously.

Another instance where political motives may have played a role relates to a pair of Khmer sculptures from the Prasat Chen temple that the Metropolitan Museum of Art (the Met) owned until recently. In May 2013, the Met voluntarily repatriated this pair of sculptures to Cambodia.<sup>53</sup> According to the Met’s press release, the *Kneeling Attendants* had been at the museum since the late 1980s to early 1990s and were allegedly looted from the Koh Ker temple site as well.<sup>54</sup> Although the press release mentioned that the decision to repatriate was influenced by newly acquired information, the museum was silent on the nature of that information.<sup>55</sup> *The New York Times*, however, reported that the additional information included witness statements and photographs depicting the bases from which the sculptures had allegedly been removed.<sup>56</sup>

More recently, in May 2014, the Norton Simon Museum in Pasadena decided to return the *Bhima* to Cambodia.<sup>57</sup> The Norton Simon had owned the *Bhima* since 1976, when it “properly acquired” the sculpture from a New York dealer.<sup>58</sup> An attorney at the Norton Simon maintains that although “there are extremely strong legal arguments for why [the Norton Simon] could defeat a claim, and . . . Cambodian law is ambiguous at best, . . . it seems appropriate and in keeping with the positive relationship the Norton

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<sup>51</sup> *Id.* at Ex. 5 at 2 (offering as an exhibit an April 1, 2011 e-mail from Brenton M. Easter, Special Agent, Dep’t of Homeland Sec., to Jane Levine, Senior Vice President & Worldwide Dir. of Compliance, Sotheby’s).

<sup>52</sup> *Id.* at Ex. 6 at 2 (offering as an exhibit an April 19, 2011 e-mail from Brenton M. Easter, Special Agent, Dep’t of Homeland Sec., to Prof. Christian Fischer, UCLA).

<sup>53</sup> See generally Press Release, Metro. Museum of Art, Metropolitan Museum of Art to Return Two Khmer Sculptures to Cambodia (May 3, 2013), <http://www.metmuseum.org/about-the-museum/press-room/news/2013/Cambodian-returns>, archived at <http://perma.cc/7VER-6KWU>.

<sup>54</sup> *Id.* For a depiction of one of the statues that the Met returned to Cambodia, see *infra* Figure 4.

<sup>55</sup> Press Release, Metro. Museum of Art, *supra* note 53.

<sup>56</sup> See Tom Mashberg & Ralph Blumenthal, *The Met Plans to Return Art to Cambodia*, N.Y. TIMES, May 4, 2013, at A1 (outlining the evidence offered by Cambodia).

<sup>57</sup> See Press Release, Norton Simon Museum, *supra* note 10 (noting that the return of the statue was a “gesture of friendship, and in response to a unique and compelling request by top officials in Cambodia to help rebuild its ‘soul’ as a nation”).

<sup>58</sup> *Id.*

Simon has had with Cambodia over the years to gift the statue to [Cambodia].”<sup>59</sup>

There are a variety of reasons why both the Met and the Norton Simon may have ultimately decided to repatriate the Khmer sculptures. If the Met’s sculptures were actually located in Cambodia until the 1980s, it is possible that they were illegally removed from the country in violation of the 1970 UNESCO Convention. Alternatively, the museums may have faced political pressure similar to that which Sotheby’s confronted and may have desired to avoid the costs associated with extensive litigation and negative publicity.<sup>60</sup> Finally, the museums may have returned these sculptures to maintain favorable relationships with the Cambodian government and art institutions.<sup>61</sup> In any case, in addition to any legal considerations, the museums’ decisions to voluntarily repatriate the sculptures may be indicative of the effects of political pressure felt by art institutions facing mounting repatriation requests.

#### E. Settlement

After Sotheby’s and Ms. Ruspoli filed their Motion for Judgment on the Pleadings and for a Stay of Discovery in September 2013, Judge Daniels entered several orders that delayed further discovery throughout October, November, and early December.<sup>62</sup> Finally, on December 13, 2013, the parties

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<sup>59</sup> Mike Boehm, *Asian Statue Heads Home; The Norton Simon’s Familiar “Temple Wrestler” Will Roost Again in Cambodia*, L.A. TIMES, May 21, 2014, at D1.

<sup>60</sup> Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 425 (2003).

<sup>61</sup> A special exhibition called “Lost Kingdoms: Hindu-Buddhist Sculpture of Early Southeast Asia, 5th to 8th Century” opened at the Met in April 2014. Press Release, Metro. Museum of Art, *Lost Kingdoms: Hindu-Buddhist Sculpture of Early Southeast Asia, 5th to 8th Century*: April 14–July 27, 2014 (Apr. 9, 2014), <http://www.metmuseum.org/about-the-museum/press-room/exhibitions/2014/lost-kingdoms>, archived at <http://perma.cc/MPZ3-E59C>. The exhibition contained sculptures loaned by Cambodia. See Holland Cotter, *Gathering of Gods from Places Long Forgotten*, N.Y. TIMES, Apr. 11, 2014, at C23 (“Most of its 160 sculptures, monumental and minute, are national treasures in an unprecedented transmigration from Cambodia, Indonesia, Thailand and Vietnam.”).

<sup>62</sup> See Order, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Dec. 9, 2013) (adjourning the pretrial conference scheduled for December 10, 2013, to February 13, 2014); Order, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Nov. 26, 2013) (extending all motion and discovery deadlines by one week at the parties’ request); Order, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Nov. 4, 2013) (extending all motion and discovery deadlines by three weeks at the parties’ request); Order, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Oct. 10, 2013) (extending deadlines with respect to claimants’ motion for judgment on the pleadings as a result of the federal government shutdown).

reached a settlement.<sup>63</sup> Despite resolving several significant issues, the settlement failed to resolve the uncertainties regarding the government's potential political motivations and the contested points between the parties.<sup>64</sup>

The agreement did, however, achieve certain notable accomplishments. First, Sotheby's and Ms. Ruspoli agreed to voluntarily return the sculpture to Cambodia within ninety days of the settlement.<sup>65</sup> Second, both parties agreed that a "good faith disagreement" still exists about whether the various decrees ever conferred ownership of the sculpture to Cambodia.<sup>66</sup> Third, the United States conceded that neither Sotheby's nor Ms. Ruspoli "knew or believed that the Statue was owned by the Kingdom of Cambodia."<sup>67</sup> Finally, the judge dismissed the forfeiture action with prejudice and stipulated that the government would not file any additional claims regarding the *Duryodhana*.<sup>68</sup>

Publicly, both Sotheby's and Cambodia appear satisfied with the settlement. A Sotheby's representative maintained that "the agreement confirms that Sotheby's and its client acted properly at all times," while Cambodia's secretary of state publicized that the country was "very pleased with the help from the American government."<sup>69</sup> From a legal perspective, however, the settlement is unsatisfying because it precluded Judge Daniels from ruling on the disputed interpretations of the French colonial decrees, as well as the application of the NSPA to future restitution requests and other cultural property disputes.<sup>70</sup> The settlement's failure to resolve these legal issues accentuates the need to examine the current legal landscape surrounding repatriation requests and to determine steps that could potentially ensure that auction houses do not face similar requests in the future.

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<sup>63</sup> Stipulation and Order of Settlement, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12-2600 (S.D.N.Y. Dec. 13, 2013).

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* at 3 ("Within 90 days of the entry of this Stipulation and Order of Settlement, Sotheby's shall transfer the Statue to a representative of the Kingdom of Cambodia in New York.").

<sup>66</sup> *See id.* at 2 ("Sotheby's and Ms. Ruspoli have a good faith disagreement with the United States regarding whether the Kingdom of Cambodia owned the Statue.").

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3.

<sup>69</sup> Mashberg & Blumenthal, *supra* note 10, at C1.

<sup>70</sup> *See infra* Section II.F for a further exploration of the NSPA and its application to cultural property disputes.

## II. LAW APPLICABLE TO THE GOVERNMENT'S FORFEITURE ACTION

In initiating this forfeiture action against the defendant *in rem*, the United States invoked various provisions of the United States Code.<sup>71</sup> Because of certain legal impediments to filing this action,<sup>72</sup> the government assembled a somewhat intricate puzzle of code provisions. Forfeiture is unique in that “[t]here is no general forfeiture law; rather, the penalty of forfeiture must be provided within the particular statute that is violated.”<sup>73</sup> Most notably, the government based its claim on a provision titled “Proceeds of All Specified Unlawful Activity,” which subjects to forfeiture “[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting ‘specified unlawful activity.’”<sup>74</sup> Specified unlawful activity, through an additional step that invokes a money laundering statute, is then defined to include violations of the NSPA.<sup>75</sup>

Many advantages follow from the government’s ability to invoke these provisions in its forfeiture action against the defendant *in rem*. First, following the implementation of the Civil Asset Forfeiture Reform Act<sup>76</sup> in 2000, the government can hold that the “proceeds of a violation of the National Stolen Property Act . . . are directly forfeitable under 18 U.S.C. § 981(a)(1)(C).”<sup>77</sup> Second, in a civil forfeiture action, the government must prove its case by only a preponderance of the evidence—a *civil* burden of proof—even when alleging a violation of the NSPA, a criminal statute.<sup>78</sup>

<sup>71</sup> See Verified Amended Complaint, *supra* note 2, at 28-30 (enumerating the provisions of the United States Code upon which the forfeiture complaint was based, i.e., 18 U.S.C. § 545, 18 U.S.C. §§ 2314–2315, 19 U.S.C. § 1595a(c), and 18 U.S.C. § 981(a)(1)(C)).

<sup>72</sup> See *supra* text accompanying notes 79-81.

<sup>73</sup> GERSTENBLITH, *supra* note 5, at 673.

<sup>74</sup> 18 U.S.C. § 981(a)(1)(C) (2006) (emphasis added).

<sup>75</sup> For the definition of “specified unlawful activity,” see 18 U.S.C. § 1956(c)(7)(A) (2006), which includes “any act or activity constituting an offense listed in section 1961(1) of this title.” Section 1961(1) then outlines that “‘racketeering activity’ means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . sections 2314 and 2315.” 18 U.S.C. § 1961(1)(B)(2006) (emphasis added).

<sup>76</sup> Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. § 981 (2012)).

<sup>77</sup> GERSTENBLITH, *supra* note 5, at 675.

<sup>78</sup> See Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 132 n.54 (2010) (“An advantage to bringing a civil forfeiture *in rem* action is the lower burden of proof: the United States must prove that a crime has occurred under the lower civil standard (preponderance of the evidence) rather than the more stringent criminal standard (beyond a reasonable doubt).”).

Finally, the NSPA is the only statute applicable to this civil forfeiture action that applies retroactively.<sup>79</sup>

The government must resort to alleging a violation of the NSPA because the Convention on Cultural Property Implementation Act of 1983 (CCPIA)<sup>80</sup>—the United States’ implementation of the 1970 UNESCO Convention—and the Memorandum of Understanding (MOU) between Cambodia and the United States do not apply. These agreements and the CCPIA were all passed or ratified after the period during which the *Duryodhana* is alleged to have left Cambodia, between the late 1960s and 1972, and they do not apply retroactively.<sup>81</sup> Although these sources do not apply to the *Duryodhana*, an overview of their scope and implications provides a background for how they could apply to similar cultural property disputes or restitution requests in the future.

A. *The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*

The 1970 UNESCO Convention bolsters countries’ existing import and export restrictions in an effort to limit the illicit trade in cultural property.<sup>82</sup> It defines cultural property broadly to include any property “which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or sci-

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<sup>79</sup> 18 U.S.C. § 545, which criminalizes smuggling, is also favorable to the government. “Proof of defendant’s possession of such goods” creates a rebuttable presumption of guilty knowledge. 18 U.S.C. § 545 (2006); *see also* 14 FEDERAL PROCEDURE: LAWYERS EDITION § 37:1134 (2011) (“Proof of the defendant’s possession of such goods, unless explained to the satisfaction of the jury, is deemed evidence sufficient to authorize conviction for violation of smuggling goods into the United States.”).

<sup>80</sup> Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613 (2012)).

<sup>81</sup> *See id.*; Memorandum of Understanding Concerning the Imposition of Import Restrictions on Khmer Archaeological Material, U.S.–Cambodia, art. 1(C), Sept. 19, 2003, T.I.A.S. No. 03-919 (“Such import restrictions shall become effective on the date the Designated List is published in the U.S. *Federal Register* . . . . Emergency import restrictions covering Khmer stone sculpture, first promulgated by regulation on December 2, 1999, shall remain in effect.”); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 21, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention] (“This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or accession . . . .”); Import Restrictions Imposed on Certain Khmer Stone Archaeological Material of the Kingdom of Cambodia, 64 Fed. Reg. 67,479, 67,479 (Dec. 2, 1999) (codified at 19 C.F.R. § 12.104g (2013)) (imposing emergency import restrictions on certain Khmer artifacts pursuant to the 1970 UNESCO Convention).

<sup>82</sup> *See* 1970 UNESCO Convention, *supra* note 81, 823 U.N.T.S. at 234 (implementing “proposals on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property”).

ence.”<sup>83</sup> Article 7(b) of the Convention forbids State Parties from importing stolen cultural property (specifically, cultural property stolen “from a museum or a religious or secular public monument”) and addresses the procedures that State Parties should undertake when returning stolen property at the request of another State Party.<sup>84</sup> Article 9 allows a State Party to seek assistance from other State Parties when it believes its cultural property is in danger of looting.<sup>85</sup> While the UNESCO Convention has facilitated numerous repatriations since its enactment, certain scholars have criticized the Convention for various reasons. In particular, critics have noted that few countries have enacted implementing legislation for the Convention,<sup>86</sup> that the Convention unfairly burdens source nations compared to market nations,<sup>87</sup> and that the Convention’s provisions apply only to cultural property exported from its country of origin after November 1970.<sup>88</sup>

### B. *The Convention on Cultural Property Implementation Act*

The CCPIA implemented the 1970 UNESCO Convention in the United States.<sup>89</sup> Congress, which did not enact the CCPIA until 1983, chose to

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* at 240 (advising State Parties 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”).

<sup>85</sup> See *id.* at 242 (resolving that the State Parties “undertake . . . 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”).

<sup>86</sup> See Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT’L L. 1067, 1077 (2005) (noting that “[t]he United States is one of the few countries with implementing legislation”).

<sup>87</sup> See Preditia C. Rostomian, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271, 281 (2002) (noting that the UNESCO Convention “places the brunt of th[e] burden” of preventing the export of illicit cultural property on source nations, while market nations that have more resources (such as the United States) must “merely prohibit the import of such property by checking for valid certificates”).

<sup>88</sup> See Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1842 (2009) (“[C]ritics point to the fact that the 1970 UNESCO Convention has no retroactive protections, and therefore, does not apply to cultural property stolen or illegally exported before November 1970.”).

<sup>89</sup> Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613 (2012)); see also Patty Gerstenblith & Katharyn Hanson, *Congressional Responses to the Looting of Iraq’s Cultural Property* (“One of the first market nations to ratify this convention, the United States enacted implementing legislation . . . in 1983.”), in ANTIQUITIES UNDER SIEGE: CULTURAL HERITAGE PROTECTION AFTER THE IRAQ WAR 103, 104 (Lawrence Rothfield ed., 2008).



implement only Articles 7(b) and 9 of the UNESCO Convention.<sup>90</sup> Because the CCPIA implements a treaty to which the United States is a party, the act “should be considered the United States’ authoritative statement on its policy toward foreign cultural property.”<sup>91</sup> It took over ten years for the United States to implement the UNESCO Convention, in part because of disagreement in Congress.<sup>92</sup> Prior to the CCPIA, certain members of Congress worried that implementing legislation would disadvantage the United States if there were a lack of international cooperation in the restitution of cultural property.<sup>93</sup>

Between 1973 and 1983, Congress strove to craft legislation that accommodated different factions, such as auction houses, museums, and academics.<sup>94</sup> One of the most significant provisions of the CCPIA is codified at 19 U.S.C. § 2602. This provision allows the President to enter into bilateral agreements with other State Parties to apply specific import restrictions when four conditions are met: (1) the cultural property of the State Party “is in jeopardy,” (2) the State Party has affirmatively attempted “to protect its cultural patrimony,” (3) import restrictions would be “of substantial benefit” and the least drastic available option, and (4) the implementation of import restrictions would align with the “general interest of the international community in the interchange of cultural property.”<sup>95</sup> Additionally, section 2605 established the Cultural Property Advisory Committee (CPAC),<sup>96</sup> a State Department body that reviews requests for U.S. import restrictions on cultural property using section 2602’s four factors.<sup>97</sup> A final

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<sup>90</sup> See Bonnie Magness-Gardiner, *International Conventions and Cultural Heritage Protection* (“The United States, however, does not implement every article in the 1970 UNESCO Convention. Under the CCPIA, it implements articles 9 and 7(b).”), in *MARKETING HERITAGE: ARCHAEOLOGY AND THE CONSUMPTION OF THE PAST* 27, 33 (Yorke Rowan & Uzi Baram eds., 2004); see also *supra* Section II.A.

<sup>91</sup> Vitale, *supra* note 88, at 1843.

<sup>92</sup> See James F. Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT’L L. & POL. 857, 859 (1983) (detailing the “painstaking efforts of Congress to balance the legitimate but sharply competing goals of archaeologists and anthropologists, art dealers and collectors, museum directors, the academic community, and . . . bureaucrats”).

<sup>93</sup> See S. REP. NO. 97-564, at 27 (1982) (“In previous years’ consideration of various proposals for implementing legislation, a particularly nettlesome issue was how to formulate standards establishing that U.S. controls would not be administered unilaterally.”).

<sup>94</sup> See Fitzpatrick, *supra* note 92, at 858-60 (discussing the passage of the CCPIA after a decade of attempts).

<sup>95</sup> 19 U.S.C. § 2602(a)(1)(A)-(D) (2012).

<sup>96</sup> *Id.* § 2605.

<sup>97</sup> See James Cuno, *U.S. Art Museums and Cultural Property*, 16 CONN. J. INT’L L. 189, 190 (2001) (describing the structure of the CPAC and its recommendation process).

point to note is that the CCPIA defines “stolen” colloquially, applying the term to objects to which an owner had previously claimed possession.<sup>98</sup>

### C. *The UNIDROIT Convention on Stolen or Illegally Exported Objects*

The UNIDROIT Convention was adopted in 1995 to supplement the 1970 UNESCO Convention and reach a more uniform international agreement.<sup>99</sup> Unlike the 1970 UNESCO Convention, the UNIDROIT Convention allows private individuals to initiate restitution requests.<sup>100</sup> However, the UNIDROIT Convention limits the time period during which a repatriation claim may be brought. An individual must initiate her claim within three years of learning of the object’s new location and within fifty years of the original theft of the object.<sup>101</sup> As the United States has not signed the UNIDROIT Convention,<sup>102</sup> a more detailed analysis of the Convention is not necessary. The United States has likely chosen not to become a party to UNIDROIT, in part because of the criticisms voiced by many actors in the art world. Americans are uncertain about the UNIDROIT Convention because it does not define many of the terms it employs.<sup>103</sup> And, in Europe, the European Fine Arts Fund considered discontinuing the art fairs in Maastricht or Basel if the Netherlands or Switzerland signed UNIDROIT.<sup>104</sup>

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<sup>98</sup> See 19 U.S.C. § 2607 (2012) (defining “stolen” to encompass an “article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument”); Urice, *supra* note 78, at 127 (“The CCPIA, thus, adopts a conventional definition of ‘stolen,’ limiting its meaning to a known object over which an owner exercised dominion and control.”).

<sup>99</sup> See Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111, 133-35 (2008) (describing the features of the UNIDROIT Convention).

<sup>100</sup> See *id.* at 134-35 (comparing the UNIDROIT Convention with the 1970 UNESCO Convention).

<sup>101</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, art. 3, June 24, 1995, 2421 U.N.T.S. 457.

<sup>102</sup> See *Status*, UNIDROIT, <http://www.unidroit.org/status-cp> (last updated Sept. 16, 2014, 2:52 PM), archived at <http://perma.cc/9KTD-HRBV> (listing the nations that are signatories to the UNIDROIT Convention).

<sup>103</sup> See 2 RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 717 (3d ed. 2005) (opining that “the lack of definitions would cause problems in an American judicial system that generally defines all terms”).

<sup>104</sup> See Derek Fincham, *Getting the UNIDROIT Convention All Wrong*, ILLICIT CULTURAL PROPERTY (Dec. 17, 2010, 5:52 PM), <http://illicit-cultural-property.blogspot.com/2010/12/getting-unidroit-convention-all-wrong.html>, archived at <http://perma.cc/G89P-XSRH> (analyzing the potential impact of the UNIDROIT Convention and discussing the various responses to the treaty from actors in the art world).

D. *The Memorandum of Understanding (MOU) Between  
Cambodia and the United States*

Pursuant to the CCPIA, the President—with the advice of the CPAC— institutes bilateral agreements, or Memoranda of Understanding (MOU), when a State Party requests the United States' assistance in protecting its cultural property.<sup>105</sup> A bilateral agreement between Cambodia and the United States has existed since 1999, when President Bill Clinton enacted emergency import restrictions on certain Cambodian materials.<sup>106</sup> Under the CCPIA, a MOU can continue for up to five years from the date on which it enters into force,<sup>107</sup> at which point the agreement either expires or can be renewed for another period not to exceed five years.<sup>108</sup> In September 2013, Cambodia and the United States extended their MOU for yet another five years.<sup>109</sup> The MOU between these two countries applies to certain "archaeological material from Cambodia from the Bronze Age through the Khmer Era."<sup>110</sup> If the MOU had been in force before the *Duryodhana* departed Cambodia, it would have applied to the sculpture, as it restricts the importation of "statuary in stone," including sandstone from the "Angkorian (9th-14th c.)" period.<sup>111</sup>

E. *The National Stolen Property Act*

The NSPA, which is the federal law that the United States invoked in its civil forfeiture action,<sup>112</sup> should arguably not apply to the *Duryodhana*'s situation. This law mandates that an individual who transports an object worth at least \$5000 across state or foreign boundaries, or who receives or

<sup>105</sup> See 19 U.S.C. § 2602(a)(1)-(2) (2012) (authorizing the President to enter bilateral agreements with State Parties who request protection of their cultural patrimony); see also JOHN HENRY MERRYMAN & ALBERT E. ELSSEN, LAW, ETHICS AND THE VISUAL ARTS 257 (2002) (describing the President's authority to enter into bilateral agreements pursuant to the CCPIA).

<sup>106</sup> Import Restrictions Imposed on Certain Khmer Stone Archaeological Material of the Kingdom of Cambodia, 64 Fed. Reg. 67,479, 67,479 (Dec. 2, 1999) (codified at 19 C.F.R. § 12.104g (2013)).

<sup>107</sup> 19 U.S.C. § 2602(b) (2012).

<sup>108</sup> *Id.* § 2602(e).

<sup>109</sup> Extension of Import Restrictions Imposed on Archaeological Material From Cambodia From the Bronze Age Through the Khmer Era, 78 Fed. Reg. 56,832, 56,832-33 (Sept. 16, 2013) (codified at 19 C.F.R. § 12.104g (2013)).

<sup>110</sup> *Id.*

<sup>111</sup> See Extension of Import Restrictions Imposed on Archaeological Material from Cambodia, 73 Fed. Reg. 54,309, 54,310-11 (Sept. 19, 2008) (codified at 19 C.F.R. § 12.104g (2013)) (detailing the scope of the import restrictions imposed by the U.S.-Cambodian MOU).

<sup>112</sup> See *supra* text accompanying notes 75-80.

possesses such an object, with knowledge that the object is stolen, will be subject to fines or imprisonment.<sup>113</sup> The NSPA was originally enacted as an expansion upon the 1919 National Motor Vehicle Theft Act, also known as the Dyer Act.<sup>114</sup> Congress enacted the Dyer Act as a response to an unexpected increase in theft stemming from the invention of the automobile.<sup>115</sup> Today, certain practitioners and scholars view as equally unexpected both the evolution of the Dyer Act into the NSPA and its application in the cultural property context in the CCPIA's stead.<sup>116</sup>

Some actors in the art world believe that the NSPA should not apply to cultural property issues, because the CCPIA represents the United States' position regarding illicit movement of cultural property and restitution.<sup>117</sup> The application of the NSPA in the cultural property context has been heavily reproached for diverging from the CCPIA in its treatment of cultural property issues.<sup>118</sup> Whereas the NSPA applies retroactively, the CCPIA is prospective, and whereas case law broadly interprets the definition of "stolen" in the NSPA, the CCPIA's definition is much narrower.<sup>119</sup> The imposition of criminal penalties on members of the art community, based on their possession of works of art that might have been acquired

<sup>113</sup> 18 U.S.C. §§ 2314–2315 (2012). Note that "post-acquisition knowledge" that property is stolen fulfills the NSPA's knowledge requirement. Urice, *supra* note 78, at 158.

<sup>114</sup> See Urice, *supra* note 78, at 133 (discussing the passage of the Dyer Act and the origins of the NSPA).

<sup>115</sup> See *United States v. Turley*, 352 U.S. 407, 413-14 (1957) ("The automobile was uniquely suited to felonious taking . . . . It was a valuable, salable article which itself supplied the means for speedy escape. . . . This challenge could be best met through the use of the Federal Government's jurisdiction over interstate commerce.").

<sup>116</sup> See, e.g., William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 CARDOZO ARTS & ENT. L.J. 561, 610 (2014) ("[W]hile it is true that there have been a limited number of criminal prosecutions under the NSPA, there have been an increasing number of civil forfeitures based on increasingly tenuous factual and legal grounds, which amount to administrative abuse of the stolen property laws."); Stephen K. Urice, *Elizabeth Taylor's Van Gogh: An Alternative Route to Restitution of Holocaust Art?*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 38 (2011) ("Although works of art are typically treated as 'goods' for purposes of U.S. law, art's unique characteristics fit uncomfortably into a general theft statute.").

<sup>117</sup> See, e.g., Adam Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1046 (2006) (describing the legal critique that the CCPIA, "which implements U.S. obligations under the 1970 UNESCO Convention . . . , should preempt [the application of the NSPA]").

<sup>118</sup> The NSPA has been interpreted to require "that a state have both a valid patrimony law and a restriction on exportation of the kind of property contemplated by the patrimony law." Vitale, *supra* note 88, at 1851 (citing *United States v. McClain*, 545 F.2d 988, 996 & n.14 (5th Cir. 1977)). Here, as discussed in Section I.C, it is unclear whether Cambodia had a valid patrimony law at the time the *Duryodhana* left the country. This was one of the most heavily disputed points between the parties.

<sup>119</sup> See *id.* at 1859-61 (noting the differences between the NSPA and the CCPIA).

many years ago,<sup>120</sup> is also disturbing. During debate prior to passage of the CCPIA, members of Congress twice attempted to limit the NSPA's scope.<sup>121</sup> Although the federal courts of appeals have addressed the application of the NSPA in the cultural property context in only three cases,<sup>122</sup> their rulings have created much controversy—especially the Fifth Circuit's decisions in *United States v. McClain*.<sup>123</sup> As part of their efforts to limit the scope of the NSPA, those same members of Congress unsuccessfully attempted to overturn the Fifth Circuit's interpretation of the law.<sup>124</sup> Senator Dole expressed his concern that the NSPA, as interpreted in *McClain*, “may render criminal liability under U.S. law essentially contingent on the export laws of other countries. Many question whether the court's interpretation of McClain thus is overly broad as a matter of national policy.”<sup>125</sup>

#### F. *The Interpretation of the NSPA in Federal Appellate Decisions*

*United States v. Hollinshead*<sup>126</sup> was the first federal appellate decision to interpret the NSPA as applied to the transportation of cultural property.<sup>127</sup> In *Hollinshead*, the defendant was a pre-Columbian artifact dealer who worked with a coconspirator in Belize to ship pre-Columbian steles from Guatemala to the defendant's home in California, labeling the boxes as containing “personal effects.”<sup>128</sup> The Ninth Circuit held that in order to be found liable under the NSPA, the defendant did not need to be aware of the Guatemalan ownership law; rather, he needed to be aware only that the steles were stolen.<sup>129</sup> The court interpreted “stolen” as used in the NSPA to

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<sup>120</sup> See Urice, *supra* note 78, at 157-58 (“It is reasonable to assume that many, if not most, . . . antiquities [in museums] lack documentation of legal export from their country of modern discovery. . . . [C]ontinued possession of such works would constitute a crime under the NSPA . . .”).

<sup>121</sup> See Cuno, *supra* note 97, at 193 (detailing certain senators' unsuccessful efforts to amend the *McClain* doctrine).

<sup>122</sup> *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003); *United States v. McClain (McClain II)*, 593 F.2d 658 (5th Cir. 1979); *United States v. McClain (McClain I)*, 545 F.2d 988 (5th Cir. 1977); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

<sup>123</sup> *McClain II*, 593 F.2d 658 (5th Cir. 1979); *McClain I*, 545 F.2d 988 (5th Cir. 1977).

<sup>124</sup> See Cuno, *supra* note 97, at 193 (“Both times the [reform] bill was opposed by officials of the State Department and U.S. Customs and was defeated.”).

<sup>125</sup> 128 CONG. REC. 25,347 (1982) (statement of Sen. Bob Dole).

<sup>126</sup> 495 F.2d 1154 (9th Cir. 1974).

<sup>127</sup> Derek Fincham, *Why U.S. Federal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 612 (“The first attempt to apply the NSPA to nationalized antiquities came in 1974 in *United States v. Hollinshead*.”).

<sup>128</sup> 495 F.2d at 1155.

<sup>129</sup> *Id.* at 1156.

mean “acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another . . . with the intent to deprive the owner of the benefit of ownership.”<sup>130</sup> This definition is much broader than the one employed in the CCPIA, which is limited to known objects that have been inventoried as belonging to museums or monuments.<sup>131</sup>

In *United States v. McClain*, the Fifth Circuit built upon the Ninth Circuit’s interpretation of the NSPA. In *McClain*, a group of defendant dealers were charged with violating the NSPA after contacting an employee at the Mexican Cultural Institute in San Antonio and offering to sell pre-Columbian antiquities from Mexico, knowing that they had illegally exported the antiquities from Mexico.<sup>132</sup> Although the court held that a 1972 Mexican law—the Federal Law on Archaeological, Artistic, and Historic Monuments and Zones, May 6, 1972—conferred ownership of the antiquities to Mexico,<sup>133</sup> it was not convinced of the exact exportation date of the goods that the defendants had offered to sell.<sup>134</sup> Because of this uncertainty, the court reversed the defendants’ convictions and remanded the case to the district court.<sup>135</sup>

Two years later, *McClain* came before the Fifth Circuit again.<sup>136</sup> Upon remand, the district court had convicted the defendants of violating the NSPA and conspiracy to violate the NSPA.<sup>137</sup> The Fifth Circuit, however, held that although the defendants were liable for conspiracy to sell stolen goods in foreign commerce under the NSPA, their conviction for the “substantive” violation had to be reversed.<sup>138</sup> The court reversed the defendants’ conviction on this “substantive” count because of its concern that at trial, the jury was incorrectly informed that Mexico had an ownership law in place since at least as early as 1897, which may have influenced the jury’s view of whether the goods were stolen.<sup>139</sup> Thus, the court opined, “the defendants may have suffered the prejudice of being convicted pursuant to laws that were

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<sup>130</sup> *Id.*

<sup>131</sup> See *supra* note 98 for the definition of “stolen” under the CCPIA.

<sup>132</sup> *McClain I*, 545 F.2d 988, 992-93 (5th Cir. 1977).

<sup>133</sup> *Id.* at 1000.

<sup>134</sup> See *id.* at 1003 (“Under a proper view of the law, it is extremely important to the issue of guilt or innocence for the jury to know or to make a fair inference as to *just when* the artifacts were exported.” (emphasis added)).

<sup>135</sup> *Id.* at 1004.

<sup>136</sup> *McClain II*, 593 F.2d 658 (5th Cir. 1979).

<sup>137</sup> *Id.* at 659.

<sup>138</sup> *Id.* at 672.

<sup>139</sup> *Id.* at 670.

too vague to be a predicate for criminal liability under our jurisprudential standards.”<sup>140</sup>

Although both incarnations of *McClain* deal with various procedural concerns, they stand for the proposition that a clear and unambiguous “declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered ‘stolen,’ within the meaning of” the NSPA.<sup>141</sup> Or, as Dr. Stephen Urice proposes, the “*McClain* Doctrine” may be interpreted as:

(Enactment of Foreign Nation Vesting Statute) + (Illegal Export) = Stolen.<sup>142</sup>

Most recently, the Second Circuit interpreted the NSPA in 2003 in *United States v. Schultz*.<sup>143</sup> The defendant, Mr. Schultz, became involved in an elaborate scheme to sell Egyptian antiquities in which he acted as an agent for an acquaintance who smuggled various sculptures out of Egypt.<sup>144</sup> Once the sculptures arrived in the United States, Mr. Schultz used the fake provenance of the “Thomas Alcock Collection” to attract buyers, claiming that the sculptures had belonged to this collection since the 1920s.<sup>145</sup> The exportation of these goods violated a 1983 Egyptian patrimony law.<sup>146</sup>

The Second Circuit adopted *McClain I*'s distinction “between mere unlawful export and actual theft,”<sup>147</sup> reiterating the proposition that “a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered ‘stolen,’ within the meaning of the [NSPA].”<sup>148</sup> The Second Circuit went one step further than the *McClain I* court, however, to hold that the foreign country’s “government [must also] assert[] actual ownership of the property pursuant to a valid patrimony law” in order for an object to be considered stolen.<sup>149</sup> Thus, under Dr. Urice’s formula, the “*Schultz* Doctrine” holds that:

(Enactment of Foreign Nation Vesting Statute) + (*Foreign Nation’s Assertion of Actual Ownership*) + (Illegal Export) = Stolen.<sup>150</sup>

<sup>140</sup> *Id.*

<sup>141</sup> *McClain I*, 545 F.2d 988, 1000-01 (5th Cir. 1977).

<sup>142</sup> Urice, *supra* note 78, at 130.

<sup>143</sup> 333 F.3d 393 (2d Cir. 2003).

<sup>144</sup> *Id.* at 396.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 398.

<sup>147</sup> *Id.* at 403.

<sup>148</sup> *Id.* (quoting *McClain I*, 545 F.2d 988, 1000-01 (5th Cir. 1977)).

<sup>149</sup> *Id.* at 416.

<sup>150</sup> Urice, *supra* note 78, at 131.

Because Second Circuit precedent is controlling in the Southern District of New York, the United States would have had to satisfy the *Schultz* standard in order to successfully invoke the NSPA had *United States v. A 10th Century Cambodian Sandstone Sculpture* progressed. Under *Schultz*, the United States would have had to demonstrate not only that the French colonial decrees confer ownership to Cambodia, but also that Cambodia has enforced the decrees and claimed actual ownership. As mentioned in Section I.C, this remains a disputed point between the parties.

### G. Critique of the Current Legal Structure

This overview of the current legal structure, including the inapplicability of the 1970 UNESCO Convention, the CCPIA, and the MOU to the *Duryodhana*, as well as the application of the NSPA criminal statute to a civil forfeiture proceeding, demonstrates why certain scholars view this framework to be deficient. Although international agreements have attempted to remedy deficiencies of inconsistent and unclear laws across countries, critiques still abound. Critics claim that the legal response is outdated, inconsistent, and difficult to follow,<sup>151</sup> especially when countries have differing cultural patrimony laws.<sup>152</sup> Again, part of this lack of clarity in the legal structure may be politically motivated; there is a political motivation for countries to fail to clearly distinguish between ownership laws and export laws. Consumers of these antiquities come from within the country, not just from foreign countries. Thus, governments may create “escape clauses” for ownership in their laws to avoid recovery from wealthy and influential citizens in their own countries.<sup>153</sup>

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<sup>151</sup> See, e.g., Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 RUTGERS L. REV. 117, 123 (2011) (arguing that “[t]he legal framework is the product of an era that has long since passed, and [that] it should be modernized to reflect the more sophisticated dialogue taking place today”).

<sup>152</sup> See, e.g., Christa L. Kirby, *Stolen Cultural Property: Available Museum Responses to an International Dilemma*, 104 DICK. L. REV. 729, 733-34 (2000) (explaining that “the governing law and museum guidelines do not treat all forms of stolen cultural property in the same manner. . . . This lack of uniformity in the law and in museum response creates uncertainty for museums, true owners, and countries of origin”).

<sup>153</sup> Hall, *supra* note 27.



### III. PROPOSAL: AUCTION HOUSES SHOULD LOOK TO MUSEUMS FOR GUIDANCE IN NAVIGATING THIS INCONSISTENT AND OUTDATED LEGAL RESPONSE

The question remains how auction houses should address repatriation requests when the current legal response is unclear and inconsistent. Rather than attempt to remedy the uncertainty by drafting a new statute or international agreement, a potential solution that would be both complicated and time-consuming, I propose instead that auction houses adopt an ethics-based response. Specifically, auction houses should look to art museums and the ICOM Code of Ethics for Museums as guides for creating their own uniform code of ethics.

#### A. *Legal Distinctions Between Museums and Auction Houses*

In order to address how the ICOM Code of Ethics for Museums can guide auction houses in formulating their own code of ethics, it is important to acknowledge the legal distinctions between museums and auction houses, as those legal distinctions will inform the behavior suggested in the code provisions. Unlike museums, auction houses usually do not acquire title to the works that they put up for auction; rather, they function as intermediaries between sellers and buyers.<sup>154</sup> Thus, due to time and resource constraints, it is impracticable for auction houses to conduct detailed due diligence on every object available at auction.<sup>155</sup> By contrast, because museums do have title to the works they acquire, they conduct a greater degree of due diligence,<sup>156</sup> which has only increased in recent years.<sup>157</sup> Auction houses can conduct extensive due diligence in researching provenance only when an object,

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<sup>154</sup> See Kimberly L. Alderman, *The Ethical Trade in Cultural Property: Ethics and Law in the Antiquity Auction Industry*, 14 ILSA J. INT'L & COMP. L. 549, 553 (2008) ("Auction houses, like realtors, are sales agents for their clients. . . . When an auction house auctions an item, it is not offering the object for sale but, instead, whatever state of title that the current owner holds.").

<sup>155</sup> See 2 FRANKLIN FELDMAN ET AL., ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS § 10.1.6, at 193 (1986) ("Auctioneers say that, unlike conventional art dealers, they handle a volume that is far too great to permit exhaustive examination and investigation of every lot they offer.").

<sup>156</sup> See Cuno, *supra* note 97, at 190-91 (describing circumstances museums consider when acquiring works); Lauren McBrayer, *The Art of Deaccession: An Ethical Perspective* (noting that "by law a museum is free to make an acquisition of a work of art without complete evidence of its legal standing as long as the museum has researched the work of art thoroughly and notified the appropriate governmental authorities of the likely country of origin"), in ALI-ABA COURSE OF STUDY: LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 341, 352 (2005).

<sup>157</sup> See Victoria Reed, *Due Diligence, Provenance Research, and the Acquisition Process at the Museum of Fine Arts, Boston*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 363, 366 (2013) (noting the increasing extent to which museums exercise diligence).

based on its country of origin and other factors, presents an increased risk of illicit transportation.<sup>158</sup>

### B. *A Proposed Uniform Code of Ethics for Auction Houses*

These legal distinctions demonstrate that requiring auction houses to undertake the same level of due diligence as museums could be extremely burdensome due to auction houses' time and resource constraints. Scholars have proposed various improvements to the legal framework through which auction houses address cultural property restitution claims, such as turning to alternative dispute resolution (mediation in particular)<sup>159</sup> or undertaking statutory or international agreement reform.<sup>160</sup> I propose that instead of pursuing these options, auction houses should adopt a uniform code of ethics. A uniform code of ethics would have many of the same advantages cited by proponents of mediation, such as the ability to sidestep problematic legal impediments encountered in arbitration and litigation<sup>161</sup> and to avoid the constraints of adhering to a specific law.<sup>162</sup>

<sup>158</sup> See Alderman, *supra* note 154, at 559 (explaining that, in certain cases, "the house requires the seller to provide paperwork of provenance to show the seller legally obtained the object").

<sup>159</sup> Several scholars have addressed the advantages of employing alternative dispute resolution (ADR) to resolve cultural property disputes. See, e.g., Anne Laure Bandle & Sarah Theurich, *Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre*, 6 J. INT'L COM. L. & TECH. 28, 34-38 (2011) (offering examples of disputes resolved through arbitration and other ADR methods); 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, 163-65 (1997) (proposing an international arbitration tribunal for the resolution of cultural property disputes); Sam Markowitz, Note, *A Meteorite and A Lost City: Mutually Beneficial Solutions Through Alternative Dispute Resolution*, 14 CARDOZO J. CONFLICT RESOL. 219, 244-49 (2012) (suggesting that the use of formal judicial proceedings to resolve cultural property disputes is less effective than is ADR).

<sup>160</sup> See Adler & Urice, *supra* note 151, at 123-25, 159-63 (proposing statutory reform to deal with an antiquated legal framework and to mitigate separation of powers concerns); Derek Fincham, *supra* note 127, at 644-45 (offering a "pragmatic" alternative to U.S. federal criminal regulation of cultural property that would allow buyers and sellers to check that their purchases are legitimate); Edward M. Cottrell, Comment, *Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L L. 627, 648-56 (2009) (proposing the formation of an unbiased international body to resolve cultural property disputes).

<sup>161</sup> See Nate Mealy, *Mediation's Potential Role in International Cultural Property Disputes*, 26 OHIO ST. J. ON DISP. RESOL. 169, 203 (2011) (noting that "if a source nation wishes to bring suit to recover a piece of its cultural property in the U.S., it must be prepared to contend with fifty different sets of state substantive and procedural laws, an overlaying federal law system, [and] local court rules").

<sup>162</sup> See *id.* at 197 (explaining that mediation can be beneficial because it does not require application of any particular substantive law).

Furthermore, a uniform code of ethics would function prophylactically, preventing the parties from reaching the point at which they would need to resort to alternative dispute resolution or litigation. Finally, a code of ethics would be especially advantageous in dealing with repatriation requests from countries, such as Cambodia, that have only recently overcome periods of political turmoil<sup>163</sup> and that may lack a clear and consistent legal stance toward preserving cultural property.<sup>164</sup> For such countries, a code of ethics would outline a more certain and predictable response to repatriation requests.

In fashioning this code of ethics, auction houses should consult the codes of ethics created by the American Alliance of Museums (AAM),<sup>165</sup> the Association of Art Museum Directors (AAMD),<sup>166</sup> and the ICOM.<sup>167</sup> The ICOM Code of Ethics for Museums, which was adopted in 1986,<sup>168</sup> is viewed as the gold standard for shaping ethical guidelines within the international museum community.<sup>169</sup> For this reason, auction houses should focus on the provisions within the ICOM Code of Ethics for Museums that address provenance and restitution issues.<sup>170</sup> Dr. Patty Gerstenblith has criticized the AAMD and the AAM for failing to fulfill the standards

<sup>163</sup> See CORFIELD, *supra* note 20, at 121-34 (detailing recent political upheavals in Cambodia).

<sup>164</sup> See Charney, *supra* note 21 (recounting an interview with Cambodia's Prince Ravivaddhana Sisowath, who admitted that although Cambodians now "take pride in their antiquities," the "preservation of ancient things is not a part of [their] traditional culture").

<sup>165</sup> *Code of Ethics for Museums*, AM. ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics/> (last visited Oct. 3, 2014), *archived at* <http://perma.cc/L6G2-V4Z6>.

<sup>166</sup> *Code of Ethics*, ASS'N OF ART MUSEUM DIRS., <https://aamd.org/about/code-of-ethics> (last visited Oct. 3, 2014), *archived at* <http://perma.cc/PD2U-55DK>.

<sup>167</sup> INT'L COUNCIL OF MUSEUMS, *supra* note 7.

<sup>168</sup> *Id.*

<sup>169</sup> See Elaine L. Johnston, *Evolving Standards for Collections: Antiquities and Archeological Material* (explaining that "[t]he ICOM Code of Professional Ethics, adopted in 1986, sets forth the most detailed and specific standards of all the relevant codes of ethics"), in ALI-ABA COURSE OF STUDY: LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 699, 709 (2000).

<sup>170</sup> Section 2.3 of the ICOM Code of Ethics for Museums, entitled "Provenance and Due Diligence," instructs that "[e]very effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin . . . . Due diligence in this regard should establish the full history of the item since discovery or production." INT'L COUNCIL OF MUSEUMS, *supra* note 7. Section 6.3, entitled "Restitution of Cultural Property," further outlines that

[w]hen a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to cooperate in its return.

outlined by the ICOM.<sup>171</sup> She contends that the AAM's and AAMD's codes are imprecise and foster perverse incentives, such as encouraging museum directors to remain ignorant of legal requirements.<sup>172</sup>

Sotheby's has already taken a first step towards developing a code of ethics.<sup>173</sup> Its website contains a page created in 2007 entitled "Sotheby's Code of Business Conduct and Ethics."<sup>174</sup> However, the code does not mention any ethical considerations or procedures that employees should follow when considering whether to sell an item at auction.<sup>175</sup> Rather, the code focuses on issues of legal compliance, fair dealing, conflicts of interest, confidentiality, insider trading, and public disclosures.<sup>176</sup>

The ICOM Code of Ethics for Museums, however, can provide insight to Sotheby's and other auction houses regarding the creation of such ethical procedures. When tailoring the provisions included in the ICOM Code of Ethics for Museums for use in their own ethical codes, auction houses should attempt to avoid the aspects of the AAMD's Code of Ethics and the NSPA that have been criticized—namely, that these provisions encourage actors to be willfully ignorant of the law so that no liability accrues. At the same time, the code should consider that it may not be feasible for auction houses to undertake the same degree of due diligence as museums in

<sup>171</sup> See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 243 (2001).

<sup>172</sup> See *id.* ("The AAMD Code . . . ignores the issue of illegal excavation and illegal export from the country of origin . . . . It . . . forbid[s] only those actions which the director knows are illegal. The AAM Code of Ethics is even vaguer. . . . It establishes no specific standards of conduct and requires no due diligence or effective search on the part of the museum in acquiring objects."). Note, too, that some museums have gone beyond the standards outlined in the ICOM Code of Ethics for Museums. For example, the Indianapolis Museum of Art will not acquire a piece unless it left its country of origin after 1970 or the museum has obtained evidence of a legal export. See Derek Fincham, *Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 SYRACUSE J. INT'L L. & COM. 145, 184 (2010) (discussing the Indianapolis Museum of Art's policy).

<sup>173</sup> Research on the websites of other large auction houses, such as Christie's, Bonhams, and Phillips, did not indicate that other auction houses have adopted similar codes of conduct. However, Sotheby's increased disclosure to the public is perhaps attributable to the fact that it is a publicly traded company, while the other auction houses are privately held. For more information on the public-versus-private nature of auction houses, see Graham Bowley, *The (Auction) House Doesn't Always Win*, N.Y. TIMES, Jan. 16, 2014, at C1 (noting that "Christie's is owned by François Pinault, the French luxury-goods magnate, while Phillips's owner is the Russian company Mercury Group").

<sup>174</sup> *Code of Business Conduct and Ethics*, SOTHEBY'S (Aug. 8, 2007), <http://www.sothebys.com/en/inside/corporate-governance/bus-ethics-conduct.html> (last visited Oct. 3, 2014), *archived at* <http://perma.cc/BTA2-S4G2>.

<sup>175</sup> Under the heading "Basic Principles," Sotheby's code mandates that employees "report any illegal or *unethical* behavior or any other behavior that violates this Code or company policies." *Id.* (emphasis added). Beyond this provision, the code fails to mention any ethical principles. *Id.*

<sup>176</sup> *Id.*; see Alderman, *supra* note 154, at 569-70 (contending that auction houses treat ethical considerations as byproducts of legal compliance).

determining which lots will be put up for auction. Thus, proposed provisions for ethical principles modeled after the ICOM Code of Ethics could read:

*Provenance:* In determining which lots to put up for auction, all employees shall be confident that the objects have not been illegally exported from their countries of origin. Taking into account the age of the object and its country of origin, as well as the auction house's time and resource constraints, the employees shall be satisfied with the sufficiency and veracity of the object's provenance before including the object in an auction. Employees shall use their own judgment regarding whether to include an object that left its country of origin after 1970.

*Restitution of Cultural Property:* Auction house employees shall comply with restitution requests issued by an auction item's country of origin, as long as certain conditions are met, and shall encourage the owner of the object to comply as well. These conditions include verification that the object belongs to the country of origin's cultural heritage, and verification that the object was exported against international agreements such as the 1970 UNESCO Convention or Memoranda of Understanding between countries.<sup>177</sup>

While both of these model provisions would be significant if auction houses were to adopt them as part of a uniform code of ethics, special attention should be given to the provision regarding provenance. If auction houses were to adopt and focus, as much as is practicable, on the ethical guidelines outlined in the model provenance provision, they would likely face fewer repatriation requests in the future. The provisions proposed here are merely basic suggestions designed to demonstrate an alternative to the current options available to address cultural property disputes—namely, litigation and alternative dispute resolution. Using these principles as a model, auction houses should carefully consider how best to alter the model provisions to formulate uniform and workable ethical guidelines.

## CONCLUSION

*United States v. A 10th Century Cambodian Sandstone Sculpture* illustrates the need for a more consistent and predictable legal framework from which to address repatriation claims. The current legal framework allows for a case-by-case analysis dependent on laws that vary by country. Although the

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<sup>177</sup> These provisions are modeled after provisions in the ICOM Code of Ethics for Museums. See INT'L COUNCIL OF MUSEUMS, *supra* note 7.

tangled web of international agreements, patrimony laws, and statutes is in certain instances helpful with repatriation claims, it is nevertheless ineffective in other instances where the laws are ambiguous or inapplicable. For the *Duryodhana*, where international conventions and cultural property statutes do not apply because of their dates of enactment or ratification, the government resorted to an attenuated invocation of the NSPA in its civil forfeiture action, which arguably does not comport with the congressional intent behind the United States' implementing legislation for the 1970 UNESCO Convention. Rather than attempt to revise the current legal framework, auction houses should fashion a uniform code of ethics modeled after the ICOM's Code of Ethics for Museums. An ethics-based response, while encompassing many of the advantages touted by proponents of alternative dispute resolution, is unique in that it can function prophylactically to prevent auction houses from being confronted with repatriation requests in the first place. Because repatriation requests from countries such as Cambodia have increased in recent years, prompt reform is necessary to ensure that sales at auction houses are not stunted by fear of legal repercussions. Unless such a response is devised, proponents of neither cultural nationalism nor cultural internationalism will be able to fully appreciate cultural heritage treasures such as the *Duryodhana*.

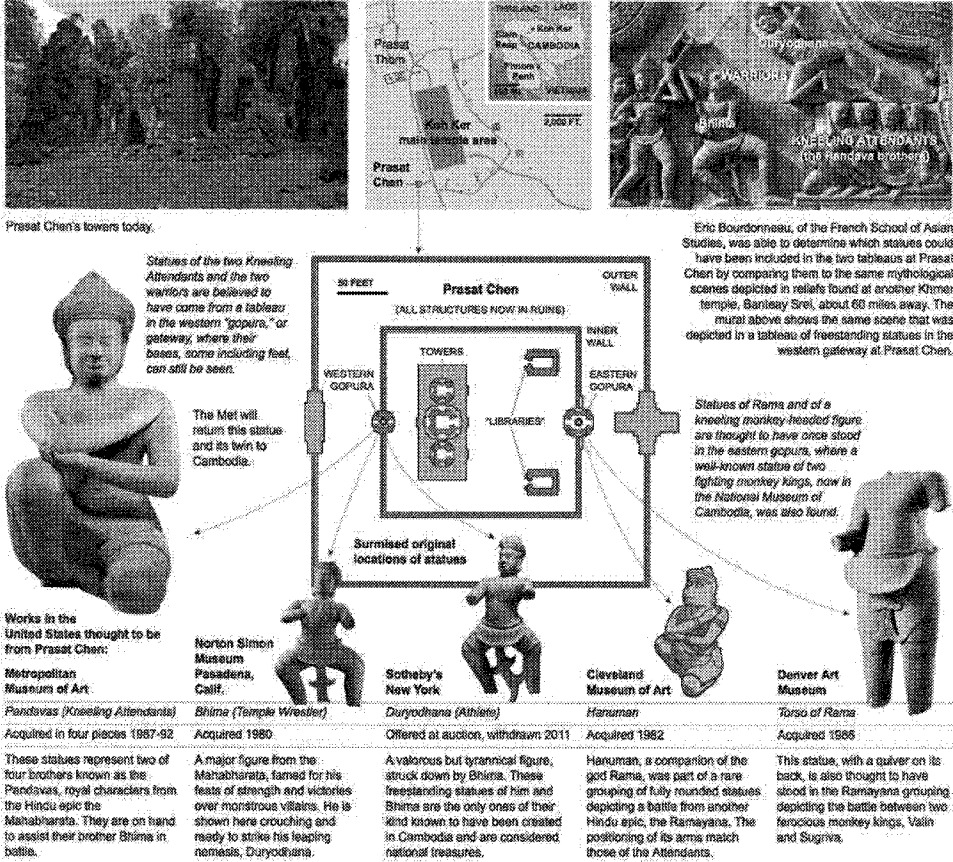
Figure 1: *Duryodhana*, Private Collection, recently repatriated to Cambodia, 10th Century<sup>178</sup>



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<sup>178</sup> Verified Complaint, *supra* note 4, Ex. A at 2.

Figure 2: *New York Times* Graphic of the Prasat Chen Temple<sup>179</sup>



<sup>179</sup> *From Jungle to Museum and Back?*, N.Y. TIMES (May 15, 2013), <http://www.nytimes.com/interactive/2013/05/16/arts/design/from-jungle-to-museum-and-back.html>, archived at <http://perma.cc/5LTX-FQL5>.



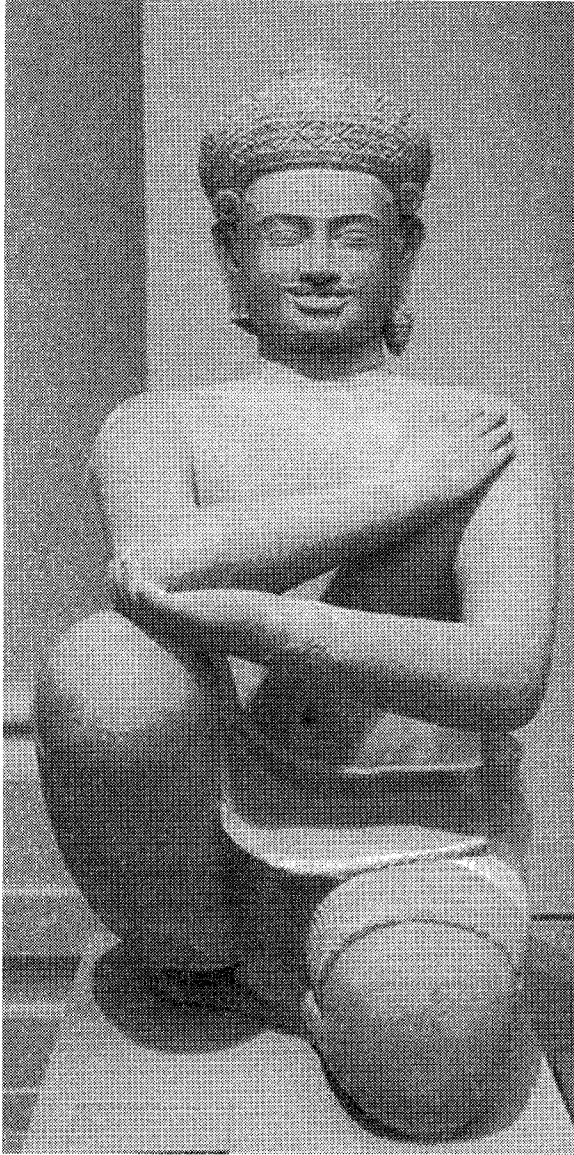
Figure 3: *Bhima*, Norton Simon Museum, recently repatriated to Cambodia, 10th Century<sup>180</sup>



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<sup>180</sup> Tom Mashberg & Ralph Blumenthal, *Christie's to Return Cambodian Statue*, N.Y. TIMES (May 6, 2014), <http://www.nytimes.com/2014/05/07/arts/design/christies-to-return-cambodian-statue.html>, archived at <http://perma.cc/5WHN-26Y8>.

Figure 4: *Kneeling Attendants*, Metropolitan Museum of Art, recently repatriated to Cambodia, 10th Century<sup>181</sup>



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<sup>181</sup> Tom Mashberg & Ralph Blumenthal, *The Met Plans to Return a Pair of Statues to Cambodia*, N.Y. TIMES (May 3, 2013), [http://www.nytimes.com/2013/05/04/arts/design/the-met-to-return-statues-to-cambodia.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/05/04/arts/design/the-met-to-return-statues-to-cambodia.html?pagewanted=all&_r=0), archived at <http://perma.cc/V4SG-6DWG>.

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