BEYOND THE ADVERSARIAL MODEL: USING MEDIATION TO CREATE VALUE IN THE RESOLUTION OF DISPUTES IN THE ART AND HERITAGE SECTOR[1]

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I. Introduction

The International Bar Association's Committee on Art, Cultural Institutions and Heritage Law and the Committee on Arbitration and Alternative Dispute Resolution have sponsored several sessions on the resolution of art, intellectual property and cultural heritage disputes.[3] This workshop and the collaboration of ICOM-WIPO to initiate a mediation panel and program in the art and cultural heritage sector can be seen as a welcome fruition of those early efforts.

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[1] © Barbara T. Hoffman 2011. The title of this paper is inspired from Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard 2000). The Author was invited to deliver an earlier version of this paper at a program of the International Bar Association titled *Mediating Disputes In The Art And Heritage Sector: Why And How To Spread The Word*, (Buenos Aires, Argentina, October, 2008).

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[3] The International Bar Association ("IBA") is the world's leading organization of international legal practitioners, bar associations and jurists. An example of a collaboration of ICOM, WIPO and the IBA is the book, *Art and Cultural Heritage: Law, Policy and Practice* (Barbara T. Hoffman, ed. Cambridge, 2007; paperback, 2010). See *Part X: Creating Value: Considering Arbitration or Mediation to Resolve Art and Cultural Property Disputes.* Brooks W. Daly, *Arbitration of International Cultural Property Disputes: The Experience and Initiatives of the Permanent Court of Arbitration*, Chap. 63 pp 465-474. J. Christian Wichard and Wend B. Wendland, *Mediation as an Option for Resolving Disputes between Indigenous/Traditional Communities and Industry Concerning Traditional Knowledge*, Chap. 64 pp 475-482. Sir Ian Barker, *Thoughts of an Alternative Dispute Resolution Practitioner on an International ADR Regime for Repatriation of Cultural Property and Works of Art*, Chap. 65 pp 483-487

A. The Nature of the Disputes and the Stakeholders

Museums and other stakeholders in the art and cultural heritage sector can be involved in a diversity of disputes, for example concerning the provenance, return, restitution, custodianship and ownership of objects in collections, as well as intellectual property issues and claims concerning intangible cultural heritage including sacred, ritual and spiritual objects.[4]

Such conflicts or disputes often rest on psychological, emotional[5] and value-laden issues that may lie beneath the stated legal position. The disputes may be intra-state or international and involve different parties or stakeholders: nation states, museums and other cultural institutions, private individuals, good faith purchasers and original owners, and indigenous or religious.

B. Mediation as a Tool for Resolving Conflict

Parties have a variety of choices to resolve disputes. Unfortunately, parties and their lawyers often elect an adversarial process rather than one bringing stakeholders together to share and solve their concerns. As Robert Mnookin Williston Professor of Law, Harvard Law School aptly observed about the litigation model, "When both sides hire attack dogs, both sides end up in a bloody mess." In particular; if the parties proceed

[4] See ICOM-WIPO Mediation Rules, Introduction, ICOM and WIPO Collaboration at http://icom.museum/what-we-do/programmes/art-and-cultural-heritage-mediation/icom-wipo-mediation-rules.html.

[5] It is helpful to parse the term "emotional." Professor Roger Fisher of Harvard University, in 2005, published one of several follow-ups to *Getting to YES*, (see *infra*. note 13) called *Beyond Reason: Using Emotions as You Negotiate* (with co-author Daniel Shapiro, a Harvard psychologist). *Beyond Reason* identifies five "core concerns" that everyone cares about: autonomy, affiliation, appreciation, status, and role. Fisher found these concerns applicable across the board in his international and other negotiations to a wide range of stakeholders, including states, institutions and individuals.

through the adversarial system either through litigation or arbitration, disputes are resolved by a judge, an arbitrator or by settlement agreements negotiated by parties' attorneys on their behalf, rather than by the parties.

This paper advocates the use of mediation as a fruitful and preferred option for resolving disputes in the art and cultural heritage sector. Mediation is a flexible and informal ADR procedure which involves a third party neutral who facilitates negotiations between the parties. In mediation, parties are encouraged to identify their interests and assumptions, understand what underlies the substance of the conflict, and to move beyond factual misperceptions, prejudices and legal positions. Mediations are not constrained by formal rules of procedure or evidence.

The mediator may move beyond narrow legal constructions, and, with the agreement of the parties, consider involving ethical and moral principles which may be appropriate in the context of the resolution of the dispute. Unlike litigation or arbitration, unless the parties agree to the contrary, mediation is not binding: the mediator does not have the power to impose a settlement on the parties. It is the parties themselves who define and agree to commit to any settlement that may be reached. Thus, the often inequitable winner-take-all of arbitration and litigation[6] may be avoided in the tailor-made mediation solution. Mediation is also confidential, if the parties so request.

[6] See *United States v. Sharyl R. Davis, The Painting Known as "Le Marché,"* Dckt. No. 10-300-CV (2011) for the inflexible and harsh potential outcome of litigation on a good faith purchaser. Judge Gerard Lynch: "Unlike in the Judgment of Solomon, see 1 Kings 3:16–28, neither party has blinked, and we are therefore in the unenviable position of determining who gets the artwork, and who will be left with nothing despite a plausible claim of being unfairly required to bear the loss."

A mediator, or third party neutral, must be able to reconcile what may appear to be contradictory positions to arrive at a mutuality of interest resulting in an agreement, amongst or between the parties. For example, consider the statement of Philippe de Montebello, former Director of the Metropolitan Museum, that: "whether legally excavated or not, cultural objects have intrinsic qualities from which one can learn a great deal." The statement is representative of the position of those called, "cultural internationalist," for whom, truth, access and preservation trump issues of return, restitution or repatriation. Contrast that, to an official statement made by Chile on the occasion of the return to Peru in 2007 of 3,788 books removed in 1881, during the Pacific War (1879-1883), from the National Library of Peru in Lima: "*los bienes culturales, sean materiales o inmateriales, expresan de manera profunda la cosmovisión de los pueblos, la creatividad, imaginación y capacidad de transformación de sus habitantes y comunidades, como también son testimonio de su memoria, de sus sentidos de identidad y pertenencia, por lo cual es indispensable reconocer el derecho de los pueblos a su patrimonio cultural, como herencia privilegiada de los que les antecedieron y de los acervos para crear nuevas obras y contenidos culturales*." Although Chile is not technically an archeologically rich (source) nation, the statement is representative of the interests and values articulated by many source nations who find their patrimony in foreign museums. In essence, a nation's cultural patrimony wrongfully seized in time of war or by colonial powers belongs to its people and must be returned.

Should the quest for "truth and knowledge" sometimes trump cultural affiliation and what evidence is acceptable to prove such cultural patrimony or affiliation? By whom is the decision made and by what criteria?

Various approaches to mediation have been developed. In general, this Author advocates the mediation model developed by Gary Friedman, Jack Himmelstein and Robert Mnookin. The understanding based model (the "Understanding Based Model") offers people in conflict a way to work together to make decisions that resolve their dispute rather than have a resolution imposed upon them. "This non-traditional approach to conflict is based on a simple premise: The people ultimately in the best position to determine the wisest solution to a dispute are those who created and are living the problem[7]."

The Understanding Based Model engages a process based on four interrelated core principles: (i) understanding not coercion (ii) party responsibility (iii) party collaboration (iv) understanding what lies under the surface of conflict.

As Robert Mnookin, states in the preface to *Challenging Conflict*:

> "Last and perhaps most importantly, this model is challenging-and-radical because of the role it defines for the mediator. It urges the mediator to explore with the parties the psychological, emotional and value laden issues that may lie beneath the stated conflict. It asked the mediator personally to forgo and resist the use of coercion and manipulation. And what is most challenging to today's conventional wisdom is the idea that the mediator should work with the parties together, in each others presence to create a resolution based on a deeper understanding of the other side."

[7] Friedman, Gary and Jack Himmelstein. *Challenging Conflict: Mediation Through Understanding* (ABA 2008 p. xxvii)

Mediation in general and the Understanding Based Model in particular, enable third party neutral to put in place a participatory communication process that allows the various stakeholders to actively and positively interact to turn seemingly intractable disputes into productive deals.

The Understanding Based Model is suitable to resolve art and heritage claims, particularly those involving claims for restitution, repatriation or return[8]. It is similarly useful for resolving claims by indigenous groups to traditional knowledge against multinational companies who seek to exploit the invention and creation of such peoples who may not find adequate protection in state law legal systems. The principles of the Understanding Based Model may also inform lawyers representing stakeholders in the negotiating process without third party neutrals.[9]

Unlike other forms of "property" to which traditional rights are more easily assigned, the formulation of cultural rights in property is extraordinarily complex. Questions about title, cultural identity and the ownership of culture, repatriation, and restitution implicate broader interests and perceptions involving of ethics, globalization, state sovereignty, governance, and distribution.

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[8] By way of overview, legal practice has tended to isolate three legal concepts relevant to our discussion: restitution, repatriation and return. Succinctly stated, restitution has always rested on the violation of the prohibition on theft and pillage opposed by binding law. The concept of repatriation is clearly different. Its origin dates back to the 19th century when due to the changing reconfiguration of the European landscape, cultural heritage ended up outside its traditional place of origin. The concept also applies to claims of indigenous or First Nation people. Finally, return can be seen as a mixture of the two, concerning both cultural objects and works of art legally exploited for purely economic reasons.

[9] For example, the settlement arrived at in *Portrait of Wally*, *infra*., bears striking similarity to a number of actual mediated settlements involving spoiliated art of the Second World War, as well as the settlement arrived at in role play and mediation workshops held by the American Bar Association Committee on Mediation in Art and Sports Law in 2007 and 2008 in New York City law firms and the New York City Bar Association using a holocaust hypothetical. For a fascinating critique of the statement see, "*Portrait of Wally* Settlement: What's Wrong with this Picture," Lee Rosenbaum (August 17, 2010) at the Huffington Post Arts Blog.

The traditional Anglo-Saxon notion of property can be best expressed as follows: "To the world: keep off unless you have my permission which I may grant or withhold." When you own something it means you have title, benefit, exclusive use and control. As Joseph Sax remarked in his fascinating book, *Playing Darts with Rembrandt P.181* (Univ. Mich. Press 2002), "that concept enable owners to exercise unbridled power over owned objects, whatever the loss to science scholarship or art. The option provided by the Understanding Based Model is to permit the parties to move beyond legal concepts of title and ownership. The mediator may assist the parties to reconfigure traditional property models in which title does not necessarily give rise to entitlement and each stick in the bundle of rights that defines property ownership is analyzed directly or indirectly in terms of the relationships between the owner and others in relationship to that property.[10]

The Understanding Based Model does not preclude a mediator from considering and applying the relevant legal concepts or from discussing possible legal outcomes. The importance the mediator allocates to applicable law in resolving the conflict is a matter to be determined by the parties to the conflict.

Closely related to a determination of property rights in cultural objects is the type of evidence deemed relevant to the proof of such claims. Often, the legal hurdles faced by claimants in a number of high profile cases in Europe and the United States involving artwork stolen during the Second World War are similar to those faced by source nations seeking to recover artifacts lost during the colonial period: adverse possession, laches, provenance, statutes of limitation, and the bona fide purchaser defense. Statute of

[10] Notwithstanding, in some cases involving, title may be the lynchpin on which any settlement is based, particularly those involving claims to a nation's patrimony such as *Peru v. Yale* discussed *infra*.

Limitations and the equitable defenses of laches and adverse possession also pose legal problems for indigenous claims. In the United States, the Native American Grave Protection Act, ("NAGPRA"), circumvents these issues by recognizing indigenous concepts such as inalienability and collective ownership.

The Understanding Based Model, as well as mediation in general, avoids the evidentiary burdens and defense hurdles faced by claimants in cultural heritage disputes.

Thus, the American Association of Museums' Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era specifies that "AAM acknowledges that in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.[11]" The Guidelines also state that "when appropriate and reasonably practical, museums should seek methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi era without subsequent restitution Such claims are particularly suited to mediation in part because of its flexibility in designing remedies[12].

Of course, as noted, the non-retroactivity of the Conventions applicable to cultural claims and the origin of disputes arising years ago, such as holocaust claims or claims from the Age of Imperialism means that these disputes are not governed by contracts which provides for mediation or by the various provisions in the Conventions which provided

[11] Although national laws adapted after the war in Switzerland, Belgium, France, Germany, Greece, Italy and the Netherlands in recognition of title difficulties caused by gaps in provenance, created a presumption in favor of the original owners of property looted during this period in title disputes overcoming significant obstacles to litigation of restitution cases, most of the national laws have expired.

[12] I have participated as both mediator and arbitrator with the ADR Committee of the ABCNY conducting training sessions using a model Holocaust art related dispute between an original owner's heirs and a good-faith purchaser, who purchased from a gallery located in a civil law country. In dividing into six groups with a mediator and six groups with an arbitrator, the mediated results were often most likely to lead to successful results and innovative solutions which are paralleled by several settlements in the real world. The arbitrations were not at all consistent or predictable in their outcomes.

for alternative dispute resolution including arbitration and mediation. That provides an important explanation for failure to use the process more often.

Another explanation was offered by E. Randol Schoenberg, counsel for the Bloch-Bauer heirs in their attempt to retrieve the Klimt paintings from Austria in the case of *Altmann v. Austria* and for the Plaintiff in *Bennigson v. Alsdorf*. In 2006, asked by the author about his views on proposals for an arbitration tribunal to consider such claims, he offered the following comments.

> In the Altmann case we have a 140-page expert opinion from the Chairman of the Inst for Civil Law at the Univ. of Vienna Prof Rudolf Welser which concludes that under Austrian law the Klimt paintings should be returned to Mrs. Altmann. The government just refuses to follow its own law and every attempt to litigate is met with procedural defenses (whether in the US or in Austria). This is the tactic of the defense in all these cases. In Bennigson (Picasso case) the defendant, Mrs. Alsdorf, had the painting sent out of the state on the day after we filed suit and has been fighting jurisdiction for the past two years. In my experience the defendants have lots of money, and they have the paintings, and so they tend to want to fight until the bitter end. In *Searle v. Goodman* (Degas case) this meant that Searle spent $2 million fighting and only gave in at the end in a settlement where he got to have a charitable deduction for 50% of the value, which turned out to be less than what he had paid for the painting – almost a total loss. But that has not deterred Mrs. Alsdorf from following his footsteps.
>
> So you asked whether an international arbitration court for art claims would be a good idea. Yes. It would be a great idea. Which is why it will never happen. The defendants would rather waste their money litigating procedural battles in the hope that they can wear down the plaintiffs and settle the matter without handing over their looted art.

C. Moving Beyond the Legal Position: Evolving Ethical Principles

Mediation allows the parties to move beyond legal positions. Cultural heritage issues are often too important to be understood and resolved only in light of legal technicalities.

A challenge for the mediator in the art and cultural heritage field is to identify objective standards[13] or ethical principles beyond the law which may serve as the basis for a solution to the dispute. Such sources may be Code of Ethics, such as the ICOM Code of Ethics or international law, either customary or convention based. Definitions of "cultural property" in international convention set forth not only legal but ethical principles for states with respect to cultural heritage.[14]

The current significant international conventions that form the legal regime for the protection of moveable "cultural property" are the Hague Convention, the 1970 UNESCO Convention, and, its companion, the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (1995)) ("UNIDROIT"). The latter two are the keystone of a network of national and international attempts to deal with the "illicit" international traffic in smuggled and/or stolen cultural objects during peacetime and thus, directly concern the theme of this Symposium.

The 1970 UNESCO Convention ("UNESCO") was adopted in response to the widespread pillaging of archaeological sites and envisages diplomatic action at the interstate level to achieve the return of cultural property. Principally, UNESCO works at the level of government administrations: governments are required to take action at

[13] In a classic bestselling book, written by the Author's former Professor, Roger Fisher, *Getting to YES: Negotiating Agreements Without Giving In* (1981), developed a method called "principled negotiation or negotiation of merits." The method, closely related and a companion to the Interest Based Model can be summarized with four principles: (1) identify the human aspect of the problem; (2) focus on interest, not positions, generate options and insist that the results should be based on some objective standard.

[14] See Hoffman, Barbara T. "Cultural Politics and the Return of Looted Antiquities," *World Politics Review*, (November 2010)

the request of a State party to the convention to seize cultural property which has been stolen. They must also collaborate to prevent major crises in the protection of cultural heritage.

The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) (Convention Concerning the Protection of the World Cultural and Natural Heritage, November 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151) was adopted by UNESCO on November 16th, 1972, partially in response to the changing social and economic conditions which aggravate the destruction of the cultural and natural heritage. Whilst the 1970 UNESCO and UNIDROIT dealt with illegal excavations, plunder and the illicit traffic in movables, the World Heritage Convention is concerned with the natural and built environment.

If the linking of culture and nature embedded in the World Heritage Convention was inspired by the environmental movement, so, too, is the linking of cultural diversity with biodiversity in the Convention on Biological Diversity (Convention on Biological Diversity, June 5, 1992, U.N.E.P. (1992)) (the "CBD"), adapted in 1992 under the auspices of the United Nations Conference on Environment and Development, Rio de Janiero. The CBD embodies the idea that states should have ownership of the natural biological resources in their territories, including their genetic resources, and imposes obligations with regard to conservation and biodiversity, recognizes the value of intellectual property rights to traditional knowledge, and seeks to address the needs of developing countries by requiring technology transfer and equitable benefit sharing in the results of research and discovery.

The Convention for the Safeguarding of the Intangible Cultural Heritage (Convention for the Safeguarding of the Intangible Cultural Heritage, October 17, 2003) ("2003 Convention") completes the current primary international legal framework for considering the principles affecting the protection of cultural heritage and the development of policy related thereto (United Nations Convention on the Law of the Sea (Montego Bay, 1982)). The 2003 Convention defines the intangible cultural heritage, or "living cultural heritage," as the practices, representations, expressions, as well as the knowledge and skills, which communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

Article 2 of the Convention states:

> For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

It is beyond the scope of this paper to discuss these principles in detail but it can be said that substantive principles, such as those based on the return of illegally exported or imported cultural property, the return of war booty, the non-exploitation of the weakness of another subject to get a cultural gain and the preservation of cultural context may provide a general guidance in cases relating to disputes involving the return or restitution of cultural property.

Although these principles generally play in favour of the return to the original owner, in any peculiar case other considerations may be considered as relevant by a mediator, to arrive at an equitable solution: the time factor in the hands of the state of destination or possession, whether the acquisition was legal at the time, the effort and care expended in

preservation, conservation and study by the possessor, the link to the current possession, the uniqueness and importance of the object, the ability to compensate the possessor, *etc*.[15]

As noted *infra*., in view of the fact that the three international conventions which potentially might apply to international art and cultural property disputes do not apply retroactively, many disputes will require a separate agreement of the parties to resolve the dispute through mediation, based on the principles embodied in the applicable convention.

In this connection, one can say that an evolving procedural standard or principle is co-operation in settling disputes. As Tuliio Scovazzi notes: "In co-operating to find a solution, the states concerned are bound to behave in good faith, which will not be the case when either of them insists upon its own position, without contemplating any modification of it, or relies exclusively on the provision of its own legislation, without considering rules and principles of international law."

Although his remarks were directed primarily to state actors, the principle is equally as valid to encourage museums and other stakeholders to resort to mediation rather than litigation, even if they have not previously agreed by contract to do so.

II. Is the Understanding Based Model Appropriate for Resolution of Holocaust and Spoliation Claims?

The problem of looted cultural goods that were plundered in wartime through acts of violence, confiscation or apparently legal transaction unfortunately remains part of

[15] See Scovazzi, Tullio, "DIVISER C'EST DETRUIRE: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties," presented at the 15th session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (Paris, May 11-13, 2009).

human history even at the beginning of the twenty first century. The general issue of restitution of art works stolen during World War II has cast a significant cloud over both the art market and the holdings of some art museums, since the victims may be able to recover the art works from collectors or museums who have held them for several decades. Holocaust art cases in the United States may involve original owners or their heirs, versus foreign governments, or good faith purchasers including museums. They may be brought as civil forfeiture actions by the United States Government or as an action for replevin pitting the original owner vs. the good faith purchaser.

A. *United States of America v. Portrait of Wally*[16]

"Portrait of Wally" by Egon Schiele was brought to the United States for an exhibit at the Museum of Modern Art (MoMA), on loan from the Leopold Museum-Privatstiftung in Austria (Leopold). The painting was taken from a Jewish owner's private collection in 1938 after Germany annexed Austria. The US government sought a forfeiture of 'Wally' predicated on a violation of the National Stolen Property Act, ("NSPA"), 18 USC § 2314. The NSPA is a federal law which *inter alia* prohibits the transportation in interstate commerce of property with knowledge that the property was stolen.

A lawsuit involving the seizure of the work was originally commenced in the courts of the State of New York in 1998. Pursuant to a grand jury investigation, the New York district attorney's office served a subpoena duces tecum on MoMA for production of 'Portrait of Wally' and another Schiele painting on loan from the Leopold, based on the allegation that the painting had been stolen by the Nazis during the German annexation of Austria.

[16] *United States of America v. Portrait of Wally*, 99 Civ. 9940 (MBM) (11 April 2002).

The museum moved to quash the subpoena on the grounds that it was invalid under a New York law that protected works of art of non-resident lenders from any kind of seizure while on exhibit in New York. The court of first instance granted MoMA's motion to quash the subpoena duces tecum. The appellate court reversed the decision. The Court of Appeals, New York's highest court, then reversed the appellate court's decision and granted the motion to quash. The Court of Appeals held that issuance of the subpoena was forbidden by section 12.03 of New York's Arts and Cultural Affairs law. The Court of Appeals further concluded that the subpoena interfered significantly with the lender's possessory interests in the painting by compelling their indefinite detention in New York and thus effectuated a seizure in violation of the statute. The Association of the Bar of the City of New York, through its Committee on Art Law, filed a friend of the Court brief in support of MoMA in both the appellate court and the Court of Appeals in support of the court of first instance.[17]

The day of the Court of Appeals decision, the United States Magistrate Judge issued a seizure warrant for the painting and the U.S. government started the above forfeiture action. The Government claimed that *Portrait of Wally* was stolen and that, therefore, it was imported and would be exported in violation of the NSPA, 18 U.S.C. § 2314 (1994) if as the Complaint alleged, the Leopold transported Wally knowing it to have been stolen by Welz. The government argued that Austrian law controlled the question of whether the painting is 'stolen' within the meaning of the NSPA.[18]

[17] The Author was chair of the Committee of Art Law of the ABCNY at the time.
[18] The Government advances this argument in an effort to preclude the defendant from relying on US common law doctrine which precludes an object from being categorized as stolen after it has been recovered by other such as law enforcement. The doctrine did not exist under Austrian law.

MoMA, the Leopold and various purported heirs of the alleged rightful owner, a Mrs Bondi, joined the suit as claimants ("the Estate").[19]

This author does not believe that civil forfeiture statutes enforced by the United States government or any other state authority are an appropriate way to resolve what are essentially disputes over title between private litigants. The District Court Judge Michael Mukasey disagreed. He stated, "This is not [an] ordinary case….This case involves substantial issues of public policy relating to property stolen during World War II as part of a program implemented by the German government…There are more interests potentially at stake [in this case] than those of the immediate parties to this lawsuit."[20]

In an increasingly familiar scenario, after twelve years of litigation, the case settled on the eve of the trial.[21] The settlement required that: (i) the Leopold Museum pay the Estate 19 million dollars; (ii) the Estate to release the claim to the painting; (iii) the United States government dismisses the forfeiture action; (iv) the Leopold will permanently display signage next to the *Wally* at the Leopold, and at all future displays of *Wally* of any kind

[19] From the initial seizure, the art community has been almost entirely uniform in opposing the seizure of *Wally*, because it was in the U.S. for an exhibition, unlike other cases that depend on where you sit.

[20] *United States of America v. Portrait of Wally*, No. 99 Civ. 9940, 2000 U.S. Dist. LEXIS 18713 (S.D. N.Y. Dec. 28, 2010) id. at pp. 4-5. The author recently lost on appeal a case in which she represented an "innocent owner" in litigation against the United States Government in *United States of America v. Sharyl R. Davis, The Painting Known as "Le Marché."* The action was brought in 2006 by the Government under the NSPA to forfeit a painting allegedly stolen from a museum in France in 1981 and now owned by a good faith purchaser who acquired the painting in 1985. The Government steadfastly opposed any mediation before a magistrate judge or otherwise. While purporting to represent the interests and policy of the United States, any effort at mediation or settlement was opposed by the Government on the theory that only France could compensate Ms. Davis; however, France was not a party to the lawsuit.

[21] No doubt one impetus for settlement was the District Court's denial of both the Justice Department's and the Leopold's motion for summary judgment requiring trial on the issue of Leopold's "good faith" or "scienter," with the burden of proof on Leopold. A second factor was Mr. Leopold's declining health and wish to see *Wally* returned to Austria before he died. In 2009 MoMA and the Guggenheim Museum settled with the heirs of Paul and Elsa von Mendelssohn-Bartholdy, the Nazi-era holders of the two major Picassos---MoMA's "Boy Leading a Horse" and the Guggenheim's "Le Moulin de la Galette," on the eve of trial pursuant to a confidential agreement.

that the Leopold authorizes or allows anywhere in the world, that sets forth the true provenance of the *Wally*, including Lea Bondi Jaray's prior ownership of the Painting and its theft from her by a Nazi agent before she fled to London in 1939; and (v) before it is transported to the Leopold in Vienna, *Wally* will be publicly exhibited at the Musuem of Heritage –A Living Memorial to the Holocaust, in New York, beginning with a ceremony commemorating the legacy of Lea Bondi Jaray and the successful resolution of the lawsuit. In a statement, representatives of the Estate expressed their appreciation at reaching this historic settlement. They underscored that the public display at the Museum of Jewish Heritage in New York will mean that visitors will be able to view the *Portrait of Wally* in a setting that memorializes the sufferings of so many in the Holocaust and the resilience and resolve of those who escaped and/or survived. They added that "the permanent signage reflecting the Painting's true provenance will ensure that future generations are told the real story of the Painting's theft from Lea Bondi Jaray during the Nazi era."

B. *Altmann v Austria*[22]

Upon evidence that certain of her uncle's valuable art works had either been seized by the Nazis or expropriated by Austria after World War II, Maria Altmann, a descendant of Adele Bloch-Bauer, a U.S. Citizen and resident of California, filed an action in Federal District Court in California to recover six of the paintings from petitioners, Austria and its instrumentality, the Austrian Gallery.

In response, the Austrian Minister for Education and Culture "opened up the Ministry's archives to permit research into the provenance of the national collection," and the

[22] *Republic of Austria et al. v Maria v Altmann*, 541 U.S. 2004.

Austrian government set up a Commission to advise on the return of artworks. Despite discovering documents that called into question the Austrian Gallery's legal claim to the Klimts through Adele's will, the Commission recommended against returning the paintings. [23]She asserted jurisdiction under §2 of the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. §1330(a), which authorizes federal civil suits against foreign states "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity" under another section of the FSIA or under "any applicable international agreement." She further asserts that petitioners are not entitled to immunity under the FSIA's "expropriation exception," §1605(a)(3), which expressly exempts from immunity certain cases involving "rights in property taken in violation of international law."

In 2004, the United States Supreme Court decided the case of *Republic of Austria et al. v Maria Altmann*. In many ways, the decision is a technical one in which the U.S. Supreme Court had to decide whether the Foreign Sovereign Immunities Act applies retroactively to art that was looted during the World War II / Nazi era. The Foreign Sovereign Immunities Act took affect in 1977 and permits lawsuits in the United States against foreign governments under certain limited circumstances. The Supreme Court permitted the suit by Maria Altman, a descendant of a Holocaust victim, to proceed against the Austrian government and the Austrian National Gallery to recover several valuable artworks by Gustav Klimt, holding that the fact that the spoliation occurred before the effective date was irrelevant.

[23] The Austrian Parliament approved a law in 1998 that allowed return of 500 looted works in Austria museums. Obviously, the Klimts were not among these works.

The case then was remanded to the California District Court, where the Court ordered mediation in March 2005, and a trial, if mediation was unsuccessful, to begin November 2005. Instead, both parties agreed to arbitration in Austria before the original claims arbitration tribunal. The Court on 16, January 2006, ruled in favor of Altman. Subsequently the Neue Gallery and Ronald Lauder in a deal brokered by Sotheby's, acquired the painting for a reportedly $135,000,000.00.

III. The Understanding Based Model as a Mechanism to Resolve Restitution Claims of Source Nations

A. The Metropolitan Museum of Art / Republic of Italy Agreement of February 21, 2006

Perhaps one of the most contentious subjects of international cultural property law is whether and under what conditions archaeological rich nations should be able to claim restitution of artifacts and antiquities that originated in ancient civilizations within their borders. Claims for the return of objects taken during the age of imperialism by European powers or the United States was becoming so common that in 2002, a statement entitled the "Universal Museum" was issued by directors of 18 major world museums following the demands by Greece and Turkey for the return respectively of the Elgin Marbles and Pergamon Alter. Though in no way denying the need to address the issues arising from World War II and the illegal traffic in ancient and ethnic artwork, the directors appealed for the abandonment of claims to objects acquired when different values prevailed many years ago.

The Metropolitan Museum decision in February 2006 to give up title and return a 2,500 year old vase known as the Euphronios Krater as well as 19 other objects to Italy in exchange for long-term loans of other antiquities and treasures from Italian collections

and future collaborations on excavations and exhibitions represents a watershed and evolving ethical principles suggests a new way for thinking about cultural property which moves beyond positions of title and ownership to acknowledge and identify the mutuality of interests such as access, preservation and benefit sharing as well as the psychological implications associated with such claims.

The Euphronios Krater and the other objects were not war booty but illegally excavated artifacts stolen from Italy. The Metropolitan Museum claimed its reversal in position, after almost thirty years, resulted from "convincing evidence" that the antiquities were stolen from Italian archeological sites in violation of Italy's law of 1939 vesting ownership of all antiquities found in the ground to Italy. Recent U.S. legal precedents supported the position that objects removed from a country in violation of such laws may be considered "stolen" under U.S. law.[24] But, the willingness of the Metropolitan Museum to engage in negotiation rather than litigation is a reflection of the changing legal, ethical and moral climate in the museum and world community. Many archeologists believed at the time of Krater's acquisition in the 1970s that it was stolen; however, this was the era of don't ask, don't tell.

Traditional common law property notions of title and ownership caused the Metropolitan Museum to litigate from 1982 to 1993 a claim by Turkey to the Lydian Hoarde. A favorable court ruling on the statute of limitations for Turkey resulted in the Metropolitan

[24] The United States Court of Appeals for the Second Circuit's affirmance on June 25, 2003 of the New York antiquities dealer Frederic Schultz on one count of conspiracy to deal in stolen property confirmed that the United States, consistent with prior precedent would enforce under appropriate circumstances the cultural patrimony or "found in the ground laws" of foreign nations on the theory that cultural objects so exported were "stolen." The U.S. does not enforce the export laws of other countries. (For the changing ethical climate and a discussion of the implication of Schultz for museums, see *Art and Cultural Heritage*, Chapter 51, DeAngelis, I.P. "How Much Provenance is Enough...").

Museum's decision to return the cache of sixth century B.C. gold and silver allegedly looted from the Ushak region in Turkey, to Turkey.

In a further example of the evolving attitude of museums, the Getty, in June 2006, agreed to turn over to Italy 21 antiquities alleged to have been stolen by tombaroli and illegally exported through Switzerland to the United States. That was followed by the decision of the Museum of Fine Arts, Boston on September 28, 2006, to return over 13 archaeological treasures to Italy which Italy claimed were looted from Italian soil. As with the Metropolitan, the Italian government agreed as part of the deal that it would lend "significant works" for exhibition at the Museum of Fine Arts. Maurizio Fiorelli, the dedicated State Prosecutor and the Italian Government's chief architect of orchestrating returns from the Boston Museum, the Metropolitan, the Getty and other cultural institutions in the United States and elsewhere, praised the Boston Museum's position. "They thought more about cultural projects than cultural property."[25]

Although there are several reasons why attorneys for Italy and the Metropolitan did not adopt an adversarial model of conflict resolution, their ability to move beyond the idea of winning and resolve their conflict by negotiating value creating trades is also a reflection of the superb talent and dedication of the counsel involved. Both Sharon Cott of the Metropolitan Museum and Maurizio Fiorelli, the Italian State Prosecutor are experienced and knowledgeable attorneys. Because each of them was "in house counsel," they could look at the long term goals and interests of the parties involved. With knowledge of the interests and values of the key players, they were able to get the Met and Italy to arrive at "Yes." Whilst not technically involving a third party neutral, the Author is aware that at

[25] *New York Times*, (September 29, 2006).

least one intermediary, connected closely to both parties, facilitated the process of conflict resolution by impressing upon the Italians that a legislative change in their restrictive loan policy was key to any agreement.

B. *Peru vs. Yale*

Peru's dispute with Yale arose out of an ambitious exhibition about the Inca organized by the Peabody Museum of Natural History at Yale. The core of the exhibition was artifacts excavated by Hiram Bingham III at Machu Picchu in 1912.

In many ways, the dispute between Yale and Peru is unlike the headline-making investigations that have impelled the Metropolitan Museum in New York, the Getty Museum in Los Angeles and the Museum of Fine Art in Boston to repatriate ancient artifacts to their countries of origin. It did not revolve around criminal allegations of surreptitious tomb-raiding and black-market antiquities deals.

Unlike the cases involving the Getty and the Met—which centered on ancient treasures that Italian officials say were dug up by looters in recent decades – the Machu Picchu objects have a far older and more complex history. They were removed during an authorized archaeological dig nearly a century ago; they were inspected by the Peruvian government before they left the country; and even Peruvian officials acknowledge that the objects themselves common Inca tools – do not have great aesthetic or museum value.

On the other hand, Peru did have laws in force at the time governing archaeological finds, and its government in theory had ownership of any artifacts unearthed from Peruvian soil. As a result, the dispute became something of a test case for the limits of cultural property claims against American institutions.

Although no third party neutral was officially involved in the negotiations, informally, the National Geographic Society, which co-sponsored Bingham's explorations, and agreed with Peru, that artifacts had been loaned to Yale, acted informally to encourage Yale to return the objects.

In September 2007, Yale University agreed to return the artifacts that were excavated at Machu Picchu. In 2007, Yale officials and a Peruvian delegation that traveled to New Haven signed a preliminary agreement that would return title to Peru of more than 350 artifacts — ceramics and metal and stone objects — that are considered to be of museum quality and several thousand fragments, bones and other objects considered to be primarily of interest to researchers.

The agreement, which established an extensive collaborative relationship between Yale and Peru, provides for an international traveling exhibition. Admission fees would be used to help build a new museum and research center in Cuzco, the city closest to Machu Picchu. The museum, for which Yale would serve as adviser, was expected to be completed in 2010. Some of the research-quality artifacts would remain at Yale, while others would be returned, though legal title to all the items would be held by Peru. Yale would also contribute what one university official called a "significant" amount of money to establish a program of scholarly exchanges that will continue for at least three years. "We aim to create a new model for resolving competing interests in cultural property," Yale's president, Richard C. Levin, said. "This can best be achieved by building a collaborative relationship — one which involves scholars and researchers from Yale and Peru — that serves science and human understanding." In a joint statement Yale and the

Peruvian government called the deal "a new model of international cooperation providing for the collaborative stewardship of cultural and natural treasures."

In comments broadcast on Peruvian radio, Hernán Garrido-Lecca, who led negotiations for Peru as Housing and Construction minister, said, "After 14 hours of negotiations we arrived at a happy agreement in which Peru was established as the owner of every one of the pieces." These different "public positions" ultimately led to the collapse of the settlement.

Notwithstanding the announcement, Elaine Karp-Toledo, former wife of the Peruvian President, stated that, "Under the "memorandum of understanding" between Yale and President García, Yale would act as adviser for the center, and would also be allowed to select which pieces would be released to the museum. Peru's sovereign right to the entire collection was not acknowledged, and it was clear that Yale would keep a significant proportion of the materials. Peru would still not be allowed to conduct its own inventory. Only when a museum has been built to Yale's specifications would even a portion of the materials return, allowing Peruvians to enjoy artifacts they have never seen."[26]

> "I fail to understand the rationale for Yale to have any historical claim to the artifacts. Bingham had no authority to transfer ownership to begin with. The agreement reflects a colonial way of thinking not expected from a modern academic institution. In fact, Yale has gone a step further than it did in its negotiations with President Toledo; the university is now brazenly asking to keep a significant part of the collection for research for an additional 99 years."

[26] *New York Times*, (February 23, 2008).

Whatever the benefit of collaboration, the Peruvian Government could not accept collaboration and shared ownership with an institution, which was in unlawful possession of the symbol of its nation.

The settlement agreement broke down. As a result, Peru filed a civil action for the return of the artifacts in December 2008, turning the century-old dispute over ownership of the Inca artifacts into a legal battle. The gravamen of the thirty-one page complaint was that "These artifacts belong to Peru and its people and are central to the history and heritage of the Peruvian nation." In so doing, Peru encountered the same technical obstacles and legal defenses that have faced other claimants seeking the return of cultural objects removed years ago on traditional property theories: statutes of limitations for recovery of goods and breach of contract, adverse possession and undue delay.

Although Peru's decision to litigate faced less than promising odds, Lima supplemented its legal approach with diplomatic appeals. On Nov. 2, 2010, President Alan Garcia sent a letter to U.S. President Barack Obama asking for help in having the pieces returned without conditions. While such diplomatic intervention might appear misplaced given the ongoing litigation, President Garcia's justification was that the request is totally consistent with Peru's various cultural heritage treaties and MOUs with the United States. The request was consistent with the formal legal complaint itself, which alleges that Yale's conduct is in violation of the 1970 UNESCO Convention, the UNIDROIT Convention and the 1972 World Heritage Convention, under which Machu Picchu is a designated World Heritage site. As noted *supra*, these conventions can properly serve as embodying not only legal but evolving ethical principles which would provide an

objective standard on which a mediator, negotiator or diplomat could rely in reaching agreement.

The diplomatic campaign paid off. On Nov. 20, 2010 Garcia stated that Yale had agreed to return the artifacts. Yale described the situation differently, with President Richard Levin saying, "There is now a constructive framework for agreement . . . Yale is very pleased with the positive developments in the discussions about the return of Machu Picchu artifacts to Peru. It has always been Yale's desire to reach an agreement that honors Peru's rich history and cultural heritage and history and recognizes the world's interest in ongoing public and scholarly access to that heritage."

An important lesson to be learned from this example is that the original opposing positions of the parties could not be resolved until Yale recognized the psychological importance of ownership of the Machu Picchu artifacts as a symbol of the culture and identity of the Peruvian nation and people, which could not be surrendered to a U.S. academic institution.

> In the case of Peru, a democratic South American nation, they care about the preservation of their cultural heritage and recovery of national sovereignty of the group of priceless cultural artifacts that are part of the country's legacy for future generations. In the case of Yale University, they are looking to protect a tradition of excellence in the field of anthropology and retain access to the collection for research together with a fair retribution for the hard work and research that was done in the beginning of the twentieth century following a properly established process. Their official position was communicated as securing the 'collection's conservation, accessibility, security and availability for scholarly study'.[27]

[27] See, Garcia, Adrian. "*Peru v. Yale*: Getting Past No in a Century Old Negotiation." *Harvard Law School Negotiation Workshop*, (Spring 2009).

What lawyers involved in mediating disputes of this kind must realize is that when a sovereign nation believes that objects have been stolen or wrongfully taken from its people, the idea of collaboration with the "thief" or accepting a "gift" of stolen property from the "thief" is simply not an acceptable option.

IV. Incorporating the Core Principles of the Understanding Based Model of Mediation to Resolve Conflict Involving the Repatriation of Sacred, Ritual and Spiritual Objects

The Understanding Based Model can be used effectively as a departure for mediating or negotiating claims by indigenous peoples. Particularly where the parties anticipate ongoing relationships, the model which demonstrates the importance and value to be given to establishing a process of communication amongst the stakeholders is an effective option.

A. *Bonnischen v. United States*[28]

Ancient human remains of a man who hunted or journeyed through the Colombia Plateau at least 8,340 to 9,200 years ago, dubbed "the Kennewick man," were discovered at an Army Corps of Engineers work site on federal aboriginal land along the Columbia River near Kennewick, Washington in the United States. Five Native American groups (hereafter, the "Tribal Claimants") demanded that the remains be turned over to them for immediate burial at a secret location "with as little publicity as possible," and "without further testing of any kind." The Tribal Claimants based their demand on the Native American Graves Protection and Repatriation Act ("NAGPRA"), enacted in 1990. On January 13, 2000, the Department of the Interior announced its determination that the

[28] *Bonnischen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002) affirmed and remanded 367 F.3d 864 (9th Cir.2004). id. 367 F 3d864 (9th Cir. 2004)

Kennewick remains are "Native American" as defined by NAGPRA. The decision was premised on only two facts: the age of the remains, and their discovery within the United States. The agency's opinion stated: "As defined in NAGPRA, 'Native American' refers to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes."

In response to arguments that scientific study could provide new information about the early history of people in the Americas, the Confederated Tribes of the Umatilla asserted, "We already know our history. It is passed on to us through our elders and through our religious practices. From our oral histories, we know that our people have been part of this land since the beginning of time. We do not believe that our people migrated here from another continent, as the scientists do."

Dr. Robson Bonnischen and other noted scientists challenged Secretary of the Interior Bruce Babbitt's interpretations of "Native American" and "cultural affiliation" and claimed further that the use of oral history to determine cultural affiliation violated the Establishment Clause of the First Amendment of the United States Constitution.

Ultimately, after eight years of litigation, the Ninth Circuit Court of Appeals agreed with the scientists. In the final outcome, the court set aside the decision awarding the remains to the Tribal Claimants, enjoined transfer of the remains to the tribes and required archaeologists be allowed to study the remains. With respect to NAGPRA, the court said,

"The term 'Native American' requires, at a minimum, a cultural relationship between remains or other cultural items and a present-day tribe, people, or culture indigenous to the United States…The evidence in the record would not support a finding that Kennewick Man is related to any particular identifiable group or culture, and the group or culture to which he belonged may have died out thousands of years ago….Congress did not create a presumption that items of a particular age are 'Native American...' No cognizable link exists between Kennewick Man and Modern Columbia Plateau Indians."

The court concluded that no reasonable person could conclude by a preponderance of the evidence on this record that Kennewick Man is "Native American" under NAGPRA. The court also rejected evidence of oral tradition in this case as just "not specific enough or reliable enough or relevant enough to show a significant relationship." As the district court observed, 8,340 to 9,200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions.

In response to the Court's interpretation of NAGPRA as requiring that tribes must show a direct relationship to these human remains before they claim authority over them, Rob Roy Smith, attorney for the tribes, stated "that's the exact opposite of what Congress wanted. It places on the tribes the burden to prove the remains are Native American."

B. Excerpts from Singer, G., "Unfolding Intangible Cultural Property Rights in Tangible Collections Developing Standards of Stewardship."[29]

> In the fall of 2000, a delegation from the Confederated Tribes of the Grand Ronde came to the American Museum of Natural History. Its purpose was to examine the Museum's anthropology collections and archives to determine whether any of the objects could or should be claimed by them for

[29] In *Art and Cultural Heritage*, Part VIII, "Museums and Cultural Heritage."

repatriation under the auspices of the Native American Graves Protection and Repatriation Act ("NAGPRA"). After several days, the delegation asked to see the Willamette meteorite that was formally part of the Museum's science collections. At that moment, the meteorite sat in the middle of a construction project, crated and secured on a permanent installation mount as one of the focal structures around which the Museum was building its new Rose Center for Earth and Space. The meteorite's size and weight required that the Museum build around it, rather than move the meteorite into the new building.

The Museum granted the request to examine the meteorite and made arrangements to halt the construction around the meteorite, removed the protective cladding, and permitted the examination. By the end of the day, the delegation from the Grand Ronde submitted a letter making its claim for repatriation of the Willamette meteorite as a "sacred object" of one of its tribes, the Clackamas, which was followed by a formal repatriation request several months later. The Museum was obligated by law to accept or reject the claim within 90 days. If rejected, the tribe could immediately file a complaint in federal court to determine the claim.

The claim was a surprise to the Museum. To the Museum and its scientists, the meteorite represented a rare and important scientific specimen that was preserved as part of a small record of authentic extraterrestrial objects, an important specimen for research in the fields of earth and planetary sciences and astrophysics, and an extraordinary scientific object for public display and education. The Museum had held the meteorite for these purposes for most of a century.

To the Clackamas of the Grand Ronde, the meteorite was a sacred object. According to the traditions of the Clackamas, the meteorite they call "Tomanowos" is a revered spiritual being that has healed and empowered the people of the valley since the beginning of time. The Clackamas believe that Tomanowos came to the valley as a representative of the Sky People and that a union occurred between the sky, earth, and water when it rested in the ground and collected rainwater in its basins. The rainwater served as a powerful purifying, cleansing and healing source for the Clackamas and their neighbors, while tribal hunters, seeking power, dipped their arrowheads in the water collected in the Meteorite's crevices. These traditions and the spiritual link with Tomanowos were preserved through the ceremonies and songs of the descendants of the Clackamas. The repatriation claim was the Grand Ronde's effort to re-unite the traditions with the meteorite.

While this claim is atypical in many respects of repatriation claims under NAGPRA, it serves to illustrate a dominant, underlying objective of the law—that repatriating objects would permit Native Americans to restore their traditional ritual and religious practices, one of the intangible cultural property rights recognized by international norms.

The law is not written in the form of the high level principles of international norms. Rather it is primarily definitional and procedural in form, delivering a doctrine of repatriation that recognizes that the Native American cultures from which these collections came have survived and are represented by today's federally recognized tribes.

The underlying legal theory of property of NAGPRA is that good title could not have been obtained to the items so defined, either because it was a kind of property that presumptively could not be owned, such as human remains, or it was of a nature that was presumptively communally owned and misappropriated. A museum could decline repatriation if it could show a "right of possession" (possession obtained with the voluntary consent of an individual or group that had authority of alienation).

In this regard, the museum drew upon the fact that NAGPRA had an extra legal effect on museum policy and practice, that is, on matters of museum stewardship not mandated by NAGPRA. For example, the American Museum of Natural History had many years before adopted a policy that declared that "relationships between the Museum and Native American peoples will be governed by respect of the human rights of Native Americans" and that the Museum recognizes the need to pursue historic and scientific research "in a respectful, non-intrusive manner that takes into account the values of the Native American nations and peoples." The Museum policy further pledged "to resolve questions of the disposition and treatment of human remains and cultural items consensually through cooperative and timely discussions between the Museum and all interested Native American groups" and declared that the Museum "recognizes the need to interpret cultural items with accuracy, sensitivity, and respect for their relationship to the cultures of Native peoples" and "to engage in dialogues with Native Americans concerning their beliefs and viewpoints. Many museums adopted similar policies.

The Grande Ronde visited the Museum again, and the Museum visited the Grande Ronde, and from those exchanges reached common ground on a settlement that involved, among other things, that the meteorite would be conveyed to the Grand

> Ronde if the Museum permanently removed it from public display. The meteorite would stay on exhibit at the Museum with a narrative label next to the scientific narrative that provides the history of "Tomanowos" and the Clackamas relationship to it. The settlement also provided for annual, private ceremonial access to the meteorite.
>
> NAGPRA has also affected museum practices of research access. One museum granted permission to a researcher to photograph human remains, but subject to restrictions prohibiting publication of the photograph. Museums have removed from their internet research databases those images of collection objects that were considered intrusive to the Native Americans and are cautious of sending images to bona fide researchers. A number of museums received a letter from one tribe requesting immediate closure of all published or unpublished field data relating to the tribe, including notes drawings and photographs, particularly those dealing with religious matters, to anyone who had not received the tribe's written permission. While it is believed that none of the museums granted the request for closure, a number of them marked the collections and archival material as "sensitive" and adopted a policy of encouraging or requiring scholars to contact tribal authorities before access would be granted.
>
> In so doing, museums have begun to develop a norm of "cultural privacy" for religious objects and rituals documented in their archives. This development is unique and remains a matter of considerable concern to an academic community that protects its own traditions of academic freedom and freedom to publish.

V. The Understanding Based Model and Solving Traditional Knowledge Disputes

A. *John Bulun Bulun v R and T Textiles*.[30]

Although intellectual property rights confer private rights of ownership, in customary discourse to "own" does not necessarily or only mean 'ownership' in the Western non-Indigenous sense. It can convey a sense of stewardship or responsibility for the traditional culture, rather than the right to exclude others from certain uses of

[30] (1998) 41 IPR 513. This case is one of the cases studied by Ms. Terri Janke in her study "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions" commissioned by WIPO, and available at http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html.

expressions of the traditional culture, which is more akin to the nature of many intellectual property rights systems. Although the analysis of Judge Von Doussa skilfully accommodated different legal systems, the case also illustrates why in another jurisdiction, perhaps less sensitive to indigenous rights, mediation, if one can obtain the infringer's consent to mediation, is an appropriate alternative.

Mr. Bulun Bulun is a well known artist from Arnhemland, Gonalbingu, and his work *Magpie Geese and Water lilies at the Waterhole* was altered and copied by a textile company. In 1996, Mr. Bulun Bulun commenced action against the textile company for copyright infringement.

The Ganalbingu people are the traditional Indigenous owners of Ganalbingu country. They have the right to permit and control the production and reproduction of the artistic work under the law and custom of the Ganalbingu people. The art work *Magpie Geese and Water lilies at the Waterhole* depicts knowledge concerning Djulibinyamurr. Djulibinyamurr, along with another waterhole site, Ngalyindi, are the two most important cultural sites in Ganalbingu country for the Ganalbingu people. Mr. Bulun Bulun noted that, under Ganalbingu law, ownership of land has corresponding obligation to create artworks, designs, songs, and other aspects of ritual and ceremony that go with the land.

The pertinent aspect of the case related to a claim by the clan group to which Mr. Bulun Bulun belonged that it, in effect, controlled the copyright in the artwork, and that the clan members were the beneficiaries of the creation of the artwork by the artist acting on their

behalf. Accordingly, they claimed to be entitled to assert a collective right with respect to the copyright in the work, over and above any issue as to authorship.

Justice Von Doussa said, "Whilst it is superficially attractive to postulate that the common law should recognize communal title, it would be contrary to established legal principle for the common law to do so." The court looked at the relevance of customary law and decided that evidence of customary law may be used as a basis for the foundation of rights recognized within the Australian legal system. After finding that Mr. Bulun Bulun's customary law obligations gave rise to a fiduciary relationship between himself and the Ganalbingu people, Justice Von Doussa stated:

> The conclusion does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu people as part of the factual matrix which characterizes the relationship as one of the mutual trust and confidence. It is that relationship which the Australian legal system recognizes as giving rise to the fiduciary relationship, and to the obligations that arise out of it.

If *Bulun* raises the issue of whether and to what extent customary law may define property rights and whether traditional intellectual property law can accommodate very different notions of ownership, so as to protect traditional knowledge and designs, a final example looks at genetic resources and the traditional knowledge debate.[31]

VI. Looking toward the Future

These cases have been put forward to show the very diverse factors and outcomes of disputes in the art and cultural heritage sector with a discussion directed to highlight the underlying values at play which seem particularly useful in clarifying basic aspects of the topic under consideration. Mediation offers one of the best tools to solve disputes in the

[31] These issues are discussed in Part VII, "Who Owns Traditional Knowledge?" Maui Solomon in "Protecting Moriori/Maori Heritage in New Zealand" questions whether the intellectual property system based on private property rights is adequate to protect traditional knowledge in the public domain.

art and cultural heritage field and The Understanding Based Model which requires a mediator to move beyond the legal positions to understand the value-laden, political, psychological and emotional issues that may lie beneath the dispute, a valuable approach. A well informed, understanding mediator can work with the parties to facilitate a solution which is time and cost effective, and is equitable, creates value, and as appropriate, promotes long term relationships.

Good luck to all in the venture.