BURYING THE BURDEN: A SOVEREIGN'S DUTY OF INVESTIGATION POST-*REPUBLIC OF TURKEY V. CHRISTIE'S INC.*

Caitlin H. French†

This Note explores the intersection of cultural heritage law and U.S. property law through the lens of Republic of Turkey v. Christie's Inc.*, a significant case involving the contested ownership of the ancient Anatolian "Stargazer" figurine. The Note explores how longstanding doctrines of property and the equitable defense of laches interact with international legal frameworks and patrimony laws aimed at preserving cultural heritage material. The case underscores tensions between cultural nationalism and internationalism, sovereign ownership claims under foreign patrimony laws, and the protections afforded to good-faith purchasers under U.S. law.*

The Note identifies two key legal issues at play: (1) the evidentiary burden placed on source nations to assert ownership of cultural property in U.S. courts, and (2) the application of the laches defense, particularly the methods that U.S. courts employ to evaluate "inquiry notice" in the context of decades-old claims. It questions whether the Second Circuit's decision properly elevated the investigatory obligations of source nations while minimizing the due diligence expectations placed on collectors and cultural institutions. The Note critiques the reliance on public exhibition and academic commentary as grounds for imputing knowledge to foreign states, thereby barring claims under laches.

Ultimately, the Note calls for greater consistency in the application of legal standards to cultural heritage disputes, emphasizing the need for heightened scrutiny of provenance in the art market and greater accountability from cultural

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† Caitlin H. French, J.D., *magna cum laude*, Benjamin N. Cardozo School of Law, Class of 2025; M.A., *with distinction* (History of Art), University College London. Associate Editor, *Cardozo Law Review*. The Author would like to thank Professor Michael McCullough for his guidance and feedback, and the *Cardozo Law Review* editorial team for their support throughout the publication process. The Author is especially grateful to her mother, Administrative Law Judge Patricia M. French, who championed her love of art and history from the beginning.

institutions in facilitating the return of unlawfully removed artifacts to their source nations.

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INTRODUCTION

In April 2017, the Republic of Turkey ("Turkey")[1] filed suit against Michael Steinhardt and Christie's Inc. (collectively, "the Possessors") seeking the return of movable cultural heritage allegedly stolen from within its borders and exported to the United States in violation of a Turkish patrimony law known as the 1906 Ottoman Decree ("the 1906 Decree").[2] The dispute arose over an Anatolian marble female Idol of Kiliya-type ("the Stargazer") that dates to at least 2200 BCE.[3] Kiliya-type figurines, known colloquially as "stargazer" figurines due to the upward tilt of their heads, are theorized to have been "killed" in ritual practice

1 Turkey is the official short form name of the Republic of Turkey. *See U.S. Relations with Turkey*, U.S. DEP'T OF STATE (Jan. 9, 2023), https://2021-2025.state.gov/u-s-relations-with-turkey [https://perma.cc/VA53-Q6ES].

2 Republic of Turkey v. Christie's Inc., 425 F. Supp. 3d 204, 209 (S.D.N.Y. 2019).

3 *Id.*

because so many of them have been broken across the neck—as a result, only about fifteen complete or nearly complete Kiliya-type figurines are known to survive at present in the entire world.[4] The Stargazer is in pristine condition and undoubtedly an "exceptionally rare and important cultural artifact."[5] This lawsuit, *Republic of Turkey v. Christie's Inc.*, ultimately reached the Second Circuit Court of Appeals.[6]

The United States is the largest arts and antiquities market in the world.[7] New York City is the largest art market within the United States, the undisputed art capital of the world if only for the sheer volume and value of the art that circulates through its bevy of galleries, auction houses, and cultural institutions.[8] The U.S. art market, largely unregulated, is prospering despite its infamous lack of transparency.[9] As a result, the Second Circuit holds significant sway over national and global arts-related issues.[10] Parties dealing in, or possessing, movable cultural heritage, and "source nations"[11] interested in reclamation, should

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4 *See An Anatolian Marble Female Idol of Kiliya Type*, CHRISTIE'S (June 8, 2005), https://www.christies.com/en/lot/lot-4505443 [https://perma.cc/E9EL-TTAW] (discussing a different stargazer idol); Press Release, Christie's, Press Release: The Guennol Stargazer (Mar. 24, 2017), https://press.christies.com/press-release-the-guennol-stargazer-nbsp [https://perma.cc/KZ7F-JEHG].

5 Republic of Turkey v. Christie's Inc., 62 F.4th 64, 68 (2d Cir. 2023).

6 *Id.* at 64.

7 *Conflict Antiquities: A Terrorist Financing Risk*, ANTIQUITIES COAL. (Aug. 4, 2017), https://perma.cc/3TLC-W5NF; Letter from The Antiquities Coalition et al., to Janet Yellen, Sec'y of the Treasury, U.S. Dep't of the Treasury, and Himamauli Das, Acting Dir., Fin. Crimes Enf't Network (Aug. 8, 2023), https://theantiquitiescoalition.org/wp-content/uploads/2023/12/Bar-Criminals-from-Exploiting-the-30-billion-dollar-American-Art-Market.pdf [https://perma.cc/CA2D-F4BP].

8 CLARE MCANDREW, ART BASEL & UBS, THE ART MARKET 2023, 139, 143 (2023), https://theartmarket.artbasel.com/download/The-Art-Basel-and-UBS-Art-Market-Report-2023.pdf [https://perma.cc/KPR9-X2F6].

9 Gregory Day, *Explaining the Art Market's Thefts, Frauds, and Forgeries (and Why the Art Market Does Not Seem to Care)*, 16 VAND. J. ENT. & TECH. L. 457, 459–61 (2014) ("[I]n contrast to efficient markets, the art industry actively suppresses reliable information about its products—a behavior that the governing legal regime reinforces. . . . Even the most diligent art consumer cannot typically access enough reliable information to determine with confidence whether a proposed art deal is a wise investment. . . . [F]ew in the art industry have seriously attempted to add transparency to the art market. But despite these flaws, consumers continue to invest substantial sums of money in art.").

10 *See, e.g.*, Kenneth A. Plevan, *The Second Circuit and the Development of Intellectual Property Law: The First 125 Years*, 85 FORDHAM L. REV. 143 (2016) (discussing the Second Circuit's influence on the development of U.S. intellectual property law).

11 The term "source nations" has been used in cultural heritage scholarship to denote a country where "the supply of cultural artifacts far exceeds the internal demand." *See* Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURIS. 249, 261 (1993). This Note uses the term "source nation" to describe the originating location of movable cultural heritage, which is

take note of this case. *Republic of Turkey v. Christie's Inc.* is a cautionary tale, but its result, that all rights, title, and interest to the Stargazer vest in Steinhardt despite the near certainty of its theft from Turkey,[12] is predicated on a highly specific set of facts.

In *Republic of Turkey v. Christie's Inc.*, the Second Circuit noted that the pleading standard for stolen property cases is a low bar, requiring claimants only to make a threshold showing of an "arguable [ownership] claim" to a stolen artwork before the burden shifts to the respondent to refute that claim.[13] This is an extraordinarily low pleading burden for claimants, particularly in the heritage context where it is practically impossible for respondents to prove that looted cultural heritage is not stolen.[14] Despite the near certainty of Turkey's ability to meet that threshold burden, the Second Circuit held that the affirmative defense of laches applied to negate Turkey's claim.[15] Laches is an equitable defense for which a defendant bears the burden of proof of showing (1) the claimant knew, or should have known, that they had an ownership claim to the disputed chattel; (2) the claimant inexcusably delayed in taking action; and (3) the defendant was prejudiced by the delay.[16] The Second Circuit agreed that Turkey knew that the Stargazer was in the United States and that an aggregate of factors supported a finding that Turkey should have known that the Stargazer was in the United States in violation of Turkish law.[17] Turkey's failure to act on this notice was deemed an impermissible delay, prejudicing the Possessors' defense and ultimately

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interchangeable with the concept of a sovereign claimant or a "country of origin" as would be described on a customs declaration form.

12 *See infra* notes 106–07 and accompanying text.

13 *Christie's Inc.*, 62 F.4th 64, 70 (2d Cir. 2023).

14 Just as it can be very challenging for source nations to prove that cultural heritage material originated from within their borders and was removed in contravention of a viable domestic patrimony law, it is equally challenging for respondents to prove the opposite under the burden of proof standard clarified by the Second Circuit in *Republic of Turkey v. Christie's Inc.* *See* cases cited *infra* note 55; *see also* Abby Seiff, *How Countries Are Successfully Using the Law to Get Looted Cultural Treasures Back*, ABA J. (July 1, 2014, 10:40 AM), https://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasur [https://web.archive.org/web/20250419074551/https://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasur] ("To establish that a cultural object is stolen property, the U.S. would have to show that the country had a national ownership law, that there is enforcement of this law internally within the country, and that the object left the country after the date that law went into effect.") (Note that this article was published prior to the Second Circuit's burden-shifting clarification in *Republic of Turkey v. Christie's Inc.*); *Christie's Inc.*, 62 F.4th at 70–71.

15 *Christie's Inc.*, 62 F.4th at 74 ("[I]n this case, because Turkey has slept on its rights, we affirm the judgment of the district court.").

16 *Id.* at 71.

17 *Id.* at 72.

barring Turkey's claim.[18] Unfortunately for future claimants, *Republic of Turkey v. Christie's Inc.* provides little clarity as to what combination of factors tip the scale in a defendant's favor in a laches analysis. The Second Circuit did not address the concern that source nations seeking replevin must face the Goliath of the art market's unregulated secrecy practices.[19]

This Note argues that the Second Circuit correctly articulated the threshold burden of proof for claimants in stolen artwork cases in New York State.[20] The Second Circuit, however, undermined the efficacy of the stated burden by shifting to the source nation a heightened stack of requirements consisting of not only identifying cultural heritage material that was possibly looted and exported, but also locating the current possessor, locating the heritage material, and establishing the necessary provenance. This Note does not assert that *Republic of Turkey v. Christie's Inc.* was wrongly decided under present New York law. Rather, this Note takes the position that the *Republic of Turkey v. Christie's Inc.* court did not adequately balance the equities, creating uncertainty for similarly situated future courts and sovereign claimants. Without clear parameters for what factors establish inquiry notice in cultural heritage cases, source nations are left without guidance as to the factors that may leave their claims vulnerable to a laches defense.[21]

Part I of this Note will introduce foundational aspects of cultural heritage law and theory, as well as the facts and disposition of *Republic of Turkey v. Christie's Inc.* as a case study.[22] Part II will then analyze and discuss the burden of proof standard and issues of inquiry notice and comparative diligence as applied to laches in the heritage context.[23] Part III proposes—and weighs the relative value of—two actions that may mitigate the information deficit central to the application of laches in cultural heritage claims, namely (1) judicial considerations of deference to sovereign nations in cultural heritage cases, and (2) a legal rule imposing a duty of inquiry on purchasers of cultural heritage material.[24]

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18 *Id.*

19 *See* discussion *infra* Section II.B; *see* Day, *supra* note 9, at 494 ("Efficient markets require the flow of plentiful, easily accessible information; yet the art market's general culture and the laws governing it encourage those possessing and selling art to proceed with the utmost secrecy and to withhold or distort information.").

20 *See* discussion *infra* Section II.A.

21 The opinion, rather paradoxically, states: "Because Turkey had reason to know the Stargazer was its cultural patrimony in the 1990s, it had reason to investigate the artifact and assert its claim to ownership. This is not to say that sovereign nations have a standing obligation to investigate the potential theft of their dispersed artifacts." *Christie's Inc.*, 62 F.4th at 72; *see* discussion *infra* Section II.B.

22 *See infra* Part I.

23 *See infra* Part II.

24 *See infra* Part III.

Finally, this Note will close with a brief discussion of whether a statutory scheme targeted to close the information gap and support source nations in bringing timely claims would be tenable, and the actions source nations should take in response to *Republic of Turkey v. Christie's Inc.*[25]

I. BACKGROUND

A. *Cultural Heritage in U.S. Jurisprudence and Diplomacy*

"Property" is a foundational legal category in common law.[26] Legal doctrine has developed and solidified in Western jurisprudence broadly favoring the rights of true owners, with some exceptions carved out in favor of good-faith purchasers.[27] These ingrained property rights are not easily compatible with cultural heritage law,[28] which looks to the protection of cultural heritage material for the benefit of present and future generations—and humankind as a whole—because the central objective of cultural heritage law is not simply protection but the possibility that persons other than the owner may have access to the cultural heritage.[29] One dichotomy within cultural heritage theory is the concept of cultural internationalism as opposed to cultural nationalism.[30] Cultural internationalism encompasses the view that cultural heritage

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25 *See infra* Part III.

26 *See* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012).

27 Day, *supra* note 9, at 472.

28 This Note uses the terms "cultural heritage" and "cultural heritage law" instead of "cultural property" to emphasize the necessary distinctions between property and cultural heritage material in the law. *See* Lyndel V. Prott & Patrick J. O'Keefe, *"Cultural Heritage" or "Cultural Property"?*, 1 INT'L J. CULTURAL PROP. 307, 309 (1992).

29 *Id.*

30 Predita C. Rostomian, Note, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271, 278 (2002). Note that Rostomian argues strongly in favor of cultural internationalism. This Note does not reach the merits of that argument but disagrees strongly with the assertion that "cultural internationalism would probably stop looting and exporting more so than cultural nationalism," which is argued with insufficient foundation. *Id.* at 293. The great weakness of cultural nationalism arises after objects are returned to their source nation if that source nation lacks the capacity to protect and preserve them, as occurred following the repatriation of the Lydian Hoard. *See infra* note 177 and accompanying text; *see also* Alessandro Chechi, Anne Laure Bandle & Marc-André Renold, *Case Lydian Hoard—Turkey and Metropolitan Museum of Art*, ARTHEMIS, Feb. 2012, at 1, 1, 6, https://plone.unige.ch/art-adr/cases-affaires/lydian-hoard-2013-turkey-and-metropolitan-museum-of-art-1 [https://perma.cc/BE9Y-CG2M]. *But see* Julian Lucas, *The Forgotten Movement to Reclaim Africa's Stolen Art*, NEW YORKER (Apr. 14, 2022), https://www.newyorker.com/books/under-review/the-forgotten-movement-to-reclaim-africas-stolen-art?utm [https://perma.cc/C7KV-5N8G] ("Chika Okeke-Agulu, an art historian and restitution advocate, has compared this rhetoric to a thief demanding the construction of a secure facility before agreeing to return a stolen BMW.").

comprises the early history of mankind, and that its preservation is the ultimate goal even if its preservation is dependent upon its divorce from its country of origin.[31] In contrast, proponents of cultural nationalism would argue that as the heirs of the creators of cultural heritage, modern nation-states should have the exclusive ownership and control of cultural heritage found within their borders.[32]

Ownership of cultural heritage property is not merely an economic interest.[33] Moreover, cultural heritage theft, historically called looting, is not solely a financial crime.[34] Looting undoubtedly robs source countries of the market value of the object and less tangibly deprives them of autonomy over their cultural heritage and divorces an object, often permanently, from its historical context.[35] As a result, cultural heritage interests have been treated differently than other forms of property by U.S. courts, namely through the recognition of foreign nations' cultural patrimony laws, as well as in the sphere of international law.[36]

The first international effort to recognize the significance of movable cultural heritage, and the necessity of its protection and preservation, was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[37] In the wake of World War II, and the mass destruction and looting of cultural heritage that occurred during that conflict, the international community recognized that cultural heritage is particularly vulnerable in periods of armed conflict.[38] In the 1950s and 1960s, as nation-states around the world gained independence from colonialist states, the international community grew increasingly concerned by the limited protection afforded to new states' ownership rights over the cultural heritage within their borders.[39]

In 1970, the international community convened the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit

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31 *See* John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L. L. & POL. 1, 10–11 (1998).

32 *Id.* at 12.

33 Leila Amineddoleh, *The Politicizing of Cultural Heritage*, 45 N.C. J. INT'L L. 333, 337 (2020).

34 *Id.* at 349.

35 Rostomian, *supra* note 30, at 272.

36 Amineddoleh, *supra* note 33, at 338.

37 Rostomian, *supra* note 30, at 277.

38 *Id.*

39 *About 1970 Convention*, UNESCO (Mar. 5, 2025, https://www.unesco.org/en/fight-illicit-trafficking/about [https://perma.cc/T8BU-K737]. Note that in contrast, the Ottoman Empire began legislating for the preservation of its property rights before the twentieth century. *See* Sibel Özel, *Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey*, 38 INT'L J. LEGAL INFO. 177, 178 (2010). Note that Dr. Özel was an expert witness for Turkey in *Republic of Turkey v. Christie's Inc. See generally* Testimony of Plaintiff's Expert Witness, Sibel Ozel—Direct Examination, Republic of Turkey v. Christie's Inc., 62 F.4th 64, No. 17-cv-3086 (S.D.N.Y. Apr. 7, 2021), 2021 WL 8742574.

Import, Export, and Transfer of Ownership of Cultural Property ("the 1970 UNESCO Convention"), establishing the first terms for modern international cooperation in this area.[40] The 1970 UNESCO Convention, to which Turkey and the United States are parties,[41] imposes a duty on state parties to prevent the acquisition, by museums or similar cultural institutions within their borders, of cultural objects illegally exported from a source nation.[42] In the United States, the 1970 UNESCO Convention is not self-executing, meaning that it did not take effect upon ratification and instead required domestic legislation to enforce.[43]

In practice, the United States has agreed to enforce select aspects of the 1970 UNESCO Convention as it pertains to archeological and ethnological heritage material through the Convention on Cultural Property Implementation Act (CPIA).[44] The CPIA provides a mechanism for the U.S. Government to institute import restrictions on movable cultural heritage at the request of another signatory nation (to the 1970 UNESCO Convention) and after a determination by the executive branch that

> (1) "the cultural patrimony of [the requesting nation] is in jeopardy from the pillage of archeological or ethnological materials of [that nation],"
>
> (2) the requesting nation "has taken measures . . . to protect its cultural patrimony,"
>
> (3) the import restrictions are necessary and would be effective in dealing with the problem, and

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40 *See* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 9, Nov. 14, 1970, 19 U.S.C. §§ 2601–2613, 823 U.N.T.S. 231 [hereinafter *1970 UNESCO Convention*] ("The States Parties to this Convention 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."). However, international efforts to preserve cultural heritage property predate the nineteenth century. Amineddoleh, *supra* note 33, at 339.

41 Executed through the codification of the Convention on Cultural Property Implementation Act, providing the President with discretion to act in the interest of protecting a party state's ownership interest as long as that interest has been diligently pursued by the source party state. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613.

42 *1970 UNESCO Convention*, *supra* note 40, art. 7.

43 19 U.S.C. §§ 2601–2613; *ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties*, CONST. ANN., https://constitution.congress.gov/browse/essay/artII-S2-C2-1-4/ALDE_00012955 [https://perma.cc/66CT-XXWF].

44 19 U.S.C. §§ 2601–2613.

(4) the restrictions are in the "general interest of the international community."[45]

In short, only after a source nation signs a memorandum of understanding ("MOU") with the U.S. State Department's Bureau of Educational and Cultural Affairs will the U.S. Government take action to prevent the import of movable cultural heritage brought into the United States in violation of a foreign state's patrimony laws.[46] The U.S. Government has no mechanism for responsive action upon a foreign state's repatriation request without these bilateral agreements unless emergency conditions necessitate the imposition of import sanctions.[47]

Cultural heritage is distinct from other forms of property because of the implied obligation of protection and preservation inherent in its ownership, often imputed through statutes limiting alienability or imposing obligations such as preservation.[48] Cultural patrimony laws establish state ownership of movable cultural heritage.[49] The breadth of material covered by these laws is typically determined by a fixed temporal duration or a categorization.[50] To illustrate, a nation may enact a patrimony law stating that anything more than 200 years old or excavated from the ground is owned by the state.

Foreign patrimony laws may be enforced within the legislating state's borders, but that does not mean that they are automatically

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45 United States v. Schultz, 333 F.3d 393, 408 (2d Cir. 2003) (alteration in original) (quoting 19 U.S.C. § 2602(a)(1)(A)–(D)).

46 19 U.S.C. §§ 2601–2613. Turkey and the U.S. State Department did not have an MOU in effect prior to *Republic of Turkey v. Christie's Inc.*, but an MOU was signed between Turkey and the United States in 2021. Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Turkey Concerning the Imposition of Import Restrictions of Categories of Archeological and Ethnological Material of Turkey, U.S.-Turk., Jan. 19, 2021, T.I.A.S. No. 21-324. In response, the U.S. Customs and Border Protection Agency (CBP), the Department of Homeland Security, and the Department of the Treasury promulgated a regulation enabling the CBP to impose import restrictions on archeological and ethnological material sourced from Turkey. Import Restrictions Imposed on Categories of Archaeological and Ethnological Material of Turkey, 86 Fed. Reg. 31910 (June 16, 2021) (to be codified at 19 C.F.R. pt. 12).

47 *See* Bureau of Educ. & Cultural Affs., *Agreements and Emergency Actions*, U.S. DEP'T OF STATE, https://eca.state.gov/cultural-heritage-center/cultural-property/agreements-and-emergency-actions [https://perma.cc/6Q7L-V7V4].

48 Amineddoleh, *supra* note 33, at 337–38.

49 James K. Reap, *Introduction: Heritage Legislation and Management*, 6 BUILT HERITAGE, at 1, 1 (2022).

50 *See generally UNESCO Database of National Cultural Heritage Laws*, UNESCO, https://www.unesco.org/en/cultnatlaws [https://perma.cc/A2J2-7K36] (database of over 3,100 national cultural heritage laws); *see also* Seiff, *supra* note 14.

enforced within the United States.[51] There are two common situations in which U.S. courts consider the validity of a foreign state's patrimony law. First, as articulated above, is where a foreign source nation has requested the U.S. Government intervene and seize property removed from the source nation in violation of a patrimony law.[52] Civil forfeiture laws in the United States generally require the violation of a predicate statute to justify the seizure.[53] In the heritage context, these predicate statutes are typically U.S. customs laws, the National Stolen Property Act (NSPA),[54] or a foreign state's patrimony law.[55] Second is where, as in *Republic of Turkey v. Christie's Inc.*, a foreign source nation has brought a private action for conversion and replevin in a U.S. court and that foreign state's patrimony law establishes the claim of ownership upon which the action relies.[56] In both situations courts look to a variety of factors, including enforcement of the relevant patrimony law within the borders of the source state, to determine whether the foreign patrimony law establishes a valid ownership claim.[57]

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51 As the presidential determinations outlined in the CPIA suggest, such out-of-court remedies are discretionary. *See* Am. Soc'y Int'l L., *Jurisdictional, Preliminary, and Procedural Concerns*, *in* BENCHBOOK ON INTERNATIONAL LAW § II.A (Diane Marie Amann ed., 2014), https://www.asil.org/sites/default/files/benchbook/jurisdiction.pdf [https://perma.cc/2M64-XG8E] ("Enforcement jurisdiction is primarily territorial. Thus, the United States may enforce a foreign judgment against assets in the United States even if it would have lacked personal jurisdiction over the original case . . . .").

52 *See supra* notes 39–46 and accompanying text.

53 *See, e.g.*, 18 U.S.C. § 545 (establishing a forfeiture penalty upon "[w]hoever fraudulently or knowingly imports or brings into the United States, any merchandise *contrary to law*, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law" (emphasis added)).

54 18 U.S.C. §§ 2314–2315.

55 United States v. Schultz, 333 F.3d 393, 410 (2d Cir. 2003) ("In light of our own precedents and the plain language of the NSPA, we conclude that the NSPA applies to property that is stolen in violation of a foreign patrimony law. The CPIA is not the exclusive means of dealing with stolen artifacts and antiquities, and reading the NSPA to extend to such property does not conflict with United States policy."); *see also* United States v. McClain, 545 F.2d 988, 1001 (5th Cir. 1977) ("Were the word [stolen] to be so narrowly construed as to exclude coverage, for example, with respect to pre-Columbian artifacts illegally exported from Mexico after the effective date of the 1972 [patrimony] law, the Mexican government would be denied protection of the [NSPA] after it had done all it reasonably could do [to vest] itself with ownership to protect its interest in the artifacts. This would violate the apparent objective of Congress: the protection of owners of stolen property.").

56 Republic of Turkey v. Christie's Inc., 62 F.4th 64, 67 (2d. Cir. 2023).

57 *Schultz*, 333 F.3d at 400–02.

B. *Laches as Applied to Cultural Heritage Claims Under New York Law*

New York law typically favors the original owner in cases of stolen property under the maxim *nemo dat quod non habet*: "no one gives that which one does not have."[58] This is true even in cases where the possessor is a good-faith purchaser for value, meaning that they purchased the property absent knowledge of its prior theft.[59] The statute of limitations for conversion claims, meaning civil claims arising from the wrongful possession of another's property or interference with another's property right,[60] in New York is governed by the State's longstanding "demand and refusal rule" ("the *Guggenheim* rule").[61]

Under the *Guggenheim* rule, a cause of action for conversion accrues when a true owner makes a demand for the return of the stolen property and the possessor refuses that demand.[62] The seminal case applying this rule to cases of stolen artwork is *Solomon R. Guggenheim Foundation v. Lubell*, a 1991 case wherein the Guggenheim Museum in New York brought an action against a good-faith purchaser to recover an allegedly stolen painting.[63] Per *Guggenheim*, "[u]ntil demand is made and refused, possession of the stolen property . . . is not considered wrongful."[64] Accordingly, New York courts have consistently held demand and refusal to be a "substantive" element of a conversion claim—required for the possessor to be deemed "wrongful"—rather than a "procedural" element that would need to be satisfied prior to bringing a claim.[65]

Courts apply the affirmative defense of laches to prevent plaintiffs from waiting to make their demands (and thus triggering the statutory

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58 Hannah Murray Marek, Note, *Where Is the Justice?: Resolving the Dispute Between Two Innocents in Holocaust Restitution Cases*, 20 ART ANTIQUITY & L. 337, 339 (2015).

59 Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991).

60 *Conversion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

61 *Guggenheim*, 569 N.E.2d at 429–30.

62 *Id.* Refusal is defined as words or actions that are inconsistent with the claimant's possession or enjoyment of the property. *See* Grosz v. Museum of Mod. Art, 772 F. Supp. 2d 473, 483 (S.D.N.Y. 2010) ("Though there is little case law addressing what constitutes a 'refusal' for purposes of the statute of limitations, the cases that exist hold that, 'A refusal need not use the specific word "refuse" *so long as it clearly conveys an intent to interfere with the demander's possession or use of his property*.'" (quoting Feld v. Feld, 720 N.Y.S.2d 35, 37 (N.Y. App. Div. 2001)).

63 569 N.E.2d at 427.

64 *Id.* at 429. *Guggenheim* rejected the federal "due diligence" rule established in *DeWeerth v. Baldinger*, which held that the statute of limitations began to run when the plaintiff should have discovered the whereabouts of stolen art through "reasonable diligence," irrespective of the application of laches. 836 F.2d 103, 107–11 (2d Cir. 1987).

65 *Guggenheim*, 569 N.E.2d at 430.

period) until a more advantageous time.[66] Laches is an equitable defense based on the maxim *vigilantibus non dormientibus aequitas subvenit*, meaning that equity favors the vigilant over those who sleep on their rights.[67] New York courts have noted that "[i]n the context of claims of lost or stolen works of art or cultural artifacts, the doctrine of laches safeguards the interests of a good faith purchaser of lost or stolen art by weighing in the balance of competing interests the owner's diligence in pursuing his claim."[68] To prevail on a laches defense, a defendant must establish "(1) the plaintiff knew of the defendant's misconduct; (2) the plaintiff inexcusably delayed in taking action; and (3) the defendant was prejudiced by the delay."[69] Significantly, the first element ("the knowledge element") is also satisfied where the plaintiff *should have known* of their ability to bring a conversion claim.[70]

In cases involving stolen artwork, the issue of public exhibition has developed as a significant factor considered by courts in the evaluation of whether a plaintiff had sufficient notice to satisfy the knowledge element.[71] For this reason, a laches defense is often employed by cultural institutions to prevent such cases from "ever reaching the merits."[72] It is within this legal framework that *Republic of Turkey v. Christie's Inc.* is situated.

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66 *See Grosz*, 772 F. Supp. 2d at 482–83 (citing Republic of Turkey v. Metro. Museum of Art, 762 F. Supp. 44, 46–47 (S.D.N.Y. 1990)) (holding that a defendant's claims of unreasonable delay apply to whether the defense of laches is available and not to a defense based on the statute of limitations).

67 Ikelionwu v. United States, 150 F.3d 233, 237 (2d Cir. 1998) (citing Ivani Contracting Corp. v. City of New York, 103 F.3d 257, 259 (2d Cir. 1997)).

68 Bakalar v. Vavra, 819 F. Supp. 2d 293, 303 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012) (quoting Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., No. 98-cv-7664, 1999 WL 673347, at *7 (S.D.N.Y. Aug. 30, 1999)).

69 *Ikelionwu*, 150 F.3d at 237.

70 Republic of Turkey v. Christie's Inc., 62 F.4th 64, 72 (2d Cir. 2023).

71 *See* Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 194 (2d Cir. 2019) (holding that the delay was unreasonable where the stolen item was on display at the Metropolitan Museum of Art and had been published in the museum's published catalogue of French paintings for decades); *see also In re* Peters, 821 N.Y.S.2d 61, 68–69 (N.Y. App. Div. 2006) (finding suit barred by doctrine of laches where missing art was exhibited "at prominent museums, galleries, and universities during the second half of the twentieth century"); Howard Univ. v. Borders, 588 F. Supp. 3d 457, 481 (S.D.N.Y. 2022) (denying summary judgment as to laches).

72 *See* Charles A. Goldstein & Yael Weitz, *Claim by Museums of Public Trusteeship and Their Response to Restitution Claims: A Self-Serving Attempt to Keep Holocaust-Looted Art*, 16 ART ANTIQUITY & L. 215, 215 (2011) (discussing laches defense in the context of Nazi-looted art).

C. Republic of Turkey v. Christie's Inc.

Republic of Turkey v. Christie's Inc. was originally brought in the United States District Court for the Southern District of New York under diversity jurisdiction in late April 2017.[73]

The Stargazer's provenance is largely uncertain because it is unstratified, meaning that there is no evidence of the archeological information associated with its discovery.[74] It appeared without context in New York City in 1961, when it was sold by art dealer J.J. Klejman[75] to collectors Alastair and Edith Martin.[76] The Martins added the Stargazer to their famed "Guennol Collection" and loaned it to the Metropolitan Museum of Art in New York City from 1968–1993.[77] The Martins then transferred ownership of the Stargazer to the Buttercup Beta Corporation, owned by Alastair Martin's son, which sold the Stargazer to the Merrin Gallery in 1993.[78] The Merrin Gallery sold it to Steinhardt in a private sale in 1993, and Steinhardt loaned it back to the Met, where it was again displayed from 1999 to 2007.[79] The Met published the Stargazer's origin as "Anatolian."[80]

Of significance to the Southern District of New York and later the Second Circuit, several Turkish scholars—including scholars attached to the Turkish Ministry of Culture—discussed the Stargazer in academic scholarship and newspaper publications after the Stargazer's arrival in the United States.[81] These scholars acknowledged that the Stargazer was of Turkish origin and was located outside of Turkey and at the Met in New

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73 Republic of Turkey v. Christie's, Inc., No. 17-cv-3086, 2021 WL 4060357, at *1 (S.D.N.Y. Sept. 7, 2021), *aff'd*, 62 F.4th 64 (2d Cir. 2023).

74 *Christie's Inc.*, 62 F.4th at 68.

75 An alleged "well known . . . 'dealer-smuggler' of stolen antiquities." Second Amended Verified Complaint at 15, Republic of Turkey v. Christie's, Inc., No. 17-cv-3086 (S.D.N.Y. July 27, 2017), 2017 WL 11532087.

76 *Christie's Inc.*, 62 F.4th at 68.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.* "Anatolia is entirely contained within the modern boundaries of Turkey." Second Amended Verified Complaint at 12, Republic of Turkey v. Christie's, Inc., No. 17-cv-3086 (S.D.N.Y. July 27, 2017), 2017 WL 11532087.

81 *Christie's Inc.*, 62 F.4th at 68 ("In 1989, Özgen Acar, the leading journalist on Turkish cultural heritage and later consultant to a former Turkish Minister of Culture, mentioned the idol's place in the Guennol Collection in an article published in a prominent Turkish newspaper. Jürgen Seeher, a scholar in residence at the German Archaeological Institute in Istanbul, addressed the Stargazer in his 1992 article *Anatolian Marble Statues of the Kiliya-Type*, and, in 2014, Önder Bilgi, an archaeology professor at Istanbul University, referenced the idol and featured its image in his book, *Anthropomorphic Representations in Anatolia*.").

York.[82] Counsel for the Possessors highlighted these publications as evidence of Turkey's knowledge of the Stargazer's location,[83] and critiqued Turkey's failure to investigate its claim of ownership during the 1990s, when these publications allegedly placed Turkey on inquiry notice.[84]

In March 2017, Turkey learned of the upcoming sale of the Stargazer at auction at Christie's.[85] The then-Consul General of Turkey met with Christie's to request the return of the Stargazer—a demand under New York's *Guggenheim* rule.[86] Christie's proceeded with auction preparation.[87] Turkey promptly filed suit on claims of conversion and replevin seeking a temporary restraining order to enjoin the sale on the basis that the Stargazer had been illegally exported from Turkey in violation of its patrimony law.[88] The Southern District of New York allowed the sale to continue, on the condition that Christie's announce the encumbrance of Turkey's claim of title immediately preceding the auction lot.[89] The Stargazer was sold for $12,700,000 to an undisclosed bidder.[90]

Turkey filed suit against the Possessors and the Stargazer *in rem* on April 27, 2017, asserting claims for conversion and replevin.[91] Turkey sought a declaratory judgment that all rights, title, and interest in the Stargazer were vested in Turkey.[92] The Possessors counterclaimed, alleging tortious interference with contract and tortious interference with prospective economic advantage, resultant from Turkey's efforts to enjoin the sale, and "requesting a declaratory judgment that all rights,

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82 *Id.*

83 Christie's Inc.'s & Michael Steinhardt's Memorandum of Law in Support of their Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) at 10–13, Republic of Turkey v. Christie's, Inc., No. 17-cv-3086 (S.D.N.Y. Aug. 28, 2017), ECF No. 75.

84 *Id.* at 20.

85 Republic of Turkey v. Christie's Inc., 425 F. Supp. 3d 204, 209 (S.D.N.Y. 2019).

86 Second Amended Verified Complaint at 6, *Christie's, Inc.*, 2017 WL 11532087 (No. 17-cv-3086 (AJN)).

87 *Christie's Inc.*, 425 F. Supp. 3d at 209.

88 *Christie's, Inc.*, 17-cv-3086, 2021 WL 4060357, at *5 (S.D.N.Y. Sept. 7, 2021) (relying on the 1906 Ottoman Decree, stating "[a]ll monuments and immovable and movable antiquities situated in or on land and real estate belonging to the Government and to individuals and various communities, the existence of which is known or will hereafter become known, are the property of the Government of the Ottoman Empire. Consequently, the right to discover, preserve, collect and donate to museums the aforementioned belongs to the Government.").

89 *Christie's Inc.*, 425 F. Supp. 3d at 210.

90 *Christie's, Inc.*, 2021 WL 4060357, at *3. This sale included a "right of cancellation" and eventually fell through—the Stargazer remained in Christie's possession during litigation. *Id.*

91 Republic of Turkey v. Christie's Inc., 62 F.4th 64, 69 (2d Cir. 2023).

92 *Id.*

title, and interest in the Stargazer vest in Steinhardt."[93] The Southern District of New York granted Turkey's motion to dismiss the Possessors' tortious interference counterclaims and denied both parties' motions for summary judgment upon a finding that there were genuine issues of material fact pertaining to ownership of the Stargazer.[94] Turkey then moved *in limine* to introduce evidence of other actions undertaken by Steinhardt to evince a pattern of willful ignorance toward provenance research and respect for foreign patrimony laws in his collection practices, which was denied on the court's finding that the evidence was "irrelevant, prohibited, and cumulative."[95]

The court conducted a bench trial in April 2021, entering judgment in the Possessors' favor on September 7, 2021.[96] The court concluded that in order for Turkey to establish ownership under the 1906 Decree, it was required to prove, by a preponderance of the evidence, that the Stargazer was found within the boundaries of modern-day Turkey after 1906, the effective date of the patrimony law under which Turkey claimed ownership of the Stargazer.[97] Additionally, the court found that Turkey had failed to meet that evidentiary burden, based on the possibility that the Stargazer may have traveled outside of Turkey, and been subsequently discovered outside of Turkey, sometime between 2200 BCE and 1906,[98] and that the uncertain date of its discovery allowed for the possibility that the Stargazer was discovered, excavated, or exported from Turkey prior to the enactment of the 1906 Decree.[99] Finally, the court held that Turkey's claims were barred by the Possessors' laches defense because long-term public exhibition at the Met and academic scholarship published by Turkish scholars with connections to the Turkish Ministry of Culture had placed Turkey on inquiry notice of its potential claim in the period from 1961 to the 1990s.[100] Turkey failed to take any action to inquire about the provenance of the Stargazer until asserting its claim in 2017,[101] and that delay prejudiced the Possessors' defense because several significant witnesses to the Stargazer's arrival in the United States and first sale had died in the interim.[102]

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93 *Christie's Inc.*, 62 F.4th at 69.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Christie's, Inc.*, 2021 WL 4060357, at *6.

98 *Id.*

99 *Id.* at *7.

100 *Id.* at *8–9.

101 *Id.* at *9–10.

102 *Id.* at *10. These witnesses included the Martins and Klejman. *Id.*

The Second Circuit reviewed the district court's findings of fact for clear error and reviewed the application of those facts to draw conclusions of law de novo.[103] The application of laches was reviewed for abuse of discretion.[104]

Turkey argued on appeal that the court incorrectly concluded that Turkey failed to meet its burden of proof.[105] Turkey argued that it had met its burden by showing that the Stargazer was crafted in Turkey (Kulaksizlar is the only location known to have produced Kiliya-type figurines),[106] that Klejman was a "notable antiquities trafficker," that looted antiquities typically appeared for sale shortly after their theft, and that there is no provenance information attached to the Stargazer prior to its sale to the Martins in New York in 1961.[107] The Second Circuit agreed, noting that the "preponderance of the evidence standard" applied by the district court was too stringent.[108] Citing *Bakalar v. Vavra*,[109] the Second Circuit noted that claimants need only make a "threshold showing" that they have an "arguable claim" to the contested chattel before the burden shifts to the current possessor to prove that the chattel was not stolen.[110] The Second Circuit did not address whether Turkey met this burden, but emphasized that the ultimate burden of proof in such cases does not rest on the claimant.[111] Judge Lohier of the Second Circuit, in a brief concurrence, asserted that the burden of proof discussion was purely dicta.[112]

Turkey also alleged that the court had abused its discretion in applying the doctrine of laches,[113] but the Second Circuit disagreed.[114] Addressing each element of laches in turn,[115] the Second Circuit held that the 1990s publications discussing the Stargazer authored by academics with connections to the Turkish Ministry of Culture were sufficient to

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103 Republic of Turkey v. Christie's Inc., 62 F.4th 64, 69–70 (2d Cir. 2023).

104 *Id.* at 70; *see* Ikelionwu v. United States, 150 F.3d 233, 237 (2d Cir. 1998).

105 *Christie's Inc.*, 62 F.4th at 70.

106 *Christie's, Inc.*, 2021 WL 4060357, at *1.

107 *Christie's Inc.*, 62 F.4th at 70.

108 *Id.* at 71.

109 Bakalar v. Vavra, 619 F.3d 136, 147 (2d Cir. 2010) ("Indeed . . . if the district judge determines that [claimants] have made a threshold showing that they have an arguable claim to the Drawing, New York law places the burden on . . . the current possessor, to prove that the Drawing was not stolen.").

110 *Christie's Inc.*, 62 F.4th at 70–71 (quoting *Bakalar*, 619 F.3d at 147).

111 *Id.* at 71.

112 *Id.* at 74 (Lohier, J., concurring).

113 *Id.* at 71 (majority opinion).

114 *Id.* at 74.

115 *Id.* at 71–73.

place Turkey on inquiry notice of its potential claim of ownership.[116] This inquiry notice was deemed sufficient to satisfy the knowledge requirement of laches and, therefore, Turkey's inaction between the 1990s and 2017 was held to be unreasonable.[117]

The Second Circuit then turned to the issue of whether such unreasonable delay was prejudicial to the Possessors' defense.[118] The Second Circuit found prejudice in Turkey's delay because key witnesses (Klejman and the Martins) had died prior to Turkey's suit.[119] The Second Circuit reasoned that these deaths deprived the Possessors of testimony necessary to prove that the Stargazer was not stolen, which would be required once Turkey met its threshold burden of showing an arguable claim to the Stargazer.[120] The Second Circuit rejected Turkey's argument that the deaths of these witnesses were not prejudicial because "their testimony remains unknown,"[121] and upheld the district court's exclusion of character evidence pertaining to Steinhardt's past and known collection practices.[122] Finally, the Second Circuit addressed the reasonable diligence of both parties.[123] While granting deference to the findings of the district court that Steinhardt's inquiry, prior to purchasing the Stargazer in 1993, was sufficiently diligent,[124] the Second Circuit determined that a balance of the diligence between the parties did not evidence an abuse of discretion by the district court judge.[125] Accordingly, the Second Circuit affirmed the district court's determination that Turkey's claim was barred by laches.[126]

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116 *Id.* at 71.

117 *Id.* at 72.

118 *Id.* at 73.

119 *Id.*

120 *Id.*

121 *Id.* This is a generalization by the Second Circuit. Turkey argued that these witnesses could not have helped the Possessors' case because none of these witnesses would have been able to show good title to the Stargazer. *See* Reply Brief for Plaintiff-Counter-Defendant-Appellant, Republic of Turkey v. Christie's Inc. at *26, No. 21-2485-cv (2d Cir. Apr. 29, 2022), 2022 WL 1406528.

122 Turkey aimed for the inclusion of this evidence to show that "Steinhardt would have purchased the Stargazer even if he knew it was stolen." *Christie's Inc.*, 62 F.4th at 73.

123 *Id.* at 73–74.

124 The district court found that Steinhardt had "questioned the Merrin Gallery about the Stargazer, reviewed a report on the idol that was authored by a 'noted' art expert, met with other experts, and relied upon the 'Met's good reputation.'" *Id.* at 74 (internal citations omitted).

125 *Id.*

126 *Id.*

II. ANALYSIS

This Note argues that the primary flaw in the reasoning of *Republic of Turkey v. Christie's Inc.* stems from the court's conclusion that public exhibition and academic scholarship, if "known" by a source nation, is sufficient to place that source nation on inquiry notice of its claim such that laches may apply if the source nation does not investigate.[127] The issues pertinent to the *Republic of Turkey v. Christie's Inc.* decision on appeal are, for clarity of analysis, distilled into two distinct issues: (1) the burden of proof (pleading standard) imposed on claimants in cultural heritage cases under New York law, and (2) respective duties of due diligence as applied to cultural heritage collectors and source nations.

A. *The Burden of Proof for Ownership Claims by Sovereign Nations*

The basis of Turkey's claim of ownership is the 1906 Decree—a patrimony law which declared that all antiquities found in or on public or private Turkish lands were state property and could not be removed from the country.[128] Patrimony laws, implemented by many states around the world to assert ownership over movable and immovable cultural heritage material, are an important factor in disputes involving the antiquities trade.[129] In Turkey, the 1906 Decree claimed state ownership of all newly discovered antiquities found in lands under the control of Turkey's predecessor, the Ottoman Empire.[130] Importantly, the 1906 Decree was enacted only with prospective effect, meaning that antiquities that were in private possession prior to the enactment of the 1906 Decree remained in the hands of those private parties.[131] The 1906 Decree remained unabated by the Turkish government formed at the creation of the Republic of Turkey in 1923 and remained in full force and effect until 1973, when it was subsumed by a functionally equivalent law.[132] The

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127 *Id.* at 72, 74.

128 Özel, *supra* note 39, at 179.

129 *See supra* Section I.A; *Interactive Timelines*, ANTIQUITIES COAL., https://theantiquitiescoalition.org/multimedia-resources/interactive-timelines [https://perma.cc/PQR2-ZFSJ]. This interactive tool produced by the Antiquities Coalition provides a comprehensive timeline of patrimony law development throughout the Arab League nations, with links to the UNESCO Cultural Heritage Database where available. *See also Database of National Cultural Heritage Laws*, UNESCO, https://www.unesco.org/en/cultnatlaws/list?hub=169342 [https://perma.cc/CF4B-UE6Q].

130 Özel, *supra* note 39, at 179.

131 *Id.*

132 *Id.*

current Turkish patrimony law, enacted in 1983,[133] preserves the principle of state ownership of antiquities.[134]

Domestic patrimony laws function in conjunction with other international agreements allowing for joint efforts to combat the illicit trafficking of antiquities, most notably the 1970 UNESCO Convention.[135] The 1970 UNESCO Convention was ratified by Turkey in 1981 and by the United States in 1983.[136] In the United States, the 1970 UNESCO Convention is a non-self-executing and prospective agreement, meaning that it only becomes judicially enforceable through the implementation of domestic legislation and has no effect on cultural heritage removed from source states prior to its enactment.[137] For this reason, cultural institutions and art dealers employ the 1970 UNESCO Convention to defend their claims to antiquities collected prior to 1970.[138] In *Republic of Turkey v. Christie's Inc.*, Christie's argued before the district court that the 1970 UNESCO Convention, rather than the 1906 Decree, controlled.[139] Its argument, and presumably its assumption during provenance research prior to its highly publicized auction of the Stargazer, was that the 1961 advent of provenance for the Stargazer was sufficient to overcome the temporal requirements of the 1970 UNESCO Convention.[140] By the time the case reached the Second Circuit, that issue had been resolved and the 1906 Decree was deemed valid to resolve the question of Turkey's ownership claim.[141] Once the case reached the

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133 The current patrimony law is titled Kültür ve Tabiat Varlıklarını Koruma Kanunu [Law on the Conservation of Cultural and Natural Property]. Türk Medeni Kanunu, Kanun No.: 2863 R.G.: 21/07/1983 Sayı: 18113, Kabul Tarihi: 23.07.1983.

134 Özel, *supra* note 39, at 180.

135 *1970 UNESCO Convention*, *supra* note 40.

136 *See supra* note 41.

137 19 U.S.C. § 2601–2613; *see also* Katarzyna Januszkiewicz, Note, *Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia*, 41 BROOK. J. INT'L L. 329, 358–59 (2015); Seiff, *supra* note 14 ("U.S. input during the negotiation for the 1970 UNESCO convention and its subsequent ratification and implementation into domestic law significantly limited the operation of the [1970 UNESCO Convention] . . . [n]onretroactivity was a primary U.S. concern during the 1970 UNESCO convention deliberations."(quoting ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS (2006)).

138 *See* Januszkiewicz, *supra* note 137, at 359–60.

139 Defendant Christie's Inc.'s Memorandum of Law in Opposition to Republic of Turkey's Motion for a Preliminary Injunction at 16, Republic of Turkey v. Christie's Inc., No. 17-cv-3086 (S.D.N.Y. June 9, 2017), 2017 WL 11530948 ("Christie's investment in an extensive promotional campaign for the Figure was based on its excellent provenance, including a long record of exhibitions and publications in the U.S., and the Figure's inclusion in a U.S. collection at least as early as 1964, well before the 1970 adoption of the UNESCO Convention.").

140 *Id.* at 3, 16; *see supra* notes 136–37 and accompanying text.

141 Republic of Turkey v. Christie's Inc., 62 F.4th 64, 69–70 (2d Cir. 2023). The significance of this determination must be highlighted. *See* Merve Stolzman, *Turkey Rules: Cultural Heritage*

Second Circuit, the court "emphasize[d] that under New York law, the ultimate burden of proof does not rest on the shoulders of the claimant. . . . Rather, the claimant must only make a 'threshold showing' of an 'arguable claim' to the pilfered artwork before the possessor must carry the rest."[142]

This statement is noteworthy for its broad application to all conversion claims in New York, not limited to those involving art or cultural heritage.[143] However, given the commonality of deficient provenance associated with illegally excavated and exported movable cultural heritage, the ramifications of this clarification on cultural heritage law are particularly significant. The Second Circuit did not define what factors are sufficient to meet that threshold showing, nor did it address whether Turkey met this burden.[144] However, it is likely that had laches not applied to defeat Turkey's claim, the 1906 Decree, coupled with Turkey's dogged pursuit of its antiquities held outside of its borders, would have been sufficient to meet the "arguable claim" pleading standard as clarified. In that event, the burden would have shifted to Steinhardt to prove by a preponderance of the evidence that the Stargazer was not stolen.[145] Were it not for laches, it is almost guaranteed that the dearth of recorded provenance would have prevented Steinhardt from meeting that burden.[146] It would have been impossible to prove by a preponderance of the evidence that the Stargazer was not stolen without

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Protection Efforts Explained, CTR. ART L. (Mar. 26, 2018), https://itsartlaw.org/2018/03/26/turkey-rules-cultural-heritage-protection-efforts-explained [https://perma.cc/2HGA-PA6A] ("The Louvre, the Met, and Christie's refuse to recognize this law as a basis for restitution, arguing that the 1970 UNESCO Convention, which does not have retroactive application, allows them to keep these items. Only time will tell whether Turkey is successful in proving ownership through the 1906 Ottoman law. If the courts decide in Turkey's favor, this will prove monumental in not only aiding its own restitution claims, but those of other countries fighting similar battles.").

142 *Christie's Inc.*, 62 F.4th at 71 (quoting Bakalar v. Vavra, 619 F.3d 136, 147 (2d. Cir. 2010)).

143 This may be traced from *Christie's Inc.* to *Bakalar* to *Guggenheim*. *Christie's Inc.*, 62 F.4th at 70 ("[C]laimants are required to make a 'threshold showing that they have an arguable claim' to the property before the burden of proof shifts to the possessor."); *Bakalar*, 619 F.3d at 147 ("[I]f the district judge determines that [plaintiffs] have made a threshold showing that they have an arguable claim to the [chattel], New York law places the burden on [defendant], the current possessor, to prove that the [chattel] was not stolen."); Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 624 (N.Y. App. Div. 1990), *aff'd*, 77 N.Y.2d 311 (N.Y. 1991) ("[I]t being settled that a complaint for wrongful detention contains every statement of fact essential to a recovery where it alleges the plaintiff's ownership of the property and the defendant's possession and refusal on demand to deliver."). That decision of the Supreme Court of New York's Appellate Division cites the general tort law principle that "persons deal with the property in chattels or exercise acts of ownership over them at their peril." *Guggenheim*, 550 N.Y.S.2d at 624.

144 *Christie's Inc.*, 62 F.4th at 70–71.

145 *Id.* at 70.

146 *See* discussion *supra* Section I.C.

provenance records indicating that the sale was legitimate and lawful under the 1906 Decree.

B. *Reasonable Diligence and Inquiry Notice*

While the common law favors true owners over parties who knowingly purchase stolen property, legislatures have established exceptions to offer limited protections to good-faith purchasers for value.[147] Most of these protections stem from the Uniform Commercial Code (UCC), which imposes a limited warranty of title on merchants unless the buyer is aware that the owner does not hold good title.[148] The UCC also protects good-faith purchasers where an owner has entrusted goods to a "merchant who deals in goods of that kind."[149] This situation, known as "entrusting," places the burden on the owner to place their trust in reputable merchants, and protects consumers who reasonably rely on representations of merchants.[150] These rules frequently conflict with the customs of the art market, where buyers have little incentive to perform due diligence and sellers have even less.[151]

The market incentives in favor of shrouding transactions—including the persons and goods involved—in secrecy increases the likelihood that by the time any secrets come to light, the party bringing a conversion claim would be bringing that claim against an innocent purchaser for value.[152] In such cases, while there is some onus on the buyer to conduct due diligence to confirm that a broker is a merchant

147 *See In re* Cooper, 592 B.R. 469, 480 (S.D.N.Y. 2018) ("[T]he Second Circuit has 'adopted the traditional equitable definition [of good-faith purchaser for value]: "one who purchases the assets for value, in good faith and without notice of adverse claims."'" (quoting *In re* Lehman Bros. Holdings, Inc., 415 B.R. 77, 83–84 (S.D.N.Y. 2009))); William R. Ognibene, Note, *Lost to the Ages: International Patrimony and the Problem Faced by Foreign States in Establishing Ownership of Looted Antiquities*, 84 BROOK. L. REV. 605, 626 (2019).

148 U.C.C. § 2-312 (AM. L. INST. & UNIF. L. COMM'N 2022).

149 *Id.* § 2-403(2).

150 *See generally id.* § 2-403.

151 Day, *supra* note 9, at 485 ("[T]he UCC and most state laws generally seek to encourage buyers to purchase commodities that are free of titling issues, shielding purchasers from liability if they buy new items from reputable dealers. These schemes neglect to recognize that the majority of works over a couple decades old must be sold on the secondary market and due to the industry's secrecy, almost all of them include titling gaps. In other words, the legal regime requires a level of information that almost never exists. Because buyers and sellers cannot possibly adjust their behavior to what the law demands, they have instead increased secrecy and other undesirable behaviors that contribute to market failures." (footnote omitted)).

152 *Id.* at 474.

who deals in goods of that kind,[153] the traditional secrecy of the international commercial art market means that gaps in provenance are common and that the older a work, the more likely that buyers are purchasing without certainty of title.[154] Laches is an equitable defense, and as such, its application requires a factual inquiry into the reasonable diligence of both parties.[155] In this regard, the Second Circuit focused only on Turkey's argument that Steinhardt should have been held to a higher standard under the UCC, and ultimately dismissed the argument.[156]

The Court of Appeals of New York previously addressed this comparative diligence issue in *Solomon R. Guggenheim Foundation v. Lubell*, stating that in stolen artwork cases, "the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser."[157] The *Guggenheim* court acknowledged that their decision was influenced by recognition of New York's "worldwide reputation as a preeminent cultural center."[158] The court noted that "[t]o place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art."[159]

While the New York Court of Appeals in *Guggenheim* placed the burden of investigation on potential purchasers, the Second Circuit diverged from that court's reasoning, noting in *Republic of Turkey v. Christie's Inc.* that:

> Steinhardt, as an ordinary purchaser of art, was under no duty to investigate the provenance of the Stargazer, [but] the district court determined that he nevertheless *did* investigate the idol's provenance. It detailed that Steinhardt, whom it found to be a "credible witness," questioned the Merrin Gallery about the Stargazer, reviewed a report on the idol that was authored by a "noted" art expert, met with other experts, and relied upon the "Met's good reputation." . . . It determined these efforts were "reasonably diligent."[160]

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153 *See* Porter v. Wertz, 421 N.E.2d 500, 501–02 (N.Y. 1981) (holding that a buyer who purchased a stolen painting from a delicatessen employee, not a reputable merchant, was required to return the painting to the true owner because the duty imposed on buyers to act in good faith required an exercise of due diligence).

154 Day, *supra* note 9, at 476–77.

155 Republic of Turkey v. Christie's Inc., 62 F.4th 64, 71, 73 (2d Cir. 2023).

156 *Id.* at 74.

157 569 N.E.2d 426, 431 (N.Y. 1991).

158 *Id.*

159 *Id.*

160 *Christie's Inc.*, 62 F.4th at 74.

By declining to impose any affirmative investigatory burden on Steinhardt, the Second Circuit revealed a stark contrast in the evidentiary burden placed on purchasers of art (or cultural heritage material) between 1991 and 2023.[161] This illustrates the differences in each court's understanding of the relative burdens of the parties.

The action or inaction of the Met is relevant to the present discussion only insofar as it relates to examining the scope of Turkey's good-faith effort to track and investigate cases of stolen cultural heritage, as well as the investigatory expectations placed upon it and other source nations by the Second Circuit. The Stargazer has no provenance information attached to it prior to its sale to the Martins in 1961.[162] Kiliya-type figurines have only been sourced from within the confines of modern-day Turkey,[163] regardless of the potential for their travel outside of Turkey prior to 1906.[164] Accordingly, as Kulaksizlar, in Anatolia, is the only known source of Kiliya-type figurines, the Met labeled the Stargazer as "Anatolian."[165] This labeling provided no indicia of deficient provenance or illegal possession.

It is simple to see why U.S. courts, and specifically the Second Circuit, might favor museums in cultural heritage disputes. However, the Second Circuit should have considered the importance of public trust in museums and similarly situated cultural-educational institutions, especially those that are publicly funded. Museums should not be available for use as shelter organizations for private lenders to develop laches defenses. Moreover, museums should not be permitted to unreasonably withhold information about objects held in their collections when that information is requested by source nations. This Note does not address the issue of, nor does it advocate for, the

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161 Consider that the practice of donating or lending material to cultural institutions to create an illusion of legitimacy for both the material and the individual lender, known as "reputation laundering," is a strategy often employed by sophisticated illicit dealers. Donna Yates & Shawn Graham, *Reputation Laundering and Museum Collections: Patterns, Priorities, Provenance, and Hidden Crime*, 30 INT'L J. HERITAGE STUD. 145, 156–57 (2024).

162 *Christie's Inc.*, 62 F.4th at 68.

163 Republic of Turkey v. Christie's, Inc., No. 17-cv-3086, 2021 WL 4060357, at *1 (S.D.N.Y. Sept. 7, 2021), *aff'd*, 62 F.4th 64 (2d Cir. 2023).

164 The district court entertained this possibility in its denial of Christie's and Steinhardt's motion for summary judgment, finding that Turkey's arguments in support of the illegality of the Stargazer's removal from Turkey after 1906 raised a genuine issue of material fact. Republic of Turkey v. Christie's Inc., 425 F. Supp. 3d 204, 217 (S.D.N.Y. 2019) ("While Christie's and Steinhardt argue that Turkey has presented *no* other evidence, either of its excavation date or of its export date, Turkey has indeed put forth evidence from which a reasonable juror could infer that the [Stargazer] was excavated and exported while the 1906 Decree was in effect."); *see also supra* notes 105–06 and accompanying text.

165 *Christie's Inc.*, 62 F.4th at 68.

deaccessioning[166] or the repatriation[167] of lawfully possessed or acquired art and heritage artifacts. However, as a matter of public policy, illegally possessed, movable cultural heritage should not be displayed in major cultural institutions within the United States.

Inquiry notice, or the "should have known" component of the knowledge element of laches, is part of a longstanding legal doctrine that imputes actual knowledge on a party that was privy to sufficient information that they should have known that they had a legal claim.[168] It also imposes an implicit duty to investigate further, as a "person of ordinary prudence" would.[169]

The Second Circuit affirmed the district court's conclusion that the defense of laches barred Turkey's claim.[170] On appeal, Turkey argued that the district court improperly imposed a duty of investigation when it deemed the publications discussing the Stargazer, written by Turkish scholars with connection to the Turkish Ministry of Culture, sufficient to establish inquiry notice.[171] Turkey argued that such a duty "would place an 'impossible burden' on countries which have a 'vast trove of unknown ancient artifacts.'"[172] The Second Circuit disagreed.[173] The court found credence in the district court's conclusion that Turkey possessed sufficient information to merit investigation of the Stargazer, and that its failure to do so for over twenty-five years was unreasonable.[174]

Christie's repeatedly argued that Turkey's failure to investigate the provenance of the Stargazer, despite its actual knowledge that the Stargazer was on display at the Met, was unreasonable because the period of time when the scholarship was being published in Turkey, the 1990s, corresponded with a period during which Turkey was engrossed in

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166 "To sell or otherwise dispose of (an item in a collection)." *Deaccession*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/deaccession [https://perma.cc/M57B-8LVK].

167 "[T]he act or process of restoring or returning someone or something to the country of origin, allegiance, or citizenship . . . ." *Repatriation*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/repatriation?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [https://perma.cc/6SRZ-PWEB].

168 *Christie's Inc.*, 62 F.4th at 71.

169 81 N.Y. JUR. 2d *Notice and Notices* § 8 (2025).

170 *Christie's Inc.*, 62 F.4th at 74.

171 *Id.* at 71.

172 *Id.* at 71–72.

173 *Id.* at 72 ("Because Turkey had reason to know the Stargazer was its cultural patrimony in the 1990s, it had reason to investigate the artifact and assert its claim to ownership. This is not to say that sovereign nations have a standing obligation to investigate the potential theft of their dispersed artifacts. But Turkey sat on its hands despite signals from its own Ministry of Culture that the Stargazer was in New York City. Turkey's failure to bring its claim (or even investigate it) until 2017 was unreasonable.").

174 *Id.* at 74.

litigation against the Met for the return of the Lydian Hoard.[175] The Lydian Hoard investigation began in 1970 when British journalist Peter Hopkirk contacted a Turkish journalist named Özgen Acar,[176] seeking a local contact to assist in the investigation of a rumored illicit acquisition of Turkish antiquities by the Met.[177] Their investigation into the Lydian Hoard, a collection of hundreds of gold pieces (coins, jewelry, and household objects) sourced from Southwest Turkey, acquired by the Met from Klejman[178] without concern for provenance, and held in storage out of public view, proceeded for sixteen years without any publication.[179] It was not until 1984, when Acar observed fifty pieces matching a description of the Lydian Hoard on display at the Met and labeled as "East Greek Treasure" that the investigation grew teeth.[180] In 1987, Turkey filed its first-ever claim in a U.S. court for the return of its illicitly exported movable cultural heritage.[181] The Met, facing significant reputational damage and a mountain of evidence against it, ultimately returned the Lydian Hoard to Turkey in 1993.[182]

In *Republic of Turkey v. Christie's Inc.*, the Second Circuit did not discuss the Lydian Hoard proceedings in its assessment of inquiry notice, though the Lydian Hoard proceedings were included in briefs by both parties during litigation[183] and would have likely been a factor in the district court's evaluations of inquiry notice and comparative diligence.[184] The Possessors argued that because Turkey had, in the course of the

175 *See, e.g.*, Defendants Christie's Inc.'s and Michael Steinhardt's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims at 8–9, Republic of Turkey v. Christie's Inc., No. 17-cv-3086, 2019 WL 8688834 (S.D.N.Y. Jan. 11, 2019).

176 Acar is one of the journalists, and later a consultant to a former Turkish Minister of Culture, whose mention of the Stargazer in a newspaper publication is claimed to have placed Turkey on inquiry notice of its potential claim to the Stargazer. *Christie's Inc.*, 62 F.4th at 68.

177 Sharon Waxman, *Chasing the Lydian Hoard*, SMITHSONIAN MAG. (Nov. 14, 2008), https://www.smithsonianmag.com/history/chasing-the-lydian-hoard-93685665 [https://perma.cc/FW3T-R3ZV]. This source is informative regarding Turkey's efforts to repatriate the Lydian Hoard and illustrates a significant issue with cultural nationalism in that objects returned to their source nation may ultimately be re-looted. *Id.*

178 Klejman is the same dealer responsible for selling the Stargazer to the Martins in 1961. *Christie's Inc.*, 62 F.4th at 68.

179 Waxman, *supra* note 177.

180 *Id.*

181 *Id.*

182 *Id.*

183 Defendants Christie's Inc.'s and Michael Steinhardt's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims, *supra* note 175, at 8–9; Reply Brief for Plaintiff-Counter-Defendant-Appellant, *supra* note 121, at 17.

184 *See* Bakalar v. Vavra, 819 F. Supp. 2d 293, 304–05 (S.D.N.Y. 2011) (noting that claimants do not need to have specific knowledge of stolen property to satisfy the knowledge element of laches and that knowledge that works in the same collection were stolen under common circumstances may be sufficient).

Lydian Hoard litigation, asked the Met to disclose "every object in the museum that came from Turkey" but did not pursue the matter further when the Met objected to providing that information, a presumed lack of diligence should be held against Turkey.[185] The crux of the Possessors' argument was that, had Turkey pursued the matter further in the early 1990s, Turkey would have discovered the Stargazer's presence at the Met and would have had the means to uncover its deficient provenance.[186] Turkey argued that the lack of diligence flowed both ways.[187] It highlighted that Steinhardt knew, "at the very time he was acquiring the suspiciously unprovenanced [Stargazer]," that the Met was embroiled in litigation with Turkey for the return of the Lydian Hoard.[188] Turkey countered with Steinhardt's own testimony, during which he acknowledged that he was "particularly knowledgeable" about the problems the Met was facing as a result of their acquisition of the Lydian Hoard.[189] This, Turkey alleged, meant that Steinhardt was uniquely situated to understand the risks of purchasing Turkish antiquities of questionable provenance.[190]

In its second amended complaint, Turkey stated that it first became aware of its potential claim to the Stargazer when Christie's catalogue for the 2017 auction described the Stargazer's limited provenance.[191] The Possessors reiterated that the academic publications referencing the Stargazer's location and Anatolian origin were sufficient to establish inquiry notice.[192] The Second Circuit concluded that public exhibition at a U.S. institution and academic scholarship by scholars with relation to

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185 Defendants Christie's Inc.'s and Michael Steinhardt's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims, *supra* note 175, at 8–9.

186 Defendants Christie's Inc.'s and Michael Steinhardt's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims, *supra* note 175, at 8. The Second Circuit did not address this argument on appeal but instead focused on the fact that Acar himself published material referencing the Stargazer in the 1990s. *Christie's Inc.*, 62 F.4th at 68.

187 Reply Brief for Plaintiff-Counter-Defendant-Appellant, *supra* note 121, at 17.

188 *Id.*

189 *Id.*

190 *Id.*

191 Second Amended Verified Complaint, *supra* note 75, at 5–6.

192 Brief for Defendants-Appellees at 10, Republic of Turkey v. Christie's Inc., 62 F.4th 64 (2023) (No. 21-2485), 2022 WL 1117897 ("Evidence demonstrated that Turkey knew the Stargazer's importance, its location and possessor, and its Anatolian origin since at least 1992 and could have known about it much earlier. The Ministry of Culture itself published at least three papers that cite the well-known 1992 article by Seeher, who was working in Turkey and identified a Kiliya-type idol in the Guennol Collection in New York—that is, all three Ministry publications show that the Turkish government was aware of the Idol's existence, Anatolian origin, location, and possessor as early as 1992.").

the Turkish Ministry of Culture, describing the Stargazer as "Anatolian" and locating the Stargazer at the Met, was sufficient to put the Turkish government on inquiry notice.[193] This conclusion imputed an obligation on Turkey to assume that all antiquities located outside of its borders were in violation of the 1906 Decree or other applicable patrimony laws, even though the prospective effect of the 1906 Decree permitted any antiquities already in private hands before 1906 to legally remain private property.[194] Under the Second Circuit's standard, the only way for countries like Turkey to limit their risk of loss of ownership interest would be to assume ownership over, and devote limited resources to, the protection and return of any cultural heritage material located outside of their borders. This is an unrealistic obligation.

Turkey had no actual knowledge of the sale of the Stargazer to Steinhardt because the sale was private;[195] moreover, the Stargazer was referred to in publications as the Guennol Stargazer despite no longer being a part of that collection after its sale to Steinhardt.[196] There is considerably more benefit in hiding or misrepresenting provenance on the collection side, a fact that should have weighed in Turkey's favor.[197]

It is also worth noting that Turkey's Ottoman-era patrimony laws are comparatively longstanding in the world of patrimony legislation.[198] That longevity provides some security in the ability to establish claim of title, as evidenced by Christie's insistence that the 1906 Decree did not govern.[199] However, the breadth of movable cultural heritage subject to the 1906 Decree also leaves Turkey vulnerable to laches defenses unless it assumes that every artifact outside of its borders has been exported in contravention of the 1906 Decree and investigates accordingly—the exact

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193 *Christie's Inc.*, 62 F.4th at 71–73.

194 *See* Özel, *supra* note 39, at 179.

195 Second Amended Verified Complaint, *supra* note 75, at 5.

196 *See, e.g.*, *Christie's Inc.*, 62 F.4th at 68 ("In 1989, Özgen Acar, the leading journalist on Turkish cultural heritage and later consultant to a former Turkish Minister of Culture, mentioned the idol's place in the Guennol Collection in an article published in a prominent Turkish newspaper.").

197 *See supra* Section III.B.

198 Reap, *supra* note 49, at 2–3.

199 The enforceability of the 1906 Decree in U.S. courts was an issue of first impression for the Second Circuit. *See supra* note 139 and accompanying text. Christie's also argued that the 1906 Decree was insufficiently clear under the standards set by *United States v. McClain*, 593 F.2d 658, 660 (5th Cir. 1979) (explaining that foreign patrimony laws may be held void in U.S. courts if they are "vague and inaccessible"), and *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (outlining a number of factors courts may consider to determine the legitimacy of a patrimony law as a predicate for the NSPA including: a clear declaration of state ownership, nontransferability without government consent, automatic vesting of title, government possession and registration practices, domestic enforcement, criminal penalties, and a lack of legal exceptions permitting possession by private individuals).

investigatory duty it protested on appeal,[200] and which the Second Circuit acknowledged and refuted in their discussion of the knowledge element.[201] Turkey's argument as to the "impossible burden" imposed by the district court's inquiry notice determination is underscored by the sheer volume of movable cultural heritage artifacts discovered within the territory of modern-day Turkey every year, and the burden of tracking, housing, enforcing, and otherwise supervising the excavation, inventory, and care of its movable cultural heritage.[202] Moreover, this investigatory burden imposed on source nations to avoid laches-barred claims is similarly disposed for other source nations, and establishes precedent that extends beyond the borders of *Republic of Turkey v. Christie's Inc.* While Turkey may be particularly aggressive in its pursuit of the repatriation of its cultural heritage,[203] many other nations are similarly harmed by illicit antiquity excavation and the trade of such looted material to and within the United States and may seek remedy in U.S. courts.[204]

III. PROPOSAL

In *Republic of Turkey v. Christie's Inc.*, the Second Circuit appears to employ a sliding scale approach to inquiry notice with no clear parameters. This provides future courts the discretionary leeway to make factual and credibility determinations based on the specific facts before them. *Republic of Turkey v. Christie's Inc.* does not provide explicit guidance to source nations of the type or extent of information sufficient to place them on inquiry notice and a corresponding duty of investigation. Moreover, the driving economic forces within the art market rely on self-policing and maintaining a consistent shortage of

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200 *Christie's Inc.*, 62 F.4th at 71–72.

201 *Id.* at 72 ("Because Turkey had reason to know the Stargazer was its cultural patrimony in the 1990s, it had reason to investigate the artifact and assert its claim to ownership.").

202 *Christie's Inc.*, 62 F.4th at 71; *see* SAFE (Saving Antiquities for Everyone), *Cultural Heritage at Risk: Turkey*, SMARTHISTORY (Jan. 30, 2018), https://smarthistory.org/cultural-heritage-risk-turkey [https://perma.cc/4L8B-VC73].

203 Reply Memorandum of Law in Further Support of Plaintiff's Motion for a Preliminary Injunction at 8, Republic of Turkey v. Christie's, Inc., No. 17-cv-3086 (S.D.N.Y June 16, 2017), 2017 WL 11530008.

204 *See Current Agreements and Import Restrictions*, U.S. DEP'T. OF STATE: BUREAU OF EDUC. & CULTURAL AFFS., https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions [https://perma.cc/8NHM-9PCV]; Tom Seymour, *The EU Law That's Threatening to Up-End the Antiquities Market*, FIN. TIMES (Mar. 5, 2025), https://www.ft.com/content/9a35cde6-c5f1-4a72-8795-59410f04753a?utm ("In October 2020, UNESCO launched its Real Price of Art campaign, which estimated that the illicit cultural goods trade was worth $10bn annually, making it the third-largest black market after drugs and arms.").

information for buyers and sellers.[205] The slam dunk cultural heritage case is more myth than reality.

To mitigate the danger posed by the art market's preference for secrecy, courts weighing the relative diligence of the parties in a laches determination should apply a subjective inquiry notice standard to sovereign claimants. This would involve evaluating the diligence of the foreign government in light of the many challenges facing source nations in identifying, locating, and asserting claims of ownership over cultural heritage material subject to their patrimony laws. Additionally, in the narrow context of applying laches to cultural heritage material claims, purchasers of cultural heritage material should inherit the diligence, including its defects, of their predecessor ("the original purchaser"). Purchasers like Steinhardt should not be able to use the prejudice element of laches as a shield to defend their lack of diligence in establishing provenance. Had Steinhardt not been able to lean on the inability of the Martins or Klejman to testify as evidence that Turkey's delay was prejudicial, *Republic of Turkey v. Christie's Inc.* would likely have been decided in Turkey's favor.[206]

A. *Subjective Inquiry Notice for Sovereigns in Comparative Diligence Determinations*

In the context of claims of stolen or lost works of art or cultural material, laches is a balancing test of competing interests intended to produce the fairest result in a dispute between two or more good-faith parties asserting claims over a nonfungible asset.[207] A sovereign state, acting on behalf of the whole of its citizenry, could be accorded additional deference in this test for several reasons.[208]

Even if the proposition stands that a sovereign state, acting under the authority of its domestic patrimony laws, is a party like any other, the point remains that antiquity trafficking is not a victimless crime, and the tort of conversion applied to the antiquity context renders more than financial harm to the source nations.[209] Patrimony laws function to preserve cultural heritage for the benefit of the public[210]—and to an

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205 Day, *supra* note 9, at 485.

206 *Christie's Inc.*, 62 F.4th at 73.

207 *See* Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., No. 98-cv-7664, 1999 WL 673347, at *7 (S.D.N.Y. Aug. 30, 1999).

208 *See* Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357, 394 (2009) (discussing sovereign immunity from laches in the Native American context).

209 *See supra* Section I.A.

210 Amineddoleh, *supra* note 33, at 338.

arguably secondary degree, the financial benefit of the state.[211] Cultural heritage is increasingly viewed as a distinct property group worthy of special protection because of its cultural significance;[212] however, the debate between cultural internationalists and cultural nationalists is ongoing.[213] Cultural internationalists support the view that cultural heritage material, like any other form of property, is a market resource.[214] They draw a distinction between so-called "market nations" and "source nations," the latter term describing states with vastly more cultural heritage material than internal demand for that material.[215] These source nations have more to gain, under this theory, from the sale of cultural heritage material to countries with a market for that material.[216]

Instead of an objective framework (inquiry notice plus reasonable diligence), the standard for inquiry notice in cultural heritage cases should consider deference to the sovereign. The question would therefore be what a reasonably prudent sovereign nation should have done or would have been capable of doing, under similar circumstances—a scheme affording heightened consideration to the broad challenges and responsibilities facing nations with a wealth of movable cultural heritage. This subjective framework could consider what efforts, if any, a source nation undertakes to identify and investigate material subject to its patrimony laws, or the 1970 UNESCO Convention, as applicable.

Such subjective inquiry is justified by actions presently undertaken by U.S. cultural institutions to mitigate reputational harm and the risk of litigation. Many cultural institutions are investing in provenance research teams tasked with ensuring the legitimate ownership of cultural heritage within their collections in response to rising attention.[217] In Turkey, such responsibilities belong to the Ministry of Culture and Tourism ("the Ministry").[218] The Ministry examines new excavation sites, maintains a list of known excavation sites, and develops heritage management plans, among other duties.[219] The Ministry faces funding and staffing shortages, threats posed by modern construction and development, tourism, antiquity trafficking, and the additional burden imposed by the

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211 Ismail Serageldin, *Valuing the Legacy of our Cultural Heritage*, *in* CULTURAL HERITAGE AND MASS ATROCITIES 110, 116–17 (James Cuno & Thomas G. Weiss eds., 2022).

212 Amineddoleh, *supra* note 33, at 335.

213 *See supra* Section I.A.

214 *See* Rostomian, *supra* note 30, at 272.

215 *Id.* at 279.

216 *Id.*

217 *See, e.g.*, *Selected Museum Provenance Research Projects in the US and Abroad*, METRO. MUSEUM OF ART, https://www.metmuseum.org/about-the-met/provenance-research-resources/museum-provenance-research-projects [https://perma.cc/S5RD-5UKB].

218 SAFE (Saving Antiquities for Everyone), *supra* note 202.

219 *Id.*

trafficking of antiquities into Turkey from neighboring countries including Syria and Iraq.[220] A subjective standard may permit a court to consider extrinsic factors that may inhibit a similarly situated ministry's ability to act promptly[221]—as well as other political factors (for example, the several *coups d'état* and international and domestic armed conflicts[222] occurring within Turkey since the Stargazer arrived in the United States in 1961).[223]

B. *A Duty of Inquiry and Inherited Diligence*

A key issue in the Second Circuit's laches determination was that Steinhardt was able to show that Turkey's delay was prejudicial because the witnesses who may have been able to assist him in showing that the Stargazer was not stolen from Turkey had died prior to Turkey's suit.[224] Even if it had been Steinhardt and not the Martins who purchased the Stargazer from Klejman, Klejman's death alone would have been sufficient for a finding of prejudice because Klejman was the source point for the Stargazer's arrival in the United States.[225] This system places too much significance on the testimony of dealers, many of whom rely on customs of secrecy and discretion within the art market and are thus incentivized to falsify records pertaining to acquisition.[226]

It may be helpful to think of the acquisition and possession of cultural heritage material prior to a conversion suit as a chain of custody. Whether the material is looted or responsibly sourced, its entry into the U.S. market begins with its import and first acquirer and proceeds through each subsequent purchaser until it is purchased by the current owner. Under the Second Circuit's present diligence standard, as described in *Republic of Turkey v. Christie's Inc.*, ordinary purchasers of cultural heritage material are under no duty to investigate provenance.[227]

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220 *Id.*

221 Seiff, *supra* note 14 ("The reason [looted Cambodian] antiquities flooded the market is that a decade of turmoil made them an easy target. Unrest coupled with attractive cultural heritage is a fairly simple key to predict the area from which the next influx of antiquities will emanate.").

222 This includes successful and attempted *coups d'etat* in 1960, 1971, 1980, and the 1990s. *See* Sedat Laçiner, *Are Turkish Coups Different from the Others?*, 4 USAK Y.B. POL. & INT'L RELS. 289, 289–91 (2011) (arguing that Turkey exists in a constant cycle of military coups).

223 This is not to suggest that Turkey would have been unable to litigate for the return of the Stargazer had it known about it, as the 1987 suit against the Met for the return of the Lydian Hoard exemplifies. *See* Republic of Turkey v. Metro. Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990).

224 Republic of Turkey v. Christie's Inc., 62 F.4th 64, 73 (2d Cir. 2023).

225 *Id.*

226 Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 386–87 (1995).

227 *Christie's Inc.*, 62 F.4th at 74 (internal citations omitted).

Because of the numerous layers involved in the illicit trade of cultural heritage material, individuals involved at every level—namely looters, smugglers, intermediaries, auctioneers, dealers, and purchasers—are insulated from knowledge of their illicit activity and actively benefit from the secrecy and lack of diligence of others.[228] Consider, in contrast, if a duty of inquiry were imposed and Steinhardt had been required to inquire about provenance or accept the risk of inheriting any deficits born from the lack of diligence of the Martins.[229] A rule of law that owners of cultural heritage material inherit the deficits of diligence of each former owner would encourage purchasers of cultural heritage material, regardless of their sophistication within the market, to purchase from reputable dealers. Purchasing from irreputable dealers would be a risky endeavor and would necessitate more exacting inquiry to avoid liability for defects in title. Such duty of inquiry is aligned with the theory articulated by the *Guggenheim* court that the burden of investigating provenance should be on a potential purchaser for the protection of the true owner and could be imposed by judicial or statutory construction.[230]

C. *Does a Statutory Solution Exist?*

Statutorily imposed reporting requirements and due diligence requirements have been periodically proposed by legal academics as potential solutions to the information gap plaguing the cultural heritage trade.[231] While the aforementioned duty to inquire may be statutorily

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228 Borodkin, *supra* note 226, at 385–86.

229 This concept is not novel. The 1995 UNIDROIT Convention, viewed as culturally nationalist in purpose, imposes a duty on possessors of stolen cultural heritage material to return said material in exchange for fair and reasonable compensation *only* if said possessor can prove that they had no actual or inquiry notice of its stolen nature *and* can prove that they exercised due diligence at the time of acquisition. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ch. II art. 4, June 24, 1995, 34 I.L.M. 1322; *see* Marilyn E. Phelan, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 JEFFREY S. MOORAD SPORTS L.J. 31, 36 (1998). There are fifty-six state parties to the 1995 UNIDROIT Convention; the United States is not one of them. *States Parties*, UNIDROIT, https://www.unidroit.org/instruments/cultural-property/1995-convention/status [https://perma.cc/9QSN-VNMF].

230 Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430–31 (N.Y. 1991).

231 *See, e.g.*, Patrick J. O'Keefe, *The Use of Databases to Combat Theft of Cultural Heritage Material*, 2 ART ANTIQUITY & L. 357, 365–66 (1997) ("Legislation and courts must make it a condition for enjoying the protection of [statutes of limitation] that existing databanks are consulted at the time of purchase."); Amnon Lehavi, *From Global Databases to Global Norms? The Case of Cultural Property Law*, 44 U. PA. J. INT'L L. 359, 411 (2023) ("[T]o the extent that an auction house, cultural institution, or collector posts the details of a cultural artifact in its possession in an accessible digital database, then such an act can be viewed as creating at least a presumption of

imposed, statutory proposals are often untenable because there is no foolproof way to verify provenance for the copious material coming out of the ground each year all over the world.[232] Despite surface similarities between real property and movable cultural heritage (namely the unique character of the material), imposing comparable strict liability and due diligence requirements on cultural heritage buyers would be impracticable because there is no international database capable of generating a reliable title report.[233]

Advocating for the creation of a governmental agency, and a central database, tasked with managing the investigatory burden of establishing what cultural heritage material is present in the United States illegally, has been raised in legal scholarship discussing heritage issues.[234] To some extent, databases like the Art Loss Register[235] play an important role in establishing a basis for a finding of inquiry notice—after all, consulting a database seems the bare minimum of due diligence. However, looted cultural heritage may share few practical characteristics with real property, for the purchase of which title searches are standard practice.[236] While cultural heritage material may be stolen directly from museums or

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knowledge on the part of potential claimants . . . [c]onversely, if a claimant can prove that he or she exercised efforts in searching such databases, but that such searches did not produce results in identifying a missing object, then such an act can create a presumption against starting to 'run the clock' of a limitation period or a doctrine of laches.").

232 This is why courts have found that a database search may support a finding of diligence on the part of a buyer, but such a search is not dispositive. *See, e.g.*, Davis v. Carroll, 937 F. Supp. 2d 390, 435 (S.D.N.Y. 2013) (holding that a buyer's due diligence, including a search of UCC security filings, was insufficient in a sale with numerous "red flags"); Abbott Lab'ys v. Feinberg, 506 F. Supp. 3d 185, 195, 197 (S.D.N.Y. 2020) (holding that a buyer's due diligence, including a UCC security filings search and International Foundation for Art Research database search, were not sufficient to defeat a replevin claim when the painting at issue was stolen); Joseph P. Carroll Ltd. v. Baker, 889 F. Supp. 2d 593, 602 (S.D.N.Y. 2012) (discussing art market due diligence standards, where a database search was one of several actions taken by a buyer).

233 Title searches are ubiquitous in real property transactions. *See, e.g.*, Morgan L. Weinstein & J. Anthony Van Ness, *Implied and Constructive Notice: Title Search Fallibility and the Rigidity of the Constructive Notice Doctrine*, 87 FLA. BAR J. 37, 37 (2013). Databases including the Art Loss Register and the FBI's National Stolen Art File (NSAF) rely upon artwork being reported as stolen. Because of the looting problem, the reality of the illicit trade of cultural heritage material does not comport with such a database system. *See* ART LOSS REG., https://www.artloss.com/search [https://perma.cc/QYH6-WVR3]; *see also National Stolen Art File*, FBI, https://artcrimes.fbi.gov [https://perma.cc/XW5G-MWXX].

234 Admittedly, that concept is where this Note originated. *See, e.g.*, Rostomian, *supra* note 30, at 299; *see also* Tess Bonelli, *The Art Market Database: Preventing Art Crime and Regulating the New Global Currency*, 20 HOLY CROSS J.L. & PUB. POL'Y 119, 123 (2016).

235 ART LOSS REG., *supra* note 233.

236 Abraham Bell & Gideon Parchomovsky, *Of Property and Information*, Columbia Law Review, https://www.columbialawreview.org/content/of-property-and-information [https://perma.cc/JYA4-U7HF] ("The most common means of conveying information about property rights is a property registry, which lists different property rights and their owners.")

heritage sites within source nations and sold abroad, the reality is that looted cultural heritage material is typically removed directly from the ground without record and sold into a market that actively embraces secrecy.[237]

Similarly, a statutorily imposed reporting requirement seems likely to fall short of what is necessary to prevent the problem of looted cultural heritage material circulating within the U.S. art market without adequate traceability and accountability. Reporting requirements are commonplace in industries where the likelihood of illicit activity is considerable, and where the consequences of illicit activity are high. Reporting requirements are imposed on the financial, drug, medical, jewelry and precious metals, automotive, and food industries within the U.S. under a number of statutory and regulatory schemes, and this is an inexhaustive list.[238] Reporting requirements may also be imposed on individuals, broadly, as through the tax system, or acutely, in response to some triggering event, such as traveling into the United States with a certain amount of currency.[239] As such, in the cultural heritage context, reporting requirements could be imposed on cultural institutions and companies, or individuals, like dealers themselves.[240]

One option for a reporting requirement could involve imposing on cultural institutions the duty to report donations, loans, or proposed loans, of cultural heritage material suspected to have been illicitly

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237 Day, *supra* note 9, at 485; *see* Bell & Parchomovsky, *supra* note 236 ("Registries reveal their information only upon being searched. When owners do not suspect that they own assets, there is little reason for them to start searching the various registries around the world that may reveal some hidden ownership.").

238 *See* Bank Secrecy Act (BSA), 31 U.S.C. § 5311; Joel M. Geiderman & Catherine A. Marco, *Mandatory and Permissive Reporting Laws: Obligations, Challenges, Moral Dilemmas, and Opportunities*, 1 J. AM. COLL. EMERG. PHYSICIANS OPEN. 38, 38 (2021); Dodd-Frank Act, 15 U.S.C, § 78m-2; Anti Car Theft Act of 1992, 15 U.S.C. § 2042; *see, e.g.*, Federal Meat Inspection Act, 21 U.S.C. § 601; *see also see* Bell & Parchomovsky, *supra* note 236.

239 See, e.g., Kathleen DeLaney Thomas, *Rethinking Tax Information: The Case for Quarterly 1099s*, 97 S. CAL. L. REV. 1527, 1533 (2024) ("The United States tax system is generally based on 'voluntary compliance,' meaning the government relies on taxpayers to voluntarily self-report their taxable income each year on their tax return."); see also FIN. CRIMES ENF'T NETWORK, CMIR GUIDANCE FOR COMMON CARRIERS OF CURRENCY, INCLUDING ARMORED CAR CARRIERS (2014), https://www.fincen.gov/resources/statutes-regulations/guidance/cmir-guidance-common-carriers-currency-including-armored [https://perma.cc/6QME-HETT] ("FinCEN's regulations implementing the Bank Secrecy Act . . . stipulate that a [Report of International Transportation of Currency or Monetary Instruments] must be used to report the physical transportation of currency or other monetary instruments in an aggregate amount exceeding $10,000 at one time from the United States to any place outside the United States, or into the United States from any place outside the United States.").

240 The aforementioned industries are regulated in such a way due to concerns about public health, challenges inherent in their identification and distinction (ex. jewelry, which may be melted or cut down into smaller parts), or for moral and ethical reasons (ex. antitrafficking, anti-money laundering, anti-terrorism efforts). *Id.*

acquired.[241] Such a requirement could place the burden to report on institutions instead of the possessors lending the objects to those institutions.[242] While such a burden may ultimately present a fair trade-off for institutions, in relation to the harm wrought by the illicit trade of cultural heritage material, such a requirement would have little impact on trafficked objects in private collections.[243]

Moreover, a statutory requirement that cultural institutions provide notice of their possession of cultural heritage material to the U.S. Government or to source nations would likely be untenable even if it allowed for the availability of a laches defense, not least because it would likely discourage collectors from lending to museums to avoid such scrutiny. Moreover, such measures would profoundly burden the courts, as source nations would need to bring claims promptly upon a deluge of actual notice, unless legislators took careful consideration of the statute of limitations, not to mention the cost of litigation to be borne by source nations.[244] The question remaining is who, if anyone, should bear the burden of facilitating the information transfer necessary to diminish the investigatory burden placed on source nations post-*Republic of Turkey v. Christie's Inc.*?

A logical outgrowth of the arguments for a legal distinction between cultural heritage and other forms of property is that the intrinsic qualities inherent in cultural heritage, as well as global security concerns associated

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241 A similar compulsory reporting requirement was proposed by the U.K. government in 2000 before the idea was scrapped as infeasible. U.K. Parl. House of Commons, Culture, Media and Sports Comm., Seventh Report, VII. Summary of Conclusions and Recommendations, https://publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/37109.htm ("[W]e have received persuasive evidence that a compulsory 'log book' providing such a record would face many difficulties, some of them probably insuperable.").

242 *But see* Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 193 (2007) ("In determining certainty of title, the burden of proving the artifact's legitimate background should be placed on the donor. If a collector knows that he or she may not be able ultimately to donate an antiquity to a museum because the artifact's legitimate background cannot be affirmatively established, then the collector is more likely to avoid purchasing the undocumented artifact.").

243 Regulation of non-museum collections is not particularly comprehensive even among the parties to the 1970 UNESCO Convention, with few if any imposing reporting requirements on private collectors. *See* UNESCO, REPORT ON THE IMPLEMENTATION OF THE UNESCO 2015 RECOMMENDATION ON MUSEUMS AND COLLECTIONS 39 (2019), https://unesdoc.unesco.org/ark:/48223/pf0000371549 [https://web.archive.org/web/20250601162747/https://unesdoc.unesco.org/ark:/48223/pf0000371549].

244 *See e.g.*, Native American Graves Protection and Repatriation Act (hereinafter NAGPRA), 25 U.S.C. §§ 3001–3013 (containing no temporal limiting language for the requirement imposed on federal agencies and museums to inventory, notify, and repatriate materials if applicable); Holocaust Expropriated Art Recovery Act of 2016 (hereinafter HEAR Act), 22 U.S.C. § 1621 (explicitly providing a six-year statutory period from the actual discovery by the claimant of either the identity or location of the material and a possessory interest of the claimant in said material).

with cultural heritage trafficking,[245] should subject the trade and possession of cultural heritage to additional regulation. While the U.S. art market is largely unregulated,[246] there are a few statutory schemes that touch upon narrow sectors of the market. Congress and state legislatures have many tools at their disposal (including reporting and due diligence requirements,[247] extensions on statutes of limitations in fact-specific circumstances,[248] and the grant of authority to agencies and institutions to investigate conduct that raises red flags[249]) that could be adapted to create protections for source nations. Currently, the illicit cultural heritage trade is largely self-policed by art market stakeholders, and to a lesser extent combatted through creative investigatory and prosecutorial practices—including using reporting requirements such as those mandated by the Bank Secrecy Act[250] to alert relevant authorities to illicit transactions.[251] This work, while vital to national security, antiterrorism,[252] and anti-money laundering initiatives, has not, and

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245 Victoria Maatta, Note, *ISIL as Salesmen? The Roles of Due Diligence and the Good Faith Purchaser in Illicit Artifact Trafficking from the ISIL Insurgency*, 13 J. NAT'L SEC. L. & POL'Y 181, 181–82 (2022).

246 Letter from The Antiquities Coalition et al., to Janet Yellen, Sec'y of the Treasury, U.S. Dep't of the Treasury, and Himamauli Das, Acting Dir., Fin. Crimes Enf't Network, *supra* note 7, at 1–2.

247 *See* NAGPRA § 3003 ("If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to [NAGPRA's inventory] section, the Federal agency or museum concerned shall . . . notify the affected Indian Tribes or Native Hawaiian organizations."). The Department of Interior has very recently promulgated a regulation under NAGPRA barring cultural institutions from designating Native American remains and cultural heritage material "culturally unidentifiable." These new standards require cultural institutions to identify the community that can rightfully claim such material or file an explanation in the Federal Register. Mary Hudetz, *New Federal Rules Aim to Speed Repatriations of Native Remains and Burial Items*, PROPUBLICA (Dec. 8, 2023, 1:15 PM), https://www.propublica.org/article/interior-department-revamps-repatriation-rules-native-remains-nagpra [https://perma.cc/C8SQ-N7RP].

248 *See* HEAR Act § 1621.

249 *See* Bank Secrecy Act (BSA), 31 U.S.C. § 5311. The BSA has been amended by the Anti-Money Laundering Act of 2020 (AML) to include reporting requirements for suspicious activity involving the illicit trade of cultural heritage material. *See generally* Saskia Hufnagel & Colin King, *Anti-Money Laundering Regulation and the Art Market*, 40 LEGAL STUD. 131 (2020) (discussing the application of the AML regulatory regime to art dealers given the vulnerabilities inherent in the art market to money laundering).

250 LIANA W. ROSEN & RENA S. MILLER, CONG. RSCH. SERV., R47255, THE FINANCIAL CRIMES ENFORCEMENT NETWORK (FINCEN): ANTI-MONEY LAUNDERING ACT OF 2020 IMPLEMENTATION AND BEYOND 11 (2022).

251 *See* Letter from The Antiquities Coalition et al., to Janet Yellen, Sec'y of the Treasury, U.S. Dep't of the Treasury, and Himamauli Das, Acting Dir., Fin. Crimes Enf't Network, *supra* note 7, at 2; *see also* Borodkin, *supra* note 226, at 397–98.

252 Seiff, *supra* note 14 ("War is an expensive business . . . [s]o long as there is a market for these so-called blood antiquities, there will be a supply. At best, those who purchase such pieces are contributing to the destruction of the world's cultural heritage. At worst, they may be prolonging conflict by funding . . . those who wage it.").

probably will never, reach the issue of cultural heritage material, like the Stargazer, that has been in the United States for decades and whose true owner may find their claim barred by a laches defense.

In recent years, U.S. regulatory agencies have been shoring up anti-money laundering and customs regulations.[253] Imports of cultural material from source nations who have signed MOUs with the U.S. Department of State are subject to seizure under the CPIA, suggesting that the groundwork is in place for U.S. CBP to extract raw data and generate reports that could be shared with source nations signatory to the 1970 UNESCO Convention through customs mutual assistance agreements ("CMAAs").[254] These reports, which could be disseminated annually, would provide a gradual stream of actual notice to source nations who do not have these MOUs currently in effect. While this action would empower source nations with actual knowledge, it would represent a significant divergence from current practice, as the purpose of CMAAs has never been to furnish foreign governments with information that bolsters their private civil claims against U.S. citizens.[255]

D. *Recommended Actions for Source Nations Post-*Republic of Turkey v. Christie's Inc.

Regardless of regulatory mandate, source nations should institute procedures designed to mitigate the risk posed to conversion and replevin claims by the knowledge element of laches. Most importantly, source nations without patrimony laws should enact them, in a manner that comports with the enforceability requirements of the United States, and source nations should make all efforts feasible to enforce their patrimony laws within their borders.[256] Enforcement is the most significant factor

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253 *See, e.g.*, 31 U.S.C. § 5311 (2021).

254 *Customs Mutual Assistance Agreements (CMAA)*, U.S. CUSTOMS & BORDER PROT. (Oct. 24, 2024), https://www.cbp.gov/border-security/international-initiatives/international-agreements/cmaa [https://perma.cc/6E4V-SXTL].

255 *Id.* ("[CMAAs] aid in the prevention, detection, and investigation of crimes associated with goods crossing international borders (e.g., duty evasion, Intellectual Property Rights violations, trafficking).").

256 U.S. courts recognize foreign patrimony laws that specifically vest ownership of protected material in the state. United States v. McClain, 545 F.2d 988, 1001–02 (5th Cir. 1977). U.S. courts also consider the efforts, if any, that foreign states take to enforce their patrimony laws. *See, e.g.*, Gov't of Peru v. Johnson, 720 F. Supp. 810, 814 (C.D. Cal. 1989), *aff'd sub nom.* Gov't of Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991) ("[T]he domestic effect of [Peru's law] appears to be extremely limited. . . . There is no indication in the record that Peru ever has sought to exercise its ownership rights in such property, so long as there is no removal from that country."). Christie's argued repeatedly in motion practice that Turkey's domestic enforcement of the 1906 Decree was not

considered by U.S. courts in validating foreign patrimony laws as the basis of an ownership claim, or as the predicate for a forfeiture action under the NSPA.[257] To that end, while an MOU would not have provided an alternate remedy to Turkey in its pursuit of the Stargazer due to the prospective effect of MOUs under CPIA, source nations who have not yet signed an MOU with the U.S. State Department should initiate those bilateral negotiations.[258]

Source nations should share the reality of this investigatory burden beyond notice to their governmental agencies. Just as the research and publication undertaken by scholars and journalists weighed in favor of a finding that Turkey should have known that the Stargazer was in New York in violation of the 1906 Decree in *Republic of Turkey v. Christie's Inc.*, in the absence of formal assistance from the U.S. Government, art historians, heritage scholars, and journalists may be best equipped to support source nations in the work of determining whether material in U.S. collections is being possessed in violation of patrimony law.[259] It would be unreasonable to expect those researchers to avoid publication on the off chance that their work would undermine a possible future conversion claim, but educating them on this issue and creating efficient reporting processes for objects of uncertain provenance or provenance incongruent with patrimony legislation may be one step in the right direction.

The market for cultural heritage material is based upon individuals, families, and organized groups of looters who supply the cultural heritage material for trade.[260] This looting activity does not result in significant profit for looters, who sell the looted material to middlemen who retain

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consistent enough to merit recognition by the U.S. *See* Defendant Christie's Inc.'s Memorandum of Law in Opposition to Republic of Turkey's Motion for a Preliminary Injunction, *supra* note 139, at 7.

257 *See* United States v. Schultz, 333 F.3d 393, 400–02 (2d Cir. 2003).

258 Morag M. Kersel, *From the Ground to the Buyer: A Market Analysis of the Illegal Trade in Antiquities, Archaeology, in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 188, 198 (Neil Brodie, Morag M. Kersel, Christina Luke & Katherine Walker Tubb eds., 2006).

259 In no small part because this work is already ongoing at cultural and academic institutions around the globe. *See, e.g.*, Ted Loos, *The Met May Have Millions in Stolen Art. It's Not Waiting to Be Asked to Return It*, WALL ST. J. (Mar. 16, 2025, 8:00 AM), https://www.wsj.com/arts-culture/fine-art/the-met-art-museum-provenance-restitution-30392eb6 [https://perma.cc/FT8W-QQE9]. Provenance research departments are proliferating, increasing the potential for research partnerships between universities and source nations. *See, e.g.*, *Provenance Research*, YALE UNIV. ART GALLERY, https://artgallery.yale.edu/research-and-learning/provenance-research [https://perma.cc/BZ5U-VMWJ]; *Collecting and Provenance Research*, PRINCETON UNIV. ART MUSEUM, https://artmuseum.princeton.edu/collections/collecting-and-provenance-research [https://perma.cc/UUH8-FB3B]; *Provenance*, UNIV. ARIZ. ART MUSEUM, https://artmuseum.arizona.edu/collections/art/use-the-collection/provenance [https://perma.cc/9VA7-WURQ].

260 Kersel, *supra* note 258, at 190.

the majority of the profits.[261] In a market where looters typically retain less than one percent of the eventual retail value of the looted material,[262] there is potential state benefit in funding programs compensating citizens for reporting discoveries of cultural heritage to the state.

CONCLUSION

The Second Circuit's decision in *Republic of Turkey v. Christie's Inc.* should be interpreted as an invitation to source nations to bring claims in the United States and an increased willingness to afford deference to source nations' patrimony laws.[263] Moreover, the clarification of the correct burden of proof to apply to claims of stolen artwork has put even good-faith possessors on notice that they should consider the return of property possessed despite uncertain provenance to source nations if they are not confident in their ability to sustain a laches defense. *Republic of Turkey v. Christie's Inc.* should also be read as a cautionary tale: Under present law, patrimony laws will not supersede the equitable doctrine of laches in New York courts.

This case is situated amidst growing international attention on issues of repatriation and decolonization, and grapples with the tension between protecting museums, cultural institutions, and good faith purchasers within the United States, as well as providing judicial avenues for redress to source nations.[264] While the low burden required by New

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261 *Id.*

262 *Id.*; Seiff, *supra* note 14 ("On the dollar, the local person gets 50 cents, the runner gets 74 cents, the first importer gets $1.50, next gets $2.50, then it gets to the dealer in the U.S. and they sell for $100. There's profit being made every stretch of the line and that's what keeps people in the game.").

263 *See supra* Section II.A.

264 *See, e.g.*, Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1, 1 (2012) (discussing the unsettling nature of decolonial practice); Dorothy Lippert, *The Limits of Repatriation's Decolonizing Abilities, in* ROUTLEDGE HANDBOOK OF THE ARCHEOLOGY OF INDIGENOUS-COLONIAL INTERACTION IN THE AMERICAS 516 (Lee M. Panich & Sara L. Gonzalez eds., 2021) (discussing the limits of repatriation's decolonizing ability as related to its reliance on practices linked to settler-colonial norms); Ashleigh ML Breske, *Decolonization at the Museum: Exploring Power Dynamics and Changing Ethical Norms Repatriation Policy in US Museums*, POLAR ONLINE EMERGENT CONVERSATION (2024), https://polarjournal.org/2024/09/21/decolonization-at-the-museum-exploring-power-dynamics-and-changing-ethical-norms-repatriation-policy-in-us-museums [https://perma.cc/48CP-KUSE] (discussing contemporary repatriation efforts as mechanisms for challenging the lasting effects of colonial control); Clement Akpang, *Beyond the Neo-Imperial Politicizing of Object Repatriation: Restitution and the Question of Decolonization*, ART J. OPEN (Nov. 22, 2024), https://artjournal.collegeart.org/?p=19111 [https://perma.cc/YJ98-P9CT] (discussing the politicization of the repatriation of African heritage material and the need for new and fair methods

York courts to sustain an ownership claim is a boon for source nations seeking to bring conversion claims for material located in the United States in violation of patrimony law, the laches determination in *Republic of Turkey v. Christie's Inc.* places an inequitable investigatory burden squarely on the shoulders of foreign governments.[265] Furthermore, because the Second Circuit failed to enumerate the factors a court should consider in a determination of a source nation's inquiry notice, potential claimants must navigate a state of uncertainty around whether laches may apply to bar a conversion claim.

A balance of the equities would consider the realities of sociopolitical upheaval, looting, and budgetary constraints, which limit a foreign ministry of culture's ability to prosecute cultural heritage theft abroad. Judicial consideration of such factors in a laches determination should be standard in cultural heritage conversion cases. Moreover, were the buyer to inherit the diligence exercised by the seller in determining provenance, and thus the diligence of each previous seller, buyers of movable cultural heritage would be incentivized to operate within the legal market. In the context of the cultural heritage trade, U.S. courts, and specifically the Second Circuit, should be chiefly concerned with motivating legal market activity and disincentivizing illicit trade practices.

The art market is mired with incentives for bad behavior.[266] Laches should not function as a backdoor quiet title action for individuals who bought with eyes half-closed. The equitable principle that underscores the laches defense is one of fairness and courts should not encourage its use for the retention of cultural heritage property acquired through willful blindness. Possessors must bear diligence responsibility proportionate, at least, to their access to provenance resources and ability to ascertain red flags. Further, were buyers to inherit the diligence deficiencies of their predecessors, the risk of dealing with unscrupulous parties would increase dramatically.[267] As cultural heritage claims increase in both number and complexity, courts must engage in the hard work of parsing when a possessor exercised reasonable diligence at the time of acquisition and when they did not.

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to confront racism and colonial legacies in cultural institutions); Devorah Lauter, *Restitution, Repatriation Efforts See Halting Progress Across Europe and the US, amid Shifts in Public Opinion*, ARTNEWS (Feb. 19, 2024, 10:00 AM), https://www.artnews.com/art-news/news/restitution-repatriation-art-efforts-europe-united-states-progress-1234696438 [https://perma.cc/ML6X-5LUC].

265 *See* discussion *supra* Section II.

266 *See supra* Section III.B.

267 *See* supra Section III.B.