

# GENERAL ARTICLES

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## Brazil's International Cultural Heritage Obligations and the Potential Use of Alternative Dispute Resolution Mechanisms for Illicit Trafficking Disputes

**Abstract:** The protection of cultural heritage from illicit trade is today a global imperative, and the return of unlawfully removed cultural goods is essential to enforce cultural rights. Indeed, every

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community has the right to enjoy its cultural heritage and keep alive its collective memory. While referring to these general objectives of contemporary international cultural heritage law and policy, this article seeks to explore those instruments of the Brazilian national legislation that could be effectively applied to combat the illicit trafficking of cultural goods. To this end, it first outlines the relationship between Brazil's international law obligations and its national legislation in respect of cultural heritage. In other words, it explains how these obligations have been implemented in the national legal system and to what extent they have affected actual regulatory solutions. Next this article identifies and debates, through hermeneutic analysis, those legal provisions and instruments of the Brazilian law which could be used to prevent the illicit transfer of cultural goods. It also recalls the *Banco Santos* case, which provides a clear example of the shortcomings and pitfalls of the current legal system for the protection of cultural heritage in Brazil. Finally, this article advocates mediation as an alternative method of cultural heritage-related dispute settlement, particularly regarding cases of illicit trade.

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**Keywords:** international cultural heritage law, Brazil, illicit trafficking of cultural goods, mediation

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## Introduction

According to information provided by INTERPOL,<sup>1</sup> the illicit trafficking of cultural goods by theft, robbery, or any other means of loss, has become a burning issue in light of the numerous limitations of domestic law and the existing shortcomings of international treaty law, in particular the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention")<sup>2</sup> and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("1995 UNIDROIT Convention").<sup>3</sup> In fact a large number of artworks and other cultural objects illicitly leave the territory of Brazil every year.<sup>4</sup> These objects disappear from museums, archives, as well as from public and private institutions, and are rarely recovered by their owners. The volume of missing works is much higher than those found or returned to their place of origin, and often there is no evidence of the works' whereabouts. Most cul-

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<sup>1</sup> See INTERPOL, *The Issues – Cultural Property*, <https://www.interpol.int/Crimes/Cultural-heritage-crime/The-issues-cultural-property> [accessed: 18.06.2021].

<sup>2</sup> 14 November 1970, 823 UNTS 231.

<sup>3</sup> 24 June 1995, 2421 UNTS 457.

<sup>4</sup> See the INTERPOL database: <https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database> [accessed: 10.08.2020].

tural property obtained illegally is sold to intermediaries for collectors and auctioneers, which hampers the investigations and the recovery of the pieces. INTERPOL data<sup>5</sup> reveal that Brazil ranks 26th on the list of countries with the highest number of stolen cultural objects, and has an extremely low recovery percentage rate, and the “FBI Top Ten Art Crimes” lists the robbery of the Chácara do Céu Museum in Rio de Janeiro in 2006 in seventh place.<sup>6</sup>

According to the Brazilian Institute of Museums (IBRAM), there are 212 cultural goods from museums which were stolen and declared as disappeared objects (*Bens Musealizados Desparecidos*),<sup>7</sup> and 1,632 cultural goods have been searched for which belong to the National Institute of Historic and Artistic Heritage's (IPHAN) database of disappeared objects (*Bens Culturais Procurados*). Only 127 of these goods have been recovered so far.

Unfortunately, the Constitution of Brazil<sup>8</sup> does not establish any specific legislative or administrative policy towards illicit trafficking in cultural objects. Moreover, the Brazilian criminal law system offers only sparse legal provisions regulating offences related to cultural property. In fact, the Brazilian Penal Code<sup>9</sup> does not provide any specific regime for such offences. The nearest classification for the illicit trading of certain cultural property is the *qualified receiving* of stolen cultural goods (Article 180(1)). Hence, it is necessary to report these criminal practices – recognized by museums, libraries, and archives – as an organized criminal action. However, organized crime attributes a mere monetary value to cultural goods that are in fact priceless. These goods are unique and irreplaceable, forming part of Brazil's cultural heritage.

In this article, we discuss the operation of national law on curbing the illicit trafficking of cultural property. Our main objective is to describe the relationship between Brazil's international cultural heritage obligations and its national heritage legislation. This will shed light on legal loopholes and will make it possible to focus on the necessary legal measures in order to protect cultural heritage. With this aim in mind, we first identify the relevant international cultural heritage obligations in peace time and explain how they have been implemented in Brazil. Secondly, we analyse the national regulations concerning the illicit trafficking of cultural goods, followed by addressing, using a hermeneutic analysis, the protection manifested in the Federal Republic Constitution of 1988, codes, and other laws that

<sup>5</sup> See INTERPOL, *The Issues...*

<sup>6</sup> See FBI, *FBI Top Ten Art Crimes*, <https://www.fbi.gov/investigate/violent-crime/art-theft/fbi-top-ten-art-crimes/theft-museu-chacara-do-ceu-rio-de-janeiro> [accessed: 20.10.2021].

<sup>7</sup> See the IBRAM database: [http://sca.ibram.gov.br/cbd\\_publico/](http://sca.ibram.gov.br/cbd_publico/) [accessed: 02.09.2021].

<sup>8</sup> Constituição da República Federativa do Brasil [Constitution of the Federative Republic of Brazil], 5 October 1988, Diário Oficial da União, Seção 1, 5/10/1988, p. 1, [http://www.planalto.gov.br/ccivil\\_03/constituicao/constitui%C3%A7ao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm) [accessed: 22.06.2021].

<sup>9</sup> Decreto-Lei N° 2.838/1940: Código Penal [Decree-Law No. 2838/1940: Penal Code], 7 December 1940, [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/del2848compilado.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm) [accessed: 17.08.2021].

also deal with the trading of cultural heritage. In this regard we examine the *Banco Santos* case, which provides an example of how unsatisfactory the implementation and enforcement of the law is. And finally, we discuss the application of mediation, especially that practiced by UNESCO, as an alternative solution for the return of cultural goods to their place of origin.

### National Regulations and International Treaties Ratified by Brazil to Protect Cultural Heritage Against Illicit Trafficking

Brazil ratified the 1970 UNESCO Convention pursuant to Decree No. 72312,<sup>10</sup> promulgated on 21 November 1973; and it ratified the 1995 UNIDROIT Convention on 24 September 1999 pursuant to Decree No. 3166.<sup>11</sup> These two treaties set out a set of protection measures against illicit trafficking, including the creation of appropriate national legislation to combat such practices and the establishment of a national inventory system in order to list all the cultural works, those which require export licenses. They promote the creation of a code of ethics for collectors of and dealers in artworks, and foster the implementation of educational programs in respect of cultural heritage, its protection against illicit removal and transfer. However, to date international law obligations under these two treaties have not been fully implemented in the Brazilian domestic law.

In the Brazilian legal system, international treaties need to be promulgated and published in order to have binding force in the internal (domestic) legal order. Moreover, international treaties must be transposed into national legislation before they can take direct effect within the national territory.<sup>12</sup> However, while the 1970 UNESCO and 1995 UNIDROIT Conventions were incorporated into the Brazilian legal system, they are still not effectively implemented, both at the legal and policy levels.

So, it is not a theoretical issue of monism or dualism, but of the effects of incorporation and implementation (or the lack thereof) of some laws.<sup>13</sup>

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<sup>10</sup> Decreto N° 72.312/1973 Promulga a Convenção sobre as Medidas a serem Adotadas para Proibir e Impedir e Importação, Exportação e Transferência de Propriedades Ilícitas dos Bens Culturais [Decree No. 72312/1973 Enacts the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property], 31 May 1973, *Diário Oficial da União*, Seção 1, 1/6/1973, p. 5298.

<sup>11</sup> Decreto N° 3.166/1999 Promulga a Convenção da UNIDROIT sobre Bens Culturais Furtados ou Illicitamente Exportados, concluída em Roma, em 24 de junho de 1995 [Decree No. 3166/1999 Enacts the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, concluded in Rome on June 24, 1995], 14 September 1999, *Diário Oficial da União*, Seção 1, 15/9/1999, p. 1, <https://www2.camara.leg.br/legin/fed/decret/1999/decreto-3166-14-setembro-1999-345028-publicacaooriginal-1-pe.html> [accessed: 02.08.2020].

<sup>12</sup> For more about monism and dualism theories and legal relationship between national law and international law in Brazil, see A.C.P. Pereira, E. Silva Júnior, *Domestic Law and International Law in Brazil*, "Panorama of Brazilian Law" 2018, Vol. 4(5-6), pp. 197-222.

<sup>13</sup> A. Nollkaemper, *The Effects of Treaties in Domestic Law*, in: C.J. Tams, A. Tzanakopoulos, A. Zimmermann (eds.), *Research Handbook on Law of Treaties*, Edward Elgar Publishing, Cheltenham 2014, pp. 123-150.

In Brazil, the first regulation which provided for the protection of cultural heritage was the Constitution of 1934, influenced by the German constitutional rules of 1919 in the Weimar Republic. This regulation provides, in its Article 148, that “it is for the Federal Government, the states, and the municipalities to protect objects of historical interest and the artistic heritage of the country”.<sup>14</sup> In the 1920s and 1930s, some popular manifestations of the modernist movement – which sought to establish and protect the Brazilian identity – as well as the global economic crisis, the accompanying internal socioeconomic changes, and the strengthening of industrial and commercial elites caused a new phase of national capitalism to come to the fore, and thus led to a re-evaluation of the notion of national cultural heritage.<sup>15</sup> These changes influenced the drafting of rules on the protection of cultural heritage. In fact, the Minister of Education, Gustavo Capanema, invited the modernist writer Mario de Andrade to prepare a draft bill for the protection of national heritage. The process culminated in Decree-Law No. 25/1937<sup>16</sup> – the Historical-Cultural Goods Protection Act, which promotes the protection of historical and artistic heritage.

Moreover, it established the National Historic and Artistic Heritage Service (SPHAN), also known as the National Institute of Historic and Artistic Heritage (IPHAN), and established guidelines for the protection of national heritage. It also established rules on the rights to cultural goods. After the Second World War, there was an improvement in effective tools for the protection of cultural heritage, as its legal definition was widened.

The National Environmental Policy Act (LPNMA 1981),<sup>17</sup> influenced by the Declaration of the United Nations Conference on the Human Environment, Stockholm Convention (1972),<sup>18</sup> provides a legal conception of the environment as a priceless good (*macrobem*), constituted by the union of its natural and cultural aspects.<sup>19</sup> The Act also established extrajudicial measures for environmental protection, considering that the legal analysis of natural assets differs from cultural ones, as the former is aimed at situations that can generate an ecological imbalance.

<sup>14</sup> Constituição da República Federativa do Brasil [Constitution of the Federative Republic of Brazil], 16 July 1934, Diário Oficial da União, Seção 1, Suplemento, 16/7/1934, p. 1, [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao34.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao34.htm) [accessed: 03.08.2020].

<sup>15</sup> A.D. Soares, J. Martins, *Patrimônio cultural como dignidade cultural: declaração sobre as responsabilidades das gerações presentes em relação às gerações futuras*, “Unoesc International Legal Seminar: Dignidade e Proporcionalidade na Teoria de Robert Alexy” 2014, Vol. 3.1, p. 1082.

<sup>16</sup> Decreto-Lei N° 25/1937 Organiza a proteção do patrimônio histórico e artístico nacional [Decree-Law No. 25/1937 Organizes the Protection of the National Historical and Artistic Heritage], 30 November 1937, Diário Oficial da União, Seção 1, 6/12/1937, p. 24056.

<sup>17</sup> Lei N° 6.938/1981 Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências [Law No. 6938/1981 Provides for the National Environmental Policy, Its Purposes and Mechanisms for Formulation and Application, and Other Measures], 31 August 1981, [http://www.planalto.gov.br/ccivil\\_03/leis/L6938compilada.htm](http://www.planalto.gov.br/ccivil_03/leis/L6938compilada.htm) [accessed: 23.08.2021].

<sup>18</sup> 4-16 June 1972, UN Doc. A/CONF/48/14/Rev.1.

<sup>19</sup> A.D. Soares, J. Martins, op. cit., p. 1088.

ance and thus give rise to the existence of a cultural value according to the theory of social systems.<sup>20</sup>

It is also important to highlight that the following normative acts have been enacted in Brazil: Decree-Law No. 25/1937 (which organizes the protection of historical and artistic heritage); Law No. 3924/1961<sup>21</sup> (with rules on archaeological and prehistoric monuments); Law No. 4845/1965<sup>22</sup> (which prohibits traveling abroad with works of art produced in the country until the end of the monarchic period); Law No. 5471/1968<sup>23</sup> (which provides rules governing the export of Brazilian ancient books), and IPHAN Ordinance No. 396/2015,<sup>24</sup> which aims at protecting cultural property. This legislation is supposed to curb the illicit trafficking of cultural goods in the country.

### Combating Illicit Trafficking of Brazilian Cultural Heritage: The National Regulations

In this section we address the national norms concerning the illicit trafficking in cultural goods (which were mentioned in the previous section). In Brazil, there is no specific law dealing with protection against illicit trafficking in cultural goods, nor is there even a mechanism for the creation of new laws to fully incorporate international obligations laid down in the 1970 UNESCO Convention and the 1995 UNIDROIT Convention – there are only laws that regulate other diverse measures to protect cultural heritage. However, the administrative and criminal law provisions do to a certain extent fulfil the function of giving effect to the obligations under these two international treaties, as will be explained below.

The conception of cultural heritage in the 1988 Federal Constitution is in tandem with international rules for the protection of mobile tangible cultural goods,

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<sup>20</sup> C.M. de S. Paiva, *Direito do patrimônio cultural: autonomia e efetividade*, Juruá Editora, Curitiba 2015, p. 55.

<sup>21</sup> Lei Nº 3.924/1961 Dispõe sobre os monumentos arqueológicos e pré-históricos [Law No. 3924/1961 Provides for Archaeological and Prehistoric Assets], 26 July 1961, [http://www.planalto.gov.br/ccivil\\_03/leis/1950-1969/l3924.htm](http://www.planalto.gov.br/ccivil_03/leis/1950-1969/l3924.htm) [accessed: 03.08.2020].

<sup>22</sup> Lei Nº 4.845/1965 Proíbe a saída, para o exterior, de obras de arte e ofícios produzidos no país, até o fim do período monárquico [Law No. 4845/1965 Prohibits the Departure Abroad of Works of Art and Crafts Produced in the Country until the End of the Monarchical Period], 19 November 1965, [http://www.planalto.gov.br/ccivil\\_03/leis/L4845.htm](http://www.planalto.gov.br/ccivil_03/leis/L4845.htm) [accessed: 29.07.2020].

<sup>23</sup> Lei Nº 5.471/1968 Dispõe sobre a exportação de livros antigos e conjuntos bibliográficos brasileiros [Law No. 5471/1968 Provides for the Export of Antique Books and Brazilian Bibliographic Sets], 9 July 1968, [http://www.planalto.gov.br/ccivil\\_03/leis/l5471.htm](http://www.planalto.gov.br/ccivil_03/leis/l5471.htm) [accessed: 06.08.2020].

<sup>24</sup> Portaria IPHAN Nº 396/2015 Dispõe sobre os procedimentos a serem observados pelas pessoas físicas ou jurídicas que comercializem Antiguidades e/ou Obras de Arte de Qualquer Natureza, na forma da Lei nº 9.613, de 3 de março de 1998 [IPHAN Ordinance No. 396/2015 Provides for the Procedures to be Followed by Individuals or Legal Entities that Sell Antiques and/or Works of Art of Any Nature, in accordance with Law No. 9613/1998], 15 December 2016, [https://www.in.gov.br/materia/-/asset\\_publisher/Kurw0TzC2Mb/content/id/21920471](https://www.in.gov.br/materia/-/asset_publisher/Kurw0TzC2Mb/content/id/21920471) [accessed: 22.09.2021].

such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. Thus, their protection is reflected in Article 23 of the 1988 Constitution as follows:

It is the common competence of the Federal Government, States, Federal District and Municipalities [...]

III – to protect the documents, works and other goods with historical, artistic and cultural value

IV – to prevent evasion, destruction and mischaracterization of works of art and other assets of historical, artistic or cultural value.

The Constitution also regulates the legislative powers of the Federal Government, states, and municipalities to preserve certain cultural goods. According to Article 24, Paragraphs VII and VIII and Article 30, Section IX of the Constitution:

It is the competence of the Federal Government, the States and the Federal District to legislate concurrently on: [...]

VII – the protection of historical, cultural, artistic, touristic, and landscaping assets;

VIII – environmental, consumer, artistic, aesthetic, historical, touristic, and landscaping damage liability;

It is the competence of Municipalities [...]

IX – to promote the protection of the local historic and cultural heritage, in compliance with the laws and federal and state supervision.

In spite of these constitutional provisions, there is nevertheless a lack of specific measures to curb the trafficking of cultural heritage; a lack which facilitates illegal trade and the formation of illegal collections. This legal loophole thus has pernicious effects on the national cultural heritage.

## The public administration protection of cultural heritage

It also necessary to analyse the protection of cultural heritage in the administrative sphere and examine how these measures could avoid the illegal trade according to international treaties. It is important to highlight the measure of *tombamento*, which consists of a preservation measure that ensures public protection of goods with historical, cultural, artistic, archaeological, or aesthetic value. Mobile goods, buildings, and even landscapes may be protected by the *tombamento*. Its name comes from the Tombo Tower in Portugal, where historical documents are preserved. For instance, the measure prohibits structural changes in historical buildings, thereby preserving their original characteristics. IPHAN, governed by Decree-Law No. 25/1937, is the administrative organ responsible for *tombamentos* in the federal sphere.

When a good is preserved or protected through the *tombamento* measure, it takes on the characteristic of a public good and cannot be exported. In this sense, a public good is not allowed to be sold and it must stay in its place of origin, as recommended by the international conventions. However, according to Decree-Law No. 25/1937 the goods can be transferred if the transfer is reported to IPHAN by the purchaser. According to Article 14 of the same Decree, the good can only leave

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the country for a short-term period, for cultural exchange purposes. Usually, the goods cannot be outside the country for more than six months, except in cases of itinerary exhibitions, when they can remain outside the country for two years. A finding of an illegal export implies a legal duty on the part of the receiving State to return it, and those responsible for its illegal transfer may be subject to administrative or criminal penalties.

In the case of cultural property belonging to private individuals, such properties should be inscribed in the *Livro do Tombo* (the *Tombamento* Cultural Heritage Book), in accordance with Decree-Law No. 25/1937. In the case of its sale, the seller and purchaser must comply with an established order of preference to purchase it. In such cases, the Federal Government, states, and municipalities have 30 days to manifest their intention to acquire the good subject to *tombamento*.

Properties belonging to trading (auction) houses are not subject to *tombamento*, due to the principle of free trade and movement of goods, but they must receive a license for free trade by IPHAN, as provided for in Article 3 of Decree-Law No. 25/1937. The same rule applies to the works of exhibitions brought from other countries which may be subject to exchange.

Another administrative measure of utmost importance to protect cultural heritage is the inventory. According to the rules regarding it, it must contain a detailed description of the cultural object, including its features, images for identification, and its location. The creation of inventories of public or private collections provides a better knowledge of that cultural property, which in turn contributes to investigations about illicit trafficking. This measure also fosters international cooperation, for instance with the INTERPOL Stolen Works of Art database.<sup>25</sup>

It is noteworthy that according to Article 3 of Decree-Law No. 25/1937 “works of foreign origin are excluded from the national historical and artistic heritage”. This should be reconsidered, as there are constitutional and international rules that recognize the importance of foreign goods to the Brazilian cultural identity, thereby making it part of the Brazilian cultural heritage. These goods should also be subject to the protection of *tombamento*.

According to Decree-Law No. 25/1937, there are three mechanisms for controlling the trade of cultural goods in Brazil, promoted by IPHAN. The first is the special registration requirement of works of art, manuscripts, and ancient or rare books. This must be done by antique dealers, and it has to be updated twice a year. Secondly, it is necessary to list the goods sold. This must be done by auction agents, under penalty of a fine in the amount of 50% of the value of the good(s) sold. Finally, it is necessary to obtain prior authentication by IPHAN, or by an expert of the same institution, for the goods to become available for sale, once again under penalty of a fine of 50% of the value attributed to the asset(s).

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<sup>25</sup> See the INTERPOL database: <https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database> [accessed: 10.08.2020].



These mechanisms are established by Articles 26, 27, and 28 of Decree-Law No. 25/1937, which provide that “dealers of antiques, works of art of any kind, manuscripts, and ancient or rare books are bound to a special registration at the National Institute of Historical and Artistic Heritage, and they shall submit every six months a complete list of the historical and artistic items they own”; and further that “every time the auction agents have to sell objects of an identical nature [...], they shall submit a list to the competent agency [...], otherwise they will be subject to a fine of 50% of the value of the sold objects”.

Indeed, no objects of an identical nature may be offered for sale by traders or agents of auctions unless they have been previously authenticated by IPHAN, or by certified experts, once again under penalty of a fine of 50% of the value assigned to the object(s). Additionally, the authentication of such objects is made by payment of an expertise fee, at the rate of 5% of the value of the item, if it is less than or equal to a *conto de réis*,<sup>26</sup> plus 5,000 *conto de réis* or a fraction thereof, when it exceeds the *conto de réis*.

In addition to the administrative measures, other instruments for the protection of cultural heritage should be highlighted, such as surveillance; document management; popular actions; public civil suits; tax and financial benefits; and, especially, heritage education and political participation. All these measures are regulated by the Federal Constitution of 1988, but they are not directly focused on combating the illicit trafficking of cultural goods.

Furthermore, IPHAN has since 1997 developed a campaign with the Federal Police, INTERPOL, and the International Council of Museums (ICOM) to return to countries of origin the stolen or illegally misappropriated cultural property, as recommended by the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. Among the main measures adopted, we should highlight the creation of the General Coordination of Environment Protection and Historical Heritage in the Federal Police Department, and the subsequent creation of Police Departments specialized in fighting crimes against the Environment and the Historical Heritage (Delemaph) in 27 states.

## The cultural property protected in the criminal sphere

There is no specific legislative crime regarding cultural heritage in Brazilian criminal law. There are some sparse acts that may be used when there is damage caused to cultural goods, for example Decree-Law No. 25/1937 on the administrative protec-

<sup>26</sup> The first official currency of Brazil was the real, with the symbol R\$. As the currency of the Portuguese empire, it was in use in Brazil from the earliest days of the colonial period, and remained in use until 1942, when it was replaced by the cruzeiro. The name comes from the Portuguese word “real” (in the sense of “royal” or “regal”) and was borrowed from a Portuguese currency previously used in Brazil. The name “real” was resurrected in 1994 for the new currency unit, but with the new plural form “reais”. This currency is still in use. One modern real is equivalent to  $2.75 \times 10^{18}$  (2.75 quintillion) of the old “réis”.

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tion of cultural property. Trafficking promotes the illegal importation of certain assets in order to feed domestic trade. It may also export these goods, which consists of the act of trading in or peddling goods from illegal businesses, being characterized by the agent's *animus lucrandi* (intent to make a profit). Therefore, it presents similar characteristics to *qualified reception*, and it could match illicit trafficking of cultural objects as prohibited under international treaty law.

In spite of the fact that the illicit trafficking of cultural goods has not received special treatment in Brazilian criminal law – which stands in contrast to the specific acts related to illicit trafficking of narcotics and weapons – the Brazilian laws have many other protections to prevent this kind of crime. Criminally, the classification that most closely matches this conduct is *qualified reception*, a crime described in Article 180, Paragraph 1, of the Penal Code, which defines a receptor as one who acquires, receives, transports, drives, hides, keeps in deposit, disassembles, assembles, reassembles, sells, exposes for sale, or otherwise uses, for one's use or for the use of others in the exercise of commercial or industrial activity, an object which should be known to be a product of a crime, with a penalty of imprisonment from 3 to 8 years and a fine. In addition, the legal property covered in this crime refers to both public and private assets, which encompasses the reach of the Conventions.

A required condition for the offense of receiving is the existence of a previous offense, such as theft, robbery, or any other crime referred to in the list of crimes against cultural heritage, which in most cases makes it difficult to hold the suspect responsible.

Moreover, insofar as concerns the issue of illegal introduction and trading of cultural goods brought from other countries or fraudulently imported into other countries, there are the evasion and smuggling crimes under Article 334, Paragraph 1, item III and Paragraph 3, and Article 334-A, Paragraph 1, item II and Paragraph 3 of the Penal Code respectively. The problem with these legal provisions lies in identifying the provenance of the cultural good and proving that it is inalienable, especially when it is not registered as a missing asset in databases such as INTERPOL.

Tax evasion, or *Descaminho* (Article 334, Paragraph 1, item III) is the evasion of duties or taxes due on commercial or industrial activities, including the import or export of goods. It criminalizes those who evade, in whole or in part, the payment of taxes due on the entry, exit, or the consumption of goods, and stipulates a penalty of imprisonment of 1 to 4 years. The same penalty applies to one who “sells, offers for sale, keeps on deposit, or in any way uses – for oneself or for others in the exercise of a commercial or industrial activity – merchandise of foreign origin introduced clandestinely into the country or imported fraudulently or which is known to be the product of smuggling in the national territory or fraudulent importation from another”. The penalty for such actions is doubled if the crime of tax evasion is practiced through air, sea, or inland waterway transport.

Smuggling is the act of importing or exporting prohibited goods (Article 334-A, caput), especially if the goods require the registration, review, or authorization of

a competent public body (Article 334-A, Paragraph 1, item II). Smuggling is punishable by a penalty of imprisonment of 2 to 5 years for those who engage in the criminal act, and the penalty for such an action is doubled if the crime of smuggling is committed through air, sea, or inland waterway transport.

Chapter VI, Article 48 of Decree-Law No. 3688/1941<sup>27</sup> – the Misdemeanours Law – disciplines misdemeanours relating to Labour Organization and provides that taking part in the *illegal practice of trading in antiques and works of art*, which consists of participating, “outside the relevant legal provisions, in the trading of antiques, works of art, or manuscripts and old and rare books” is subject to a penalty of simple imprisonment of 1 to 6 months or a fine of 1 to 10 *contos de réis*.

In this sense, the Decree-Law aims concurrently to prevent dealers of these cultural goods from placing the objects for sale illicitly, if obtained through criminal activities carried out by third parties; and to ensure and regulate the peaceful and lawful exercise of such trade, while respecting freedom of occupation and freedom of enterprise.

Analysed from the perspective of criminal environmental law as established by Law No. 9605/1998,<sup>28</sup> crimes against cultural heritage are restricted to the destruction, alteration, or deterioration of assets. This Law elaborates on crimes against cultural heritage in Section IV, entitled *Crimes against Urban Planning and Cultural Heritage*.<sup>29</sup>

Article 62 of the Law provides penalties for destroying, rendering useless, or deteriorating an asset especially protected by law, administrative act, or judicial decision, as well as registry, museum, library, art gallery, scientific, or similar installations protected by law, administrative act, or judicial decision, with penalties ranging from a sentence of confinement of 1 to 3 years and a fine. This crime encompasses the crime of extraction of paleontological cultural goods, when extracted from their place of origin and sold as souvenirs, thus making them almost impossible to be identified (i.e. for example what happens in Chapada do Araripe, in the northeast region of Brazil).<sup>30</sup>

<sup>27</sup> Decreto-Lei N° 3.688/1941: Lei das Contravenções Penais [Decree-Law No. 3688/1941: Misdemeanours Law], 3 October 1941, [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/del3688.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del3688.htm) [accessed: 17.08.2021].

<sup>28</sup> Lei N° 9.605/1998 Dispõe sobre as sanções penais e administrativas derivadas de condutas e atividades lesivas ao meio ambiente, e dá outras providências [Law No. 9605/1998 Provides for Criminal and Administrative Sanctions for Conduct and Activities that Are Harmful to the Environment, and Provides Other Measures], 12 February 1998, [http://www.planalto.gov.br/ccivil\\_03/leis/19605.htm](http://www.planalto.gov.br/ccivil_03/leis/19605.htm) [accessed: 02.08.2020].

<sup>29</sup> Articles 163, 165, and 166 of Chapter IV – Damage of the Penal Code predict the damage crime practiced against the cultural heritage, but it was revoked by the specific Law No. 9605/1998.

<sup>30</sup> See the publication in Brazilian media, on 12 October 2021, about the paleontological good, the fossil of the dinosaur *Ubirajara jubatus*, found at Chapada do Araripe, which is considered to be one of the most interesting pieces in the collection of the Museum of Natural History of Karlsruhe and is the subject of a dispute with paleontologists in Brazil, <https://politica.estadao.com.br/blogs/fausto-macedo/devolvam-nossa-galinha/> [accessed: 12.10.2021].

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According to Article 63, a penalty of imprisonment from 1 to 3 years and a fine is incurred by anyone who changes the appearance or the structure of a building or location specifically protected by law, administrative or judicial decision, or act because of its landscape, ecological, tourist, artistic, historical, cultural, religious, archaeological, ethnographic, or monumental value, without authorization from the competent authority or falling outside the scope of the authorization granted. This legal precept should include falsifications concerning cultural goods both entering or leaving a country, as well as the tampering with accompanying documents, such as, for example, the certificate of authenticity.

Law No. 3924/1961 regulates the protection of archaeological and prehistoric monuments, regarding both conservation and exit from Brazilian territory. In addition to excavation regulations, Article 3 prohibits the economic exploitation, destruction, or mutilation, for any purpose, of the goods listed in the law and others, albeit admitting special purposes upon completed scientific exploration with a favourable opinion from IPHAN. This law provides for criminal penalties for those responsible for a violation of these rules, and in accordance with Article 5 of the law “any act that results in destruction or mutilation of the monuments referred to in Article 2 of this law shall be considered a crime against the national heritage”.

This law, in its Articles 20 and 21, prohibits the export of archaeological, pre-historical, numismatic, or artistic objects without the express permission of IPHAN, which is listed in a *release document* in which the property to be transferred must be specified. Chapter V of Law No. 3924/1961 regulates the shipment abroad of archaeological or prehistoric, historic, numismatic, or artistic objects. It provides that no objects of archaeological or prehistoric, numismatic or artistic interest may be transferred abroad without an express license from the Board of Historical and Artistic Heritage, which is listed in a *release document* in which the objects to be transferred are duly specified in accordance with Article 20.

In addition, Article 21 stipulates that failure to comply with the prescriptions of the previous article can give rise to the summary seizure of the object to be transferred, without prejudice to other legal sanctions that the responsible party may be subject to, and that an object seized in accordance with this article will be delivered to the Board of Historical and Artistic Heritage. Thus according to this article non-compliance with this rule will result in seizure of the object to be transferred and its delivery to IPHAN, without prejudice to other criminal liabilities. The situation is similar in the case of paleontological goods, which even though they belong to Brazil, the proof of their provenance through documentation can be very difficult to prove.

Resolution No. 8/2021<sup>31</sup> of the Council for Financial Activities Control (COAF) sets forth the procedures to be followed by individuals or legal persons trading in

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<sup>31</sup> Resolução COAF N° 8/2021 [COAF Resolution No. 8/2021], 21 May 2021, <https://www.legisweb.com.br/legislacao/?id=414655> [accessed: 20.08.2021].

works of art and antiques, with the aim of preventing economic exploitation by the illicit trafficking of cultural heritage. In Article 1, Section I, in order to prevent and combat the crimes of “laundering” or concealment of assets, rights, and values as established by Law No. 9613/1998,<sup>32</sup> natural or legal persons trading in objects of art and antiques must observe the provisions of this Resolution, and the provisions of the Resolution apply to all natural or legal persons trading, importing, exporting, or intermediating in the purchase or sale of art objects and antiques; on a permanent or occasional basis, as a main activity or in a side manner, whether cumulatively or not.

Therefore, whoever conceals or disguises the nature, source, and location, or conceals or disguises the use of the property, rights, or values, purchases, receives, exchanges, moves, or transfers, or imports or exports goods of value, including cultural goods among others, violates the terms of this Resolution. Nonetheless, as the art market is based on speculation of values, many taxpayers end up declaring a much lower value of the goods involved, making it difficult to ascertain the real value and monitor the entry and exit of cultural goods into and out of the country.

## The Principal Case in Brazil concerning Illicit Trafficking of Cultural Heritage: the *Banco Santos* Case

Following the considerations presented above regarding the rules governing the illicit trafficking in movable cultural goods; and in particular the measures applied in Brazil for this purpose, it is worthwhile to present an adjudicated case in order to demonstrate and corroborate the applicability of the rules.

Criminal case No. 2005.61.81.9003966,<sup>33</sup> adjudicated in the 6th Federal Criminal Court of São Paulo, involved the former Banco Santos. This case concerned the seizure of works of art, their confiscation, collaboration between the governments of Brazil and the United States in repatriating some of them to their country of origin, and the conviction of Edemar Cid Ferreira for gangster activities, money laundering, currency evasion, etc., followed by the confiscation of their property at Banco Santos S.A. headquarters, Instituto Cultural Banco Santos, and at the Cid Ferreira Collection Empreendimentos Artísticos Ltda. technical reserve.

<sup>32</sup> Lei N° 9.613/1998 Dispõe sobre os crimes de “lavagem” ou ocultação de bens, direitos e valores; a prevenção da utilização do sistema financeiro para os ilícitos previstos nesta Lei; cria o Conselho de Controle de Atividades Financeiras - COAF, e dá outras providências [Law No. 9613/1998 Deals with Crimes of “Laundering” or Concealment of Assets, Rights and Values; Preventing the Use of the Financial System for the Illicit Activities Provided for in this Law; and Creating the Financial Activities Control Council - COAF, and Taking Other Measures], 3 March 1998, <http://presrepublica.jusbrasil.com.br/legislacao/104073/lei-de-lavagem-de-dinheiro-lei-9613-98> [accessed: 28.05.2020].

<sup>33</sup> 6th Federal Criminal Court of São Paulo, Miscellaneous Criminal Procedure No. 2005.61.81.9003966. Federal Public Prosecutor's Office requires the seizure of assets by Edemar Cid Ferreira and the search and seizure of documents or any object related to the offenses provided for in Law No. 7492/1986 and Law No. 9613/1998, 11 February 2005.

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The cultural goods involved totalled more than 12,000 pieces, including paintings, sculptures, photographs, archaeology, ethnography, and works by renowned artists from the 14th to 9th centuries BC to the contemporary times. Cultural objects were assigned to institutions of the State of São Paulo as trustees, such as the Museum of Archaeology and Ethnology (MAE/USP), the Museum of Contemporary Art (MAC/USP), etc.; and were divided according to the theme of cultural heritage to join a permanent collection and start the process of turning them over to the Historical, Cultural and Environmental Heritage Preservation City Council of São Paulo city (CONPRESP).

The works sent abroad were also confiscated and an official note was issued to INTERPOL, allowing part of them to be repatriated in collaboration with US authorities. For example, the painting “Hannibal” was sold in an auction house in London in 2016 for £10 million, while it had been purchased by ex-director of the Santos Bank, Edemar Cid Ferreira, in 2003 for US\$680,000. The painting was returned to Brazil via cooperation between the FBI and the Brazilian Ministry of Justice. Another note was issued to the Department of Assets Recovery and International Legal Cooperation (DRCI), under the Ministry of Justice, to adopt the necessary measures for the kidnapping of non-localized works and their repatriation by forwarding a new list to the US and Switzerland. A register of the works of art in INTERPOL’s global database was also performed, along with publication in the INTERPOL *Stolen Works of Art*.

The archaeological pieces were subject to different treatment, inasmuch as they are property which belongs to the Federal Government, i.e. public goods, insusceptible to being possessed by individuals, which would be incompatible with constitutional provisions (Article 20, item X). Their protection is the responsibility of the Republic powers (Article 23, Sections III and IV). Thus, based on expertise it was determined that the Federal Government’s pieces of property could not, under the 1988 Constitution, be acquired by private parties following their entry into Brazil. Furthermore, by the decision of the Superior Court it was held that a special feature of the archaeological and ethnographic goods was that despite the competence conflict between the Federal sphere and the State of São Paulo, the goods could not be taken into account for failure to honour the creditors of the bankrupt estate of Banco Santos S.A. while serving as a restitution on behalf of the Federal Government.

In the ruling, the reasoning proffered for the protection of cultural heritage was the good of humanity, which belongs to the entire community and not to a single individual, as prescribed in the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.<sup>34</sup> According to the Convention, it is the duty of the States Parties to protect, preserve, and enhance their heritage (Article 1) in order to transmit it to future generations (Article 4), and fulfil a role in community

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<sup>34</sup> 16 November 1972, 1037 UNTS 151.

life (Article 5). This was also based on Article 23, Sections III and IV, of the Federal Republic Constitution, which provides the responsibility of the branches of government for the protection of historical, artistic, and cultural assets, as well as in the infra-constitutional legislation such as Decree-Law No. 25/1937 (Articles 1 and 24).

## Mediation: An Alternative Conflict Resolution in Cases of Illicit Trafficking of Cultural Heritage

In addition to the international conventions that protect cultural heritage and the local laws which seek its restitution, as we have described for Brazil, it is important to note the existence of different initiatives developed by international organizations and specialized institutions in favour of mediation as a mechanism for conflict resolution in cases of illicit trafficking.<sup>35</sup> Mediation has been posited to be the best way that States can repatriate cultural goods – a solution which offers benefits such as a flexible process, respect for the sovereignty of States, and the opportunity to reach a settlement through the parties' consent.<sup>36</sup> The use of mediation in art-related problems has increased in recent years and offers the opportunity to achieve creative and special agreements which are not available through the judicial system.<sup>37</sup>

Indeed, there are arbitral institutions which specialize in the administration of art-related arbitrations, as well as mediations. The Court of Arbitration for Art (CAfA) was founded to solve problems in the art community around the world. It was organized by the Netherlands Arbitration Institute and Authentication in Art. CAfA offers mediation services in accordance with its Mediation Rules, offering

<sup>35</sup> R. Morek, *The Art of Mediation and Mediation in Art Disputes*, "Kluwer Arbitration Blog", 19 August 2018, [http://mediationblog.kluwerarbitration.com/2018/08/19/art-mediation-mediation-art-disputes/?doing\\_wp\\_cron=1595639324.6349990367889404296875](http://mediationblog.kluwerarbitration.com/2018/08/19/art-mediation-mediation-art-disputes/?doing_wp_cron=1595639324.6349990367889404296875) [accessed: 10.08.2020]. There are various types of art-related disputes that can be resolved through mediation and arbitration. In arbitration, some international commercial arbitration centres offer arbitration services in this matter. But when an art-related problem arises as a result of an investment dispute between a foreign investor and a host State (i.e. expropriation, fair and equitable treatment, non-discrimination measures, among others), the investor could sue to the State using investment treaty arbitration. See V. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, Cambridge University Press, Cambridge 2014, pp. 114-115. Unfortunately, Brazil has not signed the ICSID Convention and does not accept investor-State arbitration. Instead, the Federal Republic had celebrated in the last six years a special investment treaty entitled *Agreements on Cooperation and on Facilitation of Investments (ACFI)*. N. Monebhurrin, *Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model*, "Journal of International Dispute Settlement" 2017, Vol. 8, pp. 79-100.

<sup>36</sup> N. Mealy, *Mediation's Potential Role in International Cultural Property Disputes*, "Ohio State Journal on Dispute Resolution" 2011, Vol. 26(1), pp. 192-200. See also A.M. Tanzi, *The Means for the Settlement of International Cultural Property Disputes: An Introduction*, <https://docs.pca-cpa.org/2019/12/A.-Tanzi-Lecture-of-25-October-2019.pdf> [accessed: 24.08.2021].

<sup>37</sup> J. Prowda, *The Art of Art Authentication and a Global Alternative to Dispute Resolution*, "New York Dispute Resolution Lawyer" 2020, Vol. 13(1), pp. 16-17.

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a flexible and confidential procedure. It is interesting to note that according to the Dutch law if the parties reach a settlement agreement, they can agree with the mediator to have it handed down in the form of an arbitral settlement award.<sup>38</sup> Since 2015 the Milan Chamber of Arbitration also offers mediation for art-related disputes in a similar fashion, called ADR Art & Cultural Heritage (ADR Arte).<sup>39</sup> There are two ways to activate the mediation process: (i) through the Fast-Track Mediation Rules for international cases, which offer low costs and a flexible procedure; or (ii) through the Italian mediation law, for national cases which need an enforceable ruling. Between 2015 and 2018, ADR Arte dealt with more than 70 art mediations involving a broad range of legal categories, especially in extra-contractual matters.<sup>40</sup> And in the UK there is another specialized institution in arts called Art Resolve, which offers mediations through a flexible procedure.<sup>41</sup>

In addition to the aforementioned institutions, there are two illustrative examples of the initiatives organized by international organizations relating to art disputes. The first involves the World Intellectual Property Organization and the International Council of Museums, which together offer the ICOM-WIPO Art and Cultural Heritage Mediation service. It covers, according to its website, disputes relating to art and cultural heritage, including return and restitution, loan and deposit, transactions, art fairs, digitalization, donation, *droit de suite*, misappropriation of traditional cultural expressions, and repatriation. This method and service is available to both public and private parties.<sup>42</sup>

The second initiative is organized by UNESCO. This international organization offers a mediation service in order to facilitate the return of cultural property to its country of origin. The most interesting feature of this service is that States which are non-parties to the 1970 UNESCO Convention can participate, if they consent to do so. And with this objective in mind, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) enacted general rules of mediation in 2010.<sup>43</sup>

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<sup>38</sup> See *CAfA Mediation Rules*: <https://www.cafa.world/docs/CAfA%20Mediation%20Rules.pdf> [accessed: 29.09.2021].

<sup>39</sup> See Milan Chamber of Arbitration, *Art-related Disputes*, <https://www.camera-arbitrale.it/en/mediation/art-related-disputes.php?id=526> [accessed: 29.09.2021].

<sup>40</sup> See ADR Arte Statistics for 2018: <https://www.camera-arbitrale.it/upload/documenti/statistiche/statistiche-adr-arte-2018.pdf> [accessed: 29.09.2021].

<sup>41</sup> See Art Resolve, *The Mediation Process*, <https://artresolve.org/art-disputes-mediation-adr-services/how-mediation-works/> [accessed: 29.09.2021].

<sup>42</sup> See WIPO, *ICOM-WIPO Art and Cultural Heritage Mediation*, <https://www.wipo.int/amc/en/center/specific-sectors/art/icom/> [accessed: 11.02.2021].

<sup>43</sup> See UNESCO, *Rules of Procedure for Mediation and Conciliation in Accordance with Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation*, Paris 2010, [https://unesdoc.unesco.org/ark:/48223/pf0000192534\\_eng](https://unesdoc.unesco.org/ark:/48223/pf0000192534_eng) [accessed: 10.02.2021].



According to the rules, this mediation is a process where an outside party can intervene to help achieve an amicable solution with respect to the restitution or the return of cultural property. Also, the rules define conciliation as a process whereby the parties submit their case or problem to a special organ (called the conciliation commission), which will investigate and effect an amicable settlement. It is important to note that in these mediations States may represent the interests of public or private institutions located in their territories. They are initiated by a request submitted by a State Member or Associate Member of UNESCO with the relevant case information. The parties have 60 days to appoint the mediator and should inform the Director-General of UNESCO of such an appointment. If the mediator appointed accepts, he/she initiates and conducts a flexible process, which ensures that due process is ensured in all the stages.

Taking into consideration the above procedures, we contend that mediation constitutes an excellent opportunity to resolve disputes arising from the illicit trafficking of cultural property, and that all the Brazilian citizens and authorities should be aware of this, especially in cases where Brazil could represent the interests of private persons (physical or juridical) due to being a signatory of the 1970 UNESCO Convention.

But another question needs to be discussed: Is it possible in Brazil to organize these kinds of mediations to resolve national cases? We argue that the road is still long, but we stand with Morek's statement that: "Big-ticket international disputes over art and cultural property are becoming more common. No doubt we will see the increasing use of mediation and arbitration in this field in the future".<sup>44</sup>

In 2015 Brazil enacted Law No. 13140/2015, which concerns mediations between private persons as method of resolving disputes and the self-composition of conflicts within the scope of the Public Administration.<sup>45</sup> This Law regulates judicial and extra-judicial mediations, as does the Civil Procedure Code of 2015.<sup>46</sup> But the Code mainly regulates the judicial forms of dispute resolution. In this sense, the question arises: Who can be parties in these kinds of disputes: only States or States and private persons?

There are three possible answers to this question. First, according to Article 32, with due authorizations IPHAN<sup>47</sup> can create a mediation chamber to evaluate the admissibility of requests for conflict resolution, by means of composition,

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<sup>44</sup> R. Morek, *op. cit.*

<sup>45</sup> Lei No. 13.140/2015 Dispõe sobre a mediação entre particulares como meio de solução de controvérsias e sobre a autocomposição de conflitos no âmbito da administração pública [Law No. 13140/2015 Provides for Mediation Between Private Parties as a Means of Dispute Resolution and for the Self-composition of Conflicts within the Scope of Public Administration], 26 June 2015, [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/l13140.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13140.htm) [accessed: 10.08.2020].

<sup>46</sup> Lei No. 13.105/2015 Código de Processo Civil [Law No. 13105/2015 Civil Procedure Code], 16 March 2015, [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/l13105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm) [accessed: 11.08.2020].

<sup>47</sup> Or any other public institution which concerns cultural heritage, such as the Brazilian Institute of Museums (IBRAM).

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in the event of a dispute between private individuals and public legal entities.<sup>48</sup> Second, in an extrajudicial mediation, private persons and public institutions may – with due consent – explore solutions to the problem. Third, in a judicial process it is possible to initiate a mediation procedure prior to trial or at any stage of it (Article 334 of the Civil Procedure Code).

Also, Article 3 of Law 13140/2015 establishes that a conflict that deals with “available rights”, or with “unavailable rights that limit a transaction” can be mediated. In cases of “unavailable but enforceable rights”, the agreement must be ratified in court, after hearing the Public Ministry. The question arises whether, according to Article 3, a given matter can be resolved through this special method? We argue that it is possible if the cultural property in dispute is not unavailable according to the following list:

- 1) Artefacts, collections, or collections registered by IPHAN: paintings, sculptures, engravings, pieces of furniture, pieces or collections of old coins and medals, and other objects whose exceptional value is recognized individually or jointly by IPHAN (Decree-Law No. 25/1937 – list of assets *tombados*);
- 2) Works of art and crafts produced or introduced in Brazil until the end of the monarchic period (1889): paintings, drawings, sculptures, carvings, engravings, elements of architecture, imagery, jewellery, pieces of furniture (Law No. 4845/1965);
- 3) Objects of archaeological or prehistoric interest, including pieces or collections of old coins and medals (Law No. 3924/1961); and
- 4) Books and documentary collections made up of Brazilian works or about Brazil, edited in the 16th to the 19th centuries (Law No. 5471/1968).

The procedural rules applicable will depend on whether the mediation is a judicial or extrajudicial according to Brazilian law. However, in any case the parties can appoint the mediator and confidentiality and due process must be assured.

### Conclusions

There are several laws and regulations governing circulation and protection of cultural goods in Brazil, but there is no specific legal regime pertaining to the illicit trade. This legal loophole must be filled. The hedging of existent instruments in the country aimed at the protection of cultural heritage is not sufficient for the safeguarding of cultural property, which is imbued with special features which, if damaged or lost, will bring about an intellectual impoverishment for all mankind.

An improvement that could be made in the Brazilian legal system – following the recommendations of the 1970 UNESCO Convention, 1995 UNIDROIT Con-

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<sup>48</sup> See J.C. Guedes, *Jurisdição Voluntária no CPC/2015 como meio de resolução de ‘controvérsias’ com a Administração Pública*, “Revista Brasileira de Políticas Públicas” 2017, Vol. 7(1), pp. 28-50.

vention, and international institutions like ICOM – would be the creation of appropriate national, Brazilian legislation to combat such practices, as well as defining public policies for the prevention and recovery of cultural heritage. In addition, centralizing the activities of this protection in a single agency would allow it to collaborate with the management and supervision of trade, transfer, and transport of cultural goods.

The creation of a deliberative committee is also necessary for the implementation of these protection activities, especially regarding alternative means of conflict resolution such as mediation. This would increase communication between not only national institutions through the establishment of a national inventory system, such as the Federal Police, INTERPOL, the Ministry of Foreign Affairs, and the Ministry of Justice, but would above all trigger international cooperation. They could also recommend the implementation of educational programs to foster respect for the cultural heritage and rules to ensure that any interested party may contest the disappearance of cultural goods. Last but not least, the creation of codes of ethics for collectors and dealers of artworks must be recommended and implemented.

Although the Constitution regulates certain aspects of this issue, there is a lack of specific measures appropriate for combatting the trafficking of cultural heritage, a lack which facilitates illegal trade and the formation of illegal collections. This absence of specific measures may be one of the causes of the illegal trade in cultural goods, which has caused great damage to Brazilian national cultural heritage and posed difficulties in the paths to return cultural goods to their place of origin. Therefore it is essential to create specific legislation on the illicit trafficking of cultural goods, as well as to increase and intensify the supervision of trade in artworks and those who serve as conduits in the harmful activities to the Brazilian cultural heritage, in order to curb the circulation of illicit products by subjecting individuals and companies to administrative and criminal sanctions, with the obligation to repair the damage.

Moreover, when Brazil transposes legal provisions, both international and national, concerning the protection of cultural heritage it is necessary that they be implemented, recognized, and identifiable by the local people dealing with these cultural assets, based on an approach that facilitates an understanding that it is the responsibility of the present generation to preserve such property for future generations. Moreover, this would enable and facilitate the possibility of access to these goods.

Finally, in order to solve the problems arising out of the illicit trafficking of cultural property, there are alternative dispute resolution (ADR) mechanisms, such as mediations, offered in accordance with the 1970 UNESCO Convention and other initiatives organized by international organizations and specialized institutions. Such mediations are aimed at facilitating dialogue between the parties through a flexible and confidential procedure, with the objective of restitution of cultural

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property to its place of origin. Considering the international experience and the newest national mediation laws, a new door could be opened in the future in Brazil.

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