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Historical and Social Perspectives on the Regulation of
the International Trade in Archaeological Objects:
The Examples of Greece and India

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I. INTRODUCTION

It is a well-established fact that the international antiquities market is responsible for the destruction and vandalism of archaeological and cultural sites worldwide.¹ Material removed from these sites is traded across jurisdictions until it can be sold legally and acquired as “art” by private and institutional collectors in North America, Europe and, increasingly, East Asia.² One consequence of this trade is that most countries outside the United States have now passed laws that protect archaeological heritage by proscribing the unauthorized excavation of antiquities, the export of antiquities, or both.³ Opinions are divided, however, as to the effectiveness and

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1. See e.g., ROGER ATWOOD, *STEALING HISTORY: TOMB RAIDERS, SMUGGLERS, AND THE LOOTING OF THE ANCIENT WORLD* 11, 241 (2004); NEIL J. BRODIE ET AL., *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 8 (2000); PATRICK J. O’KEEFE, *TRADE IN ANTIQUITIES: REDUCING DESTRUCTION AND THEFT* 14–16 (1997).

2. BRODIE ET AL., *supra* note 1, at 33.

3. See 3 LYNDEL V. PROTT & PATRICK J. O’KEEFE, *LAW AND THE CULTURAL HERITAGE: MOVEMENT* 429–530 (1989).

even the desirability of such strong regulations at the source of the artifacts.⁴

Opponents of such regulation argue that the prohibitions deter people from declaring antiquities that are discovered by chance. They further argue that because of the prohibition, information about the place of finding and context of the objects is often lost, and that any subsequent trade is driven underground, increasing the criminalization and corruption concomitant with such regulation.⁵ Opponents also contend that these laws should protect only the most important archaeological finds while allowing the remainder to circulate freely.⁶ The free circulation of these duplicate or poorer quality pieces, which might result from museum storage and fresh excavations, would go some way towards satisfying demand. They further argue that free circulation has the added cultural and educational benefit of allowing a large number of people to come into contact with ancient "art," either as owners or as museum visitors.

Proponents of strong regulation at the source of the artifacts counter that archaeological sites are a finite resource such that, in the long term, there can be no strategy of legal and sustainable commercial exploitation.⁷ They argue instead that laws regulating the free flow of archaeological material constrain the market, through either a direct deterrent effect or the potentially high cost of circumvention, and therefore help to protect the integrity of archaeological sites at the source of the artifacts.⁸

These two contrasting views on how best to regulate the market reveal a fundamental disagreement over the source of traded antiquities. Opponents of strong regulation adhere to the premise that most archaeological objects coming onto the market are chance finds.⁹ Chance finds are objects that would be found anyway as an incident of building or agricultural operations but, in the absence of a market, would be thrown away or destroyed. In effect, the market rescues them. Proponents are not convinced about chance finds; they believe that most material new to the market has been deliberately looted and that, without the market, it would remain safely unexcavated.¹⁰

Both parties to this debate make simplifying assumptions, and there is a noticeable absence of evidentiary support. For example, in 2000, the American Association of Museums (AAM) claimed that "blind enforcement of restrictive patrimony laws is not the answer" to

4. BRODIE ET AL., *supra* note 1, at 31.

5. *See id.*

6. *See id.*

7. *See* 3 PROTTE & O'KEEFE, *supra* note 3, at 464-70.

8. *See id.*

9. S. White, *A Collector's Odyssey*, 7 INT'L J. CULTURAL PROP. 171-72 (1998).

10. *See* 3 PROTTE & O'KEEFE, *supra* note 3, at 12.

archaeological looting, because "experience shows that given the unabated demand for antiquities, restrictive cultural property regimes merely promote a black market, shifting the trade from legitimate to illegitimate channels and increasing the risks posed by clandestine looting by driving all trade underground."¹¹ But the AAM gave no factual support for this statement, relying upon the authority of another similar statement made by John H. Merryman that,

[r]etention laws . . . merely ensure that the export trade moves underground, putting cultural property traffic in the hands of the wrong people, who will do it the wrong way. Historically, the tighter the export control in the source nation, the stronger the pressure to form an illicit market.¹²

Merryman himself relied upon yet a further authority, Paul Bator.¹³ Bator sets out the microeconomic and psychological reasons why strong regulation should fail, but gives no hard evidence, aside from his explanation that the large volume of illegally exported material reaching the international market itself demonstrated that strong export control regimes had failed.¹⁴ He seems not to have considered that, without such controls, the situation may have been far worse.¹⁵

In theory, the study of regulatory responses to other illegal trades, particularly those in narcotics and natural resources, should offer instructive insights into the use of regulation against the antiquities trade. There is no broad measure, however, of agreement as to the effectiveness of these regulatory responses, which seems often to depend upon the particular social and cultural circumstances of the trade in question.¹⁶ It is not surprising that the effect of regulation depends upon factors that are not always legal or economic, and it emphasizes the danger in considering all illegal

11. Brief for Am. Assoc. of Museums et al. as Amici Curiae Supporting Michael H. Steinhardt, *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. July 12, 1999) (No. 97-6319).

12. *Id.*

13. See, John H. Merryman, *A Licit International Trade In Cultural Objects*, in 5 *LEGAL ASPECTS OF INTERNATIONAL TRADE IN ART* 13 (Martine Briat & Judith A. Freedberg eds., 1996).

14. PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 41-43 (Univ. of Chicago Press ed. 1983).

15. It can be argued that if more material is released to the market to ameliorate demand, then dealers will develop strategies to promote the new material and create more demand, so that the ameliorating effect is lost. See Neil Brodie, *Export Deregulation and the Illicit Trade in Archaeological Material*, in *LEGAL PERSPECTIVES ON CULTURAL RESOURCES* 88-92 (Jennifer M. Richman & Marion P. Forsyth eds., 2004).

16. See generally ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES AND PLACES* (2001) (evaluating the drug problem and possible solutions in the United States and comparing that with the problems and remedial attempts in different countries); *THE TRADE IN WILDLIFE: REGULATION FOR CONSERVATION* (Sara Oldfield ed., 2003) (comprising essays examining the regulation and enforcement of international trade in wildlife and the global disparities).

trades together as a single generic category. The trade in antiquities, and in cultural material more generally, has its own sociocultural characteristics. Thus, it is distinguishable from other illegal trades and the value of comparative perspectives is diminished.

Two empirical studies of the trade in cultural material have shown that strong export controls work. Between 1820 and 1870, pre-unification Italian states with strong export controls in place retained more of their cultural heritage (measured in terms of paintings and antique books) than states with weak or no controls.¹⁷ Thefts from cultural institutions in the Czech Republic rose sharply after 1989, the year the "Iron Curtain" was raised; though this example also highlights the curtailment of civil liberties that might be necessary for strong export controls to work and that are probably unacceptable in a liberal society.¹⁸

This Article offers a further, admittedly partisan, contribution to the debate over the effectiveness of statutory regulation, especially at source, of the antiquities trade by introducing historical and social perspectives. First, this Article describes the history and assesses the utility of regulation in two countries, Greece and India. Second, this Article incorporates insights drawn from the examples of Greece and India into a discussion of the wider social and cultural contexts of the collection and trade of antiquities.

II. REGULATION AT THE SOURCE OF THE ARTIFACT

The objective of any strategy aimed at combating the illegal trade in antiquities is twofold: to take the trade out of the hands of criminals while, at the same time, protecting the archaeological resource. Clearly, the trade could easily be saved from criminals by relaxing regulation, but only at an undetermined cost to the archaeological resource. Unfortunately, there is no consensus as to how this cost might be measured.¹⁹ Successful protection of the archaeological resource might be differently conceived, either as conserving the integrity of archaeological sites and monuments, or as defending property rights. From the archaeological perspective of this Article the former concept is preferred, although national laws may enshrine an uneasy compromise between both concepts.

The archaeological laws of most so-called "source countries" have a long history that often predates the modern nation state. In Italy,

17. Guido Guerzoni, *Cultural Heritage and Preservation Policies: Notes on the History of the Italian Case*, in *ECONOMIC PERSPECTIVES ON CULTURAL HERITAGE* 107, 118-21 (Michael Hutter & Ilde Rizzo eds., 1997).

18. See Pavel Jirásek, *Situation in the Czech Republic*, in *ONE HUNDRED MISSING OBJECTS: LOOTING IN EUROPE* 35-39 (ICOM ed. 2000).

19. See 3 PROTT & O'KEEFE, *supra* note 3, at 17-25.

for example, laws enacted before nineteenth century unification continue to exert an influence over present legislation.²⁰ In many states, including India, laws were first enacted by colonial administrations.²¹ Thus, modern archaeological laws often have a long pedigree and have been amended and adapted to changing political and economic circumstances. One legacy of this historical development is that rules are not always unequivocal, and laws might embody accommodations or compromises that have been made between different social interests or intellectual agendas. This legal indeterminacy has sometimes caused difficulties for U.S. courts called upon to enforce foreign archaeological laws.²² Nevertheless, most source countries have adopted laws that prohibit the export of archaeological objects and take archaeological heritage into state ownership. As noted earlier, Bator has suggested that these laws have been ineffective.²³ If Bator is right, then before abandoning these laws, it will be useful to examine in detail several specific examples of apparent failures, in order to identify the causes of failure and suggest possible remedies.

With this strategy in mind, this Article presents two case studies. The first concerns the plundering of Bronze-Age Cycladic cemeteries in Greece between the 1950s and 1970s. The second looks at the situation in India over the same time period. These two countries offer a useful contrast because, during the time in question, the archaeological law of Greece took, in Merryman's terms, a more "nationalist" approach, while India's was more "internationalist."²⁴

For Merryman, a culturally-nationalist regime is retentionist and potentially destructive if sufficient resources are not available within the host country to support the proper care of retained objects or of archaeological sites and monuments.²⁵ A culturally-internationalist regime offers protection to materials as the free trade of objects draws them inevitably towards those countries with the means to conserve them.²⁶ As will become clear, however, these characterizations are probably overdrawn.²⁷

20. Guerzoni, *supra* note 17, at 121-24.

21. *See infra*, note 67.

22. *See e.g.*, United States v. McClain, 545 F.2d 988, 997-1000 (5th Cir. 1977) (noting that while "Mexican law has been concerned with the preservation and regulation of pre-Columbian artifacts since 1897," Mexican ownership of pre-Columbian artifacts was declared gradually, and not "unequivocally" until 1972).

23. BATOR, *supra* note 14, at 41-43.

24. John H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831, 846 (1986).

25. *Id.* at 846, 852-53.

26. *Id.* at 846-47.

27. Merryman draws his distinction from readings of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, which he claims recognizes the existence of a common (universal) interest in some manifestations of cultural heritage, and from readings of the 1970 UNESCO

A. Example 1: The Greek Cycladic Islands

Cycladic figurines—manufactured on some of the Greek Cycladic islands during the third millennium B.C. (early Bronze Age)—are small, bleached-white marble figures varying in height from 0.15 to 1.5 meters (with most falling in the lower end of the range). When they first came to public attention in the nineteenth century, the figurines were considered ugly and barbaric but, by the middle years of the twentieth century, their simplicity of form and color had raised their status to harbingers of Modernist sculpture.²⁸ During the 1950s and 1960s large numbers of these figurines began to appear on the international market where they commanded high prices and were acquired by museums and collections around the world.²⁹ Today, there are thought to be 1,600 in existence, though the large majority were not known before the 1960s and do not have a provenance that can be traced back to an archaeological site.³⁰ An unknown percentage of the figurines are almost certainly fakes.³¹ Most genuine figurines acquired on the market were looted from early Bronze Age Cycladic cemeteries—a trend that became endemic in the 1950s and did not diminish until the 1970s.³² It is believed that, during this time, hundreds of cemeteries were destroyed,³³ perhaps 10,000 or 12,000 graves in all.³⁴

Greek antiquities have been looted since Greece was an Ottoman province, and statutory protection of archaeological heritage in

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which he claims recognizes instead the concept of individual national heritages. *Id.* Roger O'Keefe offers an alternative perspective when he argues that the idea of a common cultural heritage is flawed and has been superseded in international law by the UNESCO Convention's more sophisticated concept of cultural diversity. See Roger O'Keefe, *The Meaning of "Cultural Property" Under the 1954 Hague Convention*, 56 NETH. INT'L L. REV. 26–56 (1999).

28. David W.J. Gill & Christopher Chippindale, *Material and Intellectual Consequences of Esteem For Cycladic Figures*, 97 AM. J. ARCHAEOLOGY 601, 605 (1993).

29. *Id.* at 605–08.

30. *Id.* at 608–16.

31. See *id.* at 616–21; John Craxton & Peter Warren, *A Neocycladic Harpist?*, in MATERIAL ENGAGEMENTS: STUDIES IN HONOUR OF COLIN RENFREW, 109–13 (Neil Brodie & Catherine Hills eds., 2004); Ricardo J. Elia, *A Seductive and Troubling Work*, in ARCHAEOLOGICAL ETHICS 54, 56–59 (Karen D. Vitelli ed., 1996).

32. Marisa Marthari, *Altering Information from the Past: Illegal Excavations in Greece and the Case of the Early Bronze Age Cyclades*, in TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE 161, 165 (Neil Brodie et al. eds., 2001).

33. Gill & Chippindale, *supra* note 28, at 610 (citing Christos Doumas, who at the time was working for the Greek Archaeological Service in the islands).

34. See Gill & Chippindale, *supra* note 28, at 625.

independent Greece dates back to 1834, at the latest.³⁵ By the 1950s, when large scale looting first broke out in the Cyclades, the governing law was Law 5351/32 "On Antiquities," enacted in 1932.³⁶ This law established that all antiquities were state property, but that they could be possessed and transacted within Greece by private individuals.³⁷ Any found antiquity had to be declared, whereupon the State might have offered to purchase it, although if it was thought to be of little commercial or archaeological value it would be left in the possession of the finder with the proviso that any subsequent sale or change of ownership be declared.³⁸ It was recognized at the time that the most likely finders of material—rural inhabitants—might be ignorant of their rights under the law, and would thus be fearful of contact with government authorities. There was also concern that payment for finds might be subject to bureaucratic delays.³⁹ Both circumstances would encourage the emergence of a black market. Thus, the 1932 law also provided for the private collection and sale of antiquities within Greece, though export was still prohibited.⁴⁰ Collectors and dealers were licensed, yet their numbers were, and still are, limited.⁴¹ In 2000, for example, there were only thirty-six licensed private collectors and sixteen dealers, most of whom were concentrated in Athens.⁴²

Thus the 1932 law introduced a sophisticated strategy aimed at protecting archaeological heritage. First, it prohibited the export of antiquities in order to isolate Greece from the strong financial attraction and inflating effect of the international antiquities market. Second, it created an internal market to protect chance finds and present a legitimate alternative to illegal export. Finally, it guarded against any dangerous expansion of the internal market by taking steps to regulate its size. In 1932 this law promised to work well. Chance finds would be cared for and, since there would be no real incentive to dig up antiquities for sale, the integrity of archaeological sites would be protected too. Unfortunately, the 1932 law proved incapable of dealing with the changing world of the 1950s when increasing numbers of new archaeological sites were discovered and

35. Pantos A. Pantos, *Greece and Greek Legislation about Antiquities*, in *CULTURAL PROPERTY: RETURN AND ILLICIT TRADE* 17–19 (Katerina Kostandi et al. eds., 2000).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Rhodoniki Etzeoglou, *The Ephorate of Antique Shops and Private Archaeological Collections*, in *CULTURAL PROPERTY: RETURN AND ILLICIT TRADE* 39–40 (Katerina Kostandi et al. eds., 2000).

the expanding international art market caused the demand for antiquities to escalate.⁴³

In the 1950s, Greece was a poor country and in no position to match the prices that Cycladic figurines fetched on the international market.⁴⁴ In response to the plunder of Cycladic cemeteries, the Greek government encouraged Nicholas and Dolly Goulandris, two private citizens, to form a private collection of Cycladic antiquities (particularly figurines) with the intention of keeping plundered material in Greece.⁴⁵ The Goulandris collection was established in 1961 and exhibited worldwide between 1979 and 1984.⁴⁶ In 1986, it was permanently housed in the private Museum of Cycladic Art in Athens, where it remains open to public view.⁴⁷

The Goulandris collection acquired, and still acquires, material from dealers within Greece and on the international antiquities market, none of which is derived from officially sanctioned archaeological excavations.⁴⁸ The collection has succeeded on one level, in that it has retained many figurines in Greece that would otherwise have gone abroad. The collection, however, has been heavily criticized for its governing policy of buying material inside Greece and its failure to restrict buying to the international market.⁴⁹ The acquisitions policy of the Goulandris collection circumvented the need for looted material to be smuggled out of the country. As a consequence of the Goulandris' acquisition policy, looted material could now be sold locally and legally; thus, the deterrent effect of export control was seriously compromised and the effect of looting was exacerbated.⁵⁰

Today, the early-Bronze-Age cemeteries of the Cycladic islands are devastated.⁵¹ Most Cycladic graves never contained figurines yet they were destroyed by the search for them.⁵² Rescue excavations at several sites by the Greek Archaeological Service⁵³ have investigated intact graves, but they are a small proportion of the original total.⁵⁴ Mainstream archaeology has illuminated many aspects of Cycladic

43. Pantos, *supra* note 35, at 23–25.

44. *Id.*; Elia, *supra* note 31, at 54–62.

45. Elia, *supra* note 31, at 54–62.

46. *Id.*

47. See generally CHRISTOS G. DOUMAS, EARLY CYCLADIC CULTURE: THE N.P. GOULANDRIS COLLECTION (2000) (cataloguing the collection); Museum of Cycladic Art, <http://www.cycladic-m.gr/index.htm>.

48. Elia, *supra* note 31, at 54–62.

49. *Id.* The activities of the Nicholas P. Goulandris Foundation, which supports the Museum of Cycladic Art, extend beyond those of acquisition and display, as some of its critics suggest, and it has supported several large exhibitions. *Id.*

50. Gill and Chippindale, *supra* note 28, at 625.

51. *Id.*

52. Elia, *supra* note 31, at 58.

53. The state-run archaeological service of Greece.

54. Gill and Chippindale, *supra* note 28, at 625.

settlement and society, but out of context, the figurines have been marginalized as enigmatic though controversial curiosities. Consequently, the chance to learn more about Cycladic belief systems has been lost.⁵⁵ It is difficult to assess the scale of present day looting in the Cyclades, but members of the Greek Archaeological Service who work on the various islands think that it is now much reduced.⁵⁶ One reason for this reduction might simply be that the resource—the early-Bronze Age cemeteries—is exhausted. Another reason must be that the economic position of the islands has improved from the growth of tourism and from Greece's membership of the European Union.⁵⁷ This economic improvement has probably been the crucial factor influencing the fall-off in looting, but it does not exclude the possibility that strong regulation may also have played a part. If regulation is relaxed, there is no guarantee that widespread looting will not resume.

B. Example 2. India

Archaeological law in India in the 1950s dated back to colonial times and was based on British precepts of selective protection and equitable division of finds.⁵⁸ The 1878 Treasure Trove Act, still in force today, requires that any object or group of objects of value found in the ground be reported to the responsible government agent.⁵⁹ If no owner is traced, the find, or the value of the find, is divided between the finder and the landowner.⁶⁰ The government has the right to acquire the find by payment of its market value, plus twenty percent.⁶¹ The 1904 Ancient Monuments Preservation Act allowed for the protection of specified archaeological sites and monuments and, after independence in 1947, it was superseded by the 1958 Ancient Monuments and Archaeological Sites and Remains Act.⁶² This Act afforded protection to archaeological sites and monuments designated to be of national importance, and was intended to complement the

55. *Id.*

56. Author's Conversations with Staff of the Greek Archaeological Service.

57. *See id.* The growth of tourism has encouraged a long term program of museum building and refurbishment in the Cycladic Islands, but many of the best quality early Bronze Age finds can only be viewed in Athens at the Museum of Cycladic Art. *Id.* How this increasingly visible and perhaps economically damaging loss of archaeological heritage affects the islanders' perceptions of past and present looting would be interesting to know.

58. SACHINDRA SEKHAR BISWAS, PROTECTING THE CULTURAL HERITAGE: NATIONAL LEGISLATIONS AND INTERNATIONAL CONVENTIONS 3 (1999).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 34–49.

pre-independence 1947 Antiquities Act (Export Control Act), which allowed the licensed export of any antiquity that was not protected.⁶³

Although there had been some international demand for Indian (and other South Asian) religious statuary and sculpture in the nineteenth and early-twentieth centuries, it was not highly regarded. Consequently, the damage caused to archaeological sites and monuments by the illegal removal of such works was limited.⁶⁴ By the mid-twentieth century, however, art historians had convinced Western collectors of its aesthetic merit. By the 1950s and 1960s, alarming quantities of Indian antiquities were flowing out of the country, much of it into U.S. art museums.⁶⁵ The existing legal regime in India protected only a small number of total archaeological sites and allowed the licensed export of antiquities; it was clearly unable to deal with scale of the problem. The seriousness of the situation prompted the Indian government to introduce the more stringent 1972 Antiquities and Art Treasures Act, which was implemented in 1976.⁶⁶ This Act strictly prohibited the export of archaeological objects and took steps to regulate the private ownership and sale of antiquities within India. It stopped short, however, of taking all archaeological heritage into state ownership.⁶⁷ Article 3 of the 1972 Antiquities and Art Treasures Act does allow for the legal export of antiquities through a government-authorized agency, but no such agency has ever been established.⁶⁸

Thus, in India, the originally internationalist regime based on the British model of protecting significant archaeological sites and individual pieces (though allowing export of the rest) had two major shortcomings: (1) it failed to ameliorate the international demand for Indian antiquities and (2) it failed to stem the large-scale trade in Indian antiquities that developed in the 1950s and the destruction of sites and monuments that followed. The Indian response was to tighten control.⁶⁹ It is unclear how much of the material that reached the international market during this period was licensed for export and how much was removed illegally. But several pieces have been returned to India from private collections or museums, usually

63. *Id.* at 29–31.

64. See H. BHISHAM PAL, *THE PLUNDER OF ART* 28–49 (1992); U.N. SOC. DEF. RES. INST. (UNSDRI), *THE PROTECTION OF THE ARTISTIC AND ARCHAEOLOGICAL HERITAGE: A VIEW FROM ITALY AND INDIA* 191–259 (1976) (showing statistically the growing export of art from India).

65. Neil Brodie & Jenny Doole, *The Asian Art Affair: US Art Museum Collections of Asian Art and Archaeology*, in *MATERIAL ENGAGEMENTS*, *supra* note 39, at 83–108.

66. See PAL, *supra* note 64, at 78–103.

67. UNSDRI, *supra* note 64, at 226–28.

68. DILIP K. CHAKRABARTI, *ARCHAEOLOGY IN THE THIRD WORLD: A HISTORY OF INDIAN ARCHAEOLOGY SINCE 1947*, at 171 (2003).

69. See PAL, *supra* note 64, at 78–103.

voluntarily, when they have been identified as stolen from religious institutions.⁷⁰

One high profile court case concerning a bronze Nataraja removed during this period is quite revealing.⁷¹ In 1951, a group of bronze images was discovered at Sivapuram (Tamil Nadu) and declared treasure trove.⁷² The images were acquired by the Indian government and then donated to the local Hindu temple.⁷³ A Nataraja from the hoard was stolen in 1957 while it was away from the temple being repaired.⁷⁴ It was smuggled out of India in 1969 and by 1973 was in the hands of the American private collector Norton Simon.⁷⁵ Its entry into the United States was facilitated by the production of a false export certificate at customs.⁷⁶ In 1974, it was sent to the United Kingdom for repairs, where at the request of the Indian authorities, it was seized by Scotland Yard.⁷⁷ In 1976, after initial litigation, the parties reached an out-of-court settlement, which recognized the government of Tamil Nadu as the rightful owner but allowed Simon to retain possession for a ten year period.⁷⁸ The image was returned to India in 1986.⁷⁹

The Nataraja was shown to be stolen property, and it seems likely that, given the religious character of most Indian antiquities that appear on the market, they too would have been stolen from temple collections or even from the actual structure of temples. Presumably, this type of material was not being released on to the market legally, and the lesser material that was available for export was not in demand. Thus, this Indian case study confounds the logic that underpins the argument for weak regulation: the legal export of poor quality pieces cannot satisfy a demand for high quality ones.

70. Ajai Shankar, *The Threat to Cultural Sites in India from Illegal Excavation*, in TRADE IN ILLICIT ANTIQUITIES, *supra* note 32, at 33–35.

71. *Id.* Natarajas were first manufactured in tenth to thirteenth century Chola-period south India and comprise a three-dimensional image of the Hindu god Shiva in a dancing pose set within the confines of an encompassing bronze circle or halo. *Id.*

72. *Id.* at 34.

73. *Id.*

74. *Id.*

75. *Id.*

76. 3 PROT & O'KEEFE, at 665.

77. Shankar, *supra* note 70, at 34.

78. *Id.*

79. B.P. SINGH, *INDIA'S CULTURE: THE STATE, THE ARTS AND BEYOND* 178–84 (1998).

III. DISCUSSION

The Indian and Greek archaeological laws in place in the 1950s both attempted to balance public and private interests in archaeological heritage. In international terms, since it allowed for the legal export of archaeological objects, India's law can be viewed as more liberal than the Greek law. Both countries, however, failed to prevent the extensive destruction or vandalism of their archaeological or cultural sites and the flow abroad of archaeological material.⁸⁰ The simple reason was that the inflating international art market caused such a price differential between the rich "demand" countries and the poorer source countries that smuggling became worthwhile. The profits to be made outweighed the chances of being caught, and were such that smugglers could easily absorb the added costs of law avoidance. The internationalist regime of India could no more assuage demand than the nationalist regime of Greece could deny it.

The objects reaching the market were not chance finds. The Cycladic figurines had been dug out of graves,⁸¹ and the Indian Natarajas and other religious images and sculpture were often stolen private property.⁸² The release of surplus or duplicate material onto the market would not have helped in either case because the trade was driven by demand for what were considered high-quality pieces. The consumers wanted Cycladic figurines and Indian Natarajas or the like, and there were no available "duplicates" or acceptable substitutes that would have satisfied them. Indeed, it seems inevitable that while antiquities are collected as "art," the demand for the exceptional piece—for the "masterpiece"—will persist. It is a fact recognized and even approved by the Association of Art Museum Directors' 2004 guidelines for the acquisition of antiquities that

some works of art for which provenance information is incomplete or unobtainable may deserve to be publicly displayed, preserved, studied, and published because of their rarity, importance, and aesthetic merit. AAMD affirms that art museums have an obligation with respect to such works of art, which in the absence of any breach of law . . . may in some cases be acquired . . .⁸³

(For the AAMD, in this context, a work of art is an antiquity). In view of this philosophy, it seems naïve to suggest that a regulation allowing a freer flow of what dealers call "less important material" would satisfy demand and, thus, ameliorate looting at source. The

80. See PAL, *supra* note 64, at 97.

81. Gill & Chippindale, *supra* note 28, at 610.

82. See Shankar, *supra* note 70, at 34–35; UNSDRI, *supra* note 64, at 216–17.

83. Association of Art Museum Directors, *Report of the AAMD Task Force on the Acquisition of Archeological Materials and Ancient Art*, art. I(D) (June 10, 2004), available at http://www.aamd.org/papers/documents/June10FinalTaskForceReport_001.pdf. (last visited Aug. 15, 2005).

examples of Greece and India show that there would most likely still be a large demand for rare, or what are perceived to be, high-quality objects of a type that would not be released onto the market under any regime, and that the destruction of archaeological heritage would continue.

Looking more closely at what happened in Greece and India, it might be suggested that the provisions made to balance public and private interests ultimately weakened both sets of laws. They were both designed for a world with an extant but not overly large antiquities market. When that market expanded, both in terms of monetary value and material volume, the Greek internal market expanded along with it. Instead of competing with international demand, it acted to augment it.⁸⁴ The example of the Sivapuram Nataraja shows that before 1976 the possibility of legal export from India prompted the manufacture of fake licenses that could ease the passage of stolen and smuggled material through customs controls and into collections. Another ruse was to substitute high quality unlicensed objects for poor quality licensed objects.⁸⁵ Simpler laws offering more state control may well have better served the archaeology of both countries. In fact, Indian legislators took that approach in 1972 when they moved from a regime of export screening to one of total prohibition.⁸⁶ There is no published data available to show whether the 1972 Indian law did anything to diminish the flow of antiquities abroad (and the thefts certainly did continue),⁸⁷ although it did discourage at least one U.S. museum from acquiring them.⁸⁸

Simpler laws may also facilitate their enforcement by foreign courts. The conviction in 2002 of New York antiquities dealer Frederick Schultz for dealing in antiquities stolen from Egypt confirmed that U.S. courts are prepared to enforce foreign patrimony laws.⁸⁹ This fact should deter the purchase or other acquisition of antiquities that are public property. But the law has to be clear, and it has to be clearly enforced.⁹⁰ In 1989, Peru filed a lawsuit to recover what it claimed were stolen state-owned pre-Columbian artifacts. The suit failed because although Peru had first enacted a patrimony law in 1929, private possession and transaction of artifacts were

84. See UNSDRI, *supra* note 64, at 224.

85. *Id.*

86. *Id.* at 228; BISWAS, *supra* note 58, at 80–97.

87. See, e.g. Gitanjali Deb, *Stealing Gods: Illegal Trade in Indian Antiquities*, 10 ART ANTIQUITY & L. 44–49 (2005).

88. Brodie & Doole, *supra* note 65, at 97.

89. U.S. v. Schultz, 178 F. Supp. 2d 445, 446–47 (S.D.N.Y. 2002) (“[P]atrimony consists of all works of art within the borders of a country (and perhaps some outside) that are subject to that country’s power of jurisdiction.”).

90. See *id.* at 447.

tolerated within the country as long as they were not exported.⁹¹ In fact, the patrimony law had the material effect of an export control, which the U.S. court would not recognize.⁹²

India's 1972 law is not a patrimony law. It remains to be established whether the most recent Greek law—3038/2002, "On the Protection of Antiquities and of the Cultural Heritage in General"—⁹³ which still provides for some private possession and transaction, would be recognized as a patrimony law by a U.S. court.⁹⁴ Both countries might be well-advised to enact clearly defined archaeological patrimony laws and look to U.S. courts to enforce them.

With this eventuality in mind, it is arguably against the U.S. taxpayers' interest to pay for the enforcement of foreign patrimony laws. On the other hand, while it might not be in their interest, they may feel morally obliged to contribute something since they benefit culturally and economically from the antiquities trade while suffering few of its adverse consequences. The trade provides U.S. art museums with material for display and public enjoyment. Furthermore, the trade generates fiscal revenue for U.S. state and federal authorities, directly, through sales and, indirectly, through increased employment in the museums and market sectors.⁹⁵ In contrast, countries with strong laws protecting archaeological heritage are generally those that incur the social, cultural and economic costs of the trade; these include the loss or destruction of cultural heritage, the diminution of a long-term economic resource, and the socially harmful consequences of crime.⁹⁶ These source countries are also the ones that can least afford to enforce their own legislation.⁹⁷ This inequitable division of costs and benefits could be remedied in part by shifting the cost of law enforcement off the already overloaded shoulders of poor governments and onto those of the U.S. taxpayers, who are, after all, the trade's beneficiaries.

Although the two examples of the Cycladic Islands and post-1976 India show that strong export controls did not prevent the destructive looting of archaeological sites, the example of pre-1976 India shows

91. John H. Merryman, *Limits on State Recovery of Stolen Artefacts: Peru v. Johnson*, 1 INT'L J. CULTURAL PROP. 169–71 (1992).

92. *Id.* at 171.

93. Nikolaos Davrados, *On the Protection of Antiquities and of Cultural Heritage in General*, 9 KOINODIKION 241–65 (2003).

94. *See Schultz*, 178 F. Supp. 2d at 447 (enforcing Egyptian antiquities law for reasons including its prohibition of private ownership, possession, and disposal of antiquities).

95. *See Lisa J. Borodkin, The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 413 (1995).

96. *See id.* at 391.

97. *See id.* at 399.

that a weak export control did nothing to prevent the looting either.⁹⁸ Yet while the evidence suggests that strong export controls were not completely effective, it does not show that they were completely ineffective.⁹⁹ Even though strong regulation might not have a direct material effect, it will exert a moral effect.

Bator's judgment that strong export controls will fail was based upon the self-confessed "pessimistic premise" that "so long as there is a world market for beautiful archaeological objects, a substantial amount of looting will persist no matter what regulatory system is installed."¹⁰⁰ The examples of Greece and India discussed here would appear to prove his point.¹⁰¹ But the world market for beautiful archaeological objects is not a natural or inevitable phenomenon; it is historically and culturally contingent and thus open to methods of control that depend more upon persuasion than direct regulation.¹⁰² In this context, even what is an unenforceable legal control at the source, nevertheless places a moral restraint upon the trade. Antiquities in the developed world are cultural capital: they are objects of scholarship and signifiers of taste and style. One compelling reason for the retention of strong regulation at the source, even if poorly enforced, is that law-abiding citizens and museums will think twice before acquiring an object of possibly illegal origin.¹⁰³ If strong regulation is relaxed or abandoned, the moral restraint is removed. Collecting antiquities is not addictive, at least not in the way that drugs are, and good faith collectors will not want to be associated

98. See PAL, *supra* note 64, at 97.

99. See Brodie, *supra* note 15, at 92–93 (explaining how the International Council of Museums' Code of Ethics has indirectly influenced museums to stop purchasing or accepting material that may have been illegally exported).

100. BATOR, *supra* note 14, at 49.

101. Gill and Chippindale, *supra* note 28, at 610–11; Shankar, *supra* note 70, at 34–35.

102. BRODIE ET AL., *supra* note 1, at 482; see Christine Alder & Kenneth Polk, *Stopping this Awful Business: The Illicit Traffic in Antiquities Examined as a Criminal Market*, 7 ART, ANTIQUITY & L. 46 (2002) (detailing a criminological perspective on "moral persuasion" and the antiquities trade).

103. International Council of Museums, *2004 Code of Ethics for Museums*, available at <http://icom.museum/ethics.html>. The effect of this moral injunction can most clearly be seen in Art. 2.3 of the 2004 Code of Ethics for Museums, which states that

[e]very effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from, its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item from discovery or production.

Id. The International Council of Museums is a nongovernmental organization maintaining formal relations with UNESCO, and has 21,000 individual and institutional members in 146 countries. *Id.*

with a criminal enterprise. At least some will collect only antiquities that can be shown to have a legal provenance; others might choose to collect something of a less controversial nature.