

## Museum Strategies: Leasing Antiquities

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### ABSTRACT

*This is the first attempt to study leasing in the context of the international trade in cultural artifacts. This Article advances a heated debate in the field of cultural heritage law, which centers on whether cultural artifacts of ancient civilizations should belong to the modern nation states from which they are excavated or to humankind in general, by proposing an alternative analytic framework based on leasing. This framework would make it possible for objects to circulate but at the same time stay under the ownership and jurisdiction of their respective source countries.*

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## INTRODUCTION

Several scandals involving U.S. museums buying illicitly traded ancient artifacts surfaced in relation to and after the criminal prosecution of Marion True, former senior curator for antiquities at the J. Paul Getty Museum. In 2005, True was indicted in Italy on charges of conspiring to acquire artifacts that were illegally removed from Italian soil, and the Getty was required to repatriate around forty of its most important objects acquired for a total of \$44 million.<sup>1</sup> The Getty case was a catalyst for several similar cases that followed: the Metropolitan Museum of Art in New York returned a number of objects including the Euphronios krater to Rome, as did several other institutions, including the Museum of Fine Arts in Boston, the Cleveland Museum of Art and the Princeton University Art Museum.<sup>2</sup> Over the span of nearly four decades, curators were accused of pitching artifacts with a dubious or incomplete provenance to the trustees of their institutions, until source countries claimed some of the objects back.<sup>3</sup> How could the internal processes of large and prestigious U.S. institutions permit buying illicitly traded items? How could things go so wrong as to justify criminal prosecutions and more than 100 returns? Most importantly, how can U.S. institutions continue collecting antiquities given these precedents?

This Article addresses the problem of how U.S. museums can continue to collect ancient classical artifacts on the international art market by proposing the development of a rental market to supplement the currently narrow sales market. The broader context in which this analysis is to be viewed requires the consideration of two ways of thinking about the movement of cultural property that developed in the past decades: the first conceives of cultural artifacts as an integral part of a national cultural heritage and the second as property common to all mankind.<sup>4</sup> In accordance with this distinction, countries can be divided into two separate categories: source nations, like Italy and Greece, that are rich in art and have enacted patrimony laws that prohibit the sale of cultural objects, and market nations, such as the United States, that favor the more cosmopolitan interpretation

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1. JASON FELCH & RALPH FRAMMOLINO, CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUM 259 (2011); *see also* FABIO ISMAN, I PREDATORI DELL'ARTE PERDUTA: IL SACCHEGGIO DELL'ARCHEOLOGIA IN ITALIA [RAIDERS OF THE LOST ART: THE LOOTING OF ARCHAEOLOGY IN ITALY] (2009).

2. FELCH & FRAMMOLINO, *supra* note 1, at 307.

3. *Id.*; *see also* David Gill & Christopher Chippendale, *From Boston to Rome: Reflections on Returning Antiquities*, 13 INT'L J. CULTURAL PROP. 311, 312 (2006); David Gill & Christopher Chippendale, *From Malibu to Rome: Further Developments on the Return of Antiquities*, 14 INT'L J. CULTURAL PROP. 205, 205–06 (2007) [hereinafter Gill & Chippendale, *From Malibu to Rome*].

4. The nationalist versus internationalist debate was introduced by the seminal paper of John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986). For representative arguments on the internationalist side, see JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE (2008). For representative arguments on the side of the archaeologists, see Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969), and TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S CULTURAL HERITAGE (Neil Brodie, Jennifer Doole & Colin Renfrew eds., 2001).

and would like objects to freely circulate and be available on the international art market. At the moment, source nations seem to prevail because the sovereign governments of source countries have enacted legislation that impedes the international movement of cultural artifacts and have persuaded market nations to aid them in their retention efforts.<sup>5</sup> What remains is a scenario where in source nations the supply of artifacts exceeds the demand yet the surplus cannot be exported, while on the other hand the demand of artifacts in market nations exceeds the supply but national and international laws prevent the market nations from importing artifacts.

The extensive restrictions on the export of ancient objects dictated by the patrimony laws of source nations have left the demand of museums and collectors in market countries unfulfilled. Faced with the diminishing supply of legitimate objects, U.S. museums seeking to enlarge their antiquities collections continued acquiring unprovenanced artifacts, which were often the product of illicit excavations. Increasingly aware of the damage caused by such practices, the international community introduced the 1970 UNESCO Convention, a supranational instrument aimed at combating illicit trade by mandating the restitution of unlawfully exported objects.<sup>6</sup> In essence, the 1970 Convention was an attempt by source countries to externalize the enforcement costs by shifting the responsibility of policing the illicit trade in cultural artifacts onto market nations.<sup>7</sup> In the United States, for instance, the Convention was implemented by putting into place import restrictions for broad ranges of cultural artifacts coming from source nations party to the Convention.<sup>8</sup> Instead of curtailing illicit trade and making the market more transparent, these efforts aimed at retaining and returning cultural property not only narrowed the trade in legitimate ancient objects, but, given that the demand remained high, it also led to large numbers of artifacts being smuggled across national borders and sold on the black market.<sup>9</sup> This Article examines the effect of national and international legal measures on the antiquities trade and substantiates their inefficiency by supplying empirical evidence of the illicit trade and illustrating the scope of the problems associated with collecting antiquities subject to patrimony laws.

In recent years, after source countries like Italy and Greece successfully

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5. See Legge 1 giugno 1939, n. 1089 (It.), amended by Legge 1 marzo 1975, n. 44 (It.), Legge 30 marzo 1998, n. 88 (It.), and Legge 30 marzo 1998, n. 100 (It.); Nomos (1932:5351) O nomos Arxaiotitwn [The Antiquities Act], 1932 (Greece); see also Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 13(b), Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

6. 1970 UNESCO Convention, *supra* note 5, pmb., art. 2.

7. Asif Efrat, *Protecting Against Plunder: The United States and the International Efforts Against Looting of Antiquities* 4 (Cornell Law Sch., Working Paper No. 47, 2009).

8. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, § 300-15, 96 Stat. 2339, 2350-63 (1983) (codified as amended at 19 U.S.C. §§ 2601-13 (2012)).

9. Merryman, *supra* note 4, at 847-48; see also LYNDEL PROTT, STRENGTHS AND WEAKNESSES OF THE 1970 CONVENTION: AN EVALUATION 40 YEARS AFTER ITS ADOPTION (2011), available at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/strengths%20and%20weaknesses%20of%20the1970%20convention.pdf>.

reclaimed illicitly exported objects, the acquisitions of antiquities by U.S. museums are at low levels.<sup>10</sup> To overcome the legal limits of the international antiquities trade and to enable museums to expand their collections and educational goals in an ethical way, this Article proposes a new avenue: the development of a rental market for ancient artifacts. In order to assess whether a rental market is a viable option for furthering the circulation and display of cultural property, this Article relies on interviews with museum officials, data about past acquisitions, and the analysis of cooperation agreements between several U.S. museums and source countries in connection with the restitution of illegally traded items.<sup>11</sup> With the help of this data, this Article aims to show that long-term leases could not only be an attractive addition to existing collecting strategies, but could also bridge some of the issues raised in the nationalist versus internationalist debate.

This is the first attempt to study leasing in the context of the international trade in cultural artifacts. A few commentators have referred to leasing as a potential solution to the problem of illicit trade in general terms, but there has not been an in-depth analysis and explanation about how such a market could be developed.<sup>12</sup> From an economic perspective, a draft paper by Kramer and Wilkening develops a formal model showing the effects of export bans on the antiquities trade and suggests that leases and sale contracts with options to buy back could create revenue in source countries and incentivize preservation by putting objects into the hands of the highest value consumer through auctions.<sup>13</sup> Their model is useful but incomplete because it lacks a legal perspective, which is crucial to the issue. This Paper presents the first legal and empirical study of leasing in the context of the antiquities trade. It builds on the work of Bator, Gerstenblith, Pearlstein and others who analyze the effects of the 1970 Convention and its implementation in the United States; yet, it goes further in assessing the impact of these legal measures on two related phenomena: illicit trade and the level of antiquities acquisitions of major US institutions.<sup>14</sup> The impact on illicit trade is measured through the

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10. FELCH & FRAMMOLINO, *supra* note 1, at 307; *see also infra* figs. Part II.A.

11. This Article also relies at times on my work experience at UNESCO and familiarity with the Italian ministry system, including its ministry of culture.

12. Bernard Frischer, Dir., Inst. for Advanced Tech. in the Humanities, Univ. of Va., *The Grand Compromise: A Hybrid Approach to Solving the Problem of Looted Art 8* (Oct. 20, 2006) (presentation paper, Eleventh International Congress on Cultural Heritage and New Technologies); *see also* Suna Erdem, *New Trojan War Highlights Pillage of Turkey's Past*, REUTERS, Oct. 13, 1993, available at Westlaw NewsRoom.

13. Michael Kremer & Tom Wilkening, *Protecting Antiquities: A Role for Long-Term Leases?* 30–43 (Feb. 17, 2009) (unpublished paper), available at [http://dev.wcfia.harvard.edu/sites/default/files/Kremer\\_Antiquities.pdf](http://dev.wcfia.harvard.edu/sites/default/files/Kremer_Antiquities.pdf).

14. William G. Pearlstein, *Cultural Property, Congress, the Courts, and Customs: The Decline and Fall of the Antiquities Market?*, in *WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 9 (Kate Fitz Gibbon ed., 2005); Paul Bator, *An Essay on the International Trade*, 34 STAN. L. REV. 275 (1982); Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197 (2001); John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11 (2005); James Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT'L L. & POL. 789 (1983).

empirical evaluation of import and export data of cultural objects. The impact on acquisitions is measured by looking at the acquisition trends of selected collections over time and the introduction of acquisition policies. This Paper intends to offer an alternative analytic framework to a sales market based on arguments favoring the introduction of a leasing market. The recent returns of artifacts from museums in the United States to Italy and Greece prompted this research. Given the empirical angle, the scope of this Paper is limited to considering the potential development of leasing strategies of ancient classical artifacts originating from Italy and Greece to institutions in the United States. Future research may focus on the leasing options of other source countries.

Section I explains how the relevant legal frameworks governing the market for cultural property—namely, Italian and Greek patrimony laws and the 1970 UNESCO Convention—have not only restricted the legal trade in such objects, but have also led to the growth of illicit trading. This section includes the empirical analysis of data on the export of Italian and Greek cultural artifacts and their import into the United States. Section II examines the impact of illicit trade on collecting strategies and acquisition levels of three important U.S. museums with established antiquities collections: the Metropolitan Museum of Art, the J. Paul Getty Museum and the Princeton University Art Museum. This section includes a discussion of cooperation agreements that were negotiated by the above institutions in connection with the return of illegally traded items and focuses on how such agreements provided the museums with loans in exchange for the returned items. Section III argues that long-term leases could be a useful addition to the present collecting strategies of museums in the United States. In order to show how a leasing market for ancient artifacts could be developed in practice, this part of the Paper examines: demand preferences and the objects likely be leased; the Italian and Greek laws regulating the temporary exit of artifacts; and the potential restrictions on the use of resources available to museums in the United States. Finally, Section IV addresses differences between art systems in source countries and in the United States.

### I. THE LEGAL FRAMEWORK AND ILLICIT TRADE

This section explains how the interaction of national and international legal measures governing the trade in cultural objects has generally resulted in the restriction of the licit trade and in the growth of the illicit trade in such objects. It first addresses the complications that strict patrimony laws, in combination with the supranational framework set up by the 1970 UNESCO Convention, have created with respect to the international trade in cultural objects. Although a substantial literature already exists on this point,<sup>15</sup> it is worth summarizing the main thoughts behind the legal framework in order to lay a solid ground for the discussion that

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15. See Gerstenblith, *supra* note 14; Merryman, *supra* note 14; Nafziger, *supra* note 14; Pearlstein, *supra* note 14.

follows. Next, it examines the impact of the existing legal regime on the trade in such objects, with a focus on illicit trade. To analyze how leasing can overcome this problem, the leasing framework will then be applied to cultural artifacts from Italy and Greece put up for sale on the U.S. market. The discussion of the legal framework will therefore refer to the Italian and Greek patrimony laws and how the 1970 Convention was implemented in the United States.

### A. LEGAL FRAMEWORK

Ancient civilizations spanned vast regions of lands that do not correspond to modern day nation states. Records of the creation, movement and trade of most objects are lost in antiquity and often it is impossible to know the true provenance of an object. In most source countries, patrimony laws regulate cultural material excavated from archaeological sites.<sup>16</sup> Such laws solve the problem of discontinuity of title by declaring any archaeological object—excavated or not yet excavated from the national soil—to be the property of the state.<sup>17</sup> The rationale behind this was summarized by an Irish court as follows: “[A] necessary ingredient of sovereignty in a modern State was and should be the ownership by the State of objects which constitute antiquities of importance which were discovered and which had no known owner.”<sup>18</sup> Typically the state in question does not allow such objects to be sold on the market, neither within nor outside its borders, and this usually limits the market of ancient artifacts of a given source country to the objects that were privately owned before the patrimony laws were passed and for which authorization to export is obtained by the relevant authority.<sup>19</sup> Sometimes the export of privately owned objects is circumscribed, for instance, when the state can statutorily exercise the right of preemption.<sup>20</sup>

Greece was the first nation to vest ownership of all of its antiquities within the state in 1834.<sup>21</sup> The Greek antiquities law declares that “all antiquities within Greece, being works of the ancestors of the Greek peoples, are considered national property belonging to all Greeks” and that “all ruins or other antiquities . . . found on national land or under it, on the sea bed, in rivers, public streams, lakes or

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16. Legge 1 giugno 1939, n. 1089 (It.), *amended by* Legge 1 marzo 1975, n. 44 (It.), Legge 30 marzo 1998, n. 88 (It.), *and* Legge 30 marzo 1998, n. 100 (It.); Nomos (1932:5351) O nomos Arxaiotitwn [The Antiquities Act], 1932 (Greece).

17. L. n. 1089/1939 art. 6 (It.); Nomos (1932:5351) arts. 61–62 O nomos Arxaiotitwn [The Antiquities Act], 1932 (Greece).

18. *Webb v. Ireland* [1988] I.R. 353, 383.

19. L. n. 1089/1939 arts. 30–34 (It.). For legislation governing the impact and export of cultural property for several other countries, see LYNDEL V. PROTT & PATRICK J. O’KEEFE, *HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY* (1988); *Art Law and Cultural Property*, INT’L FOUND. FOR ART RES., [http://ifar.org/art\\_law.php](http://ifar.org/art_law.php) (last visited Feb. 9, 2013).

20. L. n. 1089/1939 arts. 31, 61 (It.); *see also* PROTT & O’KEEFE, *supra* note 19.

21. Nomos (1834:10/22) [On Scientific and Technological Collections and on the Discovery and Preservation of Antiquities and their Uses], 1834 (Greece); *see also* Nomos (1932:5351) arts. 61–62 O nomos Arxaiotitwn [The Antiquities Act], 1932 (Greece) (incorporating the 1834 law).

marshes, are the property of the State.”<sup>22</sup> In Greece, all cultural property, including objects in private collections, is regulated by national antiquities laws.<sup>23</sup> Similarly, Italy’s first patrimony laws—the oldest dating back to 1902, followed by the 1909 and the landmark 1939 laws—gave the Italian state broad power and exclusive competence to regulate cultural heritage.<sup>24</sup> The Italian ministry of culture is entrusted with the authority to supervise every action involving national cultural property, including the power to control excavations, to grant export controls, to price objects, to regulate the discovery of archaeological material, to force private owners of such objects to restore them at their own expense, and, if of great interest, to make them publicly accessible.<sup>25</sup> By giving the state the power to determine the circulation of cultural property and to impose penalties for noncompliance, these patrimony laws have in essence banned the export of ancient artifacts for the purpose of being sold on the international market.

The Italian and Greek state authorities have not manifested any interest in trading ancient artifacts; patrimony laws have been used as a tool to retain cultural property within the boundaries of the modern nation-state, thereby restricting licit trade to categories of cases where such state authorities have granted an export permit.<sup>26</sup> For instance, the relevant Italian law provides that antiquities belonging to public bodies can only be deaccessioned if the ministry of culture agrees and if several conditions regarding the proposed use of the work and its state of conservation are met.<sup>27</sup> The contract of sale will include a list of prescriptions on where and how the object shall be kept and exhibited in order to guarantee its physical safety, public enjoyment and value enhancement.<sup>28</sup> Antiquities belonging to private parties can be deaccessioned if similar conditions are met; in each case, the ministry must be notified and it can purchase the object for the same price as contained in the contract of sale if it chooses to do so within sixty days.<sup>29</sup> If a work

22. Nomos (1932:5351) arts. 61–62 O nomos Arxaiotitwn [The Antiquities Act], 1932 (Greece).

23. *Id.*; see also Nomos (3028:2002) Gia tin prostasia twn Arxaiotitwn kai en genei tis Polistikis Klironomias [On the Protection of Antiquities and of the Cultural Heritage in General], 2002 (Greece).

24. See Legge 12 giugno 1902, n. 185 (It.); Legge 28 giugno 1909, n. 1364 (It.); L. n. 1089/1939 (It.).

25. L. n. 1089/1939 art. 25 (It.) (“The Minister of Public Education, having consulted with the Central Commission for Antiquities and Fine Arts or the Central Commission for Academies and Libraries, may authorize the exchange of antiquities or works of art with those belonging to other bodies, institutions and private bodies, including foreign bodies, with due prudence as dictated by the regulation.”); *id.* art. 31 (“In the case of a sale for monetary consideration, the Minister of Public Education shall have the right to acquire the item at the price established in the sale documentation.”); *id.* art. 36 (“Anyone intending to remove cultural property from the Italian territory must make a declaration and submit it to the relevant export office, at the same time indicating the sales value of each item.”); *id.* art. 39 (“[T]he minister of Cultural and Environmental Property or the export office’s region may acquire the item for the amount indicated in the claim.”); *id.* art. 49 (“Accidentally discovered items shall be the property of the State.”); *id.* art. 53 (“The Minister . . . may require private owners of immovable items of exceptional interest . . . to allow viewing of the items.”).

26. Decreto Legislativo 22 gennaio 2004, n. 42 arts. 55–57 (It.).

27. *Id.*

28. *Id.*

29. *Id.* arts. 57–61.

is determined to be of particular importance, the law requires the object to be kept on Italian soil even if the buyer is not an Italian national.<sup>30</sup> It can eventually be exported on a temporary basis if authorization from the ministry is obtained.<sup>31</sup> Similarly, in Greece national antiquities cannot be traded unless the ministry grants a permit to sell and export an object.<sup>32</sup> Again the Greek ministry of culture is given the right to preempt the transfer.<sup>33</sup> Overall, both systems rely on ministerial permission for deaccession. Until now, exportation has been very limited, mostly involving the sale of privately owned lesser antiquities.<sup>34</sup> This narrow flow of legitimate objects could not satisfy the international demand for high quality ancient artifacts, the rest of which was met by illicitly exported cultural goods.<sup>35</sup>

The most important supranational measure to address the illicit trade in cultural objects is the 1970 UNESCO Convention, an international treaty that is intended to provide a framework for cooperation among nations to combat the illicit trade of cultural artifacts.<sup>36</sup> The Convention has a standard-setting function; it is not self-implementing but has to be ratified and transposed into national law before it becomes directly applicable.<sup>37</sup> This instrument has now been ratified by 120 countries including the target countries of this Article: Italy, Greece and the United States.<sup>38</sup> The Convention urges each of its state parties to identify and protect

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30. *Id.* art. 54.

31. *Id.* arts. 66–67.

32. Nomos (3028:2002) art. 21.1 *Gia tin prostasia tw n Arxaioitwn kai en genei tis Polistikis Klironomias* [On the Protection of Antiquities and of the Cultural Heritage in General], 2002 (Greece) (“Moveable ancient monuments dating up to 1453 belong to the State in terms of ownership and possession, are imprescriptible and extra commercium”); *id.* art. 28.1 (“The holder of a movable monument dating up to 1453 may transfer his possession, after notifying the Service of his intention and the personal data of the candidate holder, who shall submit an application for a permit of possession to be granted in accordance with the provisions of article 23. The relevant act shall be issued within reasonable time.”); *id.* art. 34.2 (“The export of monuments may be allowed upon permit, provided that they are not of special significance to the cultural heritage of the country and the unity of important collections shall not be affected”).

33. *Id.* art. 28.5.

34. Conversation with Jeanette Papadopoulou, Dir., Mgmt. & Int’l Circulation of the Archaeological Heritage, Italian Ministry of Culture, in Rome, It. (July 5, 2012).

35. See FELCH & FRAMMOLINO, *supra* note 1, at 1–5; ISMAN, *supra* note 1.

36. 1970 UNESCO Convention, *supra* note 5, pmb l., arts. 1–7. Another major international convention concerning the regulation of cultural property is the International Institute for the Unification of Private Law (UNIDROIT), Convention on Stolen or Illegally Exported Cultural Objects, 34 I.L.M. 1322, 1322 (1995) [hereinafter UNIDROIT Convention]. Currently, the UNIDROIT Convention has thirty-three state members. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, available at <http://www.unidroit.org/english/implement/i-95.pdf>. The UNIDROIT Convention is not thoroughly analyzed here because although the United States played an active role in the drafting stages, a brief filed by a large consortium of museums and dealers persuaded the U.S. delegation not to sign it. James F. Fitzpatrick, *Stealth Unidroit: Is USIA the Villain?*, 31 N.Y.U. J. INT’L L. & POL. 47, 49 (1998).

37. See *General Introduction to the Standard-Setting Instruments of UNESCO*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., [http://portal.unesco.org/en/ev.php-URL\\_ID=23772&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Feb. 9, 2013).

38. The United States participated in the promulgation of the 1970 UNESCO Convention and was the first major market nation to transpose it into national law when it passed the Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, § 300–15, 96 Stat. 2339, 2350–63 (1983) (codified as

cultural property present on their territory and to cooperate with other state parties in combating the dangers inherent in illicit trading.<sup>39</sup> Its main purpose is to achieve a more uniform multinational regulation of the international antiquities market and to introduce a mechanism facilitating the return of illicitly traded cultural objects to the source nations.<sup>40</sup> This repatriation mechanism, however, allowed state parties to claim back cultural objects based on domestic legislative declarations of ownership, thereby increasing the ability of patrimony laws to actually retain cultural objects.

The implementation of the 1970 Convention in the United States is significant to the instant inspection of illicit trade on the U.S. market. The interest in and demand for ancient cultural objects from private collectors and museums has made the United States one of the largest markets for foreign antiquities.<sup>41</sup> Although most market participants opposed any regulation that would restrict the international trade in antiquities, the lobbying work of archaeologists was organized, effective and ultimately successful in persuading the U.S. Congress to ratify the Convention, which was implemented into national law by the Cultural Property Implementation Act (CPIA) in 1983.<sup>42</sup> The CPIA introduced a

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amended at 19 U.S.C. §§ 2601–13 (2012)). Kevin F. Jowers, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, The United States, and Mexico*, 38 TEX. INT'L L.J. 145, 149, 155 (2003). Italy did the same with Legge 30 ottobre 1975, no. 873 (It.). See Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze,"* in CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW 301, 317 n.73 (Silvia Borelli & Federico Lenzerini eds., 2012). On December 29, 1980, Greece also ratified the 1970 UNESCO Convention with Law No. 1103/80. See E. Beriatos, M. Papageorgiou, J. Lainas & Ch. Nikolakopoulou, *Sustainable Management of Cultural Heritage in Greek Cities and Regions 2* (2011) (presentation paper at the 47th ISOCARP Cong.), available at [http://www.isocarp.net/Data/case\\_studies/2055.pdf](http://www.isocarp.net/Data/case_studies/2055.pdf). For the full list of state parties' deposit dates of instruments and types of instruments, see *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Paris, 14 November 1970*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (last visited Dec 30, 2012).

39. 1970 UNESCO Convention, *supra* note 5, pmb1.

40. *Id.* ("Considering that it is incumbent upon every State to protect the cultural property existing within its territory against the danger of theft, clandestine excavation, and illicit export, considering that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations."); see also UNESCO, RECOMMENDATION CONCERNING THE INTERNATIONAL EXCHANGE OF CULTURAL PROPERTY (1976), available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13132&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13132&URL_DO=DO_TOPIC&URL_SECTION=201.html) ("[T]he circulation of cultural property . . . is a powerful means of promoting mutual understanding and appreciation among nations . . . a systematic policy of exchanges among cultural institutions, by which each would part with its surplus items in return for objects that it lacked, would not only be enriching to all parties but would also lead to a better use of the international community's cultural heritage which is the sum of all the national heritages.")

41. ASIF EFRAT, GOVERNING GUNS, PREVENTING PLUNDER: INTERNATIONAL COOPERATION AGAINST ILLICIT TRADE 134, 137 (2012).

42. Convention on Cultural Property Implementation Act §§ 300–15; Efrat, *supra* note 7 (discussing the lobbying efforts of the archaeologists). Efrat argues that the Convention was implemented as an act of moral leadership, even though it did not offer any gains to the United States as a market country. *Id.* at 86–87; see also JACK A. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3, 13–14, 202 (2005) (discussing the interest-based approach to international law).

mechanism that allows for the prohibition of the importation of documented cultural property into the United States based on bilateral agreements with source countries party to the Convention.<sup>43</sup> The Act was designed to shield U.S. institutions from liability for ownership claims made solely on the grounds of foreign patrimony laws by establishing a process of internal review that redefined the need and scope of import controls.<sup>44</sup> A country party to the Convention can formally request that the United States restrict the import of certain defined categories of cultural property into its territory.<sup>45</sup> Applying for import restrictions is a time-consuming process that may take up to several years: applicants must document their nation's looting problem in great detail, explain what they are currently undertaking in order to alleviate it, show that the U.S. market for their cultural objects is sizable enough to merit restrictions, and submit a descriptive list with defined categories of objects that shall be the subject of import restrictions.<sup>46</sup> By way of example, a segment of the bilateral agreement entered into with Italy in 2001 restricts the import of "Attic Black Figure, Red Figure and White Ground Pottery," which "are made in a specific set of shapes (amphorae, craters, hydriae, oinochoi, kylikes) decorated with black painted figures on a clear clay ground (Black Figure), decorative elements in reserve with background fired black (Red Figure), and multi-colored figures painted on a white ground (White Ground)."<sup>47</sup> Attic vases are particularly risky objects for a museum to purchase: a study shows that between seventy and eighty percent of them come from Etruria.<sup>48</sup> The Cultural Property Advisory Committee (CPAC) evaluates applications; import restrictions are granted if its eleven members, including archaeologists, museum people, experts in the international sale of antiquities and public interest representatives, find that the cultural patrimony of a country is in jeopardy from pillage.<sup>49</sup> In making such a determination, CPAC members are required to take into account "the general interest of the international community in the interchange of cultural

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43. See 19 U.S.C. § 2602(a)(2)(A), (B) (2012).

44. See Bator, *supra* note 14, at 287, 328.

45. See 19 U.S.C. § 2602(a)(1)(A)–(D). "Cultural property" is defined to comprise specified categories of "significant archaeological or important ethnological materials" or any other "culturally significant" material object that was discovered within a source nation. *Id.* § 2601(2), (6). The language of the Act specifically encompasses every object that is "important to the cultural heritage of people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people." *Id.* § 2601(2)(C)(ii)(II).

46. *Id.* § 2602(a)(1)(A)–(D), (3); see also Letter from Patty Gerstenblith, President, Lawyers' Comm. for Cultural Heritage Pres., to Cultural Prop. Advisory Comm. (Apr. 22, 2010) (on file with author).

47. Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7399, 7401 (Jan. 23, 2001) (to be codified at 12 C.F.R. pt. 12).

48. Conversation with Jeanette Papadopoulou, *supra* note 34; see also Maria Antonietta Rizzo, *Gli scavi clandestini a Cerveteri (1982-94)*, in *ANTICHITÀ SENZA PROVENIENZA* 15, 24–25 (1995).

49. 19 U.S.C. § 2605(b)(1)(A)–(D), (f)(1)(A)–(C) (providing for the regulation of CPAC); *id.* §§ 2602–03 (stating the criteria) 1970 UNESCO Convention, *supra* note 5, art. 9; see also Steven Vincent, *Stealth Fighter: The Secret War of Maria Kouroupas*, *ART & AUCTION* 63 (2002).

property among nations for scientific, cultural and educational purposes.”<sup>50</sup> Negotiations may last for a long time; for example, it took about ten years before Italy and CPAC reached an agreement on the categories to be restricted.<sup>51</sup> Once approved, the list is published in the Federal Register, and the import restrictions are effective from that date.<sup>52</sup>

Initially it was thought that source nations could only request import restrictions on items of “cultural significance,” but this rule was not necessarily followed and the substance of these agreements includes broad categories of items that almost resemble a patrimony law.<sup>53</sup> It has been argued that the concept of “cultural significance” has been substituted for “archeological significance”; this way, anything of archaeological interest will be understood to be “culturally significant” and returned to its source country.<sup>54</sup> Another section of the CPIA states that an import restriction can be requested only if the objects are catalogued on the inventory of a museum, archaeological site or cultural institution.<sup>55</sup> This does not restrict the import of objects recently excavated and smuggled across national borders, which are of greatest concern for obvious reasons: first, because recently surfaced objects are not listed in any national inventory, and, second, because the country of origin would not be listed as the one from which the object was excavated, but the one from which it is sold. Technically, such objects can enter the United States notwithstanding the existence of a bilateral agreement.<sup>56</sup> Since 1983 the United States has entered into bilateral agreements limiting the categories of objects that can enter its territory with fifteen countries.<sup>57</sup> All these agreements became effective in the early 2000s, and they allow U.S. customs to seize cultural property that has been imported without a valid export certificate.<sup>58</sup> No petition to restrict imports has ever been rejected by the CPAC, but some have been materially delayed.<sup>59</sup>

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50. 19 U.S.C. § 2602(a)(1)(D); *see also id.* § 2605(b)(1)(B) (establishing CPAC’s composition as a committee composed of eleven members appointed by the President to renewable three-year terms, with the following profiles: two members represent the interests of museums; three members are expert in archaeology, anthropology, ethnology or related fields; three members are experts in the international sale of cultural property; and three members represent the interests of the general public).

51. Conversation with Jeanette Papadopoulos, *supra* note 34.

52. 19 U.S.C. § 2602(f)(1).

53. *Id.* § 2601(2)(c)(i)(I).

54. Cultural Policy Research Inst., Cultural Property Implementation Act: Is It Working? (Mar. 21, 2011) (transcript available at <http://www.cprinstitute.org/Home/issues/transcript—cultural-property-implementation-act-is-it-working>).

55. 19 U.S.C. §§ 2607, 2610(2)(a); 1970 UNESCO Convention, *supra* note 5, art. 7 (b)(1);. Note that UNIDROIT art. 3.1 states: “The possessor of a cultural object which has been stolen shall return it . . . .” This is important because it provides for uninventoried objects to be returned, which would remedy the present gap.

56. *See* 1970 UNESCO Convention, *supra* note 5, art. 7(b)(1); 19 U.S.C. §§ 2607, 2610(2)(a).

57. Peru, Bolivia, Mali, Cambodia, Columbia, Canada, Italy, Cyprus, Honduras, Nicaragua, Guatemala, El Salvador, Honduras, China, Mali and Greece. *Bilateral Agreements*, BUREAU EDUC. & CULTURAL AFF., <http://exchanges.state.gov/heritage/culprop/listactions.html> (last visited Jan. 13, 2012).

58. *Id.*

59. *See, e.g., Long-Delayed Chinese Import Restrictions Imposed*, CULTURAL PROP. OBSERVER

Although the aim of the CPIA was to put into place a system giving CPAC the option to create import barriers in certain defined circumstances where the interest in retaining culturally significant but unprovenanced objects could be proven under clear guidelines, CPAC's granting of import restrictions to broad categories of archaeological material seems to have had the effect of severely limiting the trade in antiquities altogether. This can in part be explained by the fact that CPAC is largely staffed by archaeologists and therefore defends their broader interests, but it is not in line with the aim and goals envisioned by Congress when it decided to ratify the 1970 Convention.<sup>60</sup> The aim behind passing the CPIA was to afford relief to source nations in certain evident circumstances of crisis where illicit trade is a real threat to a country's cultural heritage, but also to "allow the free flow of art, art honestly and honorably acquired, to continue to come to the United States."<sup>61</sup> The CPIA was thought to create a safe harbor for a limited selection of significant objects, but the way it was implemented transformed it into a blanket measure for the return of artifacts to source countries.<sup>62</sup>

Instead of stimulating international exchanges and combating illicit trade by enabling countries to claim the return of significant cultural objects, this section has shown that the 1970 UNESCO Convention has been aiding patrimony laws in impeding most legitimate trade in antiquities. The measures discussed above do not provide for a meaningful way to enhance the licit trade in cultural artifacts, and, by failing to recognize the utility of the market as a transactional arena, the present legal rules ignore the interest of the demand side, which includes the desires of dealers, collectors and museums in market nations. The combined effect of the Italian and Greek patrimony laws, the 1970 UNESCO Convention, and its United States implementing counterpart has been to discourage international trade and reduce the scope of a licit market in cultural objects.

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(Jan. 15, 2009), <http://culturalpropertyobserver.blogspot.co.uk/2009/01/long-delayed-chinese-import.html>.

60. *Relating to Stolen Archaeological Property: Hearing Before the Subcomm. on the Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. 4-5 (1985) (statement of Sen. Daniel Moynihan). The Cultural Property Implementation Act (CPIA) was enacted only after a long and arduous process of compromise that fairly balanced all competing interests. One part of the compromise which led to the unanimous passage of the act—after a decade of effort—was the clear understanding among all interests, public and private, that the CPIA would establish the definitive national policy regarding the importation of cultural objects and that any inconsistent provisions of law would be brought into accord. *Id.* (statement of Sen. Daniel Moynihan).

61. *Convention on Cultural Property Implementation Act: Hearing Before the Subcomm. on Int'l Trade of the S. Comm. of Fin.*, 95th Cong. 69 (1978) (statement of Oscar White Muscarella, Chairman, Comm. on Professional Responsibility, Archaeological Institute of America).

62. See, e.g., *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (discussing the CPIA but convicting a private dealer under the National Stolen Property Act (NSPA), which prohibits the transportation of goods known to have been stolen). Although this case bypasses the statutory requirements set out in the CPIA by using the NSPA, the "Schultz doctrine" has never been applied in the case of a state action for restitution. It would also be difficult to prove the scienter requirement of the NSPA. The recognition and enforcement of restrictions to the international trade in cultural property has been termed the "blank check rule." See Bator, *supra* note 14, at 354.

**B. ANALYSIS OF THE ILLICIT TRADE IN CULTURAL PROPERTY AND ANTIQUES**

As artifacts started to be sold on the black market, the legal restrictions affecting the trade in cultural objects lead to the growth of an illicit trade.<sup>63</sup> Illicit trade came into existence because there was a strong demand on the side of wealthy museums and collectors all around the world for objects that were prohibited from being sold in lawful markets since the 1970 UNESCO Convention was negotiated. A black market arose because of restrictions and prohibitions on licit markets and the tightening of the legal regime beginning in the 1970s that regulates the import of cultural material, which automatically diminished the supply of legitimately tradable objects.<sup>64</sup> Artifacts sold on the black market are typically excavated from the soil of source nations by local looters, then passed on to middlemen, smuggled across borders and resold until they reach global dealers that have direct contacts with collectors and curators of important museums.<sup>65</sup> These global dealers usually operate from countries with lax export restrictions on cultural material, like the United Kingdom or Switzerland.<sup>66</sup> The looting of objects that find their way to museums often involves the destruction of large numbers of lesser items and the loss of scientific knowledge that comes with a preserved context.<sup>67</sup> There are several levels of due diligence that should be complied with before acquiring an ancient artifact, and an attentive analysis of these steps would often reveal whether the object in question could have been illicitly excavated. However, potential acquirers often choose not to inquire too closely about provenance as a way to avoid direct confrontation with the legal and ethical repercussions that knowledge of illicit trade entails.<sup>68</sup> The willingness to buy remained so strong that due diligence steps were bypassed, transactions became blurred, documents outlining provenance were faked and all sorts of schemes were devised to ensure that the black market in antiquities would thrive.<sup>69</sup> These arrangements worked well during the 1970s, the 1980s and part of the 1990s, but with the new millennium, source

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63. Bator, *supra* note 14, at 317. Bator argues that a system of total embargo would fail because a complete prohibition in trade would lead to the emergence of a black market fed by illicit trade. *Id.* at 318–19; see also J. David Murphy, *The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?*, 3 INT'L J. CULTURAL PROP. 227, 234 (1994).

64. See Neil Brodie, *Introduction* to *ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE* 1, 5–6 (Neil Brodie et al. eds., 2006); Colin Renfrew, *Museum Acquisitions: Responsibility for the Illicit Traffic in Antiquities in Illegal Antiquities*, in *ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE*, *supra*, at 245, 245–56.

65. See FELCH & FRAMMOLINO, *supra* note 1, at 1–5; ISMAN, *supra* note 1.

66. See FELCH & FRAMMOLINO, *supra* note 1, at 171; ISMAN, *supra* note 1.

67. NEIL BRODIE ET AL., *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 9 (McDonald Inst. ed., 2000).

68. *Id.* at 8–10 (defining provenance as “[t]he full history and ownership of an item from the time of its discovery or creation to the present day, from which authenticity and ownership is determined”); but see INT'L COUNCIL OF MUSEUMS, *CODE OF ETHICS FOR MUSEUMS* § 2.3 (2006), available at [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code\\_ethics2013\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf).

69. FELCH & FRAMMOLINO, *supra* note 1; see also ISMAN, *supra* note 1; PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS* (Public Affairs ed., 2006).

nations started to pursue the return of illicitly imported artifacts more vigorously.<sup>70</sup> The peak was reached when prominent art dealers as well as the curator of one of the world's most important museums were criminally prosecuted.<sup>71</sup> The following section illustrates the scope of the black market and argues that the presence of illicit trade can be proved empirically.

As data sets on illegal activities are by their nature hard to obtain, it is very difficult to offer precise figures on the full extent of the illicit trade in cultural artifacts; available estimates range from a global total of \$300 million to \$6 billion each year, but it is unclear how these estimates were calculated.<sup>72</sup> A study by economists Fisman and Wei suggests that the illicit trade in cultural property can be empirically analyzed by looking at reported figures on imports and exports of cultural objects and by taking advantage of different reporting incentives between source and market countries.<sup>73</sup> The legal systems in source countries like Italy and Greece regulate the export of ancient objects: exporting these objects requires an export permit and customs will retain objects without the required documentation.<sup>74</sup> Beyond the logistical problems with guarding archaeological sites and enforcing export laws, looters are encouraged to smuggle antiquities across national borders without declaring them by the small incentives to report finds to the authorities, compared with the high profitability of antiquities on the black market.<sup>75</sup> However, the moment a smuggled artifact is outside its source country, it ceases to be a good *extra commercium* and becomes tradable in a market country like the U.S.—absent

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70. WATSON & TODESCHINI, *supra* note 69, at 20 (explaining that source countries' pursuits started when the Geneva storeroom of antiquities dealer Giacomo Medici was raided by the Carabinieri and the Swiss police); *see also* VERNON SILVER, *THE LOST CHALICE 175* (2009) (explaining that the official report of the contents of Medici's storerooms was submitted in July 1999, and since then it has been used as evidence in restitution claims).

71. SILVER, *supra* note 70, at 194; WATSON & TODESCHINI, *supra* note 69, at 165.

72. *See* ROGER ATWOOD, *STEALING HISTORY: TOMB RAIDERS, SMUGGLERS, AND THE LOOTING OF THE ANCIENT WORLD* 221 (2004); *see also* Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 377–78 (1995); Neil Brodie, *Statistics, Damned Statistics, and the Antiquities Trade*, 73 ANTIQUITY 447, 447 (1999); Alia Szopa, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55, 75 (2004) (“The stolen art market is an industry estimated to be worth between two and six billion dollars.”).

73. Raymond Fisman & Shang-Jin Wei, *The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques*, 1 AM. ECON. J.: APPLIED ECON. 82–96 (2009). Fisman and Wei's paper's contribution lies in finding a correlation between the measure of the illicit trade in cultural goods and survey-based corruption indices.

74. *See generally* discussion *supra* Part I.A. *See also* Decreto Legislativo 22 gennaio 2004, n. 42 art. 65 (It.); Nomos (3028:2002) art. 32.2 Gia tin prostasia twn Arxaiotitwn kai en genei tis Polistikis Klironomias [On the Protection of Antiquities and of the Cultural Heritage in General], 2002 (Greece); Council Directive 93/7, Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, 1993 O.J. (L 74) 74 (EC) (providing for the return of illicitly exported artifacts); Council Regulation 3911/92, *Export of Cultural Goods*, 1992 O.J. (L 395) 1 (EC) (requiring the presentation of an export license for the cultural goods to be exported outside the EU).

75. *See* Sue J. Park, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering its Antiquities*, 23 U. PA. J. INT'L ECON. L. 931, 931–32 (2002).

detailed references in bilateral agreements under the 1970 Convention.<sup>76</sup> If the cultural object in question is not covered by a bilateral agreement, it will not be regarded as illicit when imported into a market nation and can enter the market country legally once its value has been declared to customs.<sup>77</sup> Traditionally, the U.S. has not required records of ownership history or identification of the vendor.<sup>78</sup> The United States also provides positive incentives to declare the import of cultural objects upon entry by not taxing properly imported goods; this, coupled with the potential for seizure in case of an improper declaration, provides a strong incentive to declare the import.<sup>79</sup> Considering the incentive system, but also the fact that people regularly understate the value of imported objects to expedite the customs processes and attract less attention, reported U.S. import values are likely conservative estimates, but still indicative figures of antiquities entering the United States. Taking into account the different reporting incentives in source versus market countries, a measure of the illicit trade in cultural goods can be generated by comparing the difference between a given measure of imports of cultural material recorded by customs in the United States and the measure of exports of the same material recorded by customs authorities in source countries. If the imports reported by one country roughly coincide with exports reported by its trading partner, the trade would be transparent and legal. Minor differences could be explained by differing terms of valuation, timing of the reports, and inconsistencies in including or excluding particular items in broader categories. On the other hand, a significant discrepancy in reported imports and exports would signal the presence of illicit movements.

The following discussion applies the above analysis to the import/export data provided by the U.N. Commodity Trade Statistics Database.<sup>80</sup> This database contains import/export data on commodities organized by calendar year. For the purpose of this Paper, the data provides an overview of the annual value in U.S. dollars of exports and imports of works of art starting in 1995. For each reported

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76. Fisman & Wei, *supra* note 73, at 83.

77. See Bator, *supra* note 14, at 343 n.117; see also U.S. CUSTOMS & BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: WORKS OF ART, COLLECTOR'S PIECES, ANTIQUES, AND OTHER CULTURAL PROPERTY (2006), available at [http://www.cbp.gov/linkhandler/cgov/trade/legal/informed\\_compliance\\_pubs/icp061.ctt/icp061.pdf](http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/icp061.ctt/icp061.pdf); E-mail from James McAndrew, Former Senior Special Agent, U.S. Dep't of Homeland Sec., to author (July 5, 2012) (on file with author). For court discussion of this point, see, for example, *Att'y Gen. of New Zealand v. Ortiz* [1982] 3 All E.R. 432 (A.C.), *aff'd*, [1983] 2 All E.R. 93 (H.L.) (U.K.), reprinted in JOHN HENRY MERRYMAN, ALBERT E. ELSÉN & STEPHEN K. URICE, LAW, ETHICS, AND THE VISUAL ARTS 247–51 (2007).

78. Morag Kersel, *From the Ground to the Buyer A Market Analysis of the Trade in Illegal Antiquities*, in ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE, *supra* note 64, at 188, 194.

79. *Id.*; see also *United States v. Antique Platter of Gold*, 184 F.3d 131, 136 (2d Cir. 1999).

80. *Availability Result: 9706*, UNITED NATIONS COMMODITY TRADE STAT. DATABASE, <http://comtrade.un.org/db/mr/daCommoditiesResults.aspx?px=H1&cc=9706> (last visited Feb. 10, 2013); *Availability Result: 9705*, UNITED NATIONS COMMODITY TRADE STAT. DATABASE, <http://comtrade.un.org/db/mr/daCommoditiesResults.aspx?px=H1&cc=9705> (last visited Feb. 10, 2013).

year, import values for specific categories containing antiquities in market nations can be compared to the export values of the same objects exported by source countries. The most relevant categories for this purpose in the database are HS 9705, which includes collections and collectors' pieces of various types, and HS 9706, which covers antiques older than one hundred years.<sup>81</sup> James McAndrew, an expert on the illicit trade in artifacts and customs procedures, confirms that even though HS 9705 corresponds to the import of antiquities better than HS 9706, U.S. Customs will accept both.<sup>82</sup> These classifications are not ideal because they both contain more than just cultural artifacts of ancient civilizations, including non-cultural artifact entries. However, the combination of both categories should cover virtually all antiquities imported by the U.S.

Upon entry in the United States, importers are required to fill out customs form 7501.<sup>83</sup> The form asks for the value, i.e., the price paid for the item, the exporting country and the country of origin of the object.<sup>84</sup> For customs purposes, country of origin is defined as "country of manufacture, production, or growth of any article"—terms not relative to the antiquities trade.<sup>85</sup> No reference is made to the possibility of the country of origin being unknown.<sup>86</sup> The UNESCO Convention and the CPIA refer to the place of excavation (licit or illicit), but such a definition is not a legal one.<sup>87</sup> Even though customs makes the country of origin declaration a material fact, this information is often impossible for the importer to know.<sup>88</sup> As long as the form is completed with accuracy and to the best of the importer's knowledge, the burden of proof falls on the claimant country to prove that the antiquity was excavated from a location within their modern day boundaries and that when this occurred there was a patrimony law in place covering the items.<sup>89</sup> It seems that unless there is a false statement the item will be imported legally.<sup>90</sup>

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81. HS 9705 comprises collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, paleontological, ethnographic or numismatic interest. *Commodity List*, UNITED NATIONS COMMODITY TRADE STAT. DATABASE, <http://comtrade.un.org/db/mr/rfCommoditiesList.aspx?px=H1&cc=9705> (last visited Feb. 10, 2013). HS 9706 and HS 9705 are subcategories of HS 9700, which comprises "works of art, collectors pieces' and antiques." *Id.*

82. E-mail from James McAndrew, *supra* note 77.

83. U.S. CUSTOMS & BORDER PROTECTION, DEP'T OF HOMELAND SEC., CBP FORM 7501: ENTRY SUMMARY (2009), available at [http://forms.cbp.gov/pdf/cbp\\_form\\_7501.pdf](http://forms.cbp.gov/pdf/cbp_form_7501.pdf).

84. *Id.*; see also 19 U.S.C. § 1401a (2012).

85. U.S. CUSTOMS & BORDER PROTECTION, DEP'T OF HOMELAND SEC., CBP FORM 7501 INSTRUCTIONS (2012) available at [http://forms.cbp.gov/pdf/7501\\_instructions.pdf](http://forms.cbp.gov/pdf/7501_instructions.pdf); see also E-mail from James McAndrew, *supra* note 77.

86. U.S. CUSTOMS & BORDER PROTECTION, *supra* note 85.

87. 19 U.S.C. § 2601(2)(C); 1970 UNESCO Convention, *supra* note 5, art. 1(c); see also E-mail from James McAndrew, *supra* note 77.

88. *United States v. Antique Platter of Gold*, 991 F. Supp. 222, 230 (S.D.N.Y. Nov. 14, 1997). In this case, the United States successfully sued for civil forfeiture of an antique gold platter. The incorrect identification of the place of origin by the platter's purchaser was a violation of 18 U.S.C. § 542, which prohibits importation of goods "by means of false statements." *Id.* at 228–30. The object in question came from Italy, but the importation form falsely listed the work's country of origin as Switzerland. *Id.*

89. *Id.*; see also *United States v. Schultz*, 333 F.3d 393, 405 (2d Cir. 2003).

90. See *Antique Platter of Gold*, 991 F. Supp. 222.

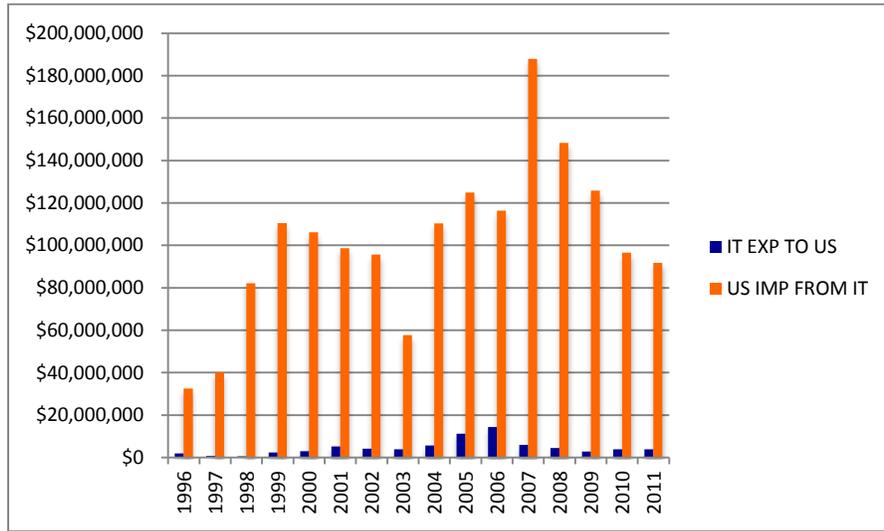
To begin the analysis of the differences between reported import and export values, the declared export values of HS 9705 and HS 9706 into the United States for two source countries, Italy and Greece, will be compared to the declared import value of the same categories (HS 9705 and HS 9706) into the United States.<sup>91</sup> These two numbers illustrate the reporting discrepancy. However, they will not determine the value of the black market in antiquities since subtracting the values of the exports from the value of the U.S. imports as reported on the y axis of the tables below will include inaccuracies for which it is difficult to account.<sup>92</sup> Instead they will enable us to compare the gap between the export and import values of the same goods in two countries that have differing interests in the trade of cultural objects: the United States would like to have them circulate, whereas Greece and Italy are in favor of retaining their cultural artifacts. This comparison identifies elements that may signal the presence of illicit trading in these goods.

Figures 1.1 and 1.2 below illustrate the gaps between the exports recorded in Italy and Greece respectively based on the value of recorded imports of the same objects (HS 9705 and HS 9706) into the United States.

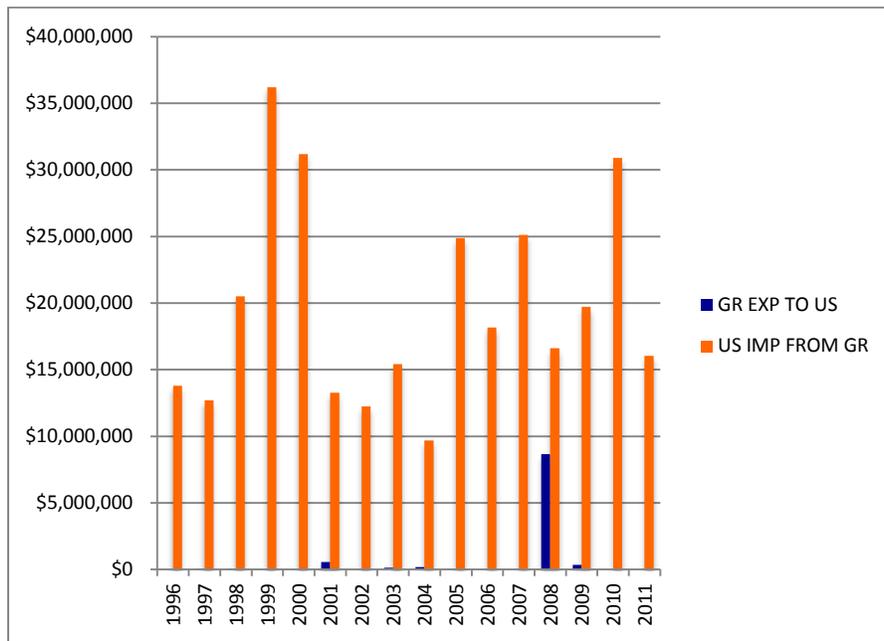
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91. The following selections were made for the analysis: classification: HS1996; commodities: 9706 (antiques older than one hundred years); reporters: Italy, Greece, United States; partners: Italy, Greece, United States; years: 1996–2010; trade flows: import/export.

92. Besides certain limitations with the dataset, *see Read Me First (Disclaimer)*, UNITED NATIONS COMMODITY TRADE STAT. DATABASE, <http://comtrade.un.org/db/help/uReadMeFirst.aspx> (last visited Feb. 10, 2013), the following other factors contribute to inaccurate results. First, restrictions in the legal regime, the entering of bilateral agreements, and specific increase or decrease of the demand for cultural objects alter their value, which will be reflected in the total value of goods entering the United States according the above dataset. Second, by selecting the country in the search, it is assumed that the items included are of local origin when this is not always the case. Third, Customs and Border Protection regulations require the submission of the country of origin of the merchandise, not the place of discovery, whereas CPIA refers to the place of discovery. Customs and Border Protection has never issued any written guidance addressing how importers of cultural property should deal with this inconsistency.



**Figure 1.1:** Annual value of exports from Italy to the United States of categories HS 9705 and HS 9706 and annual value for imports to the United States from Italy of the same categories.



**Figure 1.2:** Annual value of exports from Greece to the United States of categories HS 9705 and HS 9706 and annual value for imports to the United States from Greece of the same categories.

Figures 1.1 and 1.2 indicate the yearly total value in U.S. dollars of the declared export of cultural material (HS 9705 and HS 9706) from Italy and Greece to the United States and its counterpart, the U.S. import of cultural material coming from Italy and Greece. The results are significant because the gaps are extremely large. This means that even though the definitions of categories HS 9705 and HS 9706 are broader than the focus of this analysis and include objects other than classical antiquities, the reality is that exports of HS 9705 and HS 9706 materials are consistently underreported to the point where for most years the reported export value in Greece is zero. In both figures, the reported export values are extremely low compared to the U.S. import counterpart. As noted above, in 2001 the United States entered into a bilateral agreement with Italy that established import controls for certain categories of cultural objects.<sup>93</sup> This fact deserves closer attention because Figure 1.1 shows that entering into this agreement resulted in an increase of recorded exports. This point suggests that such agreements do have an effect in combating illicit trade; however, given their narrow focus on inventoried archaeological material and the small sample size, it is difficult to say how significant these results are. The bilateral agreement between the United States and Greece was only finalized in December 2011; therefore it is not yet possible to compare results.<sup>94</sup>

Overall, the findings confirm the presence of an activity which is unrecorded on the export side. Exports of ancient works of art are not being communicated to the authorities, when, in accordance with the patrimony laws, this should be the case. Again, the aim of this analysis is not to develop a tool that enables the measurement of illicit trade, and even though this data does not make it possible to measure the volume of illicitly traded objects in a rigorous way, it does highlight important issues. It provides a framework for understanding the reporting issues associated with the trade in cultural property in countries with different interests. Based on the above data, the gaps between recorded imports and exports signal the presence of illegal activity that can be explained by the high demand and

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93. See Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7399, 7401 (Jan. 23, 2001) (to be codified at 12 C.F.R. pt. 12). The Memorandum of Understanding between the United States of America and Italy had an initial duration of five years and was renewed in 2006 and 2011. See Agreement Between the Government of the United States and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy, U.S.-It., Jan. 19, 2001 [hereinafter 2001 U.S.-Italy Memorandum of Understanding], available at <http://eca.state.gov/files/bureau/it2001mou.pdf>; Italy, BUREAU EDUC. & CULTURAL AFF., <http://eca.state.gov/cultural-heritage-center/international-cultural-property-protection/bilateral-agreements/italy> (last visited Feb. 10, 2013).

94. Memorandum of Understanding Between the Government of the United States and the Government of the Hellenic Republic Concerning the Imposition of Import Restrictions on Categories of Archaeological and Byzantine Ecclesiastical Ethnological Material through the 15th Century A.D. of the Hellenic Republic, U.S.-Greece, July 17, 2011, available at <http://eca.state.gov/files/bureau/gr2011mou.pdf>.

diminishing supply of legitimate artifacts.

How vibrant an underground market is usually depends on the penalties associated with the activity in question. In Italy, the penalties associated with illicit export of cultural material used to be regulated by a 1939 law, which mandated imprisonment up to four years and a fine of approximately 2,000 Euro.<sup>95</sup> In 2004, the fine grew to approximately 5,000 Euro.<sup>96</sup> Very recent developments include the approval by the Italian Council of Ministers of a law in 2011 that further increases the maximum penalty to a maximum of six years' imprisonment and a 30,000 Euro fine.<sup>97</sup> Although the penalties are not lenient, the gap between import and export values and the systematic reporting of high entry values for imported Italian material suggests that the penalties are inadequate deterrents. This can best be explained first by the tight limitation period to pursue such a claim: under Italian law, the statute of limitations for an illicit export case is seven years.<sup>98</sup> Additionally, it is very difficult to prove when an object was removed from the ground in the context of clandestine excavations; this severely limits the prosecutable cases to the small number where looters are caught and arrested on the spot. In Greece, the illegal excavation and export of cultural material is punished by a prison term of up to ten years.<sup>99</sup> On the import side, in the United States if illicitly imported objects are caught by the CPIA, the claim results in civil forfeiture.<sup>100</sup> However, if the scienter requirement of the National Stolen Property Act can be proved, its criminal penalties apply; this happened in the seminal case of *United States v. Schultz*, where the trial court imposed a thirty-three month prison sentence on an American dealer for knowingly importing illicitly excavated antiquities from Egypt.<sup>101</sup>

To highlight the significance of the above results, the same data is measured with reference to the United Kingdom and Switzerland, two countries with rather lenient system of export control.<sup>102</sup> Both countries have been reluctant to curtail their well-established markets for ancient artifacts, which are profitable and legitimate under their respective laws.<sup>103</sup> In fact, archaeological material coming from other countries has actively been sold on the United Kingdom and Swiss markets, and, given the legitimacy of this trade, there is very little incentive for

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95. Legge 1 giugno 1939, n. 1089 art. 66 (It.).

96. Legge 22 gennaio 2004, n. 42 art. 174 (It.).

97. Legge 21 novembre 2011, n. 3016 (It.) (draft bill).

98. Legge 5 dicembre 2005, n. 251 (It.); *see also* ISMAN, *supra* note 1, at 195.

99. Nomos (3028:2002) art. 61, 63 Gia tin prostasia tw n Arxaiotitwn kai en genei tis Polistikis Klironomias [On the Protection of Antiquities and of the Cultural Heritage in General], 2002 (Greece).

100. 19 U.S.C. § 2609 (2012).

101. *See* National Stolen Property Act, 18 U.S.C. §§ 2314–15 (2012); *United States v. Schultz*, 333 F.3d 393, 398 (2d Cir. 2003).

102. CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 192–94 (2010). For the U.K. specifically, *see* CULTURE, MEDIA & SPORT COMMITTEE, CULTURAL PROPERTY: RETURN AND ILLICIT TRADE, 1999–2000, H.C. 372-I (U.K.), *available at* <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcmds/371/37102.htm>

103. FORREST, *supra* note 102, at 192–94.

these countries not to report exports.<sup>104</sup> Figures 1.3 and 1.4, below, show that the United Kingdom and Switzerland are two of the top exporters and importers of antiquities and that the majority of exports are reported to customs.

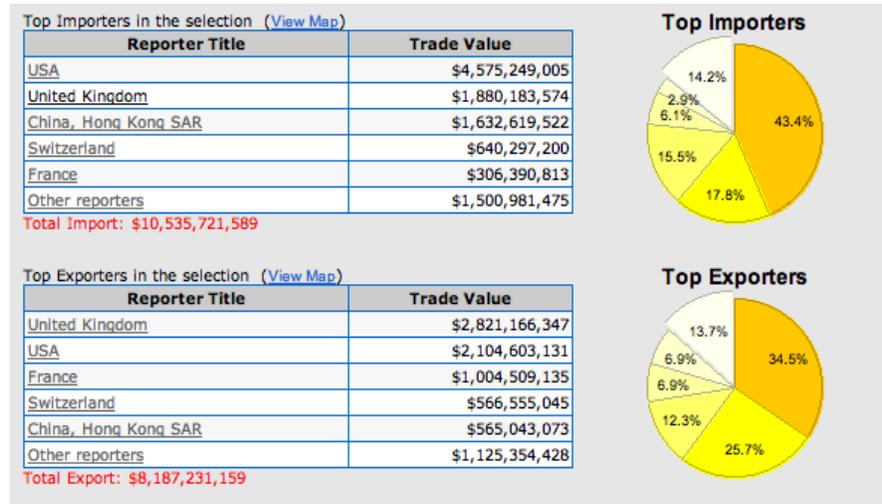


Figure 1.3: UN ComTrade overview values for HS 9705.<sup>105</sup>

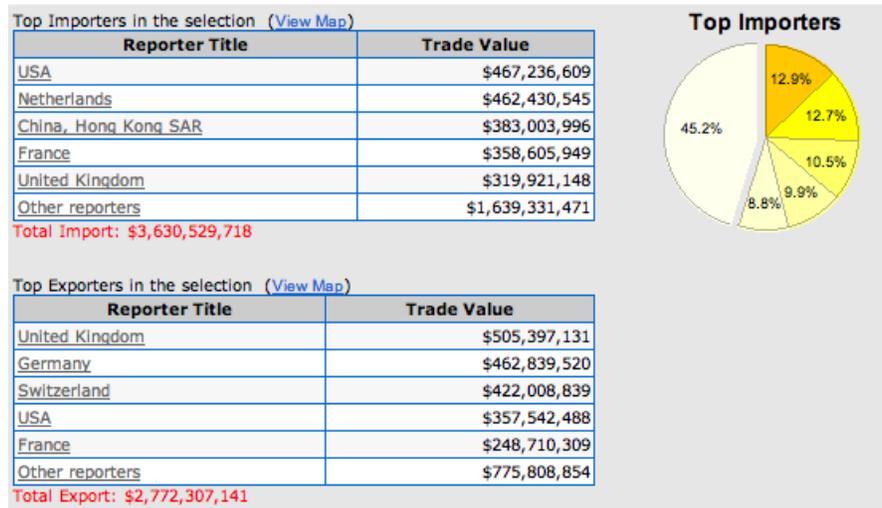


Figure 1.4: UN ComTrade overview values for HS 9706.<sup>106</sup>

104. See Neil Brodie, *Britannia Waives the Rules? The Licensing of Archaeological Material for Export from the United Kingdom*, in *ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY* 185, 189 (Neil Brodie & Kathryn W. Tubb eds., 2001).

105. *Comtrade Explorer – Snapshot: 9705*, UNITED NATIONS COMMODITY TRADE STAT. DATABASE, <http://comtrade.un.org/db/ce/ceSnapshot.aspx?px=H1&cc=9705> (last visited Jan. 29, 2013).

Figures 1.5 and 1.6 show the results for the United Kingdom and Switzerland from the same exercise undertaken above, comparing United States import values with the Swiss and British export values for categories HS 9705 and HS 9706. Although the values never match perfectly, the gaps are considerably smaller than the gaps that result in the cases of Italy and Greece. The trade of cultural goods is regulated at European Union (EU) level by a Council Regulation, which requires any person who intends to export cultural goods from the EU to any other destination to obtain a license.<sup>107</sup> Such export licenses are issued by designated agencies, in each individual member state, that have the competence to decide what objects can be classified as “cultural goods.”<sup>108</sup> This means that this EU instrument is subject to different degrees of control reflecting national approaches to cultural property. No uniform export system can exist as long as EU Member States maintain different notions with regards to cultural property.<sup>109</sup> The impact of national laws and policies is reflected in the different outcome of the figures above: for Greece and Italy, which have an export regime based on prohibition, the reported export values are very low, contrasted with the United Kingdom and Switzerland where they are much higher.

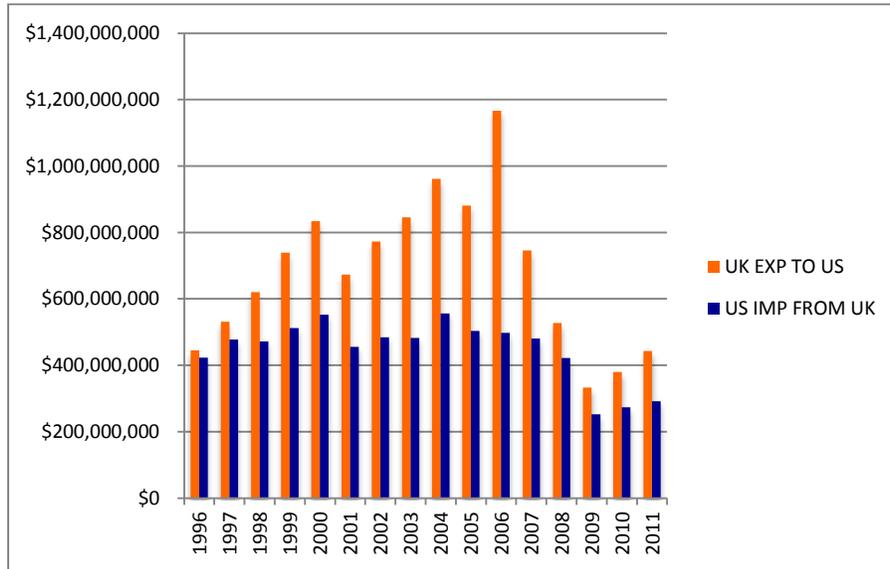
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106. *Comtrade Explorer – Snapshot: 9706*, UNITED NATIONS COMMODITY TRADE STAT. DATABASE, <http://comtrade.un.org/db/ce/ceSnapshot.aspx?px=H1&cc=9706> (last visited Jan. 29, 2013).

107. Council Regulation 116/2009, art. 2, 2009 O.J. (L 39) 1 (EC).

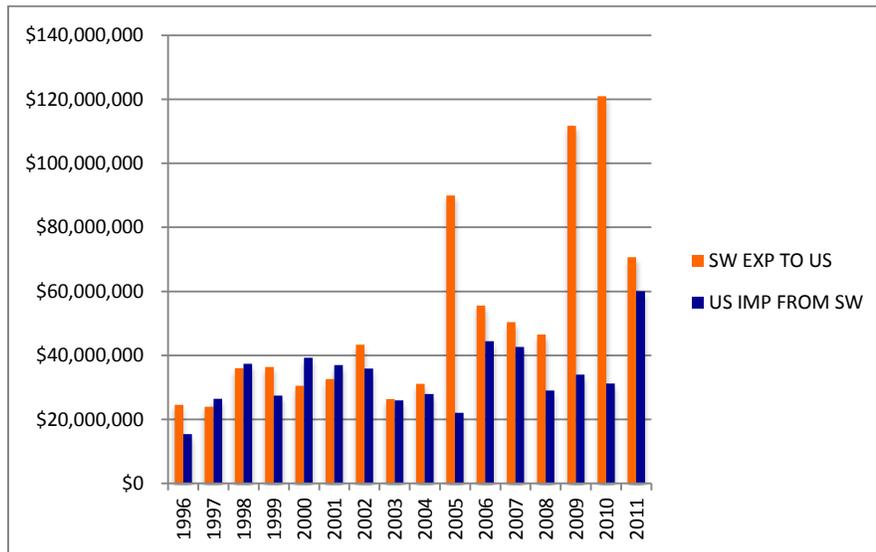
108. List of Authorities Empowered to Issue Export Licenses for Cultural Goods, 2012 O.J. (C 72) 29, available at [http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/cultural\\_goods/list\\_authorities\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/cultural_goods/list_authorities_en.pdf).

109. See IRINI STAMATOUDI, CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW 120 (Evangelos Kyriakidis ed., 2011).



**Figure 1.5:** Annual value of exports from the United Kingdom to the United States of categories HS 9705 and HS 9706 and annual value for imports to the United States from the United Kingdom of the same categories.<sup>110</sup>

110. To further test the dataset for accuracy, I did undertake a comparative analysis using reported imports and exports values for toys (HS 9503). Economists Fisman and Wei also chose toys to test their analysis because toys also have a zero tariff rate in the United States and there is no incentive to not report their entry. Fisman & Wei, *supra* note 73, at 83. For the purpose of this Paper the same analysis is applied over fifteen years (1996 – 2011), and although the U.S. import records are usually higher than the export records for Italy and Greece, the percentage of the difference in the gap never exceeds twenty percent. When considering cultural objects, i.e., HS 9705 and HS 9706 objects, the difference in the gap was almost always above ninety-five percent as the tables for Italy and Greece show. This proves that the above results cannot be explained by poor customs records in Italy and Greece, since this would affect trade data for toys and antiques equally. The results of the analysis are on file with the author.



**Figure 1.6:** Annual value of exports from Switzerland to the United States of categories HS 9705 and HS 9706 and annual value for imports to the United States from Switzerland of the same categories.

The above empirical analysis shows that the problem of illicit trafficking is a concrete one and that the restrictive legal regimes governing the trade in Italian and Greek artifacts exacerbate, rather than limit, these activities. It is worth noting that Italy, a source nation that has been suffering the effects of plundering of its archaeological sites for a long time, has been a major player in terms of prosecuting and actively seeking the restitution of illicitly traded artifacts.<sup>111</sup> In addition to a group of prosecutors specialized in cultural property crimes and a police force for the protection of Italian cultural heritage, the *Comando Carabinieri Tutela Patrimonio Culturale*, Italian law prescribes a positive obligation to prosecute when there is evidence of a crime (compared to the United States where the state has the option not to prosecute upon finding evidence of a crime).<sup>112</sup> At the end of the 1990s, the *Carabinieri* raided a warehouse in Geneva where thousands of illegally exported antiquities were stored.<sup>113</sup> The owner, Giacomo Medici, an

111. For example, Italy has prosecuted both Marion True, *see* Trib. Roma, 13 ottobre 2010, n. 19360/10 (It.) (on file with author), and Giacomo Medici, *see* App. Roma, 16 luglio 2009, n. 5359 (It.) (on file with author).

112. On the role of the *Carabinieri*, see Lt. Col. Alberto Deregibus, *The Carabinieri Headquarters for the Protection of Cultural Heritage: Tasks, Activities and International Cooperations*, in INTERNATIONAL MEETING ON ILLICIT TRAFFIC OF CULTURAL PROPERTY 149, 149–53 (Jeannette Papadopoulos ed., 2011). On the positive obligation to prosecute, see Ildiko P. DeAngelis, *Italian Prosecutor Paolo Ferri in Rome, Italy, March 2007 Interview*, in YEARBOOK OF CULTURAL PROPERTY LAW 11, 13 (Sherry Hutt & David Tarler eds., 2008).

113. Suzan Mazur, *The Medici Go-Round: Sotheby's & the Signed Euphronios*, SCOOP INDEP. NEWS (Dec. 1, 2005), <http://www.scoop.co.nz/stories/HL0512/S00017.htm>.

antiquities dealer of international fame, was arrested in 1997 and sentenced by a tribunal in Rome to ten years in prison and a fine of 10 million Euros for dealing in stolen ancient artifacts.<sup>114</sup> Evidence acquired from the investigation of Medici enabled Italian prosecutors to attempt to indict Marion True, the former senior curator at the antiquities department at the Getty Villa, as well as art dealer Robert Hecht, for conspiracy to traffic in illicitly traded antiquities.<sup>115</sup> In addition, Robin Symes, a well-known antiquities dealer based in London, declared bankruptcy; a court is currently assessing Italy's claim to some of the artifacts in his possession.<sup>116</sup> At the time this Article was written, a criminal trial against Michael Padgett, Princeton's antiquities curator, is being pursued.<sup>117</sup> Although some of the claims against Hecht and True were later dropped because the Italian statute of limitations had expired,<sup>118</sup> the Medici trial was of pivotal importance in uncovering the schemes devised to buy illicitly traded artifacts.<sup>119</sup> It enabled the *Carabinieri* and the Italian prosecutorial team to detect the connections that sometimes exist between museums and the trade of illicit antiquities.<sup>120</sup> These developments turned into highly publicized scandals and raised serious concerns about purchases by U.S. museums, for the acquisition of illicitly traded material severely undermined their trustworthiness, their goal to serve the public, and their commitment to the value of education.<sup>121</sup> Altogether, these events had the effect of further slowing down the art market for antiquities and motivating several of the United States' largest and most prestigious institutions to return several significant objects in their antiquities collections with doubtful provenance to their respective source countries.<sup>122</sup> The dynamics of the market for antiquities and the repatriation of such objects to source countries will be analyzed in the next section.

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114. *Id.*; see also SILVER, *supra* note 70, at 214.

115. Trib. Roma, 13 ottobre 2010, n. 19360/10 (It.) (on file with author); see also Andrew L. Slayman, *The Trial in Rome*, *ARCHAEOLOGY* (Feb. 6, 2006), <http://www.archaeology.org/online/features/italytrial/>.

116. Telephone Conversation with Maurizio Fiorilli, Deputy State Attorney for Italy (Mar. 27, 2012); see also Colin Renfrew, *Combating the Illicit Antiquities Trade: Progress and Problems*, UFFICIO STUDI MINISTERO PER I BENI E LE ATTIVITÀ CULTURALI (Mar. 17, 2010), [http://www.ufficiostudi.beniculturali.it/mibac/export/UfficioStudi/sito-UfficioStudi/Contenuti/Archivio-Newsletter/Archivio/2010/Newsletter-2/visualizza\\_asset.html\\_1712427011.html](http://www.ufficiostudi.beniculturali.it/mibac/export/UfficioStudi/sito-UfficioStudi/Contenuti/Archivio-Newsletter/Archivio/2010/Newsletter-2/visualizza_asset.html_1712427011.html).

117. Jason Felch, *Turkey Targets Getty, Other Museums*, *L.A. TIMES*, Mar. 31, 2012, at A1; see also *Tag Archives: Michael Padgett*, *CHASING APHRODITE*, <http://chasingaphrodite.com/tag/michael-padgett/> (last visited Jan. 5, 2013).

118. Trib. Roma, 13 ottobre 2010, n. 19360/10 (It.) (on file with author); see also Bruce Weber, *Robert Hecht, Antiquities Dealer, Dies at 92*, *N.Y. TIMES*, Feb. 10, 2012, at A18.

119. App. Roma, 16 luglio 2009, n. 5359 (It.) (on file with author).

120. *Id.*

121. *Code of Ethics for Museums*, AM. ALLIANCE OF MUSEUMS (2000), <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics-for-museums> ("As nonprofit institutions, museums comply with applicable local, state, and federal laws and international conventions, as well as with the specific legal standards governing trust responsibilities. . . . [T]hey must take affirmative steps to maintain their integrity so as to warrant public confidence. They must act not only legally but also ethically.").

122. FELCH & FRAMMOLINO, *supra* note 1, at 307.

## II. IMPACT OF ILLEGAL TRADE ON THE COLLECTING STRATEGIES OF MAJOR U.S. MUSEUMS

This section analyzes the impact of the inefficient legal regime and the resulting indications of illicit trade on the collecting strategies of major U.S. museums. The problems in this area of law make it difficult for museums to continue to acquire legitimate ancient artifacts on the international market. The impact of illicit trade on collecting strategies of museums will be measured by inspecting the trends in antiquities acquisitions and by looking at the consequences of repatriations of significant artifacts.

The discussion that follows will refer to the experience of three U.S. institutions that host important classical antiquities collections: the Metropolitan Museum of Art (“Met”), the Getty Villa (“Getty”) and the Princeton University Art Museum (“Princeton Museum”). These three institutions were selected because, aside from having very active antiquities departments and outstanding antiquities collections, they all have returned artifacts and have undertaken contractual cooperation with source countries including Italy and Greece.<sup>123</sup> The data utilized to assess the trends in antiquities acquisitions has a qualitative and quantitative component. The quantitative component refers to data on acquisitions from the annual reports or other official publications of each institution.<sup>124</sup> The qualitative component refers to interviews conducted with museum officials about existing and future collecting strategies.<sup>125</sup> First, this section will examine the available collecting strategies and how antiquities collections of the above institutions grew over the past thirty years. Next, it will inspect the institutions’ recently adopted acquisition policies and their effect on acquisitions. Finally, this section will look at the frequency of claims that arose in connection with illegally exported objects, and analyze the cooperation agreements that regulated the repatriations, with special attention paid to whether the losses of repatriated objects were compensated with loans.

### A. COLLECTING ANTIQUITIES: AVAILABLE ROUTES AND HOW COLLECTIONS INCREASED OVER TIME

The collections of most U.S. art museums consist of objects donated to them by

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123. See Agreement, Metropolitan Museum of Art-It., Feb. 21, 2006, *reprinted in* 14 INT’L J. CULTURAL PROP. 427, 427–34 (2006) [hereinafter Met-Italy Agreement]; Press Release, The Getty Trust, The Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome (Aug. 1, 2007), available at [http://www.getty.edu/news/press/center/statement06\\_getty\\_italiancultureministry.html](http://www.getty.edu/news/press/center/statement06_getty_italiancultureministry.html).

124. See *generally* *Acquisitions*, J. PAUL GETTY MUSEUM J. (1983–1986); *Acquisitions*, GETTY TRUST ANN. REP. (1987–2010); *Departmental Accessions*, ANN. REP. TRUSTEES METROPOLITAN MUSEUM OF ART (1983–2008); *Acquisitions of the Princeton University Art Museum*, REC. ART MUSEUM, PRINCETON U. (1983–2007).

125. See Conversation with Claire Lyons, Senior Antiquities Curator, J. Paul Getty Museum, in L.A., Cal. (Nov. 10, 2011); see also Conversation with James Steward, Dir., Princeton Art Museum, in Princeton, N.J. (Dec. 1, 2011); see also Conversation with Sharon Cott, General Counsel of the Metropolitan Museum of Art, in S.F., Cal. (Mar. 20, 2012).

collectors or purchased with monetary gifts from supporters. Purchases and donations are the primary avenues through which antiquities departments have continued exhibiting new objects and linked them to recent scholarship and innovative curatorial ideas. Acquisitions through the market generally include transactions with auction houses, dealers and private collectors. When a museum is making decisions regarding an acquisition, the emphasis should be placed on proper due diligence in order to ensure the provenance of the object; this is easier if the object in question has been sold on the market before and relevant records prove past transactions, but harder if there is no searchable record.<sup>126</sup> Museums also rely heavily on donations to fill out their collections. The level of due diligence required to accept a donation was previously lower than for a purchase, but now it typically requires the same scrutiny.<sup>127</sup> If the quality of a donation, measured in terms of aesthetics and documentation, does not meet the standard of a given collection, it will be rejected.<sup>128</sup>

I will now turn to data on accessions, either through acquisitions or through donations, of the three selected institutions in order to assess what impact illicit trade and the recent scandals may have had on their buying behavior. Figure 2.1 contains a summary of the data showing the number of accessioned antiquities for each year by each institution, including both acquisitions through the market and donations. Figure 2.2 contains the same data for acquisitions through the market only.

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126. Conversation with Claire Lyons, *supra* note 125.

127. *Id.*

128. *Id.* Lyons explains that in the past accepting donations was thought to require less rigorous due diligence; only recently have the standards been aligned. *Id.*; see also FELCH & FRAMMOLINO, *supra* note 1, at 36 (explaining that donations of cultural material have caused problems in the past because private collectors acquired objects with doubtful provenance on the market and then donated or loaned them to museums thereby skipping adequate levels of due diligence). Felch and Frammolino also explain how the Getty's former curator Jiri Frel envisioned a donation scheme whereby he convinced people he knew to buy and subsequently donate artifacts in return for higher tax deductions. *Id.* All of the gifts were reported in the museum's annual 990 tax forms, and most of them were published in the *J. Paul Getty Museum Journal*, the annual catalogue of acquisitions. *Id.* Frel's successor Marion True also succeeded in convincing the Fleischmans to donate part of their notable and acclaimed antiquities collection to the Getty by first exhibiting it and putting together a catalogue. *Id.* This donation was very controversial, as ninety percent of the pieces appear to have unascertained provenance. *Id.* at 124–34. An IRS study of tax returns with art donations revealed that overvaluations—often at over three times the value of the work—are widespread. See Jason Felch & Doug Smith, *Inflated Art Appraisals Cost U.S. Government Untold Millions*, L.A. TIMES (Mar. 2, 2008), <http://www.latimes.com/news/local/la-me-irs2mar02,0,3015698.story>. Between 1973 and 1985, the Getty museum received donations altogether valued at \$14.7 million. *Id.*

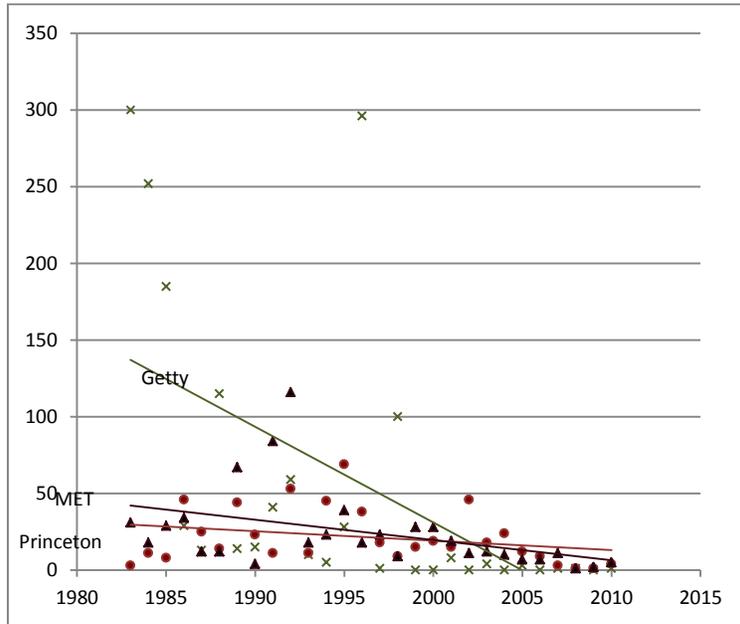


Figure 2.1: Data on museum accessions (including purchases and donations).<sup>129</sup>

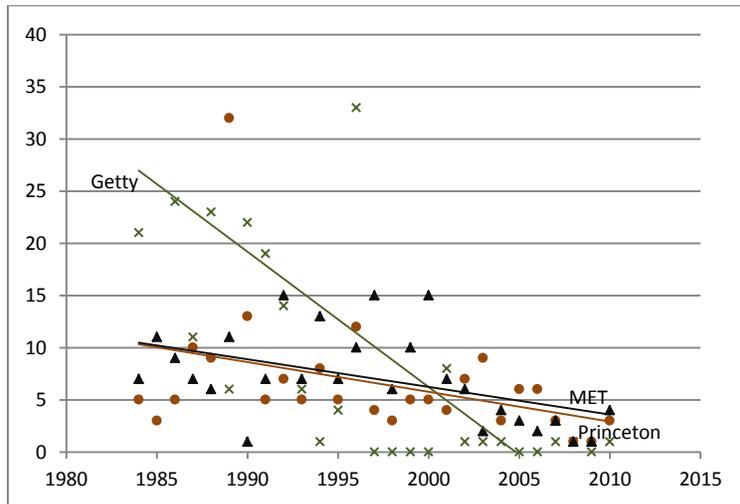


Figure 2.2: Data on market acquisitions (purchases only).

129. A cap was put at three hundred objects to make the graph more intelligible. However, for several years during the 1980s, the number of acquisitions at the Getty exceeded three hundred objects.

Figure 2.1 shows the accession trend line of the antiquities departments at the Getty, the Met and the Princeton Museum over the past thirty years.<sup>130</sup> Accessions comprise both purchases and donations. Two main observations deserve comment. First, the trend line of the Getty decreases more sharply in comparison to those of the other two museums partly because the Getty is a younger institution (it was founded in 1953), and its resources to pursue acquisitions increased sharply with J. Paul Getty's bequest in 1976, thus increasing the pace of acquisitions initially.<sup>131</sup> On the other hand, the Met and the Princeton Museum have had established antiquities collection since the beginning of the twentieth century.<sup>132</sup> It is noteworthy that in the case of the Getty and the Met, the trend lines in both figures show a decrease in accessions, compared to Princeton in the first figure there is a very modest increase in accessions. This changes if the data is limited to the examination of purchases only (Figure 2.2), where all three trends show a decrease. This can be explained by the fact that a university art museum relies more heavily on donations than do the other two institutions.<sup>133</sup> Overall, the consideration of donations here is less important given that the argument is that an inefficient legal regime and illicit trade have negatively impacted the ability of U.S. institutions to continue collecting antiquities through purchases on the international market. It is, however, instructive to conduct this comparison as it illustrates the interaction between donations and acquisitions over time. It follows that Figure 2.2 is more relevant, and it also shows that over the past ten years the levels of acquisitions through the art market diminished and remained low—which is of crucial importance to the argument of this Article.<sup>134</sup> There are multiple explanations for this, including the tightening of the market, the extensive restrictions on exports, the significant risks of prosecution, and curatorial decisions to buy fewer artifacts as a response to shifting institutional practices.

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130. Acquisition levels are reported starting in 1983, since the data on acquisitions by the Getty is not accurately reported in official publications before this year. There are ways to identify acquisition patterns for years before 1983, but it would not be as accurate as the set that is presented. Another reason for choosing the 1980s as a starting date to compare acquisition trends is the fact that this decade had the highest number of acquisitions that had to be returned to Italy by the Getty. See Gill & Chipindale, *From Malibu to Rome*, *supra* note 3, at 206.

131. See FELCH & FRAMMOLINO, *supra* note 1, at 276, 324. Felch and Frammolino explain that in 1939 Getty acquired his first antique object, a terracotta sculpture, at a Sotheby's auction, and continued to collect antiquities for his private personal collection until 1953, and after 1953, every acquisition was made on behalf of the museum. *Id.* at 276. By the time of Getty's death in 1976, the collection included approximately 11,000 objects; today, it comprises approximately 44,000. *Id.* According to Getty's will, press accounts and federal tax forms from 1977, the gift to the museum included sixty-four acres of land in Malibu worth \$3.1 million, an art collection valued at \$3.6 million, \$17 million in cash and four million shares of stock worth \$662 million. *Id.* at 324.

132. Conversation with Sharon Cott, *supra* note 125; Conversation with James Steward, *supra* note 125.

133. Conversation with James Steward, *supra* note 125.

134. Survey Release, Ass'n of Art Museum Dirs., Survey Shows Museum Antiquities Purchases Are Less than 10% of Global Trade (Feb. 7, 2006), available at [http://www.aamd.org/newsroom/documents/AAMDAntiquitiesSurveyRelease\\_FINAL](http://www.aamd.org/newsroom/documents/AAMDAntiquitiesSurveyRelease_FINAL).

## B. ACQUISITION CODES AND THE CALL FOR PROVENANCE

Another factor that can explain the decreasing trend in antiquities acquisitions in recent years is the enactment of stricter acquisition policies by museums and art institutions. Ethical codes in connection with antiquities acquisitions have existed for a long time, but the standards they set out have evolved over time; what is considered negligent according to the principles prevailing today used to be acceptable in the past, including the recent past. In particular, the understanding of ethical acquisition behavior has shifted over the past decades. Although the 1970 UNESCO Convention played a significant role in planting the seeds for improved scrutiny of prior ownership documentation, the practice of requiring pre-1970 documentation did not generally materialize until Italy's investigations of Medici, Hecht and True. Actual documentation of the place of origin of an artifact is still not legally required, as this may sometimes prove impossible to establish; however, the call for provenance requirements is not contained in most U.S. institutions' acquisitions codes.<sup>135</sup> To illustrate these points, this discussion will refer to the code of ethics of the Association of Art Museum Directors (AAMD) and then move on to consider recently adopted internal acquisition policies of U.S. museums.

In the past, ethical codes and acquisition policies drafted by museum associations encouraged the making of good faith inquiries into the provenance of an object before its acquisition could take place.<sup>136</sup> If such provenance could not be cleared, the rules required foregoing the transaction, although they did not mandate its preclusion.<sup>137</sup> One indicative example can be found in the code of ethics of the AAMD, which declares that a "director must not knowingly allow to be recommended for acquisition—or permit the museum to acquire—any work of art that has been stolen . . . or illegally imported into the jurisdiction in which the museum is located."<sup>138</sup> Yet even if such statements sound strict, there are gaps. Export controls are not specifically mentioned nor is there a precise standard of knowledge as to whether an object is stolen. It could refer to theft in the traditional sense and exclude its application to illicitly traded items—and it allows for instances where such knowledge is suspected but not established. Under this reading, museum officers could still acquire objects with undocumented provenance that may have been removed in violation of a country's patrimony laws. Finally, there is no penalty associated with noncompliance with the AAMD code of ethics, and no action has ever been taken by the AAMD or the U.S.

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135. See BD. OF TRS., J. PAUL GETTY TRUST, POLICY STATEMENT: ACQUISITIONS BY THE J. PAUL GETTY MUSEUM (2006), available at [http://www.getty.edu/about/governance/pdfs/acquisitions\\_policy.pdf](http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf); see also PRINCETON UNIVERSITY ART MUSEUM, ACQUISITION POLICY (2007) (on file with author); *Collections Management Policy*, METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/about-the-museum/collections-management-policy> (last modified Nov. 12, 2008) (stating the MET's acquisition policy in section IV).

136. FELCH & FRAMMOLINO, *supra* note 1, at 88, 181.

137. *Id.*

138. ASS'N OF ART MUSEUM DIRS., PROFESSIONAL PRACTICES IN ART MUSEUMS 8, 17 (2011), available at [http://aamd.org/about/documents/2011ProfessionalPracticesinArtMuseums\\_000](http://aamd.org/about/documents/2011ProfessionalPracticesinArtMuseums_000).

government against any museum officer for acquiring illicitly traded objects.<sup>139</sup>

These loopholes make this and other similar codes and acquisition statements weak tools to combat the problem of illicit trade. Much is still left to the discretion of the individual institution, and current practices vary widely. What should be required of antiquities departments is an active investigation into the provenance of the object, including all prior available documentation (export permits, sale records, inheritance papers, published references, etc.), and strict limitations with regards to the acquisition of recently surfaced objects.<sup>140</sup> The latest versions of the internal acquisition policies of the institutions in question, including the 2006 Getty policy statement on acquisitions, the 2007 acquisition policy of the Princeton Museum and the 2008 amendments to the collections management policy of the Met, contain such provisions and mandate substantial levels of research before making an acquisition or accepting a donation.<sup>141</sup> These changes seem to have played out positively. The General Counsel of the Met claims that the level of due diligence for each acquisition has substantially increased, and in 2010 the Museum of Fine Arts (MFA) in Boston hired a curator of provenance to research the origin and movements of both objects proposed for acquisition as well as the ones already present in the collection.<sup>142</sup> In 2008, the AAMD set up a web portal that requires museums to file statements in relation to acquisitions that do not meet their acquisition policy and explain their reasoning; museums have been complying by listing acquisitions and attaching explanations.<sup>143</sup> These are welcome changes, especially considering the educational role that contemporary museums have attached to their collecting role. It is unfortunate, however, that they became effective so late, as it appears that the cut-off date for buying unprovenanced

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139. *Id.*; see also Lee Rosenbaum, *AAMD: A Toothless Watchdog*, CULTUREGRRL (June 26, 2006), [http://www.artsjournal.com/culturegrll/2006/06/aamd\\_a\\_toothless\\_watchdog.html](http://www.artsjournal.com/culturegrll/2006/06/aamd_a_toothless_watchdog.html).

140. An orphan is an unprovenanced archaeological object, not necessarily one that recently surfaced. The problem with fostering orphans is an avenue for further research for the following reasons. If the unprovenanced object is documented in the sense that it is catalogued and studied although its provenance and context is unknown, this measure would not necessarily help prevent looting. The acquisition and policy statements of the museums mentioned here—and of most museums in general—do prohibit their acquisition. Unless the object does not simply surface from the void, in which case the suspicion of it being looted is strong, its owner should trade and keep it, and it should be studied and exhibited. If the studies establish clear provenance, restitution should be the right response. By trading an unprovenanced object in the sense described above, the market will allocate it to a safe place without encouraging looting. It would therefore be desirable if reviewed acquisition policies recognized the peculiar position of orphans. See also Press Release, Ass'n of Art Museum Dirs., *The Association of Art Museum Directors Releases New Guidelines on Loans of Antiquities and Ancient Art 6* (Feb. 27, 2006), available at [http://aamd.org/papers/documents/Loans\\_and\\_PressRelease.pdf](http://aamd.org/papers/documents/Loans_and_PressRelease.pdf) (discussing developing guidelines for due diligence in the context of loan issuances).

141. See BD. OF TRS., J. PAUL GETTY TRUST, *supra* note 135; *Collections Management Policy*, *supra* note 135.

142. Conversation with Sharon Cott, *supra* note 125; see also Derek Fincham, *A New Museum Position: Curator of Provenance*, ILLICIT CULTURAL PROP. (Dec. 13, 2011), <http://illicit-cultural-property.blogspot.com/2011/12/new-museum-position-curator-of.html>.

143. *Registry of New Acquisitions of Archaeological Material and Works of Ancient Art*, ASS'N OF ART MUSEUM DIRECTORS, <http://aamdobjectregistry.org/Antiquities> (last visited Jan. 5, 2013).

antiquities became the date of enactment of such internal policies.<sup>144</sup>

All the above cited acquisition policies now require proof that the object in question was in circulation before 1970 or legally exported after 1970 for it to be acquired.<sup>145</sup> The significance of 1970 the threshold date for the application of more rigorous standards to the acquisition of archaeological material derives from the 1970 Convention.<sup>146</sup> Proving that an antiquity was in circulation before 1970 requires sale records, catalogues of past exhibitions, publications or other documentation acknowledging its existence; it also requires showing either that it was outside of its country of origin before 1970 or that it was legally exported after that date.<sup>147</sup> Archaeologist Colin Renfrew argues that there would be a clear benefit in the international community agreeing not to purchase undocumented objects excavated before 1970.<sup>148</sup> This formulation, he asserts, would no longer condone the buying of illicitly exported antiquities prior to that date but would also prevent the future acquisition of such objects.<sup>149</sup> Even though 1970 has been recognized as the boundary date by a number of influential associations, including the AAMD,<sup>150</sup> the reality is that 1970 is not cited explicitly in any national legal measure, which means that at the most it can be regarded as a consensus date. In other words, 1970 is a date to be considered from an ethical point of view. This does not block claims of works of art illicitly exported before 1970, if the

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144. See *supra* figs. 2.1 & 2.2.

145. *Collections Management Policy*, *supra* note 135, § IV(D)(3); see also *BD. OF TRS., J. PAUL GETTY TRUST*, *supra* note 135, at 1.

146. See 1970 UNESCO Convention, *supra* note 5.

147. Renfrew, *supra* note 116.

148. Colin Renfrew, Lecture at City University of New York: Combating the Illicit Antiquities Trade: A Time for Everyone (Jan. 15, 2009), available at <http://www.savingantiquities.org/our-work/media/podcasts/colin-renfrew-on-combating-the-illicit-antiquities-trade>; see also Renfrew, *supra* note 116 (“For, in theory at least, its [the 1970 date] application should make recently looted antiquities completely unsalable.”).

149. Renfrew, *supra* note 116.

150. Press Release, Ass’n of Art Museum Dirs., New Report on Acquisitions of Archaeological Materials and Ancient Art Issued by Association of Art Museum Directors 1 (June 4, 2008), available at <http://www.aamd.org/newsroom/documents/2008ReportAndRelease> (“[The report] [r]ecognizes the 1970 UNESCO Convention as providing the most pertinent threshold date for the application of more rigorous standards to the acquisition of archaeological material and ancient art. Widely accepted internationally, the 1970 UNESCO Convention helps create a unified set of expectations for museums, sellers, and donors. . . . [The report] [s]tates that AAMD members normally should not acquire a work unless research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970. [The report] [p]rovides a specific framework for members to evaluate the circumstances under which a work that does not have a complete ownership history dating to 1970 may be considered for acquisition.”); see also *AM. ASS’N OF MUSEUMS, STANDARDS REGARDING ARCHAEOLOGICAL MATERIALS AND ANCIENT ART 1* (2008), available at <http://www.ifar.org/upload/PDFLink49147a7825e13AAM%20-%20Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf> (“In addition, AAMD recommends that museums require documentation that the object was out of its probable country of modern discovery by November 17, 1970, the date on which the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was signed.”).

individual elements of a legal claim can be proved.<sup>151</sup>

### C. COOPERATION AGREEMENTS: RETURNS IN EXCHANGE FOR LOANS

The most significant impact of the stringent laws, the sustained presence of illicit trading and the subsequent scandals is the large number of returns that followed source country repatriation claims following investigations by source countries. Between 2005 and 2010, U.S. museums returned 102 objects to Italy and Greece.<sup>152</sup> Private collectors have also returned a number of objects.<sup>153</sup> For the most part, the objects returned were high quality and rare works acquired under dubious circumstances or with insufficient documentation after 1970.<sup>154</sup> Sometimes the returns were spontaneous, and at other times they were the result of lengthy negotiations between museum officials and the authorities of the source country claiming the objects. The course of such negotiations depended on the strength of the evidence of theft.<sup>155</sup> The outcome of these negotiations was recorded in agreements that set out the conditions of the returns. This section of the Article examines the negotiation procedures and the terms regulating the returns of artifacts contained in the cooperation agreements entered into by the Getty, the Met and the Princeton Museums with the Italian authorities. Special attention will be given to whether such returns were compensated with loans to the returnee, and, if so, details about these loans will be discussed, including the duration and the importance of the piece on loan. Overall, these agreements are important on two levels. First, they introduce a new model to resolve restitution disputes outside the judicial context based on negotiation and international cooperation, and second they show how the concept of long-term loans has worked in this setting.

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151. See Christopher Chippindale & David W.J. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. ARCHAEOLOGY 463, 470–71 (2000).

152. See FELCH & FRAMMOLINO, *supra* note 1, at 307.

153. See *id.* The authors explain that in addition to returns from museums, returns also came from private collections: eight from Jerome Eisenberg, fourteen from Shelby White, and 251 from the Aboutam brothers. *Id.* at 307; see also Elisabetta Povoledo, *Two Marble Sculptures to Return to Sicily*, N.Y. TIMES, B7, Sept. 1, 2007 (discussing recent returns to Italy); Conversation with Jeanette Papadopoulos, *supra* note 34 (explaining that, after failed attempts to remain anonymous, in 2002 millionaire Maurice Tempelman donated two acroliths to the University of Virginia Art Museum, which later returned them to Italy.).

154. For specific information on the returned objects, see David Gill, *Minerva: Holding Back on the Detail?*, LOOTING MATTERS (Nov. 10, 2007), <http://lootingmatters.blogspot.com/2007/11/minerva-holding-back-on-detail.html>; David Gill, *Shelby White, the Returns to Italy, and the Geneva Polaroids*, LOOTING MATTERS (Jan. 18, 2008), <http://lootingmatters.blogspot.com/2008/01/shelby-white-returns-to-italy-and.html>.

155. Conversation with Claire Lyons; *supra* note 125; Conversation with James Steward, *supra* note 125. Lyons explains that in 1999, Getty spontaneously returned three objects to Italy: Euphronios/Onesimos vase shards bought from different dealers over time, a Mithras torso, and a bust of Diadumenus. Conversation with Claire Lyons, *supra* note 125. Steward explains that in 2002, the Princeton Art Museum voluntarily returned to the Italian government an ancient Roman sculptural relief in its collection, having contacted the Italian authorities after the museum's own research revealed that the work was taken out of Italy without a legal export permit before the museum acquired it in good faith in 1985. Conversation with James Steward, *supra* note 125.

### 1. The Met's Cooperation Agreement with Italy

The 2006 collaborative agreement between the Metropolitan Museum of Art and Italy was the first agreement establishing formal cooperation between a U.S. institution and the Italian government in the broader context of combating illicit trade. It set the precedent for the agreements that followed.<sup>156</sup> The Met agreed to repatriate six pieces at different times: the Euphronios krater in 2008, the set of sixteen Morgantina silver vessels in 2010, and four additional items shortly after the agreement had been made.<sup>157</sup> Title to these objects was transferred immediately. In return, Italy agreed to loan the silver vessels from Morgantina to the Met for short-term exhibitions every four years and to provide loans of works of art of “equivalent beauty and importance to the [other] objects being returned.”<sup>158</sup> Former director of the Met Philippe de Montebello referred to this cooperation as “a highly equitable arrangement.”<sup>159</sup>

The agreement describes in detail the quality of the items that are to arrive on loan from Italy to compensate for the return of the Euphronios krater and the length of time for which they will be loaned. For the duration of the agreement, which is set at forty years, Italy will make four-year loans of predetermined items on a continuing and rotating basis.<sup>160</sup> The agreement specifically lists twelve items agreed to by the parties to be of “equivalent beauty and importance” to the Euphronios krater, objects that include very major pieces from prominent Italian archaeological museums.<sup>161</sup> In short, at least one of these twelve numbered objects will be on view at the Metropolitan instead of the Euphronios krater until the agreement expires.

In the past five years Italy held to the agreement by providing the Met with several items on loan: a Laconian drinking cup in 2006; three pieces, including a cup signed by the potter Euxitheos and painted by Oltos in 2008; and a terracotta kylix and the Moregine treasure in 2010.<sup>162</sup> Official statements report that the four

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156. Aaron K. Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 623 (2007). See generally Met-Italy Agreement, *supra* note 123.

157. *Statement by the Metropolitan Museum of Art on Its Agreement with Italian Ministry of Culture*, METROPOLITAN MUSEUM OF ART (Feb. 21, 2006), <http://www.metmuseum.org/about-the-museum/press-room/news/2006/statement-by-the-metropolitan-museum-of-art-on-its-agreement-with-italian-ministry-of-culture#>.

158. *Id.*; see also Met-Italy Agreement, *supra* note 123, § 4.1(b) (providing a list of twelve specific objects that could be suitable loans).

159. *Statement by the Metropolitan Museum of Art on Its Agreement with Italian Ministry of Culture*, *supra* note 157.

160. Met-Italy Agreement, *supra* note 123, § 4.1(b).

161. *Id.*

162. *Id.*; *Important Antiquities Lent by Republic of Italy on View at Metropolitan Museum*, METROPOLITAN MUSEUM OF ART (Feb. 19, 2010), <http://www.metmuseum.org/about-the-museum/press-room/news/2010/important-antiquities-lent-by-republic-of-italy-on-view-at-metropolitan-museum>. The further two pieces loaned in 2008 include a jug shaped as a young woman's head and a fourth-century B.C. vase of showing Oedipus solving the riddle of the sphinx. Lee Rosenbaum, *Euphronios' Last Day Is Sunday; Italy to Substitute a Jug, Cup and Vase*, CULTUREGRRL (Jan. 10,

loans of 2006 and 2008 are thought to provide a time-limited replacement for the Euphronios krater.<sup>163</sup> These statements are significant because they point to the fact that once outgoing loans have served as compensation for the returns and Italy has met the obligations of the agreement, there may no longer be any incentive for Italy to continue loaning objects to the Met.

## 2. The Getty's Cooperation Agreements with Italy and Greece

In 2006, to celebrate the opening of the renovated Getty Villa in Malibu, California, the Getty had asked Italy permission to borrow bronzes from the Archaeological Museum of Naples as part of a special exhibition.<sup>164</sup> The request was denied based on the lack of transparency of the Getty's acquisition practices and the presence of disputed objects in its collection; in fact, Marion True was being tried in Rome at the time.<sup>165</sup> According to the Italian deputy attorney general, who was directly involved in the negotiations in connection with restitution and exchanges with the Getty, the Italians took into consideration the Getty's lack of commitment to responsible acquisition standards and its presumptuous behavior.<sup>166</sup>

Between 2006 and 2007, Italy formally claimed forty-two objects from the Getty's collection. Negotiations resulted in the Getty agreeing to transfer forty objects to Italy on which the Getty is said to have spent more than \$44 million.<sup>167</sup> The list of items returned included the Cult Statue of a Goddess, also known as the Aphrodite, which would remain on display at the Getty Villa until 2010, in addition to several items that came from the Fleishman Collection, a very important and equally controversial collection that the Getty had partially acquired and partially received as a donation in 1996.<sup>168</sup> By 2007 no consensus as to a formal agreement could be found because of an ongoing and still unresolved dispute involving a bronze.<sup>169</sup> However, according to a 2009 joint statement from Italy and the Getty,

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2008), [http://www.artsjournal.com/culturegrl/2008/01/euphronios\\_last\\_day\\_is\\_sunday.html](http://www.artsjournal.com/culturegrl/2008/01/euphronios_last_day_is_sunday.html).

163. *Three Spectacular Vases Lent by Italy to Metropolitan Museum for Four Years Replace Euphronios Krater*, METROPOLITAN MUSEUM OF ART (Jan. 18, 2008), <http://www.metmuseum.org/about-the-museum/press-room/news/2008/three-spectacular-vases-lent-by-italy-to-metropolitan-museum-for-four-years-replace-euphronios-krater> ("These loans come to the Met in exchange for the return of the Euphronios krater to Italy."); *see also* Rosenbaum, *supra* note 162.

164. Hugh Eakin, *Italy Goes on the Offensive with Antiquities*, N.Y. TIMES, Dec. 26, 2005, at E1.

165. *Id.*

166. Telephone Conversation with Maurizio Fiorilli, *supra* note 116.

167. *See* FELCH & FRAMMOLINO, *supra* note 1, at 198, 304; *see also* Gill & Chippindale, *From Malibu to Rome*, *supra* note 3, at 206 (confirming that most of the tainted objects that had to be returned were acquired by Getty curator Marion True during the 1980s.).

168. *See* FELCH & FRAMMOLINO, *supra* note 1, at 124. Felch and Frammolino explain that in 1994 the Getty agreed to buy thirty-three objects from the Fleischmans for \$20 million. *Id.* at 144. The next year, the Fleischmans donated their collection, amounting to 288 objects, to the Getty; this donation was very controversial because 90% of the pieces have no ascertained provenance and around the same percentage surfaced after 1970. *Id.*

169. Conversation with Claire Lyons, *supra* note 125. She explains that this lack of consensus is because of the ongoing discussion relating to the Statue of a Victorious Youth and the outcome of

the two parties “agreed to broad cultural collaboration that will include loans of significant art works, joint exhibitions, research, and conservation projects.”<sup>170</sup> In the same year the Getty received two important pieces on loan from the Museo Archeologico di Napoli and one from the Museo Archeologico di Firenze.<sup>171</sup> Although the objects from Naples were being loaned to the Getty for an initial period of two years (i.e., from 2009 to 2011), one of the loans, the Ephebe as a Lampbearer, has been renewed for another two years, thereby allowing the Getty to keep it until 2013.<sup>172</sup>

In 2010, an agreement formalized the cultural collaboration that had already started between the two parties and provided the Getty with further loans from Italy.<sup>173</sup> One of them, the Chimaera of Arezzo, had never left Italy before.<sup>174</sup> The senior antiquities curator at the Getty explains that conservation institute at the Getty provided conservation services to some of the objects on loan: a new seismic isolation base was created for the Agrigento Youth statue, and a new display vitrine was produced for the Gela Krater.<sup>175</sup> In early 2012, several objects from the archaeological site of Morgantina in central Sicily arrived at the Getty Museum in view of their future display at the exhibition entitled, “Sicily: Art and Innovation Between Greece and Rome.”<sup>176</sup> Through this cooperation agreement, which is to last twenty-five years, the Getty has been able to build solid relationships not only with the ministry in Rome, but with individual archaeological museums as well as Italy’s *sovrintendenze*, the specific regional boards that yield vast power over Italian culture.<sup>177</sup>

Between 2006 and 2007, four antiquities, including a Thasian relief, a Boeotian stele, a funerary wreath and the statue of a woman known as a kore, were returned to Greece following an official claim.<sup>178</sup> In 2011, following the restitution of further two objects acquired in the 1970s (fragments of a grave marker and a Greek language inscription), an agreement setting out a framework of Cultural Cooperation was signed by the J. Paul Getty Museum and the Ministry of Culture of the Hellenic Republic.<sup>179</sup> Commenting on the restitution of the two fragments of

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ongoing legal proceedings, which are still underway in Pesaro, Italy. *Id.*

170. Press Release, *supra* note 123.

171. See Press Release, The Getty Trust, Extraordinary Bronze Statue Excavated from Pompeii Goes on View at the Getty Villa (May 6, 2009), available at [http://www.getty.edu/news/press/center/naples\\_bronze.html](http://www.getty.edu/news/press/center/naples_bronze.html).

172. Conversation with Claire Lyons, *supra* note 125.

173. *Id.*

174. Telephone Conversation with Maurizio Fiorilli, *supra* note 116.

175. Conversation with Claire Lyons, *supra* note 125.

176. *Id.*; see also *Future Exhibitions and Installations*, GETTY, <http://www.getty.edu/visit/exhibitions/future.html> (last visited Dec. 26, 2012).

177. Conversation with Jeanette Papadopoulos, *supra* note 34.

178. See Press Release, The Getty Trust, Ministry of Culture for the Hellenic Republic and J. Paul Getty Museum Sign Agreement Finalizing Return of Objects to Greece (Feb. 7, 2007), available at [http://www.getty.edu/news/press/center/getty\\_greece\\_wreath\\_kore\\_release020707.html](http://www.getty.edu/news/press/center/getty_greece_wreath_kore_release020707.html).

179. See David Bomford, *A Landmark Antiquities Agreement with Greece*, GETTY IRIS (Sept. 22, 2011), <http://blogs.getty.edu/iris/a-landmark-antiquities-agreement-with-greece/>.

a grave marker, the senior antiquities curator of the Getty explains that “it was more a gesture of cooperation because the fragments fit with other fragments in the museum in Greece; it was the logical gesture, the right thing to do.”<sup>180</sup> Greece agreed to loan objects to the Getty; 190 loans from numerous Greek institutions have now been confirmed in view of the upcoming exhibition entitled “Heaven and Earth: Art of Byzantium from Greek Collections,” which will take place in 2014.<sup>181</sup>

### 3. Princeton’s Cooperation Agreement with Italy

In 2007 Princeton University agreed to return eight out of fifteen disputed antiquities to the Italian government.<sup>182</sup> The agreement completed negotiations that began in April 2006; Princeton would immediately transfer ownership of the eight objects to Italy, although it would hold onto four of them as loans for an additional four years.<sup>183</sup> An addendum to the agreement was signed in June 2011, according to which the University transferred title to eight further works of art to Italy.<sup>184</sup> As part of the agreement, Italy agreed to lend Princeton an unspecified number of works of art of “great significance and cultural importance,” and to give Princeton faculty and students “unprecedented access” to Italian archaeological sites and materials.<sup>185</sup> This last point is significant because it is consistent with the commitment of a cultural institution, which is part of a leadership research university, to prioritize the advancement of archaeological scholarship.<sup>186</sup> The schooling and research element that access to Italian archaeological sites may give is crucial to the educational mission of Princeton University because it gives art history and archaeology scholars new research material to advance their work and careers.

In addition to the four objects that will stay at the Princeton Museum, since 2007 two additional objects were loaned from Italy for an initial four-year term. These objects, a bronze vessel of a hydra and a marble head, are classified by the director of the Princeton Museum as “anchor objects, of such quality that they have the capability of having the deepest teaching impact.”<sup>187</sup> He further explains that such impact comes in two ways: through course-related work at the university’s art and archaeology departments and through the mission of public engagement with the

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180. Conversation with Claire Lyons, *supra* note 125.

181. *Id.*; see also *Future Exhibitions and Installations*, *supra* note 176.

182. Cass Cliatt, *University Art Museum, Italy Sign Antiquities Agreement*, PRINCETON WKLY. BULL., Nov. 12, 2007, at 3, available at <http://www.princeton.edu/pr/pwb/07/1112/art/>.

183. *Id.*

184. *Princeton University Art Museum, Italy Reach New Antiquities Agreement*, PRINCETON U. (Jan. 25, 2012) <http://www.princeton.edu/main/news/archive/S32/75/13K74/>.

185. *Id.*

186. See Elisabetta Povoledo, *Princeton to Return Disputed Art to Italy*, N.Y. TIMES, Oct. 27, 2007, at B7 (“What’s unique about this agreement is that it is calibrated to favor cultural exchanges,” Mr. Fiorilli said. “It’s the right accord for a university. We hope both sides will profit from it.”).

187. Conversation with James Steward, *supra* note 125.

local community, including the museum's docent program.<sup>188</sup>

#### 4. The Significance of Cooperation Agreements

These agreements represent "a new deal" in this context because they delineate a cultural project based on reciprocity that is much broader than mere restitution.<sup>189</sup> These cooperation agreements are contracts between states and foreign nationals, which are different from responsibilities under an international treaty such as the 1970 UNESCO Convention. It was crucial for Italy that U.S. museums would take responsibility for their actions in a direct way by agreeing to resolve future controversies through a collaboration that stems from a commitment to the cause of combating illicit trade.<sup>190</sup> By becoming party to the 1970 UNESCO Convention, the U.S. Department of State made the same commitment, but signing the cooperation agreements bound individual private institutions to specific duties.

Overall, these accords show how negotiation presented several advantages over other judicial remedies because they enabled the parties to fully evaluate and agree on specific sets of facts and priorities. Altogether the above brief analyses have shown that the provision of loans in exchange for the restitution of artifacts has proved to be a successful strategy that has enabled museums to continue exhibiting high quality items. All agreements discussed above waive the possibility of litigation for any of the objects at issue. Several other U.S. institutions, including the MFA in Boston and the Cleveland Museum of Art, have also negotiated cooperation agreements that included the provision of long-term loans when required to return artifacts to Italy.<sup>191</sup> The deputy attorney general for Italy confirms that other museums have recently gotten in touch with him to establish connections and start negotiations.<sup>192</sup> The willingness to negotiate and find mutually convenient terms is the result of Italy's use of loans to leverage the restitution of objects, and of U.S. museums' dependence on access to Italian cultural property to run some of their programs.<sup>193</sup> Although most of these agreements are drafted broadly, thus implying that the cooperation may last for longer periods of time,<sup>194</sup> it is unclear whether source countries will continue lending their masterpieces to U.S. institutions once the loans given in exchange for

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188. *Id.*

189. See Met-Italy Agreement, *supra* note 123, pmbl. §§ G, H. The museum "deplores the illicit and unscientific excavation of archaeological materials" and "is committed to the responsible acquisition of archaeological materials and ancient art according to the principle that all collecting be done with the highest criteria of ethical and professional practice." *Id.*

190. Telephone Conversation with Maurizio Fiorilli, *supra* note 116; Conversation with Jeanette Papadopoulos, *supra* note 34.

191. Press Release, Museum of Fine Arts, Bos., and Italian Ministry of Culture, Museum of Fine Arts, Boston and Italian Ministry of Culture Sign Agreement Marking New Era of Cultural Exchange (Sept. 28, 2006) available at <http://www.mfa.org/collections/art-past/italian-ministry-culture-agreement>.

192. Telephone Conversation with Maurizio Fiorilli, *supra* note 116.

193. *Id.*

194. *Id.* (confirming that the approximate duration of these agreements is between twenty and forty years).

the returned items have expired. One could hope the warm relationship continues, but it might not.

### III. LEASING ANTIQUITIES

The main issue seems to be that antiquities departments of U.S. museums are severely restricted in their acquisition strategies because the licit market in antiquities is narrow, and it is becoming increasingly difficult to acquire legitimately provenanced objects on the art market. These departments have come to rely on cooperation agreements with source countries for the provision of new high quality pieces to exhibit. Loans through these recently negotiated partnerships have proved very successful and have made it possible for U.S. institutions to associate their public images with unique objects. However, as the above analysis has shown, these loans were made in view of the return of artifacts, and it is unclear whether Italy and other source countries will continue lending their masterpieces to U.S. institutions once loans for the returned items have expired. Notwithstanding their success, it is probably not realistic to assume that a structure based on loans through partnerships can satisfactorily supplement the licit trade in antiquities, especially considering that there is also a constant high demand coming from private collectors and other institutions that have not negotiated cooperation agreements.<sup>195</sup>

The demand for antiquities in the U.S. market is much broader than the demand met by such agreements, and to be satisfied it would require a substantial flow of transactions.<sup>196</sup> Furthering the lending strategies that began with cooperation agreements and turning them into leases could provide a sound addition to the traditional collecting routes. The development of a rental market through leases has the potential to overcome some of the limits of the international trade in cultural property described above: ownership issues are not resolved by passing proprietary rights for an indefinite period of time, thereby enabling the country of origin to maintain final patrimony rights and ultimate jurisdiction over the object. In addition, given that a lease differs from a sales contract in that it offers only a temporary possessory interest, most legal restrictions contained in patrimony laws would not be applicable.<sup>197</sup> Overall, the development of robust leasing mechanisms would undercut sales on the black market by replacing acquisitions: the longer duration of such leases would reduce shipping and insurance costs, and it would make the lease more similar to an acquisition and therefore more attractive

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195. Maria Baugh, *Antiquities: The Hottest Investment*, TIME MAG., Dec. 12, 2007, <http://www.time.com/time/business/article/0,8599,1693792,00.html>; see also Stephen Wilmot, *Antiquities: The War of Art*, FIN. TIMES (June 23, 2011), <http://www.ft.com/intl/cms/s/0/be1859ba-9caf-11e0-bf57-00144feabdc0.html#axzz2JRHPFX9Y>.

196. *Id.*

197. Both the relevant Italian and Greek laws apply to sales contracts. See Legge 1 giugno 1939, n. 1089 (It.), amended by Legge 1 marzo 1975, n. 44 (It.), Legge 30 marzo 1998, n. 88 (It.), and Legge 30 marzo 1998, n. 100 (It.); Nomos (1932:5351) O nomos Arxaiotitwn [The Antiquities Act], 1932 (Greece).

to a potential lessee.

#### A. FROM LENDING TO LEASING ANTIQUITIES

Once the loans made by Italy have fulfilled the obligations of the repatriation agreements, other incentives will need to be found in order to maintain cooperation. Partnerships could be extended to continue providing U.S. museums with new pieces to exhibit by regulating loans not as compensation for returned items, but as transactions that would involve either the payment of a fee, exchanges for other artifacts, scholarly and conservation work or anything else the parties are willing to negotiate. This seems to be a fair approach that would allow different institutions to seek out loans in return for a variety of options that would provide direct cash incentives or would indirectly increase the value of the artifact.<sup>198</sup> Museums with outstanding collections can propose exchanges of objects, institutions with conservation institutes can offer conservation work, those with research centers can provide scholarly publications, and museums with large endowments can pay a fee. Combinations should be possible too, as long as there is a counterpart in the collection of the museum seeking the exchange.

All of this has, in part, been happening already. The Getty's senior curator of antiquities confirmed that most loans into which the Getty has entered a result of the cooperation agreement with Italy were part of broader scientific projects to study these objects, publish scholarly work about them, and learn from them through conservation work.<sup>199</sup> The production of a seismic base for the Agrigento Youth statue mentioned above confirms this and further implies that having one of the top conservation institutes in the world gives the Getty substantial leverage when negotiating a loan.<sup>200</sup> Museum officers seem to agree that although loans can be costly—mainly because of the transaction costs of drafting the loan contract, but also because of transport and insurance costs—they are also immensely profitable in ways not immediately quantifiable in monetary terms.<sup>201</sup> A balance has to be struck when an institution decides whether incurring these costs will have positive

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198. See Neil Brodie, *Academic Facilitation of the Antiquities Market*, in INTERNATIONAL MEETING ON ILLICIT TRAFFIC OF CULTURAL PROPERTY, *supra* note 112, at 103, 104 (arguing that scholarly work and publication increases the value of an object by a considerable amount).

199. Conversation with Claire Lyons, *supra* note 125.

200. *Id.*; see also *supra* text accompanying note 175 (discussing the Getty's production of a seismic base for the Agrigento Youth statue).

201. See Conversation with James Steward, *supra* note 125. Steward explained that loaning fees for items are often nominal (\$500 to \$1000) and offset by the costs involved, which involve larger sums of money to cover insurance, administrative expenses, transport and packaging of the object. *Id.* Steward notes the expense of \$10,000 for the special shipping crate for a particularly precious and fragile vase. *Id.*; see also the Arts and Artifacts Indemnity Act, Pub. L. No. 94-158, 89 Stat. 844 (1975) (codified as amended at 20 U.S.C. §§ 971-977) (providing for reduced insurance costs for American museums borrowing objects from abroad as part of traveling exhibitions). The Arts and Artifacts Indemnity Act was amended in 2007 to establish a parallel domestic indemnity program with up to \$5 billion coverage for domestic exhibitions taking place at one time. Pub. L. No. 110-161, § 426(2), 121 Stat. 1844, 2151 (2007) (amending 20 U.S.C. § 974(b)).

externalities. The externalities in question are mainly connected with exposure, which will be addressed below in Part III.B.

When asked about the incentive for source countries to continue lending once the returns have been “covered,” the director of the Princeton Museum takes the position that source countries have a critical interest in establishing and maintaining good relationships with important U.S. institutions, because this cooperation can be extended to other art-related fields and because the work such loans foster “increases the historical value of such objects through research and public exposure, advancing knowledge of individual cultures and our shared cultural heritage through the appreciation of great works of art.”<sup>202</sup> This is certainly true, but there is no doubt that U.S. museum directors are conscious of the fact that they too need to foster good relations with Italy in order to access ancient material. The director of the Princeton Museum adds that at present, out of fear of drawing attention to particular at-risk objects and thereby exposing themselves to claims for repatriation, some museums have become loathe to display or publish insufficiently documented objects; as a consequence, there have been fewer publications recently.<sup>203</sup> This is one of a number of what can be termed unintended consequences of vigorous repatriation efforts. The effect of driving numerous objects already held in public collections “underground” is clearly against the interest of everyone—museums, scholars and the general public—and it reminds us that the intention of stricter policies is supposed to cut down on illicit trade, not on research, publication and public access. The public good is reflected in the notions of access, distribution and impact through scholarship and education. American museums are champions of keeping up these values through the quality of their exhibitions and publications and through the extent of their outreach to the public through educational programs.<sup>204</sup> The problems posed by the acquisition of cultural objects may be overcome with loans, as the standard is looser than that of acquisition policies, but there still is a need for transparency. That is part of the reason why the Princeton Museum is in the process of coming up with a policy on loans that requires disclosure of all known provenance and compliance with prevailing laws, bilateral agreements and provenance indications.<sup>205</sup>

What is in store for source countries like Italy in the future, once loans provided for by cooperation agreements have been granted and the demands of gratitude for restitution have been met?<sup>206</sup> Conservation work and fostering strong relationships

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202. Conversation with James Steward, *supra* note 125.

203. *Id.*

204. John Henry Merryman, *Museum Ethics*, 1 *ART & MUSEUM L.J.* 93 (2006), reprinted in JOHN HENRY MERRYMAN, *THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW* 568 (2d ed. 2009).

205. Conversation with James Steward, *supra* note 125. Princeton’s loan policy is stricter than the AAMD loan policy in that the AAMD policy does not require compliance with the laws of the country of origin. The AAMD policy guidelines also state that “[l]ong-term loans . . . should be evaluated under criteria comparable to those for acquisitions”; codes on acquisitions are stricter than codes regulating loans. Press Release, Ass’n of Art Museum Dirs., *supra* note 140.

206. See generally Elisabetta Povoledo, *Italy Makes Its Choices of Antiquities to Lend Met*, N.Y.

with prestigious institutions are certainly important factors, but they are hard to quantify in monetary terms since they are fundamentally barter transactions. The problem with loans when understood as barter transactions—transactions in which objects are exchanged for either other objects or relevant services—is that such transactions require a coincidence of wants. The exchange costs involved in a barter transaction are high: negotiations between the parties to determine whether the transaction is in their favor can be lengthy and do not always result in a successful the transfer. Adam Smith recognized the limitations of barter transactions long ago: “[I]n order to avoid the inconveniency of such situations, every prudent man . . . must have at all times by him a certain quantity of some one commodity or other, such as he imagined few people would be likely to refuse in exchange for the produce of their industry.”<sup>207</sup> From here stems the need to find a medium of exchange that can be used for any good or service and create a general purchasing power.

If the quantity of loans must expand to cover the high demand for antiquities in the U.S. market, it is necessary to have a readily verifiable measure of compensation for such instruments, such as a lending fee. The payment of a fee would transform an uncompensated loan into a lease. Since the development of an efficient leasing market depends on systematic mechanisms of value assignment and price formulation, the introduction of fees would regulate lending instruments and give them a more uniform structure. This would lower transaction and coordination costs and enable such arrangements to occur on a broader scale. The same contractual terms as in loan contracts could be kept with regards to insurance, duty of care, maintenance, governing laws, etc., and a clause relating to the fee payment would be included. Such fee would be based on the leasing term and the significance of the object; moreover, the price would indirectly reflect when the prestige of showing a new artifact for an extended period of time provides an adequate substitute for full ownership. Museums would pay money for the temporary possession of objects instead of buying only when they see a benefit accruing that cannot otherwise be obtained. Activity on a leasing market will help to establish prices that respond to the interaction of supply and demand and give leasing options a more consistent structure that would make them easier to trade. If the costs of negotiating a lease are still higher than reducing the transaction costs involved, then barter will occur instead.

A substantial expansion of the licit trade in cultural objects could be accomplished if source countries and market countries become active participants in a leasing market. The implementation of a leasing model could become a viable way to continue collecting once cooperation agreements have expired. Recent successful examples of the international leasing of works of art include the Louvre agreeing to lease between two and three hundred artworks to its counterpart in Abu

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TIMES, Mar. 15, 2006, at E2 (“Maurizio Fiorilli, a lawyer for the Italian state, said that Italy’s offer of the funerary sets was a show of ‘good will’ toward foreign institutions that agree to return illegally excavated booty. ‘It’s a generous offer,’ he said.”).

207. 1 ADAM SMITH, WEALTH OF NATIONS 20 (J.M. Dent and Sons Ltd. 1964) (1910).

Dhabi over a ten-year period for a total sum of \$247 million.<sup>208</sup> Another example is the King Tut exhibit, which was leased to a private agency on behalf of the Egyptian government and circulated in London and the United States between 2005 and 2008 for a fee of \$5 million per city.<sup>209</sup> This trend of monetizing collections could also be adopted for classical antiquities. For instance, when the Art Institute of Chicago opened new galleries of Greek, Roman and Byzantine art in November 2012, it paid a lender's fee for borrowing fifty-one objects from an international institution.<sup>210</sup> For the moment, discrete negotiations continue, and it is possible Italy may want to see tangible returns on the loans it grants in the future.

### B. THE QUALITY ARGUMENT: INCREASING GOODWILL

Knowledge about the preferences of the demand is a crucial feature if a leasing market is to replace some of the outright acquisitions. In the past decades the curators of the selected museums have focused on the acquisition of prominent pieces as their purchase and exhibition brought prestige and recognition to their respective institutions.<sup>211</sup> Given that this Article focuses on museums with established collections and that recent trends have shown that decisions on acquisitions favor fewer high quality objects as opposed to larger numbers of lesser pieces, the argument will concentrate on how leasing high quality objects can enhance museum collections, exhibitions and displays.

There is a special prestige that can arguably only be conferred by the ownership of a masterpiece. Besides the aesthetical value, not only its rarity and uniqueness draws visitors and experts to view a masterpiece at its hosting institution, but also the educational and scholarly works of researchers and curators both help to create an association between the museum and the piece. By inspiring exhibitions, publications and conferences, such high quality pieces have the power to increase goodwill toward their holding institutions—a rise in reputation may result from the possession of certain objects—and the added prestige may be such that these objects become trademarks of a collection or a museum in general. The Getty's Cult Statue of a Goddess (also known as Aphrodite) is one of the best examples because it illustrates the willingness of an institution to invest a large sum of money

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208. Alan Riding, *The Louvre's Art: Priceless. The Louvre's Name: Expensive*, N.Y. TIMES, Mar. 7, 2007, at E5 ("France is profiting handsomely from this deal: in exchange for \$247 million, it will rotate between 200 and 300 artworks through the Louvre Abu Dhabi during a 10-year period."). See generally *Le Projet Scientifique et Culturel*, AGENCE FRANCE-MUSÉUMS, <http://www.agencefrancemuseums.fr/fr/le-louvre-abou-dabi/le-projet-scientifique-et-culturel/> (last visited Jan. 8, 2013) (discussing the Louvre Abu Dhabi's scientific and cultural project).

209. *Talk of the Nation, New Blockbusters: Traveling Exhibits* (NPR radio broadcast Jun. 1, 2005) (transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=4675421>); see also Laura Porter, *King Tut Exhibition Returns to London*, ABOUT.COM LONDON TRAVEL (Mar. 14, 2007), <http://golondon.about.com/b/2007/03/14/king-tut-exhibition-returns-to-london.htm>.

210. E-mail from Karen Manchester, Chair & Curator of Ancient Art, Dep't of Ancient & Byzantine Art, Art Inst. of Chi., to author (Feb. 11, 2013) (on file with author).

211. Conversation with Sharon Cott, *supra* note 125; Conversation with Claire Lyons, *supra* note 125; Conversation with James Steward, *supra* note 125.

for a trademark piece. The Getty paid \$18 million, the highest sum ever paid by an antiquities department for a single work, to acquire this exclusive object even though there was a strong suspicion that the object had been recently looted.<sup>212</sup> Similarly, the Sabina at the MFA and the Met's Euphronios krater are both iconic symbols that conform to the high quality masterpiece analysis above and were bought under suspicious circumstances for large sums of money. Both were later returned to Italy.<sup>213</sup>

Recent acquisitions as well as the loans made by Italy involve prestigious items, the possession of which has the potential to improve reputation. The deputy attorney general for Italy confirms that "museums ask for the best pieces on view, they don't really care about the items in storage."<sup>214</sup> This is not necessarily true according to other commentators, who think that the material in storage in source countries can include very valuable pieces for which there is a strong demand, especially if acquired in exchange for conservation work.<sup>215</sup> Ultimately, it depends on a combination of aesthetic values, the solidity of the cultural content that the object carries with it, and the context the work would find in a borrowing or leasing institution. Leasing items from storage would have many advantages; for instance, it would not frustrate the expectations of visitors who expect to view specific pieces in their home institutions, which might otherwise discourage art-related tourism in the long-run due to the fact that visitors may incur the risk of not finding a particular known object on display in its expected location. In addition, such loans might relieve storage burdens on the lending museums, as well as benefit the public good, by providing access to works of art that might otherwise languish in repositories.

The senior antiquities curator at the Getty asserts that, presently, decisions to collect are based on a number of observations, including the quality features of an item, its fit within the context of the collection, and the impact it can have on the public, experts as well as visitors.<sup>216</sup> The Princeton Museum director agrees in part, noting that quality comes before all other considerations because generally high quality pieces will fit into every well-established museum collection, and such works are therefore in greatest demand.<sup>217</sup> The curator for Greek and Roman art at the Carlos Museum, located at Emory University, makes decisions based on "filling gaps" and would therefore borrow or acquire objects for which there is no comparable work in the collection already.<sup>218</sup> Either way, the problem is that there are not enough high quality objects with cleared provenance on the market, and museums with similarly strict acquisition policies are likely to find themselves in

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212. See generally FELCH & FRAMMOLINO, *supra* note 1 (narrating the exact story of the negotiations and how some Getty officials acted in order to retain the object).

213. *Id.* at 307.

214. Telephone Conversation with Maurizio Fiorilli, *supra* note 116.

215. Telephone Conversation with Jasper Gaunt, Curator of Greek and Roman Art, Carlos Museum, Emory Univ. (May 2, 2012).

216. *Id.*

217. Conversation with James Steward, *supra* note 125.

218. Telephone Conversation with Jasper Gaunt, *supra* note 215.

competition for the same works.<sup>219</sup> Before source nations claimed works, the demand of museums centered on beautiful, glamorous and aesthetically pleasing objects, regardless of provenance issues. Nowadays, provenance carries real value. Reviews of recent auction catalogues confirm that a sound provenance can drive up prices considerably and is becoming an increasingly important parameter when deciding on acquisitions.<sup>220</sup>

The fact that repatriations have often involved very important objects is a strong indicator that high quality objects with a clear provenance are difficult to acquire on the licit market.<sup>221</sup> Objects that have surfaced recently with an obscure provenance are most likely the product of illicit excavations; otherwise, they would have been published and their existence and whereabouts would be known to experts in the field. In contrast, previously discovered masterpieces are known to be in specific locations, and their owners have tended to keep them due to the scarcity of supply that would make it difficult to acquire substitutes. Furthermore, when important pieces with legitimate provenance are sold, the seller usually has a strong interest in publicizing the fact in order to attract the highest bidder. Indeed, significant competition from museum bidders seeking such objects has grown in recent years. If curators are after objects for which there is very little supply on the international market, the adoption of leases should become the rational choice for furthering collections because such temporary measures would not trigger the application of import restrictions and would make the circulation of artifacts easier. The situation is complicated by the retentionist efforts of most patrimony laws, which specifically identify high quality objects and prohibit their trade.<sup>222</sup>

### C. ITALIAN AND GREEK LAWS REGULATING LOANS

Considering that loans have been successful in the past, and that the demand for high quality pieces remains high, the next issue becomes whether international treaties and the laws regulating loans in source countries are structured in a way

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219. Conversation with James Steward, *supra* note 125.

220. Silvia Beltrametti, Proposed Title: The Impact of Recent Legal Developments on the Sale Prices of Antiquities Sold at Auction (research project in progress) (on file with author). Through this research, I analyze empirically the impact of the prosecutions of Schultz and Marion True on the way ancient art is sold. I am looking in particular at which factors drive the prices of antiquities and have assembled a database of approximately 17,500 classical and Egyptian antiquities sold by Sotheby's and Christie's in the past seventeen years. I am using this data to show that the value of provenance has risen. A strong provenance can drive prices up considerably in comparison to the base estimate that the auction house sets before the sale.

221. See Efrat, *supra* note 7, at 85 (“[A]cquisition today carries significant risks for museums, especially the risks of legal battles, either over civil claims for return or over criminal charges. Museums caught in unlawful possession of antiquities pay a hefty price in terms of reputation and public trust as well as loss of the acquisition funds. The chilling effect of litigation has increased the reliance on loans and has made museums more cautious about accepting antiquities from collectors.”); see also Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L. J. 597, 598 (2007).

222. See, e.g., Legge 1 giugno 1939, n. 1089 arts. 30–41 (It.).

that would make leasing to foreign institutions possible. When inspecting national laws, the length of time that an object can be kept abroad becomes crucial: the longer the term of the lease, the more similar it becomes to an acquisition, and, its likelihood of serving as a trademark piece increases. A longer leasing term and a strong association value will make a lease relatively more valuable to the lessee.

Although, the export controls supported by the 1970 UNESCO Convention lead to the over-retention of cultural material by source countries, as described in Part I, the Convention's preamble states: "[T]he interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations."<sup>223</sup> The concept of exchange is elaborated upon in a subsequent UNESCO Recommendation, which promotes international exchanges understood as "transfers of ownership, use or custody of cultural property between States or cultural institutions in different countries—whether it takes the form of the loan, deposit, sale or donation of such property—carried out under such conditions as may be agreed between the parties concerned."<sup>224</sup> This is a clear encouragement to find procedures that allow for the circulation of artifacts. The preamble of the Recommendation also includes a specific reference to the fact that there is a marketable surplus of objects in source countries that would be welcomed by institutions in other countries.<sup>225</sup>

The bilateral agreement into which Italy and the United States entered after the enactment of the CPIA incarnates, to a certain extent, a spirit of reciprocity and cooperation involving exchanges: it grants restrictions on imports of Italian artifacts into the United States but also includes a provision referring to long-term loans of archaeological material.<sup>226</sup> Article II.E of the agreement states that Italy will use its best efforts to promote each long-term loan of objects for research and education for as long as necessary.<sup>227</sup> A success story illustrating the effect of such a provision involves a five-year traveling exhibition starting in 2004 of the

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223. 1970 UNESCO Convention, *supra* note 5, pmb1.

224. General Conference of the United Nations Educational, Scientific and Cultural Organization, Nairobi, Kenya, Oct. 26, 1976–Nov. 30, 1976, *Recommendation Concerning the International Exchange of Cultural Property*, Records (Vol. I), Annex I 16, 17 (Nov. 26, 1976), available at <http://unesdoc.unesco.org/images/0011/001140/114038E.pdf>.

225. See *id.* at 16 ("[M]any cultural institutions, whatever their financial resources, possess several identical or similar specimens of cultural objects of indisputable quality and origin which are amply documented, and . . . some of these items, which are of only minor or secondary importance for these institutions because of their plurality, would be welcomed as valuable accessions by institutions in other countries . . .").

226. 2001 U.S.-Italy Memorandum of Understanding, *supra* note 93.

227. CULTURAL PROP. OFFICE, U.S. DEP'T OF STATE, GUIDELINES: LOANS OF ARCHAEOLOGICAL MATERIAL UNDER THE 2001 U.S.-ITALY MEMORANDUM OF UNDERSTANDING 2 (2001) ("[L]onger term loans may be permitted when there is a significant research or education component in the exhibit program . . ."). A list of examples follows, covering longer loans when substantial conservation could be carried out in the United States, scholarly publications may result from the cooperation and comparisons with objects in U.S. museums can advance knowledge on the larger historic context or other connections between the objects. *Id.*

Stabiano frescoes, which were previously kept in storage, to nine museums in the United States.<sup>228</sup> In 2001, the year in which the bilateral agreement was signed, Italian cultural heritage laws only permitted exports for displays for one year. Longer terms were granted only if significant research and educational components were at stake.<sup>229</sup> Although “Italy has always been accused of having an excessively rigid legislation concerning loans,” notes the deputy attorney general for Italy, “in 2004, with the introduction of the Italian Cultural Heritage Code, the term was extended to four years, and since 2011 renewals are possible.”<sup>230</sup>

The key provision of the 2004 Italian code with regards to the temporary exit of cultural artifacts is article 67, which permits the provisional circulation of objects if such circulation is in pursuit of cultural cooperation agreements with foreign institutions.<sup>231</sup> Before exiting the country, a certificate must be obtained from the relevant export office, which, *inter alia*, indicates the value of the object and the party responsible for its safekeeping when abroad.<sup>232</sup> Although article 67 sets four years as the maximum circulation duration, the possibility of renewing the temporary export license for a further term was introduced in 2011.<sup>233</sup> The deputy attorney general for Italy argues that “loans can be renewed for a further term if convincing arguments concerning the advancement of research or conservation are made.”<sup>234</sup> He further explains that whereas the notion of high quality conservation work is in many ways self-explanatory, for it involves the enhancement of the objects and their value, the significance of a research element, when it comes to renewing a loan, is mainly related to the study of an art object in a new cultural context.<sup>235</sup> Extensions will be granted if the object in question can be studied as part of a set of objects that enable visitors and scholars to have access to what he defines as “a path of cultural testimony.”<sup>236</sup> Although conservation initiatives and solid research proposals carry substantial weight, the decision seems to rest on whether a scientific reinterpretation of the object in question will take place

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228. Telephone Conversation with Jasper Gaunt, *supra* note 215; *see also* Letter from Patty Gerstenblith, *supra* note 46 (listing other loans given out to US museums through the bilateral agreement); In Stabiano 2005–2008 U.S. Tour Current Schedule, *available at* [http://www.niaf.org/events/images/RAS\\_Events.pdf](http://www.niaf.org/events/images/RAS_Events.pdf) (last visited Jan. 8, 2013) (naming the following nine U.S. institutions: (1) National Museum of Natural History Washington, DC; (2) Arkansas Arts Center, Little Rock, AR; (3) Nevada Museum of Art, Reno, NV; (4) San Diego Museum of Art, San Diego, CA; (5) Michael C. Carlos Museum of Art, Emory University, Atlanta, GA; (6) Toledo Museum of Art, Toledo, OH; (7) Elvehjem Museum of Art, University of Wisconsin Madison, WI; (8) Dallas Museum of Art, Dallas, TX; and (9) The Cummer Museum of Art and Gardens, Jacksonville, FL).

229. Telephone Conversation with Jasper Gaunt, *supra* note 215.

230. Telephone Conversation with Maurizio Fiorilli, *supra* note 116.

231. Decreto Legislativo 22 gennaio 2004, n. 42 (It.).

232. *Id.* at arts. 42, 71 (regulating the powers of the Italian competent authorities, the Sovrintendenze).

233. Legge 12 luglio 2011, n. 206 arts. 1, 16(bis) (It.) (modifying Decreto Legge 22 gennaio 2004, no. 42 art. 67 (It.)).

234. Telephone Conversation with Maurizio Fiorilli, *supra* note 116.

235. *Id.*

236. *Id.*

engaging unexplored contexts.<sup>237</sup>

An inspection of loans provided by Italy in pursuit of the cooperation agreements with several U.S. museums shows that the negotiation of renewals has been successful in a number of cases.<sup>238</sup> This demonstrates that decisions will be weighed on a case-by-case basis according to the above criteria, with a strong focus on the creation of novel contextual relationships, and that loans will be extended after a careful balancing of interests. Depending on the object and on the institution welcoming it, a four-year loan may be an adequate timeframe to advance the exhibiting purposes of the museum and of scholarship, but not necessarily enough time to establish that association between the object and the institution that delivers goodwill and prestige. The occurrence of renewals shows that longer term loans are an option if the situation requires it, which enables all parties to the decision to adjust their interests.<sup>239</sup>

The 2004 Italian code is silent on the possibility of requesting monetary compensation for a loan, which makes it an option in theory. In practice, a new law amending the existing code by introducing provisions related to monetary compensation would make leasing an established option. Considering that the Italian code was changed frequently since it was introduced in 2004,<sup>240</sup> and that several of its provisions, such as the duration of the export licenses, have been applied with flexibility, further changes that would enable a leasing model (as described above) could be an option for the future. The deputy attorney general for Italy claims to favor the idea: “Pushing in that direction would create resources to de-store, valorize and study more items.”<sup>241</sup>

The Greek cultural heritage code of 2002 provides that the loans of state-owned antiquities to museums or cultural institutions for display as well as educational purposes must “take place on condition of reciprocity” and that the item in question cannot be of particular significance to the cultural heritage of Greece.<sup>242</sup> The maximum negotiable term is five years, though it may be renewed.<sup>243</sup> Whereas the emphasis on a relationship of reciprocity is understandable, the particular significance argument is more obscure. Article 25(2) of the code states that particular significance in this context means that the object is not needed to complete an existing local collection and that the unity of important objects

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237. *Id.*

238. Conversation with Claire Lyons, *supra* note 125; *see also* Hugh Eakin, *Italy Goes on the Offensive with Antiquities*, N.Y. TIMES, Dec. 26, 2005, at E1.

239. *See* Cultural Policy Research Inst., *supra* note 54, at 38 (“We see within Italy the willingness to change their laws to allow for the display of objects in the United States that were being borrowed from Italy for 6 months. Now it’s up to 4 years, and I think if the process continues, it will continue to be even longer than that. So I think we see that, in fact, these countries are willing to allow this type of shift and change.”).

240. *See* Disegno di Legge 21 novembre 2011, n. 962 (It.) (draft bill); Disegno di Legge 21 novembre 2011, no. 3016 (It.) (draft bill); *see also* Legge 5 dicembre 2005, n. 251 (It.).

241. Telephone Conversation with Maurizio Fiorilli, *supra* note 116.

242. Nomos (3028:2002) art. 25 *Gia tin prostasia twn Arxaiotitwn kai en genei tis Polistikis Klironomias* [On the Protection of Antiquities and of the Cultural Heritage in General], 2002 (Greece).

243. *Id.* art. 25(1) (on the loan and exchange of movable monuments that belong to the State).

constituting a collection shall not be broken.<sup>244</sup> Although it is not entirely clear how the assessment is made, it seems that an object can be loaned unless the object is a true landmark in Greece. Currently the loans from Greece that have followed from cooperation agreements have not completed their course, it is therefore difficult to predict whether the Greeks will apply their cultural heritage code in a flexible way similar to that of the Italians.

#### D. INTERNAL LIMITATIONS ON THE USE OF RESOURCES

Resources available to antiquities departments of museums to further their antiquities collections vary. The Getty, the Met and the Princeton Museum have substantial endowments and can afford to buy the items in which they have a substantial interest. In particular, some past acquisitions required big sums of money within a short period of time: the Met bought the Euphronios krater in 1972 for \$1.2 million; the Getty spent \$3.95 million for a bronze statue of an athlete in 1977, \$9.5 million for the statue of a kouros in 1985 and \$18 million for the statue of a goddess in 1988.<sup>245</sup>

Decisions on acquisitions are typically made by a museum's board of trustees after the antiquities curator in charge makes the case for acquisition. The Getty and the Met tend not to have specific funds allocated exclusively to antiquities acquisitions; depending on how the trustees view the acquisition plan of a specific department in relation to other departments, they will decide where to invest during a given year.<sup>246</sup> The set-up of an institution is also important: whereas the Met is run as charity, the Getty is managed as a private operating foundation, and, in order to retain its tax-advantaged status, it is legally required to spend a specified portion of its endowment assets or investment income.<sup>247</sup> This portion amounts to 4.25% of endowment assets each year.<sup>248</sup> Given that the endowment figures are publicly available, it is possible to calculate the exact amount the Getty Trust is supposed to spend to run its four programs, the foundation, the conservation institute, the research institute and the museum.<sup>249</sup> This gives an indication of the institution's

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244. *Id.* art. 25(2).

245. See FELCH & FRAMMOLINO, *supra* note 1, at 14–18, 25, 64, 95.

246. Conversation with Sharion Cott, *supra* note 125; Conversation with Claire Lyons, *supra* note 125.

247. See 26 U.S.C. §§ 4942(j)(3), 501(c)(3) (2012); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 7.26.6.3.4; *Financial Information*, GETTY TRUST, <http://www.getty.edu/about/governance/finance.html> (last visited Jan. 30, 2013); *Annual Reports*, METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/about-the-museum/annual-reports> (last visited Jan. 30, 2013).

248. JOHN WALSH & DEBORAH GRIBBON, *THE J. PAUL GETTY MUSEUM AND ITS COLLECTIONS: A MUSEUM FOR THE NEW CENTURY* 76 (1997); see also S. Nuray Akin et al., *Rushing to Overpay: Deadlines, Search, and Purchase-Contingent Benefits 2* (unpublished paper) (on file with the author).

249. Calculations of the endowment values are on file with the author. The museum program of the Getty includes two separate collections: the Getty Center in Los Angeles, which houses pre-twentieth-century European paintings, drawings, sculpture, manuscripts, decorative arts, and nineteenth- and twentieth-century photographs; and the Getty Villa in Malibu entirely dedicated to antiquities from ancient Rome, Greece and Etruria.

wealth. However, what is more important in this context is the fact that because nothing in these institutions' internal regulations seems to prevent the use of such resources to lease antiquities, the method of acquiring artworks seems to stay within the discretion of the president and the trustees.<sup>250</sup>

The situation is more complex in the case of the Princeton Museum. Princeton's endowment for the acquisition of artworks is substantial. "Our assets for purchasing works of art are greater than the ones of any other university museum," states its director, and "this has to do with the exceptional historical levels of giving by university alumni, including the fact that sixty percent of Princeton's alumni donate annually. Some make restricted gifts for art acquisition, and some donate works of art directly."<sup>251</sup> However, the complication lies in the fact that there are two types of transactions taking place when an object is donated to a museum—the first occurs between the donor and the museum and the second between the museum and the seller—and some funds donated for art acquisitions are held in trust for purchases only.<sup>252</sup> The fact that some of these funds are restricted and do not take into account other collecting options would likely be a limiting factor for the implementation of leasing strategies. If a donor dies without leaving instructions for the trustee, the terms of the trust cannot be changed to include leasing.<sup>253</sup> On the other hand, when the donors are alive, or if a donor's instructions are more open-ended, the terms governing the use of funds could be modified to include leasing if market developments favor this method of collecting antiquities. This does not exclude the introduction of innovative instruments such as specific fundraising or the creation of new endowments for the leasing of art.

Although in the end it is a question of internal negotiation and policies, it appears that the museums discussed in this Article and several others have sufficient resources to support antiquities departments, and, if leasing becomes the most efficient way to show and study cultural objects, the relevant funds could be allocated in the same way in which they are allocated to an acquisition. Other than those restricted funds that were set up for acquisitions only, there generally do not appear to be internal policies in place that would discourage or prohibit the collecting of antiquities through leases.

#### IV. CHANGING ART SYSTEMS

Changes in the governmental attitude and structure in the United States, as well as in source countries, could facilitate the negotiation of new trade instruments such as leases and strengthen cooperation in terms of solving the legal issues surrounding the international trade of cultural objects. Assuming that a U.S. museum is willing to spend money on leasing an artifact, the lending institution of

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250. See BD. OF TRS., J. PAUL GETTY TRUST, *supra* note 135; *Collections Management Policy*, *supra* note 135, § IV.

251. Conversation with James Steward, *supra* note 125.

252. *Id.*

253. *Id.*

a source country must agree to the terms of the lease. In many source countries, ministries of culture make these decisions, while individual museums make these decisions in the United States. The institutional differences between the U.S. system and ministry-based systems deserve a brief analysis.<sup>254</sup> The following discussion determines the potential role of regulation in correcting the present inefficiencies in this area of law.<sup>255</sup>

When asked about whether she would welcome the introduction of leasing strategies as a new way of collecting artifacts, the Getty senior antiquities curator hints that the prospect of earning income through loan fees would involve the risk of taking decisions based on finance rather than what is best for the object.<sup>256</sup> The Getty senior curator voices a very common sentiment in this field: the value of education that goes with the research of art objects stands in stark contrast with the political apparatus and bureaucratic decisions as to monetary value—a contrast which would create the risk of confusing priorities in a way that is not in the public's interest.<sup>257</sup> She further argues that “cooperation agreements have to be viewed in the context of diplomacy: such exchanges and collaboration emphasize a much broader international relation point.”<sup>258</sup>

It is, however, difficult to anticipate what kind of diplomacy is possible between a privately run nonprofit organization and the ministry of culture of a source nation. A governmental ministry can by its nature engage in diplomatic exchanges, which is what has been happening with the signing of the cooperation agreements. On the other hand, as well-intended as they might be, U.S. museums are pursuing their private interests and not the interests of a national art policy.<sup>259</sup> U.S. art museums such as the Getty and the Met are private institutions founded upon and sustained by private donations of funds or works of art.<sup>260</sup> Their activities follow their own rules and are decided upon by an independent board of appointed trustees.<sup>261</sup> The actions of private museums are only marginally prescribed by government

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254. See John Henry Merryman, *Art Systems and Cultural Policy*, 15 *ART ANTIQUITY & L.* 99 (2010) (comparing the American art system to other countries' systems).

255. See DANIEL F. SPULBER, *REGULATION AND MARKETS* (1989) (on regulatory economics in general).

256. Conversation with Claire Lyons, *supra* note 125.

257. Telephone Conversation with Jasper Gaunt, *supra* note 215; see also Dick Netzer, *Cultural Policy: An American View*, in *HANDBOOK OF THE ECONOMICS OF ART AND CULTURE* 1223, 1233 (Ginsburg and Throsby eds., 2006). When the National Endowment for the Arts and the National Endowment for the Humanities were established in 1965, some opposed the creation of these bodies because they feared the politicization and bureaucratization of the cultural sector. See EDWARD C. BANFIELD, *THE DEMOCRATIC MUSE: VISUAL ARTS AND THE PUBLIC INTEREST* (1984); MICHAEL MACDONALD MOONEY, *THE MINISTRY OF CULTURE: CONNECTIONS AMONG ART, MONEY AND POLITICS* (1980); Merryman, *supra* note 254 (discussing the deductible status of gifts to non-profit institutions). Merryman argues that by allowing tax deductions for gifts to museums and thereby forgoing taxable income for its own use, the U.S. government is indirectly supporting such institutions. *Id.* at 103–04.

258. Conversation with Claire Lyons, *supra* note 125.

259. Merryman, *supra* note 254, at 108, 113–14.

260. *Id.* at 100–02.

261. *Id.* at 100.

authorities.<sup>262</sup> Furthermore, professional organizations, such as the AAMD, the American Association of Museums (AAM) and the Association of Art Museum Curators (AAMC), are self-governing bodies.<sup>263</sup> Even though the associations are certainly important from a public perspective because the standards represent a consensus on broad issues concerning museum administration, they remain privately regulated entities.<sup>264</sup>

The model of the U.S. museum operated by private funds has been successful if we consider the role in education and scholarship and the impressive collections of U.S. institutions. However, whenever such institutions commit a misdeed, such as the acquisition of objects of doubtful provenance, they are rarely held accountable.<sup>265</sup> Even though state attorney generals have jurisdiction to hold museums accountable for their wrongful actions, there has been much less oversight in the area of art acquisitions.<sup>266</sup> For instance, when the Attorney General of California opened an inquiry into the Getty's misuse of funds in 2002, it was almost all related to the personal expenses of its chief executives and not to the acquisition of tainted artifacts.<sup>267</sup> Thus, the existing regulatory environment relying on the attorney general's power to sanction museums has not been working satisfactorily in this area. Few and ineffective enforcement mechanisms, little transparency and inadequate disclosure highlight major failures in the system; the buying of illicitly excavated artifacts and the resulting scandals have shown that the model of the responsible institution based on standards of professional practice has often failed in the context of the antiquities trade. This suggests that the introduction of legal standards regulating behavior and standardizing processes could benefit the public's trust in institutions and the credibility of U.S. institutions and the U.S. art system in general, and supplement standards of professional practice in fostering accountability in this field.<sup>268</sup>

Until now, the role of the Department of State in setting standards in the cultural field has been minimal. There is nothing comparable to a ministry of culture in the United States, and although there is a Bureau of Educational and Cultural Affairs, it seems that no specific body has decision-making power over general cultural policy

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262. *Id.*

263. *Id.* at 104.

264. *Id.*

265. See Merryman, *supra* note 204; see also John Henry Merryman, *Are Museum Trustees and the Law Out of Step?*, ARTNEWS, Nov. 1975, at 24.

266. Merryman, *supra* note 204, at 574.

267. Robin Fields & Jason Felch, *State Examines Spending at Getty*, L.A. TIMES, Aug. 2, 2005, at B1.

268. See Paul L. Joskow & Roger C. Noll, *Regulation in Theory and Practice: An Overview*, in STUDIES IN PUBLIC REGULATION 1, 35–36 (Gary Fromm ed., 1981). Joskow and Noll refer to the “Normative Analysis as a Positive Theory,” according to which regulation is the manifestation of political pressure brought to bear by the public, which in turn demands that a market failure be corrected. *Id.* The establishment of regulatory bodies was meant to eliminate inefficiencies engendered by market failure. See *id.*; see also W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 2–3 (1995).

issues.<sup>269</sup> There is, however, a Cultural Heritage Center, a sub-branch of the Office of Policy and Evaluation, which is a sub-branch of the Bureau of Educational and Cultural Affairs.<sup>270</sup> This marginalized entity administers the implementation of the 1970 Convention through the Cultural Property Advisory Committee, the committee that evaluates the bilateral agreements discussed above.<sup>271</sup> The staff of this small governmental body is mainly composed of archaeologists.<sup>272</sup> This can best be understood as the result of effective lobbying by the Archaeological Institute of America (AIA) for the passage of the CPIA.<sup>273</sup> The AIA convinced Congress that the concern for the loss of scientific knowledge due to illicit trade was legitimate, and that ratifying the 1970 Convention would make the United States, as a market country, an example of leadership in this area.<sup>274</sup> This way, archaeologists captured governmental influence and turned it to their own benefit, not only by effectively lobbying for regulation in the first place, but also by occupying staff positions of the Cultural Heritage Center.<sup>275</sup> The lobbying efforts of the other groups of interested parties such as museums and dealers were less organized and persuasive, and their interests are less well-represented.<sup>276</sup> This resulted in the granting of import restrictions that are broader than the ones envisioned during the Congressional debate.<sup>277</sup>

On the international level, one of the major standard setting bodies in the ambit

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269. See Merryman, *supra* note 254, at 104–05. He explains that the National Endowment for the Arts (NEA) and the National Endowment for the Humanities (NEH) come closest to a U.S. governmental institution devoted to culture and the arts. *Id.* However, their budgets are limited if compared with the resources of some U.S. museums, and although their activities resemble those of an official authority, their impact is not particularly strong. *Id.* at 105. These endowments are very important in supporting their projects, but they cannot substitute a centralized unit that has decision-making power with regards to cultural heritage. When these endowments were established by Congress in 1965 as independent federal agencies, Congress thought about giving these institutions more powers and therefore bringing them closer to the idea of a ministry of culture was aired, but there was a reluctance to make art and culture a subject for bureaucratic administration. *Id.* at 104 n.21.

270. *Organizational Structure*, BUREAU EDUC. & CULTURAL AFF., <http://eca.state.gov/about-bureau-0/organizational-structure> (last visited Feb. 13, 2013).

271. See 19 U.S.C. § 2605 (2012).

272. See Efrat, *supra* note 7, at 47–49, 53–60 (explaining the exact lobbying strategies of archaeologists, dealers and collectors).

273. *Id.*

274. *Id.*

275. DEREK FINCHAM, *JUSTICE AND THE CULTURAL HERITAGE MOVEMENT: USING ENVIRONMENTAL JUSTICE TO APPRAISE ART AND ANTIQUITIES DISPUTES* 35 (2012); see also George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3 (1971). Stigler explains that even though regulatory agencies may have been created with the intention of correcting market failures, as time goes by the agency is subject to “capture” by the interest group they regulate, and invariably will tend to issue regulations to improve the group’s well-being. *Id.* at 3. As its name suggests, Stigler’s paper founded what has come to be called “the economic theory of regulation.” Gary Becker argues that the result is therefore one produced by the collective pressure of all groups—not a single entity. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 3 Q.J. ECON. 371 (1983) (presenting a theory of competition among pressure groups for political influence).

276. See Efrat, *supra* note 7, at 78–85.

277. *Id.*

of culture is UNESCO. At UNESCO, countries are represented by their own diplomats, who are governmental officers appointed by the executive departments of their central governments.<sup>278</sup> For instance, a diplomat representing Italy at UNESCO meetings on cultural matters has to execute orders coming from Italy's ministry of culture. Lacking such an entity, members of the U.S. mission to UNESCO coordinate with the Bureau of International Organizations in Washington, D.C. or with the Cultural Heritage Center when the 1970 Convention is at issue.<sup>279</sup> The minimal involvement of the U.S. government in cultural issues and the lack of a national art policy impact the work of the United States at an international level because the concerns and interests of major American players, such as museums, collectors and dealers, are not sufficiently taken into account when formulating international policy.

In many source countries, such as Italy and Greece, the picture looks very different. Decision-making power with regard to cultural issues stays with the relevant highest governmental authority, the ministry of culture. These systems are centralized and hierarchical: state officers decide on cultural policies, programs and operations, and all major museums in source countries are public institutions. The central direction of the ministry supervises all areas relating to culture, including the permission to loan objects, the regulation of archaeological excavations, and the powers and duties of professional archaeologists and museum professionals. The public officers working in the ministries include politicians, lawyers, museum experts, archaeologists and other professionals. To date, the Italian ministry employs 25,000 people.<sup>280</sup> Decisions on loans of artifacts are made at three levels of the hierarchy: first, the individual museum has to agree; then, the regional office gives an opinion; finally, the ministry decides on the proposal.<sup>281</sup> In some cases an advisory body composed of high-ranking professionals sits in judgment to give an opinion if so requested.<sup>282</sup> The seats on the advisory body, as well as senior positions in regional offices, are elected positions, which means that politics inform decisions on culture quite directly.<sup>283</sup>

A problem with this set-up is that the officers who make decisions have been trained to think that the scientific character of archaeological research can only be accomplished if objects are understood and kept in their original context, not far

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278. Conversation with Carolyn Willson, Senior Legal Advisor, Permanent Delegation of the U.S. to UNESCO, in Paris, Fr. (Dec. 15, 2011).

279. *Id.*

280. See Legge 6 dicembre 2011, n. 201 (It.); see also Marta Romana, *Dallo "Stato-providenza" alla "cittadinanza culturale,"* IL GIORNALE DELL'ARTE (June 2012), available at <http://www.ilgiornaledellarte.com/articoli/2012/6/113600.html>.

281. Conversation with Jeanette Papadopoulos, *supra* note 34.

282. See *La struttura organizzativa*, MINISTERO PER I BENI E LE ATTIVITÀ CULTURALI, [http://www.beniculturali.it/mibac/export/MiBAC/sito-MiBAC/MenuPrincipale/Ministero/La-struttura-organizzativa/index.html\\_85114179.html](http://www.beniculturali.it/mibac/export/MiBAC/sito-MiBAC/MenuPrincipale/Ministero/La-struttura-organizzativa/index.html_85114179.html) (last updated Dec. 11, 2012) (describing the organizational structure and competence of the so-called "Scientific Committee for Archaeological Heritage" (Comitato Tecnico-Scientifico per i Beni Archeologici).

283. *Id.*; see also Conversation with Jeanette Papadopoulos, *supra* note 34.

away from the place from which they are excavated.<sup>284</sup> This fossilized attitude to exhibiting and collecting makes the case for the commoditization of antiquities problematic, as it would mean trading the promulgation of knowledge through scientific research for other values. However, the mentality of Italian bureaucrats appears to be changing. Such change in approach became clear with the recent introduction of several reforms in the cultural heritage field.<sup>285</sup> Over the past year, the Italian government introduced measures to facilitate tax deductions for donations and procedures to sponsor projects involving cultural heritage so that it would be easier for “private money” to fund cultural activities.<sup>286</sup> These major innovations in the Italian scenario enabled billionaire Diego Della Valle to fund the 25 million-Euro restoration project for the Colosseum in Rome.<sup>287</sup> The role of the state as sole promoter and financial supporter for culture is adapting to another reality based on new ways of sharing and promoting culture, as well as on the evolving financial needs of the cultural sector, which can no longer be wholly or sufficiently met by the state. These reforms reflect a new awareness that culture impacts the quality of the rights of citizenship and represent a meeting place for the integration of identities and a shared commitment.<sup>288</sup> The current Italian minister for culture defines this change of approach as “a movement towards cultural citizenship.”<sup>289</sup> This movement may well support a model that conceives of culture as an investment that can attract international resources, for instance, through the leasing of antiquities.

The deputy attorney general for Italy agrees that leasing could be a “viable option, a helpful model that would benefit the situation on both ends.”<sup>290</sup> Jeanette Papadopoulos, a director of the antiquities section at the Italian ministry of culture, is dubious about charging for leasing antiquities, stating that conservation work is beneficial to the object in a way that monetary compensation could not be.<sup>291</sup> This skepticism can be addressed in the following way: there should be no problem if monetary and scientific values coexist and if the revenues obtained through leases were used to improve the preservation of objects and the security of archaeological sites. This would require the establishment of an instrument that holds specific funds on trust for the purposes of research, preservations, etc., as opposed to the funds being mixed with the general monies of the national treasury. Another option would be to loan in exchange for the financing of specific cultural projects,

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284. Telephone Conversation with Maurizio Fiorilli, *supra* note 116; Conversation with Jeanette Papadopoulos, *supra* note 34.

285. Telephone Conversation with Maurizio Fiorilli, *supra* note 116; *see also* ISMAN, *supra* note 1, at 61.

286. Romana, *supra* note 280.

287. *Colosseo, contratto Della Valle regolare*, CORRIERE DELLA SERA (Feb. 16, 2012), [http://roma.corriere.it/roma/notizie/cronaca/12\\_febbraio\\_16/colosseo-authority-appalto-regolare-1903312442594.shtml](http://roma.corriere.it/roma/notizie/cronaca/12_febbraio_16/colosseo-authority-appalto-regolare-1903312442594.shtml).

288. Romana, *supra* note 280.

289. *Id.*

290. *Id.*

291. Conversation with Jeanette Papadopoulos, *supra* note 34.

such as the excavation of a site or the renovation of a museum, although this does not solve the complications posed by barter transactions explained above. Overall, recent changes demonstrate that a more entrepreneurial vision is increasingly realistic.

The divide between the United States and the ministry-based systems is enormous, and this is best summarized in an intention-versus-rewards analysis. The intentions of the parties differ because, until now, Italy has had a politically charged ministry with little motivation to monetize scientific research, whereas the U.S. museum mentality is more oriented towards public education and engagement. The interest of a privately run museum is to provide its public and patrons with exhibitions that include prestigious objects explained in the new contexts that result from curatorial skill, insight and vision.<sup>292</sup> For instance, the interest of a museum director negotiating a cooperation agreement with a foreign ministry lies in obtaining the best possible deal in terms of loans, partnerships and exchanges that will profit his institution. On the other side, officers of a ministry have no interest in having important national objects kept abroad for an indefinite time. By granting loans, a source country is seeking help in combating illicit trade and encouraging international restitutions on a broader scale, as well as securing other forms of cooperation. Referring to the cooperation agreements, the deputy attorney general for Italy confirms that “the accords delineate a cultural project that is broader than the mere returns: loans are being used as cultural propositions towards the cause of combating illicit trade.”<sup>293</sup>

This asymmetry in interests and intentions does not preclude a mutually beneficial deal between source and destination countries. The realpolitik would consist of changing the reward system and making it such that the reputation of the parties and the conservation and security of objects and sites is achieved. Education and enjoyment do not require ownership interests in the destination countries; therefore, leasing could be a satisfactory option. Meanwhile, many source countries face financial difficulties and would benefit from leasing revenues. The problem up until now has been that nationalist and populist pressures have forced source countries to take an uncompromising retentionist position.<sup>294</sup> A market in leasing should relieve this pressure while also helping to undermine the black market.

## V. CONCLUSION

Combating illicit trafficking and the sustainable movement of objects is possible only through a strong spirit of cooperation. This Article has shown that the global trade in cultural material is plagued by several complexities that have created a

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292. See Ferdinand Eckhardt, *American Museums Seen Through the Eyes of a European*, 12 C. ART J. 131, 133 (1953).

293. Telephone Conversation with Maurizio Fiorilli, *supra* note 116.

294. Such a position is particularly strong in Turkey. See, e.g., Dan Bilefsky, *Seeking Return of Art, Turkey Jolts Museums*, N.Y. TIMES, Oct. 1, 2012, at A1.

climate of fear for museums, which resulted in a decline in trade. The prospect of facing criminal liability for importing an artifact deters museums from making new investments in such material. This is unfortunate, because museums play a special role in the shaping of cultural policy: besides being the safest places in which to keep art accessible, they are also in a unique position to push for a limited, legalized trade in cultural objects. At this moment in time, major scandals involving the buying of illicitly excavated artifacts by several prestigious institutions said to be carrying out their mission on public trust have tarnished the reputation of the antiquities market and raised anti-acquisition, pro-retention sentiments. This is an unwelcome development that ignores the fact that the 1970 UNESCO Convention was never meant to freeze the art market. The introduction of a new model for acquiring antiquities based on cooperation and complemented by long-term leasing would enable museums to continue carrying out their collecting activities and their educational function in an ethical way.

This Article has outlined how a leasing model for antiquities could be implemented. There are many advantages associated with the use of formal leases: they would allow objects to be studied and exhibited at foreign institutions for negotiable periods of time; they would enhance the value of the object as well as the exposure of the hosting institution; and they would also create resources for art-rich countries to be invested in the preservation of their cultural heritage. Most importantly, they would make it possible for objects to circulate yet, at the same time, stay under the ownership and jurisdiction of their respective source countries. This would prevent the risk of reputational and economic damage associated with acquiring unprovenanced objects. Considering the present situation of the antiquities market, where provenanced objects are scarce and prices high, the rational decision for museums should be to engage in leasing. Altogether, the success of loans through cooperation agreements is a strong indicator that leasing strategies have the potential of being successful as well, and in the long-run the development of such tools could support a good measure of the international demand.

Leasing also presents a good compromise in view of the nationalist versus internationalist debate. It would enable people around the world to be exposed to antiquities as the internationalists advocate, but still satisfy the nationalist interest by keeping the ownership interest with source nations. Although a more effective solution might be to change patrimony laws to allow for the sale of duplicates or material in storage—and in this scenario leasing would apply only to cultural treasures of a very high rank, namely the ones that source countries will refuse to sell—at this moment in time, a sales market is neither possible nor desired by source countries.

Leasing is a pragmatic solution, especially considering the scarce resources and the immense patrimonies that several countries need to protect. However, a great step towards implementation requires source countries' ministries to accept the trading of cultural material as a way to create resources. While we wait for a truly international approach to find its footing through more radical legal changes, the

development of a solid leasing system could not only reduce illicit trafficking by changing the conduct of the actors in the art market but also thereby provide a realistic and sensible solution to the present deficiencies in the antiquities market.