Museum Strategies: Leasing Antiquities

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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, which would make it possible for objects to circulate but at the same time stay under the ownership and jurisdiction of their respective source countries.

INTRODUCTION

Several scandals involving US museums buying illicitly traded ancient artifacts surfaced after the criminal prosecution of Marion True, ex senior curator for antiquities at the Getty. 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 40 of its most important objects acquired for a total of $44 million.1 The Getty case was a catalyst for several similar cases that followed: the Metropolitan Museum in New York returned a number of objects including the Euphronios krater to Rome and so did several other institutions, including the Museum of Fine Arts in Boston, the Cleveland Museum of Art and the Princeton Art Museum.2 Curators were found to pitch artifacts with a dubious provenance to the trustees of their respective institutions throughout nearly four decades and their negligence was not detected until source countries claimed some of the objects back.3 How could the internal processes of large and prestigious US institutions permit buying illicitly traded items? How could things go so wrong as to justify criminal prosecutions and more than 100 returns, and most importantly, how can US institutions continue collecting antiquities given these precedents?

The present paper addresses the problem of how US museums can continue collecting 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

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2 Id., Felch and Frammolino at 307.
movement of cultural property that developed in the past decades: the first conceives cultural artifacts as an integral part of a national cultural heritage and the second as property common to all mankind. In accordance with this distinction the world is divided in source nations, art rich countries such as Italy and Greece, that favor the more nationalistic approach and have enacted patrimony laws that prohibit the sale of their vast collections of cultural objects, and market nations, like the US, that favor the more cosmopolitan interpretation and would like objects to freely circulate and be available on the international art market. At the moment the nationalistic side seems to be prevailing because sovereign governments of source countries have enacted legislation that impedes the international movement of cultural artifacts and persuaded market nations of the necessity to aid them in their retention efforts. What is left is a scenario where the supply of such artifacts in source countries exceeds the demand, but the “surplus” can not be exported, whereas in market nations the demand exceeds the supply, but can not be satisfied by imports because the national and international laws in this area do not support it in practice.

The extensive restrictions on the export of ancient objects dictated by the patrimony laws of source countries have left the rising demand of museums and collectors in market countries unfulfilled. Faced with the diminishing supplies of legitimate objects, US museums seeking to enlarge their antiquities collections, started 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 artifacts. 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. In the US 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. 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 also translated in large numbers of artifacts being smuggled across national borders and sold on the black market. The present paper 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, since source countries like Italy and Greece have successfully been

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claiming the repatriation of illicitly exported objects, the acquisitions of antiquities by US museums reached overall very low levels. To overcome the legal limits of the international antiquities trade and to enable museums to further their collecting and educational goals in an ethical way this paper proposes a new avenue: the development of a rental market for ancient artifacts. In order to assess if a rental market is a viable option for furthering the collection and circulation of cultural property, the paper relies on interviews with museum officials, data about past acquisitions and the analysis of cooperation agreements between several US museums and source countries in connection with the restitution of illegally traded items. With the help of this data the present paper aims to shows 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 legal 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 no in depth analysis has ever been undertaken to show on what premise and how such leasing market could be developed. 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 suggesting 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. Their model is useful but incomplete because it lacks a legal perspective which is crucial to the issue. The contribution of the present paper is in the legal field; it presents the first legal and empirical study of leasing in the context of the antiquities trade. It builds on the work of Bator (1982), Gerstenblith (2001), Pearlstein (2005) and others who analyze the effect of the 1970 Convention and its implementation in the US, but 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. The impact on illicit trade is measured through the 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. With this exercise the paper intends to offer an alternative analytic framework to a sales market based on arguments favoring the introduction of a leasing market. This research project was prompted by the recent returns of artifacts from US’ museums to Italy and Greece, and given its empirical angle its scope is limited to inspecting

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.

The paper proceeds as follows. 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 licit trade in such objects but also induced 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 US. Section II examines the impact of illicit trade on collecting strategies and acquisition volumes of three main US museums with established antiquities collections: the Metropolitan Museum of Art, the J. Paul Getty Museum and the Princeton University Museum of Art. 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 US. In order to show how a leasing market for ancient artifacts could be developed in practice this part of the paper examines preferences of the demand as to what kind of objects would likely be leased, the Italian and Greek laws regulating the exit of artifacts on a temporary basis and potential restrictions in the use of resources available to US museums. Finally Section IV briefly addresses the differences between art systems in source countries and in the US.

I. THE LEGAL FRAMEWORK AND ILlicit TRADE

This section of the paper 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 will first address 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,10 it is worth summarizing the main thoughts behind the legal framework to laay a solid ground for the discussion that follows, which analyzes the impact of the existing legal regime on the trade in such objects. Throughout the paper the focus of the analysis on illicit trade and how leasing can potentially overcome this problem will be tested on classical artifacts originating from Italy and Greece put up for sale on the US 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 US.

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 most times it is impossible to know the true provenance of an object. In most countries covering grounds rich in archeological sites the regulation of cultural property is

10 Id.
performed by patrimony laws. Such laws solve the problem of discontinuity of title by declaring any archaeological object, excavated or not yet excavated from the national soil, property of the state. The ratio behind this is summarized by a UK 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.” 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 ministry. Sometimes the export of privately owned objects is circumscribed, for instance when the state can statutorily exercise the right of preemption.

Greece is famous for being the first nation to vest ownership of all of its antiquities within the state in 1834. 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 further states that “all ruins or other antiquities… found on national land or under it, on the sea bed, in rivers, public streams, lakes or marshes, are the property of the State.” In Greece all cultural property, including objects in private collections, is regulated in great detail by the national antiquities law. In similar fashion Italy’s first patrimony laws, of which the oldest dates back to 1902, then followed by the 1909 and the landmark 1939 laws, gave the Italian State broad power and exclusive competence to regulate cultural heritage. 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 archeological 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. By giving to the state the power to decide on the

12 Italian Law No. 1089/1939, Tutela delle cose di interesse artistico e storico (also known as Legge Bottai, the Minister for national Education under Mussolini’s government), Protection of objects of historical and artistic interest, at Arts. 30-41. See also legislation governing the import and export of cultural property for several other countries assembled by International Foundation for Art Research available at http://www.ifar.org/icpoel.php (last visited February 10, 2012) and Prott and O’Keefe, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (UNESCO 1988).
13 Id., Italian Law No. 1089, at Art. 31, 61.
14 Greek Law No. 10/22, May 1834, of Regency on the scientific and technological collections, on the discovery and preservation of antiquities and of their use, Official Gazette 22, 16 June 1834.
15 Id., Arts. 61, 62.
16 See Italian Law No. 185/1902, Italian Law No. 364/1909 and Italian Law No. 1089, supra note 12.
17 Id. at Art. 25 “The Minister for National Education, after consulting with the National Council of Education, Science and the Arts, can authorize the exchange of art objects with others, belonging to organizations, and private and foreign institutions and taking into consideration the precautions set out by the regulation.”, Art. 31 “Should the item be sold.. its price shall be determined by the Minister’s office”, Art. 36 “Anyone wishing to export objects listed in Art. 1 from the national territory must obtain a license. To do so a claim must be filed and the objects in question must be submitted to the office of exports together with a declaration of their value.”, Art. 39 “The Minister may acquire any object that represents a national treasure, as defined under this law, for the value stated in the declaration”, Art. 49 “Any object discovered fortuitously belongs to the State and the discoverer will be compensated by the Minister, either in cash or by being allowed to keep some of the objects

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circulation of cultural property and to impose penalties for non compliance, 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 letting ancient artifacts be traded and 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. For instance, the relevant Italian law provides that antiquities belonging to public bodies can only be deaccessioned if the ministry agrees to it and if several conditions regarding the proposed use of the work and its state of conservation are met. The contract of sale will include a list of prescriptions on where and how the good shall be kept and exhibited in order to guarantee its physical safety, public enjoyment and value enhancement. Antiquities belonging to private parties can be deaccessioned if similar conditions are met, and in every instance the ministry has to be notified, and can, if it chooses to do so within 60 days, exercise its rights of preemption for the same price as contained in the contract of sale. If the work has been determined to be of particular importance the code provides that although the buyer does not need to be an Italian national the object has to be kept on Italian soil. It can eventually be exported on a temporary basis if authorization from the ministry is obtained. In Greece the scenario looks similar, as a general rule national antiquities cannot be traded, unless the ministry grants a permit to sell and export an object. Here again the ministry is given the right to preempt the transfer. Overall, both systems rely on ministerial permission to deaccession and until now exportation has been very limited, mostly involving the sale of privately owned lesser antiquities. This narrow flow of legitimate objects could not satisfy the international demand for high quality ancient artifacts which was mostly met by illicitly exported items.

The most important supranational measure to address the illicit trade in cultural objects is the 1970 UNESCO Convention, an international treaty that meant to provide a framework

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19 Id.
20 Id. at Arts. 57-60.
21 Id. at Art. 54.
22 Id. at Arts. 66-67.
23 Greek Law No. 3028/2002 on the Protection of Antiquities and Cultural Heritage in General, Art. 21.1 “movable ancient monuments dating up to 1453 belong to the state in terms of ownership and possession, are imprescriptible and extra commercium.”
24 Id. at 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 reasonable time” and 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.
25 Id. at 28.5.
26 Interview with Jeanette Papadopoulos, Director, Management and International Circulation of the Archeological Heritage, Italian Ministry of Culture, conducted in Rome on July 5, 2012.
for cooperation among nations to combat the illicit trade of cultural artifacts.\(^{27}\) The Convention has a standard-setting function; it is not self-implementing and has to be ratified and transposed into national law before it becomes directly applicable.\(^{28}\) This instrument has now been ratified by 120 countries including the target countries of this paper: Italy, Greece and the US.\(^{29}\) The Convention urges each of its state parties to identify and protect cultural property present on their territory and to cooperate with other state parties in combating the dangers inherent in illicit trading.\(^{30}\) Its main purpose was to achieve a more uniform multinational regulation of the international antiquities market and to introduce a mechanism facilitating the restitution of illicitly traded cultural objects to their respective source countries.\(^{31}\) This repatriation mechanism allowed state parties to claim back cultural objects based on domestic legislative declarations of ownership resembling national patrimony laws, thereby aiding such laws in the retention of cultural objects.

Given that the present paper inspects the impact of illicit trade on the US market it will now turn to the implementation of the 1970 Convention in the US. The interest in and demand for ancient cultural objects from private collectors and museums has made the US one of the largest markets for foreign antiquities. Although most market participants opposed any regulation that would restrict the international trade in antiquities, the lobbying work of archeologists was organized and effective, and ultimately successful in persuading Congress to ratify the Convention, which was implemented into national law by the Cultural Property Implementation Act of 1983 (CPIA).\(^{32}\) The CPIA puts into place a mechanism that allows for

\(^{27}\) 1970 UNESCO Convention, *supra* note 5, at 4. Another major international convention concerning the regulation of cultural property is the Unification of Private Law Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNIDROIT), 34 ILM 1322 (1995), at the moment of writing UNIDROIT has 32 state parties, see [http://www.unidroit.org/english/implement/i-95.pdf](http://www.unidroit.org/english/implement/i-95.pdf) (last visited February 10, 2012). It is not thoroughly analyzed here because although the US played an active role in the drafting stages, a brief filed by a large consortium of museums and dealers persuaded the US Delegation not to sign it.


\(^{31}\) Id., “Considering that the 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” and “Considering that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations.” See also the 1976 Recommendation Concerning the International Exchange of Cultural Property “the 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.”

\(^{32}\) Cultural Property Implementation Act 1983, *supra* note 6, at 5. See Asif Efrat, *Protecting against Plunder: The United States and the International Efforts against Looting of Antiquities*, Cornell Law School Working Paper Series No. 47 (2009) at 6 ff on the lobbying efforts of the archeologists. Efrat argues that even-though the Convention did not offer any gains to the US as a market country the Convention was implemented as an act of
the prohibition of the importation of documented cultural property into the US based on bilateral agreements with source countries party to the Convention. The act was designed to shield US institutions from liability for ownership claims made solely on the grounds of foreign patrimony laws by establishing a process of internal review redefining the need and scope of import controls.  

A country party to the Convention can formally request that the US restrict the import of certain defined categories of cultural property. 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 depth, explain what they are currently undertaking in order to alleviate it, show that the US 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. 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--These are made in a specific set of shapes (amphorae, craters, hydriai, oinochoai, 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).”

Attic vases are objects of particular risk, a study shows that 70% - 80% of them come from Etruria. The evaluation of applications is conducted by the Cultural Property Advisory Committee (CPAC), and import restrictions are granted if its eleven members, which include archeologists, museum people, experts in the international sale of antiquities and public interest representatives, find that the cultural moral leadership. See also Goldsmith and Posner, The Limits of International Law (Oxford University Press: 2006) on the interest based approach to international law.

See Glossary and Definitions of the Convention on Cultural Property Implementation Act 1983. Cultural property is defined to comprise specified categories of “significant archeological or important ethnological materials” or any other “culturally significant” material object that was discovered within a source nation. 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.”

Cultural Property Implementation Act 1983, supra note 6, at 19 U.S.C. § 2602. See also letter by Patty Gerstenblith, President of the Lawyers’ Committee for Cultural Heritage Preservation, to CPAC, April 22, 2010, evaluating the criteria by expressing support for the proposed extension of the United States-Italy Memorandum of Understanding: “Italy is a leader in protecting its archaeological sites and in the effectiveness of its Carabinieri. As a result, the number of looted sites, the number of looted artifacts recovered, and the monetary value of stolen and looted archaeological artifacts and other art works have decreased in recent years. Nonetheless, looting of archaeological sites still poses a threat to Italy’s cultural patrimony” and “the fourth determination focuses on whether the imposition of import restrictions will further cultural interchange in ways that do not threaten the cultural patrimony of the requesting nation. One purpose of this provision is to ensure that archaeological materials that are subject to import restriction will still be available to the American public through loans for exhibition.” On file with the author.

Italy Federal Register Notice, Jan 23, 2001, III.B.1.b.

The patrimony of a country is in jeopardy from pillage, and in making such determination they are required to take into account “the general interest of the international community in the interchange of cultural property among nations for scientific, cultural and educational purposes.” Negotiations may last long, it took about 10 years before Italy and CPAC found an agreement on the categories to be restricted. Once approved the list is published on the Federal Register, and the import restriction will be effective from that date.

Initially it was thought that source countries could only request import restrictions of 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. It has been argued that the concept of “cultural significance” has been substituted for “archeological significance” and this way anything of archeological interest will be understood to be “culturally significant” and returned to its source country. 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, archeological site or cultural institution. 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 the object was excavated from, but the one from which it is sold. Technically such objects can enter the US notwithstanding the existence of a bilateral agreement. Since 1983 the US has entered into bilateral agreements limiting the categories of objects that can enter its territory with 15 countries. All these agreements became effective after the late 1990s and they allow US customs to seize cultural property that has been imported without a valid export

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39 Cultural Property Implementation Act 1983, supra note 6, at 19 U.S.C. § 2602 (a)(1)(D). See 19 U.S.C. § 2605 (b)(1)(B) on CPAC’s composition: the Committee is composed of 11 members appointed by the president to renewable three-year terms, with the following profiles: 2 members represent the interests of museums; 3 members are expert in archaeology, anthropology, ethnology, or related fields; 3 members are expert in the international sale of cultural property; and 3 members represent the interests of the general public.
40 Interview with Jeanette Papadopoulos, supra note 26.
44 1970 UNESCO Convention, supra note 5, at Art. 7 (b)(1) and Cultural Property Implementation Act 1983, supra note 5 at 19 U.S.C. §2607 and §2610 (2)(a). Note that UNIDROIT Art. 3 Para. 1 “The possessor of a cultural object which has been stolen shall return it.” this is important because it provides for uninventoryed objects to be returned which would remedy the present gap.
45 Peru, Bolivia, Mali, Cambodia, Columbia, Canada, Italy, Cyprus, Honduras, Nicaragua, Guatemala, El Salvador, Honduras, China, Mali and Greece. The individual agreements are available at http://exchanges.state.gov/heritage/culprop/listactions.html (last visited on January 13, 2012).
certificate. No petition to restrict imports has ever been rejected by the CPAC, but some have been materially delayed, as China’s was.

Although the aim of the CPIA was to put into place a system that gave CPAC the option to create import barriers in certain defined circumstances where the interest in retaining culturally significant objects that could not be traced back to a particular owner could be proven under clear guidelines, CPAC’s attitude of granting import restrictions to broad categories of archeological material 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 archeologists 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. 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.”

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.

To conclude, it seems that instead of stimulating international exchanges and combating illicit trade by enabling countries to claim the return of significant cultural objects, 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 as well as its US implementing counterpart has been to discourage international trade and reduce the scope of a licit market in cultural objects.

### B. Analysis of the Illicit Trade in Cultural Property and Antiques

48 Senate Hearing, 99th Congress, 1st Session, Serial No. J-99-27 (1985) at 4, 5. Statement of Senator Moynihan: “The CPIA was enacted only after a long and arduous process of compromise which 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.”
49 Hearing on H.R. 5643 and S. 2261 before the Subcommittee on International Trade of the Committee of Finance, United States Senate, 96th Cong., 2nd Sess., February 8, 1978 at 61.
50 In United States v. Schultz 333 F3d 393 (2003) the 2nd Circuit discusses the CPIA but convicts a private dealer under the National Stolen Property Act (NSPA) which prohibits the transportation of goods knows to have been stolen. Although this case bypasses the statutory requirements set out in the CPIA by using the NSPA, the “Schulz doctrine” has never be 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 “blank check rule”. See Paul Bator, supra note 9 at 354.
The legal restrictions affecting the trade in cultural objects lead to the growth of an illicit trade as artifacts started to be sold on the black market. Illicit trade came into existence because there was a strong demand on the side of wealthy museums and collectors from all around the world for objects that were prohibited from being sold in lawful markets since 1970, when the UNESCO Convention was negotiated. A black market only arises because of restrictions and prohibition on licit markets and the tightening of the legal regime regulating the import of cultural material since the 1970s automatically diminished the supply of legitimately tradable objects. Artifacts sold on the black market are typically excavated from the soil of source countries 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. These global dealers usually operate from countries with lax export restrictions on cultural material, like the United Kingdom or Switzerland. The looting of objects that find their way to museums often involves the destruction of high numbers of lesser items and the loss of scientific knowledge that comes with context. 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 if the object in question could have been illicitly excavated. However, potential acquirers often chose not to enquire too closely about provenance so as to avoid direct confrontation with the legal and ethical repercussions that knowledge of illicit trade entails. 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 ensuring that the black market in antiquities would thrive. These arrangements worked well during the 70s, 80s and part of the 90s, but with the new millennium source countries started to pursue the return of illicitly imported artifacts more vigorously. The peak was reached when prominent art dealers and the curator of one of the world’s most important museums were criminally prosecuted. The following section will illustrate the scope of the black market and argue that the presence of illicit trade can be proved empirically.

51 Id., Bator, at 317 “The ineffectiveness of embargo: Ten easy lessons on how to create a black market.” 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. See also J. David Murphy, The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?, Int’l. J. of Cultural Prop. 3 (1994) at 227-242.


53 Neil Brodie, Jenny Doole, and Peter Watson, Stealing History: The Illicit Trade in Cultural Material (McDonald Institute 2000) at 9.

54 Id., at 8-10. Provenance is defined 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.” See also International Council of Museums (ICOM) Code of Ethics for Museums (2006), available at http://icom.museum/ethics.html (last visited Jan 15, 2012).

55 Felch and Frammolino, and Isman, supra note 1. See also Peter Watson and Cecilia Todeschini, The Medici Conspiracy: The Illicit Journey of Looted Antiquities, From Italy’s Tomb Raiders to the World’s Greatest Museums, Public Affairs (April 30, 2006).

56 Id.
As data sets on illegal activities are by 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 no study shows how these measures were calculated.\(^{57}\) A study by economists Fisman and Wei suggests that the illicit trade in cultural property can be empirically analyzed by looking at figures of import and export of cultural objects and by taking advantage of different reporting incentives between source and market countries.\(^{58}\) The legal regimes in source countries like Italy and Greece make the exit of ancient objects subject to export controls, which means that to be exported these objects require an export permit and that in the absence of such a document the object will be retained by customs.\(^{59}\) Beyond obvious logistical problems with the guarding of archeological sites and the enforcement of export laws, the small incentives in reporting finds to the authorities compared with the profitability of the black market encourages looters to smuggle antiquities across national borders without declaring them.\(^{60}\) 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 US, absent detailed references in bilateral agreements under the 1970 Convention. It follows that the same objects will not be regarded as “illicit” and can enter the market country legally once its value has been declared to customs.\(^{61}\) Traditionally the US has never required record of ownership history nor identification of the vendor.\(^{62}\) In addition the US provides further positive incentives to declare the import of cultural objects upon entry into its territory by establishing a zero tariff rate on such goods—this coupled with the potential for seizure in case of an improper declaration provides an even stronger incentive to declare the import.\(^{63}\) Considering the incentive system, but also the fact that people regularly understate the value of objects to expedite the customs processes and


\(^{58}\) Fisman and Wei, The Smuggling of Art and the Art of smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques, 1(3) American Economic Journal: Applied Economics (2009) at 82–96. This paper’s contribution lies in finding a correlation between the measure of the illicit trade in cultural goods and survey-based corruption indices.

\(^{59}\) In the case of Italy export permits are regulated by the Cultural Heritage Code of 2004. Italy also abides to the European Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (93/7/EEC ) and the European Regulation on the Export of Cultural Goods (3911/92) – the former provides for the return of illicitly exported artifacts, the latter requires the presentation of an export license for cultural goods to be exported outside the EU.


\(^{63}\) Id. See also United States v. An Antique Platter of Gold, 184 F.3d 131, 136 (2d Cir. 1999).
attract less attention, US import values could be regarded as a lower than accurate but still indicative figures of antiquities entering the US. 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 US and the measure of exports of the same material recorded by customs authorities in source countries. If the imports reported by one country would roughly coincide with exports reported by its trading partner the trade would seem to be a transparent and purportedly licit one. Minor differences could be explained by differing terms of valuation, timing of the reports and specific inclusions/exclusions of 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 section applies the above analysis to the import/export data provided by the UN Commodity Trade Statistics Database. This database contains commodity-level import/export data limited to calendar year-based annual series. For the purpose of this paper the data enables an overview of the annual value in US Dollars of exports and imports of works of art starting in 1995. For each reported year import values for specific categories comprising antiquities in market countries can be compared to the export values of the same objects in source countries. The most relevant categories of goods for the purpose of this paper contained in the database are HS 9705, which covers collections and collector’s pieces of various types and HS 9706 which covers antiquities older than 100 years. James McAndrew, an expert on the illicit trade in artifacts and customs procedures, confirms that even-though HS 9705 matches the import of antiquities better than HS 9706 US Customs will accept both. Although the classification is not ideal because both individual categories encompass more than just cultural artifacts of ancient civilizations, there is nevertheless value to this exercise because the combination of both categories should cover virtually all of them—even if they may constitute a smaller fractions of each category.

Upon entry in the US importers are required to fill in customs form 7501. The form asks for the declared value, which is the price paid for the item, the exporting country and the country of origin of the object. For customs purposes, country of origin is defined as “place of manufacturer” a term not relative to the antiquities trade. No reference is made to the possibility of the country of origin being unknown. The CPIA defines country of origin as “place of excavation” (licit or illicit), but such definition is not a legal one. Even-though customs makes the country of origin declaration material, this information is often impossible for the importer to know. As long as the form is compiled accurately 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

65 Id., HS 9705 comprises Collections and collector’s pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest. HS 9706 and HS 9705 are subcategories of HS 9700 which comprises works of art, collectors pieces and antiques.
66 Correspondence with James McAndrew, supra note 61.
occurred there was a patrimony law in place covering such items. It seems that unless there is a false statement the item will be imported licitly.67

The analysis will proceed as follows: the declared export values of HS 9705/06 for two source countries, Italy and Greece, will be compared to the declared import value of the same categories (HS 9705/06) into the United States for all reported years.68 This exercise does not aim to determine the value of the black market by subtracting the values of the exports to the value of the US imports as reported on the y axis of the tables below because such measurement will include several inaccuracies which are difficult to account for.69 What this exercise aims to do is to measure the gap between the export and import of the same goods in two countries that have differing interests in the trade of cultural objects: the US would like to have them circulate whereas Greece and Italy are in favor of retaining such artifacts. This comparison enables the identification of some probable elements that could signal the presence of illicit trading in these goods.

Figures 1.1 and 1.2 below indicate the findings, which illustrate the gaps between the exports recorded in Italy and Greece respectively when confronted with the value of recorded imports of the same objects (HS 9705/06) into the United States.

67 United States v. An Antique Platter of Gold, 991 F.Supp. 222 (S.D.N.Y.1997). In this case Steinhardt was declared culpable of the importation of goods “by means of false statements” which is prohibited by 18 U.S.C. § 542. The object in question came from Italy and Steinhardt falsely listed the work’s country of origin as Switzerland. The statements were found to be material and therefore subject to forfeiture.

68 Id., the following selections were made : 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.

69 Besides of certain limitation with the dataset, available at http://comtrade.un.org/db/help/uReadMeFirst.aspx (last visited on June 29, 2012) other factors contributing to inaccurate results include: first, the fact that restrictions in the legal regime, the entering of bilateral agreements and specific increase or decrease of the demand for cultural objects alters their value and this will be reflected in the total value of goods entering the US according the above dataset. Second, by selecting the country it is assumed that the items included are of local origin when it is not always the case. Third, Customs and Boarder Protection regulations requires the submission of the country of origin of the merchandise, not the place of discovery. The CPIA refers to the place of discovery. There never been any written guidance from CBP on this issue of how importers of cultural property are to deal with this.
Figures 1.1 and 1.2 indicate the yearly total value in US dollars of the declared export of cultural material (HS 9705/06) from Italy/Greece to the US and the declared counterpart of US import of cultural material coming from Italy/Greece. The results are significant because the gaps are extremely large. This means that even-though the definition of categories HS 9705/06 is broader than the focus of this analysis and includes objects other than classical antiquities the reality is that exports of HS 9705/06 material are consistently underreported to the point were for most years the reported export value in Greece is zero. In both figures the reported export values are extremely low compared to the US import counterpart. As the paper noted above, in 2001 the US entered into a bilateral agreement with Italy that established import controls for certain categories of cultural objects. This fact deserves closer attention because Figure 1.1 shows that entering into this agreement did result in an increase of recorded exports. This hints to the fact that such agreements do have an effect in combating illicit trade, however given their narrow focus on inventoried archeological material and the small sample size it is difficult to say how significant these results are. The bilateral agreement between the US and Greece was only finalized in December 2011, it is therefore not possible to compare results as yet.

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 reported to the authorities, when, according to the patrimony laws in force, 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 highlights important issues. It provides a framework for understanding the reporting issues associated with the trade in cultural property in countries with different

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70 See Italy Federal Register Notice, supra note 36. The Memorandum of Understanding between the United States of America and Italy, had an initial duration of 5 years and was renewed in 2006, it is available at http://exchanges.state.gov/media/office-of-policy-and-evaluation/che/pdfs/it20012006mou_tias.pdf (last visited on January 13, 2012).
interests. By relying on the data contained in the above figures it can be argued that the gaps between recorded imports and exports signal the presence of illegal activity which can be explained by the high demand and 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 were regulated by the 1939 law, which mandated imprisonment up to four years and fines of approx. 2,000 Euro.\(^\text{71}\) With the introduction of the 2004 code the fine increased to 5,000 Euro.\(^\text{72}\) Very recent developments include the introduction of a 2011 law which further increases the penalties to up to 6 years imprisonment and a 30,000 Euro fine.\(^\text{73}\) 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 they were inadequate deterrents. This can best be explained by the tight limitation period to pursue such a claim; under Italian law after seven years an illicit export case is not triable anymore,\(^\text{74}\) and by the fact that in the context of clandestine excavations it is very difficult to prove when the objects were removed from the ground, and this severely limits the prosecutable cases to the ones 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 10 years.\(^\text{75}\) On the receiving end, in the US, if illicitly imported objects are caught by the CPIA the claim is a civil one and will result in forfeiture. If the scienter requirement of the National Stolen Property Act can be proven its criminal penalties apply: this happened in the seminal case of Schultz, where the court imposed a 33 month prison sentence and a $50,000 fine on an American dealer for knowingly importing illicitly excavated antiquities from Egypt.\(^\text{76}\)

To highlight the significance of the above results the same data is measured with reference to the UK and Switzerland, two countries with rather lenient system of export control. Both countries have been reluctant to curtail their respective well established markets for ancient artifacts, which are profitable and legitimate under their respective laws. There is very little incentive in non-reporting exports and archeological material coming from other countries has actively been sold on the UK and on the Swiss markets.\(^\text{77}\) Figures 1.3 and 1.4 below show that the UK and Switzerland belong to the top exporters and importers of antiquities.

\(^{71}\) Italian Law No. 1089/1939, supra note 12, at Art 66.
\(^{73}\) Italian Laws No. 962/2012 and 3016/2012.
\(^{74}\) Italian Law No. 251/2005. See also Isman, supra note 1, at 195.
\(^{75}\) Greek Law No. 3028/2002 at Arts. 61, 62.
Figure 1.3: UN ComTrade overview values for HS 9705.

Now, the same exercise as above which compares US import values with the export values for categories HS 9705/06, but this time from the UK and Switzerland, will be conducted. Figures 1.5 and 1.6 below show the results. Although the values never match perfectly, the gaps are considerably smaller than the gaps that result in the case of Italy and Greece. The trade of cultural goods is also 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.\textsuperscript{78} 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.”\textsuperscript{79} 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. The impact of national laws and policies is reflected in the different outcome of the figures above, whereas for Greece and Italy, countries that have an export regime based on prohibition reported export values are very low, for the UK and Switzerland they are much higher.

Figure 1.5: Annual value of exports from the UK to the US of category HS 9705/06 and annual value for imports to the UK of the same category.

Figure 1.6: Annual value of exports from Switzerland to the US of category HS 9705/06 and annual value for imports to Switzerland from Switzerland of the same category.

This first section of the paper has shown empirically that the problem of illicit trafficking is a concrete one and that the restrictive legal regimes governing the trade in

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80 See Irini Stamatoudi, CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW (Edward Elgar Publishing Ltd, 2011) at 120 ff.

81 To further test the dataset for accuracy I run a comparative analysis using reported imports and exports values for toys (HS 9503). Also Fisman and Wei, supra note 58, chose toys to test their analysis because toys also have a zero tariff rate in the US and there is no incentive to not report their entry. For the purpose of this paper the same analysis is applied over 10 years (1996 – 2011) and although the US import records are usually higher than the export records for Italy and Greece the percentage of the difference in the gap never exceeds 20 percent. When considering cultural objects (HS 9705/06) the difference in the gap was almost always above 95 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 are on file with the author.
artifacts of Italy and Greece fomented, instead of curtailing, these activities. It’s worth noting that Italy, a source country that has been suffering the effects of plundering of its archeological sites for a long time, has been a major player in terms of prosecuting and actively seeking the restitution of illicitly traded artifacts. 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 (in the US the State has the choice to do so). At the end of the 1990s the Carabinieri raided a warehouse in Geneva where thousands of illegally exported antiquities were stored. The owner, Giacomo Medici, an 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. Evidence acquired from the investigations of Medici enabled Italian prosecutors to try and indict Marion True, ex senior curator at the antiquities department at the Getty Villa, and art dealer Robert Hecht for conspiracy for trafficking in illicitly traded antiquities. Also Robin Symes, a well-known antiquities dealer based in London, was declared bankrupt and a court is currently assessing Italy’s claim to some of the artifacts in his possession. At the time of writing a criminal trial against Michael Padgett, Princeton’s antiquities curator is being pursued. Although some of the claims against Hecht and True were later dropped because the Italian statute of limitation expired, the Medici trial was of pivotal importance at uncovering the schemes devised to buy illicitly traded artifacts. It enabled the Carabinieri and the Italian prosecutorial team to detect the connections that sometime exist between museums and the trade in illicit antiquities. These developments turned into highly publicized scandals and raised serious concerns about the buying conduct of US museums, as the acquisition of illicitly traded material severely undermined their responsibility of serving the public and their commitment to the value of education. Altogether these events had the effect of further slowing down the art market for antiquities and motivated several of the United States’ largest and most prestigious institutions to return several significant objects of their antiquities collections with a doubtful provenance to their respective source countries. The dynamics of the market for antiquities and the repatriation of such objects to source countries will be analyzed in the next section.

II. IMPACT OF ILLEGAL TRADE ON THE COLLECTING STRATEGIES OF MAJOR US MUSEUMS

83 Susan Mazur, The Medici Go-Round: Sotheby’s ad the Signed Euphrnios, Scoop Ind. News (December 9, 2005). See also Watson and Todeschini, supra note 55.
85 Interview with Maurizio Fiorilli, Deputy State Attorney for Italy, conducted on March 27, 2012. See also Newsletter 2/2010 of the Ministero dei Beni Culturali at 10.
This part will inspect the impact of the inefficient legal regime and the resulting indications of illicit trade on the collecting strategies of major US museums. The problems in this area of law made it difficult for museums to continue acquiring legitimate ancient artifacts on the international market to increase their permanent collections. 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 that the repatriations of significant artifacts brought about.

The discussion that follows will refer to the experience of three US institutions that host important classical antiquities collections: the Metropolitan Museum of Art (“Metropolitan”), 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 returned artifacts and started contractual cooperation with source countries. 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. The qualitative component refers to interviews conducted with museum officials about existing and future collecting strategies. The analysis of this material will proceed as follows: first the examination of the available collecting strategies and how antiquities collections of the above institutions increased over the past 30 years. Then the inspection of recently adopted acquisition policies and their effect on acquisitions. Finally this part will look at the frequency of claims that arose in connection with illegally exported objects, and analyze the cooperation agreements that regulated returns by paying special attention to whether such returns were compensated with loans.

A. Collecting Antiquities: Available Routes and How Collections Increased Over Time

The collections of most US art museums consist of objects donated to them by collectors or purchased with monetary gifts of supporters. Acquisitions and donations have been the main ways of antiquities departments to continue exhibiting new objects and link them to recent scholarship and innovative curatorial ideas. Acquisitions through the market comprise transactions with auction houses, dealers or private collectors. When a museum is making decisions on acquisitions the emphasis should be placed on a properly conducted due diligence in order to highlight 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. Another way of increasing collections museums rely on heavily is through donations. The level of due diligence required to accept a donation used to be lower, but nowadays it requires the same scrutiny as a market purchase. If the quality of a

89 Interview with Claire Lyons, Senior Antiquities Curator at the Getty conducted on November 10, 2012. Interview with James Steward, Director of the Princeton Art Museum conducted on December 1, 2010. Interview with Sharon Cott, General Counsel of the Metropolitan Museum of Art conducted on March 20, 2012.
donation, measured in terms of aesthetics and documentation, does not meet the standard of a given collection it will be rejected.90

The paper will now turn to data on accessions, either through acquisitions or through donations, of the three selected institutions to assess what impact illicit trade and the recent scandals 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.

Figure 2.1: Data on museum accessions (comprising acquisitions and donations)91

90 Id. Interview with Lyons. In the past accepting donations was thought to require less rigorous due diligence; only recently have the standards been aligned. In general 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. In addition, once catalogued in a museum collection their provenance was cleared because a record history was created. Other problems involved the granting of excessive tax deductions. See Felch and Frammolino supra note 1 at 36ff explaining how Getty 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. The LA times did an analysis of IRS art donation records that illustrated how many of the donations that were checked by the IRS were found to be appraised at nearly double their value. In the case of the Getty, between 1977-1980 approx. 100 donors donated approx. 6000 antiquities valued at $14.7 million – all 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. Frel’ s successor Marion True also succeeded in convincing the Fleishmans to donate their notable and acclaimed antiquities collection to the Getty by first exhibiting it and putting together a catalogue. This donation was very controversial as 90% of the pieces appear not to have ascertained provenance. Note that US archeologists are campaigning against tax deductions in the context of donations arguing that it is corrupt. Although the question of appraisals for tax purposes is different than the question of illicit trade, the same objects are involved.
Figure 2.2: Data on market acquisitions (excluding donations)

Figure 2.1 shows the accession trend line of the antiquities departments at the Getty, the Metropolitan and the Princeton Museum over the past 30 years. Accessions comprise both purchases and donations. Two main observations deserve note. First, the reason why the trend line of the Getty decreases more sharply in comparison to those of the other two museums is 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 bequest in 1976 thus increasing the pace of acquisitions initially. The Metropolitan on the other hand has had an established antiquities collection since the beginning of the 20th century and so has Princeton. It is of relevance to note that in the case of the Getty and the Metropolitan the trend line shows a decrease in accessions in both figures whereas for Princeton in the first figure we see a very modest increase in accessions. This changes if the data is limited to the examination of

91 A cap was put at 300 objects to make the graph more intelligible. Several years during the 80s the number of acquisitions at the Getty exceeded 300 objects.
92 Acquisition levels are reported starting from 1983 as the data on acquisitions by the Getty is not accurately reported in official publications before this year. There are ways to indentify acquisition patterns for 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 is the decade that comprises the highest number of acquisitions that had to be returned to Italy by the Getty, see Gill and Chippindale, supra note 3 at 206.
93 See Felch and Frammolino, supra note 1 at 331, 324. In 1939 Getty acquires his first antique object, a terracotta sculpture, at Sotheby’s auction, and continues collecting antiquities for his private personal collection until 1953, after that date every acquisition would be made on behalf of the museum. By the death of Getty in 1976 the collection counted ca. 11000 objects and now it counts ca. 44000. According to Getty’s will, press accounts and federal tax forms (of 1977) the gift to the museum amounted to 64 acres of land in Malibu worth 3.1 mio, 3.6 mio in art collection, 17 mio in cash and 4 mio shares worth 662 mio.
purchases only (Figure 2.2), where all three trend lines show a decrease. This can be explained by the fact that a university art museum relies more heavily on donations than the other two institutions do. Overall the consideration of donations is less important given that the argument made here is that the inefficient legal regime and illicit trade have negatively impacted the ability of US 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. In follows that Figure 2.2 is more relevant, and what it also shows which is of crucial importance to the argument of the present paper is that over the past 10 years the levels of acquisitions through the art market diminished and stayed low. This is a result of a multitude of reasons that include the tightening of the market, the extensive restrictions on exports, the significant risks of prosecution and curatorial decisions buy fewer artifacts as a response to the claims by source countries followed by the return of significant objects.

B. Acquisition Codes and the call for provenance

Another factor that explains the decreasing trend of antiquities acquisitions in recent years is the enactment of stricter acquisition policies. Ethical codes in connection with antiquities acquisitions have been present for a long time, but the standards they set out evolved over time, what is considered negligent according to the principles prevailing today used to be acceptable in the past. The understanding of ethical acquisition behavior has been shifting over the past decades: although the 1970 UNESCO Convention played a significant role in planting the seeds for the needs for prior ownership documentation, the practice of requiring such documentation didn’t materialize until Italy’s investigations of Medici, Hecht and True. Documenting the place of origin of an artifact is still not a legally required document, however the call for provenance is now contained in most acquisitions codes of US institutions. To illustrate these points, the present discussion will briefly refer to the code of ethics of the AAMD and then move on to consider recently adopted internal acquisition policies of US museums.

In the past ethical codes and acquisition policies drafted by museum associations called for the making of good faith inquiries into the provenance of an object before its acquisition could take place. If such provenance could not be cleared the rules called for foregoing the transaction. One indicative example which represents consensus in the field can be found in the code of ethics of the AAMD, which declares it unprofessional for museum officers to “knowingly acquire.. any objects which have been stolen.. in contravention of the applicable laws of its country of origin and/or.. of international treaties..” Even if such statements sound strong there are gaps: export controls are not specifically mentioned nor is there a definition of what “known to have been stolen” is supposed to mean. It could refer to theft in the traditional sense and exclude its application to illicitly traded items. This would still make it possible for museum officers to acquire objects with undocumented provenance removed in violation of a country’s patrimony laws. Finally, there is no penalty associated with non-compliance with the

94 The diminished levels of acquisitions are also reported by the Antiquities Survey Release of the AAMD available at http://www.aamd.org/newsroom/documents/AAMDAntiquitiesSurveyRelease_FINAL.pdf (last visited February 14, 2012).
AAMD code of ethics and no action has ever been taken against any museum officer for acquiring illicitly traded objects.

These loopholes make this and other similar codes and acquisition statements weak tools to combat the problem of illicit trade. What should be required on the side 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. The latest versions of the internal acquisition policies of the above institutions, including the 2006 Getty policy statement on acquisitions, the 2007 acquisition policy by the Princeton Museum and the 2008 amendments to the collections management policy of the Metropolitan, contain such provisions and mandate substantial levels of research before making an acquisition or accepting a donation. These changes seem to have played out positively; the General Counsel of the Metropolitan 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 objects proposed for acquisition and also the ones already present in the collection. 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 why—and museums have been complying by listing acquisitions and attaching explanations. These are welcome changes, especially considering the educational role that contemporary museums have put beside their collecting role. It is unfortunate however, that they became effective so late as it appears that the cut-off date for buying unprovenanced antiquities became the date of enactment of such internal policies.

All the above cited codes now require proof that the object in question was in circulation before 1970 for it to be acquired. The significance of the 1970 as threshold date for the application of more rigorous standards to the acquisition of archeological material derives from the 1970 Convention. Proving that an antiquity was in circulation before 1970...
requires sale records, catalogues of exhibitions, publications or other documentation acknowledging its existence and either that it was outside of its country of origin before 1970 or that it has been legally exported after that date. Archeologist Colin Renfrew argues that there would be a clear benefit in having the international community agree not to purchase undocumented objects excavated before 1970.\textsuperscript{101} This formulation, he asserts, does not condone the buying of illicitly exported antiquities prior to that date but prevents the acquisition of such material after that date.\textsuperscript{102} Even-though 1970 has been recognized as boundary date by a number of influential associations including the AAMD,\textsuperscript{103} 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, a term 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 individual elements of a legal claim can be made out.\textsuperscript{104}

\textbf{C. Cooperation Agreements: Returns in exchange for loans}

The most significant impact of the stringent laws, the growth of illicit trading and the subsequent scandals is given substance to by the large number of returns that followed source countries repatriation claims: between 2005 and 2010 US museums returned 102 objects to Italy and Greece.\textsuperscript{105} Also private collectors were required to hand back a number of objects.\textsuperscript{106} For the most part, the objects returned involve works acquired in dubious circumstances after 1970 that were altogether part of the top tier in terms of quality and rarity at their respective

\begin{footnotesize}
\begin{enumerate}
\item Renfrew, Combating the Illicit Antiquities Trade: A Time for Clarity, lecture given at CUNY Graduate Center, January 15, 2009. See also Renfrew’s contribution to Newsletter 2/2010 of the Ministero dei Beni Culturali, \textit{supra} note 85 at 1, “For, in theory at least, its [the 1970 date] application should make recently looted antiquities completely unsalable.”
\item Id.
\item New Report on Acquisition of Archeological Materials and Ancient Art, AAMD, available at \url{http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf} (last visited April 12, 2012). [The AAMD] I. Recognizes the 1970 UNESCO Convention as providing the most pertinent threshold date for the application of more rigorous standards to the acquisition of archeological material and ancient art. Widely accepted internationally, the 1970 UNESCO Convention helps create a unified set of expectations for museums, sellers, and donors. II. States 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. III. Provides 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 the AAM Standards Regarding Archaeological Materials and Ancient Art at para 1, 2: “In addition, AAM 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.”
\item See Felch and Frammolino, \textit{supra} note 1 at 307. In addition to returns from museums, returns also came from private collections: 8 by Eisenberg, 14 by Shelby White, and 251 from the Aboutaam brothers. Interview with Papadopoulos, \textit{supra} note 26, who explains that in 2007 millionaire Maurice Tempelsman donated two acroliths to the University of Virginia Art Museum who then returned them to Italy – it was a move to hide the identity of the returnee. See also Elisabetta Povoledo, Two Marble Sculptures to Return to Italy, NY Times, September 1, 2007, available at \url{http://www.nytimes.com/2007/09/01/arts/design/01rest.html} (last visited July 10, 2012).
\item Id. In addition to returns from museums, returns also came from private collections: 8 by Eisenberg, 14 by Shelby White, and 251 from the Aboutaam brothers.
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\end{footnotesize}
institutions. Sometimes the returns were spontaneous; sometimes they were the result of lengthy negotiations between museum officials and the authorities of the source country claiming the objects depending on how strong the evidence was that the objects had been looted.\textsuperscript{107} The outcome of these negotiations was recorded in agreements that set out the conditions of the returns. This part of the paper will examine the negotiation procedures and the terms regulating the returns of artifacts contained in the cooperation agreements entered into by the Getty, the Metropolitan and the Princeton Museum respectively with the Italian authorities. Special attention will be given to whether such returns were compensated with loans by the returnee and if so, details about these loans including the duration and the importance of the piece on loan. 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 worked in this setting.

1. The Metropolitan’s Cooperation Agreement with Italy

The 2006 collaborative agreement between the Metropolitan Museum and Italy was the first agreement establishing formal cooperation between a US institution and the Italian government in the broader context of combating illicit trade and set the precedent for the ones that followed.\textsuperscript{108} The Metropolitan agreed to repatriate six pieces at different times: the Euphroneos krater in 2008, the set of 16 Morgantina silver vessels in 2010 and the remaining four items shortly after the agreement had been entered into.\textsuperscript{109} Title to these objects was transferred immediately. In return Italy agreed to loan the silver vessels from Morgantina to the Metropolitan 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.”\textsuperscript{110} Ex-director of the Metropolitan Philippe De Montebello referred to this cooperation as “a highly equitable arrangement.”\textsuperscript{111}

The agreement describes in detail the duration and the quality of the items that are to come on loan from Italy to compensate the return of the Euphroneos krater. For the duration of the Agreement, which is set at 40 years, Italy will make four year loans of predetermined items

\textsuperscript{107} Interviews with Lyons and Steward, \textit{supra} note 89. In 1999 Getty spontaneously returned 3 objects to Italy: Euphronious/Onesimos vase shards bought from different dealers over time, Mithras torso, and a bust of Diadumenus. 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 being acquired by the museum in good faith in 1985.


\textsuperscript{110} Id. Statement. \textit{See} also the Section 4.1.b of the Agreement, \textit{supra} note 108, which provides a list of 12 specific objects that could be suitable loans.

\textsuperscript{111} Id. Statement.
on a continuing and rotating basis.\textsuperscript{112} The agreement specifically lists 12 items agreed by the parties to be of “equivalent beauty and importance” to the Euphroneos krater which comprises very major pieces from prominent Italian archeological museums. To sum up, at least one of these 12 numbered objects will be on view at the Metropolitan instead of the Euphroneos krater until the agreement expires.

In the past five years Italy held to the agreement by providing the Metropolitan with several items on loan: a Laconian drinking cup in 2006, a further three pieces including a cup signed by the potter Euxitheos and the painter Oltos in 2008 and a terracotta kylix and the Moregine treasure in 2010.\textsuperscript{113} Official statements report, and the Metropolitan’s General Counsel confirms, that the four loans of 2006 and 2008 are thought to provide a time-limited replacement for the Euphroneos krater.\textsuperscript{114} These statements are very significant, because they point to the fact that once outgoing loans will have served as compensation for the returns and therefore met the obligations of the agreement, there is no longer any incentive for Italy to continue loaning objects to the Metropolitan.

2. The Getty’s Cooperation Agreements with Italy and Greece

In 2006, to celebrate the opening of the renovated Getty Villa in Malibu, the Getty had asked Italy permission to borrow bronzes from the Archeological Museum of Naples as part of a special exhibition.\textsuperscript{115} The request was denied based on the lack of transparency of the Getty’s acquisition practice and the presence of disputed objects in their collection—Marion True was being tried in Rome at the time.\textsuperscript{116} According to the Italian deputy attorney general, who was directly involved in the negotiations, the Getty’s lack of commitment to responsible acquisition standards and its presumptuous behavior were taken into consideration when negotiating restitutions and exchanges.\textsuperscript{117}

In 2006-07 Italy formally claimed 42 objects from the Getty’s collection. Negotiations resulted in the Getty agreeing to transfer 40 objects to Italy on which the Getty is said to have spent more than $44 million.\textsuperscript{118} The list of objects to be returned included the Statue of a

\textsuperscript{112} Agreement, \textit{supra} note 108, at 4.1.b.
\textsuperscript{113} Met press room: Important Antiquities lent by the Republic of Italy on view at the Metropolitan Museum available at \url{http://www.metmuseum.org/about-the-museum/press-room/news/2010/important-antiquities-lent-by-republic-of-italy-on-view-at-metropolitan-museum} (last visited on February 21, 2012) The further two pieces loaned in 2008 include a jug in the shape of a young woman’s head and a vase of the fourth century B.C. showing Oedipus solving the riddle of the sphinx.
\textsuperscript{116} Id.
\textsuperscript{117} Interview with Fiorilli, \textit{supra} note 85.
\textsuperscript{118} See Felch and Frammolino \textit{supra} note 1 at 198 and 304. See also Gill and Chippindale, \textit{supra} note 3 at 206 confirming that most of these tainted objects that had to be given back were acquired by curator Marion True during the 80s.
Goddess, also known as the Aphrodite, which would remain on display at the Getty Villa until 2010, and 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. In 2006-07 no consensus as to a formal agreement could be found because of an ongoing and still unresolved dispute involving a bronze, but according to a joint statement of 2009 Italy and the Getty “agreed to broad cultural collaboration that will include loans of significant art works, joint exhibitions, research, and conservation projects.” In the same year the Getty received two important pieces on loan from the archeological museum of Naples and one from the archeological museum of Florence. Although the objects from Naples were being loaned to the Getty for an initial period of two years, from 2009 to 2011, one of the loans, the Apollo Saettante, has been renewed for another two years, now allowing the Getty to keep it until 2013.

In 2010 an agreement formalized the cultural collaboration that had already started between the two parties and it provided the Getty with further loans from Italy. One of them, the Chimera of Arezzo, had never left Italy before. The senior antiquities curator at the Getty explains that another object on loan, the Agrigento Youth, needed a new base and the Getty conservation institute is in the process of developing this base with a seismic isolation system. Still to come on loan are several objects from the archaeological site of Morgantina in central Sicily that will be loaned to the Getty Museum for display at the exhibition “Sicily: between Greece and Rome.” Through this cooperation agreement, which is going to last 25 years, the Getty was able to build solid relationships not only with the ministry in Rome, but with individual archeological museums as well as Italy’s sovraintendenze, specific regional boards that yield vast power in relation to culture.

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. In 2011, following the restitution of further two objects (fragments of a

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119 See Felch and Frammolino, supra note 1, at 124ff. In 1995 the Getty agreed to buy 33 objects from the Fleischmans for $20 million and the year after the Fleischmans donated their collection, comprising 288 objects to the Getty – it was very controversial as 90% of the pieces have no ascertained provenance and around the same percentage surfaced after 1970.

120 Interview with Lyons, supra note 89. Because of the ongoing discussion relating to the Statue of a Victorious Youth and the outcome of ongoing legal proceedings which are still underway in Pesaro, Italy.


123 Interview with Lyons, supra note 89.

124 Id.

125 Interview with Fiorilli, supra note 85.

126 Interview with Lyons, supra note 89.

127 Id.

grave marker and a Greek language inscription, both acquired in the 1970s), an agreement for cooperation was entered into by the Getty and Greece. Commenting on the restitution of the two fragments of 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.”

Greece agreed to loan objects to the Getty; talks are ongoing for several loans for an exhibition that will take place in 2014.

3. Princeton’s Cooperation Agreement with Italy

In 2007 Princeton agreed to return eight out of fifteen disputed antiquities to the Italian government. An agreement completed the negotiations that began in April 2006: Princeton would immediately transfer ownership of the eight objects to Italy, although it will hold on to four of them as loans for an additional four years.

An addendum to the agreement was signed in June 2011, according to which the University transferred title to further eight works of art to Italy. As part of the deal 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 archeological sites. This last point is significant because it is consistent with the commitment of an institution which is part of a university to prioritize the advancement of archeological scholarship. The schooling and research element that access to Italian archeological sites may give is crucial to the educative mission of Princeton University because it gives scholars new research material for advancing their careers.

Since 2007, in addition to the four objects that would stay at the Princeton Museum, two additional objects came from Italy for an initial four year loan. These objects, a bronze vessel of a hydra and a marble head, are classified by the director of the Princeton Museum as “highlight objects, objects that have the capability of having the deepest teaching impact.” He further explains that such impact comes in two ways, through course–related work at the art and archeology departments of the university and through the mission of public teaching of the local community.

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129 Interview with Claire Lyons, supra note 89.
130 Id.
133 Elisabetta Povoledo, Princeton to Return Disputed Art to Italy, New York Times, October 27, 2007, available at http://www.nytimes.com/2007/10/27/arts/design/27prin.html, (last visited on April 6, 2012) “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.”
134 Interview with Steward, supra note 89.
135 Id.
These agreements represent “a new deal” in this context because they delineate a cultural project based on reciprocity which is much broader than mere restitution.\textsuperscript{136} These cooperation agreements are contracts between a State and foreign nationals, which is different from responsibilities under an international treaty such as the 1970 UNESCO Convention. It was crucial for the Italian side that US museums would take up 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.\textsuperscript{137} By becoming party to the 1970 UNESCO Convention the US Department of State made the same commitment, but signing the cooperation agreements bound individual 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 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 US 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. The deputy attorney general for Italy confirms that other museums have recently gotten in touch with him to establish connections and start negotiations.\textsuperscript{138} 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 US museums’ dependence on access to Italian cultural property to run their programs. Although most of these agreements are drafted broadly implying that the cooperation may last for longer periods of time,\textsuperscript{139} it is unclear whether source countries will continue lending their masterpieces to US institutions once the loans given in exchange for the returned items will have completed their course. One could hope the warm relationship continues, but it might not.

\textbf{III. LEASING ANTIQUITIES}

The main issue seems to be that antiquities departments of US museums are severely restricted in their acquisition strategies because the licit market in antiquities is narrow and it is nearly impossible to build a collection of legitimately provenanced objects through the 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 US institutions to associate their public images with unique objects. However, as the above analysis has shown, these loans were made in exchange for the return of artifacts, and it is unclear whether Italy

\textsuperscript{136} Agreement [with the MET], \textit{supra} note 108, at Preamble §§ G, H where the museum “deplores the illicit and unscientific excavation of archeological materials...” and “is committed to the responsible acquisition of archeological materials and ancient art according to the principle that all collecting be done with the highest criteria of ethical and professional practice.”

\textsuperscript{137} Interview with Fiorilli, \textit{supra} note 85. Interview with Papadopoulos, \textit{supra} note 26.

\textsuperscript{138} Id.

\textsuperscript{139} Interview with Fiorilli, \textit{supra} note 85, who confirms that the approximate duration of these agreements is between 20 and 40 years.
and other source countries will continue lending their masterpieces to US institutions once loans for the returned items have completed their course. It follows that 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 a constant high demand coming also from private collectors and other institutions that have not negotiated cooperation agreements.

The demand for antiquities in the US market is much broader than the part met by such agreements, and to be satisfied it would require a substantial flow of transactions. The remaining part of the present paper suggests that 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 resolved by not 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, most legal restrictions contained in patrimony laws would not be applicable. 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 would make the lease more similar to an acquisition, and therefore the more attractive to a potential lessee.

A. From lending to leasing antiquities

Once the loans made by Italy will 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 US 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 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. 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.

This has in part been happening already. The Getty’s senior curator of antiquities confirmed that most loans the Getty has entered into as 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. The production of a seismic

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140 Brodie, Academic Facilitation of the Antiquities Market, in INTERNATIONAL MEETING ON ILLICIT TRAFFIC OF CULTURAL PROPERTY, Mibac eds. (Gangemi Editore 2010) at 103 ff. At 104 Brodie argues that scholarly work and publication increases the value of an object of a considerable amount.

141 Interview with Lyons, supra note 89.
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 a substantial leverage when negotiating a loan.\textsuperscript{142} Museums officers seem to agree on the fact that although loans can be costly, mainly because of transaction costs of drafting the loan contract, but also because of transport and insurance costs, they are also immensely profitable in terms which are not immediately quantifiable in monetary terms.\textsuperscript{143} A balance has to be struck when an institution decides whether incurring these costs will have positive externalities. The externalities in question are mainly connected with exposure, I address this issue in subsection B. below.

When asked about the incentive to continue lending once the returns have been “covered” the director of the Princeton Museum contends that source countries have a critical interest in establishing and maintaining good relationships with important US institutions, because this cooperation can be extended to other art-related fields and “have the value of objects increase through research in the sense of the grand goal of advancing knowledge and an advertisement that the world has come to know and appreciate top objects of a given country.”\textsuperscript{144} This is certainly true, but there is no doubt that US museum directors are conscious of the fact that they too need to foster good relations with Italy in view of accessing material. The director of the Princeton Museum adds that at present out of fear of being caught and having to repatriate objects, museums have started hiding potentially tainted antiquities and not publishing or doing any research on them and that as a consequence there have been fewer publications in recent times.\textsuperscript{145} This 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. The public good is reflected in the notion of access, distribution, impact through scholarship and education, and American museums are champions in keeping up these values through the quality of their exhibitions and publications, and in the extent of their outreach to the public through their educational programs. These problems 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 which require disclosure and compliance with prevailing laws, bilateral agreements and provenance indications.\textsuperscript{146}

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

\textsuperscript{142} Id.
\textsuperscript{143} Interview with Steward, supra note 89. Loaning fees for items are often nominal ($500–1000) offset by the costs involved, which involve larger sums of money to cover insurance, administrative expenses, transport and packaging of the object. Steward notes the expense of $10,000 for the special container for a vase. With regards to insurance, the Art and Artifacts Indemnity Act (1975) provides for reduced insurance costs for American museums borrowing objects from abroad as part of traveling exhibitions. The 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.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id. 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. It also states that “long term loans.. should be evaluated under criteria comparable to those for acquisitions” and codes on acquisitions are stricter as codes regulating loans. See Report of the AAMD Subcommittee.
been met? Conservation work and fostering strong relationships with prestigious institutions are certainly important factors, but they are hard to quantify in monetary terms. The problem with loans understood as barter transactions, which is when objects are exchanged either for other objects or relevant services, is that it requires a coincidence of wants. The exchange costs involved in a barter transaction are high: negotiation between the parties trying to establish whether the transaction is their favor can be lengthy and not always result in a successful conclusion of the transfer. Adam Smith recognized the limitations of barter transactions long ago: “in 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.” 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 is to expand to cover the high demand for antiquities in the US 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 a loan into a lease. The introduction of fees would regulate lending instruments and give them a more uniform structure and overall the development of an efficient leasing market is conditional on systematic mechanisms of value assignments and price formulation. 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, and indirectly the price would reflect when the prestige of showing a new artifact for an extended period of time would provide a sufficient motivation to forgo full ownership. Activity on a leasing market will help to establish prices that respond to the interaction of supply and demand and give this tool a more consistent structure that would make it easier to trade. If the cost of negotiating a lease would still be higher than cutting on 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 general counsel at the Metropolitan Museum states that there is nothing in the rules of the institution that would prevent the implementation of a leasing model if that becomes a viable way to continue collecting. Referring to the accord with Italy she suggests that long term leases could be a suitable addition to collecting strategies in the longer run, once the cooperation agreement has expired. The international leasing of works of art began when world-famous institutions such as the Louvre agreed to lease to its counterpart in Abu Dhabi

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147 Elisabetta Povoledo, *Italy Makes Its Choices of Antiquities to Lend Met*, New York Times, March 15, 2006, “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.” available at [http://www.nytimes.com/2006/03/15/arts/design/15vase.html](http://www.nytimes.com/2006/03/15/arts/design/15vase.html) (last visited April 5, 2012).


149 Interview with Cott, *supra* note 89.

150 Id.
between 200 and 300 artworks over a ten year period for a total sum of $247 million.\textsuperscript{151} Another example includes the King Tut exhibit which was leased to a private agency on behalf of Egypt and circulated in London and the US during 2005-2008 for a $5 million fee per city.\textsuperscript{152} This trend of monetizing collections could also be adopted for classical antiquities. For the moment negotiations continue and it is possible that Italy will start wanting to see some tangible returns on the loans it will grant in the future.

\textbf{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 exhibition brought great recognition to their respective institutions. Given that the present paper focuses on museums with established collections and 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.

There is a special prestige that can be only conferred by the ownership of a masterpiece: besides of the aesthetical value it is its rarity and uniqueness that draws visitors and experts to view them at their hosting institutions, and the educational and scholarly work of researchers and curators that helps 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—there will be an rise in reputation resulting 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 Aphrodite is one of the best examples that illustrates the willingness of an institution to invest a big sum of money 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.\textsuperscript{153} Also the Sabina of the MFA and the Metropolitan’s Euphroneos krater are icon-symbols that conform to the high quality masterpiece analysis above and that were bought in suspicious circumstances for large sums of money. Both were returned to Italy.

Recent acquisitions but also the loans given out by Italy involve prestigious items whose possession will result in an increase in 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


\textsuperscript{153} See Felch and Frammolino, supra note 1 narrates the exact story of the negotiations and how cold-bloodedly some Getty officials acted in order to retain the object.
in storage.”¹⁵⁴ 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 taken in exchange for conservation work.¹⁵⁵ Ultimately it depends on a combination of aesthetic values and the solidity of the cultural context the object carries with it. Leasing items from storage would have many advantages, for instance it would not frustrate the expectations of visitors that expect to view specific pieces in their home institutions. In the long run this may discourage art-related tourism in general.

The senior antiquities curator at the Getty asserts that at present decisions to collect are based on the quality features of an item, and she also emphasizes that an object has to be understood within the context of the collection: “it really is only a question of quality and fit with the collection” and “it is a question of having an impact on the public, experts but also visitors.”¹⁵⁶ The Princeton Museum director agrees in part, noting that quality comes above all because generally high quality pieces fit every well-established museum collection.¹⁵⁷ The curator for Greek and Roman art at the Carlos Museum makes decisions based on “filling gaps” and would loan or acquire objects of which there is no comparable example in the collection already.¹⁵⁸ Either way the problem is that there are not many high quality objects with cleared provenance on the market, and museums with similarly strict acquisition policies are after them.¹⁵⁹ Before source country claims, 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.¹⁶⁰

The fact that repatriations involved very important objects is a strong indicator that high quality objects with a clear provenance are difficult to acquire on the licit market.¹⁶¹ Objects that have surfaced recently with an obscure provenance are most likely the product of illicit excavations, otherwise they would have been published or their existence would be known to people in the field. In contrast, already discovered masterpieces are known to be in a specific location and their owners tend to keep them because given the scarcity of the supply it would be difficult for them to acquire substitutes. Also, when important pieces with legitimate

¹⁵⁴ Interview with Fiorilli, supra note 85.
¹⁵⁵ Interview with Jasper Gaunt, Curator of Greek and Roman Art, Carlos Museum, Emory University.
¹⁵⁶ Interview with Lyons, supra note 89.
¹⁵⁷ Interview with Steward, supra note 89.
¹⁵⁸ Interview with Gaunt, supra note 155.
¹⁵⁹ Interview with Steward, supra note 89.
¹⁶⁰ Work in progress by the author analyzing the impact of recent legal developments on sales prices of ancient artifacts of Christie’s and Sotheby’s auctions catalogues over the past 15 years. Preliminary evidence shows that strong provenances have driven prices up considerably in comparison to the base estimate set out by the auction house before the sale.
¹⁶¹ See Efrat, supra note 32, at 85 “acquisition 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. (2007) at 597-598.
provenance are sold, the fact is highly publicized by the seller in order to attract the highest bidder. The situation is complicated by patrimony laws. 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.

C. Italian and Greek Laws Regulating Loans

Considering that loans have been successful, 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 that would make leasing to foreign institutions possible. When inspecting the provision of national laws, the length of the period an object can be kept abroad becomes crucial, because the longer the lease, the more similar to an acquisition, and in turn, the stronger its trademark functions, the more valuable to the lessee.

Although, as described in the first section of this article, the excessive export controls supported by the 1970 UNESCO Convention lead to the over-retention of cultural material by source countries, its preamble states that: “the 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.”162 The concept of exchanges is elaborated on in a subsequent UNESCO Recommendation,163 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.”164 This is a clear encouragement to find procedures that allow for the circulation of artifacts. The preamble of the Recommendation also includes a reference to the fact there is a marketable surplus of objects in source countries which would be welcomed as valuable accessions by institutions in other countries.165

The bilateral agreement entered into by Italy and the US after the enactment of the CPIA incarnates, to a certain extent, a spirit of reciprocity and cooperation involving exchanges: it grants import restrictions of Italian artifacts into the US but also includes a provision referring to long-term loans of archeological material.166 Article II.E of the agreement states that Italy will use its best efforts to promote the long-term loan of objects for research and education for as long as necessary on a case by case basis.167 A success story

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162 1970 UNESCO Convention, supra note __ at Preamble.
164 Id. at I.1.
165 Id. at Preamble: “Many 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.”
166 Memorandum of Understanding between Italy and the United States, supra note 53.
167 Guidelines, Loans of Archaeological Material Under the 2001 U.S.-Italy Memorandum of Understanding: “longer –term loans shall 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 would could be carried
illustrating the effect of such provision involves a 5 year traveling exhibition starting in 2004 of the Stabiano frescoes, which were previously kept in storage, to nine museums in the US. In 2001, the year the bilateral agreement was entered into, 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. “Italy has always been accused of having an excessively rigid legislation concerning loans” comments the deputy attorney general for Italy, “but in 2004, with the introduction of the Italian Cultural Heritage Code, the term was extended to four years and since 2011 renewals are possible.”

The key provision of the 2004 code with regards to the temporary exit of cultural artifacts is Article 67, which permits the provisional circulation of objects if it is in pursuit of cultural cooperation agreements with foreign institutions. Before exiting the country a certificate must be obtained from the competent export office which, inter alia, will indicate the value of the object and the party responsible for its safekeeping when abroad. Although Article 67 sets a maximum duration of four years, the possibility to renew the temporary export license for a further term was introduced in 2011. Deputy attorney general for Italy explains that “loans can be renewed for a further term if convincing arguments concerning the advancement of research or conservation are made.” He further explains that whereas the notion of high quality conservation work is in many ways self-explanatory, as it involves the enhancement of the objects and their value, the significance of research element, when it comes to renewing a loan, is mainly related to the study of an art object in a new cultural context. 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 “a path of cultural testimony.” 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 engaging unexplored contexts.

out in the US, scholarly publications may result from the cooperation, comparisons with objects in US museums can advance knowledge on the larger historic context or other connections between the objects.


169 Id.

170 Interview with Fiorilli, supra note 85.

171 Italian Law No. 42/2004, supra note __.

172 Id. at Art 71. In Italy the competent authorities are locally called “sovraintendenze” but can be equaled with the local provincial offices specialized in a certain subject, in this case it will be the office of export of objects of ancient art.


174 Interview with Fiorilli, supra note 85.

175 Id.

176 Id.

177 Id.
The above inspection of loans given out by Italy in pursuit of the cooperation agreements with several US museums shows that the negotiation of renewals has been successful in a number of cases. 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 to establish that association between the object and the institution that delivers goodwill and prestige. The occurring renewals have shown that longer term loans are an option if the situation requires it and this enables all parties to the decision to adjust their interests.

The 2004 code is silent on the possibility to request monetary compensation for a loan, which makes it an option in theory. In practice a new law amending the existing code introducing provisions relating to monetary compensation would make leasing an established option. Considering that the Italian code was changed frequently since it was introduced in 2004, 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 a likely option for the future. The deputy attorney general for Italy declares himself favorable: “pushing in that direction would create resources to de-store, valorize and study more items.”

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 have to “take place on condition of reciprocity” and the item in question can not be of particular significance to the cultural heritage of Greece. The maximum negotiable term is five years but it may be renewed. 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 constituting a collection shall not be broken. Although it is not entirely clear how the assessment will be made it seems that unless the object is a true landmark in Greece it can be loaned. No loans from

178 Interview with Lyons, supra note 89. See also Eakin, Italy goes on the offensive with Antiquities, New York Times, December 26, 2005 available at http://www.nytimes.com/2005/12/26/arts/design/26loan.html (last visited April 6, 2012) “In 2002, a group of German museums were permitted to borrow works from Italy for up to five years - provided that they also undertook to do scientific work on the borrowed object. It was a major breakthrough, said Wolf-Dieter Heilmeyer, former curator of the Antiquities Collection of the State Museum of Berlin, who helped negotiate the arrangement.”

179 See Cultural Policy Research Institute, Seminar Transcript, supra note 28. “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 from 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.”

180 Interview with Fiorilli, supra note 85.


182 Id., Art. 25 (1) on Loan and exchange of movable monuments which belong to the State.

183 Id., Art 25 (2).
Greece have followed from cooperation agreements as yet, so at this stage it is difficult to predict if the Greek will apply their cultural heritage code in a flexible way as the Italian example shows.

D. **Internal Limitations on the Use of Resources**

Resources available to antiquities departments of museums to further their antiquities collections vary. The Getty, the Metropolitan and Princeton have substantial endowments and can afford to buy the items they have a substantial interest in. This can be stated after looking at the some past acquisitions that required big sums of money within a short period of time: the Metropolitan bought the Euphronios krater in 1972 for $1.2 million and 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.\(^{184}\)

Decisions on acquisitions are taken by a museum’s board of trustees after the case for acquisition is made by the antiquities curator in charge. The Getty and the Metropolitan tend not to have specific funds allocated to antiquities acquisitions only; depending on how the trustees view the acquisition plan of a specific department in relation to the other ones they will decide where to invest during a given year. The set-up of an institution is important: whereas the Metropolitan is run as charity,\(^{185}\) 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.\(^{186}\) This portion amounts to 4.25% of endowment assets each year.\(^{187}\) 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.\(^{188}\) This gives an indication about the institution’s wealth. However, what is more important in this context is the fact that nothing in the internal regulations of these institutions prevents the use of such resources to lease antiquities. This is the case for the Getty and the same is true for the Metropolitan.\(^{189}\)

The situation is more complex in the case of the Princeton Museum. Princeton’s endowment for art acquisitions is substantial: “its financial possibilities in terms of art acquisitions are bigger than the ones of any other university” states its director, and “this has to

\(^{184}\) See Felch and Frammolino, *supra* note 1 at 25, 64, 95, 116.

\(^{185}\) IRS, Section 501(c)(3).


\(^{188}\) Break up figures 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 20th century European paintings, drawings, sculpture, manuscripts, decorative arts, and 19th- and 20th- century photographs and the Getty Villa in Malibu entirely dedicated to antiquities from ancient Rome, Greece and Etruria.

do with the fact that 60 per cent of Princeton’s alumna donate yearly and some donate art directly.” However the complication lies in the fact that there are two 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 of money donated for art acquisitions are held on trust for purchases only. The fact that some of these funds are restricted to acquisitions and do not take into account other collecting options might be a limiting factor for the working of leasing strategies. If a donor passed away without leaving instructions for the trustee the terms of the trust cannot be changed to include leasing. On the other hand, if the donors are alive, the terms governing the use of funds could be modified to include leasing if the market develops in a way that makes this the more effective way to continue collecting antiquities. This does not exclude the introduction of innovative instruments such as specific fundraising or the creation of endowments for the leasing of art.

Although in the end it is a question of internal negotiation and policies, it appears that the museums referred to in this paper and several others have sufficient resources to make antiquities departments work and if a strong case for the leasing of a significant object is made by the leading curator the funds can be allocated in the same way they would be allocated to an acquisition. Besides some restricted funds that were set up for acquisitions only there are no internal policies that discourage or prohibit the collecting of antiquities through leases.

IV. CHANGING ART SYSTEMS

Finally the paper will argue that changes in the governmental attitude and structure in the US as well as in source countries would 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 US museum is willing to spend money on the option of leasing an artifact, the lending institution of a source country has to be willing to agree to it. In many source countries these decisions are taken by ministries of culture, in the US by individual museums. The institutional differences between the US system and ministry-based systems deserve a brief analysis. The purpose of the discussion is to determine the potential role of regulation in correcting the present inefficiencies in this area of law.

When asked about whether she would welcome the introduction of leasing strategies as a new way of collecting artifacts the Getty senior curator says that “paying money directly is corrupt” because the decision as to how much money an object for lease is worth would be taken by government officers instead of more appropriate subjects such as museum curators or conservators. The curator is voicing a very common sentiment in this field, which sees the value of education that goes with the research of art objects as standing in stark contrast with the political apparatus and bureaucratic decisions on monetary value, which would create the risk of confusing priorities in a way that is not in the public’s interest. She further argues that

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190 Interview with Steward, supra note 89.
193 Interview with Lyons, supra note 89.
194 Interview with Gaunt, supra note 155. See also Dick Netzer, CULTURAL POLICY: AN AMERICAN VIEW IN HANDBOOK OF THE ECONOMICS OF ART AND CULTURE (Ginsburgh and Throsby eds. 2006) at 1241. When the
“cooperation agreements have to be viewed in the context of diplomacy: such exchanges and collaboration emphasize a much broader international relation point.”

It is however difficult to understand what kind of diplomacy is possible between a privately run non-profit organization and a ministry of culture of a source nation. A governmental ministry can by its proper nature engage in diplomatic exchanges, and that is what has been happening with the signing of the cooperation agreements, but as well-intended as they might be US museums are pursuing their private interests, not the ones of a national art policy. US art museums such as the Getty and the Metropolitan are private institutions founded and sustained by private donations of funds or works of art. Their activities follow their own rules and are decided upon by an independent board of appointed trustees. Their actions are not monitored by any governmental authority. Also professional organizations, such as the AAMD, the American Association of Museums (AAM) and the Association of Art Museum Curators (AAMC) are self-governing bodies. Even though these associations are important from a public perspective because their standards represent a consensus on broad issues concerning museum administration, they remain privately regulated entities.

The model of the US museum operated by private funds has been successful if we consider the role in education and scholarship and the impressive collections of US institutions. However, whenever such institutions commit a misdeed, such as the acquisition of doubtful objects, they are rarely held accountable. The Attorney General of each state has jurisdiction to hold museums accountable for their wrongful actions, however this has not been happening in the context of acquiring illicitly excavated objects. For instance, when the Attorney General of California opened an inquiry on the Getty’s misuse of funds it was almost all related to the personal expenses of its chief executives and not to the acquisition of tainted artifacts. The existing regulatory set-up 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 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 trust, the credibility of US institutions and the
US art system in general, and supplement standards of professional practice in fostering improvement in this field. 198

Until now, the role of the Department of State in the ambit of setting standards in the cultural field has been minimal. There is nothing comparable to a ministry of culture in the US and although there is a Bureau of Educational and Cultural Affairs, no specific body has decision-making power in relation to cultural policy issues in general. 199 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. This marginalized entity administers the implementation of the 1970 Convention trough CPAC, the Committee that decides on the bilateral agreements discussed above. The staff of this small governmental body is mainly composed by archeologists. This can best be understood as the result of effective lobbying by the Archeological Institute of America (AIA) for the passage of the CPIA. 200 The AIA convinced Congress that the concern for the loss of scientific knowledge due to illicit trade was a legitimate one, and that ratifying the 1970 Convention would make the US, as a market country, an example of leadership in this area. 201 This way archeologists captured governmental power and turned it to their own benefit, not only by efficiently lobbying for regulation in the first place but also by occupying staff positions of the Center. 202 The lobbying efforts of the other groups of interested parties, such as museums and dealers, were less organized and persuasive, and, as a consequence, their interests less represented. This resulted in the granting of import restrictions which are broader

198 See Joskow and Noll, REGULATION IN THEORY AND IN PRACTICE: AN OVERVIEW, IN GARY FROMM, STUDIES IN PUBLIC REGULATION, (MIT Press: 1981) at 1-65. They 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 demands that a market failure be corrected. The establishment of regulatory bodies would was meant to eliminate inefficiencies engendered by market failure. See also Viscusi, Vernon and Harrington, THE ECONOMICS OF REGULATION AND ANTITRUST (MIT Press: 1995).

199 See Merryman, supra note 191. He explains that what comes the closest to a US governmental institution devoted to culture and the arts are the National Endowment for the Art (NEA) and the National Endowment for Humanities (NEH), however their budgets are limited if compared with the resources of some US museums and although their activities resemble the ones of an official authority their impact is not particularly strong. 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 the thought about giving these institutions more powers and therefore bring them closer to the idea of ministry of culture was aired, but there was a reluctance to make art and culture a subject for bureaucratic administration.

200 See Efrat, supra note 32 at 47ff. He explains the exact lobbying strategies of archeologists, dealers and collectors.

201 Id.

202 Derek Fincham, Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes, (March 20, 2012) at 35, available at SSRN: http://ssrn.com/abstract=2026679 or http://dx.doi.org/10.2139/ssrn.2026679 (last visited September 7, 2012). See also George Stigler, The Theory of Economic Regulation, 2 Bell Journal of Economics (1971) 3-21. 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 the regulatory agency invariably will tend to issue regulations to improve the group’s well being. Stigler’s paper founded what has come to be called “the economic theory of regulation.” See also Gary Becker, A Theory of Competition among pressure groups for Political Influence, 3 Quarterly Journal of Economics (1983). He argues that the equilibrium resulting from the pressure exerted by interest groups represents a balancing of marginal pressure as exerted by winners and losers. The result is therefore one produced by the collective pressure of all groups—not a single entity. See also Carlton and Perloff, MODERN INDUSTRIAL ORGANIZATION (HarperCollins College Publishers 2nd ed.1994) at 686 ff.
than the ones envisioned during the Congressional debate. These regulatory restrictions limited the trade in artifacts and increased the inefficiency in the system instead of resolving it.

On the international level one of the major standard setting bodies in the ambit of culture is UNESCO. At UNESCO countries are represented by their own diplomats, who are governmental officers coordinated by the executive departments of their central governments. 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 US mission to UNESCO coordinate with the Bureau of International Organizations in DC or with the Cultural Heritage Center when the 1970 Convention is at issue. The result of the scarce involvement of the US government with cultural issues and the lack of a national art policy impact the work of the US at an international level because the concerns and interests of major players, like museums, collectors and dealers are not taken into account.

In many source countries like Italy and Greece, the picture looks very different. Decision-making power with regards 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, which include the permission to loan objects, the regulation of archeological excavations, the powers and duties of professional archeologists and museum professionals. The public officers working in the ministries include politicians, lawyers, museum experts, archeologists and other professionals—to date the Italian ministry employs 25,000 people. Decisions on loans of artifacts are taken at three levels of the hierarchy, first the individual museum has to agree, then the regional office gives an opinion and finally the ministry decides on the proposal. In some cases an advisory body composed of seven high ranking professionals sits in judgment to give an opinion if so requested. This body as well as senior positions in regional offices are seated based on politics, and this means that politics inform decisions on culture quite directly.

A problem with this set up is that the officers who make decisions have been trained to think that the scientific character of archeological research can only be accomplished if objects are understood and kept in their original context. This fossilized attitude to exhibiting and collecting makes the case for the commoditization of antiquities a problematic one, as it would mean trading the promulgation of knowledge through scientific research for other values. However the mentality of Italian bureaucrats is changing and such change in approach became clear with the recent introduction of several reforms in the cultural heritage field. 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

203 See Efrat, supra note 32.
204 Interview with Carolyn Willson, Senior Legal Advisor, Permanent Delegation of the United States of America to UNESCO conducted on December 15, 2011.
205 Italian Law No. 201 of December 6, 2011 at Art. See also Marta Romana, Dallo “Stato-provvidenza all cittadinanza culturale,” Il Giornale dell’Arte, No. 321 June 2012 at 14-15.
206 Interview with Papadopoulos, supra note 26.
207 Interview with Fiorilli, supra note 85. See also Isman, supra note 1 at 61ff.
“private money” to fund cultural activities. These are major innovations in the Italian scenario, that enabled billionaire Diego Della Valle to fund the 25 million Euro restoration project for the Colosseo in Rome.\textsuperscript{208} 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. These reforms reflect a new awareness that culture impacts the quality of the rights of citizenship, and represents a meeting place for the integration of identities and a shared commitment.\textsuperscript{209} The current Italian minister for culture defines this change of approach as “a movement towards cultural citizenship.”\textsuperscript{210} This movement may well support a model that conceives 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.”\textsuperscript{211} Jeanette Papadopoulos, a director of the antiquities’ section at the Italian ministry, is dubious about charging for leasing antiquities, she states that conservation work is beneficial to the object in a way that a monetary compensation could not be.\textsuperscript{212} This skepticism can be addressed in the following way: there should be no problem if monetary and a scientific values coexist and if the revenues obtained through leases would be used to improve the preservation of objects and the security at archeological sites. This would require the setting up of an instrument that holds specific funds on trust for the above purposes, as opposed to the funds being mixed with the general moneys of the national treasury. Another option would be to loan in exchange for the financing of specific cultural projects, like the excavation of a site or the renovation of a museum, although this doesn’t solve the complications posed by barter transactions explained above. Although policy will play a role recent changes demonstrate that a more entrepreneurial vision is realistic.

The divide between the US 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 had a politically charged ministry with little motivation to monetize on scientific research, whereas the US museum mentality is more oriented towards educating the public through entertainment. The interest of a privately run museum is to provide its public and patrons with exhibitions that include prestigious objects explained in new contexts which are the result of curatorial skills.\textsuperscript{213} For instance, the interest of a museum director negotiating a cooperation agreement with a 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 being 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. Referring to the cooperation

\textsuperscript{209} Marta Romana, \textit{supra} note 25.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Interview with Papadopoulos, \textit{supra} note 26.
\textsuperscript{213} See Ferdinand Eckhardt, \textit{American Museums seen through the eyes of a European}, 12 College Art Journal (1953) at 131, 133.
agreements 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.”

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

V. CONCLUSION

The obvious ethical conclusion is that all parties agree that combating illicit trafficking and the sustainable movement of objects is possible only through a strong spirit of cooperation. The present paper has shown that the global trade in cultural material is plagued by several complexities that have created a climate of fear for museums which resulted in overall lower acquisitions and 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 in the cultural policy shaping museums play a special role; 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.

The present paper 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 but 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

214 Interview with Fiorilli, supra note 85.
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 leaving the ownership interest to stay with source nations. Although the more effective solution would 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, the ones that source countries will refuse to sell—at this moment in time a sales market is neither possible nor wanted by source countries. Leasing is a pragmatic solution, especially considering the scarce resources and the immense patrimonies that several countries need to take care of, but for a leasing model to be implemented ministries in source countries should start thinking of trading cultural material to create resources. In the wait for a truly international approach to find its pace and rules through more radical legal changes enabling a broader licit trade, the development of a solid leasing system could reduce illicit trafficking by changing the conduct of the actors in the art market and thereby provide a realistic and sensible solution to the present deficiencies in the antiquities market.