

THE FIGHT AGAINST THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY: BEST PRACTICES IN THE UNITED STATES OF AMERICA

Lawrence M. KAYE*

We are gathered in Mexico City because, some 43 years after the 1970 UNESCO Convention (the “Convention”)¹ was adopted, the looting of cultural property and the large-scale destruction of important archaeological sites continues to be a vast problem. I will focus on how the art market and museums have reacted to both the Convention and the Cultural Property Implementation Act (“CPIA”),² and what steps they have taken—or not taken—to address the problems caused by the illicit market in the United States. I will also explain why the implementation of the Convention in the United States has encountered a good bit of controversy from the beginning to the present day.

The history of the Convention in the U.S. is a complicated one. Although the U.S. signed the Convention in 1970, and ratified it in 1972, the Convention had no legal effect in the United States until 1983, after Congress enacted the CPIA.³

The lengthy delay between the signing of the UNESCO Convention and the enactment of the CPIA was caused in part by the struggle to deter-

* Mr. Kaye is a partner in the New York law firm of Herrick, Feinstein LLP and the co-chair of the firm’s Art Law Group. Mr. Kaye and his firm have represented foreign governments, heirs of victims of the Holocaust, families of renowned artists and other claimants in connection with the recovery of artworks. This paper is based on remarks delivered by the author at “The Globalization of the Protection of Cultural Heritage, The 1970 Convention: New Challenges” symposium held in Mexico City on March 22, 2013. Mr. Kaye would like to thank Mari-Claudia Jiménez for her invaluable assistance in the preparation of this paper.

¹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

² Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (2013).

³ *Idem*, see also UNESCO List of State Parties to the Convention, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha> (last visited April 10, 2013).

mine United States policy on cultural property protection and its appropriate implementation. Opponents, including dealers, collectors and others in the art market, “held a deep concern that the U.S. State Department, under diplomatic pressure, would agree to impose excessive import controls without protecting American cultural interests”.⁴ They argued that “if the United States undertook unilateral import controls, illegal cultural property would simply be sold to those art market countries lacking similar import controls”.⁵ Ultimately, the CPIA provided much narrower cultural property protections than the Convention’s provisions contemplated.

The CPIA, as finally enacted, responded to the concerns of the antiquities trade in many ways. Instead of providing for a broad prohibition of the importation of cultural property illegally exported from signatory source nations, the CPIA limited import restrictions to instances where other State Parties have entered into bilateral or multilateral agreements with the United States regarding specific types of cultural property, where emergency restrictions are imposed, or where cultural property is stolen from the documented collection of a museum or religious institution of a State Party.

On top of this, it took some time for nations to begin to take advantage of the bilateral agreement option afforded by the CPIA. In part, the reason for the delay may have been due to the fact that the process of requesting a bilateral agreement for a foreign sovereign can be quite onerous.⁶ Thus, until the signing of the first bilateral agreement (with El Salvador in 1995),⁷ for 12 years after the enactment of the CPIA and 23 years after the 1970 Convention was ratified in the U.S., import restrictions were imposed only through emergency decrees.⁸

⁴ Barbara T. Hoffman, *Art and Cultural Heritage: Law, Policy and Practice* 160 (2005).

⁵ *Idem*.

⁶ Indeed, the “process of requesting a bilateral agreement imposes burdens on a State Party that were not anticipated by the Convention itself, particularly as a nation must prepare a request for a bilateral agreement in order to seek import restrictions in an emergency situation”. Patty Gerstenblith, *Art, Cultural Heritage, and the Law* 633 (2d ed. 2008) (citing Patrick O’Keefe, *Commentary on the UNESCO Convention* (2d ed. 2007)).

⁷ Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material from the Prehispanic Cultures of the Republic of El Salvador, 19 CFR 12.104(g), 60 FR 13360, 13361 (March 10, 1995).

⁸ U.S. Dept. of State, Bureau of Education and Cultural Affairs, *Guide to Cultural Property Import Restitutions Currently Imposed by the United States of America*, <http://eca.state.gov/files/bureau/chart-of-import-restrictions.pdf> (last visited April 10, 2013).

Consider the case of Peru. In 1990, emergency import restrictions were imposed that prohibited Moche artifacts from the Sipán region from entering the United States unless accompanied by an export permit issued by Peru.⁹ Four years later, Customs, acting under this emergency ban, seized a gold head bead and a gold and turquoise necklace, identified by the Peruvian government through examination of a Sotheby's auction house catalogue. Neither Sotheby's nor the consignor contested the forfeiture and the objects were returned to officials of the Peruvian government by Special Agents of the Customs Service in New York.¹⁰ Then, in 1997, the U.S. signed a bilateral agreement with Peru, replacing the 1990 emergency import restrictions and broadening the scope of protected archaeological materials to include artifacts from the Chavin, Paracas, Moche, Cuzco and Inca civilizations while continuing to protect those from Sipán.¹¹ Pursuant to this agreement, other seizures and forfeitures followed. In 2007, the Federal Bureau of Investigation ("FBI") seized two paintings of the Cuzco school of painting, entitled "Saint Dominic" and "Doble Trinidad" or "Sagrada Familia", that were imported into the United States.¹² Tellingly, the paintings had been cut from their frames and packed in cardboard cylinders for transport.¹³ The purported owner of the two paintings had consigned the works to a gallery in Washington, D.C.¹⁴ After the gallery sent the paintings to an art dealer and expert to examine the works, the dealer, who suspected that the paintings were stolen due to the crude manner in which they were removed from their frames and the lack of ownership documentation, contacted the FBI.¹⁵ The FBI then notified the National Institute of Culture in Lima, Peru, which concluded that the paintings were "Peruvian cultural patrimony".¹⁶ On April 9, 2008, the Federal Government filed a complaint for seizure

⁹ Import Restrictions Imposed on Archaeological Artifacts and Ethnological Material from Peru, 19 CFR 12.104(g), 55 FR 19029 (May 7, 1990), amended 62 FR 31713-31721 (June 11, 1997).

¹⁰ Cockburn, A.C., *Peruvian antiquities seized as Sipán artifacts*, IFAR Reports 17 (July-August 1996).

¹¹ Memorandum of Understanding between the Government of the United States of America and the Government of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, 19 CFR 12.104(g), 62 FR 31713-31721 (June 11, 1997).

¹² *United States v. Eighteenth Century Oil on Canvas*, 597 F. Supp. 2d 618, 620 (E.D. Va. 2009).

¹³ *Ibidem* at 619.

¹⁴ *Idem*.

¹⁵ *Ibidem* at 620.

¹⁶ *Idem*.

and forfeiture of the paintings pursuant to the CPIA.¹⁷ The alleged owner contested the forfeiture and filed a claim of ownership of the paintings.¹⁸ On February 12, 2009, the court granted the Government's motion for a judgment in its favor, holding that the seized paintings were subject to the import restrictions of the CPIA pursuant to the U.S.'s bilateral agreement with Peru and subject to forfeiture.¹⁹ On April 7, 2010, the paintings were returned to Peru.²⁰

The United States' bilateral agreement with Peru is a prime example of how the Convention works effectively in the U.S. to secure the return of looted antiquities and cultural property. But the bilateral agreement with Peru has also generated its fair share of controversy. In 1997, when the U.S. signed the bilateral agreement with Peru, as well as one with Canada,²¹ many dealers and collectors criticized these agreements as being overbroad and unnecessary. Indeed, there was a virtual outcry! The bilateral agreement with Canada, which sought to protect materials of several Aboriginal cultural groups and materials from underwater sites and shipwrecks, was particularly contentious. While the agreement with Canada was predicated on the recognition that the United States shares a long and porous border with Canada and that, consequently, protected archaeological and ethnographic objects had been disappearing into the United States, dealers and collectors were skeptical because they saw no need to extend protection to a developed country with an enlightened import-export policy. Moreover, as to both Peru and Canada, the market believed the provisions of the agreements far exceeded the original intent of the framers of the CPIA.²² Those who criticized the bilateral agreements with Peru and Canada contended

¹⁷ *Idem.*

¹⁸ *Idem.*

¹⁹ *Ibidem* at 626.

²⁰ Press Release, Federal Bureau of Investigation, FBI Returns Paintings to Peru, April 7, 2010, <http://www.fbi.gov/news/pressrel/press-releases/fbi-returns-paintings-to-peru>.

²¹ Agreement between the Government of the United States of America and the Government of Canada Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnological Material, 19 CFR 12.104(g), 62 FR 19488-19492 (April 22, 1997).

²² Indeed, the market position seems to be that "[t]he limitations expressed in the legislative history as well as in the language of the [CPIA] were meant to preserve the delicate balance between the United States' interest in supporting the international market for art against situations where protection is needed due to jeopardy from the pillage of archaeological or ethnological material". Thus, "the intention of the [CPIA] [was] to serve only as an extreme remedy applied to a narrow range of objects and in a limited number of situations". Statement of the Association of Art Museum Directors Presented by Stephen J. Knerly, Jr., Meeting of the Cultural Property Advisory Committee, Jan. 25, 2007.

that they were overbroad in the scope of materials protected, and, in the case of Canada, “not site specific or in the context of an emergency”.²³ On August 6, 1999, a meeting was held by the Cultural Property Advisory Committee (the “Committee”) in Washington, D.C. to hear objections to these agreements.²⁴ The meeting was held pursuant to the Committee’s authority under the CPIA to conduct “ongoing reviews of current agreements”.²⁵ Subsequently, on September 16, 1999, the Republic of Italy made a formal request for a bilateral agreement with the United States.²⁶ And in October 1999, the Committee met to review that request.²⁷ During the portion of the meeting open to the public, many vocal members of the U.S. art market vigorously opposed the proposed agreement, arguing that the proposed import restrictions on pre-Classical, Classical and Imperial Roman archaeological material were overbroad. Partly in response to this outcry, along with the controversy surrounding the bilateral agreements with Peru and Canada, that same month, the United States proposed legislation—sponsored by New York Senators Patrick Moynihan and Charles Schumer—that would have imposed significant restrictions on the ability of the President to enter into bilateral agreements with foreign sovereigns.²⁸

The legislative proposal never passed, and the U.S. entered into a bilateral agreement with Italy in January 2001, which imposed import restrictions on pre-Classical, Classical and Imperial Roman archaeological material.²⁹ And, despite all the controversy regarding the bilateral agreement with Peru, the agreement was extended three times (in 2002, 2007 and 2012).³⁰ The bilateral agreement with Canada, however, was allowed

²³ Steven Vincent, *Dealers v. USIA*, Art + Auction, Nov. 1997 at 43, 44.

²⁴ Meeting Notice, 64 Fed. Reg. 141 (July 23, 1999), available at <http://www.gpo.gov/fdsys/pkg/FR-1999-07-23/pdf/99-18778.pdf>.

²⁵ U.S. Dept. of State, Bureau of Education and Cultural Affairs, *Background, Role of the Cultural Property Advisory Committee*, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/process-and-purpose/background> (last visited April 10, 2013).

²⁶ Notices, 64 Fed. Reg. 184 (Sept. 23, 1999), available at <http://www.gpo.gov/fdsys/pkg/FR-1999-09-23/pdf/99-24754.pdf>.

²⁷ Meeting Notice, 64 Fed. Reg. 184 (Sept. 23, 1999), available at <http://www.gpo.gov/fdsys/pkg/FR-1999-09-23/pdf/99-24755.pdf>.

²⁸ S. 1696, 106th Cong. (1999), available at <http://www.gpo.gov/fdsys/pkg/BILLS-106s1696is/pdf/BILLS-106s1696is.pdf>.

²⁹ Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy, 19 CFR 12.104(g), 66 FR 7399-7402 (Jan. 19, 2001).

³⁰ See U.S. Dept. of State, Bureau of Education and Cultural Affairs, *Guide to Cultural Property Import Restitutions Currently Imposed by the United States of America*, <http://eca.state.gov/files/>

to expire on April 9, 2002—because at that time, there was evidence that “Canada had the problem of pillage well under control, obviating the need to extend the agreement”.³¹

There has been other criticism regarding the implementation of the CPIA. In 2010, at a panel discussion hosted by the American Bar Association Section on International Law, issues were raised regarding the United States’ 2009 bilateral agreement with China, which protects archaeological materials representing China’s cultural heritage from the Paleolithic Period (circa 75,000 B.C.) through the end of the Tang Period (A.D. 907) and monumental sculpture and wall art at least 250 years old.³² In particular, one commentator argued that “[i]t is impossible to believe that China presented evidence of pillage of all such objects...[n]ot only was the scope of the [CPIA] meant to be narrow, it was never contemplated that the President’s authority would extend to restricting the import of the entire cultural patrimony of a country”.³³

Moreover, according to the commentator, the objects that are protected by the bilateral agreement are the very same objects that turn up at contemporary auctions in China. Thus, he argued, “[i]f the goal of the [CPIA] is to stop looting by cutting demand, the place to start is the domestic Chinese market...[P]ermitting a source country to sell publicly the same objects it asks to be denied to United States museums is directly contrary to the statutory requirement that a requesting nation undertake effective self-help measures to stem a problem of looting”.³⁴ On March 22, 2013, the U.S. State Department announced that China requested an extension of its bilateral agreement with the United States. From May 14 to May 17, 2013, the Committee will meet to discuss the proposed renewal and solicit public

bureau/chart-of-import-restrictions.pdf (last visited April 10, 2013).

³¹ United States Department of State, Bureau of Educational and Cultural Affairs, *Bilateral Agreements: Canada*, <http://eca.state.gov/cultural-heritage-center/international-cultural-property-protection/bilateral-agreements/Canada>.

³² Agreement between the Government of the United States of America and the Government of the People’s Republic of China Concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period Through the Tang Dynasty and Monumental Sculpture and Wall Art At Least 250 Years Old, 19 CFR 12.104(g), 74 FR 2838-2844 (Jan. 14, 2009).

³³ James F. Fitzpatrick, *Falling Short—Profound Failures in the Administration of the 1983 Cultural Property Law*, in Art & Cultural Heritage Law Newsletter (Art & Cultural Heritage Law Committee, American Bar Association Section of International Law), Summer 2010, at 27, available at http://www.law.depaul.edu/centers_institutes/art_museum/pdf/VolumeII_IssueI.pdf.

³⁴ *Ibidem* at 28.

comment.³⁵ There has already been some initial opposition to the renewal,³⁶ and we can expect more of these attacks in the coming weeks.

The Committee has also been subject to criticism for the secrecy of its proceedings. According to news reports, “[t]he State Department classifies almost all material presented to the group to aid its deliberations, including press clippings and information available on the Internet. It also withholds the original petitions for import restrictions that foreign countries submit as well as the recommendations that the committee makes to the department”.³⁷ Critics have stated that “[t]his secrecy has largely protected [the] State [Department] and CPAC from any meaningful public scrutiny”.³⁸ Others, however, have countered that the secrecy is needed. For example, there is a strong argument to be made for not releasing information from a source country’s request for import restrictions, since this material “could provide a ‘road map’ for potential looters to go to particular locations”.³⁹ And committee members may feel “inhibited from speaking candidly in deliberations” if they know that their comments will become public.⁴⁰ Moreover, the CPIA expressly provides that the Committee is exempted from public disclosure requirements “whenever and to the extent it is determined by the President or his designee that the disclosure of matters involved in the Committee’s proceedings would compromise the Government’s negotiating objectives or bargaining positions on the negotiations of any agreement” authorized by the CPIA.⁴¹ Notwithstanding the criticism from the dealers, the Committee’s proceedings still operate in secrecy.

While controversies surrounding the CPIA will inevitably continue, the fact remains that, pursuant to the CPIA, the U.S. Government has been

³⁵ Meeting Notice, 78 Fed. Reg. 19565 (Apr. 1, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-04-01/pdf/2013-07511.pdf>.

³⁶ On his blog, Cultural Property Observer, Peter Tompa, an attorney and collector who currently serves on the board of the Cultural Policy Research Institute and the Ancient Coin Collectors Guild, noted, “I’m all for the Chinese populace collecting rather than destroying (remember the Cultural Revolution) artifacts like the bazillions of cash coins that are found all the time in China, but hope CPAC recognizes that current restrictions have done little but to provide Chinese auction houses and dealers with a leg upon on their foreign (especially US) competition”. *Proposed Renewal of Chinese MOU*, Cultural Property Observer, March 29, 2013, <http://culturalpropertyobserver.blogspot.com/2013/03/proposed-renewal-of-chinese-mou.html>.

³⁷ Jeremy Kahn, *Is the U.S. Protecting Foreign Artifacts? Don’t Ask*, N. Y. Times, April 8, 2007, <http://www.nytimes.com/2007/04/08/arts/design/08kahn.html>.

³⁸ Fitzpatrick, *Falling Short*, *supra* note 33, at 29.

³⁹ *Idem*.

⁴⁰ Kahn, *Is the U.S. Protecting Foreign Artifacts*, *supra* note 37.

⁴¹ Convention on Cultural Property Implementation Act, 19 U.S.C. § 2605 (2013).

able to quickly and efficiently seize illicit objects entering its borders and return them to their country of origin. That, in and of itself, is no small feat. But the problem is that the reach of the CPIA is severely limited. There has to be a bilateral agreement or emergency import restrictions in place that cover the particular situation. And though the CPIA also applies to thefts from collections,⁴² there are several material limitations to this remedy as well.⁴³ Therefore, in addressing the battle against the illicit market in the United States, we need to look at all of the available remedies.

First, where it can be proved that cultural property owned by a foreign sovereign ends up in the U.S., this can lead to a criminal prosecution under the National Stolen Property Act (“NSPA”).⁴⁴ Pursuant to the NSPA, the United States may criminally prosecute anyone who possesses, sells, receives, or transports stolen goods valued at more than \$5,000 that have either crossed a state or United States boundary line or moved in interstate or foreign commerce. Violations of the NSPA are punishable by fine and/or imprisonment for up to ten years.

Enacted in 1948, for many years, the NSPA was rarely used to combat the illicit art market. The first case we are aware of is *United States v. Hollinshead*, in which the defendants arranged for a pre-Columbian stele located in the Guatemalan jungle to be cut into pieces and shipped to the United States, where they attempted to sell the pieces.⁴⁵ They were convicted of transporting goods in interstate and foreign commerce. On appeal, the court found “overwhelming evidence” that the defendants “knew that it was contrary to Guatemalan law to remove the stele”.⁴⁶

The *Hollinshead* case was followed only a few years later, in 1977, by the important case of *United States v. McClain*.⁴⁷ In *McClain*, the defendants were convicted of trafficking pre-Columbian artifacts from Mexico into the United States in violation of the NSPA. On appeal, the defendants argued that their offense constituted “mere illegal exportation”, which was not covered by the NSPA.⁴⁸ The court rejected the argument and affirmed their convictions, holding that an “illegal exportation of an article can be considered theft, and the exported article considered ‘stolen’” when the foreign nation

⁴² *Ibidem* at § 2607 (2013).

⁴³ *Ibidem* at § 2611 (2013).

⁴⁴ National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (2013).

⁴⁵ *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

⁴⁶ *Ibidem* at 1155.

⁴⁷ *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

⁴⁸ *Ibidem* at 994.

makes a “declaration of national ownership”.⁴⁹ Stated simply, where there is a declaration of national ownership, illegal exportation of the covered cultural objects will be considered theft within the meaning of the NSPA.

But successfully establishing that a national law gives the foreign sovereign ownership over the cultural objects in question is not always simple. Even in *McClain*, where the court held that Mexico had a valid patrimony law in place, the court first engaged in a close examination of Mexico’s patrimony laws, looking at the laws’ “language, history and purpose”.⁵⁰ First, the court considered—and subsequently rejected—the findings of Mexico’s expert, who testified that Mexico had, since 1897, “vested itself with ownership of pre-Columbian artifacts”.⁵¹ According to the court, the 1897 law had merely been “concerned with the preservation and regulation of pre-Columbian artifacts”, but did not grant Mexico ownership of the artifacts.⁵² The court next examined three subsequent laws concerning the protection of cultural artifacts, including laws from 1930, 1934, and 1970, before concluding that it was not until 1972 that Mexico successfully enacted a patrimony law that could be recognized by a U.S. court. Unlike the prior laws, the 1972 legislation provided a clear statement of ownership by declaring that “all pre-Columbian artifacts were owned by the Republic”.⁵³

Another case in point is *Government of Peru v. Johnson*, where the Government of Peru brought an action against an art dealer to recover 89 pre-Columbian artifacts seized by the United States Customs Service.⁵⁴ In this case, the lower court rejected Peru’s description and analysis of its own laws, reaching its own conclusion that those laws did not effectively provide for ownership of antiquities in the national government. Factors that the court considered included the permissibility of private ownership in Peru as well as the failure of the government to enforce its purported ownership rights, and the lack of clarity of the laws’ provisions.⁵⁵

Then, surprisingly, and except for one odd instance in 1993, the NSPA was not effectively used again until 2002 in the landmark prosecution of Frederick Schultz, a prominent New York antiquities dealer, who was con-

⁴⁹ *Ibidem* at 1000-1001.

⁵⁰ *United States v. Schultz*, 333 F.3d 393, 404 (2d Cir. 2003) (referencing *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977)).

⁵¹ *McClain*, 545 F.2d at 997.

⁵² *Idem*.

⁵³ *McClain*, 545 F.2d at 1001.

⁵⁴ *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal 1989).

⁵⁵ *Ibidem* at 814-15.

victed in a New York Federal court and sentenced to 33 months in prison.⁵⁶ Schultz was convicted of conspiring to receive and possess artifacts that had been stolen from Egypt, which has a patrimony law that vests ownership of previously undiscovered antiquities in the Egyptian Government. Our firm was retained by the Republic of Egypt in the case, both to render advice and to work with the U.S. Government on its behalf.

What was most startling about the *Schultz* case was that a successful and well-known dealer was convicted of a crime for what many previously saw as “business as usual” in the antiquities trade. Many in the dealer and collector communities expressed great outrage and fear that the conviction threatened the ability of legitimate collectors and dealers to do business at all. At the same time, many in the so-called opposing camp—archaeologists, scholars, law enforcement officials—saw the case as heralding an entirely new legal regime that would impose a significant burden of *due diligence* to ensure—almost guarantee—that what is offered for sale was not illegally removed from a foreign country, and more importantly, would create a real risk of criminal prosecution whenever anyone acquires an antiquity.

Both positions were, in my view, overstated. Granted, the case should serve as a cautionary tale for those in the trade; but nothing more. As detailed by the Federal Appeals Court, the conduct documented in the case was extraordinary. For example, one sculpture—an image of Amenhotep III, known as A-III—was smuggled out of Egypt by coating it with plastic so that it would look like a cheap souvenir; the plastic was removed once it got to the United Kingdom.⁵⁷ Schultz and his accomplice, the English dealer Jonathan Tokeley-Parry, worked together to sell the piece and actually discussed the potential problems they would have if their conduct was uncovered.⁵⁸ Therefore, they created a false provenance for the sculpture, claiming it had been brought out of Egypt in the 1920’s by a relative of Tokeley-Parry’s and kept in an fictional English private collection, “the Thomas Alcock Collection” from that time.⁵⁹ The Court noted that, with Schultz’s knowledge, Tokeley-Parry prepared fake labels designed to look as though they had been printed in the 1920’s.⁶⁰ Schultz sold A-III with

⁵⁶ *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

⁵⁷ *Ibidem* at 396.

⁵⁸ *Idem*.

⁵⁹ *Idem*.

⁶⁰ *Idem*.

the Alcock Collection story, and the two became partners and repeated the process with other pieces.⁶¹

Most recently, on April 3, 2012, a Federal grand jury indicted four individuals on charges of smuggling and interstate transportation of Peruvian artifacts.⁶² The individuals “allegedly illegally imported authentic cultural artifacts by using a contact at the National Institute of Culture of Peru who provided forged government documents certifying the items were replicas”.⁶³ In October 2011, an undercover special agent with the U.S. Immigration and Customs Enforcement’s Homeland Security Investigations (“HSI”) arranged for purchases of Peruvian artifacts from one of the defendants who “represented the items were authentic and not replicas”.⁶⁴ According to experts and lab tests, the artifacts are genuine.⁶⁵ Over the course of the investigation, HSI agents recorded the defendants conspiring to traffic the artifacts and “discussing how the ring bribes officials in Peru to get the artifacts out of the country; and stating that they know where to look for buried pottery”. We will have to keep an eye on this case to see how it unfolds.

Yet another way that the U.S. Government works to stem the flow of illicit objects into its borders is pursuant to the Pre-Columbian Monumental or Architectural Sculpture or Murals Act.⁶⁶ This law permits the U.S. Government to seize and subject to forfeiture any pre-Columbian monumental or architectural sculpture or mural imported into the U.S. after the enactment of the law, unless the object is accompanied by a certificate stating that the object was lawfully exported from its country of origin.⁶⁷ Objects covered by the law include monumental or architectural sculptures or murals that are a “product of pre-Columbian Indian culture of Mexico, Central America, South America, or the Caribbean Islands”.⁶⁸

Customs laws are also being utilized to effect the return of illicit cultural property. One famous example where this approach was successfully em-

⁶¹ *Idem.*

⁶² Press Release, U.S. Immigration and Customs Enforcement, 4 defendants indicted in Peruvian artifact smuggling case, Apr. 3, 2013, <http://www.ice.gov/news/releases/1304/130403salllakecity.htm>.

⁶³ *Idem.*

⁶⁴ *Idem.*

⁶⁵ *Idem.*

⁶⁶ 19 U.S.C.S. §§ 2091-2095.

⁶⁷ *Idem.*

⁶⁸ 19 U.S.C.S. § 2095.

ployed is *United States v. An Antique Platter of Gold*.⁶⁹ In 1995, the United States, acting on a request from the Italian government, seized a golden antique platter of a type known as a *phiale* from New York collector Michael Steinhardt and filed a civil forfeiture action. The Italian government believed that it had been removed from Italy in violation of its cultural patrimony laws. Both Italy and Steinhardt intervened to claim the *phiale*. Steinhardt had purchased it in 1991 for approximately \$1.2 million, using an American art dealer as his agent.⁷⁰ At the time the arrangements for the purchase were made, the *phiale* was being held in Italy—the country where it had apparently been unearthed—by a Swiss antiquities dealer.⁷¹ Knowing that the *phiale* was being brought into Switzerland from Italy, Steinhardt's agent flew there to collect it.⁷² The U.S. Customs form that was filed listed the *phiale*'s country of origin as Switzerland and stated its value as \$250,000⁷³—substantially less than Steinhardt had agreed to pay. The Second Circuit affirmed the lower court's grant of summary judgment in favor of the U.S. Government, concluding that the misstatements of the *phiale*'s country of origin and value were material and that forfeiture was the appropriate remedy.

Another way that the U.S. Government assists in the fight against the growing illegal art market is the use of civil forfeiture actions. Pursuant to the forfeiture laws of the United States, the Government can bring a civil action to have property that is the subject of criminal conduct forfeited to the United States. Often, violations of the NSPA serve as the underlying criminal conduct necessary to bring a forfeiture action.

A recent forfeiture action is illustrative of the process. On April 4, 2012, the U.S. Attorney for the Southern District of New York filed a complaint seeking the forfeiture of a 10th century Cambodian sandstone sculpture, located at the time at Sotheby's auction house in New York.⁷⁴ The statue was consigned for an auction in March 2011, but was pulled at the last minute after Cambodia claimed ownership.⁷⁵ According to the Government's complaint, the statue, which is broken off at the legs, exactly matches a pair of

⁶⁹ *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).

⁷⁰ *Ibidem* at 133.

⁷¹ *Idem*.

⁷² *Idem*.

⁷³ *Idem*.

⁷⁴ Press Release, U.S. Attorney's Office, Southern District of New York, Manhattan U.S. Attorney Announces Civil Action Seeking Forfeiture of 10th Century Sandstone Statute Looted from Cambodia Temple, April 4, 2012, <http://www.justice.gov/usao/nys/pressreleases/April12/duryodhanastatueforfeiture.html>.

⁷⁵ *Idem*.

feet left behind at the site of the statue's original location in Cambodia.⁷⁶ Moreover, several months before the scheduled sale, Sotheby's was allegedly informed by a scholar that the statue was very likely stolen.⁷⁷ Nonetheless, it was not until March 2011—nearly one year after receiving the scholar's report—that Sotheby's removed the statue from the auction, after being asked by the Secretary General of Cambodia to “facilitate its return to the Kingdom of Cambodia”.⁷⁸ In June 2012, Sotheby's filed a motion to dismiss the forfeiture action, which the Government opposed.⁷⁹ In September 2012, the Federal district court heard arguments from both parties.⁸⁰ A decision is expected shortly. In the meantime, the Government filed a motion to amend its complaint to include additional facts regarding Sotheby's knowledge that the statue was stolen,⁸¹ and Sotheby's filed a motion in opposition to the Government's motion.⁸² On March 1, 2013, *The New York Times* reported that Sharon Cohen Levin, Chief of the U.S. Attorney's Asset Forfeiture Unit, and a second Federal lawyer, Alexander Wilson, embarked on a four-day trip to the Cambodian jungle to collect evidence for the Government's case.⁸³ On March 29, 2013, the Federal district court granted the Government's motion to amend its forfeiture complaint, and also denied Sotheby's motion to dismiss.⁸⁴

Since the filing of the Government's complaint, Cambodia has also raised issues about several life-size 10th century sandstone statues at the Metropoli-

⁷⁶ *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600 (GBD), at 10-12 (S.D.N.Y. Apr. 4, 2012).

⁷⁷ *Ibidem* at 24.

⁷⁸ *Ibidem* at 33.

⁷⁹ Tom Mashberg, *Prosecutors File Arguments in Effort to Return Cambodian Statue*, N.Y. Times, Aug. 20, 2012, <http://artsbeat.blogs.nytimes.com/2012/08/21/prosecutors-file-arguments-in-effort-to-return-cambodian-statue/>.

⁸⁰ *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600 (GBD) (S.D.N.Y. Sept. 28, 2012).

⁸¹ Rick St. Hilaire, *New Allegations Raised in Sotheby's Forfeiture Case: Cambodian Statue Stolen in 1972 — Trafficked through Thailand with Head Removed — Scientist Fired [UPDATED]*, Cultural Heritage Lawyer Rick St. Hilaire, Nov. 13, 2012, <http://culturalheritagelawyer.blogspot.com/2012/11/new-allegations-in-sothebys-forfeiture.html>.

⁸² Rick St. Hilaire, “*The Government Now Relies on the Inherent Rights of Kings*”, Says Sotheby's in Cambodia Statue Forfeiture Case, Cultural Heritage Lawyer Rick St. Hilaire, Dec. 5, 2012, <http://culturalheritagelawyer.blogspot.com/2012/12/the-government-now-relies-on-inherent.html>.

⁸³ Tom Mashberg, *Lawyers Go to Cambodia Over Statue*, N.Y. Times, Mar. 1, 2013, <http://www.nytimes.com/2013/03/02/arts/design/united-states-officials-travel-to-cambodia-in-statue-case.html>.

⁸⁴ Rick St. Hilaire, *Cambodian Statue Forfeiture Case Moves Forward - Sotheby's Motion to Dismiss is Denied*, Cultural Heritage Lawyer Rick St. Hilaire, Mar. 29, 2013, <http://culturalheritagelawyer.blogspot.com/2013/03/cambodian-statue-forfeiture-case-moves.html>.

tan Museum of Art in New York⁸⁵ and the Norton Simon Museum in Pasadena, California.⁸⁶ In addition, Cambodia also hopes to extend restrictions on cultural imports from Cambodia; emergency import restrictions were first enacted in 1999, followed by a bilateral agreement in 2003, which was renewed in 2008 for an additional five-year period.⁸⁷ Although the existing agreement does not apply to the statue in dispute—it was removed from Cambodia before the 1999 restrictions—Cambodia has now requested that Sotheby’s executive Jane Levine, who is also a member of the Committee, recuse herself from deliberations on import restrictions for Cambodian antiquities.⁸⁸ The Committee held discussions in October⁸⁹ and met from February 27 to March 1, 2013 regarding the regulation of Cambodian artifacts.⁹⁰ According to Cambodian officials, Levine’s presence on the Committee presents a conflict of interest because of the ongoing dispute between Cambodia and Sotheby’s.⁹¹

Besides criminal prosecution and forfeiture actions, the mere intervention of the U.S. Government can sometimes lead to the return of cultural property. For example, several years ago my firm assisted the Republic of Guatemala in recovering an intricately carved section of a Mayan limestone monument more than a thousand years old that had been pillaged

⁸⁵ Tom Mashberg and Ralph Blumenthal, *Cambodia Says It Seeks Return of Met Statues*, N.Y. Times, June 16, 2012, <http://www.nytimes.com/2012/06/02/arts/design/cambodia-to-ask-met-to-return-10th-century-statues.html>.

⁸⁶ Ralph Blumenthal, *Cambodia is Seeking 2nd Statue*, N.Y. Times, Sept. 28, 2012, <http://www.nytimes.com/2012/09/29/arts/design/cambodia-now-seeking-return-of-norton-simon-statue.html>.

⁸⁷ Rick St. Hilaire, *CPAC to Meet on Cambodian MoU Renewal - Honduras Considered Too*, Cultural Heritage Lawyer Rick St. Hilaire, Jan. 5, 2013, <http://culturalheritagelawyer.blogspot.com/2013/01/cpac-to-meet-on-cambodian-mou-renewal.html>.

⁸⁸ Tom Mashberg, *Cambodia Sees Ethical Conflict in Import Panel*, N.Y. Times, Feb. 15, 2013, <http://www.nytimes.com/2013/02/16/arts/design/cambodia-sees-ethical-conflict-in-import-panel.html>.

⁸⁹ *Idem*.

⁹⁰ Meeting Notice, 78 Fed. Reg. 976 (Jan. 7, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-07/pdf/2013-00047.pdf>.

⁹¹ Mashberg, *supra* note 88. While members of the Committee are required to recuse themselves “from any matters under consideration that would have a ‘direct and predictable effect’ on their financial interests”, members may “seek a waiver from legal counsel to the Committee in order to participate in the deliberations”. Nancy Wilkie, *Archaeologists and the 1970 UNESCO Convention*, in Art & Cultural Heritage Law Newsletter (Art & Cultural Heritage Law Committee, American Bar Association Section of International Law), Summer 2010, at 9, available at http://www.law.depaul.edu/centers_institutes/art_museum/pdf/VolumeII_IssueI.pdf. According to Nancy Wilkie, an archaeologist and member of the Committee, “waivers usually have been granted”, *idem*. It is unclear whether Jane Levine sought such a waiver for the deliberations on import restrictions for Cambodia antiquities.

from an archaeological site from the Petén region of Guatemala.⁹² In 1998, when renowned archaeologist Dr. Ian Graham discovered that the stone was being offered for sale at auction in New York, he notified the Guatemalan Consulate.⁹³ On behalf of Guatemala, we contacted the United States Customs Service and assisted with its investigation.⁹⁴ The piece was withdrawn from sale and returned to Guatemala in 1999.⁹⁵

Yet another way for foreign sovereigns to recover their cultural property in the U.S. is through the initiation of a proceeding in a U.S. court of law. Where either no bilateral agreement with the U.S. is in place or where the cultural property was imported into the U.S. prior to the implementation of the Convention, civil litigation may be the only remedy available.

In the U.S., litigation over cultural patrimony begins with a simple, fundamental rule: No one, not even a good faith purchaser, can obtain good title to stolen property.⁹⁶ When U.S. law is applicable, a true owner always has the right to reclaim stolen property, unless barred by the statute of limitations or other technical defenses. This fundamental rule has created a generally favorable legal regime in the U.S. for claimants.

I am happy to report that U.S. courts have left no doubt that such statutes adopted by foreign sovereigns vesting ownership of previously undiscovered cultural property in the State will be honored in the U.S., even though the approach to property rights they embody is at odds with traditional American jurisprudence. Accordingly, if a foreign sovereign comes into a U.S. court and is able to establish that an antiquity that was illegally excavated and then removed from the country was subject to a valid ownership law at the time of excavation, it will be considered the owner of that property, and entitled to its return. On the other hand, U.S. courts will not enforce lesser ordinances that only prevent the export of cultural property not owned by the State, unless there is a special treaty in place between the U.S. and that country or there is a remedy available under the CPIA.

There is one case—in which we represented the Republic of Turkey in its successful efforts to recover the fabled Lydian Hoard from New York’s

⁹² Press Release, Herrick, Feinstein LLP, Guatemala Announces Recovery of Thousand Year Old Stone Figure (1999), <http://www.herrick.com/siteFiles/News/BD7EA8DC-8534D0A14391044E5895DC52.pdf>.

⁹³ *Idem*.

⁹⁴ *Idem*.

⁹⁵ *Idem*.

⁹⁶ W.P. Keeton & R.E. Keeton, *Prosser and Keeton on the Law of Torts* §15, 93-94 (5th ed. 1984).

Metropolitan Museum of Art⁹⁷—that aptly illustrates the court process in the United States and which is worth a moment of our time. The background of this case is as follows: From 1966 to 1970, the Met acquired more than 360 Lydian objects dating from the sixth century B.C.E., including fragments of wall paintings, marble sphinxes, gold, silver and bronze vessels, and gold, silver and glass jewelry.⁹⁸ The artifacts had been looted from tombs in the Uşak region of Turkey in Central Anatolia. They were acquired by the Museum in three separate principal purchases, shortly after they were illegally excavated and smuggled out of Turkey and passed through the hands of some New York antiquities dealers. The pre-trial discovery in that case revealed much about the approach taken to acquisitions at that time. One of the curators at the Museum described how a dealer spread some of the objects on a table; to the curator they appeared to be some of the most extraordinary examples of the Lydian civilization ever gathered in one place.⁹⁹ To paraphrase (with great liberty) from the curator’s deposition: did he ask the dealers where the objects came from? The answer—no. Did the dealers offer any information about the origin or history of the objects? The answer—no.

This was not an atypical example of how museums and dealers operated in a “don’t ask, don’t tell” fashion in those days. Not long after he left the Met, Thomas Hoving, who was the Museum’s Director at the time of part of this acquisition, described it as typical of the “age of piracy” rampant in the museum world at that time.¹⁰⁰ It appears that, in that era, the problem went far beyond whether due inquiry was made. In this case, it became quite clear that Museum officials knew full well from where the objects had originated.¹⁰¹ Perhaps that is why the acquisition of this extraordinary hoard went unheralded until the mid-1980’s. And then, after having been stored in the Museum’s basement for that long period of time, the objects were finally put on permanent display in 1984, but as part of the collection called the “East Greek Treasure”.¹⁰² During the course of the litigation, minutes from the Ac-

⁹⁷ *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990).

⁹⁸ See generally, Lawrence M. Kaye & Carla T. Main, *The Saga of the Lydian Hoard Antiquities: From Uşak to New York and Back Again*, in *Antiquities: Trade or Betrayed: Legal, Ethical & Conservation Issues* 150-61 (Kathryn Walker Tubb ed., 1995) and İknur Özgen & Jean Öztürk, *Heritage Recovered: The Lydian Treasure* (Uğur Okman, 1996).

⁹⁹ Deposition of Dietrich Felix von Bothmer at 162:10–162:14 (on file with author).

¹⁰⁰ Thomas Hoving, *Making the Mummies Dance: Inside the Metropolitan Museum of Art* 217 (1994).

¹⁰¹ *Idem*.

¹⁰² Kaye & Main, *supra* note 98, at 151.

quisition Committee of the Board of Trustees meetings were produced by the Museum in response to our inquiry. These stated that the second of the three purchases “came from the same area of Central Anatolia as the first lot”,¹⁰³ making it clear that the Museum undeniably knew that these antiquities had come from Turkey and had no legitimate provenance. In his 1994 book, *Making the Mummies Dance*, Hoving conceded as much.¹⁰⁴

Initially, Turkey sought to resolve the matter peacefully, but the Museum flatly rejected its overtures. The resulting litigation was largely spent defending an application by the Museum asking the court to dismiss the case, without reaching the merits of Turkey’s claim, on the ground of the statute of limitations—*i.e.*, the Museum argued that the Republic had waited too long to bring its claim. After three years of litigation on this single issue alone, the application was denied. Finally, in 1993, the Museum agreed to resolve the case short of trial, and the Lydian Hoard objects were returned to Turkey.¹⁰⁵ But the Republic had to fight a long and costly legal battle before it was finally able to convince the Museum to act on the truth that lay behind its own records from the very beginning. Undoubtedly, many factors influenced the Museum’s decision to return the Lydian Hoard. But it is less likely that the Museum finally saw the light and did the right thing, and more probable that it did not want to hear the upcoming testimony of present and former Museum officials as to what the Museum knew and when it knew it. The historic return of the Lydian Hoard to Turkey, after six years of heated litigation, was a tribute to the foresight and perseverance of the Turkish officials at the time and those that followed.

The Lydian Hoard was first displayed upon its return to Turkey in 1993 at one of the great Turkish museums, the Museum of Anatolian Civilizations, in the capital Ankara, where it was greeted with great interest and excitement by Turkish visitors to the Museum as well as those from other countries. I was privileged to visit the museum when the objects were displayed there, and I cannot adequately describe the excitement displayed by the Turkish viewers in particular. Once the director revealed to them that we had assisted the Government in securing the return of the objects, many people came over to us to thank us personally for helping to ensure that this

¹⁰³ *Idem*.

¹⁰⁴ Hoving, *supra* note 100, at 101.

¹⁰⁵ Press Release, Herrick, Feinstein LLP, Turkey’s Lawsuit Against Metropolitan Museum of Art Ends with the Return of Lydian Hoard Antiquities to Turkey, 1993, <http://www.herrick.com/siteFiles/News/94F46F571AA38025A4D3343547A8B65F.pdf>.

important part of their heritage had been returned, to be viewed and appreciated by the Turkish people.

There is an unhappy postscript to this story, however. About eight years later, as a result of local politics in the Uşak region, the Turkish Government decided that it would be better to display the Lydian Hoard in the tiny Uşak Museum, nearer to the tombs from which they had originated, so the objects were transported to that rather remote location in the desert, a good four-hour drive from Ankara. This led to two things. First, Philippe de Montebello, the Metropolitan Museum's then Director, criticized Turkey for bringing the Hoard back to its roots, because, so he said, over the span of five years, only 769 people had visited it.¹⁰⁶ I am sure that is an exaggeration, but it feeds the appetite of those who say—and I disagree with this—that artifacts can be viewed better and by more people in Western museums. I personally believe that Turkey can do what it wishes with its own property that has been returned to it.

Adding fuel to the fire, it was later discovered that one of the “stars” of the collection—a gold brooch in the shape of a winged seahorse or hippocamp—had been stolen and replaced with a fake, giving rise to great embarrassment and contributing to a feeding frenzy for those who claim that countries of origin cannot take care of their own treasures.¹⁰⁷ Indeed, the Director of the Museum, who had assisted us in the court case, was implicated and convicted.¹⁰⁸ The good news is that the incident created a national outcry, showing that the importance of the object to the Turkish people is no joke at all, and leading the Government to conduct a nationwide investigation into security to ensure that this does not happen again. And the best news is that it was found in Germany in November 2012 and is being returned to Turkey, where it—and all of the other pieces of the Hoard—will be housed in a new national museum.¹⁰⁹

In great part because of the impact of the Lydian Hoard case, a new spirit of cooperation began to emerge in 2006 between sovereign claimants and U.S. museums. This historic development has led to the return of looted cul-

¹⁰⁶ Sebnem Arsu and Campbell Robertson, *Wealth of Croesus, Returned by the Museum, Stolen from Turkish Museum*, N. Y. Times, May 30, 2006, <http://www.nytimes.com/2006/05/30/arts/design/30muse.html>.

¹⁰⁷ Sebnem Arsu, *Thefts Focus Attention on Lax Security at Turkey's Museums*, N. Y. Times, Jun. 13, 2006, <http://www.nytimes.com/2006/06/13/arts/13muse.html>.

¹⁰⁸ Deborah Vankin, *Gold brooch, part of King Croesus' treasure, set to return to Turkey*, L. A. Times, Nov. 27, 2012, <http://articles.latimes.com/2012/nov/27/entertainment/la-et-cm-ancient-lost-treasure-20121126>.

¹⁰⁹ *Idem*.

tural objects in U.S. museum collections without the need for protracted litigation. In 2006, the Metropolitan Museum itself agreed to return twenty-one looted artifacts to Italy, including the famous Morgantina Hoard, a group of sixteen pieces of Hellenistic silver (dating from the 3rd century B.C.), as well as one of the Museum's most prized possessions, the Euphronios krater.¹¹⁰ In return, Italy agreed to lend objects of "equal beauty and historical and cultural significance" to the Museum.¹¹¹

This was followed by an agreement by the Getty Museum in Los Angeles to return four objects to Greece. Three of them—a gold funerary wreath, an inscribed grave marker, and a marble torso dating from 400 B.C.—had been purchased by the Getty for \$5.2 million in 1993.¹¹² The fourth item, an archaic marble relief that depicts a warrior with spear, shield, and sword, had been purchased in 1955 by J. Paul Getty himself.¹¹³ In August 2006, the Getty returned the grave marker and the relief to Greece; then in March of the following year, it returned the funerary wreath and the marble torso.¹¹⁴

Also in September 2006, the Museum of Fine Arts in Boston sent thirteen pieces back to Italy.¹¹⁵ The Museum agreed that it would inform the Italian Ministry of Culture of any future acquisitions, loans, or donations of works that could have an Italian origin.¹¹⁶ In 2007, the Getty agreed to return over forty objects from its antiquities collection to Italy, including the prized Aphrodite statue that had been purchased by the Museum in 1988 for \$18 million.¹¹⁷ In 2009, the Cleveland Museum of Art returned fourteen ancient treasures that had been looted from Italy, pursuant to an agreement signed in November 2008 with the Italian Culture Minister that the objects would be returned in exchange for several long-term loans of thirteen

¹¹⁰ Press Release, Metropolitan Museum of Art, Statement by the Metropolitan Museum of Art on its Agreement with Italian Ministry of Culture, Feb. 21, 2006, <http://www.metmuseum.org/about-the-museum/press-room/news/2006/statement-by-the-metropolitan-museum-of-art-on-its-agreement-with-italian-ministry-of-culture>.

¹¹¹ Nicole Winfield, *Italy Getting Ancient Treasures Back*, L.A. Times, Feb. 22, 2006, <http://articles.latimes.com/2006/feb/22/entertainment/et-museum22>.

¹¹² *Greeks Want Getty to Return Allegedly Stolen Items*, USA Today, Oct. 24, 2005, http://www.usatoday.com/news/nation/2005-10-24-greeks-getty_x.htm.

¹¹³ *Idem*.

¹¹⁴ *Ancient Wreath Returns to Greece*, BBC News, Mar. 30, 2007, <http://news.bbc.co.uk/2/hi/6505971.stm>.

¹¹⁵ Press Release, Museum of Fine Arts, Boston, MFA Transfers 13 Antiquities to Italy (Sept. 28, 2006), www.mfa.org/sites/default/files/MFA_Italy_Joint%20Release%20Statement.doc.

¹¹⁶ *Idem*.

¹¹⁷ Elisabetta Povoledo, *Getty Agrees to Return 40 Antiquities to Italy*, N.Y. Times, Aug. 2, 2007, <http://www.nytimes.com/2007/08/02/arts/design/02gett.html>.

equally valuable artifacts for renewable twenty-five-year periods.¹¹⁸ Also, in 2009, France agreed to return painted wall fragments that were stolen from the Luxor tomb in Egypt that had been purchased by the Louvre in 2000 and 2003.¹¹⁹ In September 2011, the Getty Museum announced that it had reached a new agreement with the Greek Ministry of Culture to return two additional artifacts, fragments of a grave marker and a Greek language inscription, which had been acquired by the Museum in the 1970's.¹²⁰

And, at about the same time, Turkey achieved a great victory for its cultural heritage when Prime Minister Recep Tayyip Erdoğan himself carried the stolen “Weary Herakles” statue back from the Boston Museum of Fine Arts to Turkey.¹²¹ The marble fragment depicts the upper part of a statue of the bearded hero Herakles leaning on his club, fatigued by his many labors.¹²² In 1990, the top half of the statue was loaned to the Metropolitan Museum as part of a larger exhibition, “Glories of the Past”. While it was on exhibit, investigative journalist Özgen Acar and others noted its similarities with the bottom half of the Herakles sculpture in the Antalya Archaeological Museum that had been excavated in Perge, Turkey, in 1980.¹²³ In 1992, the MFA agreed to conduct a test to determine if the two halves were a match.¹²⁴ Plaster casts of both original pieces were made and fitted together, demonstrating that the two halves fit together perfectly.¹²⁵ But the MFA still refused to return its piece to Turkey.¹²⁶ In September 2011, the two parties finally signed a memorandum of understanding, and Turkey dropped all claims that the Museum engaged in illicit trade when it acquired the Herakles¹²⁷ (the MFA purchased a half-interest in the statue in 1981; in 2004, the remaining half interest was donated to the museum¹²⁸). Upon its return to

¹¹⁸ *Idem*.

¹¹⁹ *Louvre to Return Egyptian Frescoes*, BBC News, Oct. 9, 2009, <http://news.bbc.co.uk/2/hi/europe/8299495.stm>.

¹²⁰ David Ng, *Getty Museum to Return Additional Ancient Pieces to Greece*, Sept. 22, 2011, <http://latimesblogs.latimes.com/culturemonster/2011/09/getty-museum-to-return-more-ancient-pieces-to-greece.html>.

¹²¹ James C. McKinley Jr., *Boston Museum Returns Bust to Turkey*, N.Y. Times, Sept. 28, 2011, [http://query.nytimes.com/gst/fullpage.html?res=9502E0DB103EF93BA1575AC0A9679D8B63\(28.02.2012\)](http://query.nytimes.com/gst/fullpage.html?res=9502E0DB103EF93BA1575AC0A9679D8B63(28.02.2012)).

¹²² *Idem*.

¹²³ *Idem*.

¹²⁴ David Ng, *Getty Museum to Return*, *supra* note 120.

¹²⁵ *Idem*.

¹²⁶ *Idem*.

¹²⁷ Press Release, Museum of Fine Arts, Boston, *supra* note 115.

¹²⁸ Geoff Edgers, *Making “Herakles” Whole After All These Years*, Boston.com, July 17, 2011, http://www.boston.com/ae/theater_arts/articles/2011/07/17/museum_of_fine_arts_to_return_weary_

Turkey, the top half of the statue was promptly united with its bottom half and went on display in the Antalya Archaeological Museum to the elation of Turkish citizens and officials alike.¹²⁹ Engin Özgen, the former Turkish Director General of Monuments and Museums, who pressed the Lydian Hoard case and many other cultural heritage disputes, stated, “What makes me happy is that this happened without a legal battle. Negotiations brought this ending... This will show the world that the Turks... will fight for their past and their heritage”.¹³⁰

And, in December 2012, the Dallas Museum of Art voluntarily returned an ancient marble mosaic from its collection to Turkey.¹³¹ When Maxwell Anderson became the director of the museum in January 2012, he asked antiquities curators to identify objects in the museum’s collection with potential provenance issues.¹³² One of these objects, the mosaic, which dates from 194 A.D. and depicts Orpheus taming animals with his lyre, was purchased at Christie’s auction house in 1999.¹³³ After the museum reached out to Turkey for more information, Turkish officials provided photographs of a looted archaeological site near Edessa, which convinced the museum that the mosaic was most likely stolen.¹³⁴ After the return of the mosaic, Turkey and the Dallas Museum signed a memorandum of understanding pursuant to the museum’s international loan initiative, called DMX, “which seeks agreements with foreign museums to share objects and to collaborate on conservation projects, exhibitions and educational programs”.¹³⁵

On January 8, 2013, the Toledo Museum of Art returned a rare Etruscan black-figure kalpis to the Italian government.¹³⁶ In 1982, the museum had purchased the kalpis, a ceramic vessel used in ancient times to hold water, from art dealers who had provided the museum with falsified documentation that misrepresented the true provenance of the vessel.¹³⁷ In 2010,

herakles_statue_to_turkey/?page=full.

¹²⁹ *Idem.*

¹³⁰ *Idem.*

¹³¹ Randy Kennedy, *Dallas Museum Volunteers to Return Mosaic to Turkey*, N.Y. Times, Dec. 3, 2012, <http://artsbeat.blogs.nytimes.com/2012/12/03/dallas-museum-volunteers-to-return-mosaic-to-turkey/>.

¹³² *Idem.*

¹³³ *Idem.*

¹³⁴ *Idem.*

¹³⁵ *Idem.*

¹³⁶ Press Release, U.S. Immigration and Customs Enforcement, Transfer ceremony clears way for looted ancient vessel to be returned to Italy, Jan. 8, 2013, <http://www.ice.gov/news/releases/1301/130108toledo.htm>.

¹³⁷ *Idem.*

special agents from Homeland Security launched an extensive investigation of the artifact, and the U.S. Government and the museum reached an agreement in June 2012, with the museum agreeing to return the kalpis.¹³⁸

Two days later, on January 10, 2013, the J. Paul Getty Museum announced that it would return to Sicily a terracotta head of the Greek god Hades that the Museum acquired in 1985. The announcement came after two years of cooperation between Getty officials and officials in Sicily, who worked together to determine that the object originated in Sicily and that it had been looted from there in the 1970's. The terracotta head is the latest object to be returned to Italy following the Getty's agreement in 2007 with the country's Ministry of Culture. The Museum also entered into a partnership with officials in Sicily in 2010, relating to "conservation, exchanges, and more".¹³⁹

Also in 2013, the Getty Museum announced that it has been reviewing the provenance of its entire collection of antiquities, including about 45,000 objects. This provenance information will be available online—with some objects' provenances already available—in an effort to both make the process as transparent as possible and to potentially lead to "more information coming in from other sources".¹⁴⁰

Despite all of these positive developments and the different methods available in the U.S. to fight the illicit market, as we all know, the flow of illicit goods into the U.S. continues. And, it goes without saying that this could not be the case without an end market for the looted goods. This is why we must ask what role auction houses, museums and dealers play—or should play—in the never-ending war against the illicit marketeers. Are all the stakeholders doing all they can?

At least in the context of Nazi-era art, one of the major auction houses has publicized a set of guidelines for dealing with these sorts of issues. In Christie's Guidelines for Dealing with Nazi-era Art Restitution Issues, the auction house recommends that, where Christie's determines that "a consigned object has a problematic provenance or ownership issue and the potential claimant... is known [to the auction house], without disclosing

¹³⁸ Press Release, U.S. Immigration and Customs Enforcement, Agreement paves way for artifact's return to Italy, Jun. 18, 2012, <http://www.ice.gov/news/releases/1206/120618cleveland.htm>.

¹³⁹ David Ng and Jason Felch, *Getty Museum to return Hades terracotta head to Sicily*, L.A. Times, Jan. 10, 2013, <http://articles.latimes.com/2013/jan/10/entertainment/la-et-cm-getty-museum-hades-sculpture-sicily-20130110>.

¹⁴⁰ Editorial, *The Getty is getting it right*, L.A. Times, Jan. 27, 2013, <http://www.latimes.com/news/opinion/editorials/la-ed-getty-antiquities-provenance-20130127,0,3413506.story>.

the consignor's identity" Christie's will "(a) promptly contact the potential claimant whenever possible, providing the information and documentation [in Christie's possession], and (b) inquire whether the potential claimant plans to pursue a claim".¹⁴¹ While the auction houses may have similar guidelines for looted antiquities, these are not available to the public.

Yet, in an art market that remains largely unregulated and that has been criticized for its lack of transparency, is this enough? As is demonstrated by the Christie's guidelines, even where questions of ownership are raised, the auction house will maintain the confidentiality of the consignor's identity. Often, galleries and auction houses prefer to keep the names of their clients private so that the competition doesn't get hold of them. Were the identities of the buyer and the seller open and public, dealers, galleries and auction houses believe that they could be frozen out of the picture since the buyer and the seller could just deal with each other directly and cut out the "middleman" and the fee paid to such a "middleman".

But this sort of non-disclosure makes it more difficult for buyers to properly research an object's provenance. Moreover, non-disclosure has been criticized as encouraging an illicit trade in art objects since it makes it difficult, if not altogether impossible for a claimant of a lost, stolen or looted artwork—including a foreign sovereign—to bring a claim against the current possessor of their artwork. This issue has come up many times in the context of stolen or looted artworks that are discovered when being sold by galleries or auction houses. While most galleries and auction houses will promptly withdraw the contested artwork from sale when presented with a claim, only rarely will they give a claimant the name and contact information of their client, the current possessor of the artwork. Therefore, in order to make a claim for the artwork, claimants must either negotiate through these third parties or bring a lawsuit to force the gallery or auction house to divulge the identity of their client. And a lawsuit of this kind is easier said than done.

Even so, while it seems that auction houses—as well as museums and dealers—are taking steps to police the illicit trade and trying to avoid dealing in tainted goods, several cases over the past several years underscore the reality that more—much more—needs to be done.

In a recent example of this, on March 22, 2013, Sotheby's auction house in Paris went forward with a two-day sale of approximately 300 pre-Columbian artifacts from the Barbier-Mueller collection, despite allegations

¹⁴¹ Christie's Guidelines for Dealing with Nazi-era Art Restitution Issues, June 2009, <http://www.christies.com/pdf/services/2010/christies-guidelines-for-dealing-with-restitution-issues.pdf>.

that the objects were illegally exported from their countries of origin, including Peru, Mexico, Guatemala and Costa Rica.¹⁴² In particular, Mexico claimed that of the 130 objects described as originating from Mexico, 51 were “archaeological artifacts that are (Mexican) national property, and the rest were handicrafts”, *i.e.*, fakes or imitations of ancient artifacts.¹⁴³ Other objects, including nine Maya vessels from Guatemala and Mexico, have “no listed provenance before 1986”; the market for such vessels is said to have developed “around 1970 as looting of ancient Maya burial sites became more sophisticated and widespread”.¹⁴⁴ Mexico also stated that, “[i]n light of [the objects’] importance for the people of Mexico”, Sotheby’s should remove those objects from the sale.¹⁴⁵ In response to these countries’ objections to the sale, Sotheby’s stated that it had “thoroughly researched the provenance of [the] collection” and that it was “confident in offering these works for auction”.¹⁴⁶ Nonetheless, the sale generated less than expected, likely because of the controversy surrounding the sale.¹⁴⁷

In another auction house controversy, in 2009, purchaser Cai Mingchao bid on and refused to pay for two bronzes, depicting a rat and a rabbit, that were auctioned as part of the Yves Saint Laurent collection at Christie’s auction house in Paris, on the grounds that the objects were looted from China’s Old Summer Palace by French and British troops in 1860.¹⁴⁸ The objects are reported to have been part of a set, “comprising twelve animals from the Chinese zodiac that were created for the imperial gardens during

¹⁴² Tom Mashberg, *Latin American Nations Object to Sotheby’s Antiquities Auction*, N.Y. Times, Mar. 21, 2013, <http://artsbeat.blogs.nytimes.com/2013/03/21/latin-america-nations-object-to-paris-antiquities-auction/>; Tom Mashberg, *Paris Auction Goes Forward Despite Heritage Claims*, N.Y. Times, Mar. 22, 2013, <http://artsbeat.blogs.nytimes.com/2013/03/22/paris-auction-goes-forward-despite-heritage-claims>.

¹⁴³ Mark Stevenson, *Mexico demands Sotheby’s halt auction of artifacts*, The Washington Post, Mar. 23, 2013, http://failover.washingtonpost.com/entertainment/mexico-demands-sothebys-halt-auction-of-artifacts/2013/03/21/e5d18316-9274-11e2-bdea-e32ad90da239_story.html.

¹⁴⁴ *Red Flags in Paris: Half of Sotheby’s Barbier-Mueller Pre-Columbian Sale Lacks Provenance*, Chasing Aphrodite, Mar. 19, 2013, <http://chasingaphrodite.com/2013/03/19/red-flags-in-paris-half-of-sothebys-barbier-muller-pre-columbian-sale-lacks-provenance/>.

¹⁴⁵ Stevenson, *supra* note 143.

¹⁴⁶ *Idem*.

¹⁴⁷ Tom Mashberg, *Sale of Pre-Columbian Art Falls Shorts of Expectations*, N.Y. Times, Mar. 25, 2013, <http://artsbeat.blogs.nytimes.com/2013/03/25/sale-of-pre-columbian-art-falls-short-of-expectations/>.

¹⁴⁸ Susan Adams, *Yves Saint Laurent Auction Sabotage*, Forbes.com, Mar. 2, 2009, http://www.forbes.com/2009/03/02/christies-auction-sabotage-lifestyle-collecting_chinese_sculptures.html.

the reign of Emperor Quianlong in the 18th Century”.¹⁴⁹ The buyer, who bid nearly \$40 million, was a member of China’s Lost Cultural Relics Foundation, which tried to stop the auction from going forward.¹⁵⁰ But a court in Paris ruled that the auction should go forward despite China’s objections, leading to the “botched sale”.¹⁵¹ And although Christie’s stated at the time that it “believed in the repatriation of cultural objects”, Christie’s also stated that it “saw its role as bringing them to the market”.¹⁵²

And yet another case in point looks like a simple contract dispute, but upon critical analysis, has a lot to say about the conduct of museums and dealers. The case is *Phoenix Ancient Art v. The Kimbell Art Museum*.¹⁵³ Let me be clear: I do not wish to single out the Kimbell unfairly. It is an excellent museum that returned an important piece of Nazi-looted art in 2006. But its conduct in the transactions with Phoenix Ancient Art, a gallery owned by brothers Hicham and Ali Aboutaam, in 2000 is a telling example of the problems that can occur when a museum’s acquisition policies are less than transparent.¹⁵⁴ The saga began when the Kimbell decided to purchase a Sumerian statuette from the gallery. After extensive negotiations, including the drafting and redrafting of complex agreements, the acquisition was completed in December 2000.¹⁵⁵ But surprisingly, about seven months later, the parties executed a written agreement whereby Phoenix bought the statuette back from the Kimbell for the original purchase price.¹⁵⁶ In order to guarantee repayment, the gallery gave the Kimbell a sculpture of a Roman torso to hold until the purchase price was repaid.¹⁵⁷ Subsequently, the museum expressed an interest in buying the torso, but, in the end, Phoenix brought a lawsuit for breach of contract against the Kimbell when that transaction was not completed.¹⁵⁸ The gallery lost that case because the court found that a meeting of the minds had not yet really occurred.¹⁵⁹

¹⁴⁹ David Barboza, *China Seeks to Stop Paris Sale of Bronzes*, N.Y. Times, Feb. 16, 2009, <http://www.nytimes.com/2009/02/17/arts/design/17auct.html>.

¹⁵⁰ Beth Loyd, *Chinese Bidder on Yves St. Laurent Auction Refuses to Pay \$40 Million*, ABCNews.com, Mar. 2, 2009, <http://abcnews.go.com/International/Business/story?id=6987633&page=1>.

¹⁵¹ Adams, *supra* note 148.

¹⁵² Barboza, *supra* note 149.

¹⁵³ *Phoenix Ancient Art, S.A. v. Kimbell Art Foundation*, No. 03 Civ. 1008, 2003 WL 22705119, *1 (S.D.N.Y. Nov. 17, 2003).

¹⁵⁴ *Ibidem* at *1.

¹⁵⁵ *Idem*.

¹⁵⁶ *Idem*.

¹⁵⁷ *Idem*.

¹⁵⁸ *Ibidem* at *1-*2.

¹⁵⁹ *Ibidem* at *3.

The more interesting facts of this case, however, concern the aborted purchase of the Sumerian statuette. The Kimbell's decision to change its mind about what it had already purchased generated some lively discussion in the press.¹⁶⁰ The Kimbell's explanation for its reversal: there were other objects on the antiquities market it was more interested in. Many were skeptical. Museums just don't repudiate transactions simply because they later decided to buy something else.¹⁶¹ Some commentators suggested that it was more likely that the museum discovered that there were serious questions about the true ownership and origin of the statuette or even that it was a forgery.¹⁶² Indeed, the decision to return the piece was apparently made after the museum received inquiries from the Internal Revenue Service about Phoenix.

The circumstances surrounding the purchase are unclear, but there is compelling evidence suggesting that appropriate steps were *not* taken to avoid a problematic purchase. It is likely that the pre-acquisition provenance research into the statuette was inadequate, perhaps because it was cut short when Phoenix offered the museum a \$300,000 discount if the transaction was completed by the end of the year.¹⁶³ Indeed, most observers believe that whenever a substantial discount is offered for an antiquity, it raises a red flag that the antiquity is undervalued because its authenticity or ownership is in question.¹⁶⁴ Also, experts said at the time that establishing a legitimate provenance for *any* Sumerian object was extremely difficult, as most such objects originated in Iraq,¹⁶⁵ and that "an extremely conservative estimate is that 70% of [Near Eastern] pieces that appear for the first time on the market are stolen or looted" and would run afoul of the trade embargo imposed in 1991 after the Gulf War.¹⁶⁶

Thomas Hoving, the former Director of the Metropolitan Museum of Art, observed during the controversy:

¹⁶⁰ Andrew Marton, *Kimbell negotiating refund for \$2.7 million statue*, Fort Worth Star-Telegram, Aug. 17, 2001, at News 1; Andrew Marton, *Return of statue stirs art world*, Fort Worth Star-Telegram, Aug. 22, 2001, at Life & Arts 1; *Kimbell Suckered in Ancient Art Scam?*, artnet.com, Aug. 24, 2001, <http://www.artnet.com/magazine/news/artnetnews/artnetnews8-24-01.asp>; Andrew Marton, *Statue's Odyssey: Latest Twist in Kimbell Saga*, Fort Worth Star-Telegram, May 1, 2002, at Life & Arts 1.

¹⁶¹ Marton, *Return of statue stirs art world*, *supra* note 160, and Marton, *Kimbell negotiating refund for \$2.7 million statue*, *supra* note 160.

¹⁶² *Idem*.

¹⁶³ Marton, *Kimbell negotiating refund for \$2.7 million statue*, *supra* note 160.

¹⁶⁴ *Idem*.

¹⁶⁵ *Idem*.

¹⁶⁶ *Idem*.

If this stuff would come to me, I'd probably just laugh and not really be interested in seeing it, but would then take a quick look if only to know what I think is being smuggled.... Look, it's a no-brainer because, unless you know for a fact this Sumerian piece has been in some English Lord's collection for years, you can bet you're probably trading with Sadam Hussein and it's probably all stolen stuff with cooked up, fake provenances. As a museum director, don't even bother with it. Just hands off.¹⁶⁷

The Kimbell mounted a strong defense of its conduct, emphasizing that the provenance was thoroughly researched, that archives were checked and that archaeologists had corroborated the statuette's presence in a private collection in the 1960s,¹⁶⁸ *i.e.*, prior to the enactment of the 1970 UNESCO Convention. It also appears that the museum reversed its decision to buy the torso that Phoenix had substituted for the Sumerian statuette originally offered after receiving a subpoena from a Federal grand jury seeking information regarding the gallery.¹⁶⁹ The museum immediately cut off discussions, which led to the breach of contract suit.¹⁷⁰

It does at least seem clear that the matter was mishandled and not conducted with the kind of transparency that should be expected of public institutions. The incident was an embarrassment for the Kimbell, even though it won the lawsuit over the torso. It also raises a number of serious, and larger, questions:

1. Did the Kimbell have a clear acquisition policy? Was it followed?¹⁷¹
2. Did the Kimbell really conduct a sufficient examination into the authenticity and provenance of the statuette?
3. Should the Kimbell have listened to those experts who said that, in this day and age, museums should be extremely careful about purchasing any Sumerian antiquity? Did the Kimbell take these concerns into consideration?
4. Although the Director stated, in general terms, that they had sufficient evidence that this particular statuette had been in private hands for some 40 years, why did he never publicly disclose the details of its ownership history?

¹⁶⁷ *Idem.*

¹⁶⁸ *Kimbell Suckered in Ancient Art Scam?*, *supra* note 160.

¹⁶⁹ *Phoenix Ancient Art*, 2003 WL 22705119 at *2.

¹⁷⁰ *Idem.*

¹⁷¹ On acquisitions policies, see *Principles for Museum Acquisitions of Antiquities*, Archaeological Institute of America, March 2006, available at http://www.archaeological.org/pdfs/archaeologywatch/museumpolicy/ALA_Principles_Museum_Acquisition.pdf.

5. What would the outcome have been if the Museum had fully and completely investigated the piece and the Gallery selling it?

6. If the museum determined the piece was unprovenanced, was returning the statuette to the dealers the best course of action?

It turns out that the principals of Phoenix had many legal problems. In 2004, one of the principals, Hicham Aboutaam, pled guilty in a Manhattan federal court to a misdemeanor charge for falsely representing that an Iranian silver drinking vessel that he imported into the United States came from Syria.¹⁷² The two Phoenix principals were also the subject of an investigative report in *The New York Times* that was not particularly favorable and made a number of assertions about possible illicit activity.¹⁷³ And more recently, Phoenix was the dealer that sold the St. Louis Art Museum an Egyptian mask of Ka-Nefer-Nefer, which is currently the subject of a Federal forfeiture action.¹⁷⁴

Other dealers have also been in the news recently as a result of their questionable—and indeed sometimes illegal—acquisition practices. In July 2012, Manhattan’s district attorney’s office issued a warrant for the arrest of New York City art dealer Subhash Kapoor, who was also arrested in India and Germany, on the grounds that Kapoor possessed stolen antiquities from India and other countries.¹⁷⁵ Pursuant to India’s 1972 Antiquities and Art Treasures Act, “no art object over 100 years old may be removed from the country”.¹⁷⁶ Authorities also seized more than \$20 million worth of antiquities from Kapoor’s storage units.¹⁷⁷ According to U.S. Immigration and Customs officials, the antiquities at issue included bronze and sandstone statues thought to have been looted from temples in India.¹⁷⁸ In connection with the arrest warrant, U.S. officials also requested that museums in the U.S. review

¹⁷² Barry Meier, *Art Dealer Pleads Guilty in Import Case*, N.Y. Times, Jun. 24, 2004, <http://www.nytimes.com/2004/06/24/arts/art-dealer-pleads-guilty-in-import-case.html>.

¹⁷³ Barry Meier & Martin Gottlieb, *Loot: Along the Antiquities Trail; An Illicit Journey Out of Egypt, Only a Few Questions Asked*, N.Y. Times, Feb. 23, 2004, <http://select.nytimes.com/search/restricted/article?res=F60711FE3C580C708EDDAB0894DC404482>.

¹⁷⁴ Malcolm Gay, *For the St. Louis Art Museum, a Legal Victory Raises Ethical Questions*, The Atlantic, May 30, 2012, <http://www.theatlantic.com/national/archive/2012/05/for-the-st-louis-art-museum-a-legal-victory-raises-ethical-questions/257839/>.

¹⁷⁵ Robin Pogrebin and Kevin Flynn, *Museums Studying Dealer’s Artifacts*, N.Y. Times, July 27, 2012, http://www.nytimes.com/2012/07/28/arts/design/us-asks-museums-to-examine-collections.html?_r=0.

¹⁷⁶ *Idem*.

¹⁷⁷ *Idem*.

¹⁷⁸ *Idem*.

their collections for any objects obtained from Kapoor.¹⁷⁹ Among other international art institutions, it was reported that the Metropolitan Museum of Art in New York; Museum of Fine Arts, Boston; the Smithsonian's Freer and Sackler Galleries in Washington, D.C. and the Art Institute of Chicago all acquired works from Kapoor.¹⁸⁰

While Phoenix's checkered history and Kapoor's multiple arrests may be extreme, as at least one commentator has observed, there is a general "problem of reluctance among dealers to ask the important, and culturally gauche, questions about provenance".¹⁸¹ In light of these issues and in recognition of the "key role that trade has traditionally played in the dissemination of culture and in the distribution to museums and private collectors of foreign cultural property", in 1999, the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation adopted an International Code of Ethics for Dealers in Cultural Property.¹⁸²

The code provides that art dealers must not "import, export or transfer the ownership of [cultural] property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported",¹⁸³ and further that, where a dealer has "reasonable cause to believe that an object has been the product of a clandestine excavation, or has been acquired illegally or dishonestly from an official excavation site or monument", the dealer must avoid "assist[ing] in any further transaction with that object, except with the agreement of the country where the site or monument exists".¹⁸⁴ Moreover, where a dealer is in possession of such an object, and where its country of origin seeks its return, the dealer shall, "within a reasonable period of time", take "all legally permissible steps to co-operate in the return of that object to the country of origin".¹⁸⁵

Unfortunately, the code is intended as a voluntary set of guidelines—a "model for national codes" that may be "adopted voluntarily and in co-op-

¹⁷⁹ *Idem*.

¹⁸⁰ Updated: *Kapoor's Footprints: 240 Objects from Alleged Antiquities Trafficker Traced to Museums Around the Globe*, Chasing Aphrodite: The Hunt for Looted Antiquities in the World's Museums, Aug. 3, 2012, <http://chasingaphrodite.com/2012/08/03/kapoors-footprints-230-objects-from-alleged-antiquities-trafficker-traced-to-museums-around-the-globe/>.

¹⁸¹ Stefano Manacorda, *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* 74 (2011).

¹⁸² International Code of Ethics for Dealers in Cultural Property, <http://unesdoc.unesco.org/images/0012/001213/121320M.pdf>.

¹⁸³ *Ibidem* at Article 1.

¹⁸⁴ *Ibidem* at Article 3.

¹⁸⁵ *Idem*.

eration with art dealers' associations...".¹⁸⁶ Consequently, non-compliance with the code will not "generally raise [proper] legal sanctions".¹⁸⁷ This does not mean, however, that dealers should ignore their ethical obligations. As the noted commentator Souren Melikian recently observed, aside from the "concerns for mankind's buried historical and artistic heritage", "[g]rowing numbers of buyers feel that at some point in the not-too-distant future... costly antiquities first bought after 1970 will become hard if not impossible to sell, and their commercial value will nosedive",¹⁸⁸ and "undocumented antiquities... will turn into such hot potatoes that few professionals will want to touch them, and even fewer investment-conscious collectors will hold on to them".¹⁸⁹ We can only hope that he is right.

The acquisition practices of museums raise similar issues. Over the past several years, questions regarding the legal and moral responsibilities of museums in connection with their acquisition of antiquities have been hotly debated by museum officials, lawyers, archeologists, public officials and other commentators. Indeed, sharp lines have been drawn and two strikingly disparate points of view have emerged. On one side are many museum advocates who, while conceding that care should be shown and research performed before an acquisition, argue that antiquities may be acquired even in the absence of clear and convincing evidence that they have not been looted or are of questionable legal status. According to this view, if a problem arises later, then it can be dealt with at that time. On the other side are archeologists and other commentators who believe that if there is any doubt about the provenance of an antiquity being considered for acquisition, the transaction should not be completed.

While both sides agree that museums must act in good faith and utilize appropriate standards of due diligence, the problem arises when one tries to define what those standards are. According to those on the museum side, a museum should be able to acquire an antiquity without having all the provenance history it might need as long as certain procedures have been

¹⁸⁶ United Nations Educational, Scientific and Cultural Organization (UNESCO), "Study on an International Code of Ethics for Dealers in Cultural Property for the Purpose of More Effective Control of Illicit Traffic in Cultural Property", <http://unesdoc.unesco.org/images/0011/001160/116007eo.pdf>.

¹⁸⁷ Dr. Guido Carducci, *Ethics, Law and Heritage*, UNESCO (2005), http://icom.museum/fileadmin/user_upload/pdf/ICOM_News/2005-3/ENG/p5_2005-3.pdf.

¹⁸⁸ Souren Melikian, *How UNESCO's 1970 Convention Is Weeding Looted Artifacts Out of the Antiquities Market*, *Art + Auction*, Aug. 31, 2012.

¹⁸⁹ *Idem*.

followed.¹⁹⁰ If, after making the acquisition, convincing evidence comes to light proving that the work was illegally excavated in violation of a country's antiquities law, then the museum would be obligated to return the property.

Proponents of the museum side argue that museums are justified in acquiring such objects because, on the whole, museums are "concerned with both the fate of the individual antiquity and the preservation of archaeological context".¹⁹¹ Indeed, these proponents contend that "most museums in the developed world... have developed acquisition policies intended to remove incentives for looting archaeological sites" and museums are "encouraged to set a date before which an antiquity must be known to have been out of its likely country of origin before it can be acquired".¹⁹² For example, the American Alliance of Museums ("AAM") in its Standards Regarding Archaeological Material and Ancient Art begins with the premise that, before acquiring an object, museums should require documentation demonstrating that the object was exported from its country of origin by November 17, 1970, the date on which the UNESCO Convention was signed.¹⁹³ Moreover, for objects exported after 1970, the AAM "recommends that museums require documentation that the object has been or will be legally exported from its country of modern discovery, and legally imported into the United States".¹⁹⁴ Where a museum is unable to obtain an object's full provenance, however, the AAM does not prevent a museum from acquiring the object. Rather, the AAM's position is that "there are cases in which it may be in the

¹⁹⁰ See, e.g., James Cuno, *Introduction to Whose Culture? The Promise of Museums and the Debate Over Antiquities* (James Cuno ed. 2009): "[S]uch objects, even those ancient ones whose archaeological context and/or provenance (recent record of ownership) are unknown have much to teach us about the past, about art, about material properties and manufacture, about human aspirations, and about distant cultures and times, all of which have relevance to the times in which we live currently. In this respect, the acquisition, preservation, presentation, and publication of these objects—excavated or not, with or without provenance—is the museum's highest purpose".

¹⁹¹ *Idem.*

¹⁹² *Idem.*

¹⁹³ American Alliance of Museums, *Museum Standards and Best Practices*, <http://aam-us.org/resources/ethics-standards-and-best-practices/characteristics-of-excellence-for-u-s-museums/collections-stewardship>. Generally, while 1970 is a good benchmark for museums to use, the most relevant date to determine whether an acquisition of cultural property is acceptable is the year the foreign sovereign's patrimony law was enacted. For example, in the Lydian Hoard case, the objects were removed from Turkey prior to 1970, but years after the enactment of Turkey's cultural patrimony law. Thus, the patrimony law vested ownership of the antiquities in the Turkish Government, even though the objects had been exported prior to the adoption of UNESCO. The AAM's use of the 1970 date as a cut-off point is therefore arbitrary and arguably misguided.

¹⁹⁴ *Idem.*

public's interest for a museum to acquire an object, thus bringing it into the public domain...".¹⁹⁵ When that happens, the AAM merely requires that the museum be "transparent about why this is an appropriate decision in alignment with the institution's collections policy and applicable ethical codes" and recommends that museums "make serious efforts" to conduct research on "objects where provenance is incomplete or uncertain".¹⁹⁶

The Association of Art Museum Directors ("AAMD"), in its Guidelines on the Acquisition of Archaeological Material and Ancient Art, provides for a similar approach.¹⁹⁷ While "[m]ember museums normally should not acquire a Work unless provenance 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",¹⁹⁸ sometimes, "even after the most extensive research, many Works will lack a complete documented ownership history".¹⁹⁹ Under those circumstances, acquisition is permitted if "[b]ased on the results of provenance research, the museum can make an informed judgment that the Work was outside its probable country of modern discovery before 1970 or legally exported... after 1970", or "[t]he cumulative facts and circumstances known to the museum... allow it to make an informed judgment to acquire the Work, consistent with the Statement of Principles...".²⁰⁰ In essence, what the AAM and AAMD guidelines reflect is that just because there is no provenance—or insufficient provenance—the museum need not conclude that the piece has been stolen or illegally excavated. Certainly, despite diligent research, it is not always possible to know everything about a work's origin, ownership history and legal standing before acquiring it. If an object has been plundered from a previously unexcavated site, its identification as looted art may not occur until the object is acquired by a museum and publicly displayed, because the authorities in the country of origin never had a chance to examine, study and record the object there. Sometimes, the thieves who originally plundered the material will be caught and statements taken, providing information that can lead to a successful search and identification once it has left

¹⁹⁵ *Idem*.

¹⁹⁶ *Idem*.

¹⁹⁷ Association of Art Museum Directors, Guidelines on the Acquisition of Archaeological Material and Ancient Art (revised 2013), https://aamd.org/sites/default/files/document/Guidelines%20on%20the%20Acquisition%20of%20Archaeological%20Material%20and%20Ancient%20Art%20revised%202013_0.pdf.

¹⁹⁸ *Ibidem* at III. E.

¹⁹⁹ *Ibidem* at III. F.

²⁰⁰ *Idem*.

the country. But, this is not often the case. The issue, then, is whether the museum should acquire the object if it cannot obtain sufficient provenance information.

Many leading archaeologists reject the suggestion by museum officials that they are “performing an act of rescue” when they buy questionable objects and deny responsibility for separating the objects from their archaeological context. In an article in the *Cardozo Journal of International and Comparative Law* on the fiduciary obligations of museums, Patty Gerstenblith, a professor at DePaul University and now Chair of the U.S. Cultural Property Advisory Committee, presents an excellent summary and analysis of this position. According to Professor Gerstenblith, this conduct on the part of museum officials is nothing less than a failure to fulfill their fiduciary obligations. She explains that there should be a higher “duty of care in the acquisition context” coupled with a recognition that “the acquisition of decontextualized objects causes historical, cultural and scientific losses”.²⁰¹ Under the regime that she advocates, the provenance and good title of an object can never be assumed unless proven otherwise.²⁰²

There are no easy answers. Compromise, as always, is needed. Perhaps museums are better off acquiring objects when no information can be obtained either way. That will at least get the material off the illicit market. Moreover, current museum standards on the publication of objects with incomplete provenances may encourage claimants to initiate action to reclaim their missing property. In January 2013, at its annual meeting in Kansas City, the AAMD adopted revisions to their Guidelines of the Acquisition of Archaeological Material and Ancient Art that require member museums acquiring objects to publish on the AAMD Object Registry “all provenance information of which the museum[s] [are] aware, as well as specific details about how the acquisition meets the standards of guidelines”.²⁰³ Whereas previously museums were only required to post an object’s provenance information, museums now must explain “why the acquisition... is consistent” with the guidelines.²⁰⁴ In addition, the guidelines amend the AAMD’s Code of Ethics so that museum directors are required to carry out the Object

²⁰¹ Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 *Cardozo J. Int’l & Comp. L.* 409, 453 (2003).

²⁰² *Idem.*

²⁰³ Press Release, Association of Art Museum Directors, Strengthened Guidelines on the Acquisition of Archaeological Material and Ancient Art Issued by Association of Art Museum Directors (Jan. 30, 2013), <http://www.aamd.org/newsroom/documents/PressReleaseAAMDGuidelinesRev.2013.pdf>.

²⁰⁴ AAMD, Guidelines, *supra* note 197, at III. H.

Registry posts for all materials that lack a complete provenance.²⁰⁵ Maxwell Anderson, the director of the Dallas Museum of Art and the chairman of the directors' association's task force on archaeological material and ancient art, has stated that this change makes the publication rule "into a sunshine law now... It gets the information out there, and if there are claimants then they can come forward".²⁰⁶

The significance of cultural property to a nation cannot be understated. The preamble to the UNESCO Convention expressly recognizes this, stating that "cultural property constitutes one of the basic elements of civilization and national culture".²⁰⁷ As further stated in the preamble, "it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations".²⁰⁸ Nonetheless, while the UNESCO Convention was a noble effort by the international community to stem the wholesale plunder of looted antiquities and cultural property, initially, the Convention was not a particularly potent tool because it was not adopted by the major art market nations. Over the last two decades, however, that has begun to change. The increasing number and scope of bilateral agreements with the U.S. under the CPIA is a positive sign that international cooperation to prevent looting can work. Not only has the United States become a party to the Convention via the CPIA, but other market nations such as the United Kingdom and Switzerland have also accepted the Convention.²⁰⁹ Because Switzerland in particular has long been an important conduit for the illicit trade, its acceptance of the Convention in 2003 was a concrete illustration of a faster pace in the movement toward a regulated market that is not dependent on objects obtained through looting, theft and smuggling.

Nevertheless, beginning in the late 1980's, there was a growing realization that the UNESCO Convention alone was by no means an adequate

²⁰⁵ AAMD, Guidelines, *supra* note 197, at Amendment to Appendix A to Professional Practices in Art Museums: A Code of Ethics for Art Museum Directors.

²⁰⁶ Randy Kennedy, *Museum Leaders Toughen Artifact Acquisition Guidelines*, N.Y. Times, Jan. 30, 2012, <http://artsbeat.blogs.nytimes.com/2013/01/30/museum-leaders-toughen-artifact-acquisition-guidelines/>. As a counterpoint, Patty Gerstenblith stated, "What I want to see is the museums not acquiring these things in the first place. It remains to be seen how they enforce that part". *Idem*.

²⁰⁷ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Nov. 14, 1970, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

²⁰⁸ *Idem*.

²⁰⁹ UNESCO List of State Parties to the Convention, *supra* note 3.

response to the ever-increasing traffic in cultural property. UNESCO requested that the International Institute for the Unification of Private Law (“UNIDROIT”) prepare a new draft convention and provide a framework that could be adopted by both art-importing and art-rich nations. I was privileged to serve as the legal advisor to the Republic of Turkey at that conference. Most market nations (such as the United States and the United Kingdom, for example) did not sign or ratify the 1995 UNIDROIT Convention.²¹⁰ But often the passage of time and a little patience cures many ills. Indeed, since 1995, thirty-three countries have ratified the Convention²¹¹ and hopefully more will do so in the future.

Through the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, the international community has taken important steps to try to rationalize the varied international response to stolen cultural property, foster widespread international enforcement of national ownership laws and, albeit gingerly at first, sanction the enforcement by one nation of another nation’s export laws in a way that adequately reflects the concerns of source and market countries. These treaties recognize that the chronic and widespread looting of cultural sites around the world can only be quelled through concerted and fortified international efforts.

I have long believed that the stimulus for looting and the illicit trade is the availability of end purchasers. So long as there is a market for illicit goods there will be an illicit marketplace. I am not naïve enough to think that a willing buyer will not be available, be it an institution or an individual, but I do believe that the strict enforcement of the rule of law is helping, if not in stemming the looting and smuggling that constantly appears to be on the rise, at least by ensuring that stolen or illegally exported antiquities are finding their way home. The 1970 UNESCO Convention, the CPIA, and the UNIDROIT Convention, as well as other by-products of international cooperation, are the tools necessary to make this happen. Given the great strides that the international community has made in the past 43 years, I am hopeful that there will be even more significant changes as the UNESCO Convention reaches the 50-year mark and beyond. In particular, I would like to see more countries enter into bilateral agreements with the United States, and more countries should enter into regional alliances. In addition, there should be more international cooperation and self-

²¹⁰ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (1995).

²¹¹ Status of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects - Signatures, Ratifications, Accessions, <http://www.unidroit.org/english/implement/i-95.pdf>.

regulation from dealers and museums. In North America, the AAM and AAMD provide guidelines and standards for museums to follow. On an international level, museums should adopt the exemplary practices outlined in the International Council of Museums' Code of Ethics.²¹² This Code of Ethics "establishes the values and principles shared by ICOM and the international museum community... and sets minimum standards of professional practice and performance for museums and their staff".²¹³ Finally, I believe that the United States and other market nations should endorse the UNIDROIT Convention.

I would like to conclude with a quote by Judge Richard Cudahy of the Seventh Circuit Court of Appeals in a case to reconstitute mosaic panels looted from Cyprus, which I think beautifully articulates why the preservation of cultural property is so important:

The UNESCO Convention and the Cultural Property Implementation Act constitute an effort to instill respect of the cultural property and heritage of all peoples. The mosaics before us are of great intrinsic beauty. They are the virtually unique remnants of an earlier artistic period and should be returned to their homeland and their rightful owner. This is the case not only because the mosaics belong there, but as a reminder that greed and callous disregard for the property, history and culture of others cannot be countenanced by the world community or by this court.²¹⁴

Thank you.

²¹² International Council of Museums, Code of Ethics, <http://icom.museum/the-vision/code-of-ethics/>.

²¹³ *Idem*.

²¹⁴ *Autocephalous Church v. Goldberg & Feldman Arts*, 917 F.2d 278, 297 (7th Cir. 1990).