Consequences of the Met-Italy Accord for the International Restitution of Cultural Property

Aaron Kyle Briggs
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In February 2006, the Metropolitan Museum of Art ("Met") and the Italian Ministry of Culture signed the Italy-Met Euphronios Accord ("Accord"), forever changing the dynamics of the international cultural property trade. Although the Met purchased the Euphronios Krater ("Krater") in 1972 for $1.2 million, Met Director Phillippe de Montebello agreed to relinquish ownership of the piece to Italy, where the object was originally found, in exchange for long-term loans of works of equal value and an absolution of liability for the illegal excavation and export of the Krater. This unprecedented resolution to a decades-old international property dispute has the potential to foster a new spirit of cooperation between museums and source nations, spawn stricter museum acquisition and loan policies, reduce the demand for illicit cultural property, and permanently alter the balance of power in the international cultural property debate.

Since the Accord was signed in February of 2006, change has already begun with the issuance of new museum guidelines and increased awareness of the problem in countries with large collections of cultural property, specifically Egypt, Peru, and Italy. However, is the Accord a replicable model whereby

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1 Elisabetta Povoledo, *Italy and U.S. Sign Antiquities Accord*, NY Times E7 (Feb 22, 2006).

2 Id.


other nations and museums can amicably resolve disputes without litigation? If not, is it still capable of generating change in the art world? This Comment will demonstrate that given the circumstances of the Accord, the model is unlikely to be perfectly replicated by other nations and museums. Nevertheless, it still has the potential to significantly alter the way in which cultural property disputes are resolved.

This Comment will proceed in four parts. The first section will provide a contextual overview of the international art market, the cultural property debate, and the culture of acquisition to show what is at stake and why these issues are important. The second section will examine the legal framework, including the current international conventions, and the US cultural property regime. This section will also expound upon the legal issues surrounding claims by source nations for restitution from American institutions. The third section will detail the Italian cultural property regime, the circumstances surrounding the Krater, and the Accord, which form a basis for the Italian Model ("Model"). The fourth section will assess whether the Model is replicable, and separately, its potential impact on the international art market. The final section will conclude by suggesting that the Model may initiate and form the basis of a dialogue between museums and source nations.

I. THE CONTEXT

Cultural property, as defined by the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention"), is "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science" and fits within certain categories. While the term "cultural property" includes a wide purview of objects, the focus of this Comment will be on the international trade in antiquities, or objects of significant cultural importance more than one hundred years old.

A. THE ANTIQUITIES TRADE

The global trade in antiquities represents a small portion of the entire art market with sales between one-hundred million and two-hundred million dollars

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5 UNESCO refers to the United Nations Educational, Scientific, and Cultural Organization.

6 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Nov 14, 1970), art 1, 823 UN Treaty Ser 231 (1972). Relevant Article 1 categories for this Comment include: (c) products of archaeological excavations or discoveries, (d) elements of artistic or historical monuments or archaeological dismembered sites (f) objects of ethnological interest (g) property of artistic interest.
annually. It is important to distinguish between the licit and illicit trades. In the licit trade, generally, the objects are discovered in archaeologically rich nations such as Italy, Greece, and Turkey through official excavations of ancient sites. Then either prior to the enactment of a national ownership law or afterwards, with the state’s consent (usually via an export certificate), they are sold through public auction houses like Sotheby’s and Christie’s or private dealers. The antiquities finally end up in the care of museums or private collectors in market nations such as the US, the UK, and other Northern European nations, with possible intermediary exchanges through other dealers.

There are two means by which the licit trade in antiquities becomes illicit. First, objects are stolen from places where they are documented. Second, and the focus of this Comment, objects are unofficially excavated from ancient sites and then sold to middlemen within the country in violation of the national cultural property ownership laws. From there, the objects are sold to dealers in market nations in violation of the national export laws, whereupon the provenances of the objects are forged and/or title is perfected through the operation of favorable statutes of limitations. The objects are then sold to museums or private collectors.

Some estimate that the illicit trade in antiquities represents billions of dollars annually, rendering antiquities the third largest global black market. However, according to Interpol, the actual figure is unascertainable because of the lack of meaningful statistics and the underground nature of the trade. Though quantifying the illicit trade is nearly impossible, this is immaterial because the significance of the looting crisis lies in the destruction of cultural heritage, not numbers. The illicit cultural property market necessarily involves the impromptu or unofficial excavation of sites without the proper analysis, care, and preservation taken in official excavations, thus resulting in objects of

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8 Id at 184.

9 Sue J. Park, *The Cultural Property Regime in Italy: An Industrialized Source Nation’s Difficulties in Retaining and Recovering its Antiquities*, 23 U Pa J Intl Econ L 931, 938 (2002) (noting that “[u]nder Swiss civil law, the owner of stolen acquisitions, who purchased in good faith, becomes their legal owner at the end of five years. Thus, once five years pass, illegally excavated antiquities of unclear provenance are safe to leave Switzerland for their final destination in market nations.”).

10 See, for example, id at 936; Charles A. Palmer, *Recovering Stolen Art: Avoiding the Pitfalls*, 82 Mich Bar J 20, 21 (2003).

unknown or incomplete provenance. This imperfect knowledge is devastating because "[a]n antiquity without a provenance—even if perfectly preserved—is of limited historical significance; if we do not know where it came from, it can provide only limited scientific knowledge of the past." Thus, the illicit cultural property trade is detrimental to man’s understanding of his past, and must be stopped so that archaeological excavation can occur with the requisite care and expertise crucial to ensuring the furtherance of knowledge.

B. THE CULTURAL PROPERTY DEBATE

The question of how to achieve an end to the illicit cultural property trade is much debated and necessarily implicates the larger debate between cultural nationalists and cultural internationalists over the enforcement of foreign export controls. Generally, proponents of cultural internationalism, usually market nations, emphasize the international interest in preserving cultural property and thus the exhibition of it throughout the world without enforcing export controls. In contrast, proponents of cultural nationalism, usually source

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12 Provenance is defined as “[t]he full history and ownership of an item from the time of its discovery or creation to the present day, from which authenticity and ownership is determined.” International Council of Museums, ICOM Code of Ethics for Museums (2006), available online at <http://icom.museum/ethics.html> (visited Jan 15, 2007).


14 See id.

15 For an overview of the two schools of thought regarding cultural property, see John Henry Merryman, Two Ways of Thinking About Cultural Property, 80 Am J Intl L 831 (Oct 1986).

16 Market nations are those with a high public (museum) and private (collector/dealer) demand for works of art and antiquities and typically include developed nations such as the US, the UK, and Japan. See Bator, 34 Stan L Rev at 292 (cited in note 13).

17 John Henry Merryman, The Free International Movement of Cultural Property, 31 NYU J Intl L & Pol 1, 9 (Fall 1998). Cultural internationalists generally believe in the free movement of cultural property and are more likely to favor buyers’ rights as good faith purchasers over source nations’ claims that an object has been illegally exported and thus are unwilling to enforce foreign nations’ export controls. See Bator, 34 Stan L Rev at 287 (cited in note 13) (observing that “the fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States . . . the possession of an art object cannot lawfully be disturbed in the United States solely because it was illegally exported from another country”). Scholars often point to the preamble to the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), 249 UN Treaty Serv 240 ("[b]eing convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world") ("Hague Convention"), as the international legal source of the doctrine.
nations,\textsuperscript{18} emphasize the national interest in preserving cultural heritage within the state and the necessity of enforcing export controls to stop the illicit trade.\textsuperscript{19}

Enmeshed within the larger question concerning recognition of foreign export controls is the proper role of museums and their policies for acquisitions and loans of antiquities. Museums promote the vision of the “universal museum” in which they are the protectorates of the world’s cultural property, protecting and preserving it while simultaneously exhibiting it to the public in their roles as educators and facilitators of appreciation for world cultures.\textsuperscript{20} In contrast, archaeologists advocate that art and antiquity must be excavated and researched \textit{in situ}, or in the context of where it is found, in order to learn everything possible about the cultures that came before.\textsuperscript{21} Yet, both agree that cultural heritage is important, must be protected, and even that scientific excavations should be done to examine the pieces \textit{in situ}.

The disagreement surfaces regarding the question of what should be done with objects already in the care of collectors and museums that are later determined to be illegally excavated. Museums advocate the position that the public should not be denied the opportunity to view these culturally valuable pieces. Furthermore, conclusive proof of legal import at the time of acquisition is not always possible.\textsuperscript{22} By contrast, archaeologists argue from an economic perspective that in order to stop illegal excavation it is important to cut off the demand. Museums should refuse to purchase artifacts of unknown

\textsuperscript{18} Source nations are typically those rich in cultural property resources and seek to retain their cultural property through strict ownership laws. Several states claim ownership to all antiquities discovered subsequent to the date of the legislative enactment, including Greece, Italy, and Turkey, among others. P.J. O’Keefe, \textit{Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level}, 10 Syr J Intl L & Comm 352, 359 n 30 (1983).

\textsuperscript{19} See Merryman, 31 NYU Intl J L & Pol at 12 (cited in note 17). Cultural nationalists emphasize the relationship between cultural property and the national heritage and generally favor a return of illegally exported cultural property to source nations. Scholars point to the UNESCO Convention where signatories oppose the illicit export and transfer of ownership of cultural property (art 2), decree trade in cultural property in violation of the source nation’s export controls is illicit (art 3), and resolve to recognize these export controls by prohibiting the importation of these objects (arts 7, 9, 13). See Merryman, 80 Am J Intl L at 843 (cited in note 15).


\textsuperscript{22} Association of Art Museum Directors, \textit{Art Museums and the International Exchange of Cultural Artifacts} at 1–2 (cited in note 20).
In its most extreme form, museums should be denied the right to exhibit illegally excavated works and forced to effectuate their restitution. The argument follows that if museums know they will have to return the pieces, they will adopt stricter acquisition policies requiring more diligent research into the provenance of the work, and refuse to trade in anything that is even borderline suspicious—thus the significance of the Met’s voluntary restitution of the Krater.

C. THE CULTURE OF ACQUISITION

To fully understand the Accord it is important to know what the culture of museum acquisitions was like during the time the Krater was acquired, and also subsequently when controversy surfaced concerning its provenance and restitution. Acquiring antiquities became popular in the 1960s, a time when museums were little concerned with an object’s history so long as it was valuable, and even turning a blind eye to knowledge of illicit provenance. To illustrate, just prior to acquiring the Krater in 1972, the Met purchased the Lydian Treasure in the late 1960s. This was done with knowledge that the treasure had been looted and exported illegally out of Turkey in 1966. Curators given free reign to build collections for great museums ignored evidence of illegal excavation and export while acquisition committees blindly accepted curators’ testimonies of a piece’s legitimacy. Despite the advent of the UNESCO Convention in 1970, and several museums declaring openly that they would not acquire objects without documentation of legitimate provenance, the cultural property trade has continued to thrive. Although there is increasing

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25 Id at 10.

26 A Met curator had actually visited the site where it was looted and matched fragments to the acquisition piece. Id.


28 Museums at the University of Pennsylvania and Harvard University, and the British Museum made these declarations in 1970. See Brodie, Dole, and Watson, Stealing History at 8–9 (cited in note 24).

29 Id. The Boston Museum of Fine Arts has stated openly that it must continue unrestricted collecting, id, and the J. Paul Getty Museum (“Getty”) through the 1970s, 1980s, and early 1990s has acquired controversial pieces. See generally Andrew L. Slayman, The Trial in Rome,
pressure on museums to tighten acquisition and loan policies, through organizations such as the American Association of Art Museum Dealers ("AAMD") and the International Council of Museums ("ICOM"), museums have been slow to effectuate real changes in their policies because of the less-than-complete implementation of the UNESCO Convention in the US31 and the difficulty for source nations to achieve restitution. The Accord is therefore significant in its potential to usher in sweeping changes for museums acquiring and displaying antiquities.

II. THE LEGAL FRAMEWORK

The legal regime protecting the international trade in cultural property is a complex array of international conventions, bilateral agreements, national ownership and export laws, and judicial interpretation. This section will lay out the principles of the UNESCO Convention and examine how it has been ratified and implemented in the US in order to understand the legal regime within which source nations make restitution claims for objects in US institutions.

A. THE UNESCO CONVENTION

The 1970 UNESCO Convention, with over one hundred signatories,32 is perhaps the most important legal instrument dealing with the cultural property trade.33 Adopted as a means to stop the illicit trade in art and antiquities during Archaeology (Feb 6, 2006), available online at <http://www.archaeology.org/online/features/italytrial/> (visited Jan 15, 2007) (discussing the history of Getty acquisitions).


31 This Comment deals with American museums because most of the European museums built their collections in past centuries before national ownership laws were in place, and this is evident in the fact that most of the 20th and 21st century restitution claims have been against US institutions. See Alan Riding, Why 'Antiquities Trials' Focus on America, NY Times A16 (Nov 25, 2005) (suggesting that the British Museum, Louvre, and Pergamon, all European museums, built their collections during the age of exploration "according to the practice at the time").


33 There is another major international convention, the International Institute for the Unification of Private Law Convention on the International Return of Stolen or Illegally Exported Cultural Objects 1995, 34 ILM 1322 (1995) ("UNIDROIT Convention"), but having only twenty-two signatories, and not including the US or any of the other major art market nations, it has had little effect on stemming the illicit trade and is outside the scope of this Comment. The UNIDROIT Convention calls more stringently for the restitution of illegally exported cultural property than the UNESCO Convention. See Kate Fitz Gibbon, Chronology of Cultural Property Legislation, in Kate Fitz Gibbon, ed, Who Owns the Past?: Cultural Policy, Cultural Property, and the Law 3, 6 (Rutgers 2005).
times of peace, it is opposed to the illicit export of cultural property. The UNESCO Convention requires its parties to prohibit the importation of stolen cultural property from public institutions in other countries provided the material has been inventoried and to recover and return any stolen property at the request of the source nation in return for just compensation. Regarding cultural property in jeopardy of pillage:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

Finally, there is a provision calling for the recognition of export controls and return of objects for any property that a state party deems “inalienable,” though subject to the national laws of the importing state. The Convention clearly contemplates an export control regime, though only in certain circumstances for stolen material that is inventoried at a public institution, for property that is in jeopardy of pillage, or for property deemed “inalienable” by the exporting state. It is significant that not only source nations, but many market nations have signed the Convention. The Convention would appear to forbid museums from acquiring antiquities illegally exported after the date of the Convention and call for the state to require restitution. However, not all parties have ratified the Convention, including the US.

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34 Prior to the UNESCO Convention, the only international convention dealing with cultural property focused on its preservation during times of war. See Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, 249 UN Treaty Ser 215 (1954).
35 Gibbon, Chronology of Cultural at 5 (cited in note 33).
36 UNESCO Convention, art 7(b).
37 UNESCO Convention, art 9.
38 UNESCO Convention, art 13.
39 For a complete list of states party, see US Department of State, States Party to the 1970 UNESCO Convention, available online at <http://exchanges.state.gov/culprop/unesco02.html> (visited Jan 15, 2007). Note that the market nations of the UK, the US, and Japan are parties to the agreement.
B. THE US CULTURAL PROPERTY REGIME

As a major art importing nation that traditionally supports a free market, it is unsurprising that the general policy in the US has been not to enforce the export laws of other countries.\textsuperscript{40} It is also not surprising that the US has few cultural property export controls of its own.\textsuperscript{41} From a legal perspective, this US policy can be seen in its legislative ratification of the UNESCO Convention, executive implementation via the bilateral agreements, and judicial forays into cultural property restitution claims.

1. The Convention on Cultural Property Implementation Act

In accordance with US reservations at the time of signing the UNESCO Convention,\textsuperscript{42} and the US policy of not enforcing foreign export controls, the US has not ratified the Convention in its entirety. The 1983 Convention on Cultural Property Implementation Act ("CPIA")\textsuperscript{43} in essence merely implements Articles 7(b) and 9 of the UNESCO Convention, thus enforcing export controls under two conditions.\textsuperscript{44} First, agreement authority is provided in Section 303 of the CPIA for the President to implement import controls at the request of a state party by negotiating a bilateral agreement if four statutory determinations are met.\textsuperscript{45} Second, emergency authority is provided in Section 304 of the CPIA for the President to unilaterally implement import controls on archeological or ethnological material in lieu of a formal bilateral agreement as set forth in Section 303 of the CPIA.\textsuperscript{46} The US therefore selectively enforces export controls

\textsuperscript{40} See Bator, 34 Stan L Rev at 287 (cited in note 13).
\textsuperscript{41} The Native American Graves Protection and Repatriation Act, Pub L No 101-601, 104 Stat 3048 (1990), codified at 25 USC §§ 3001–13 (2000), is one of the few exceptions.
\textsuperscript{42} Gibbon, Chronology of Cultural at 5–6 (cited in note 33).
\textsuperscript{44} The focus here is on export controls of non-inventoried objects resting in situ covered in Article 9 of the UNESCO Convention such that only §§ 303-04 of the CPIA are within the scope of this Comment.
\textsuperscript{45} CPIA § 303, 96 Stat at 2602. The four requisite determinations for a bilateral agreement include: (1) the archaeological or ethnological material is in jeopardy from pillaging, (2) the source nation has implemented measures to protect its cultural heritage, (3) the application of import restrictions if applied in concert with other countries having substantial import trade in the material will deter the pillaging and less drastic measures are not available, and (4) import restrictions will be consistent with the “general interest of the international community in the interchange of cultural property.” Id.
\textsuperscript{46} CPIA § 304, 96 Stat at 2603. Emergency authority may be invoked provided that the material meets one of three conditions: (1) has importance for understanding history and is in jeopardy from “pillaging, dismantling, dispersal, or fragmentation,” (2) comes from a site of “high cultural
of source nations in the form of import controls, but only if the statutory criteria are met, and certainly does not undertake the sweeping enforcement of foreign export controls required by Article 13 of the UNESCO Convention.

2. The Cultural Property Advisory Committee and Memoranda of Understanding

Responsibility for administering the CPIA is with the US Department of State ("State Department"), which makes the statutory determinations to impose import restrictions through bilateral agreement and emergency action.\textsuperscript{47} Analysis and review of requests for import restrictions occurs through the Cultural Property Advisory Committee ("CPAC"), which is composed of professionals and experts in the cultural property field and makes recommendations to the State Department.\textsuperscript{48} A favorable determination for the source nation by CPAC and the State Department results in emergency import controls or a renewable five-year bilateral agreement called a Memorandum of Understanding ("MOU").\textsuperscript{49} Specifically, prohibited materials are published as a list in the federal register and may be imported into the US only if accompanied by an export certificate from the source nation or evidence demonstrating the object was removed from the source nation prior to the effective date of the MOU.\textsuperscript{50} The US has entered into bilateral agreements with twelve nations, including Italy.\textsuperscript{51}

3. Source Nations’ Legal Options

Source nations have several mechanisms through which to make a claim for restitution of an antiquity from a US museum. First, if the object is stolen, meaning taken from an inventoried public institution or a private party, the state

\textsuperscript{47} See generally US Department of State, Background: An Introduction to International Cultural Property Protection in the U.S., available online at <http://exchanges.state.gov/culprop/backgrnd.html> (visited Jan 15, 2007).

\textsuperscript{48} The CPAC is composed of professionals in the fields of archaeology, anthropology, and ethnology, and experts in the international trade in cultural property, and notably, two spaces on the eleven-member committee are reserved for persons representing museums—an important recognition of the role of museums in the preservation of cultural property. See US Department of State, The President’s Cultural Property Advisory Committee, available online at <http://exchanges.state.gov/culprop/committee.html> (visited Jan 15, 2007).

\textsuperscript{49} CPIA § 303, 96 Stat at 2602.

\textsuperscript{50} CPIA § 307, 96 Stat at 2606.

\textsuperscript{51} For a list of past and current import controls under CPIA, see US Department of State, Chart of Current and Expired Import Restrictions Under the Convention on Cultural Property Implementation Act, available online at <http://exchanges.state.gov/culprop/chart.html> (visited Jan 15, 2007).
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or private party can claim restitution under the CPIA. Second, if the object is
not stolen, it may still be illicitly traded if in violation of the ownership and
export laws of the source nation. Usually, the source nation will have a prior
law claiming ownership to all antiquities found in its soil after a certain date, thus
vesting ownership of the cultural property with the state, and in conjunction
with an export law, rendering it illegal in that country to export the object.
However, this alone does not suffice to claim restitution in US courts, since the
US does not generally enforce foreign export controls, and accordingly, only
selectively implemented the UNESCO Convention. The date of the relevant
CPIA action is important for these claims. If the object is exported after the
effective date of emergency import controls or a MOU, and falls within the class
of objects specified, then the source nation can claim restitution under the
CPIA and the US is obligated to take necessary measures to return the
property. However, if there is no MOU or the object is exported before its
effective date, as is case with the Krater, then it is more difficult for a source
nation to claim restitution as the issue becomes whether the court will recognize
the foreign cultural patrimony laws.

US courts resolve this issue by looking to the McClain Doctrine to
determine liability of the property holder. The theory in McClain was that under
the National Stolen Property Act ("NSPA"), which prohibits the transportation
of goods in interstate commerce known to be stolen, converted, or taken by
fraud, goods that are illegally exported should be considered stolen. The Fifth
Circuit held that illegal exportation of goods will in fact be considered theft and
thus stolen under the NSPA if there is a declaration of national ownership in the
cultural property. Thus, the "knowing importation of cultural property subject
to a clear declaration of ownership by a foreign nation is grounds for the
criminal prosecution of the importer by the US under the [National] Stolen
Property Act." There were questions regarding the soundness of this doctrine

52 CPIA §308, 96 Stat at 2607 (codifying Article 7(b) of the UNESCO Convention prohibiting the
export of stolen cultural property).
53 For a general discussion of export controls and ownership laws and their distinguishing
characteristics, see O'Keefe, 10 Syr J Int'l L & Comm at 357–69 (cited in note 18).
54 See id at 362.
55 CPIA § 305, 96 Stat at 2604.
56 CPIA § 310, 96 Stat at 2609.
57 United States v McClain, 545 F2d 988 (5th Cir 1977).
59 McClain, 545 F2d at 1000–01. The court undertook a detailed analysis of what the defendants
actually knew, thus showing the importance of the scienter requirement in the NSPA.
60 William G. Pearlstein, Cultural Property, Congress, the Courts, and Customs, in Gibbon, ed, Who Owns
the Past? 9, 10 (cited in note 33).
when the CPIA was subsequently enacted, but the McClain Doctrine’s continuing validity was reaffirmed in 2003 by the Second Circuit holding that the CPIA is not “the exclusive means of dealing with stolen artifacts and antiquities.” The case demonstrates the importance of distinguishing between mere export controls and true ownership laws—only the latter coming under the purview of the NSPA.

However, both the Schultz and McClain cases were criminal prosecutions by the US government against private dealers, not state actions for restitution. In another case, Italy was able to reclaim an antiquity through a federal in rem forfeiture action brought by the US. It is significant that even in this latter case, liability and remedy were predicated on the NSPA because it suggests that if a source nation proceeds under federal law, any action for restitution or criminal liability will have to be based on the NSPA.

Applying this regime to the Krater, Italy’s claim of restitution under federal law hinges on the Met’s knowledge of the Krater’s provenance at the time of acquisition. The Schultz analysis of the Italian law in determining whether it is merely export or true ownership would likely not be at issue since at least one court has characterized the Italian patrimony law as capable of falling under the NSPA. The case would then turn on the scienter requirement of the NSPA and whether the Met knew the Krater was illegally exported from Italy. Thus, evidence as to the Krater’s provenance and what the curators and acquisition

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61 The CPIA was implemented with its strict statutory requirements for imposing import controls thus reaffirming the US policy against blanket recognition of export controls in favor of the free international movement of goods. It was thought that the McClain Doctrine’s blanket recognition would be overruled, and in fact, legislation was under review in the US Senate to this effect, but it was never passed. Id at 10–11.


63 Id. The Second Circuit undertook a detailed textual analysis of the Egyptian law and weighed the testimony of various experts in Egyptian law.

64 United States v An Antique Platter of Gold, 184 F3d 131 (2d Cir 1999). The dealer was required to return the object after having made misrepresentations on custom forms, which ultimately brought the case under the purview of the NSPA since Italy had laws vesting ownership in the state.

65 There is also the possibility of proceeding under state law in an action for replevin. See, for example, Autocephalous Greek-Orthodox Church of Cyprus v Goldberg and Feldman Fine Arts, Inc, 917 F2d 278 (7th Cir 1990) (holding Cyprus was able to achieve restitution of the mosaics); Republic of Turkey v The Metropolitan Museum of Art, 762 F Supp 44 (SDNY 1990) (settling before trial granting Turkey restitution in light of the evidence mounting against the Met regarding knowledge of the smuggling and looting).

66 See An Antique Platter of Gold, 184 F3d 131.
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committees knew, would be crucial. Note that a state law action for replevin is not available to Italy regarding the Krater because the statute of limitations has likely run. Although the Accord now renders litigation impossible, the potential for litigation was important because each party's assessment of the likelihood of achieving restitution in court affected the procedural and substantive aspects of the Accord.

The litigation model is an inadequate means for Italy to achieve restitution in this dispute. Since state action for restitution is foreclosed, and the Krater's export and excavation precede US implementation of the UNESCO Convention and the US–Italy bilateral agreement, Italy's case is dependent upon a federal action under the NSPA. It is not surprising that Italy employed an alternative model to achieve restitution in light of the NSPA's messy scienter requirement. Through litigation, Italy could have at best hoped for criminal liability with likely substantial litigation costs.

III. THE ITALIAN MODEL

This section explores the Italian Model whereby resolution of cultural property disputes is achieved outside of US courts in favor of a more cooperative approach between museums and nations. The Model will be laid out in several parts, beginning with an overview of Italy's cultural property regime, continuing with a background on the Krater, and concluding with an examination of the Accord.

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67 This evidence will be detailed later in the Comment, but suffice to say, in light of the Medici conviction and the documents and photographs obtained during that case, it is likely Italy had a strong claim to restitution.

68 In New York, the presumable location of action given that the Met is located in New York City, the statute of limitations is three years from the time the action accrues, and in the case of a good faith purchaser, an action does not accrue until the claimed-owner makes a demand for the object's return and is refused. Republic of Turkey, 762 F Supp at 45. Furthermore, the demand must be within a reasonable time after the possessor is identified. DeWeerth v Baldinger, 836 F2d 103, 108 (2d Cir 1987). Given that the Met's acquisition of the Krater was a public event in 1972 and that demands for its return were made throughout the final decades of the last century, at the time when the Accord was signed, it is likely the statute of limitations had run, thus precluding Italy from bringing a suit under state law.

69 The Met likely only agreed to negotiate because it believed Italy had a strong case. For decades the Met had rebuffed Italy's claims for restitution. Similarly, Italy's belief in the strength of its case likely spurred it to seek a resolution outside of court because the likelihood of success in court would have bolstered Italy's negotiating position vis-à-vis the Met, thus allowing Italy to achieve a favorable settlement of the dispute while avoiding costly litigation.
A. THE ITALIAN CULTURAL PROPERTY REGIME

1. The National Retention Scheme

Italy, as a major source nation with a wealth of antiquities, utilizes a strict cultural property regime based on a 1939 law vesting ownership in the state for all objects of “artistic, historical, archaeological, or ethnological interest” found in the ground during excavations or by chance in the state, and rendering it illegal to export such items without an export license.\(^7\) The presumption is that the object belongs to the state unless a possessor is able to prove private ownership prior to 1902.\(^71\) These laws enable Italy to legally retain most of its cultural property by declaring stolen any property illegally excavated and exported out of the country and prevent the export of anything more than fifty years old.\(^72\) This system allows Italy to make reasonable cases for restitution in the event its cultural patrimony is stolen and furthermore, pursuant to its signing of the UNESCO Convention,\(^73\) to take measures to prevent their illegal export.

2. The Carabinieri and Tombaroli

To enforce the stringent legal protection of its cultural property, Italy employs one of the best police units in the world. The *Arma dei Carabinieri* ("Carabinieri"), or Italian paramilitary police, via a specialized unit to protect the Italian cultural heritage known as the *Tutela Patrimonio Culturale* ("TPC"), have been world leaders in catching art and antiquities thieves.\(^74\) The TPC's extraordinary ability to recover stolen art and antiquities has garnered international acclaim leading many world leaders to call upon their services to assist in cultural property cases around the globe.\(^75\) It is significant that Italy has invested in the creation of an efficient and effective squad to protect cultural property because it is a statutory prerequisite under the CPIA before the US may

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\(^71\) *An Antique Platter of Gold*, 184 F3d at 134.

\(^72\) See Park, 23 U Pa J Intl Econ L at 940 (cited in note 9).


\(^75\) The TPC has been called upon, for example, to stop the plundering of Iraq, see Saving Antiquities for Everyone, *Say Yes to Italy: Renew Bilateral Agreement that Restricts U.S. Import of Antiquities*, available online at <http://www.savingantiquities.org/i-safe-mouitalyinfo.php#what> (visited Jan 15, 2007), and also has teamed up with China to protect its rich cultural history, see Lucian Harris, *China and Italy Team Up to Fight Illicit Trade*, Art Newspaper (Mar 2006).
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employ import controls. It is paradoxical why nations should undertake to protect the cultural patrimony of foreign nations when those nations do not themselves undertake protective measures.

Another explanation for why Italy invests so much in the proficiency of its Carabinieri is the extent of its looting problem. Italy houses half of the UN-designated world heritage sites and is a native repository for antiquities of the Romans, Etruscans in central Italy, Greeks in Sicily, and Phoenicians in Lazio. Given Italy’s extensive collection of antiquities, the demand for them and their profit-generating capabilities, it is no wonder that some take advantage of this by literally searching for buried treasure. The tombbaroli are Italian grave robbers who break into burial chambers to take the antiquities and sell them to middlemen and dealers. Under the cover of night and outside the reach of the Carabinieri, tombbaroli take the best antiquities and smash the rest—those not destroyed are disintegrated from exposure to the air. To illustrate the extent of the tombbaroli problem, between the end of World War II and 1962, four hundred out of five hundred fifty tombs were looted at just one Etruscan cemetery in Cerveteri, the same city where the Krater was found. Between 1970 and 1996, the Carabinieri recovered more than three-hundred thousand “unofficially” excavated antiquities, while a single raid on a Sicilian villa in 1998 yielded more than thirty thousand Phoenician, Greek, and Roman antiquities. With every antiquity looted by the tombbaroli, and thus not scientifically excavated, mankind’s potential for understanding past cultures is increasingly limited.

3. The US–Italy Memorandum of Understanding

In light of the severe looting of its cultural patrimony, and pursuant to the UNESCO Convention, Italy petitioned the US under the CPIA to institute

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77 See Rory Carroll, Weekend: Loot: Italy is Home to Countless Hidden Tombs and Burial Chambers Bearing Antiquities Dating Back Thousands of Years. For Academics and Archaeologists They Are Historical Treasure Troves, but for an Illicit Band of Criminals They Are a Passport into a Billion-pound International Smuggling Operation. Rory Carroll on the Racket and the Racketeers, London Guardian 44 (May 4, 2002). See also US Department of State, Italy: U.S. Protection of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods, Background, available online at <http://exchanges.state.gov/culprop/itfact.html> (visited Jan 15, 2007).
78 Brodie, Dole, and Watson, Stealing History at 23–25 (cited in note 24).
79 It is estimated that 98 percent of the profit from looted antiquities goes to the middlemen. Id at 13.
80 Carroll, The Ransack of Italy’s History (cited in note 77).
82 Brodie, Dole, and Watson, Stealing History at 19 (cited in note 24).
import restrictions to help stem the demand for Italian antiquities. This resulted in the 2001 Italy Memorandum of Understanding (“Italy MOU”) and the subsequent 2006 renewal of the Italy MOU to protect pre-Classical, Classical, and Imperial Roman archeological material, on which import restrictions are placed. Because import restrictions under other MOUs have garnered some criticism for being overly restrictive and in violation of US policy of not enforcing foreign export controls, it is significant that the Italy MOU vigorously promotes international exchange and cooperation. The agreement calls for long-term loans of archaeological or artistic items of interest, joint excavation projects between Italy and US museums and universities, and academic exchanges. Finally, the agreement also provides for a strengthening of protection within Italy by requiring increased training of the Carabinieri and intensification of their investigations, and the establishment of more severe penalties for looters.

4. Italian Foreign Cultural Policy

The final piece of the Italian cultural property regime, and a crucial element of the Model, is the aggressive pursuit to restore Italy’s cultural heritage led by Italy’s Ministry of Foreign Affairs (“Ministry”). While Italy has made claims for

83 US Department of State, Italy: US Protection (cited in note 77).
84 Id. For a list of the specific objects in the federal register, see Bureau of Customs and Border Protection, Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 19 CFR § 12 (2006).
85 The Italy MOU prohibits the importation into the US of “archaeological material ranging in date from approximately the 9th century B.C. to approximately the 4th century A.D., including categories of stone, metal, ceramic and glass artifacts, and wall paintings . . . unless the Government of the Republic of Italy issues a license or other documentation which certifies that such importation was not in violation of its laws.” Agreement between the Government of the US and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy (“Italy MOU”), art 1, 40 ILM 1031 (2001).
87 Italy MOU, art 2 (cited in note 85). For more information on these cooperative endeavors, see US Department of State, Integrated Project Italy-USA: Cultural Exchanges and Exhibitions in Archaeology, available online at <http://exchanges.state.gov/culprop/itexhib.html> (visited Jan 15, 2007) (showing examples of joint excavations and academic exchanges); US Department of State, Guidelines: Loans of Archaeological Material Under the 2001 U.S.-Italy Memorandum of Understanding, available online at <http://exchanges.state.gov/culprop/itloangl.html> (visited Jan 15, 2007) (showing long-term loan guidelines).
88 Italy MOU, arts 1–2 (cited in note 85).
89 The Directorate General for Cultural Promotion and Cooperation within the Ministry of Foreign Affairs, among other things, is responsible for recovering works of art exported illegally. See
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restitution of its antiquities for decades, museums were not always quick to comply. Italy would make demands, and museums such as the Met would respond by demanding incontrovertible proof of provenance or, in the case of the Getty, by taking measures to get around their acquisition policies.

However, since the late 1990s, Italy has intensified its pursuit by going after museums in foreign courts, criminally prosecuting dealers and curators in Italian courts, and negotiating bilateral agreements while strengthening the investigative capabilities of the Carabinieri. In 1999, Italy successfully reacquired the antique platter of gold from the Met after petitioning the US government to bring suit against the museum. In 2001, Italy negotiated the Italy MOU to enforce its export controls. In April 2004, Italy persuaded the US government to file a forfeiture action against the Getty to return the Asteas Krater it illicitly acquired in 1981. Significantly, the Asteas Krater was not returned until November 2005 when Italy indicted former Getty antiquities curator Marion True in an Italian criminal prosecution, signaling the restitution was an effort by the Getty to maintain good relations with Italy.

The True case was part of a larger strategy to go after the major players in the art world by subjecting them to criminal liability in Italian court. In 2004, Italian prosecutors convicted famed antiquities dealer Giacomo Medici, imposing a ten-year prison term. Evidence acquired from investigations of Medici enabled Italy to try True and prominent antiquities dealer Robert Hecht...
in Spring 2005 for conspiring to traffic in antiquities.\textsuperscript{98} The True prosecution is unprecedented because True is the first American curator to be criminally prosecuted in a foreign court for trafficking in antiquities.\textsuperscript{99} More importantly, True is the former antiquities curator at the Getty Museum, one of the richest and most renowned museums in the world and a prominent collector of antiquities.\textsuperscript{100} This signals the Ministry’s willingness and ability to go after even the most important players in the global antiquities trade, potentially rendering no one above prosecution.\textsuperscript{101} After successfully negotiating for the renewal of the Italy MOU in January 2006, this aggressive strategy culminated in the February 2006 accord with the Met to reacquire the Krater, an unprecedented privately negotiated, voluntary restitution by a museum. The Accord, and its lack of precedent, form the basis of the Model and is the subject of the next section.

B. THE EUPHRONIOS KRATER

Since the unprecedented $1.2 million acquisition in 1972 by the Met of the 2,500 year old Krater,\textsuperscript{102} there has been much debate as to its origin. The refusal of then-Met director Thomas Hoving and Dietrich von Bothmer, Met curator of the Greek and Roman collection, to reveal the identities of the vase’s previous owner and the dealer who sold it to the museum sparked investigations by the Carabinieri, the New York Police Department, and the FBI.\textsuperscript{103} From these investigations Italian officials concluded that the Krater was illegally smuggled from Italy in 1971.\textsuperscript{104} Robert Hecht\textsuperscript{105} was discovered to be the dealer but the investigations yielded conflicting views of the object’s provenance, and Italy backed off from the Met.\textsuperscript{106} These efforts were renewed when a 1995 raid on

\textsuperscript{98} Id. The True-Hecht trial is still in progress as of the time of this Comment.

\textsuperscript{99} Slayman, \textit{The Trial in Rome} at 1 (cited in note 29).

\textsuperscript{100} See Riding, \textit{Why ‘Antiquities Trials’ at 2} (cited in note 31) (suggesting that the Getty’s financial ability to make significant acquisitions is unique).

\textsuperscript{101} It is possible that museum directors, trustees, and prominent collectors could be next. See Jason Horowitz, \textit{How Hot Vase Irt}, NY Observer 1 (Feb 20, 2006) (discussing the connection between collector Shelby White and the Met and the possibility of Italy going after her private collection).

\textsuperscript{102} See Povoledo, \textit{Italy and U.S. Sign} (cited in note 1).

\textsuperscript{103} Saving Antiquities for Everyone, \textit{Italy and the Met: Three Decades of Controversy Finally Resolved?}, available online at \textless http://www.savingantiquities.org/h-featureItaly.htm\textgreater (visited Jan 15, 2007).

\textsuperscript{104} Id.

\textsuperscript{105} Robert Hecht is a famous American art dealer who is on trial with Marion True for trafficking in looted objects to the Getty after a 2001 raid on his Paris apartment unearthed evidence of an international antiquities trafficking operation and connections with Medici. See Kennedy and Eakin, \textit{The Met, Ending at A1} (cited in note 91).

\textsuperscript{106} Armando Cenere, a member of the \textit{tombaroli}, claimed to have been involved in the looting of the Krater from a tomb near Cerveteri while in contrast, a witness claimed she had seen the Krater
Swiss warehouses belonging to Italian antiquities dealer Giacomo Medici yielded documents and photographs revealing a massive antiquities trafficking operation that linked Medici to Hecht and the Krater, ultimately resulting in Medici's 2004 criminal conviction in Rome. However, it was not until 2001 that former Met Director Hoving solved the riddle of the conflicting provenances by discovering that there were actually two vases, and the one claimed to be seen by a witness was not the Krater acquired by the Met but rather a fraud put on by Hecht. Discussions between the Met and Italy resumed in 2005 culminating in February 2006 with the Accord. During these events, the Met refused to abandon its long-held position that the Krater was not illicitly traded until talks resumed in November of 2005—the same time that Hecht and True went on trial in Italy—ostensibly the result of the hardball strategy pursued by the Italian government.

C. THE ACCORD

The Accord represents a novel approach to restitution claims with its absolution of liability, vesting of ownership in Italy, and call for cooperation between Italy and the Met. First, the Accord calls for a transfer of title to all the items covered in the agreement. This is significant because the cultural property debate revolves around the central question of who owns the past, and in this regard the Met conceded that true ownership, if illegally exported, lies with the source nation. Specifically, the Krater will be allowed to remain at the

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108 Saving Antiquities for Everyone, Italy and the Met (cited in note 103).
109 Id.
110 Id. (cited in note 91) (discussing the Met “abandon[ing] its longstanding position that Italy's grievances were without merit”).
111 Id.
113 Id at art 2. Note that in addition to the Krater, the agreement calls for a return of a Laconian kylix, Apulian Dinos, psykter, Attic amphora, and the Hellenistic Silver. Id at arts 3, 5. For a discussion on the discovery of the true provenance of the Hellenistic Silver, see Maura Singleton, Plunder: The Theft of the Morgantina Silver, U Va Mag 38 (Spring 2006).
114 See David Bonetti, Curators, Countries Debate Who Owns the Past, St. Louis Post-Dispatch B1 (Feb 26, 2006).
museum until January 2008 with the label, "Lent by the Republic of Italy." Second, in exchange for the transfer of title once the Krater is returned, Italy will make four-year loans to the museum on a rotating basis of a selection of archaeological objects or objects of "equivalent beauty and artistic/historical significance, mutually agreed upon." This is a recognition of both the importance of museums in displaying cultural patrimony to the public and the necessity for cultural exchange between nations. In March 2006, Italy announced the specific artifacts that will be used for the loans. In the same spirit of cooperation, the agreement also calls for excavations in Italy conducted by the Met and the subsequent displaying of discovered artifacts through long-term loans at the Met, while recognizing Italian ownership. Finally, the Accord waives the possibility of litigation by Italy against the Met, whether civil or criminal, for any of the requested items. This provision is important because it is doubtful the Met would have signed the Accord without it, and it indicates Italy's willingness to pursue restitution claims outside the judicial context and achieve an amicable end to cultural property disputes.

D. THE MODEL

The premise underlying the Model is that Italy's demonstration of the seriousness of its commitment to restore its cultural property by any means necessary pushes museums to negotiate, and once in negotiations, Italy can force a desirable outcome. Prior to the Model, museums were usually unwilling to seriously negotiate since they knew that if they simply denied any wrongdoing, most of the time the claim would not be pursued further. In the rare instance the case was brought in a US court, there was the buffer of a high burden of proof on the source nation to show the museum had knowledge of the piece's illicit history. However, the combination of criminal prosecutions in Rome against high-profile museum curators and major international art dealers and the announcement of investigations concerning the antiquities collections at several prominent American museums has put pressure on museum directors and curators to examine their antiquities collections and agree to negotiate or face trial in Rome. Once in negotiations, Italy achieves considerable bargaining power.
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by making clear it will refuse to lend art and antiquities to uncooperative museums for temporary exhibitions. Amidst this dual pressure, Italy then offers museums a way out by waiving all liability and responsibility for the illicit dealings, which is good for museum public relations and assuring a source of materials for future exhibitions, in exchange for what Italy desired: restitution and ownership transfer of the cultural property.

IV. ANALYZING THE MODEL

The Model ushers in the possibility of a new approach to cultural property disputes. It could force museums to enact more stringent provenance standards for acquisitions and loans and also foster a new spirit of cooperation between museums and source nations in stopping the illicit antiquities trade. More importantly, it bypasses the American judicial system by selectively employing criminal litigation in the source nation to force future extrajudicial, private settlements. Nevertheless, before heralding the Model as an unqualified success, one must consider whether it is replicable. Can it serve as a universal template by which other nations can effectively achieve restitution from museums or was the Krater’s restitution simply a product of the factual circumstances surrounding the dispute? This section will analyze the Model’s impact on the art world and conclude that although the Model is unlikely to be perfectly replicated, its success is not contingent on exact replication because it will positively impact the art world in other ways.

A. IS THE MODEL REPLICABLE?

1. The Antiquity

Several factors render the Model’s ability to be replicated problematic. The antiquity at stake was not an inconspicuous, unknown piece of comparatively little monetary value. Rather, it was a centerpiece of the Met’s Greek and Roman Galleries. The Krater’s acquisition for over one million dollars made front-page headlines and was more than seven times the purchase price ever paid for an ancient vase. The 2,500 year old Krater is just one of a handful of vases


121 See Hugh Eakin, Italy Goes on the Offensive with Antiquilies: Seeks Deal with Museums over Disputed Objects, NY Times E1 (Dec 26, 2005).


123 Saving Antiquities for Everyone, Italy and the Met (cited in note 103).
signed by Greek master sculptor Euphronios and what Thomas Hoving described as "one of the ten greatest creations of Western civilization."\textsuperscript{124}

If the object at issue was of lesser importance or value, it is not clear that Italy would have spent over thirty years investigating its provenance and negotiating for its recovery. This is not to say that Italy would not have made a restitution claim, but it certainly affected the priority the Ministry and Carabinieri gave to achieving its repatriation. This in turn would affect the quantum of evidence of illegal export and ultimately weaken Italy’s bargaining position vis-à-vis the Met. The more evidence Italy amassed on the Met’s knowledge of the illegal export, the greater the likelihood of winning in US courts under the CPIA and NSPA, and thus the more disastrous the consequences for the Met not settling. The Model’s effectiveness may therefore be limited by the stature of the work.

2. The Museum

Because the museum in question was the Met, it renders the ability to replicate problematic. The Accord was reached at a time when the Met was planning the opening of The Leon Levy and Shelby White Court for Roman and Etruscan Art.\textsuperscript{125} This is significant for two reasons. First, at a time when the museum was investing nine hundred million dollars in renovations and additions for this court and other projects,\textsuperscript{126} it could ill afford to become embroiled in a lengthy court battle, which would promise to be publicly embarrassing.\textsuperscript{127} This was especially true given the stature of the museum and the Krater being excavated from an Etruscan tomb. The fact that the museum was in large part publicly funded,\textsuperscript{128} and a major tourist attraction in New York City,\textsuperscript{129} only heightened the probability of an extremely public trial.

\textsuperscript{124} Russell Berman, \textit{Met Chief to Discuss ‘Hot Pot’ in Rome}, NY Sun 1 (Nov 11, 2005).
\textsuperscript{126} Id.
\textsuperscript{127} See Hugh Eakin and Elisabetta Povoledo, \textit{Met’s Fears on Looted Antiquities Are Not New}, NY Times E1 (Feb 20, 2006) (discussing the Italian prosecutors use of the American press to influence public opinion concerning the criminal trial of Marion True).
\textsuperscript{128} The City of New York provides the museum with not only land (the museum is on public property), but pays its heat, light, and power expenses, half the cost of maintenance and security of the collections, and is responsible for 15 percent of the museum’s revenue. The Metropolitan Museum of Art, \textit{An Overview of the Museum}, available online at <http://www.metmuseum.org/press_room/full_release.asp?prid=9FF384DF-9FEA-4220-8634-1684C00E35D> (visited Jan 15, 2007).
\textsuperscript{129} 5.2 million people visited the Met in 1998. Id.
Second, in light of the opening of new galleries, it was also important for the museum to have an assured source of objects to exhibit. Although the Met had extensive permanent collections, it was important that the Met maintain good relations with Italy in order to call upon it in the future for loans of major works. As part of Italy’s strategy, Italian Culture Minister Rocco Buttiglioni announced it would be aggressive with using loans of art to get museums to return antiquities, and according to Giuseppe Proietti, an Italian official responsible for archaeology, Italy would deny loans to museums that buy illicit works. Italy, for example, denied the Getty’s request for a loan from the Naples Archaeological Museum of bronzes for the opening of the museum’s Getty Villa (a new building to house the antiquities collection) at the same time that Getty antiquities curator Marion True was indicted for trafficking in stolen antiquities. So, the quid pro quo of antiquities for loans was a centerpiece of the Accord and a crucial factor in bringing the Met to the table. The assured source of loan material may not be as important for other museums, especially those relying more on permanent collections or private collectors, those not as focused on exhibiting Greek and Roman antiquities as the Met, or those not opening a new wing for Mediterranean antiquities.

3. The Source Nation

Italy is unique from other source nations in key respects that could limit the applicability of the Model to Italian restitution claims. Many other nations are not as rich in antiquities and art as Italy. The negotiating position of the source country is contingent on its ability to threaten to bar access to its art as a source of loans. Italy was able to achieve the Accord in large part because the Met relied upon Italy’s significant collection of works by Italian Renaissance and Baroque masters and upon Italy’s plethora of ancient Greek and Roman art to assemble exhibitions. The Model could thus be limited to source nations that have substantial art and antiquity resources or that enjoy high demand for their cultural patrimony.

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131 Id.
132 Id.
133 Accord art 4.1 (cited in note 112).
134 See Randy Kennedy and Hugh Eakin, *Met Chief, Unbowed, Defends Museum’s Role*, NY Times E1 (Feb 28, 2006) (telling that Met director Montebello initiated the idea of “exchange for loans” and that good relations with Italy are important for borrowing works for major exhibitions).
135 There is a counter-argument to be made that source nations can link returns of antiquities to things other than future art loans. The problem with this though, is that it is not clear what source nations could offer (besides art loans) that would be of any value to museums.
Other nations may not take necessary measures to protect their cultural patrimony as diligently as Italy. The argument for restitution is stronger when a source nation has the ability to protect its cultural heritage domestically because preservation of the object is of the utmost importance for both museums and source nations. If the object is unlikely to be preserved in the source nation because that country is unwilling or unable to undertake protections, either due to lack of the rule of law, or lack of the economic resources necessary to protect the objects from theft and adverse environmental conditions, then the source nation will have a weaker claim to restitution.

This is one of the factors bolstering the British Museum's refusal to repatriate to Greece the Elgin Marbles that were taken from the Parthenon. Allowing the objects to remain in Greece would have exposed them to years of destructive natural forces. The first frieze of the Parthenon was returned by a museum to Greece only after it announced plans to build the New Acropolis Museum capable of preserving and displaying the Elgin Marbles. The return by the Heidelberg Museum of Antiquities in Germany indicates that museums do consider object preservation when deciding to return antiquities. Thus, it is not insignificant that the likely resting place of the Krater upon its return to Italy will be in the Villa Giulia National Etruscan Museum where it will be preserved safely from environmental forces and, with the help of the Carabinieri, protected from theft. Had there not been a secure site, it is unlikely the Met would have relinquished the Krater only to see it stolen or destroyed.

4. The Bilateral Agreement

The existence of the Italy MOU was integral to reaching an agreement. Although Italy could not have petitioned the US directly under the agreement for the return of the Krater, it nevertheless facilitated the Krater's return in

136 For example, Italy created a special unit, the TPC, within the Carabinieri trained exclusively in the protection of Italy's cultural property.

137 See John Henry Merryman, Thinking About the Elgin Marbles, 83 Mich L Rev 1881, 1917 (1985) (showing that the Elgin Marbles were better preserved in the British Museum than out in the open air in Greece).

138 See Martin Bailey, Parthenon Fragment Returned to Greece, Art Newspaper 9 (Feb 2006).

139 Povoledo, Italy and U.S. Sign Antiquities Accord at 2 (cited in note 1).

140 Though it is unclear whether judges would consider ability to protect the object as a factor in deciding restitution claims, much of the action occurs outside the judicial arena—the model is itself concerned with private settlements of these claims. Outside the judicial context, public pressure can play a significant role in influencing the actions of museum and government officials and it would be easy for a museum to stave off public pressure by pointing out the deficiencies in the source nation's ability to protect the object.

141 The Krater was imported by the Met in 1972, while the Italy MOU did not go into effect until 2001 and is not retroactive.
two key respects. For one thing, it augmented Italy’s negotiating position by raising public awareness of the looting problem both in Italy and in the US. The renewal of the agreement in January 2006, during the middle of the Italy–Met negotiations and just one month before the Accord, meant that the museum could not easily have dismissed Italy’s claims while hoping they would go unnoticed by the public and authorities.

More importantly, the Italy MOU pressured Italy to change its loan policy, which inadvertently made possible key provisions of the Accord. Loans of objects for display purposes were limited to one year, and longer terms were permitted on a case-by-case basis only with the inclusion of significant research or education components. In May 2004, however, an Italian law extended the loan limit to four years, thus allowing Italy to implement its loans-for-antiquities program effectively. Without the extension, long-term loans would have to be approved on a case-by-case basis. In the past, the bureaucracy of applying for and receiving the necessary export certificates would often render obtaining a loan impossible. The long-term loans for display were crucial in getting the Met to transfer ownership. If source nations make the granting of temporary loans difficult, either as an administrative or as a legal matter, their ability to negotiate for restitution is grossly undercut because the assured future source of loans would be, as a practical matter, meaningless. The Model may then be limited by the loan policies of source nations.

5. The Evidentiary Circumstances

The evidence acquired against the Met allowed Italy to reach an agreement that would otherwise not have been made. While it is true that negotiations are

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143 Eakin, *Italy Using Art* at 3 (cited in note 130).

144 The loans-for-antiquities program refers to the policy of Italy offering loans of works of equivalent significance in exchange for the return and transfer of ownership of the antiquity. See Italy MOU at art 2 (cited in note 85).


146 For example, the laws could limit the loan duration, the types of objects eligible, or the purpose for the loan such as requiring a research component. Any qualification of the loan lessens its potential value to the museum, even the last example because often a museum may wish to borrow a piece for exhibition, and thus display purposes only, and may not wish to undertake special research or educational components (whatever may be required by the law) or may not have the resources to undertake such projects.

147 It is possible that source nations’ loan policies are influenced by MOUs such that the presence of a bilateral agreement correlates with more liberal loan policies. If this is true, as it was for Italy, then the model is more easily replicated by source nations that have MOUs with the US, and thus favors source nations with more favorable foreign relations with the US.
heavily influenced by the evidence amassed on both sides such that source nations will have evidence to negotiate, Italy’s situation was unique because of the Medici investigations. While investigating into the Krater’s provenance, Italy launched investigations against antiquities dealer Giacomo Medici concerning a separate matter that resulted in a 1995 raid on a Swiss warehouse yielding photographs and documentation linking Medici to dealer Robert Hecht and the Met. This ultimately led to a 2001 raid on Hecht’s apartment in Paris that uncovered a journal with passages describing the illegal excavation and export of the Krater as well as dealings with the Met.

This fortunate turn of events facilitated the Accord in two ways. Directly, the evidence (acquired from a separate investigation) connected the Met to the dealers in a manner revealing knowledge by Met officials of the Krater’s illicit past and making it more likely Italy would be able to meet its burden of proof in a US court. Thus, Italy had a greater chance of winning in court and more leverage in negotiations since the Met was even more anxious to avoid litigation. Indirectly, the Medici investigation allowed Italy to criminally prosecute Hecht and True in the years just prior to the Accord. These criminal prosecutions put enormous pressure on other museum officials because before True no American curator stood trial on criminal charges for looting in another country. Not only was there pressure to avoid litigation in American courts, but Met directors Montebello and Hoving and their curators faced criminal prosecution in Italy, which amplified the desirability of a quick and easy resolution to the dispute. In this spirit, a major tenet of the Accord absolved the Met of all civil and criminal liability. Not all source countries will be so fortunate as to stumble upon documentation and photographs from a separate investigation proving knowledge of illegal excavation and implicating the crème de la crème of the international art market in criminal conspiracies.

B. IS THE MODEL SIGNIFICANT?

The particularity of the Italy–Met situation is evidenced by the discussion of the preceding five factors, all of which were arguably necessary for the Model

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151 Accord, art 8.3 (cited in note 112).
to be successful. At the same time, these factors show the unlikelihood of the Model being exactly replicated to produce a similar accord. Yet, this does not render the Model meaningless as it is capable of effectuating change on several levels.

1. Public Perception

The Model is likely to raise public awareness of the illegal trade in cultural property. Awareness of cultural property issues among the general public and even among the percentage of the population that visit museums is low. Until Italy began to implement its aggressive campaign to recover cultural property, there was not much public debate outside academic circles. However, since Italy and the Met began negotiations over the high-profile Krater, the number of New York Times articles concerning looted antiquities has increased dramatically. In addition, the group Saving Antiquities for Everyone has been arranging private tours of the Met to see the Krater and also of the Boston Museum of Fine Arts in order to increase public awareness of illicit provenances.

Between the Italian criminal trials of high-profile members of the art world, the alleged scandals at the Getty and the Met (two of America’s most famous art museums), and the unprecedented return of the Krater, the public has been inundated with newspaper articles focused on the cultural property debate. The increased attention given by the press can only serve to aid the plight of source nations by helping hold museums accountable. As the public begins to question how the artifacts on display came to be in the museum, museum officials will be forced to answer tough questions on provenance and acquisition policies, thus making the acquisition process more transparent, and pressuring museums to tighten their policies.

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154 A search of the New York Times archives online shows that the number of stories having to do with “looted antiquities” in 2000 was 7; 2001 was 3, 2002 was 6; 2003 was 42; and 2004 was 10. Note that for 2003, 37 of the 42 articles dealt with the extraordinary circumstances of the looting of the museums in Iraq, so after accounting for this, the number was 5, similar to the preceding years. For 2005 (when talks began between Italy and the Met), the numbers jump to 37 and for the first three and a half months of 2006 (through April 16, 2006), they are 27. See <http://www.nytimes.com> (visited Jan 15, 2007).
156 See Puente, *Stolen Art Met* (cited in note 153) (discussing how people are beginning to question at the Met).
2. Museum Policies

Museums will also feel pressure from the Accord to change their acquisition and loan policies. The AAMD, of which the Met is a member, published guidelines in 2004 for acquiring works of ancient art and archaeological materials. They stipulate that museums may not acquire an object before thoroughly researching its provenance, or any works known to have been stolen from a public institution or an official archaeological excavation, and should not acquire works removed after November 1970 (in compliance with the UNESCO Convention). The AAMD guidelines include an exception for works of incomplete provenance so long as the public is best served by the acquisition, it would secure its “conservation, exhibition, study, and interpretation,” and the work has been outside the probable country of origin long enough not to provide a “material incentive” to looting. This exception allowing museum officials to use “professional judgment” for difficult cases makes it easy for museums to acquire what they wish and justify it as “providing a singular and material contribution to knowledge.”

The Accord’s potential to effectuate change is in narrowing this exception by raising the requisite level of public value necessary to display unprovenanced objects. Even if other nations may not be able to perfectly replicate the model, there will likely be an increase in the frequency and intensity of calls for restitution, and museum officials will then be forced to answer questions concerning the provenance of their collections. Curators and directors faced with acquisition decisions will likely be more thorough in their provenance research and take seriously the parameters of acquiring unprovenanced pieces such that only with strong public interest justifications will they proceed with the acquisition. The potential future costs of acquiring the piece are increased as the likelihood of provenance questions, restitution claims, and public awareness is greater, so more precautions will be taken prior to acquisition. These changes

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158 The Association of Art Museum Dealers is an association of 172 members comprised of directors of American and Canadian art museums that seeks to establish standards for the professional practices of museums and directors. See Association of Art Museum Directors, About AAMD, available online at <http://aamd.org/about/> (visited Jan 15, 2007).


160 Id § II(A)(I). Provenance research may include ownership history, claims of ownership, appearance in databases of stolen works, and circumstances of its offer to the museum. Id.

161 Id § II(C)-(D).

162 Id § II(E).

163 Id.
will result in museums adopting policies more identical to those promulgated by ICOM and recommended by source nations and archaeologists.

Changes in museum policies and perceptions are already apparent. Since the Accord, the AAMD has shown an increased concern for acquiring works without provenance. A study done by the AAMD demonstrated that only 53 of the association’s 169 members actively collect antiquities, and out of the antiquities purchases for the 5 years preceding the study, 98 percent have complete post-1970 provenance. While some view this as merely an effort to shift the blame away from American museums, it could signal the beginning of a trend of researched looks into museum acquisitions. As one example, after the Accord, the Art Institute of Chicago reviewed its collection to ensure the integrity of its pieces.

Furthermore, the Accord has already spawned changes in museum policies regarding loans. Most museums do not acquire pieces outright but rather simply display objects on loan from private collectors and other museums. After the Accord was signed, in February 2006 the AAMD implemented new guidelines for displaying loaned objects that parallel the 2004 museum acquisition guidelines. Although criticized by the archaeology community for not requiring temporary displays to comply with the laws of the country of origin and allowing displays of antiquities without complete provenance in certain

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164 For the standards promulgated by ICOM, see ICOM Code of Ethics for Museums: 2004 Edition, (cited in note 12). The ICOM acquisition policy allows for only a very limited exception for unprovenanced pieces and gives more guidance to their acquisition as opposed to just saying museum officials should use their “professional judgment.” Id at arts 2.9, 3.4.


167 See Stevenson Swanson, Clashes Between Museums, Nations More Frequent, Chi Trib C3 (Mar 5, 2006).

168 Swanson, U.S. Museum Curators at 2 (cited in note 150).

169 The AAMD confirmed this in its study, which showed that members of the AAMD spent just seven million dollars annually on acquiring antiquities in the five years prior to the study, which is less than 10 percent of the global trade estimated at one hundred million dollars. Association of Art Museum Directors, Survey Shows Museum (cited in note 166).


171 The 2006 loan guidelines emphasize compliance with US law, id § II(A), and the UNESCO Convention, id § II(B), research into the object’s provenance, id § II(C), and contain an exception for showing unprovenanced works if “public exhibition makes possible important advances in scholarship and/or facilitates the emergence of new information,” id § II(D).
situations, the guidelines represent a substantial step forward in museum policies. The promulgation of equivalent standards for acquisition and loans shows that museums are taking responsibility for all objects within their walls and recognizing that the display of both loaned and acquired objects of unknown provenance, fuels the demand for looted antiquities.

3. Source Nations

While the Model may not be perfectly replicable, it is likely to inspire source nations to more aggressively pursue their cultural property claims in several respects. First, in order to be in position to make demands to museums like Italy, other nations could be inspired to increase domestic protections of their own cultural property, pursue negotiations with the US to achieve bilateral agreements, and bolster the investigative capabilities of the police or establish relationships with Interpol and the Carabinieri. Second, they could adopt policies similar to Italy of refusing to loan art and antiquities to museums that continue to acquire works without provenance, or that have pieces known to be illegally exported. Third, source nations could begin to pressure museums by publicizing their looting problems and by initiating the demand process with every museum suspected of harboring a work illegally exported from their country. All of these steps could help source nations reach their own particularized settlements with museums. The Model could thus act as a catalyst by showing other nations that it is possible to achieve successful resolution of cultural property disputes outside of litigation through cooperation with museums.

V. Conclusion

The Accord is a model of international collaboration that will be instrumental in shaping the future of the cultural property debate. Although not perfectly replicable, it is unprecedented and reveals the possibility of an


173 This could include both increasing the resources and training of the police to more effectively enforce cultural property laws as well as making structural improvements, such as building museums capable of preserving and exhibiting the antiquities, and securing existing museums to prevent theft.

174 A bilateral agreement would facilitate the return of yet-to-be-looted objects and raise public awareness.

175 This last possibility is especially important for source nations considering how crucial evidence of illegal excavation and export is to achieving superior bargaining positions vis-à-vis museums and thus restitution.
alternative to litigation in US courts. A dialogue between source nations and museums has been started which could usher in a new way of thinking. Instead of focusing on possession and who owns the art, museums could be regarded as stewards of cultural property which protect and preserve it unless circumstances call for its restitution. Whether this transformation is successful depends upon the ability of source nations to successfully negotiate amicable resolutions with museums. Given the likely rush of museums to cooperate with source nations lest they be cut off from future loans in the wake of the Accord, it is possible that there still may be universal museums, but as stewards of world heritage, not its owners.


177 See Deborah K. Dietsch, Big Fight about Illicit Art; Met, Italy Pact Returns Works, Wash Times B01 (Mar 4, 2006).
