THE CULTURAL PROPERTY REGIME IN ITALY: AN INDUSTRIALIZED SOURCE NATION’S DIFFICULTIES IN RETAINING AND RECOVERING ITS ANTIQUITIES

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1. INTRODUCTION

Under the cover of night, tombaroli search the Italian countryside for ancient tombs and burial chambers.1 The precious Greek and Etruscan artifacts they find in these sites fetch high prices on the illicit antiquities market.2 Motivated by the steady income from sales of antiquities to middlemen and local Italian buyers, the tombaroli continue looting despite its illegality.3 The middlemen, in contrast, enjoy big profits that make the risk of illegal trade

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1 Tombaroli are tomb raiders, who loot both tombs that they discover and official archaeological sites. See Giovanni Lattanzi, Tales of a Tombarolo, ARCHAEOLOGY, May-June 1998, at 48, 49 ("A: How do you search for tombs? T: I know the land, know how to recognize the kind of grass that grows on the ground [above tombs], know almost what the ancient Etruscans were thinking when they were looking for places to bury their dead."; Andrew L. Slayman, Italy Fights Back, ARCHAEOLOGY, May-June 1998, at 43 ("The tombaroli’s job is made easier by the large number of unidentified and unguarded sites, but looters are equally at home raiding protected areas . . . . [C]landestine digging at Morgantina [in Sicily] was almost uncontrolled; [archaeologists] were having to guard [their] own trenches at night and actually suffered some losses.").

2 See Slayman, supra note 1 (noting that artifacts found in tombs and burial sites can be sold illegally for large profits).


It makes me sad that our heritage, our Italian history is disappearing like this. I’d like to have an honest job, to spend my nights in bed with my wife,’ says Mr. Induno [the tombarolo interviewed in the article], ‘but there’s no alternative for me or for my men. We work to put food on the table for our families. I know I’m stealing from the State, but I don’t know anyone who does this job who is rich. We are all unemployed, we do what we have to do.
worthwhile. The demand for antiquities and monetary incentives allow the trade to flourish, making Italy a major supplier of ancient artifacts.

Sadly, in result, Italy has suffered numerous losses of its cultural heritage and destruction of its ancient past. Tombaroli work hastily and crudely, and, in the process, cause devastating harm to the sites. To make matters worse, tombaroli often destroy unprofitable artifacts and archaeological data such as human bones. The hasty, crude removal damages the sites and leaves the artifacts in poor condition. "Each time an antiquity is discovered and removed from a site without first being studied by anthropologists, the historical record that can be constructed through scientific evaluation of the piece in situ is destroyed." The antiquity, removed from its site without proper evaluation, becomes nothing

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4 See id.

(The guy I work with the most is a professional [states Mr. Induno] . . . . He makes a very good living from selling the material he buys from me and from other tombaroli. I estimate that this guy sells the stuff for 10 times what he paid me. Let me put it this way: he drives a Mercedes, I drive a Fiat Panda.);

see also Neil Brodie, Pity the Poor Middlemen, CULTURE WITHOUT CONTEXT (Illicit Antiquities Research Center, Cambridge, U.K.), Aug. 1998 (providing a table which shows that more than 98% of the final market price goes to the middlemen), available at http://www.mcdonald.cam.ac.uk/IARC/cwoc/issue3/Midman.htm.


6 See id.; see also Patty Gerstenblith, The Public Interest in the Restitution of Cultural Objects, 16 CONN. J. INT'L L. 197, 206 (2001) (stating that tomb robbers and site looters often destroy objects "either in order to make them transportable or simply out of ignorance").


8 Moore, supra note 5, at 466; see BATOR, supra note 5, at 25 ("The preservation of archaeological evidence thus requires not only ... [protection from] destruction or mutilation but, further, an opportunity to study and record exactly where and how each object was buried and how it related to other objects.").
more than a decorative or aesthetic item with little or no historical significance. Even if the item is recovered, the loss of history cannot be.

1.1. Source Nations Tend to Be Developing Nations

The antiquities and cultural artifacts sold on the black market often originate from source nations that are developing nations. Some advocates of nationalist protection of cultural property,

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10 See BATOR, supra note 5, at 25 ("An 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.").

11 "Source nation" refers to a nation that possesses large reserves of cultural property. Other terms used to describe such a nation include art-rich nation, artifact-rich nation, nations of origin, and supply nations. Appropriately, market nation refers to a nation that creates the demand for cultural property because of its small or nonexistent reserves. Similar terms are art-poor nation, demand nation, artifact-poor nation, and purchaser nation. See Chauncey D. Steele IV, Note, The Morganstern Treasure: Italy's Quest for Repatriation of Looted Artifacts, 23 SUFFOLK TRANSNAT. L. REV. 667, 676-77 (2000).


Because of the main direction in which such objects flowed ... [the removal of property as a result of previous colonization and the continued illicit traffic in art treasures] has inevitably become primarily an issue for Third World countries, in opposition to the more developed countries, and in particular for former colonial nations.

Id.; see also John Henry Merryman, What Do Matisse, Van Gogh, and Hitler Have in Common?, U.B.C. L. REV. 273, 274 (1994) ("[M]any source nations, though rich in cultural artifacts, have small gross domestic products and fragile economies."); Kenneth Polk, The Antiquities Trade Viewed as a Criminal Market (stating that the antiquities trade "is driven fundamentally by the economic demand originating in wealth developed countries, which then exerts a pull on the supply often found in underdeveloped nations"), at http://www.hk-lawyer.com/2000-9/Sep00-cover.htm; Samuel Sidibe, Fighting Pillage: National Efforts and International Cooperation, in ILLICIT TRAFFIC IN CULTURAL PROPERTY: MUSEUMS AGAINST PILLAG 25, 25 (Harris Leyten ed., 1995) ("Cultural resources of poor countries are exported to rich countries. There are no examples of the contrary.").

13 "Cultural property" refers to artifacts, antiquities, and works of art of archaeological, historical, and ethnological significance. See JOHN HENRY MERRYMAN, Two Ways of Thinking About Cultural Property, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 66 (2000) [hereinafter Two Ways of Thinking]. The United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting and Preventing the Ilicit Import, Export and Transfer of Ownership of Cultural Property defines cultural property as "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 . . . ." This definition is predicated on
such as Jan Pronk, Dutch Minister for Development Cooperation in 1994, argue that the poverty in developing nations creates incentives for the poor to steal and sell the artifacts to illicit traders at low prices. Another popular claim is that developing nations lack the resources to protect their cultural heritage and to recover lost property. Allegedly, developing nations lack the monetary funds and administrative structure to enforce cultural property laws, protect existing national treasures, and reclaim stolen or illegally exported cultural objects.

the notion that cultural property is a part of a nation’s cultural heritage, which is preserved through export controls and the return or “repatriation” of stolen cultural property, in contrast to the cultural internationalist conception of cultural property as objects of a common human culture. Id. at 67-68. Here cultural property will be used in the nationalist sense and solely in reference to antiquities.

See Jan Pronk, Fighting Poverty is Important for the Safeguarding of Cultural Heritage, Speech in the Rijksmuseum voor Volkenkunde, Leiden, the Netherlands (Feb. 18, 1994), in ILICIT TRAFFIC IN CULTURAL PROPERTY: MUSEUMS AGAINST PILLAGE 9, 10 (Harris Leyten ed., 1995) (“After all, if you were poor and someone offered you a year’s salary for every object you found, would you not pick up a spade and start digging?”); see also Wim Bouwman, The International Art Market, in ILICIT TRAFFIC IN CULTURAL PROPERTY: MUSEUMS AGAINST PILLAGE 61, 61 (Harris Leyten ed., 1995) (“Due to underdevelopment . . . [and] poverty . . . countries such as Nepal, Tibet and Cambodia are culture-exporting countries . . . In South America, ancient ruins are being robbed of their contents by thousands of poor people.”); Slayman, supra note 1, at 43 (“The . . . looting . . . is due partly . . . to rural poverty aggravated by the scarcity of fertile land and shortage of jobs.”)

See C. Franklin Sayre, Comment, Cultural Property Laws in India and Japan, 33 UCLA L. REV. 851, 857-58 (1986) (arguing that protection of cultural property “ultimately depends on the socio-economic conditions that exist within each nation and the political power of that nation in the international community,” and that developing nations like India lack resources and power); see also Lisa J. Borodkin, Note, The Economics of Antiquities Looting and a Proposed Legal Alternative, 95 COLUM. L. REV. 377, 384 (1995). Contra James Éde, Ethics, the Antiquities Trade, and Archaeology, 7 INT’L J. OF CULTURAL PROPERTY 128, 128 (1998) (stating that “less money is available in artifact-rich nations, many of which are developing countries, for the conservation and security of national collections”); Moore, supra note 5, at 466 (claiming that “[a]rtifact-rich nations, the majority of which are developing nations, cannot protect their archaeological sites . . . [because] these nations lack the sophisticated customs services or police forces necessary to prevent looting”); Caveat Emptor, supra note 5 (stating that “Asian and African objects are less expensive than European pieces—while also coming from countries which lack the means to track them down”); The Lydian Hoard: Return to Sender, ECONOMIST, Oct. 2, 1993, at 96, available at LEXIS, Nexis Library, The Economist File (explaining that the high cost of lawsuits often prevents the return of cultural property, especially for “countries in Central America and Africa which may be rich in art but are poor in cash”).

See, e.g., Sayre, supra note 15, at 857-58 (finding that cultural property laws, which are effective in Japan, a developed or industrialized nation, are not effective in India, a developing nation, due to unfavorable socio-economic conditions).
1.2. Italy: An Industrialized Source Nation

Then how do we account for Italy? Italy, an industrialized nation and a G-7 nation, continues to lose its antiquities to the illegal antiquities market. In fact, Italy is one of the most severely affected countries in Europe to suffer losses to the illicit antiquities trade.

1.3. Overview

This Comment argues that the difficulties source nations face in protecting their cultural property has less to do with economic development and more to do with cultural property laws and international affairs. Studying Italy, a developed nation that continues to suffer losses of its antiquities, will dispel the notion that source nations suffer because of their poverty.

Section 2 of this Comment will show that the root of the problem lies in the demand from end users, who drive the market, and the failure of market nations to cooperate with source nations in their fight against illicit trade. This Section discusses how Italy, like other source nations, have contributed to the environment of illicit excavation and trade through overly restrictive legal measures that do not satisfy demand. Successful resolution depends on how a country responds to the market for its antiquities. Its response may require resources that are more available to developed nations than developing nations, but not necessarily so.

Section 3 examines some recent U.S. cases regarding the return of stolen or illegally exported cultural property from U.S. defendants to Italy and Turkey. Both countries have had a few successes in repatriating their antiquities from the United States, a market nation that has been more cooperative than others in assisting source nations. A comparison of the two nations, Italy, a developed art-rich nation, and Turkey, a developing European nation even richer in antiquities, will show that successful restitution of

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17 G-7 refers to the seven largest industrialized nations in the world, which are Italy, England, Japan, the United States, France, Germany, and Canada. Each nation has a Finance Minister who attends G-7 meetings to discuss economic policy issues. See investorwords.com, at http://www.investorwords.com/cgi-bin/getword.cgi?2140&G-7.


19 See John Doxey, A Smuggler’s Den of Antiquities, Bus. Wk., Apr. 15, 1996, at 18, LEXIS, Nexis Library, Business Week File (“And with more ancient Greek sites than Greece and more Roman cities than Italy, Turkey has in recent decades surpassed both countries as the largest source of classical artifacts.”); The Thief at the
cultural property does not hinge on a nation's level of wealth or state of development. Rather success turns on other issues, such as the type of law applied in a case, the amount of evidence the plaintiff has in its favor, and the willingness of the defendant's nation to assist in the recovery of the property.

Section 4 of this Comment outlines the efforts of the international community and the European Union ("EU") in protecting cultural property. It will show how the international system treats all states equally, regardless of its stage of development and how the solution to the problem of illicit trade is cooperation among the states.

Finally, Section 5 draws some conclusions as to why illicit trade of antiquities continues today and proposes solutions that do not require a state to be industrialized to implement them. It will present solutions based on cooperation among states and address the demand of end users.

2. Why Italy and Other Source Nations Suffer

2.1. Why Source Nations Suffer

Source nations suffer losses of its cultural property due to international demand, which incentivizes tombaroli, smugglers, and middlemen to act, and the unwillingness of market nations to check the illegal flow of cultural goods.

2.1.1. The Demand for Antiquities

Second only to drugs in profitability for illegal trade, the international trade in antiquities generates billions annually. Since World War II, interest in antiquities among art collectors has increased, leading to unprecedented growth of the antiquities mar-

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20 GREENFIELD, supra note 12, at 206.

21 Borodkin, supra note 15, at 377. Contra Ede, supra note 15, at 128 (claiming that "Lord Renfrew['s] off-the-cuff pronouncement some years ago stating that the trade in illicitly excavated material amounted to some £3,000,000,000 per annum and was second only to the trade in drugs" was "clearly nonsense, as even he now admits").
Though the looting and trading of cultural property has existed for centuries, its extensive growth since 1945 has been a cause of concern for many art-rich nations. The demand for antiquities causes the looting of archaeological sites and the theft of state cultural property. "If the demand did not exist, the practice of clandestine archaeology would subside. If the supply of illegally excavated objects did not exist, the black market would die."  

2.1.2. The Failure of Market Nations to Help

An international chain of corruption has emerged to facilitate the smuggling of antiquities from where they originate and into the hands of buyers in major market nations. The suppliers of antiquities have become more sophisticated and systematic in their operations. Antiquities that are smuggled out of source nations, such as Italy and Turkey, in violation of their export regulations move on to transit points, such as Switzerland, where the lack of

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22 BATOR, supra note 5, at 15.
23 Fighting the Illicit Traffic of Cultural Property, supra note 18 (stating that the looting and trading of cultural property "was denounced in one of the oldest legal documents in Egypt at the time of the pharaohs, in the Amherst Papyrus dating from 1134 BC").
24 BATOR, supra note 5, at 15.
25 Fighting the Illicit Traffic of Cultural Property, supra note 18; see Rory Carroll, The Ransack of Italy's History, DANTE NEWS ("The Italian police and the archaeologists agree on one point: the only sure way to defeat the tombolari is to choke off demand."), at http://www.dante-alighieri.org.au/Dante-News/Supplement-Stories/italyshistory.htm.
27 See Carroll, supra note 25 ("A chain of corruption ferries vases, plates and figurines to buyers who might appreciate their beauty but who, in the process of obtaining them, obliterate their archaeological value.").
28 See Doxey, supra note 19 (describing the role of "mafia-like" organizations).
29 Note that Switzerland's pivotal role in the underground network that moves illicitly excavated artifacts from so-called source countries—nations with rich archaeological heritages such as Italy, Turkey, Greece, among others—to countries like Britain and the United States where the demand and the market for art is strong, has long been acknowledged.

Gaia Regazzoni, The Beginning of the End?, ART NEWSPAPER.COM, at http://www.theartnewspaper.com/news/article.asp?idart=9752. "Switzerland is a well known centre of trade in antiquities, because it is situated in the middle of Europe and because it maintains a system of free trade ports that are considered as foreign customs territory. The objects stored there are not specifically un-
import and export controls and favorable good faith purchaser rules create the ideal environment for smuggled antiquities in transit.\textsuperscript{30} Under Swiss civil law, the owner of stolen acquisitions, who purchased in good faith, becomes their legal owner at the end of five years.\textsuperscript{31} Thus, once five years pass, illegally excavated antiquities of unclear provenance are safe to leave Switzerland for their final destination in market nations like the United States, England, Japan, or France.\textsuperscript{32}

The process, which begins with the illegal export of antiquities and ends in their legal import into market nations, makes the trade half licit, half illicit.\textsuperscript{33} Major market nations, such as the United Kingdom, and transit countries like Switzerland, who have yet to change their laws or join international efforts to help source nations,\textsuperscript{34} are to blame for the veneer of legality that complicates the recovery of stolen and illegally exported cultural property. This lack of cooperation emasculates the export controls and cultural property laws of source nations rendering them meaningless.

The end result is that the London dealer can assure his or her client that the antiquities in question "have been legally obtained which may be true in the narrow sense that they have passed through customs quite legally on their way into the country."\textsuperscript{35} In

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\item \textsuperscript{30} See Regazzoni, supra note 29 (referring to Switzerland's involvement in the antiquities trade).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} See BATOR, supra note 5, at 16 (describing how antiquities often find their way to art-collecting countries such as the United States, Japan, Germany, England, and France).
\item \textsuperscript{33} Polk, supra note 12.
\item \textsuperscript{34} Things appear to be changing. Switzerland is moving towards ratification of the 1970 UNESCO Convention. Legislation that would implement the Convention into Swiss law has already been drafted. Notably, it increases the limitation period on the acquisition and restitution of stolen property from five years to thirty. See Regazzoni, supra note 29. England as well appears to be changing its direction. In 2001, Britain declared its intention to sign the UNESCO Convention. See Rory Carroll, Tomb Raiding's No Game, GUARDIAN UNLIMITED, at http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,474570,00.html. "These initiatives could put a real dampener on the trade. Take out America, Britain and Switzerland and the market is squeezed." Id. (quoting Neil Brodie, head of the McDonald Institute's illicit antiquities research centre). However, none of these gestures will mean anything until the countries sign the Convention or make real changes to their laws.
\item \textsuperscript{35} Polk, supra note 12.
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turn, the "legality" of the exchange calms the troubled conscience of the end user and guarantees that the taint of illegality will not diminish demand or deter trade enabling the illegal trade to grow and harm source nations.

2.2. Italy's Cultural Property Regime and Its Flaws

Under international law, the sovereign nation-state remains the source of legal authority, making it the defender of its cultural heritage. Italy has fulfilled this role by implementing a comprehensive scheme that includes special police forces and laws regulating the retention and return of cultural property. There are two police units that investigate matters in art theft and recover stolen or illegally exported art. The Carabinieri, the Italian police, have a special art-squad, the Comando Carabinieri Tutela Patrimonio Artistico, and the Ministry of Finance's police force, the Guardia di Finanza, has an office that investigates art thefts and illegal excavations.

The cultural property retention scheme in Italy includes national ownership laws and export control regulations. Italy's national property law, Law of June 1, 1939, Regarding the Protection of Objects of Artistic and Historic Interest, vests ownership of an-

36 See Gerstenblith, supra note 7, at 211

(If falls to the nation-state . . . to protect that heritage and while it has not always been a perfect guardian of the past, it is where legal authority resides and the source from which legitimate authority will come, if the cultural heritage is to be preserved for future generations.).

37 Contra An Embarrassment of Riches, ECONOMIST, Dec. 24, 1994-Jan. 6, 1995, at 53, LEXIS, Nexis Library, The Economist File (claiming that Italy lacks a "grand plan for conservation" of its national monuments and cultural objects, which includes the issue of illegal excavations of archaeological sites and illegal export of antiquities).


39 Slayman, supra note 1, at 44.

40 JOHN HENRY MERRYMAN, The Retention of Cultural Property, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 122, 123 (2000) [hereinafter Retention of Cultural Property] (describing retention schemes to mean the laws nations pass to retain their cultural property within their borders). Merryman uses the term in a critical and negative sense, but here it will be used in a neutral sense to refer to a source nation's national cultural property regime.
tiquities found in the state after 1902 in the nation. This law, like other source nations' national property laws, makes any illegal excavation and exportation of artifacts an act of theft. Declaring national ownership of antiquities originally found on Italian territory enables Italy to reclaim stolen goods later located outside of Italy. Courts of other nations honor the national property law of Italy in deference to its state sovereignty. "Ruling otherwise would be an unacceptable interference with the prerogative of a sovereign state to determine its respective rights . . . concerning the ownership of its cultural heritage."  

In addition to its national property law, Italy has an export control scheme that generally forbids the export of anything that is more than fifty years old. This law applies primarily to privately held cultural property that, in the absence of export controls, would move freely in international trade. In theory, Italy's export control legislation, in tandem with the national property law, creates a national cultural property regime that retains most, if not all, of Italy's cultural property. In practice, however, Italy's export prohibition is not as effective as its national property law in retaining and recovering cultural property.

Although the principle of state sovereignty underlies both the national property law and export control legislation, it is detrimental in its application to export controls. "The choice of an export policy and of a legal regime for its administration and enforcement are matters of domestic concern, to be decided according to internal political and legal criteria." In the absence of treaty obliga-

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42 See Kaye, supra note 41, at 80.

43 See United States v. McClain, 545 F.2d 988 (5th Cir. 1977) (recognizing a state's declaration of ownership).

44 Kaye, supra note 41, at 80.


46 See Two Ways of Thinking, supra note 13, at 67-68 (discussing the idea of regarding cultural property as part of a national cultural heritage).

tions, nation states, because they are sovereign entities, have no obligation to enforce the export controls, i.e., the domestic policies, of another state. In the United States, for instance, the "courts ordinarily will not enforce the laws of foreign states that prohibit the export of all cultural property .... Generally, the courts have ruled that such ordinances are functions of the purely internal 'police powers' of the foreign nation, which no other nation is bound to enforce."48

Additionally, Italy's export controls are ineffective because, unlike national property laws that address legal questions of ownership rights, export controls attempt to regulate supply and demand through legal means without taking these economic principles into consideration. Though the policy underlying export controls extend from legal claims of national ownership, on a fundamental level they regulate the physical flow of goods. By not accounting for the demand for antiquities, the export controls do not provide any legal means of satisfying demand, which forces the trade underground.49 These laws will not stop an underground trade of antiquities until they account for the demand that keeps the stream of goods flowing.

3. A COMPARATIVE ANALYSIS OF ITALY'S AND TURKEY'S SUCCESSES IN REPATRIATING THEIR CULTURAL PROPERTY


Italy and Turkey have enjoyed some success in repatriating their cultural property from the United States. In comparison to other market nations, the United States has been a willing partner...
in the restitution of stolen and illegally exported cultural property. The United States "has taken a number of measures to support the retentive policies of source nations."\textsuperscript{50} A substantive body of law applicable to the return of cultural property has developed,\textsuperscript{51} including common law principles,\textsuperscript{52} the National Stolen Property Act ("NSPA"),\textsuperscript{53} and the Cultural Property Implementation Act ("CPIA").\textsuperscript{54}

The NSPA prohibits the transportation in interstate or foreign commerce of goods, valued at $5000 or more, that have been stolen, converted, or taken by fraud.\textsuperscript{55} In \textit{United States v. McClain},\textsuperscript{56} where the definition of stolen property under the NSPA was at issue, the court recognized the validity of national ownership laws that vest ownership of antiquities in the nation-state. According to the \textit{McClain} doctrine, regardless of whether or not the plaintiff nation ever actually had physical possession of an antiquity, the nation owns it under its national ownership law.\textsuperscript{57} Thus, when an illegally excavated antiquity is imported into the United States, it is considered a stolen good imported in violation of the NSPA.

In 1983, the United States acceded to the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention,\textsuperscript{58} implementing it through the passage of the CPIA. It

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\item Retention of Cultural Property, supra note 40, at 125.
\item See Kaye, supra note 41, at 80-81 (noting the development of a body of law favorable to the return of cultural property in the United States).
\item U.S. law operates under the common law system, where a good faith purchaser cannot acquire good title from a thief. U.C.C. § 2-403(1). Thus, in cases where an antiquity is stolen, or considered stolen because of its illegal export, the foreign source nation may successfully reclaim it upon a showing of ownership. For a discussion on the differences between the civil and common law systems with regard to the position of good faith purchasers, see infra note 111.
\item 545 F.2d 988 (5th Cir. 1977).
\item See Douglas C. Ewing, \textit{What is "Stolen"? The McClain Case Revisited, in THE ETHICS OF COLLECTING CULTURAL PROPERTY} 177-78 (Phyllis Mauch Messenger ed. 1989); Gerstenblith, supra note 7, at 215 (exploring the McClain decision and its ramifications).
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places restrictions on the import of cultural property from a nation with which the United States has an agreement. The CPIA additionally authorizes the President to issue emergency decrees that impose import restrictions in certain circumstances and provides for the seizure and forfeiture of undocumented objects.  

3.2. Turkey: A Developing Nation with a Restrictive Cultural Property Retention Scheme

Turkey, "with more ancient Greek sites than Greece and more Roman cities than Italy,"60 is a Mediterranean source nation that suffers even more losses than Italy to the international black market.61 An estimated $200 million in antiquities disappear yearly.62 Though the trade dates as early as the mid-19th century, the trade exploded in the 1960s when Mafia-like organizations63 took control of it. Using their international connections, the Mafia-like rings sell antiquities, smuggled through a contraband pipeline between Istanbul and Germany,64 to foreign buyers.

Like Italy, Turkey has a restrictive cultural property retention scheme. Turkey first claimed ownership of its antiquities, found in or on its territory since 1906, through issuance of an imperial decree and later through the enactment of the Law on Protection of Cultural and Natural Antiquities in 1983.65 Its export control law,

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59 See Kaye, supra note 41, at 84-85 (describing when the President may issue such emergency decrees).

60 Doxey, supra note 19; see also The Thief at the Wedding, supra note 19 ("Turkey has more ancient Roman tombs than Italy and more antique Greek sites than Greece.").

61 See BATOR, supra note 5, at 16 ("In the Mediterranean world, Turkey probably has the most severe current problem, followed by Italy . . . ").

62 See Doxey, supra note 19 (discussing how objects worth an estimated $200 million disappear from Turkey every year).

63 Mafia "conjures images of uneducated gangsters. But these guys are really very cultured, and they tend to have a better eye for quality than most scholars." Id. (quoting Sami Guneri Gulener, a former smuggler turned government informant).

64 See id. (explaining that "[m]afia style outfits sprang up in Istanbul and Germany to mastermind the contraband pipeline").

65 See Republic of Turkey v. OKS Partners, 1994 U.S. Dist. LEXIS 1732, 3 (1994) (recognizing Turkey's ownership of the antiquities at issue); Mark Rose & Ozgen Acar, Turkey's War on the Illicit Antiquities Trade, ARCHEOLOGY, Mar.-Apr. 1995, at 46 ("[Turkey] bases its ownership of these antiquities on Turkish laws that, since at least 1906, have established its proprietary interest in all antiquities found in or on its territory.").
Antiquities Law No. 1710 of 1793, bans all export of its antiquities creating an embargo.\(^6^6\)

Unlike Italy, however, Turkey does not have a developed economy or belong to the European Union ("EU").\(^6^7\) Rather, the Turkish economy is in transition, and Turkey is an applicant state to the EU.\(^6^8\) Turkey does not enjoy the wealth that is characteristic of an industrialized nation or the political and legal benefits of EU membership as Italy does. Nonetheless, Turkey has met some success in its attempts to recover its stolen antiquities,\(^6^9\) and results have been described as impressive.\(^7^0\)

3.3. Turkey’s and Italy’s Repatriation of Antiquities under U.S. Law

Italy too has successfully reclaimed several of its stolen or illegally exported antiquities.\(^7^1\) General Roberto Conforti, head of the Carabinieri art theft squad, has remarked that Italy’s campaign for the return of stolen works of art has begun to pay.\(^7^2\)

In United States v. An Antique Platter of Gold,\(^7^3\) Italy successfully reclaimed a fourth century B.C. gold plate (Phiale). The Phiale passed through many hands along the way from Sicily, Italy, through Lugano, Switzerland, to its final stop in New York City.\(^7^4\)

Several years later, in 1995, the Italian government sought assistance from the United States in investigating the Phiale’s export-
tion and securing its return. In response, the U.S. government filed an in rem forfeiture action claiming that the Phiale had been imported illegally due to misrepresentations on the customs forms and Italy's ownership of the statue, which made it a stolen good transported in violation of the NSPA.

The district court ordered forfeiture based on the material false statements on the customs forms, and, alternatively, on the illegal importation of stolen property in violation of the NSPA. The statue, which the Italian state owned under its 1939 national ownership law, was considered stolen property under the McClain doctrine making its importation illegal. The Second Circuit affirmed the first holding on the materiality of the misrepresentations on the customs forms, but did not reach the second holding on Italy's ownership thereby avoiding the question of national ownership.

The outcome would have been unfavorable to Italy had there not been several factors in its favor. First, Italy benefited from the willingness of the U.S. government to assist in its recovery efforts and represent the country in court. Second, the existence of the NSPA provided Italy with a legal claim. Finally, the development of the McClain doctrine, which considers "an object . . . stolen' if a foreign nation has assumed ownership of the object through its artistic and cultural patrimony laws," eased Italy's burden of establishing ownership. Italy, otherwise, would have faced the obstacles of first showing ownership of the statue and then persuading a foreign court to enforce its cultural property laws.

In The Republic of Turkey v. The Metropolitan Museum of Art, the contested antiquities, called the Lydian Hoard, consisted of more than 300 gold and silver artifacts, which were illegally excavated and exported to the United States. Similar to Italy's case, Turkey claimed ownership of the Lydian Hoard under its national prop-

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75 Id.
77 Id. at 230.
78 See supra Section 2.2.
80 Gerstenblith, supra note 7, at 246 n.88.
erty law. However, in contrast to the Phiale case, Turkey brought a civil suit against the museum under New York state law for the recovery of chattel.\footnote{Id. at 45.} Shortly before trial the Metropolitan Museum returned the hoard.\footnote{Kaye, supra note 41, at 82.}

The evidence in this case determined the outcome, unlike the Italian case, which turned on the law. Even though the court never reached Turkey’s ownership claim, the evidence that Turkey accumulated during discovery clearly indicated that the Lydian Hoard had been taken from a Turkish tomb. Additionally, the evidence showed that the Museum knew that the antiquities had been illegally excavated and smuggled out of Turkey.\footnote{Rose & Acar, supra note 65, at 47.} The district court’s refusal to dismiss the case and the strong likelihood that Turkey would win at trial motivated the Museum’s return of the Lydian Hoard.\footnote{Id.}

Both Turkey and Italy’s successes prove that successful restitution of a nation’s cultural property does not turn on whether the state is developed or not, but rather on other factors. These factors tend to be legal in nature, such as whether the source nation has enough proof of ownership,\footnote{See supra note 82 and accompanying text.} what system of law governs,\footnote{See supra note 52.} whether the defendant nation is party to any agreements or conventions to which the plaintiff nations belongs,\footnote{See supra Section 3.1; infra Section 4.1.} and whether a source nation legally recognizes a market nation’s cultural property laws.\footnote{See supra Section 3.1.} The countries in these cases were able to repatriate their property because the evidence favored them and U.S. laws and doctrines recognized their national property laws.

4. **INTERNATIONAL CULTURAL PROPERTY REGIME**

International customs and treaties constitute the two main sources of international law.\footnote{Kelly, supra note 8, at 42. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).} With respect to the international

\footnotesize{\begin{itemize}
\item \footnote{Id. at 45.}
\item \footnote{Kaye, supra note 41, at 82.}
\item \footnote{Rose & Acar, supra note 65, at 47.}
\item \footnote{Id.}
\item \footnote{See supra note 82 and accompanying text.}
\item \footnote{See supra note 52.}
\item \footnote{See supra Section 3.1; infra Section 4.1.}
\item \footnote{See supra Section 3.1.}
\item \footnote{Kelly, supra note 8, at 42. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).}
\end{itemize}
trade in cultural property, no international customary law exists\footnote{Kelly, supra note 8, at 42.} and the conventions and agreements in effect only bind those parties that have ratified or acceded to them.\footnote{Id.} At present, the two main conventions are the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property\footnote{UNESCO 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, 10 I.L.M. 289 [hereinafter UNESCO Convention].} and the 1995 International Institute for the Unification of Private Law ("UNIDROIT") Convention on Stolen or Illegally Exported\footnote{Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 23, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].} Cultural Objects. Other measures under international law include bilateral and multilateral agreements between nation-states regarding the illicit trade in cultural property and the EU measures\footnote{See infra Section 4.3.} regulating the movement of cultural property within and outside the European Union.

4.1. Convention

The UNESCO Convention was intended to promote international cooperation in the return of illegally exported cultural property.\footnote{Etienne Clément, The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 1970), in ILICIT TRAFFIC IN CULTURAL PROPERTY: MUSEUMS AGAINST PILLAGE 45 (Harris Leyten ed., 1995); Kaye, supra note 41, at 84.} However, most of the signatories are source nations leaving the UNESCO Convention useless in cases where purchasers are located in market nations who have not signed the agreement.\footnote{See Gimbrère, supra note 45, at 55; Kelly, supra note 8, at 44; Harrie Leyten, ILICIT TRAFFIC and the Collections of Western Museums of Ethnography, in ILICIT TRAFFIC IN CULTURAL PROPERTY: MUSEUMS AGAINST PILLAGE 14, 19 (Harris Leyten ed., 1995); Nation and the Object, supra note 47, at 173. However, this state of affairs soon may change. See supra note 34.} Other weaknesses include the Convention’s limited scope of protection to only museums, public monuments, or similar institutions; lack of formal dispute resolution procedures; different definitions of cultural property and different legislative adoptions of the Convention for each state; and its applicability only to cases...
that arise after the convention has formally entered into force for both the importing and exporting states. Finally, it fails to offer any resolution of important matters such as the position of the good faith purchaser in restitution actions.

In 1984, UNESCO approached UNIDROIT with a project that would remedy the problems of the 1970 UNESCO Convention. The result was the UNIDROIT Convention. It improves upon the UNESCO Convention by considering subject matter that was not considered before, such as "unlawfully excavated" cultural objects, and providing for the restitution of stolen, illegally excavated, or illegally exported cultural property. However, the UNIDROIT Convention so far has had few parties accede to it, and none that could be considered important market nations.

Italy has been a party to the UNESCO Convention since 1970 and has ratified, but not acceded to, the UNIDROIT Convention. Though the UNESCO Convention does not apply to all of Italy’s restitution claims, it has been quite helpful in cases between Italy and other states that are party to the UNESCO Convention. For example, Italy successfully recovered the Torso of Artemis from Sotheby’s New York under section 2607 of the CPIA, the United State’s legislative implementation of the UNESCO Convention.

4.2. Bilateral Agreements

On January 19, 2001, the United States and Italy, both parties to the UNESCO Convention, entered into a bilateral agreement in an effort to reduce the illegal excavation of Italy’s archaeological sites and to facilitate the return of stolen antiquities. A few months

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99 Greenfield, supra note 12, at 259.
100 Gimbrère, supra note 45, at 55.
101 UNIDROIT Convention, supra note 95, at 1331.
102 Id.
103 See supra note 58.
105 Slayman, supra note 41, at 457-58. Section 2607 forbids the importation of cultural property stolen from religious institutions of nations party to the Convention. Id. at 458.
106 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 Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, Jan. 19, 2001, U.S.-Italy, at
later, an ancient bust of a victorious athlete that disappeared in 1956 from southern Italy finally returned home. "Archaeologists welcomed the transfer as the first major success of... [the] bilateral agreement between Italy and the United States to make restitution quicker and easier."107

Bilateral agreements between nation-states, which often exist without the auspices of a formal convention, serve as an effective weapon against the illicit trade in antiquities. Though being party to the UNESCO and UNIDROIT Conventions can be helpful in dealing with other states parties, the Conventions are ineffective in resolving disputes with nations not party to them. Since many market nations, such as the United Kingdom and Switzerland, have not acceded to the Conventions at this time, forming agreements with market nations appear to be the best and possibly only means to protect a source nation's cultural property under international law.

Source nations also benefit from forming treaties with nations that are not necessarily market nations, but are strategically important in the enforcement of their cultural property laws. For example, a treaty between Turkey and Bulgaria would greatly help the Turkish government enforce its export restrictions. The absence of such an agreement allows for the legal export from neighboring Bulgaria of Turkish antiquities that make it safely across the Turkey-Bulgaria border.108 Similarly, an agreement between Switzerland and Italy would shut down one of the main transit points for illegally exported Italian antiquities.

4.3. Regional Measures

In 1993, the formation of the EU single "market[,]... an area without internal frontiers in which the free movement of goods... is ensured,"109 raised concerns regarding trade in cultural

http://exchanges2.state.gov/education/culprop/it01agr.html. Article 15 of the UNESCO Convention allows states parties to form bilateral agreements separate from the Convention. UNESCO Convention, supra note 94, at 292. Furthermore, the CPIA permits the United States to impose import restrictions on archaeological and ethnological materials of party nations with which the United States signs a bilateral or multilateral agreement. Kaye, supra note 41, at 84.

107 Carroll, supra note 34.

108 Doxey, supra note 19 ("Now, experts on both sides of the law say, some 85% of [Turkey's] booty passes through neighboring Bulgaria, several hours' drive north form Istanbul.").

property. Italy and other source member nations worried that the cultural objects would leave their borders more easily under the new single market system. The Council of the European Communities, in response, passed the EC Regulation No. 3911/92 on the export of cultural goods\(^{110}\) and the 1993 Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.\(^{111}\)

In theory, these legal measures improved Italy’s position but, in practice, they failed to reduce the outflow of cultural property. EC Regulation No. 3911/92 on the export of cultural goods “was intended to establish a uniform system of control for all cultural material exported outside the European Union, no matter what its EU state of origin.”\(^{112}\) Originally, the regulation required all antiquities exported outside the EU be subject to license.\(^{113}\) However, under pressure from the English antiquities market, England, a major market nation\(^{114}\) and transit point,\(^{115}\) negotiated an exemp-

\(^{110}\) 1992 O.J. (L395) 1 (“The export of cultural goods is subject to the presentation of an export licence which is valid throughout the Community. A licence may be refused if the goods in question fall into the category of national treasures covered by national legislation.”), available at http://europa.eu.int/scadplus/printversion/en/lvb/111017a.htm; see generally Neil Brodie, Licensing of Archaeological Material for Export, in ILICIT ANTIQUITIES: THE THEFT OF CULTURE AND EXTINCTION OF ARCHAEOLOGY 190-92 (Neil Brodie & Kathryn Walker Tubb eds., 2002).

\(^{111}\) The Directive reinforces member states’ national cultural property retention schemes while offering provisions that strengthen their retention efforts. First, the Directive does not distinguish between theft and illegal export of cultural property, purchased in good faith, in its prohibition of illegal removal of cultural objects. This provision solves Italy’s problem in enforcing its export control laws in other jurisdictions within the EU.

Second, the Directive offers legal recourse to member states for the return of illegally removed cultural objects found in other member states. This measure aids Italy in recovering its illegally exported property from member states of the civil law tradition, where the concept of bona fide allows a thief to pass good title to a good faith purchaser after a certain period of time has passed, namely those states in continental Europe who constitute the majority of the EU.

In contrast, in common law countries, such as England, the principle of nemo dat qui non habet applies, which means that a seller cannot transfer a better title than he has himself. See Patrick J. O’Keefe, Provenance and Trade in Cultural Heritage, U.B.C. L. Rev. 259, 263 (1995).

\(^{112}\) Brodie, supra note 110, at 190-91.

\(^{113}\) See id. at 191.

\(^{114}\) See Carroll, supra note 25 (“For decades, Britain, home to the second largest art market in the world, has been accused of fostering the trade in stolen antiquities.”).

\(^{115}\) Brodie, supra note 110, at 186.
tion to the licensing requirement for objects of limited archaeological and scientific value.  

"The exclusions negotiated at the time of drafting the EC Regulation allow the major part of exported antiquities to leave the country unlicensed."  

Italy's fears that a single market would facilitate the illegal trade have come true.

The efforts of the European Union to combat the illicit trade of cultural property illustrate the importance of cooperation amongst nations as well as the limitations of law. The EC Directive and Regulation established a system of export control and cultural property restitution that worked on paper, but failed without the cooperation of all the member states. "[I]n an integrated Europe, Italy's export control is only as strong as that of its most liberal EU partner, in this case the UK." Without the assistance of other nations to enforce the laws, England in particular, Italy alone can only do so much to stop the illicit trade.

5. CONCLUSIONS AND SOLUTIONS

By conceptualizing cultural property retention schemes, particularly export controls, without regard for the demand for antiquities, source nations continue to promote a cultural property regime that engenders a black market in antiquities. Under such regimes, tombaroli and similar groups will continue to destroy archaeological sites in search of antiquities to supply the demand.

In order to solve the problems source nations face in retaining their cultural property, these nations must first recognize that demand for cultural property, and so the international trade in antiquities, will always exist. Source nations must work to decrease the demand for illegal antiquities at the end-point of the market.

116 Id. at 191.
117 Id. at 198.
118 Id. at 200.
119 Retention of Cultural Property, supra note 40, at 152.
120 Ede, supra note 15, at 130.
122 See Roger Bedaux, An Archaeologist's Appeal, in ILICIT TRAFFIC IN CULTURAL PROPERTY: MUSEUMS AGAINST PILLAGE 67, 69 (Harris Leyten ed., 1995); Gerstenblith, supra note 7, at 211; Kaye, supra note 41, at 93; Free International Movement, supra note 121, at 308; Pronk, supra note 14, at 12.
The end purchasers—private collectors and museums—are the ones who create the demand that causes illicit looting and trading, and makes the trade so profitable. Controlling this demand will require international cooperation as well as a truly licit trade in some of these artifacts.

5.1. Various Solutions

Scholars and lawyers in the field of cultural property and art law have suggested myriad solutions that address this problem. These experts have championed the use of litigation and rule of law to deter purchasers on the black market, while others within the field have blamed restrictive cultural property laws for the increase in illicit trade. Participants in the discourse on cultural property have called for more bilateral agreements between market nations and source nations, stronger national legislation, exchange or loan programs, establishment of cultural property schemes that distinguish between cultural patrimony and property, and creation of a licit market. The best solutions address the quite real and growing demand for antiquities while using the law to give them force.

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123 Kaye, supra note 41, at 93.
124 See Slayman, supra note 1, at 43 ("[T]he choicest pieces end up on the international market, where prices and profits are high.").
126 See Gerstenblith, supra note 7, at 211, 245; Kaye, supra note 41, at 93-94.
127 Retention of Cultural Property, supra note 40, at 152.
128 Greenfield, supra note 12, at 294; Gerstenblith, supra note 7, at 245-46; Kaye, supra note 41, at 87.
129 Id.
132 A Licit International Trade, supra note 26, at 214; Ede, supra note 15, at 130.
5.2. The Best Solution

5.2.1. Bilateral and Multilateral Agreements

Under the current international system of sovereign nation-states, rules and laws that regulate international trade in cultural property are useless without the cooperation of nation-states. Though the UNESCO and UNIDROIT Conventions are both helpful in theory, too few of the major market nations have signed onto them to be of much assistance. Instead, bilateral and multilateral agreements can fill the gap. Since most market nations do not have import restrictions on cultural property, these agreements will put them in place and help source nations recover illegally exported goods. Source nations, developing or developed, can negotiate these agreements to enforce controls over the export of their cultural property and facilitate the return of stolen and illegally exported property. Developing nations are not hindered by their lack of wealth in forming these agreements.

5.2.2. A Licit Trade

Bilateral agreements will help nations recover their antiquities and control some of the outflow, but will not solve the problem of demand. Resolution of this problem requires source nations to reconsider their laws and cultural property policies. Many nations with restrictive retention schemes now are overloaded with antiquities that could be sold on a licit market (generating funds for recovery of truly important artifacts, i.e., national treasures) or loaned to museums.

To best meet the demand from museums and private collectors who desire ownership of the antiquities, source nations should pass national laws limiting state ownership to antiquities that are considered treasures essential to the nations’ cultural heritage. Surplus antiquities then should be channeled to a state-regulated

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133 See supra note 34.
134 Bouwman, supra note 14, at 62.
135 The United States has such agreements with Mexico, Peru, and Guatemala regarding the importation of pre-Columbian monumental sculpture and murals. Two Ways of Thinking, supra note 13, at 88-89.
136 A Licit International Trade, supra note 26, at 206-07; Cuno, supra note 131, at 83-84; Ede, supra note 15, at 128.
137 A Licit International Trade, supra note 26, at 204-06.
market\textsuperscript{138} that rewards excavators who bring forth their finds or identify sites loaded with artifacts. However, the sale of nonessential antiquities may not completely satisfy the private collectors’ demand for rare and valuable pieces, unlike museums that may be content with long-term loans of national treasures. Thus, in order to meet the demand of private collectors, source nations should leave aside a few treasures for sale. Alternatively, reluctant source nations could sell the treasures conditioned on their eventual return or for limited terms. For instance, under this alternative system a private collector owns the treasure for a limited term of seventy-five years or until death. Upon the end of the term or the collector’s death the treasure is returned to the source nation.

Museums should be satisfied by a policy of long-term loans of national treasures and sales of less valuable antiquities and cultural artifacts. The loan should be long enough for the museums to fully study the piece, which should eliminate the museums’ need to acquire the artifacts for reasons other than display. In addition to satisfying the demand of the museums, the long-term loan will benefit source nations that may lack the resources to adequately preserve its cultural property in the same manner as market nations’ museums.

6. CONCLUSION

These solutions will not completely remedy the problems of source nations. The great demand, limits of international law, and lack of cooperation of market nations are difficult to overcome. However, by recognizing the demand that drives the international black market in antiquities, they offer a realistic approach accessible to source nations both rich and poor.

\textsuperscript{138} See generally id., supra note 26.