

## TRANSNATIONAL FORFEITURE OF THE GETTY BRONZE<sup>♦</sup>

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### *Abstract*

Italy has been engaged in an ongoing fifty-year struggle to recover an ancient Greek bronze. The “Bronze Statue of a Victorious Youth” has a remarkable story. It was lost at sea in the Adriatic in antiquity; found by chance in international waters; smuggled into the Italian seaside village of Fano; hidden first in a bathtub, then a cabbage field; smuggled and hidden in Brazil; later conserved in Germany and London; and ultimately purchased by the Getty Museum only months after the death of the Trust’s namesake, J. Paul Getty. Getty refused to allow his museum to purchase the statue during his lifetime without a thorough and diligent inquiry into the title history of the Bronze, a step the trustees of the Getty did not take prior to acquisition of the Bronze.

The question is not whether the Bronze was illicit when the Getty trustees made the decision to acquire it. It most certainly was, and still is. The question now is whether the Getty will be able to continue to retain possession. In the press and in cultural property circles, the Bronze is considered nearly un-repatriatable given this convoluted history. But an Italian forfeiture action in Pesaro has quietly set in motion a means by which Italy might repatriate the Bronze through a Mutual Legal Assistance Treaty. This transnational forfeiture marks the creation of a useful new tool in the struggle to repatriate looted and stolen cultural objects. And perhaps more importantly, the dispute signals a continuing trend reflecting the importance of domestic law in

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source nations in cultural heritage law.

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#### INTRODUCTION

*This court orders the seizure of the statue named 'Victorious Athlete' attributed to the Greek sculptor Lysippos, currently held by the J. Paul Getty Museum, or wherever it is found.*<sup>1</sup>

-Il Giudice Dott.ssa Lorena Mussoni

The Bronze in question has many names. It has been called the *Getty Bronze*, the *Bronze Statue of a Victorious Youth*, and Italian officials calling for its return name it *la atleta di Fano*, or “athlete from Fano.” It was the first bronze antiquity dating from the 4th century B.C. that could have gone up for sale in the modern antiquities market.<sup>2</sup> A decision by the Tribunal of Pesaro in Italy, which has ordered the forfeiture of the Bronze, signals a fundamental shift in the basic assumptions governing contested objects.<sup>3</sup> This forfeiture has taken place under the jurisdiction of the Italian judicial system, despite the absence of the statue in Italy. Cultural heritage advocates have been hampered in their efforts to secure the repatriation of looted objects that have been illegally exported based on the old taboo that a nation will not enforce the public or penal laws of another nation. But quietly, with little notice of cultural heritage lawyers, the United States has entered into Mutual Legal Assistance Treaties with a number of nations of origin, notably Italy, which challenge this old prohibition.

Italy, in attempting to secure the repatriation with a transnational forfeiture, is once again pioneering repatriation law. Will more nations

<sup>1</sup> Translation of the holding from the 2010 Italian seizure proceeding in Pesaro. “Ordina la confisca della statua denominata ‘L’ Atleta Vittorioso’ attribuita allo scultore Greco Lisippo attualmente detenuta dal J. PAUL GETTY MUSEUM ovunque essa si trovi.” Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell’esecuzione, *Ordinanza del 10 febbraio 2010*, No. 2042/07 R.G.N.R. No. 3357/07 R.G.I.P. at 36 [2010 Ordinanza], available at <http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387>.

<sup>2</sup> Jeannette Smyth, *A Bronze Antiquity Turns to Pure Gold*, WASH. POST, Nov. 22, 1977, at B2.

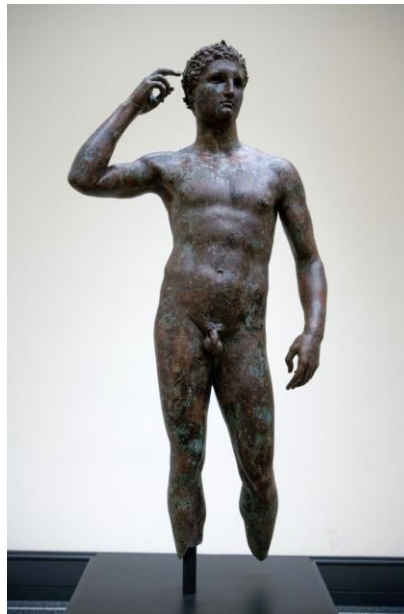
<sup>3</sup> See 2010 Ordinanza, *supra* note 1.

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of origin use domestic courts to repatriate objects that have been smuggled, looted, or removed? Will courts in so-called market nations enforce these foreign judgments? By examining the story of this bronze statue, one can see an important new strategy that nations of origin may employ. The piece proceeds in four parts. First, the artistic and historical merit of the statue are examined, as well as the story of the discovery of the statue, the initial prosecution of the finders, and the acquisition of the statue by the Getty. Second, the piece examines recent efforts at forfeiture of the Bronze since 2007, and discusses what substantive Italian laws serve as the basis for the Italian forfeiture. Third, the use of Mutual Legal Assistance Treaties (“MLATs”) is examined, and the specific treaty between Italy and the United States is discussed in detail. Finally, the piece makes some general observations about how the use of MLATs signals an important change in international cultural heritage law.

### I. A HISTORY OF THE GETTY BRONZE

Early studies of the Bronze named its sculptor as Lysippos, a renowned sculptor of the 4th century B.C., but more recent studies place its creation in the second or third century B.C.<sup>4</sup>



**FIGURE 1:** The Bronze Statue of a Victorious Youth<sup>5</sup>

<sup>4</sup> Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES (Jan. 15, 2010), [http://www.nytimes.com/2010/01/16/arts/design/16bronze.html?\\_r=0](http://www.nytimes.com/2010/01/16/arts/design/16bronze.html?_r=0).

<sup>5</sup> File: *L'atleta di Fano.jpg*, WIKIMEDIA COMMONS, [http://upload.wikimedia.org/wikipedia/commons/6/67/L%27atleta\\_di\\_Fano.jpg](http://upload.wikimedia.org/wikipedia/commons/6/67/L%27atleta_di_Fano.jpg).

The school of Lysippos strove to both idealize and capture the appearance of the subject. The slightly small head and slim body gives the viewer an impression of greater height, and we imagine the figure is taking a momentary pause before springing back into his athletic pursuit. The statue was probably cast in Greece, removed at some point in antiquity. We cannot know for sure, but it may have been removed by agents of the Roman Empire.<sup>6</sup> During its transit by ship to an unknown destination, it was lost at sea;<sup>7</sup> its location remained unknown for over two millennia. When it emerged to members of the American Museum community, its rarity and level of detail instantly made it an object that would become the centerpiece of any antiquities collection in the United States. Thomas Hoving, the then-director of the Metropolitan Museum of Art (“the Met”) said of the sculpture:

I went to see the sculpture in Munich in December, 1972, . . . I looked at it for a long while. I touched it all over, its face, the underside of its arms and its legs. The artist of the work did not take any shortcuts in modeling his sculpture, the way many Roman artists later did. It is a great visual experience.<sup>8</sup>

The number of ancient Greek bronzes that have survived to present day is small. Greek cities and public spaces would have been filled with these lifelike statues, but over the centuries many bronzes were lost to iconoclasm, and the mundane fact that bronze was and is a useful metal with many applications.<sup>9</sup> Sadly, many of these bronzes were melted down. As a result, many of the bronzes that have survived from Greece were lost at sea and later recovered; or would have been widely copied by Roman artists.

#### A. *Discovery of the Bronze and its Conservation*

The facts surrounding the chance recovery and the violations of Italian law must now be examined in some detail. We should bear in mind two aspects of this recovery: first, there were a number of violations of Italian law committed by the fishermen, and later the buyers who hid and smuggled the Bronze out of Italy; and second, Italian officials have been engaged in a persistent fifty-year effort to recover the Bronze after its location was discovered. As the following section outlines, the statue was first brought up onto an Italian fishing

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<sup>6</sup> Memorandum from Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture 4 (Nov. 20, 2006) (on file with author).

<sup>7</sup> *Id.* at 5.

<sup>8</sup> David L. Shirey, *Greek Bronze on Sale for \$3.5-Million*, N.Y. TIMES, Mar. 10, 1973, at 37.

<sup>9</sup> For a photo essay showing the recent Greek exhibition of the Antikythera Wreck which shows the full context and range of objects which an ancient vessel may have been transporting (including bronzes, marble figures) and the ways in which the ocean floor destroyed or preserved the works, see Dorothy King, *The Antikythera Wreck: Photos*, DOROTHY KING'S PHDIVA (Feb. 6, 2013), <http://phdiva.blogspot.com/2013/02/the-antikythera-wreck-photos.html>.

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vessel, then brought to shore, hidden, and finally sold. This section takes its account of these events from a Memorandum prepared by the Getty's lawyers for the Italian Culture Ministry,<sup>10</sup> as well as the reporting of Jason Felch and Ralph Frammolino for the Los Angeles Times and their work focusing on another illicit object acquired by the Getty, the so-called *Getty Goddess*, since repatriated and now called *La dea di Aidone*.<sup>11</sup>

One summer evening in 1964 A.D., the Italian trawler *Ferruccio Ferri* dropped line near a rocky outcropping in the Adriatic Sea, about halfway between Italy and Yugoslavia<sup>12</sup> and about thirty-two nautical miles<sup>13</sup> from its Italian port of Fano.<sup>14</sup> Early the next morning, the fishing nets caught and brought up what appeared to be a human figure, covered with a thick layer of encrustation.<sup>15</sup>

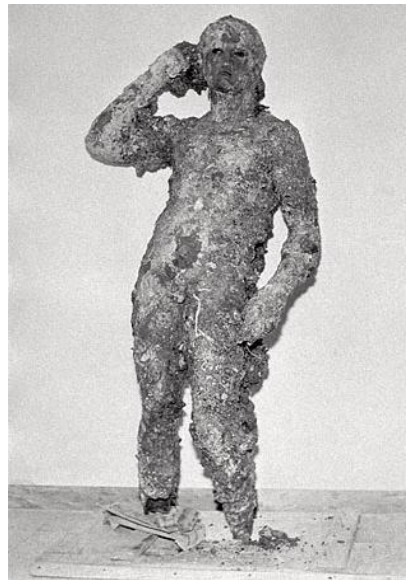


FIGURE 2: The Bronze before Conservation<sup>16</sup>

<sup>10</sup> Memorandum from Olson & Li, *supra* note 6.

<sup>11</sup> JASON FELCH & RALPH FRAMMOLINO, CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUM (2011).

<sup>12</sup> *Id.* at 9–10.

<sup>13</sup> For a general discussion of international maritime law as it relates to salvage and historic wrecks, see Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347 (2009).

<sup>14</sup> The ship had ventured so far as to fish in a “rocky outcropping that rose from the seabed where octopuses and schools of *merluza* and St. Peter’s fish gathered in the summer heat.” FELCH & FRAMMOLINO, *supra* note 11, at 10.

<sup>15</sup> Jason Felch, *The Amazing Catch They Let Slip Away*, L.A. TIMES, May 11, 2006, at A1, available at <http://articles.latimes.com/print/2006/may/11/local/me-bronze11> [hereinafter *The Amazing Catch*]; FELCH & FRAMMOLINO, *supra* note 11, at 9.

<sup>16</sup> Victorious Youth: Corrosion & Incrustation Layer, THE GETTY, <http://www.getty.edu/art/gettyguide/artObjectDetails?handle=tech&artobj=8912&artview=55508>.

Trawlers in the Mediterranean will occasionally bring up ancient urns and amphora, but the crew had apparently never seen a figure like this before.<sup>17</sup> They had brought up one of the most important archaeological discoveries of the 20<sup>th</sup> century. The nearly life-sized figure weighed 300 pounds—and given its encrustations appeared as if it had rested on the ocean floor for centuries.<sup>18</sup> Rather than report their discovery to the Italian authorities for conservation, the fishermen elected to sell it and divide the proceeds.<sup>19</sup> To accomplish this, they brought the statue to shore in the middle of the night, at 3 a.m., using a handcart and hiding the barnacled statue under a pile of nets.<sup>20</sup> This failure to report the find, in a kind of illegal importation from international waters to the Italian port, was the first of many violations of Italian law.

At first, the crew hid the statue in the home of Felici Dario, a friend of Captain Ferri Guido, one of the captains of the two ships involved.<sup>21</sup> A few days later, with word of the statue spreading throughout the town, the owner's son decided to move it a few kilometers inland—and bury it in a cabbage field.<sup>22</sup> Once the statue was hidden, the crew contacted Giacomo and Fabio Barbetti, two brothers who bought and resold ancient objects discovered by fishermen or farmers.<sup>23</sup> The brothers bought it in early August for 3.5 million lire.<sup>24</sup> The Barbetti brothers temporarily hid the statue in the church of a local priest, Father Giovanni Nagni, who later moved it beneath his wooden staircase.<sup>25</sup> There the statue was hidden until May 1965, at which point it was believed to have been moved elsewhere in Gubbio.<sup>26</sup> At no time did anyone inform the Department of the Ministry of Cultural Heritage or the Fano customs authorities that the statue was on Italian soil.<sup>27</sup> The accuracy of the fishermen's accounts was confirmed in 1989 when one of the fishermen who discovered the Bronze gave a local official in Fano a calcium deposit which had "the impression inside of a man's upper leg and thigh and traces of bronze. It should fit the leg of the Getty bronze like a discarded plaster cast."<sup>28</sup>

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<sup>17</sup> *The Amazing Catch*, *supra* note 15.

<sup>18</sup> FELCH & FRAMMOLINO, *supra* note 11, at 10.

<sup>19</sup> *The Amazing Catch*, *supra* note 15.

<sup>20</sup> FELCH & FRAMMOLINO, *supra* note 11, at 11.

<sup>21</sup> 2010 Ordinanza, *supra* note 1, at 2–3.

<sup>22</sup> *The Amazing Catch*, *supra* note 15.

<sup>23</sup> *Id.*

<sup>24</sup> 2010 Ordinanza, *supra* note 1, at 5.

<sup>25</sup> *The Amazing Catch*, *supra* note 15. The Los Angeles Times spells the priest's surname "Nanni," but the Italian court spells it "Nagni." The Italian court spelling is used throughout.

<sup>26</sup> 2010 Ordinanza, *supra* note 1, at 5.

<sup>27</sup> *Id.*

<sup>28</sup> George Armstrong, *The One That Almost Got Away*, THE GUARDIAN, Aug. 29, 1989. At the time the fisherman had a photograph of what may have been the Bronze under heavy encrustation, and the fishermen expressed a desire to lead investigators back to the site where

### B. Prosecution of the Barbettis and Nagni in Italy

Very soon after Italian authorities learned of the discovery of a relic in the Adriatic by fishermen, an investigation revealed the activities of the Barbetti brothers and Father Nagni. In 1965, Italian police received an anonymous letter alleging that the Barbettis had been travelling in Germany and actively soliciting a buyer for the statue.<sup>29</sup> During their investigation, Italian police searched Nagni's house and only found a red drape which had covered the statue.<sup>30</sup> Perhaps in an effort to compel the defendants to reveal the location of the Bronze, criminal proceedings were brought against the Barbettis and Nagni. At an initial trial in 1966 the defendants were acquitted due to a lack of evidence regarding the circumstances of the statue's location, including when it was found and whether it was found in Italian territorial waters.<sup>31</sup> Also, there were questions about the historic and artistic value of the object, which were subjective elements of the crimes with which the men were charged.<sup>32</sup>

The verdict was appealed to the Court of Appeals in Perugia. The Barbettis were convicted of receipt of stolen property and Nagni was convicted of aiding and abetting the crime.<sup>33</sup> The judgments were then appealed to the Italian Supreme Court which overturned the sentences on the grounds that there was insufficient evidence of the statue's find-spot in Italian territorial waters, and the prosecutors had not met their burden with respect to the artistic, archaeological and historic value of the object because it was not possible to directly examine it, and there were no available photographs of the statue.<sup>34</sup> During these proceedings, although the defendants were acquitted due to a lack of evidence, the Barbettis and Nagni did admit to having bought the Bronze and selling it to an unnamed individual from Milan.<sup>35</sup>

Another set of proceedings was initiated in 1973 to secure the return of the Bronze. Alessandra Lanciotti, an Italian legal scholar who has worked on the case, notes that the 1973 proceeding was unsuccessful and ended with a decision in 1976, and was opened again in 1977 in front of the same judge. In the end, this stage of legal proceedings "concluded with a decision not to proceed" because the individuals who may have committed the crime of illicitly exporting the

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they found the Bronze. At the time though, the Getty had a policy that it would return works of art to a nation if they had been taken from its home country illegally. *Id.*

<sup>29</sup> 2010 Ordinanza, *supra* note 1, at 5.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Legge 8 agosto 1939, n. 374 (It.).

<sup>33</sup> 2010 Ordinanza, *supra* note 1, at 5.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.* at 6.

Bronze could not be identified.<sup>36</sup> On the conclusion of these proceedings, the Bronze surfaced in Germany.

*C. Acquisition of the Bronze by the Getty*

A European art consortium, Artemis, announced in 1971 that it had purchased a statue for an undisclosed sum from unnamed Italians in Brazil,<sup>37</sup> who had been holding it in a private collection.<sup>38</sup> One partner in the consortium, Heinz Herzer, then moved the statue to Munich, where he oversaw restoration with an unnamed German expert.<sup>39</sup> The Artemis Group was an art holding company founded in 1970. A member of the board of Artemis, Eugene Thaw, claimed that Artemis bought the Bronze in 1971, and of its title, said only “[i]t had been in a private collection, for some time before that, . . . . ‘I don’t know whose.’”<sup>40</sup> As early as 1973, the Bronze was reported to be up for sale for as much as \$3.5 million.<sup>41</sup>

The statue was acquired by the Getty Museum in 1977 in a purchase surrounded by little fanfare, just months after the death of J. Paul Getty.<sup>42</sup> Recent reporting has uncovered concerns at the Getty regarding the acquisition of the Bronze. J. Paul Getty learned about the Bronze in 1972 from an advisor, Bernard Ashmole, at the time the statue had appeared suddenly in Europe.<sup>43</sup>

Bernard Ashmole, an advisor to art collector J. Paul Getty, foresaw no serious legal challenge to the statue, due in large part to the reversal of the Barbettis’ and Father Nagni’s convictions.<sup>44</sup> He began persuading Getty, who was building a museum in Malibu, to purchase it.<sup>45</sup> In 1974, Getty entered into an agreement with the New York Metropolitan Museum of Art: the Met would loan the Getty a set of seventeen frescoes in exchange for joint ownership of the statue, which would be funded by Getty.<sup>46</sup> The negotiations were stymied by Italian attempts to recover the statue.<sup>47</sup> However, as Herzer refused to identify the statue’s

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<sup>36</sup> Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the “Getty Bronze,”* in CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW 301, 304 n.13 (Silvia Borelli & Federico Lenzerini eds., 2012).

<sup>37</sup> *The Amazing Catch*, *supra* note 15.

<sup>38</sup> Smyth, *supra* note 2, at B2.

<sup>39</sup> *The Amazing Catch*, *supra* note 15.

<sup>40</sup> Smyth, *supra* note 2.

<sup>41</sup> Shirey, *supra* note 8.

<sup>42</sup> Smyth, *supra* note 2.

<sup>43</sup> Jason Felch, *A Twist in Getty Museum’s Italian Court Saga*, L.A. TIMES (Jan. 14, 2010), <http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14>.

<sup>44</sup> *The Amazing Catch*, *supra* note 15.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

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sellers, the case fell apart.<sup>48</sup>

In light of the investigation, Getty put the deal on hold until legal conditions could be satisfied.<sup>49</sup> He wanted written permission from the Italian Minister of Culture and proof that the statue had received permission to leave the country.<sup>50</sup> Before those conditions could be met, however, negotiations stalled.<sup>51</sup> Getty asked his attorney to look at the legal status of the Bronze. The attorney asked the seller's Italian lawyers, "who insisted that Italy had no claim to the statue."<sup>52</sup> In a letter from the then-director of the Met, Thomas Hoving, Hoving promised Getty that the Met's attorneys would talk to Italian officials to clarify the circumstances under which the Bronze left Italy. Hoving wrote, "[a]s I already explained to you during our conversations, the conclusion of the purchase [of the Bronze] by Mr. Getty is subject to examination and approval from the Metropolitan Museum Counsel and from Mr. Getty's General Counsel."<sup>53</sup> And Hoving noted "[i]t is clearly understood by us that no commitment is to be made by me on your behalf for the Greek Bronze until certain legal questions are clarified."<sup>54</sup> Dietrich von Bothmer, the then-antiquities curator at the Met, warned Hoving that the simple acquittal of the Barbettis and Father Nagni would not mean that the Bronze had been legally exported from Italy.<sup>55</sup> In 1973, the Getty offered to acquire the Bronze with the Met for \$3.8 million, so long as the sellers could guarantee no legal complications with respect to the acquisition. However, this deal fell apart, and Jason Felch reported that after a 2010 request for information from the Getty, the Getty spokesperson would not comment as to why the agreement was abandoned.<sup>56</sup> The inability of the sellers to provide a documented history of the Bronze is a likely cause.

In 1976, Getty and Jiri Frel, the then-antiquities curator, resumed negotiations for the Bronze.<sup>57</sup> When Stephen Garrett, then the director of the Getty museum, was asked about these negotiations, he acknowledged that at the time museums did not ask questions about objects they suspected to have been illegally exported.<sup>58</sup> Italy has

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Felch, *supra* note 43.

<sup>53</sup> Tribunale di Pesaro, Il GIP, in funzione di giudice di opposizione ex art.667 co.IV c.p.p. (proc. 25/11 esec.), at 8 [2012 Ordinanza] (translation by Chiara Morini Mazzeri).

<sup>54</sup> Felch, *supra* note 43.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> JIRI FREL, THE GETTY BRONZE 1 (1978). Frel, in his publication on the Bronze was coy about how the negotiations stalled: "The *Bronze* remained in Getty's mind, a topic of much discussion, and later in 1975 he greatly admired the statue firsthand when it was transferred to London. He would have been overjoyed to know that it finally found its home in Malibu in 1977." *Id.*

<sup>58</sup> See e.g., Derek Fincham, *Towards A Rigorous Standard for the Good Faith Acquisition of*

argued that the Bronze was smuggled across Italy's borders, and that the Getty was "willfully negligent" in examining the history of the object before acquiring the Bronze.<sup>59</sup>

In 1976, while these negotiations were still ongoing, Getty died.<sup>60</sup> In a meeting held soon after the reading of J. Paul Getty's will, Burton Fredericksen, as chief curator, and the other curators at the Getty, met and decided the statue would be the museum's very first acquisition with part of the massive new \$700 million endowment left to the Getty Trust.<sup>61</sup> The trustees of the J. Paul Getty Museum voted to pay Artemis \$3.98 million for the Bronze<sup>62</sup>—an amount Getty himself had refused to pay.<sup>63</sup> In fact, writing about the massive endowment that J. Paul Getty left his Museum, Robert Lindsey noted in the *New York Times* that Getty was "spending more money on art than anyone since the Medicis . . ."<sup>64</sup> The trustees also declined to fulfill any of the legal conditions demanded by Getty.<sup>65</sup> En route to California, the statue spent a few months in Denver to avoid paying California taxes.<sup>66</sup> Upon its arrival, the trustees revealed they had voted to name the statue the "Getty Bronze."<sup>67</sup>

## II. ITALY'S TRANSNATIONAL FORFEITURE OF THE BRONZE

Given the history of the Bronze since its discovery in 1964, we should consider now what strategies the Italians have used to recover the work. As early as 1974, Italy asked German authorities to seize the Bronze and extradite the Munich dealer who had offered it for sale to the Getty; yet German officials offered no concrete assistance.<sup>68</sup> Later on in March of 1989, Italian authorities requested that the Bronze be returned.<sup>69</sup> In response Getty Museum director John Walsh claimed the statue had "little possibility of being related to Italian cultural heritage," and only a "tenuous relation' to Italy's patrimony."<sup>70</sup>

The relationship between Italy and the Getty was dramatically

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*Antiquities*, 37 SYRACUSE J. INT'L L. & COM. 145 (2010).

<sup>59</sup> Povoledo, *supra* note 4.

<sup>60</sup> *The Amazing Catch*, *supra* note 15.

<sup>61</sup> FELCH & FRAMMOLINO, *supra* note 11, at 25.

<sup>62</sup> *The Amazing Catch*, *supra* note 15.

<sup>63</sup> FELCH & FRAMMOLINO, *supra* note 11, at 25.

<sup>64</sup> Robert Lindsey, *Getty Museum Ponders How to Use Its \$800 Million*, N.Y. TIMES, Jan. 9, 1978, at A1.

<sup>65</sup> FELCH & FRAMMOLINO, *supra* note 11, at 25.

<sup>66</sup> *Statue's Tax Dodge Doesn't Quite Work*, BALTIMORE SUN, Dec. 11, 1997. To avoid sales tax in California, which was then 6%, the Bronze was given to the Denver Art Museum for ninety days. AP reports at the time indicated that the city of Denver has a 3% use tax on items bought elsewhere and used in Colorado, so the success of the tax-avoidance was unclear. *Id.*

<sup>67</sup> *The Amazing Catch*, *supra* note 15.

<sup>68</sup> Felch, *supra* note 43.

<sup>69</sup> *The Amazing Catch*, *supra* note 15.

<sup>70</sup> *Id.*

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altered due to a successful antiquities investigation. In 1995, authorities raided the Swiss warehouse of Giacomo Medici, an Italian antiquities dealer.<sup>71</sup> There they found thousands of Polaroid photographs that showed objects that had been illegally excavated and sold.<sup>72</sup> The evidence was used to build a case against former Getty antiquities curator Marion True.<sup>73</sup> Italy's demand was renewed yet again in 1996.<sup>74</sup> True claimed that the statute of limitations for such a claim had expired, and it was "not realistic" for Italy to think the Bronze would be returned.<sup>75</sup> In October 2006, the Getty and the Italian Ministry of Culture renewed talks over title to various antiquities in the Getty's collection; the result of these talks would later be known as the "October Agreement."<sup>76</sup> The negotiations eventually led to a signed agreement stipulating that the Getty return twenty-six objects, enter into an innovative joint ownership agreement with Italy of the "Cult Statue of a Goddess," and collaborate with the Italian government on future exhibits, to include the loan of objects and joint research.<sup>77</sup> Yet the ultimate conclusion of the agreement was stalled by the Italian government's insistence over the return of the Bronze.<sup>78</sup> The Getty claimed that its ownership of the statue was "not subject to reasonable challenge," as it had purchased the Bronze "only after Italian courts had declared that there was no evidence that the statue belonged to Italy."<sup>79</sup> Italy conceded that it had "no ownership claim because the statue was found at sea . . . ."<sup>80</sup>

In its negotiations with Italy, the Getty often claimed that the Bronze should not be considered alongside the other looted objects, and that it would not return the object to Italy.<sup>81</sup> In response, Italy stressed that the Bronze must be a part of any agreement. In July of 2007, Francesco Rutelli, then the Italian Culture Minister, threatened a cultural embargo against the Getty unless a number of objects, including the Bronze, were returned to Italy.<sup>82</sup> In response, the Getty announced to the press that it was on "firmer ground" with respect to the Bronze

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<sup>71</sup> Jason Felch & Ralph Frammolino, *The Return of Antiquities A Blow to Getty*, L.A. TIMES (Aug. 2, 2007), <http://articles.latimes.com/2007/aug/02/local/me-getty2>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *The Amazing Catch*, *supra* note 15.

<sup>75</sup> *Id.*

<sup>76</sup> *J. Paul Getty Museum to Return 26 Objects to Italy*, THE GETTY (Nov. 21, 2006), [http://www.getty.edu/news/press/center/statement06\\_getty\\_italy\\_meeting111706.html](http://www.getty.edu/news/press/center/statement06_getty_italy_meeting111706.html).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Ralph Frammolino & Jason Felch, *Getty Makes New Offer to Italy*, L.A. TIMES (Nov. 22, 2006), <http://articles.latimes.com/print/2006/nov/22/local/me-getty22>.

<sup>81</sup> *Id.*

<sup>82</sup> *Rutelli Talks with Getty Down to Wire*, IL DENARO (July 20, 2007), <http://archivio.denaro.it/VisArticolo.aspx/VisArticolo.aspx?IdArt=508531&KeyW=>.

because it could not be linked to the questionable acquisitions policies of Marion True, who at the time was defending herself in a criminal trial in Rome.<sup>83</sup> Christopher Knight, an arts critic for the Los Angeles Times, argued that Rutelli's posturing for the return of forty-seven objects was little more than old-fashioned political demagoguery that was pitched to voters back in Italy, and that the ultimatum was merely a symbolic act, demonstrating that Italy would not be intimidated by the United States.<sup>84</sup>

Later in July, days before the proposed embargo was set to take effect, the Getty Museum resumed negotiations with the Italian government over the disputed objects.<sup>85</sup> It appears these negotiations resumed because Italy agreed to set aside the issue of the Bronze. In August 2008, the Getty agreed to send forty objects back to Italy in exchange for the long-term loan of other objects. Francesco Rutelli said the accord was "an agreement of historic value."<sup>86</sup> The Italian Culture Ministry relented and concluded that negotiations over the statue should be set-aside until the final disposition of a new criminal investigation into the discovery and export of the Bronze from Italy.<sup>87</sup> This investigation began with a grassroots request by the citizens of Fano.<sup>88</sup>



<sup>83</sup> *Id.*

<sup>84</sup> Christopher Knight, *The Grandstand Erected by Italy*, L.A. TIMES (July 25, 2007), <http://articles.latimes.com/2007/jul/25/entertainment/et-getty25>.

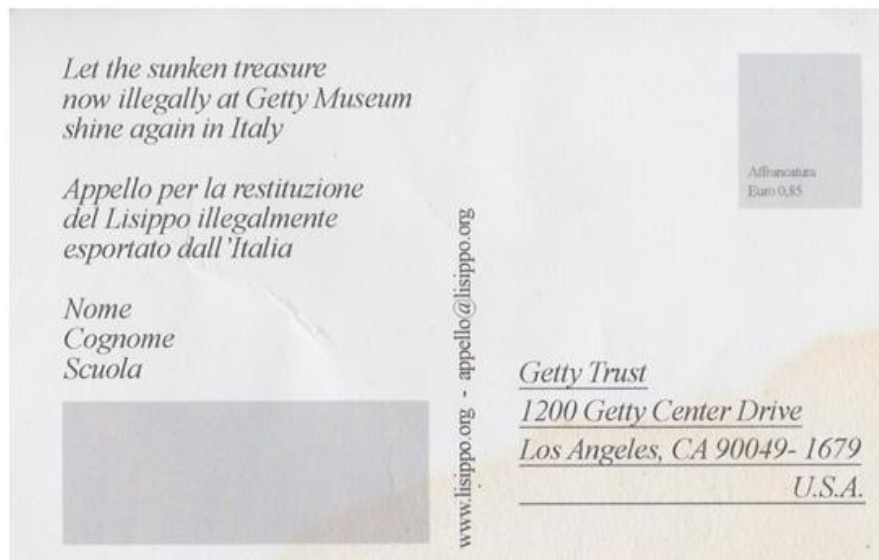
<sup>85</sup> Jason Felch & Ralph Frammolino, *Getty, Italy Reopen Talks on Antiquities*, L.A. TIMES (July 31, 2007), <http://articles.latimes.com/2007/jul/31/local/me-getty31>.

<sup>86</sup> Felch & Frammolino, *supra* note 71.

<sup>87</sup> Felch & Frammolino, *supra* note 85.

<sup>88</sup> *Id.*

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**FIGURE 3:** A Postcard Campaign by the Residents of Fano Seeking the Return of the Bronze.<sup>89</sup>

The forfeiture proceeding in Pesaro commenced decades after the Bronze left Italian territory. These efforts demonstrate the deep connection some Italians feel with the statue, and the deep remorse that the residents of Fano collectively feel towards the loss of the object. In 2010, the Mayor of Fano, Stefano Aguzzi, summarized the sentiment of local residents, stating, “[t]he statue and its discovery has become part of our culture and folklore, . . . [i]t’s clear we have a claim to it.”<sup>90</sup> However, the first forfeiture proceeding for the Bronze did not go well for Italian prosecutors.

In November 2007, an Italian judge rejected a prosecutor’s request to seize the statue.<sup>91</sup> The Italian prosecutor argued that the Bronze was smuggled out of Italy after it was found in fishing nets, while the Getty countered that there was no proof that the statue was found in Italian waters.<sup>92</sup> The judge rejected the petition by Italian prosecutors, noting “[t]he responsibility of the Getty Museum, which is not of a criminal nature, will have to be established in another forum, possibly via the cross-examination of the interested parties.”<sup>93</sup> Even the members of the grassroots organization which moved to begin legal proceedings to

<sup>89</sup> Postcard published by Pro loco “Fanum Fortunae” (2007) (on file with author).

<sup>90</sup> Povoledo, *supra* note 4.

<sup>91</sup> *Getty Bronze Seizure Turned Down*, IL DENARO (Nov. 21, 2007), <http://archivio.denaro.it/VisArticolo.aspx?IdArt=518560&KeyW=GETTY%20BRONZE%20SEIZUR E%20TURNED%20DOWN>.

<sup>92</sup> *Getty Cleared in Statue Case*, ANSA, Nov. 20, 2007.

<sup>93</sup> *Id.*

return the Bronze admitted that “their legal action was unlikely to result in the Bronze being returned, in part because of legal ambiguities surrounding its discovery and sale.”<sup>94</sup> Yet the grassroots organization persisted.<sup>95</sup>

In a subsequent 2009 decision, the “Pre-Trial Judge” re-examined the case. She first found that “the Tribunal had jurisdiction over the case and that Italian Law applied.”<sup>96</sup> Later in a crucial ruling on February 10, 2010, the same Pre-Trial Judge found that the Bronze “currently held by the J. Paul Getty Museum” should be forfeited “*wherever it is found*.”<sup>97</sup> The focus of this Article is not to examine the principles of Italian criminal law and procedure upon which Italian officials ordered this forfeiture. Rather, this Article is concerned with how the judgment (and others like it) might be enforced in the United States.<sup>98</sup> Therefore, an initial examination of the specific legal violations of Italian law is helpful.

The first violation is the illegal export of the Bronze. Italy restricts the export of certain works of art and antiquities. Article 9 of the Italian Constitution safeguards “the natural beauties and the historic and artistic wealth of Italy.”<sup>99</sup> Italy has declared ownership of certain objects of cultural heritage and has prohibited the trade and export of certain objects.<sup>100</sup> At the time the Bronze was removed from Italy in the 1960s, Article 66 of Law no. 1089 of 1939 punished the unlawful export of cultural objects with a fine and confiscation.<sup>101</sup>

The second violation is a declaration of ownership of cultural objects (“*beni culturali*”) in Italian territory. Professor Lanciotti has argued that under Article 44 of Law no. 1089/39, “an archaeological item is presumed to belong to the State unless its possessor can show private ownership prior to 1902.”<sup>102</sup> Italy enacted a law in 1939 that declared the State the owner of any antiquity for which no valid title predating 1902 exists.<sup>103</sup> Article 23 of that law states “that State-owned

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<sup>94</sup> Jason Felch, *Italian Group’s Bid for Getty Statue Rejected*, L.A. TIMES (Nov. 20, 2007), <http://articles.latimes.com/2007/nov/20/world/fg-getty20>.

<sup>95</sup> Lanciotti notes that the “Prosecutor asked the Pre-Trial Judge (*Giudice per le Indagini Preliminari*) of the Tribunal of Pesaro to issue a forfeiture order (*ordine di confisca*) despite the fact that the charges against the accused had been dismissed due to the expiry of the time-limit for prosecution and the death of one of them.” Lanciotti, *supra* note 36, at 304.

<sup>96</sup> *Id.*

<sup>97</sup> 2010 Ordinanza, *supra* note 1, at 36.

<sup>98</sup> Lanciotti notes that an appeal to the Court of Cassation was brought, and that in January of 2011 the “*Corte di Cassazione* issued a very short and rather odd judgment, in which it did not rule on the legitimacy of the confiscation.” Lanciotti, *supra* note 36, at 304 n. 17.

<sup>99</sup> Lanciotti, *supra* note 36, at 305 n.18.

<sup>100</sup> *Id.* at 305–06.

<sup>101</sup> *Id.* at 307.

<sup>102</sup> *Id.* at 306.

<sup>103</sup> See, e.g., *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 227 n.25 (S.D.N.Y. 1997) (The District Court was given a translation of the Italian law by an Italian lawyer, Giuliano

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cultural property is inalienable without prior authorization by the Ministry of Culture, . . . [and] Article 61 deems to be null and void all unauthorized sales and transactions of cultural property belonging to the State.”<sup>104</sup> The current “Code of Cultural Property” prohibits the export and sale of archaeological objects.<sup>105</sup>

The Ordinanza of 2010 found that Italian export restrictions should be applied to the Bronze. Notably, both those restrictions that were in force when the Bronze was smuggled out of Italy and restrictions enacted later were held to apply.<sup>106</sup> The judge took up the question of whether the Bronze should be considered part of the State’s public domain or as a part of the “inalienable assets of the State.”<sup>107</sup> If under the public domain (“*demanio pubblico*”), the statue would fall under the provision of Article 822(2) of the Civil Code of 1942. This provision includes “State owned real property of historic archaeological or artistic interest as well as collections of paintings, archives and libraries of the State museums.”<sup>108</sup> If considered Italian state property (“*patrimonio indisponibile dello Stato*”), it would fall under Article 826(2) of the Civil Code. This provision regulates “things of artistic historical, archaeological, palethnological, paleontological and artistic interest by whosoever and by whatever means found underground” as belonging to the State of Italy.<sup>109</sup>

Lanciotti argues that objects belonging to the *demanio pubblico* are subject to a blanket prohibition on sale, but those belonging to the *patrimonio indisponibile* can be bought and sold with permission of the State.<sup>110</sup> Lanciotti notes that this rule was amended in 2004 to make the illegal export of cultural objects a crime punishable by one-to-four years imprisonment and fines ranging from 258-to-5,165 euro.<sup>111</sup> Notably, Article 174 “provides for the *confisca* (forfeiture or confiscation) of the item in question if it is proven that it was exported abroad from Italian territory in violation of” Italian export laws.<sup>112</sup> Article 174(3) allows for the forfeiture of those objects unless, as Lanciotti translates in the article, “they belong to a person who was not involved in the commission of the crime.”<sup>113</sup> Lanciotti notes that in the 2010 decision,

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Berruti, and the court agreed with the Italians’ argument that the provision declares Italy the owner of any antiquities without documented ownership before 1902—essentially retroactively declaring ownership of them.).

<sup>104</sup> Lanciotti, *supra* note 36, at 306.

<sup>105</sup> *Id.* (citing Codice dei beni culturali e del paesaggio, Articles 65, 54(2)(a), 55, and 10(3)(d)).

<sup>106</sup> 2010 Ordinanza, *supra* note 1, at 24.

<sup>107</sup> Lanciotti, *supra* note 36, at 306.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 307.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

the judge did not consider why Italian law should be applicable to the forfeiture:

The judge simply took for granted that the domestic retentionist law was applicable to the case as the *lex rei sitae*. According to her reasoning, as State-owned cultural property the Bronze could not have been legally acquired by a third party through a private transaction, regardless of the passage of time and its transfer abroad.<sup>114</sup>

The judge also took up the question of whether the Getty had acquired title, and came to the conclusion that there were serious defects:

The “Victorious Youth” statue was purchased in the full awareness of its preceding vicissitudes that denoted its exit from Italian territory under dark circumstances (out of any kind of euphemism: certainly illegal), without asking for any particular guarantees (in particular the title deed) to its vendor, even if it had been claimed, previously and before his death, by J.P. Getty senior who in the end had given up the idea to purchase the statue, and without consulting the Italian Government, thus unable to interject in matter and to furnish the necessary explanations with regard to the events of the transferring of the good. The acquisition, even if of an important sum of money (3.9 million dollars), consented the purchase of a work of art of an inestimable historical, artistic and as well as venal value to the Getty Museum with obvious implications of economic nature and of an international prestige. The preceding considerations lead to the conclusion that the Getty Museum cannot be considered “a party not involved in the crime” being impossible to affirm the existence of its not guilty reliance in the purchase of the asset that is the material subject of the crime, and having it taken advantage of the transaction concluded in this way.<sup>115</sup>

As we have seen, there are four violations of Italian law which provide a basis for forfeiture: first, the illegal export of the Bronze; second, the failure to notify Maritime authorities of the discovery; third, the failure to notify the relevant authorities of the discovery of the piece of cultural heritage; and fourth, the violation of importation rules from the importation of the Bronze when it was brought ashore to Fano in the middle of the night.<sup>116</sup> This collection of legal violations bears a number of similarities to the more recent legal argument which resulted in repatriation of looted antiquities from an art dealer in London to the Jiroft region in Iran.<sup>117</sup> Professor Lanciotti notes that the confiscation

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<sup>114</sup> *Id.* at 311.

<sup>115</sup> 2012 Ordinanza, *supra* note 53, at 33–34.

<sup>116</sup> *Id.* at 14.

<sup>117</sup> See Gov’t of the Islamic Republic of Iran v. The Barakat Galleries Ltd., [2007] EWCA (Civ) 1374 (Eng.).

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order has been affirmed by the Italian Court of Cassation.<sup>118</sup> Because the case resulted in what Professor Lanciotti has defined as a final forfeiture order, the question becomes whether Italy can secure the assistance of a court in the United States to enforce it.

### III. REPATRIATION VIA MUTUAL LEGAL ASSISTANCE TREATY

Italy may elect to use its Mutual Legal Assistance Treaty with the United States. Since 1982, the United States and Italy have had a bilateral mutual assistance treaty. The most recent update to this agreement, which entered into force in 2010, provides in Article 18 that both nations will “assist each other to the extent permitted by their respective laws in the seizure, immobilization and forfeiture of the fruits and instrumentalities of offenses.”<sup>119</sup>

Professor Lanciotti indicates that the forfeiture now only remains to be enforced in the United States: “the Prosecutor of the Tribunal of Pesaro sent a letter rogatory to the Central Authority in the United States to enforce the order of confiscation of the Bronze . . . .”<sup>120</sup> This letter has not been made public.<sup>121</sup> MLATs are bilateral agreements which provide for the sharing of information and evidence related to transnational criminal investigations. The number of these agreements has increased in recent decades.<sup>122</sup> They seek to facilitate cooperation between the United States and foreign governments in criminal matters. Each country will provide for a central authority responsible for handling communications and requests under the treaty. In the United States, the Department of Justice is the designated authority.<sup>123</sup>

When crimes cross national borders, these treaties have become increasingly useful.<sup>124</sup> White collar crimes are regularly being committed by “persons located in the United States who then flee the

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<sup>118</sup> Lanciotti, *supra* note 36, at 324 n.109.

<sup>119</sup> Mutual Legal Assistance Agreement with the European Union, U.S.-It., May 3, 2006, T.I.A.S. 10-201.36.

<sup>120</sup> Lanciotti, *supra* note 36, at 324.

<sup>121</sup> *Id.* at 324–25.

<sup>122</sup> Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 WM. & MARY BILL RTS. J. 209, 211 (2002).

<sup>123</sup> *Id.* at 226. “The Office of International Affairs in the Criminal Division of the U.S. Department of Justice serves as the designee of the United States Attorney General for purposes of making and receiving MLAT requests. The Central Authority for the treaty partner is most often the Minister of Justice, Attorney General, Minister of Interior, or other person responsible for international criminal assistance matters in that country, or a person designated by such an official.” *Id.* at 226–27.

<sup>124</sup> To give an idea of the justifications for these treaties, consider the remarks of Representative George W. Gekas in discussing a treaty entered into in 2002 between the United States and Cyprus, which he praised as “[providing] for many provisions that will fight not just global terrorism, but also organized crime and drug trafficking.” 148 CONG. REC. E1809-03 (daily ed. Oct. 9, 2002) (statement of Rep. George W. Gekas).

country or hide their illicitly derived proceeds abroad, or by persons located physically outside the United States who utilize the telephone, mail, Internet, and the international financial system to perpetrate their crimes and launder their profits.”<sup>125</sup> Art and heritage crime shares many of these characteristics. It is an inevitable development, then, that the tools used to combat drug trafficking, organized crime, and terrorism will also be used to combat antiquities looting and art theft.<sup>126</sup> In the past, evidence sought by foreign governments would have been requested by a letter rogatory sent from one court to a court in another country.<sup>127</sup> The process of requests for witnesses or testimony has been provided for by federal statute.<sup>128</sup> But the section 1782 process proved cumbersome and law enforcement wanted to curtail the wide discretion given to district courts in the statute.<sup>129</sup> MLATs “contractually obligate the two countries to provide to each other evidence and other forms of assistance needed in criminal cases while streamlining and enhancing the effectiveness of the process.”<sup>130</sup>

When the first Mutual Legal Assistance Treaty with Italy was signed in 1982, transnational forfeitures were included. The Senate Foreign Relations Committee report noted that the Article 18: Immobilization and Forfeiture of Assets provision was a “major innovation,” which “provides in emergency situations for the immobilization of assets in a requested country which are subject to forfeiture to the requesting country.”<sup>131</sup> The provision was praised for its importance in “depriving international drug traffickers and members of organized crime of the fruits of their criminal activity.”<sup>132</sup>

There is legislation guiding the operation of these transnational forfeitures, with 28 U.S.C. § 2467 laying out procedures for enforcing foreign forfeiture orders under limited circumstances. These include banking fraud and drug trafficking; and circumstances where there is a treaty or other formal international agreement in effect providing for mutual forfeiture assistance.<sup>133</sup> If the Italian forfeiture order were to be enforced, there must first be a final order of a foreign nation, and the so-called dual forfeiture requirement must be met, meaning that the

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<sup>125</sup> Snow, *supra* note 122, at 209–10.

<sup>126</sup> See *United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, U.N. Doc. E/Conf. 82/16, reprinted in 28 I.L.M. 493 (Dec. 20, 1988).

<sup>127</sup> *In re Commissioner’s Subpoenas*, 325 F.3d 1287, 1290 (11th Cir. 2003).

<sup>128</sup> 28 U.S.C. § 1782 (2012). The statute provides that district courts may order residents in their district to give testimony, produce evidence, and generally cooperate in foreign criminal investigations, and even private suits. *Id.*

<sup>129</sup> Mutual assistance requests do not have to comply with any restrictions provided under § 1782. *In re Commissioner’s Subpoenas*, 325 F.3d at 1305–06.

<sup>130</sup> *Id.* at 1290.

<sup>131</sup> S. EXEC. DOC. NO. 98-36, at 12 (1984).

<sup>132</sup> *Id.*

<sup>133</sup> 28 U.S.C. § 2467(a)(1) (2006).

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property must also be subject to forfeiture in the United States, as well as Italy.<sup>134</sup>

It is an interesting question how close of a match the dual forfeiture requirement imposes. To require that the United States mirror the heritage protection scheme of Italy in every respect for the forfeiture to proceed would be too onerous an obligation. Put another way, how close must the law in the United States regulate the illicit export and smuggling of similar pieces of underwater cultural heritage like the Bronze? There are broad forfeiture principles embedded in certain federal laws that would certainly match the Italian laws violated with respect to the Bronze, notably the national Stolen Property Act;<sup>135</sup> the Abandoned Shipwreck Act;<sup>136</sup> and perhaps most closely, the Archaeological Resources Protection Act.<sup>137</sup> How closely this dual forfeitability must be would be a close question in some cases.<sup>138</sup> In seeking to have the forfeiture enforced by a district court in the United States, the requesting nation must submit a request to the Attorney General,<sup>139</sup> which has designated the Office of International Affairs in the Department of Justice.<sup>140</sup> The Attorney General, or his or her designee, has the final decision whether to let the enforcement action continue; the only guidance given in the act is to let the “interest of justice” guide the decision.<sup>141</sup> One way to judge the “interests of justice” would be to consider the decades of unsuccessful international investigation which the Italians have conducted, and the interests of cultural justice.<sup>142</sup> Yet whatever we might think about the merits of Italy’s claim to the Bronze, we are left only with the power of discretion guiding this decision. Should the Attorney General’s designee grant the Italian request, then the requirements for enforcement are straightforward. The judgment will not be enforced if it violates due process, if personal jurisdiction was lacking, subject matter jurisdiction

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<sup>134</sup> *Id.* at § 2467(a)(2)(A).

<sup>135</sup> 18 U.S.C. § 2323 (2006).

<sup>136</sup> 43 U.S.C. § 2105 (2006) (asserting title for the United States to certain abandoned shipwrecks).

<sup>137</sup> 16 U.S.C. § 470gg(b) (2006) (“All archaeological resources with respect to which a violation of subsection (a), (b), or (c) of section 470ee of this title occurred and which are in the possession of any person, and all vehicles and equipment of any person which were used in connection with such violation, may be . . . subject to forfeiture to the United States . . .”).

<sup>138</sup> *See in re Restraint of All Assets Contained or Formerly Contained in Certain Inv. Accounts at UBS Fin. Servs., Inc.*, 860 F.Supp.2d 32, 41–42 (D.D.C. 2012) (holding the dual forfeiture requirement does not apply to restraining orders, and was met in the case because the alleged criminal conduct violated federal law).

<sup>139</sup> 28 U.S.C. § 2467(b)(1) (2006).

<sup>140</sup> U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 276 (1997) [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00276.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00276.htm).

<sup>141</sup> 28 U.S.C. § 2467(b)(2).

<sup>142</sup> *See* Derek Fincham, *Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes*, 20 VA. J. SOC. POL’Y & L. 43 (2012).

was lacking, notice was not given, or fraud was involved.<sup>143</sup> None of these requirements would seem to present a hurdle to enforcement of the judgment. Section 2467(a)(2)(A) was amended to allow federal courts to enforce a foreign forfeiture that was based on “any violation of foreign law that would constitute a violation or an offense for which property could be forfeited under federal law if the offense were committed in the United States.”

Italy has the benefit of precedent, having used mutual legal assistance before to secure assistance in returning cultural objects. In the forfeiture litigation of an Italian gold phiale,<sup>144</sup> Italian officials submitted a Rogatory Request to the United States under the earlier MLAT agreement.<sup>145</sup> The assistance sought in that case included help in “investigating the circumstances surrounding the exportation from Italy of the [p]hiale” and confiscation of the phiale so that it could be returned to Italy.<sup>146</sup>

Italy requested the restitution of a gold bowl dated from the third or fourth century B.C.E. The object was illegally exported from Italy, and there were inaccuracies on the customs declaration.<sup>147</sup> The country of origin was wrongly listed as Switzerland when the actual nation of origin was Italy.<sup>148</sup> Also, the value of the object was listed as only \$250,000 when the actual value was \$1.2 million. Federal prosecutors initiated a forfeiture proceeding in the Southern District of New York. The district court held in favor of the prosecution holding that the gold phiale had been illegally imported due to the false statements on the customs declaration.<sup>149</sup>

In February of 1995, Italian officials submitted a Letters Rogatory Request to the United States.<sup>150</sup> The request was for assistance in investigating the export of the phiale from Italy, and it also asked for the object to be confiscated for an eventual return to Italy.<sup>151</sup> In November of 1995, United States Customs agents seized the phiale from Steinhardt’s home, and the United States filed a forfeiture action under 18 U.S.C. §§ 545 and 981(a)(1)(C) for importing the goods by means of

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<sup>143</sup> 28 U.S.C. § 2467(d).

<sup>144</sup> *United States v. An Antique Platter of Gold*, 991 F.Supp. 222, 226 (S.D.N.Y. 1997).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 226–27.

<sup>147</sup> *Id.* at 226.

<sup>148</sup> The dealer who facilitated the sale of the Gold Phiale, Robert Haber, claimed that the incorrect nation of origin was actually the fault of the shipping agent who had hastily taken the information from the letterhead of one of the dealers who Haber had worked with to secure the sale. Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L. 197, 223 n.121 (2001) (citing Robert Haber, *The Steinhardt Phiale: a Trading History*, THE ART NEWSPAPER (London), June 1999, at 4).

<sup>149</sup> *An Antique Platter of Gold*, 991 F.Supp at 230–31.

<sup>150</sup> *Id.* at 226.

<sup>151</sup> *Id.* at 226–27.

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false statements.<sup>152</sup> The district court held that falsely listing both the country of origin and the value of the phiale were fatal flaws in a legal importation of the object.<sup>153</sup> The district court also found that the phiale was subject to forfeiture under 19 U.S.C. § 1595a(C) as a stolen good.<sup>154</sup> The Second Circuit affirmed the district court holding on the grounds that stating the wrong nation of origin was material,<sup>155</sup> but it declined to address the second ground for forfeiture under the National Stolen Property Act, 18 U.S.C. § 545.<sup>156</sup> The phiale was ultimately returned to Italy in 2000.<sup>157</sup> Subsequent events have confirmed the illicit origins of the plate. In December of 1998, Italian police raided a villa in Sicily connected to one of the looters of the phiale, and found 30,000 archaeological objects that were valued at \$35 million.<sup>158</sup> Italian officials at the time praised the arrest as a connection linking the ever-present problems of archaeological looting in Italy with the Mafia and organized crime.<sup>159</sup>

The phiale forfeiture shares a number of similarities with the Bronze. There was a prolonged Italian investigation, but a return was only secured with the help of assistance from federal authorities and the forfeiture action brought by the U.S. Attorney.<sup>160</sup> James Cuno, the current head of the Getty Trust, was very critical of the result in the forfeiture of the phiale, arguing that U.S. Customs agents were taking actions in opposition to Congressional intent.<sup>161</sup> However, Cuno's criticism failed to take into account that the United States signed a treaty with Italy, expressly requiring American officials to cooperate with these Italian investigations.<sup>162</sup> Given his strong criticism of Italian repatriation efforts in the past, the possibility of a negotiated repatriation of the Bronze may be unlikely now that Cuno is President of the Getty

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<sup>152</sup> *Id.* at 227.

<sup>153</sup> *Id.* at 230.

<sup>154</sup> *Id.* at 231–32 (citing *United States v. McClain*, 593 F.2d 658, 664–65 (5th Cir. 1979)). Professor Patty Gerstenblith has argued that that the Second Circuit “did approve the essential elements of the *McClain* doctrine,” and the court’s analysis “discredit[ed] the argument that *McClain* was preempted by [Congress] . . .” Gerstenblith, *supra* note 148, at 225.

<sup>155</sup> *United States v. An Antique Platter of Gold*, 184 F.3d 131, 132 (2d Cir. 1999).

<sup>156</sup> *Id.* at 134.

<sup>157</sup> *Ancient Platter Recovered*, N.Y. TIMES, Feb. 12, 2000, at A8.

<sup>158</sup> Mike Toner, *Buying, Selling, Stealing History*, ATLANTA JOURNAL CONSTITUTION, (Sept. 19, 1999).

<sup>159</sup> John Hooper, *Police in Sicily Suspect Mafia Link in Growing Theft of Ancient Treasures*, CLEVELAND PLAIN DEALER, Dec. 10, 1998.

<sup>160</sup> *An Antique Platter of Gold*, 991 F.Supp at 226–27.

<sup>161</sup> James Cuno, *U.S. Art Museums and Cultural Property*, 16 CONN. J. INT’L L. 189, 194–95 (2001) (arguing that U.S. Customs conflicted with Congress when Customs issued an information Notice pointing out Pre-Columbian objects were potentially violating the National Stolen Property Act in the wake of the *McClain* cases).

<sup>162</sup> See Jason Felch, *Antiquities Issue Rears Head With Getty Leaders Potts, Cuno In Place*, L.A. TIMES (Feb. 17, 2012), <http://articles.latimes.com/2012/feb/17/entertainment/la-et-getty-antiquities-20120217>.

Trust.

#### IV. FORFEITING CULTURAL OBJECTS FROM THE SOURCE NATION

If Italy is successful in using this transnational forfeiture technique for the return of the Bronze (and perhaps even if it is not successful), it will likely lead to other similar efforts from nations which have secured MLATs with the United States. This would provide another valuable tool for nations of origin seeking to repatriate looted cultural objects. It would in many ways rewrite the playbook of international cultural heritage law. Professor John Henry Merryman expressed the traditional view in the United States that the courts of one nation “will not enforce claims based on the public law (as distinguished from claims based on private rights, like ownership) of another nation.”<sup>163</sup> Professor Paul Bator, who assisted in drafting the 1970 UNESCO Convention, also pointed out that “illegal export does not itself render the importer (or one who took from him) in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.”<sup>164</sup> Both the Second<sup>165</sup> and Fifth<sup>166</sup> Circuits have endorsed Bator’s view of the general non-enforceability of export restrictions. Yet Bator did note that this general principle could be abrogated by a treaty or other act of Congress.<sup>167</sup> These MLATs and § 2467 have created just such an abrogation.

The policy and legal justification for non-enforcement of public law has been criticized. Professor James Gordley argues in a recent book chapter that this general prohibition makes for bad law and policy because it “too strictly construed the notion of territorial sovereignty,” and it also “too strictly construed the ownership right a foreign nation must have” in order to secure a successful repatriation.<sup>168</sup>

In the past, cultural heritage law has been hampered by a two-tiered system of enforcement. Nations have been successful in enlisting foreign courts to enforce national ownership declarations where nations are seeking the enforcement of an ownership right that resembles

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<sup>163</sup> John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 484 (1988).

<sup>164</sup> Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 287 (1982).

<sup>165</sup> *Jeanneret v. Vichey*, 693 F.2d 259, 267 (2d Cir. 1982).

<sup>166</sup> *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977) (“Professor Bator correctly states the law applicable to violations of export laws . . . [which] has been qualified by congressional statute and by treaties.”).

<sup>167</sup> Bator, *supra* note 164, at 287–88 (citing *Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals*, Pub. L. No. 92-587, §§ 201-205 (1972)).

<sup>168</sup> James Gordley, *The Enforcement of Foreign Law: Reclaiming One Nation’s Cultural Heritage in Another Nation’s Courts*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 110, 124 (Francesco Francioni & James Gordley eds., 2013).

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individual rights of ownership.<sup>169</sup> Yet export and other restrictions have not been enforced by courts absent a treaty or other obligation.<sup>170</sup> Professor Merryman's primary criticism of enforcing export restrictions has been that when an illegally exported object is returned to its nation of origin, it is merely a "transfer of ownership" to the foreign state.<sup>171</sup>

In 1983, the United States implemented the 1970 UNESCO Convention by creating a process for nations of origin to request that import restrictions be imposed in the United States.<sup>172</sup> The Cultural Property Implementation Act ("CPIA") set up a committee comprising members of the public, art market, archaeological community, and museums.<sup>173</sup> Successful nations must present a case to the Cultural Property Advisory Committee, which then makes a recommendation to the President to impose restrictions on certain imports. When these import restrictions are in place, customs officials will seize objects and return them to their nations of origin.<sup>174</sup> This mechanism has its own set of strengths and weaknesses, but one of the glaring weaknesses is that it has no real ability to remedy past illegal importation. Mutual assistance treaties would seem to offer a new set of circumstances under which objects can be returned both when a nation is unable to bear the expense of seeking import restrictions under the CPIA, and when an object is imported into the United States before any import restrictions are put in place.

Mutual assistance treaties are a vehicle for the enforcement of these public laws, and the relationships between the law enforcement agencies of nations of origin like Italy and the United States are deep and well developed. These laws subject cultural objects to much wider and deeper regulation than has previously been examined. This will have important consequences for objects that were taken from their nations illegally in the past, but perhaps is more important in considering objects that have recently surfaced as well. Museums and collectors would be wise to conduct thorough background searches for any new acquisitions (if they were not already) as the level of cooperation between market nations and nations of origins is

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<sup>169</sup> See, e.g., *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

<sup>170</sup> See *King of Italy v. De Medici Tornaquinci*, (1918) Ch. 34 T.L.R. 623 (holding that the Medici papers were to be returned to Italy on the grounds that they were owned by Italy, and refusing to return privately owned papers that had been illegally exported). See also *Attorney-General of New Zealand v. Ortiz*, (1983) H.L. 2 W.L.R. 809 (denying New Zealand's action to recover illegally-exported Maori carvings).

<sup>171</sup> Merryman, *supra* note 163, at 129–30.

<sup>172</sup> 19 U.S.C. §§ 2601–13 (2012).

<sup>173</sup> *Id.* at § 2605.

<sup>174</sup> See, e.g., *Immigration and Customs Enforcement, ICE Returns Stolen and Looted Art and Antiquities to Italy*, U.S. DEPARTMENT OF HOMELAND SECURITY (Apr. 26, 2012), <http://www.ice.gov/news/releases/1204/120426washingtondc.htm>.

increasing.<sup>175</sup>

In the United States, forfeitures are legal actions filed directly against an object. Forfeitures are derived from English common law, and are absolute restraints on the use of property irrespective of whether the current owner or possessor had any knowledge of the illicit acts that initiated the forfeiture.<sup>176</sup> At one time, forfeiture would not normally be proper until an offender had been convicted,<sup>177</sup> but the Supreme Court did away with this requirement, holding that it “never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the [e]xchequer. The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing . . . .”<sup>178</sup> Congress reformed forfeitures with the Civil Asset Forfeiture Recovery Act of 2000 (“CAFRA”).<sup>179</sup> The burden of proof was raised to a “preponderance” standard and an innocent owner defense was introduced.<sup>180</sup> In the 1990s, the federal government began to make extensive use of forfeiture as a tool to seize money and objects as part of the “War on Drugs.”<sup>181</sup> Once the object has been connected to a criminal offense, the behavior of the current possessor has no impact on the object’s disposition.<sup>182</sup> The rationale is based on the now-curious ancient belief that it is the object itself, not its current possessor, which has offended the law.<sup>183</sup>

Forfeiture actions have been used extensively in the United States in actions brought by U.S. prosecutors. They have involved many objects from source nations all over the world. An in rem civil forfeiture claim was brought under the Archaeological Resources Protection Act<sup>184</sup> by the United States in 1996. The objects were alleged to have

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<sup>175</sup> See Ralph Blumenthal & Tom Mashberg, *Ancient Cambodian Statue Is Seized From Sotheby’s*, N.Y. TIMES, (Apr. 4, 2012), <http://www.nytimes.com/2012/04/05/arts/design/ancient-cambodian-statue-is-seized-from-sothebys.html>.

<sup>176</sup> See *Waterloo Distilling Corp. v. U.S.*, 282 U.S. 577, 580–81 (1931).

<sup>177</sup> See *The Palmyra*, 25 U.S. 1, 9 (1827).

<sup>178</sup> *Id.* at 14.

<sup>179</sup> 18 U.S.C. § 983 (2012).

<sup>180</sup> *Id.* at § 983(d). For a discussion of the reforms introduced under CAFRA written by the then-Assistant Chief of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice, see Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates A Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 KY. L.J. 653 (2001).

<sup>181</sup> See, e.g., Matthew P. Harrington, *Rethinking In Rem: The Supreme Court’s New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL’Y REV. 281, 346 (1994).

<sup>182</sup> *J.W. Goldsmith, Jr., Grant Co. v. U.S.*, 254 U.S. 505, 513 (1921) (“It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental.”).

<sup>183</sup> The Second Circuit noted the idea could be traced to the origins of Western legal traditions according to Oliver Holmes, examining the Old Testament, Greek and Roman writings, and even Blackstone. *United States v. One Tintoretto Painting*, 691 F.2d 603, 606 (2d Cir. 1982) (citing OLIVER W. HOLMES, JR., *THE COMMON LAW* 7–9 (1881)).

<sup>184</sup> See 16 U.S.C. § 470gg(b) (2012).

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been looted from an archaeological zone in Rome and purchased by a company called “Antiquarium” in 1987 for \$24,500.<sup>185</sup> A default judgment was entered after no responsive pleading or motion was filed on behalf of the possessor of the objects.<sup>186</sup> And there are a staggering variety of other forfeited objects of cultural heritage:

- A manuscript which had been stolen from the Mexican National Archives;<sup>187</sup>
- *Doble Trinidad*, an 18th Century work of Colonial art from Peru;<sup>188</sup>
- an illicit Egyptian mask known as the *Ka-nefer-nefer*;<sup>189</sup>
- another Egyptian Sarcophagus;<sup>190</sup>
- a work of art stolen from a Museum in France in 1981 by Camille Pissarro titled *Le Marché*;<sup>191</sup>
- a work of art by Jean-Michel Basquiat and a sculpture of “unknown Mediterranean origin,” which were falsely listed as having values of only \$100;<sup>192</sup>
- pre-Columbian objects alleged to have been illegally exported from Guatemala;<sup>193</sup>
- a work of art titled *Portrait of Wally* by Egon Schiele taken from an art dealer during Aryanization in Austria;<sup>194</sup>
- another work, *Femme en Blanc* by Pablo Picasso, which had ties to Nazi-era spoliation;<sup>195</sup>

<sup>185</sup> Verified Complaint ¶¶ 1, 3, 6, *United States v. An Archaic Etruscan Pottery Ceremonial Vase C. Late 7th Century, B.C. and a Set of Rare Villanovan and Archaic Etruscan Blackware with Bucchero and Impasto Ware, c. 8th-7th Century, B.C.*, Located at Antiquarium, Ltd., 948 Madison Avenue, New York, N.Y., 10021, No. 96 CIV. 9437 (S.D.N.Y. Dec. 12, 1996) (on file with author).

<sup>186</sup> Default Judgment, *United States v. An Archaic Etruscan Pottery Ceremonial Vase C. Late 7th Century, B.C. and a Set of Rare Villanovan and Archaic Etruscan Blackware with Bucchero and Impasto Ware, c. 8th-7th Century, B.C.*, Located at Antiquarium, Ltd., 948 Madison Avenue, New York, N.Y., 10021, No. 96 CIV. 9437 (S.D.N.Y. Dec. 12, 1996) (on file with author).

<sup>187</sup> *United States v. An Original Manuscript Dated November 19, 1778*, No. 96 Civ. 6221, 1999 WL 97894 (S.D.N.Y. Feb. 19, 1999) (granting summary judgment).

<sup>188</sup> *United States v. Eighteenth Century Peruvian Oil on Canvas*, 597 F. Supp. 2d 618 (E.D. Va. 2009).

<sup>189</sup> *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA, 2012 WL 1094658 (E.D. Mo. Mar. 31, 2012).

<sup>190</sup> *United States v. One Ancient Egyptian*, No. 1:09-cv-23030 (S.D. Fla. Oct. 8, 2009) (on file with author).

<sup>191</sup> *United States v. Davis*, 648 F.3d 84 (2d Cir. 2011).

<sup>192</sup> *United States v. Painting Known as “Hannibal”*, No. 08 Civ. 1511(RJS), 2010 WL 2102484 (S.D.N.Y. May 18, 2010).

<sup>193</sup> *United States v. Pre-Columbian Artifacts*, 845 F.Supp. 544 (N.D. Ill. 1993) (U.S. Customs agents seized objects when they were imported into the United States in violation of the National Stolen Property Act, 18 U.S.C. § 2314–5).

<sup>194</sup> *United States v. Portrait of Wally, A Painting by Egon Schiele*, No. 99 Civ. 9940, 2002 WL 553532 (S.D.N.Y. 2002). See Carol Vogel, *A Schiele Going, a Schiele Staying*, N.Y. TIMES (May 5, 2011), <http://www.nytimes.com/2011/05/06/arts/design/schiele-work-being-sold-by-leopold-museum.html>.

<sup>195</sup> *United States v. One Oil Painting Entitled “Femme en Blanc” by Pablo Picasso*, 362 F.Supp.

- two other works that had been stolen by Nazis from the Polish National Museum;<sup>196</sup>
- a Tyrannosaurus skeleton, which had been placed for auction after having been illegally smuggled and stolen from Mongolia;<sup>197</sup> and finally
- a moon rock, retrieved during a NASA mission in 1973, given by President Nixon to the people of Honduras, and later stolen and imported into the United States.<sup>198</sup>

The law of forfeiture in the United States is well developed and stands as a powerful tool available for nations of origin (and original owners of stolen art).<sup>199</sup> This practice has been used with increased regularity, and if federal prosecutors take this step, these government attorneys have a number of advantages—most notably a favorable burden of proof.<sup>200</sup> The use of these forfeitures reflects an increased emphasis on returning objects to original owners and nations of origin, sometimes at the expense of criminal charges against individuals. But with the Italian forfeiture of the Bronze, this trend may move in a new direction. Nations of origin might decide to bring forfeiture actions at home, and take a final judgment to the United States where it may be enforced.

The Getty has maintained a consistent position with respect to Italian repatriation efforts. Even the Getty's publications of the Bronze reveal a deep refusal to ask about or even seriously consider the history of the Bronze. Jiri Frel, curator at the time the Bronze was acquired,

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2d 1175 (C.D. Cal. 2005).

<sup>196</sup> Verified Complaint, *United States v. One Julian Falat Painting Entitled "Off to the Hunt,"* No. 1:10-cv-09291 (S.D.N.Y. Dec. 13, 2010) (on file with author); Press Release, U.S. Attorney, S. Dist. of N.Y., *United States Seizes Two Julian Falat Paintings Stolen by the Nazis During World War II from the National Museum in Warsaw, Poland* (Dec. 16, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/December10/falatcivilforfeiturecomplaintpr.pdf>.

<sup>197</sup> *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760 (PKC), 2012 WL 5834899 (S.D.N.Y. 2012); *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760 (PKC), *default judgment*, 2013 WL 628549 (S.D.N.Y. Feb. 13, 2013); Ralph Blumenthal, *Dinosaur Skeleton to Be Returned to Mongolians*, N.Y. TIMES (May 5, 2013), <http://www.nytimes.com/2013/05/06/arts/design/dinosaur-skeleton-to-be-returned-to-mongolians.html> (The defendant has been convicted of smuggling the statue into the United States and reassembling it. The Tyrannosaurus has been slated for return to Mongolia.).

<sup>198</sup> *United States v. One Lucite Ball Containing Lunar Material*, 252 F.Supp. 2d 1367, 1379 (S.D. Fl. 2003) (noting customs seizures are exempted from the innocent owner defense under CAFRA).

<sup>199</sup> See Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 621–29 (2007).

<sup>200</sup> See Jennifer Anglim Kreder, *Executive Weapons to Combat Infection of the Art Market*, 88 WASH. U. L. REV. 1353, 1361 (2011) (“Most people would agree that we generally should allow possessors of property facing forfeiture to the government to demonstrate that they were bona fide purchasers . . . . But when it comes to stolen art in the civil context under our law, bona fide purchaser status does not matter much.”).

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wrote a publication on the work and begins with the puzzling question and answer: “The first question everyone asks is where does the statue come from? The statue speaks for itself.”<sup>201</sup> Very little has changed with respect to the Getty’s position since. In an email exchange with Julie Jaskol, the Assistant Director for Media Relations at the Getty, the Getty responded when asked about the Bronze with the following:

After dismissing the case in 2007, a court in Pesaro, Italy, has found that the Getty Museum’s Victorious Youth is subject to forfeiture under Italian law. The court declined to hear any relevant witnesses offered by the Getty, and did not consider many of the documents that were offered to rebut the findings of the Italian prosecutor. The Getty believes that there is no authority for this decision on the facts or under applicable Italian law and has appealed the matter to the Court of Cassation in Rome. The appeal is still pending.

Unlike objects belonging to the Italian state by virtue of being found in Italian soil, the Getty Bronze is of Greek origin and spent centuries at the bottom of the Adriatic Sea before being accidentally found in international waters by fishermen in 1964.

No Italian court has ever found any person guilty of any criminal activity in connection with the possession, export, or sale of the statue. To the contrary, more than four decades ago, the Court of Cassation held that the ownership of the statue by the original owners “did not constitute a crime.”

Italian courts have repeatedly rejected the case for Italian ownership: In 1968, the country’s highest court reversed the convictions of several Italian citizens who purchased the statue because there was no evidence that the object belonged to Italy.

As we have said previously, we are confident that the Getty is the legal owner of the Statue of a Victorious Youth and we will defend that position vigorously.<sup>202</sup>

There certainly should be limits on the circumstances under which objects should be returned to their nation of origin. However, the Getty in this statement has refused to acknowledge the role that it played in financially supporting the smuggling of cultural heritage. These arguments do not respond well to the substantive arguments raised by Italy and the forfeiture action. Though the Getty here claims that the objects should not be repatriated because no individual has been convicted, this flies in the face of typical forfeiture practice. These actions are instituted to target the financial or other incentives behind criminal activity when prosecuting individuals is impossible or impractical. Such was the case here with respect to the Bronze. Italian officials brought a number of criminal actions against the smugglers of

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<sup>201</sup> FREL, *supra* note 57, at 4.

<sup>202</sup> E-mail from Julie Jaskol, Assistant Director, Media Relations, Getty Trust, to Author (June 10, 2013) (on file with author).

the Bronze, but were unable to meet their burden because the location and description of the Bronze was unknown. Indeed, we should remember that J. Paul Getty was unwilling to acquire the Bronze during his lifetime without certain guarantees from Italian officials.<sup>203</sup> The Getty seems defiant in the face of the forfeiture, and it will be interesting to see just how useful the MLAT process will be for Italian officials, and how the Getty will respond to the use of the Treaty. Similar treaties have been concluded with every other European nation, so any American museum with a potentially illicit object of cultural heritage should be watching the development of this dispute closely. Yet there is a risk here for nations of origin as well: if they are undisciplined about the use of the MLAT process, they may stir up controversy and create a backlash against the use of this international cooperation.

If these actions are used more extensively, there are a number of potential questions that need to be considered by policy makers. What kinds of decisions will be enforced under MLATs? Will they include administrative tribunals? What about officials acting in a judicial or quasi-judicial capacity? When does a foreign judgment “end” for the purposes of assistance? Will the assistance include arbitration? And, perhaps most importantly, how much assistance from Executive Branch agencies does the assistance compel?

There may also be problems with disparate treatment if an object originating in the United States is smuggled abroad. There may be a situation where a court in the United States assists in a foreign forfeiture and yet if the corresponding case occurred, where a foreign court was asked to enforce an American forfeiture, the peculiar nature of federal forfeiture practice, which is in rem, may lead to difficulties and could produce unfair and unequal treatment. If the use of these forfeitures continues, international conventions may be needed to harmonize practice.<sup>204</sup> In the past, international forfeitures were governed on an ad hoc basis.<sup>205</sup>

Italy must also be mindful of substantive criticism that it will likely face with respect to other cultural objects on display. Many critics point out that when a push is made for repatriation, a nation with such rich heritage like Italy will always struggle with the cost and difficulty of managing the objects that it *does* have in its museums and

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<sup>203</sup> See Neil Brodie & Blythe Bowman Proulx, *Museum Malpractice As Corporate Crime? The Case of the J. Paul Getty Museum*, J. CRIME & JUST. 1, 11 (2013) (arguing “[t]hat the Getty . . . routinely purchased trafficked antiquities for its collection suggests an organizational culture of tolerance if not approval of malpractice.”).

<sup>204</sup> See Bruce Zagaris & Elizabeth Kingma, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 EMORY INT’L L. REV. 445, 448.

<sup>205</sup> See, e.g., Consult. Ass., *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds From Crime*, (Nov. 8, 1990), reprinted in 30 I.L.M. 148 (1991).

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storehouses. One example is the Riace Bronzes. These sculptures date from the fifth century B.C.E. They were found off the Calabrian coast in the 1970s, and were one of the most important archaeological discoveries of the last century, much like the Getty Bronze.<sup>206</sup> The Bronzes were displayed all over Italy in 1980 when they went on a national tour, and were later sent to Calabria where they were on display until 2008. They underwent extensive conservation involving chemical, laser, and electromagnetic tests to help understand the origin of the statue. During this study and conservation, visitors were able to view the ancient masterpieces behind a custom-designed glass enclosure to watch the work being conducted. But in 2009, the ultimate home for the Bronzes, the Calabrian museum, was closed for renovation and the Bronzes were transferred to the local council offices. There have been persistent delays in the completion of the museum renovations,<sup>207</sup> due partly to funding, but also due to disagreement between the Ministry of Culture and the local Soprintendenza that runs the museum over its final layout.<sup>208</sup> Giovanni Puglisi, president of the Italian National Commission for UNESCO, has criticized the failure to display these ancient masterpieces, calling it “an absolute disgrace.” The Bronzes had effectively been “abandoned for over 1,290 days in the headquarters of the Calabrian regional council because of the ongoing restoration work at the museum.”<sup>209</sup>

## CONCLUSION

It remains to be seen what the final result in the repatriation effort for the Bronze will be. But even if Italian officials and concerned residents of Fano are unsuccessful, a new potential legal tool has emerged. At the very least, nations of origin may consider initiating forfeiture actions domestically to secure the return of looted or stolen objects. The relationships between prosecutors and law enforcement officials are becoming deeper and better developed in pursuit of other organized criminal networks such as drug trafficking, financial crimes, and terrorism. These tools that nations have created for their collective policing will of course be used for other crimes. As a consequence, cultural heritage lawyers may need to shift their focus away from trying

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<sup>206</sup> *Riace Bronzes to Return Home Later This Year*, ANSA ENGLISH (Aug. 14, 2012), [http://www.ansa.it/web/notizie/rubriche/english/2012/08/14/Riace-Bronzes-return-home-later-year\\_7342168.html](http://www.ansa.it/web/notizie/rubriche/english/2012/08/14/Riace-Bronzes-return-home-later-year_7342168.html).

<sup>207</sup> Silvia Mazza & Ermanno Rivetti, *Riace Bronzes Languish in Limbo*, THE ART NEWSPAPER (Oct. 7, 2012), <http://www.theartnewspaper.com/articles/Riace-Bronzes-languish-in-limbo/27347>.

<sup>208</sup> *Id.*

<sup>209</sup> *Italy Has “Abandoned” Riace Bronzes, Says UNESCO Official*, ANSA ENGLISH (July 8, 2013), [http://www.ansa.it/web/notizie/rubriche/english/2013/07/08/Italy-has-abandoned-Riace-bronzes-says-UNESCO-official\\_8994442.html](http://www.ansa.it/web/notizie/rubriche/english/2013/07/08/Italy-has-abandoned-Riace-bronzes-says-UNESCO-official_8994442.html).

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to develop laws designed specially for art and antiquities; they may discover that the tools they are looking for have already been created. And the means to repatriate and target the financial incentives for dealing in illicit cultural heritage are already here, waiting to be used.