

REPUBLIC OF ITALY

Request for Renewal of Import Restrictions on Certain Cultural Materials

Comments of William G. Pearlstein¹
to
Cultural Property Advisory Committee

September 8, 2005

Four Significant Obstacles to Renewal of the Italian Restrictions in their Current Form

- The US market in Italian antiquities is currently limited to provenanced objects. No fresh material is offered on the auction market or by the visible dealers. None is accepted for consignment by auction house and none is acquired by gift or purchase by US museums. Has Italy already won the war against site looting? If so, the restrictions should be relaxed.

“We’ve caught many of the biggest smugglers...The real problems today are elsewhere—Peru, Guatemala, Asia.” Colonel Ferdinando Musella, operations chief of Italy’s Comando Carabinieri Tutela Patrimonia Culturela, ARTnews, October 2002, page 129.

“The fact that seven of the eight countries, including Italy, that responded concluded either that the unlawful movement of cultural property has not grown worse or has decreased since 1993 is in dramatic contrast to the constant claims in source countries that the illegal movement of works of art is on the rise.” (Page 13, Report of May 2000 by the Commission to the European Union’s Council, The European Parliament and the Economic and Social Committee on the effectiveness of The European Council Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State of the European Union and of a Council Regulation requiring EU export licenses.)

“Art thefts in Italy reported in 2004 were 1,190, mainly from collectors and churches...The figures were disclosed today by the commander of the Carabinieri

¹ William G. Pearlstein is: Counsel to Golenbock Eiseman Assor Bell & Peskoe LLP, New York, N.Y. 10022; (212) 907-7385; wpearlstein@golenbock.com. Northwestern University School of Law (J.D., 1984), Notes and Comments Editor, Journal of International Law & Business; Lowden-Wigmore Prize for Student Writing; Yale University (B.A. English, 1979 *cum laude*). Former member: New York City Bar Association-Art Law Committee, ABA Cultural Property Subcommittee. Publications: Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market, 28:1 GEO. J. LAW & POL’Y IN INT’L BUS. (1997); *Jeanneret v. Vichey*, Sales of Illegally Exported Art Under the Uniform Commercial Code, 6 NW. J. INT’L LAW & BUS. 275 (1984); Art, Culture & the National Agenda; Preserving Our Heritage; Center for Arts and Culture (Nov. 2001) (contributing author); Cultural Property, Congress, the Courts and Customs, *Who Owns the Past?*, American Council for Cultural Policy, Rutgers University Press 2005.

unit for cultural heritage safeguard, col. Ugo Zottin, who did point out that ‘the trend seems to have dropped in the past 3-4 years.’...Thieves seem to have a preference for paintings and furniture.” Agenzia Giornalistica Italia online—News in English, February 23, 2005.

- Restrictions can apply only to “culturally significant” objects that are currently being looted. (e.g., CPAC’s 2000 Report mentions Apulian vases and Etruscan tomb finds). In other words: *import restrictions should be applied selectively, not indiscriminately.*
- Italy has failed to perform its treaty obligations and or to satisfy the recommendations in CPAC’s Report of February 7, 2000 regarding museum loans, de-accession of redundant objects and liberalized grant of export permits.
- There has been no “concerted international response” under UNESCO because no other significant market nations have imposed “similar import restrictions”. Unless Italy persuades one or more of the other significant market nations (such as the UK or Switzerland) to impose comparable import restrictions within a reasonable period, US restrictions should be allowed to lapse.

Policy Goals Underlying the Convention on Cultural Property Implementation Act

The Act requires a balance between the need to protect archeological context and to allow the lawful circulation of objects out of context. It assumes a continuity of interest among archeology, art history and the fine arts. These policy goals are reflected in statements by the key U.S. drafters of the Act:

“Today, the essence of the U.S. position is that we should cooperate with foreign countries to put some limitation on the illicit traffic in cultural property, and that we should seek actively to encourage these countries to liberalize their legislation where it unduly restricts the international circulation of cultural property. We place a high value on the international movement of cultural property.”

(Comments of Mark B. Feldman, Deputy Legal Advisor for the United States Department of State, Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention, 4 Syracuse Journal of International Law and Commerce 97 (Summer 1976), at 122.)

- Instead of embracing Italy’s policy of state ownership (a relic of the Mussolini era), CPAC and the State Dept. should be pushing Italy to liberalize its export controls where to do so would compromise neither the archeological record nor Italy’s cultural patrimony. Japan and the UK have developed successful systems for managing their cultural heritage; these models should be emulated. State ownership of cultural heritage is, as in other things, a failed model that should be discouraged. (The American Association of Museum Directors recently recommended that China consider adopting aspects of the Japanese system.)

1. *The Request Includes Categories of Objects That Are Not “Archeological Materials.”*
Only “Archeological materials” may be designated for restriction.

“Archeological materials” are defined to include only the following (Section 302(2) of Convention on Cultural Property Implementation Act):

- any object of “archeological interest” that (i) was first discovered in Italy; (ii) is “subject to export control” by Italy; (iii) is at least 250 years old; (iv) is “normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water”; and (v) is “culturally significant.”

The “*cultural significance test*” is critical to the legislative intent behind the Act, which is to restrict demand for “culturally significant” objects that are “in jeopardy of pillage.”

- The archeological view is that all objects discovered in context have potentially equal value to the archeological record. Thus any object that is part of the archeological record is “significant” and the significance of all objects in context is assumed. This view makes the term “culturally significant” irrelevant to the analysis under the Act.
- But the Act requires a more critical analysis of the categories of objects that may be restricted.
- The existing restrictions cover every category of cultural property from the 9th century BC through the 4th century AD and encompass every conceivable object falling within these broadly described categories of cultural property (including “knickknacks”).
- Compare the scope of the restrictions with statements in the Senate Report that accompanies the Act and by the key U.S. personnel involved in drafting the Act:

“The Committee intends these limitations to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, *U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other nations.*” U.S. Senate Report, 97-564.

“I think ... that it’s quite *unlikely* (unless you have a completely runaway [Executive Branch] ...) *that*

this statute can be converted into a general embargo on all ancient art.” Paul M. Bator, Head of US Delegation to UNESCO).

“We were not prepared to give the rest of the the world a *blank check* [emphasis added] in that we would not automatically enforce, through import controls, whatever export controls were established by another country.” (Mark Feldman; Chief State Dept. Negotiator)

“The power to place import controls on art was seen as an extreme and dangerous step to be used only in cases of great necessity. The power is *not* to be resorted to as a generalized way of dealing with the fact that a large amount of illegal art goes out of a lot of countries. ... the mere fact that a large amount of illegal export goes on should not trigger this legislation. *There really has to be some specific showing that illegal export is destructive to some important category of art.*”(Paul Bator)

The Senate Report states that the Act “reflects the approach to illicit trade in art adopted by the Congress in the Pre-Columbian Art Act of 1972...with regard to a particular category of artifacts.” The Pre-Columbian Art Act limited import restrictions only to specific categories of monumental art and related architectural elements.

Meredith Palmer, a former State Department employee who was heavily involved in the drafting and early operation of the Act, states that the State Department understood at the time that the Act was meant to apply only to significant categories of art and not to every object potentially found in the ground.

- *Key question:* how to determine the “cultural significance” of an object or category of objects.
- The Act does not define the term “cultural significance.” The Act leaves this subjective determination to the discretion of the Committee, whose members either personally have the necessary specialist knowledge, or can obtain the advice of specialists in the field based upon the facts and circumstances of Italy’s request.

- Suggested factors relevant to this determination include the following:

Is the archaeological record relating to the category of artifact to which the object belongs well-developed?

Is the art-historical record relating to the category of artifact to which the object belongs well-developed?

Was the object mass-produced or is it rare?

Is the object specific to a limited number of sites or are comparable objects and sites geographically dispersed?

Are comparable objects well represented in Italian, U.S. and foreign museums?

Are comparable objects available on the internal Italian market and on the international market?

- This determination does *not* depend solely on art historical or esthetic values.

2. Italy has not Satisfied CPAC's Recommendations or Performed its Treaty Obligations

The recommendations of CPAC in its Report dated February 7, 2000 are consistent with the Act's policy goals.

“This is a truly unique opportunity to progress the agenda of the protection of cultural heritage in ways that are more contemporary and innovative at times when so much of the cultural patrimony is under threat from so many circumstances apart from looting, and new mechanisms have to be found not only to protect [cultural patrimony] but to finance the protection.” CPAC Report at 24.

Findings Related to an Agreement--Determination (4).

- Include unanimous recommendations for “long term loans from Italian to U.S. museums; ***issuing more export permits for licit archeological materials to drive the illicit market out; offers to sell duplicate archeological materials;*** ... and better protection for existing archaeological sites and museums.”

Recommendations for an Agreement--Measures to Increase Accessibility.

- Express “the desire to see increased access to Italian cultural artifacts through extended loans, exhibitions, facilitation of legal export of antiquities and state-approved sales of redundant artifacts in Italian museums.” CPAC suggestions include:

- Change legislation regarding the temporary export of cultural patrimony to provide for extended loans (to 10 years) to foreign museums.
- De-accession part of museum reserves and, give, exchange, or sell them to other museums world-wide as study collections.
- Encourage the de-accession of the large number of similar or duplicate artifacts in museum reserves and allow the deaccessioned items to be sold on the open market.
- Revise Italian export law to make it easier to export archeological items legitimately sold within Italy and speed up the system for obtaining export certificates.

Evaluate Italy's Performance

CPAC is obligated to evaluate whether Italy has performed its obligations under the 2001 Agreement and CPAC's February 2000 Report.

Is Italy satisfying its obligation to make long term museum loans? (Article II.E)

- Reports that Italy has threatened to withhold loans unless U.S. museums agree to Italy's restitution claims.
- Whatever the merits of Italy's restitution claims may be, the extension of import restrictions should take into account Italy's commitment to long-term loans without regard to the outcome of Italy's restitution claims against particular U.S. museums.
 - ARTnews article (October 2002). (Enclosed with Pearlstein letters to CPAC of May/June 2004).

Is Italy granting a meaningful number of export certificates and has it rationalized its export certification process? (Article II.F)

- No.
- The archeological resistance to a state-licensed market in de-accessioned, redundant objects is unpersuasive. Auction records show that provenanced objects always command a significant premium over unprovenanced objects, which may simply be marketable. *Per CPAC's Report, the goal should be to issue "more export permits for licit archeological materials to drive the illicit market out."*

Has Italy improved its efforts to protect its archeological sites? (Article II.B)

- Continued concern at reports of destruction of archeological resources from construction and development. CPAC should evaluate the efficacy of Italy’s efforts at site preservation and museum conservation.

3. *No Multi-National Response by Other Important Market Nations.*

- “The concept that U.S. import controls should be part of a concerted international effort is embodied in article 9 of the Convention and carried forward in section 203. In previous years’ consideration of various proposals for implementing legislation, a particularly nettlesome issue was how to formulate *standards establishing that U.S. controls would not be administered unilaterally.*” Senate Report at 27.
- The requirement for a “*concerted international response*” is only satisfied if US restrictions “will be applied in concert with similar restrictions implemented or to be implemented by those nations individually having a significant import trade in such materials.” Section 303(a)(1)(c)(i).
- It is *not* satisfied if the other significant market nations are simply parties to the UNESCO Convention. The legislative history is clear: Congress considered and rejected this argument before passing the Act.
- The UNESCO Convention itself provides that a State Party’s signature to UNESCO is not enough. UNESCO is not “self-executing” with respect to import controls. Instead Article 9 of the UNESCO Convention requires State Parties:

to undertake to participate in a concerted international effort to determine and to carry out the *necessary concrete measures*, including the control of exports and imports and international commerce *in the specific materials concerned*. [emphasis added.]

- The UK, France, Belgium, Spain, Germany, Holland, Sweden, Canada and Australia are all significant markets for Italian objects. US market experts believe that the combined size of these other markets is greater than that of the US market. Yet no other party to UNESCO has signed an agreement with Italy restricting the import of cultural materials. The UK and Switzerland have acceded to UNESCO but have not yet passed implementing legislation.
- The largest recent sale of Italian antiquities was to a Spanish museum for approximately \$12 million.
- The existence of general, non-specific customs regulations, passively enforced, is not a substitute for “similar import restrictions,” selectively

targeted at specific categories of archeological materials and backed by active Customs enforcement.

- European Community Report state that the Member States of the European Community have simply failed to enforce applicable customs regulations. See Reports enclosed with Pearlstein letters to CPAC of May 21 and June 21, 2004.

One example of a failure to act on rights articulated in the Directive is that the “*cooperation between authorities both at the national and Community level has not taken any practical shape.*” Again, it is disappointing that in an area of such importance, the respective Member States have not yet set a high priority for intra-European government coordination. (Page 13).

- The existence of criminal laws in the UK narrowly aimed at looted materials is not a substitute for “similar import restrictions” aimed at broad categories of unprovenanced (but not necessarily looted) objects.
- “This exception allows the President, once he has identified the significant importing nations the participation of which ordinarily would be expected to comprise a concerted international effort, to enter into agreements *without the participation of all such nations*. The essential nature of a concerted international effort is thus preserved, while the president is allowed to move forward *without the full participation* of nations the contributions of which are not essential to amelioration of the problem.” Senate Report at 28.
- In the complete absence of a formal multinational response by any other significant market nation, unilateral US restrictions can not be imposed.²

² Restrictions could be imposed in the absence of “similar restrictions” by one or more significant market nations only if the Committee determines that US restrictions, together with similar restrictions by one or more other significant market nations would have a “substantial benefit” in deterring looting. Section 303(c)(2).