

**The “Grand Compromise”:  
A Hybrid Approach to Solving the Problem of Looted Art**

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Let me begin by thanking Friedrich Schipper for organizing this important meeting and for inviting me here to speak, especially since my topic today—proposing a new, hybrid solution to the problem of looted art--does not exactly fall under the call for papers. In the call, Prof. Schipper said that “the purpose of this session is to ascertain the international status quo [*scil.*, regarding the UNESCO convention of 1970 on the means of prohibiting and preventing the illicit import, export, and transfer of ownership of cultural property]... The focus will... be put on the legal situation in Austria, Germany, and Switzerland. In addition, inside reports from the USA and Turkey will widen the view.” As you will see, although I firmly believe in the need for more countries to ratify the UNESCO convention, I do not think that this will, in itself, bring us any closer to a solution of the problem of making the black market in illicit art shrink to the vanishing point. It is the thesis of this paper that a more complex attack on the problem is needed.

But let me begin by making one thing clear: my own personal view is that, along with the Hague Conventions of 1907 and 1954, the Roerich Pact of 1935, and the UNIDROIT Convention of 1995, the UNESCO Convention of 1970 represents a landmark in international legal thought about the status of cultural property.<sup>1</sup> Through these agreements, the problem of looted art was addressed first in time of war, then during periods of peace. They expanded the protection of international law from works of art owned by governments to those owned by private parties. These were all critical steps forward from the principle of *vae victis* that had dominated the world scene for millennia.

Equally important is the advance of ethical thought in this area as typified, in the USA, by the “Four Statements for Archaeology” issued by the Society of American Archaeology in 1960,<sup>2</sup> the Philadelphia Declaration of the curators of the Museum of the University of Pennsylvania of 1970,<sup>3</sup> and by the Codes of Ethics adopted by the Society of Professional Archeologists in 1976<sup>4</sup> and by the Archaeological Institute of America in 1990.<sup>5</sup> As a member of the latter organization, I would like to quote the following important principle in the Code:

Members...should...refuse to participate in the trade in undocumented antiquities and refrain from activities that enhance the commercial value of such objects. Undocumented antiquities are those which are not documented as belonging to a public or private collection before December 30, 1970, when the ...Archaeological Institute of America endorsed the UNESCO Convention on Cultural Property....

Finally, I also applaud two important organizations that have recently come into existence to confront the problem of looted art: Saving Antiquities for Everyone (SAFE), about which Samuel Paley will speak at this session; and the Illicit Antiquities Research Centre of the McDonald Institute at Cambridge University. The distinguished archaeologist, Colin Renfrew, was instrumental in creation of the IARC and he has fought the good fight against looted art through publications such as *Loot, Legitimacy and Ownership*, a book published in 2001,<sup>6</sup> and through legislation in the British House of Lords, most notably a proposed law that would have restored the Elgin Marbles to Greece in time for the 2004 Olympic Games. Unfortunately, Lord Renfrew’s proposal was not adopted into law and the marbles remain in London.

But much as I appreciate these efforts and achievements, I speak to you today because I do not think they are adequate to meeting the problem of looted art. After working for over 30 years in several universities in the USA and in Europe, I have observed that in academic politics there are just two political parties: the normatists and the pragmatists.

The normatists--as the name implies--are great believers in norms and in explicit codes of conduct, standards of achievement, and the like. Their favorite verbs are “should” and “ought.” Rather than compromise on their beliefs, they would rather wring their hands and lament the hypocrisy of mankind in failing to live up to its beliefs. Pragmatists, on the other hand, care more about results than principles. They would rather get the job done than lament the sins and foibles of their fellow man. Personally, I like to think that the best approach to solving any problem combines the best of both approaches: the high ethical principles of the normatists applied to the case at hand in an effective, which is to say pragmatic, way.

I think that the matter of illegal excavation of archaeological sites and the massive looting of ancient cultural and religious monuments also lends itself to this kind of hybrid solution, even though it is hardly a harmless issue of university politics but a global scandal of apparently growing dimensions. I say “apparently growing” because, of course, no one knows the exact size of the black market in art looted from source countries in the Mediterranean, South America, Africa, and the Middle East, but a recent estimate puts the annual trade at between \$2 billion and \$6 billion.<sup>7</sup> My claim is that, up to now, the world’s approach to this problem has been entirely normative. This is as it should be: we first need the vision to define our ethical standards and to convert those standards into law. In taking this first, normative step toward solving the problem of looted art, humanity is well along the road to the highly desirable goal of achieving a worldwide legal regime governing cultural property. Let us hope that, partly as a result of this session, Austria and Germany soon join the USA and many other countries in signing the UNESCO convention of 1970.

But let us not deceive ourselves: the normative approach alone has not been working and will not work. As Neil Brodie and David Gill of Cambridge’s IARC recently wrote: “codes of practice for auction houses and dealers in antiquities do not seem to work... The problem of legislation in what is now an international issue... requires a change of approach.” This assessment is shared by Julie Hollowell-Zimmer, who recently wrote,

“most people agree that, in spite of new laws, treaties, and enforcement strategies, the overall situation is worse today than it ever was.”<sup>8</sup>

But Brodie, Gill, and Hollowell-Zimmer are classic normatists, as is Lord Renfrew. Although they perceive the need for a change of approach, they fail to offer anything other than declarations, such as the Cambridge Resolution of 1999, which, however well-intentioned has done nothing to stop the traffic in illicit antiquities.<sup>9</sup>

If we ask why the problem is getting worse, not better, then I would suggest that it is less a result of an absence of laws and codes of ethics, still less about a lack of awareness of the problem and resultant need for more public education.<sup>10</sup> The key point is that we lack a pragmatic solution that can complement the normative approach that has been dominant thus far. The ethical codes and laws developed by the world community are an essential part of the solution; strict enforcement of these norms is another; raising public consciousness about the problem and about the relevant principles and laws is yet another. But there is still something else that is missing before we can begin to shrink the black market in looted art: we must not only make it a violation of the law to traffic in looted art, *we must make it unnecessary and uneconomical to do so*, at least for the overwhelming majority of institutions and individuals who wish to collect archaeological artifacts. How might this be done?

There are four key principles on which a pragmatic approach might be based. These are:

*First*, that cultural property should be widely shared among peoples and nations;

*Second*, that we must make *borrowing* of cultural property an alternative to *ownership*;

*Third*, that curiosity about the past is natural and desirable; it cannot be suppressed;

*Fourth*, that open markets are more efficient than black markets.

The first principle of *sharing* is to be found at the beginning of the UNESCO convention of 1970, which states: "...the *interchange* of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations." We should not forget this principle of the 1970 charter as we try to achieve its goal of ending the market in looted art. Indeed, as you will see, I think that we need to focus more attention on how "the interchange of cultural property" might be facilitated precisely because a freer interchange will help to dry up the illicit traffic in art.

The second principle of *borrowing* as an alternative to ownership is embodied in the solutions successfully applied this year by the Italian Ministry of Culture in resolving the cases of looted art in American collections such as the Metropolitan Museum and the Boston Museum of Fine Arts. In settling these cases, the US museums agreed to return some 34 disputed works of art in return for being able to borrow an equal number of works of similar quality for long-term exhibition at some time in the future.<sup>11</sup> Thus, the issue of ownership was resolved in favor of the source country—in this case, Italy—but the foreign museums were compensated for their previous investments by in effect becoming the borrowers rather than owners of other works of art from the source country.

The second principle is important but will, at best, help to settle the many outstanding ownership disputes that have accumulated in the past century since the passage of what has aptly been called "retentive" national laws on cultural property by source countries such as Greece, Italy, and Turkey.<sup>12</sup> But the principle of borrowing rather than ownership does not tell an individual or institution how to *increase* the size of an art collection. Here we encounter the third principle of *curiosity*, a constituent element of what it means to be human and, as Albert Einstein once remarked, something to be cherished and encouraged, not suppressed.<sup>13</sup> The earliest collectors in modern times were motivated by this drive to form their curiosity cabinets for reasons explained by Leibnitz in a famous letter to Czar Peter the Great.<sup>14</sup> Today, a pragmatic approach to the problem of looted antiquities must start from the assumption that human curiosity about the past cannot, and

should not, be stopped. We must rather try to channel the energy and resources that flow from this perfectly normal desire to discover and collect antiquities into responsible exploration by professional archaeologists and legitimate collection building by ethically aware individuals and institutions.

At the present time, this is not the case: instead of having a great deal of responsible archaeological exploration and legitimate collection building with just a small amount of illegal digging and trafficking, we have the reverse. From an economic point of view, this is hardly surprising. In the liberal nineteenth century, it was possible for a museum like the Louvre or British Museum to send an archaeological expedition to a source country like Italy, Greece, or Turkey and bring back spectacular finds; and it was possible for an individual collector to buy, for example, an Etruscan funerary urn in a store in the middle of Chiusi in Tuscany. By the early twentieth century, countries from Turkey to Guatemala had replaced such liberalism with “retentive” laws and claimed ownership of all cultural property within their borders. Besides making it illegal for their citizens to sell antiquities found on their land, these laws removed the incentive that foreign collectors had had in the nineteenth century to sponsor new excavations. As the economist Jeremy Bertomeu has recently written:

When price regulations or capacity constraints distort free markets, illegal resales naturally arise in an attempt to reap the benefits of the supply gap. Bootleggers trade off between the benefits of [breaking the law] and the risk of legal liability. As a direct consequence, high and persistent distortions to the market necessarily induce an active underground economy.<sup>15</sup>

This brings me to the fourth principle of *economics*: open markets are more efficient than black markets. Ironically, this is as true for the black marketeers themselves as for the collector. As Watson and Todeschini recently showed in *The Medici Conspiracy*, the *tombarolo*, Giuseppe Evangelisti, earned on average just \$88 for the objects such as Greek vases or Etruscan and Roman statues which he illegally excavated near his home north of Rome. But similar objects sold at auction in London for an average of \$830,

about ten times as much; and some of them sold at the shop of a high-end London dealer such as Robin Symes for \$5,000, or 60 times as much.<sup>16</sup>

For collectors, the inefficiency is, of course, much, much worse, although the public rarely is privy to the details of how much a museum has paid for a dubious acquisition. One exception is the bronze statue of a youth, attributed to Lysippus, in the collection of the J. Paul Getty Museum (fig. 1). It was the subject of intense legal scrutiny in Italy in the 1970s, and so some hard figures are on record. We know, for example, that the 18 fisherman who found the statue while fishing in the Adriatic Sea off the coast of Fano in 1964 were each paid \$220 for their valuable “catch.” We are informed that the Getty paid \$3.9 million for the statue in November 1977. The “markup” caused solely by the black market was hence almost exactly a thousandfold.<sup>17</sup>

Of course, the true disadvantage to the collector caused by the black market goes beyond the price of the objects he purchases. Even worse, he usually does not know the exact provenance of the object in his collection, thus depriving him of the information that would be needed to date and interpret it;<sup>18</sup> and, worst of all, he cannot even be certain that the object is authentic and not a fake. So the “retentive” legal regime that dominated the source countries in the twentieth century has guaranteed the worst of all worlds: the source countries themselves have been plagued by the black market, causing criminality and lack of respect for the law among their citizenry; and individual and institutional collectors have been forced to pay ridiculously inflated prices for works of unknown context, some of which have even turned out to be fakes, or suspected to be so. For an example of the latter, we may once again cite the J. Paul Getty Museum, which has admitted that a piece in its collection—the Getty Kouros (fig. 2)—might or might not be an authentic work of the archaic period of Greek art.<sup>19</sup> As former Getty curator Marion True wrote, “the problem of the authenticity of the Getty kouros is an issue for our entire discipline. Do we include this statue in the corpus of known ancient *kouroi*, or do we relegate it to the growing class of masterful forgeries, created intentionally to deceive?”<sup>20</sup> This is a strange question for a museum curator to have to ask after reportedly paying \$10 million for the work in question!

How might the four principles be applied?

If only *ownership* could be separated from *possession*, then museums in countries like Austria or the USA might be able to make a deal with source countries like Greece and Italy such that, in return for sponsoring excavations, the museum would be able to borrow and exhibit a certain percentage of the finds, leaving the rest in the country of origin. Over time, all the finds from a site could be exchanged on rotating basis between the country of origin and the museum, with all expenses borne by the sponsoring museum (see fig. 3). The country of origin would *own* all the finds, as is the case today. This arrangement could continue indefinitely, as long as the sponsoring museum continued to bear all the expenses.

Of course, there is no guarantee when a site is excavated that works of art will be found, let alone objects that are of museum quality. My proposal foresees a solution to the problem that no foreign museum would willingly agree to invest several millions of dollars in an excavation in the hope of finding new great works of art: the sponsoring museum should make a partnership with a source-country museum, which I call the “host museum.” There are two reasons for suggesting such a partnership. First, the host museum would be the place where any new works of art found by the excavation would be displayed in the source country when not on display in the sponsoring museum. Secondly, if, by the end of the excavation, a sufficient number of new works of art had not been found to justify the foreign museum’s investment, the host museum would compensate the sponsoring museum by lending it pieces in its own collection for short-term exhibitions in the foreign museum. This latter feature serves as a kind of insurance policy for the sponsoring museum.

Of course, individuals as well as institutions collect art, and so a full, pragmatic solution to the problem of drastically shrinking the black market for looted art must find a role for the private collector to play. I would suggest that the private collector can enter into the equation as a partner of the sponsoring museum. To be sure, not all sponsoring museums



would need or welcome such partners. For example, with its \$5 billion endowment, the J. Paul Getty Museum, hardly needs partners to be able to finance new excavations of the kind I am proposing today. But there are many museums that do need such partners—indeed, I daresay that the majority of museums fall into this category. One need think only of our great university museums to confirm this claim. The private partner-collector would share in the rotating possession of the new finds on the same basis as the sponsoring museum. The sponsoring museum would have the responsibility of monitoring the partner-collector's behavior as a borrower and steward of any work of art lent to him. The museum would also determine how the works on loan are to be parceled out between itself and its various private partners. But all these are details that need not concern us here today. One detail worth mentioning is the new role that the much-maligned auction house could play: instead of the place where antiquities (usually unprovenanced, often looted) are auctioned off, it can be the place where shares are sold or traded in partnerships for new excavations organized by museums.<sup>21</sup>

The beneficiaries of the grand compromise I am proposing would be not only source countries like Italy or Mexico which have long been at the mercy of the black market in antiquities, or museums like the Getty that have had to pay outrageously high prices for works torn from their context and not infrequently of doubtful authenticity. The general public, students, and scholars would benefit even more. Excavation is the lifeblood of archaeology, and despite almost two centuries of scientific archaeology around the world, much more remains to be discovered than has already been found. Yet source countries typically spend most of the funds earmarked for archaeology on conservation, not exploration. The constant flow of new finds that would inevitably result if my proposal is adopted would delight the public and keep scholars busy for decades to come. It would revitalize the field of archaeology and, more importantly, as the 1970 UNESCO convention foresees, it would “enrich...the cultural life of all peoples and inspire... mutual respect and appreciation among nations.” As everyone who has read a newspaper recently can attest, in today's world, we can't have too much of that! Thank you very much....



Fig. 1: Bronze statue, fourth century B.C., J. Paul Getty Museum. Photo: Bernard Frischer.



Fig. 2: Kouros, J. Paul Getty Museum. Photo: Bernard Frischer.

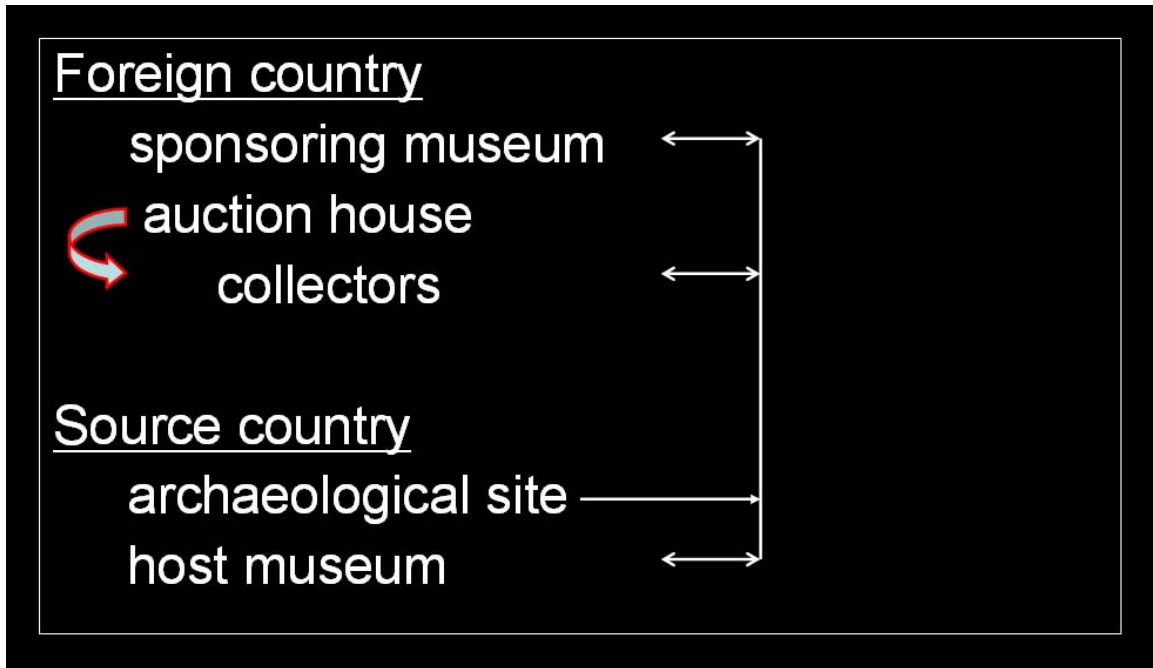


Fig. 3: Flow chart showing workings of the “grand compromise.”

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## NOTES

<sup>1</sup> See Sherry Hutt, Caroline Meredith Blanco, Walter E. Stern, Stan N. Harris, *Cultural Property Law. A Practitioner’s Guide to the Management, Protection, and Preservation of Heritage Resources* (American Bar Association, Chicago, 2004) 190-197.

<sup>2</sup> The Third Statement prohibits the buying and selling of artifacts by SAA members; see Mark Lynott, “The Development of Ethics in Archaeology,” in *Ethical Issues in Archaeology*, edited by Larry J. Zimmerman, Karen D. Vitelli, Julie Hollowell-Zimmer (New York, Oxford 2003) 17-27, at p. 20.

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<sup>3</sup> For the text, see Colin Renfrew, *Loot, Legitimacy, and Ownership* (Duckworth, London 2001) 118-19.

<sup>4</sup> *Ibid.*, p. 21.

<sup>5</sup> [http://www.archaeological.org/pdfs/AIA\\_Code\\_of\\_EthicsA5S.pdf](http://www.archaeological.org/pdfs/AIA_Code_of_EthicsA5S.pdf) (as emended in 1997).

<sup>6</sup> Colin Renfrew, *Loot, Legitimacy and Ownership. The Ethical Crisis in Archaeology* (Duckworth, London 2001).

<sup>7</sup> See Maura Singleton, "Plunder. The Theft of the Morgantina Silver," *The University of Virginia Magazine*, Spring 2006, 38-41, at p. 41. The best global assessment of the scale and value of the illicit trade in antiquities is *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage*, edited by Neil Brodie, Jennifer Doole and Colin Renfrew, MacDonald Institute Monographs (Cambridge 2001).

<sup>8</sup> Julie Hollowell-Zimmer, "Digging in the Dirt—Ethics and 'Low-End Looting,'" in *Ethical Issues in Archaeology*, edited by Larry J. Zimmerman, Karen D. Vitelli, and Julie Hollowell-Zimmer (New York, Oxford 2003) 45-56, at p. 47, where she cites in support of her view Ricardo J. Elia, "Looting, Collecting and the Destruction of Archaeological Resources," *Nonrenewable Resources* 6(2) (1997) 85-98; and Karen D. Vitelli, "'Looting' and Theft of Cultural Property: Are We Making Progress?" *Conservation, The Getty Conservation Institute Newsletter* 15(1) (2000) 21-24.

<sup>9</sup> For the text of the Cambridge Resolution, see Neil Brodie, Jennifer Doole, Colin Renfrew, editors. *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage*, "McDonald Institute Monographs (Cambridge 2001) 175-76. Cf. Colin Renfrew, *Loot, Legitimacy, and Ownership* (Duckworth, London 2001) 74: "When one asks what may be done to curb the looting and the traffic in illicit antiquities, there is no single, simple answer. As noted earlier, much more could and should be done in the source countries to encourage the provision of a good and effective antiquities service, and above all to ensure that the economic benefits (often through tourism) of a rich cultural heritage are adequately shared at the local level. But ultimately it is *we* the academic community and *we* the informed public, who must bear the main responsibility....In this particular sense, it should become widely understood and agreed among academics, which is not the case at present, that it is unethical and immoral to aid and abet the sale of illicit antiquities by offering authentication and expertise...."

<sup>10</sup> Thus, Neil Brodie and Jennifer Doole, "Illicit Antiquities," in Neil Brodie, Jennifer Doole, Colin Renfrew, editors. *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage*, "McDonald Institute Monographs (Cambridge 2001) 4, urge the need for more public education: "it will be difficult to stem looting until people understand the importance of context, and that their heritage is worth more in

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every sense than the usually paltry sums it can generate in the short-term when sold to middlemen.”

<sup>11</sup> See Ariel David, “U.S. Museum Returns 13 Italian Artifacts,” Associated Press , September 28, 2006; seen on October 14, 2006 at: <http://www.forbes.com/business/feeds/ap/2006/09/28/ap3053048.html>.

<sup>12</sup> On the term “retentive” to describe such laws, see William G. Pearlstein, “Cultural Property, Congress, the Courts, and Customs: The Decline and Fall of the Antiquities Market?” in *Who Owns the Past? Cultural Policy, Cultural Property, and the Law*, edited by Kate Fitz Gibbon (Rutgers University Press, New Brunswick, New Jersey and London 2005) 9-32 at p. 12.

<sup>13</sup> Einstein, wrote, “Never lose a holy curiosity.” He also wrote of himself: “I have no special talents. I am only passionately curious.”

<sup>14</sup> On the letter (written in 1708), see Roland Schaer, *Il museo. Tempio della memoria*, translated by Silvia Marzocchi (Universale Electa Trieste 1996) 35.

<sup>15</sup> Jeremy Bertomeu, “The Economics of Black Markets,” December 24, 2004; available online at: <http://www.andrew.cmu.edu/user/jbertome/docs/blackmarket26.pdf> (seen October 14, 2006), p. 2. At p. 4, Bertomeu reviews the small literature on the economics of black markets.

<sup>16</sup> Peter Watson and Cecilia Todeschini, *The Medici Conspiracy. The Illicit Journey of Looted Antiquities from Italy’s Tomb Raiders to the World’s Greatest Museums* (Public Affairs, New York 2006) 268.

<sup>17</sup> See Bryan Rostron, “Smuggled!” *Saturday Review*, March 31, 1979, pp. 25-30. On the winners and losers in the current black market in looted art, see, in general, Kate Fitz Gibbon, “Alternatives to Embargo,” in *Who Owns the Past? Cultural Policy, Cultural Property, and the Law*, edited by Kate Fitz Gibbon (Rutgers University Press, New Brunswick and London, 2005) 291-303, at p. 291: “the primary beneficiaries of the present system are corrupt source-country officials at all levels of government, and middlemen, most of whom are source-country nationals who exploit the working digger. The main losers are source-country cultural institutions, legitimate government interests, and dealers, scholars, collectors, museums, and even archaeologists throughout the world.”

<sup>18</sup> On the compromise of intellectual value of unprovenanced art, see especially Colin Renfrew, *Loot, Legitimacy, and Ownership* (Duckworth, London 2001) 19-22.

<sup>19</sup> See *The Getty Kouros Colloquium, Athens, 25-27 May 1992* (Nicholas P. Goulandris Foundation Museum of Cycladic Art and The J. Paul Getty Museum, Athens, 1993).

<sup>20</sup> *Ibid.*, p. 11.

<sup>21</sup> On the role of auction houses in the antiquities trade, see Arielle Kozloff, “The Antiquities Market. When, What, Where, Who, Why...and How Much?” in *Who Owns the Past? Cultural Policy, Cultural Property, and the Law*, edited by Kate Fitz Gibbon (Rutgers University Press, New Brunswick and London 2005) 183-189, at pp. 184-85.