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Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects

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Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects

Kurt G. Siehr*

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I. GOOD OLD TIMES?

Almost two hundred years ago, Dr. Croke, Justice of the British Vice-Admiralty Court of Halifax, handed down the earliest reported judicial decision to treat works of art as cultural property. He reasoned: "They [the arts and sciences] are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species."¹ What did Dr. Croke mean by this statement? Did he want to praise good old times of free circulation of works of art between nations? Not at all! He was fighting against some of the bad customs of traditional warfare.

The Vice-Admiralty Court had to decide whether the *Marquis de Somerueles*—a U.S. merchant vessel seized by a British ship during the War of 1812 between the United States and England and brought to the seaport of Halifax—should be taken as prize or returned to the owners.² A suit for restitution was brought on behalf of the Academy of Arts of Philadelphia to which Mr. Joseph Allen Smith had donated twenty-one paintings and fifty-two prints bought in Italy and transported to America by the *Marquis de Somerueles*.³ The lawsuit was successful.⁴ Dr. Croke decided:

Heaven forbid, that such an application [for restitution of the art objects] to the generosity of Great Britain should ever be ineffectual.

1. THE MARQUIS DE SOMERUELES, NOVA SCOTIA STEWART'S VICE-ADMIRALTY REPORTS 483 (1813). Also reprinted in 5 INT'L J. OF CULTURAL PROP. 319 (1996); BARNETT HOLLANDER, THE INTERNATIONAL LAW OF ART 250 (Bowes & Bowes 1953).

2. SOMERUELES, *supra* note 1, at 482.

3. *Id.*

4. *Id.* at 486.

The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection.⁵

Hence, Dr. Croke was confronted with some peculiarities of good-old times: the wartime limits of art trade, which survive to some extent today.

A. Free Trade and Exchange

People have traded since ancient times. In ancient times, people traded goods that today would qualify as cultural objects but were then normal goods of daily life (e.g., pottery), of aristocratic lifestyle (e.g., jewelry, statues for gardens, villas, or patios) or of funeral traditions (e.g., urns, sarcophagi, etc.). The creators of these goods were normally unknown artisans. Even if the creators were known (for example, Phidias or Ephronios), the creators may have speculated for higher prices while never having to face the export prohibitions of their home country or city. Their business was part of general business relations among all parts of the ancient world, including Europe and the Mediterranean countries.

Art trade as a specialized profession is a rather recent phenomenon.⁶ The earliest art agents were Italians who served their northern European clients, both private and aristocratic collectors.⁷ For example, Jacopo della Strada (1507–1588) bought artwork for the Fugger in Nuremberg and for the royal courts in Munich and Vienna.⁸ In addition, Francesco Algarotti (1712–1764) was engaged to acquire Italian paintings for the art collection of the King August of Saxony (now part of the Dresden Gallery of Old Masters),⁹ and Johann Georg von Dillis worked for the art collection of King Ludwig I of Bavaria (now part of Munich's Old Pinakothek).¹⁰

Art auctions started in the eighteenth century¹¹ and, since that time, the art trade has been recognized as a special type of business. For instance, Joseph Allen Smith made use of art trade when he

5. *Id.* at 483.

6. See HANS PETER THURN, *DER KUNSTHÄNDLER: WANDLUNGEN EINES BERUFES* 30 (Hirmer 1994); FRANCIS HASKELL, *PATRONS AND PAINTERS: A STUDY IN THE RELATIONS BETWEEN ITALIAN ART AND SOCIETY IN THE AGE OF BAROQUE 347–60* (Yale University Press 1980) (1963).

7. *Id.*

8. THURN, *supra* note 6, at 30.

9. HASKELL, *supra* note 6, at 347–60.

10. "IHM, WELCHER DER ANDACHT TEMPEL BAUT . . .", LUDWIG I. UND DIE ALTE PINAKOTHEK 17 (Bayerische Staatsgemäldesammlungen 1986).

11. BRIAN LEARMOUNT, *A HISTORY OF THE AUCTION* 101 (Barnard & Learmount 1985).

bought the paintings and prints in Italy for the Pennsylvania Academy of the Fine Arts in Philadelphia.¹² Because of this development, most major museums in America, Asia, and Europe preserve and exhibit art objects from almost every part of the world, and representative of most periods and styles throughout art history. Not all treasures of museums and private collections, however, were acquired in the open market. There were and continue to be art objects of a rather obscure provenance.¹³

B. Pillage and Plundering in Times of War and Dependence

Prize taken in naval warfare was taken as booty in land warfare. From ancient times until the nineteenth century, it was the privilege of the victorious party to loot, capture, and sack the enemy's property. In many European museums and collections, one can still find artwork that was looted in former golden days. For example, Egyptian obelisks were transported to classical Rome as trophies of Roman expansion in the Mediterranean area,¹⁴ and the *Horses of St. Mark* in Venice were taken by the Venetians when they sacked Constantinople in 1204 during the Fourth Crusade.¹⁵ The *Codex Argenteus*, Wulfila's gothic Bible, and one of the treasures of the University Library of Uppsala in Sweden, is part of the booty taken when King Gustav Adolf of Sweden captured the Czech city of Prague in 1648.¹⁶ The painting, *Wedding of Cana* by Paolo Veronese, was taken from Venice by Napoleon in 1797. The painting became part of the Musée Napoléon—now the Louvre—and was not returned to Venice until after Napoleon's defeat in 1814–15.¹⁷ Finally, the Russian Museums in Moscow and St. Petersburg still exhibit German art taken as booty after the ceasefire of World War II and claimed by

12. John Henry Merryman, *Note on The Marquis de Somerueles*, 5 INT'L J. OF CULTURAL PROP. 321, 321 (1996).

13. See discussion *infra* Parts I.B.-C.

14. The obelisk in the Piazza del Popolo, brought to Rome around 10 B.C., was the first obelisk brought to Rome. The obelisk in New York City (*Cleopatra's Needle*) was a gift made by Egypt to New York City in 1879. See MARTINA D'ALTON, *THE NEW YORK OBELISK 12–15* (The Metropolitan Museum of Art 1993).

15. See JONATHAN PHILLIPS, *THE FOURTH CRUSADE AND THE SACK OF CONSTANTINOPLE* 258–81 (Jonathan Cape 2004); CHARLES FREEMAN, *THE HORSES OF ST. MARK'S* 69 (Little Brown 2004).

16. T. KLEBERG, *CODEX ARGENTEUS: THE SILVER BIBLE AT UPPSALA* 15 (6th ed. 1984).

17. For general background on Napoleon's art raids, see D. Mackey Quynn, *The Art Confiscations of the Napoleonic Wars*, 50 AM. HIST. REV. 437 (1945); WILHELM TREUE, *ART PLUNDER* 139 (John Day 1960); PAUL WESCHER, *KUNSTRAUB UNTER NAPOLEON* 38 (Mann 1976).

the Russians as "restitution in kind" and compensation for the destruction of Russian art by the German army in World War II.¹⁸ Article 47 of the Hague Convention of 1907 with Respect to the Laws and Customs of War on Land (Hague Regulations) states that "[p]illage is formally forbidden."¹⁹ Today, this rule is recognized as being part of customary international law, which is even binding on states that did not ratify the Hague Regulations.²⁰ The Hague Regulations also prohibit plundering by soldiers and require looted objects to be returned to the owners.²¹ A present-day example is Iraqi art that has been recently stolen, plundered, or looted during the war in that country.

What is to be done, however, with those cultural objects that were taken as booty, trophy, or simple antiquity in former wars, skirmishes, or times of dependence? Should the Elgin or Parthenon marbles presently housed in the Duveen Gallery of the British Museum be given back to Greece and Athens?²² Should the Benin bronzes that were captured during the punitive expedition of 1897 be returned to Nigeria?²³ Should pre-Columbian artifacts brought to Europe centuries ago be repatriated to Ibero-American countries?²⁴ Does the past have any future? Without going into the details, it can be stated that the colonial and imperialistic past is barred by statutes of limitation and similar barriers, and its future is a matter of goodwill and policy. It can be added that, in the future, we do not want to "liberalize" art exchange by using force, threat, or misleading statements.

18. See KONSTANTIN AKINSHA ET AL., *STOLEN TREASURE* 151–166 (Weidenfeld & Nicolson 1995); Wilfried Fiedler, *Legal Issues Bearing on the Restitution of German Cultural Property*, in: *THE SPOILS OF WAR* 175–178 (Elizabeth Simpson ed., Abrams 1997); LYNN H. NICHOLAS, *THE RAPE OF EUROPA* 407–444 (Knopf 1994); SUSANNE SCHOEN, *DER RECHTLICHE STATUS VON BEUTEKUNST* 123 (Duncker & Humblot 2004).

19. Hague Convention of 1907, *reprinted in* *THE LAWS OF ARMED CONFLICT* 57, 83 (Dietrich Schindler & Jiří Toman eds., Leyden 1973).

20. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 132–35 (1st ed. 2005) ("Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against property of great importance to the cultural heritage of every people is prohibited.").

21. See, e.g., Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 3, *reprinted in* *THE LAWS OF ARMED CONFLICT*, *supra* note 19 at 54.

22. See WILLIAM ST. CLAIR, *LORD ELGIN & THE MARBLES* 332–36 (Oxford University Press 1998); John Henry Merryman, *Thinking about the Elgin Marbles*, 83 *MICH. L. REV.* 1880, 1880–1923; see also *THINKING ABOUT THE ELGIN MARBLES, CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW* 24 (John Henry Merryman ed., Kluwer 2000).

23. JEANETTE GREENFIELD, *THE RETURN OF CULTURAL PROPERTY* 118–23 (Cambridge University Press 1996).

24. See JORGE A. SANCHEZ CORDERO DAVILA, *LES BIENS CULTURELS PRECOLOMBIENS, LEUR PROTECTION JURIDIQUE* 389 (Librairie Générale de Droit et de Jurisprudence 2004).

C. Expropriation and Nationalization

Those objects that cannot be appropriated by war or exploitation of colonies can be acquired within the state by expropriation or nationalization. The most well-known events of this kind are expropriations in times of revolution and persecution. The Revolution of 1649 terminated the reign of King Charles I of England and led to the sale of his art collection.²⁵ The French Revolution and the accompanying secularization deprived the churches of their financial bases and caused the denaturizing of religious objects in secular museums.²⁶ The Russian Revolution of 1917 introduced communism and comprehensive state intervention, which left no place for private property in art objects and precious goods. Private collections—such as those of Moscow merchants Sergei Iwanovitsch Schtschukin (1854–1936) and Iwan Abramovitch Morosow (1871–1925)—were nationalized and integrated into national museums.²⁷ Finally, the Nazi persecution of Jews and of “degenerated” artists dispersed many private collections and devalued many public museums.²⁸

The problems caused by these events have not yet been properly settled. Under the Washington Conference Principles of December 3, 1998, on Nazi-confiscated Assets;²⁹ the Resolution 1205 (1999) of the Parliamentary Assembly of the Council of Europe of November 4, 1999, on Looted Jewish Cultural Property;³⁰ and the Vilnius Forum Declaration of October 5, 2000,³¹ many museums still have to complete their provenance research on unclear or obscure acquisitions and decide what to do with formerly confiscated, privately-owned art.³² Today, the issue of quasi-confiscating interventions by states that adhere to retentionism and prohibit the

25. See John Elliot, *A Troubled Relationship: Spain and Great Britain, 1604–1655*, in *THE SALE OF THE CENTURY* 37 (Jonathan Brown & John Elliot eds., Yale University Press/Museo Nacional del Prado 2002).

26. Annemarie Gethmann-Siefert, *Kunst als Kulturgut. Die Sammlung Boisserée—ein Schritt in der Begründung des Museums*, in *KUNST ALS KULTURGUT* 1 (Annemarie Gethmann-Siefert & Otto Pöggeler eds., Bouvier 1995).

27. Albert Kostenewitsch, *Russische Sammler französischer Kunst: Die Familiencians der Schtschukin und Morosow*, in *MOROSOW UND SCHTSCHUKIN—DIE RUSSISCHEN SAMMLER* 35 (Dumont 1993).

28. See HECTOR FELICIANO, *THE LOST MUSEUM* 13–23 (Basic Books 1997); Nicholas, *supra* note 18, at 3–25; See generally DAVID ROXAN ET AL., *THE JACKDAW OF LINZ* (Cassell 1964).

29. See Rascher, *Conf. Rep. The Washington Conference on Holocaust-Era Assets*, 8 INT'L J. OF CULTURAL PROP. 338, 342 (1999); see also PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES, *PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIM'S ASSETS* (Government Printing Office 2000).

30. See K. Siehr, *Chronicles*, 9 INT'L J. CULTURAL PROP. 185, 199 (2000).

31. See Patrick O'Keefe, *Vilnius International Forum on Holocaust-era Looted Cultural Assets*, 10 INT'L J. CULTURAL PROP. 127, 132 (2001).

32. *Id.* at 132–33.

export of art of national importance remains. These limitations of art trade will be discussed below.

II. RESTRICTIONS AND LIBERALIZATION OF EXCHANGE

A. *Export of Cultural Objects*

When the European Community started as the European Economic Community (EEC) in 1958, the member states inserted Article 36 into their basic Treaty of Rome of March 25, 1957,³³ which provided (and still provides under Article 30 of the Amsterdam version of the Rome Treaty)³⁴ certain restrictions on the principle of free movement of goods by stating:

The provisions of Articles 28 and 29 [on the free movement of goods] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of . . . the protection of national treasures possessing artistic, historic or archaeological value . . .³⁵

Some EEC member states with huge resources of cultural property (source states) were afraid that the common market in Europe would encourage those member states with less cultural property, but more financial power (market states), to exert financial pressure and start a “cultural buyout” of the source states.³⁶ The same fears were articulated with respect to the General Agreement on Tariffs and Trade (GATT),³⁷ the European Free Trade Association (EFTA),³⁸ the European Economic Area (EEA),³⁹ the World Trade Organization (WTO),⁴⁰ and Mercosur.⁴¹ These agreements, and

33. Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11–94.

34. Treaty on European Union, Feb. 7, 1992, 1997 O. J. (C 340) 145.

35. *Id.*

36. An example of such a “cultural buyout” occurred in the case of the *Golden Phiale of Achyris*, which was illicitly purchased and smuggled out of Italy, ending up in the hands of a wealthy U.S. hedge fund manager who paid \$1.2 million for it. As noted by Patty Gerstenblith, a law professor at DePaul University: “Auction houses are doing more business every year. If you accept that the number of existing collections is limited, you have to accept that much of what is being bought and sold is new—and therefore illegal.” Mike Toner, *Buying, Selling, Stealing History*, ATLANTA J. & CONST., Sept. 19, 1999, at H1. Thus, the reporter’s conclusion that “antiquities are [] subject to the law of supply and demand.” *Id.*

37. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, Art. XX(f) [hereinafter GATT 1947].

38. Convention Establishing the European Free Trade Association, Mar. 23, 1960, art. 12(h), reprinted in SWISS SYSTEMATIC COLLECTION OF FEDERAL LAW No. 0.632.31.

39. Convention of May 2, 1992, art. 13, reprinted in LIECHTENSTEINISCHES LANDESGESETZBLATT 1995 No. 68.

40. WTO Convention and General Agreement on Tariffs and Trade, Apr. 15, 1994 [GATT 1994], 1994 O.J. (L 336) 3, 11; see also GATT 1947, *supra* note 37, at art. XX(f).

similar agreements establishing some kind of free trade association, inserted similar restrictions on the free trade of cultural objects.⁴² Still to be determined is whether these restrictions are necessary and, if so, whether they serve their purposes.

1. Export Prohibitions

International free trade agreements with restrictions on free trade in cultural objects are based on national restrictions of this kind. They make exceptions in favor of national cultural policy.

a. National Export Prohibitions

Export restrictions are typically found where there is a shortage of a particular good or when a good is deemed dangerous (e.g., weapons). Why, however, is the export of cultural objects prohibited? In many countries with extensive prohibitions on the export of artwork (e.g., Italy) there is no shortage of artwork and the art is not dangerous. Thus, there must be other reasons for such barriers on free trade.

The earliest provisions for the protection of cultural property seem to have been the Papal Bull *Cum Almam Nostram* of Pope Pius II (Enea Silvio Piccolomini) issued on April 28, 1462.⁴³ This, and other instruments of the Holy See, was mainly concerned with antiquities and the unfettered run on digging for them.⁴⁴ These instruments, therefore, tried to regulate this business and to reserve the monuments and the excavated ancient art for the secular and spiritual nobility of Rome.⁴⁵ This selfish attitude prevailed until the time of Napoleon. In 1797, Napoleon invaded Italy, occupied most of the art centers in Northern Italy, seized hundreds of art objects, and shipped them to Paris.⁴⁶ Only the enlightened people of revolutionary France were able to appreciate eternal art.⁴⁷ This arrogant

41. Mercosur Treaty of March 26, 1991, reprinted in BOLETÍN OFICIAL DEL MERCOSUR I 1, 13 (1997).

42. See Lomé Convention between the European Economic Community and the AKP-States, Dec. 8, 1984, art. 132, BGBl. II 1986, at 19, 43.

43. A. THEINER, 3 CODEX DIPLOMATICUS DOMINI TEMPORALIS S. SEDIS: RECUEIL DE DOCUMENTS POUR SERVIR A L'HISTOIRE DU GOUVERNEMENT TEMPOREL DES ETATS DU SAINT-SIEGE 422 (Rome 1862). Also reprinted in LORENZ WOLF, KIRCHE UND DENKMALSCHUTZ 220 (LIT 2003).

44. *Id.*

45. *Id.*

46. See generally CECIL GOULD, TROPHY OF CONQUEST: THE MUSÉE NAPOLÉON AND THE CREATION OF THE LOUVRE 41 (Faber and Faber 1965).

47. As early as 1794, one French officer said,

Trop longtemps . . . ces chef-d'œuvres avaient été souillés par l'aspect de la servitude . . . Ces ouvrages immortels ne sont plus dans une terre étrangère, ils

nationalism very quickly prompted opposition. The most prominent critic was a Frenchman, Antoine Chrysostome, known as Quatremère de Quincy (1755–1849).⁴⁸ Chrysostome criticized the removal of art from their place of origin, thereby creating a kind of “nationality” of art objects.⁴⁹

The Holy See, which lost many artworks under the Peace Treaty of Tolentino of February 19, 1797,⁵⁰ passed legislation on the export of art.⁵¹ The Papal Editto Doria Pamphili of October 2, 1802,⁵² and the Editto Pacca of April 7, 1820,⁵³ became the model of modern national legislation on the protection of cultural property, including the export of such objects.⁵⁴

A common feature of these national export prohibitions is a nationalistic approach to cultural property at-large. Art objects are part of a national cultural heritage. They embody the genius of regional civilization and are designed to symbolize national achievement, success and pride. No answer, however, is given to the question of why such symbols should exclusively be held and exhibited in the country of origin. Why should every painting of Francisco Goya be kept in Spain? Is it really necessary that every piece of ancient pottery be shown in Greece or Italy? Why should every masterpiece of Nicolas Poussin stay in France? Why should every statue from ancient Egypt be exhibited in Cairo? There are no answers to these questions, aside from the cynical remarks of some government officials that every piece of cultural property located in the country is part of the protected national heritage.⁵⁵

sont aujourd'hui déposés dans la patrie des arts et du génie, dans la patrie de la liberté et de l'égalité sainte, de la République française.

[Too long . . . these master pieces have been soiled by the aspect of servitude . . . These immortal objects are not more in a foreign country, today they are located in the homeland of arts and genius, in the homeland of liberty and sacred equality, of the French Republic.]

ALBERT SOREL, *L'EUROPE ET LA REVOLUTION FRANCAISE IV: LES LIMITES NATURELLES 1794–1795*, at 117 (Plon 1948).

48. QUATREMERE DE QUINCY, *LETTRE A MIRANDA SUR LE DEPLACEMENT DES MONUMENTS DE L'ART DE L'ITALIE 7 passim* (Pommier ed., Macula 1989) (1976); Erik Jayme, *Die Nationalität eines Kunstwerks als Rechtsfrage*, in *INTERNATIONALER KULTURGÜTERSCHUTZ* 7–29 (Gerte Reichelt ed., Manz 1992).

49. *Id.*

50. 53 THE CONSOLIDATED TREATY SERIES 485–91 (Clive Parry ed., Oceana 1969).

51. ANDREA EMILIANI, *LEGGI, BANDI E PROVVEDIMENTI PER LA TUTELA DEI BENI ARTISTICI E CULTURALI NEGLI ANTICHI STATI ITALIANI 1571–1860*, at 86, 100 (2d ed. 1996).

52. *Id.* at 86.

53. *Id.* at 100.

54. *Cf.* 1 THE PROTECTION OF MOVABLE CULTURAL PROPERTY. COMPENDIUM OF LEGISLATIVE TEXTS (UNESCO 1984). This compendium is no longer current.

55. TAR, sez. un., 26 jan. 1990, n. 38, Foro Amm. 1991, I, 38, 46 (Italy).

It must be added, however, that there may be certain good reasons for prohibiting unlicensed export of certain artworks. For example, composite objects should not be dismembered and spread across several countries. Also, archaeological objects should not be illegally excavated and freely traded; export prohibitions may limit the incentives for plundering ancient sites. National symbols such as Hungary's crown of St. Stephen, Leonardo's *Mona Lisa* in the Louvre, or Johann Jakob Tischbein's painting *Goethe in der Campagna* in the Staedel of Frankfurt/Main should stay at the sites where they have been historically located.

Are these national export prohibitions really obstacles to international trade? The simple answer is "no." Export prohibitions can be enforced only in the country of export; other countries do not enforce foreign export prohibitions.⁵⁶ Such prohibitions form part of foreign public law, and courts have declined to pay respect to foreign rules of cultural or business policy. In the case *Attorney General of New Zealand v. Ortiz*, the House of Lords declined to enforce a New Zealand law prohibiting the export of Maori carvings.⁵⁷ Similar decisions have been handed down in Germany,⁵⁸ Italy,⁵⁹

Ora, indubbiamente nel caso in esame l'acquisizione alle raccolte statali dell'opera d'arte in questione, come si legge nel provvedimento impugnato, riveste interesse pubblico di particolare rilevanza, assicurando il dipinto 'Il Giardiniere' un 'elemento di integrazione di rilevantissimo significato—anche per l'epoca in cui l'opera stessa fu creata—per la compagine delle raccolte statali di opere d'arte contemporanea europea, data la penuria in esse di dipinti di Vincent Van Gogh.'

[In the case, however, the acquisition for state collections of art of this kind is, as can be read in the contested decree, of special public interest because the securing of the painting 'The Gardener' would be an 'element of significant relevance—also for the time in which the art object was created—for the state collections of modern art, especially because of lack of any painting of Vincent van Gogh.]

56. THE PROTECTION OF MOVABLE CULTURAL PROPERTY, *supra* note 54.

57. [1983] 2 W.L.R. 818, 818–19 (H.L.) (appeal taken from Eng. C.A.).

58. In the Nigeria case, Bundesgerichtshof [BGH] [Federal Court of Justice], *Entscheidungen des Bundesgerichtshofs in Zivilsachen* [BGHZ] 59 (82) (F.R.G.) *reprinted in* 73 I.L.R. 226, 229 (BGH 1972), the Bundesgerichtshof held that.

[t]he export of items of cultural interest does not deserve to be protected under civil law . . . The same consideration applies to the insurance of consignment of goods involving items of cultural interest which are being exported from a territory governed by a foreign legal order, contrary to an export prohibition intended to protect such items in that territory.

59. Cass., sez. un., 24 Nov. 1995, n.12166 (Italy) *reprinted in* 80 RIVISTA DI DIRITTO INTERNAZIONALE 515 (1997) (with comment by Francesco Nanetti & Francesca Squillante, *In tema di restituzione di beni culturali illecitamente trasferiti*, 80 RIVISTA DI DIRITTO INTERNAZIONALE 396–420) [hereinafter Cass., sez. un., 24 Nov. 1995, n.12166].

Switzerland,⁶⁰ and the United States.⁶¹ This can only be changed by international conventions.

b. International Conventions

i. UNESCO Convention of 1970

The UNESCO Convention of November 17, 1970, on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the UNESCO Convention),⁶² does not itself prohibit the export of cultural objects. Rather, it is designed to give international effect to national export prohibitions by obliging the state parties “to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported” and “to recover and return any such cultural property imported.”⁶³ These non-self-executing obligations require national implementing legislation, but only a few of the more than one hundred states that have ratified the UNESCO Convention passed implementing statutes.⁶⁴ The United States is one of the few countries with implementing legislation in the form of the Convention on Cultural Property Implementation Act of 1983.⁶⁵ Where, as in most countries, implementing legislation is missing, the UNESCO Convention does not work properly and there is no obstacle to international art trade.

In addition to the multilateral instrument of UNESCO, the United States has concluded bilateral treaties with several countries, including Bolivia, Cambodia, Canada, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. These treaties prohibit the import of certain types of cultural objects (such as pre-Columbian art and Italian antiquities from the classical period) which should not be exported from the foreign state party of

60. Appellationsgericht Basel-Stadt [Court of Appeals], Aug. 18, 1995, 1997 Basler Juristische Mitteilungen [BJM] 17, 21 (Switz.); see also Sybel Özel, *The Basel Decision: Recognition of the Blanket Legislation Vesting State Ownership over Cultural Property Found within the Country of Origin*, 9 INT'L J. OF CULTURAL PROP. 315 *passim* (2000).

61. Government of Peru v. Johnson, 720 F. Supp. 810, 814 (C.D. Cal. 1989).

62. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 17, 1970, 823 U.N.T.S. 231 [hereinafter Convention on Cultural Property]; see also PATRICK J. O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC (Leicester: Institute of Art and Law 2000).

63. Convention on Cultural Property, *supra* note 62, art. VII(a), (b)(ii), 823 U.N.T.S. at 240.

64. See generally THE PROTECTION OF MOVABLE CULTURAL PROPERTY, *supra* note 54.

65. Convention on Cultural Property Implementation Act, 19 U.S.C.A. §§ 2601–13 (2005); 19 C.F.R. §§ 12.104–12.109 (2005).

origin.⁶⁶ As these instruments are restricted to certain types of cultural objects, it is clear that there is no barrier to trade in art not covered by these instruments. Hence, it can be said that the UNESCO Convention is hardly an efficient obstacle to international art trade.

ii. UNIDROIT Convention of 1995

To improve the international protection of cultural property, UNESCO asked the International Institute for the Unification of Private Law (UNIDROIT) in Rome to prepare the draft for a self-executing convention more efficient than the UNESCO Convention.⁶⁷ The result of those efforts was the UNIDROIT Convention of June 24, 1995, on Stolen or Illegally Exported Cultural Objects.⁶⁸ According to Article 5(3) of the 1995 Convention, "the competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more [important] . . . interests."⁶⁹ Also, this Convention does not formulate an independent supranational policy of international art trade, restricts itself to the international enforcement of national export prohibitions, and, of course, entitles the bona fide possessor to reasonable compensation through Article 6.

The UNIDROIT Convention entered into force on July 1, 1998, and was in force on January 1, 2005, in twenty-five ratifying and acceding states, none of which is a market state.⁷⁰ Thus far, no case has been decided under this Convention, and it has not affected international art trade. This may change as soon as important market states like the United States and Great Britain ratify the 1995 Convention.

iii. Export Restrictions in International Communities

As previously mentioned,⁷¹ several international organizations and communities restrict the principle of free movement of goods to

66. Cf. 19 C.F.R. § 12.104g (2005) (providing a list of these bilateral treaties).

67. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330 (1995), reprinted in 5 INT'L J. OF CULTURAL PROP. 155 (1996) [hereinafter UNIDROIT Convention].

68. *Id.*; see also LYNDEL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION ON STOLEN AND ILLEGALLY EXPORTED CULTURAL OBJECTS 1995, at 130 (Leicester: Institute of Art and Law 1997).

69. UNIDROIT Convention, *supra* note 67, at 1333.

70. Status of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects—Signature Ratifications, available at, <http://www.unidroit.org/english/implement/i-95.pdf> (last visited Sept. 1, 2005).

71. See *supra* text accompanying notes 37–41.

goods that are not objects of cultural property. It is unknown whether such restrictions are very efficient. The only community that obliged the member states to implement community legislation is the European Community. The Council of the European Communities adopted Council Directive 93/7/EEC of March 15, 1993 (the Directive), on the return of cultural objects unlawfully removed from the territory of a member state.⁷² Thus far, all old member states of the European Community, some of the ten new member states, and all three member states of the European Economic Area (Iceland, Liechtenstein, and Norway) have implemented the Directive and passed national implementing legislation.⁷³ With the exception of Albania, Andorra, Bosnia, Bulgaria, Croatia, Macedonia, Monaco, Romania, San Marino, Serbia, and Switzerland, all European countries must return cultural objects unlawfully removed from one European country to another.⁷⁴ Even those countries that are not bound by the European Directive of 1993 are affected by foreign implementing national legislation.⁷⁵ If an artwork is unlawfully removed from Italy and sold by a New York art dealer to a collector in Great Britain, Italy may successfully sue the art collector in England to return the object to Italy. The art collector may then turn to the New York art dealer and request damages for the breach of warranty of title.

There is no reported case decided under national legislation implementing the Directive. The national authorities carrying out the tasks provided for in the Directive were seized of some return requests, but all cases were settled or dismissed as not covered by the Directive.⁷⁶

2. Trends toward Liberalization

a. Basic Rights as Barrier of Export Policy

It is common knowledge and experience that trade barriers have serious effects. If goods can only be sold to local customers, the seller is precluded from selling his goods to foreigners who may pay higher prices. By limiting the art trade to local markets, art objects are

72. Council Directive 93/7, 1993 O.J. (L 74) 74–79, *amended* by Council Directive 2001/38, 2001 O.J. (L 187) 43–44 [hereinafter Council Directive 93/7].

73. See Kurt Siehr, *Europäisches Recht des Kulturgüterschutzes und die Schweiz* [European and Swiss Law of the Protection of Cultural Property], 1999 AKTUELLE JURISTISCHE PRAXIS 962, 963 n.14 (listing national implementing legislation).

74. *Id.*

75. *Id.*

76. *Id.*

devalued. The seller cannot sell his goods in the international market and achieve market prices.

Is there any remedy from the devaluation that results from limiting the market through export prohibitions? This question was asked some years ago by an art collector, Mr. Walter, who wanted to sell a painting of Vincent van Gogh but was not allowed to offer it in New York.⁷⁷ The French authorities in cultural affairs did not grant an export license because they qualified the van Gogh painting as part of the unexportable French cultural heritage.⁷⁸ Mr. Walter did not accept these arguments. He went to court and asked for compensation for the losses he suffered by limiting the number of potential buyers of the painting, thereby devaluing the art object. His claim was successful.⁷⁹ He relied on a special provision of French legislation that provides compensation for art collectors who suffer disadvantages because of national cultural policy restricting art trade.⁸⁰

What would have happened, however, if there were no such provisions for compensation as in most countries with a national cultural policy of retentionism? One case related to these problems was decided by the European Court of Human Rights.⁸¹ The Swiss art dealer Ernst Beyeler wanted to export a van Gogh painting from Italy to Switzerland.⁸² The Italian proceedings to provide a license for the export of this precious "tesoro della cultura italiana" were so complicated, time consuming, and unfair that they were held to have violated human rights. Thus, it was held that compensation had to be paid to the art dealer Beyeler.⁸³

The French court decision in the *Walter* case has already had considerable influence on the French export policy with respect to art. As a result of the *Walter* decision, export licenses are issued more liberally because it would be too expensive for the French government to compensate every art collector for prohibiting the export of his art treasures.⁸⁴ In other countries there are also limitations to restrictive export policies. In Germany it was decided that the registration of

77. Agent Judiciaire Du Tresor v. Walter, Cour de cassation [highest court of ordinary jurisdiction], Feb. 29, 1996, J.C.P. 1996, II, 22672 note Yves Chartier (Fr.).

78. *Id.*

79. *Id.*

80. Law of Dec. 31, 1913, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 4, 1914, art. 16. *Also reprinted in* PROTECTION DU PATRIMOINE HISTORIQUE ET ESTHETIQUE DE LA FRANCE 27 (Journaux officiels 2003).

81. Beyeler v. Italy, 2000-I Eur. Ct. H.R. 57, 7-11; Ignaz Seidl-Hohenveldern, *State Preemption of Foreign-Owned Painting and International Law*, 10 INT'L J. OF CULTURAL PROP. 70, 70-78 (2001).

82. Seidl-Hohenveldern, *supra* note 81, at 70.

83. Beyeler v. Italy, 2000-I Eur. Ct. H.R. 57.

84. Emmanuel Fessy, *Caro il mio tesoro nazionale*, Il Goirnale dell'Arte, Apr. 1996, at 5; Nicholas Powell, *L'état loses to the citizen*, THE ART NEWSPAPER, July/Sept. 1993, at 1.

certain artworks as national art treasures—which rendered them subject to export restrictions—did not amount to a quasi-expropriation of the private art collector.⁸⁵ A similar decision was rendered in Switzerland.⁸⁶ If authorities refused to allow the export of the privately owned art, however, the private art collector would have a claim for compensation because of a quasi-expropriation.⁸⁷

It is interesting to observe that no special legislation is needed to liberalize the export policy of national governments. Regular remedies of already existing branches of law and the courage to make use of them are sufficient. The *Walter* and *Beyeler* cases may encourage other art collectors to push countries to limit their restrictive export prohibitions to exceptional artworks and very important and undisputed national treasures. Those decisions may also help to eliminate the well-known practice of various governments that qualifies every piece that any of the state museums would like to include in their collections as national treasure.

b. Liberal Practice to Grant Export Licenses

Financial burdens are not the only contributing factor to the liberalization of national export policy. A more internationally minded attitude also seems to abandon the traditional nationalistic cultural “main street-ism.” Germany did not prohibit the sale of the *Waldseemüller-Karte* with the earliest denomination of Northern America as “America.”⁸⁸ The Guggenheim Museum of New York opened Museums in Venice, Bilbao, and Berlin and cooperates with several other museums.⁸⁹ In addition, the Hermitage in St. Petersburg established branches outside of Russia⁹⁰ and will continue with this policy.⁹¹ Italy is trying to privatize public cultural treasures⁹² and to mitigate its nationalistic export practice. The German art collector Peter Ludwig sold his medieval manuscripts to the Getty Museum in Malibu in 1983⁹³ and spread his art treasures

85. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] May 27, 1993, 92 Entscheidungen des Bundesverwaltungsgerichts [BverwGE] 288 (F.R.G).

86. Bundesgerichtshof [BGer] [Federal Court] Dec. 23, 1987, 113 Entscheidungen des Schweizerischen Bundesgerichtshofs [BGE] 368 (Switz.).

87. JÖRG SPRECHER, BESCHRÄNKUNGEN DES HANDELS MIT KULTURGUT UND DIE EIGENTUMSGARANTIE (de Gruyter 2004).

88. See Kurt Siehr, *Chronicles*, 11 INT'L J. OF CULTURAL PROP. 173, 179 (2002).

89. DAS GUGGENHEIM PRINZIP (Hilmar Hoffmann ed., Dumont 1999).

90. The State Hermitage Museum: Hermitage News, available at http://www.hermitagemuseum.org/html_En/13/hm13_1.html [hereinafter The State Hermitage Museum] (announcing the openings of other Hermitage branches).

91. *Id.* Cooperation has been announced with Mantova (Italy).

92. Decree Law, Feb. 22, 2004, Codice Urbani [C. Urb.], *Gazzetta Ufficiale della Repubblica Italiana* [Gazz. Uff.], Feb. 24, 2004, n. 42, 45 (Italy) [hereinafter Decree Law, Feb. 22, 2004].

93. REINER SPECK, PETER LUDWIG SAMMLER 91 (Insel 1986).

all over the world from Germany, Austria, Switzerland, and Hungary to China and other places.⁹⁴ Switzerland recently passed a statute implementing the UNESCO Convention and limited Swiss export prohibitions to important artworks in the very few federal museums.⁹⁵

This liberalized export practice, however, should not be overestimated. It is valid only for privately-owned art treasures.⁹⁶ Most art treasures in Europe are in public museums, and these institutions are not allowed to sell the pieces in their collections.⁹⁷

c. Barriers for Return of Illegally Exported Objects

Until now, almost all lawsuits for the return of illegally exported artworks have failed unless the return claim could be based on theft, fraud, or illegal contracts. The reason for such failures is rather simple and is unrelated to any liberalizing trend. It is the cost, risk, and uncertainty of many return proceedings that prevent many persons from starting such proceedings. This may be the reason why no case in the European Union has been initiated for the recovery of cultural objects illegally removed from one member state to another. All these states have implemented the Directive for everyone to find out in which court recovery proceedings must be brought.⁹⁸ Yet, there are considerable psychological, financial and factual barriers to such recovery proceedings. Four such barriers are explained below.

(1) **Recovery proceedings initiated because of the illegal removal of cultural objects can only be brought by member states.** These states only have a claim based on public law (i.e., export prohibitions) and public international law (i.e., claims for national heritage) for the recovery of artworks to which they have no title. If the member state making the claim has legal title to the piece (e.g., the *Saliera* of Benvenuto Cellini has been stolen from the Vienna Museum of Art History⁹⁹ and may have been removed to another member state in the European Union), the recovery claim may also be based on replevin or any similar remedy; any private citizen who has lost art objects by theft or robbery can do the same.

94. See *id.* (noting that there are more than eight Ludwig museums); See also HEINZ BUDE, PETER LUDWIG—IM GLANZ DER BILDER 232 (Lübbe 1993).

95. Federal Act on the International Transfer of Cultural Property [Cultural Property Transfer Act, CPTA] June 20, 2003, 2003 BBl 4475, arts. 2–13 (Switz.) [hereinafter CPTA]; Regulation on the International Transfer of Cultural Property, Apr. 13, 2005, 2005 AS 1883 (Switz.). Bundesgerichtshof [BGer] [Federal Court] Dec. 23, 1987, 113 Entscheidungen des Schweizerischen Bundesgerichtshof [BGE] 368 (Switz.).

96. See generally *supra* text accompanying notes 88–95.

97. *Id.*

98. See Council Directive 93/7, *supra* note 72, at 76 art. 5.

99. FRANKFURTER ALLGEMEINE ZEITUNG, May 13, 1999, at 37.

(2) **Recovery proceedings initiated because of the illegal removal of art objects must be brought in the member state from which the artwork has been illegally removed.**¹⁰⁰ This means that the lawsuit must be filed abroad. The Brussels Regulation No. 44/2001 on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters of December 22, 2000,¹⁰¹ does not apply to such return proceedings based on illegal removal because such claims—as already mentioned—are based on public law (i.e., export prohibitions); this regulation gives a remedy to the state only for the return of illegally removed artworks to the plaintiff state as the country of origin.¹⁰² If the courts of the state of origin had jurisdiction under the domestic law of civil procedure, a judgment given by the domestic court would not be recognized in the other member states because the Brussels Regulation does not apply. Further, absent any additional treaty, no foreign court decision based on public law issues will be recognized in the member states of the European Union.¹⁰³

(3) **The member state from which the art objects have been illegally removed must provide evidence that the art object was removed from that country in 1993 or later because the Directive¹⁰⁴ and the national implementations¹⁰⁵ cover only illegal removals which took place under the post-1993 regime of “internal market.”**¹⁰⁶ This barrier is, of course, easy to overcome with respect to museum treasures registered in the catalogues of museums. But what about privately owned art objects? Anyone familiar with U.S. case law on cultural property issues is aware of these problems as a result of *Peru v. Johnson*.¹⁰⁷ In that case, the State of Peru could not provide sufficient evidence proving that art treasures were illegally excavated and exported after the new Peruvian regime for national cultural property took effect.¹⁰⁸ Such difficulties could be avoided by complying with the requirements of several international agreements providing that national governments should diligently register their pieces of national cultural heritage.¹⁰⁹

100. See Council Directive 93/7, *supra* note 72, at 76–77, art. 4–5.

101. Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC).

102. Council Directive 93/7, *supra* note 72, at 76–77, art. 8.

103. *Id.* at 77, art. 15.

104. *Id.* at 74.

105. Siehr, *supra* note 73, at 963.

106. Council Directive 93/7, *supra* note 72, at 74 (“The Directive shall apply only to cultural objects unlawfully removed from the territory of a Member state on or after 1 January 1993.”); *id.* at 963.

107. 720 F. Supp. 810 (C.D. Cal. 1989).

108. *Id.* at 812–14.

109. See Convention on Cultural Property, *supra* note 62, 823 U.N.T.S. at 231 (noting that state parties to the Convention will set up staff to establish and keep data on important cultural property); Council Directive 93/7, *supra* note 72, at 75, art. 1 (defining “cultural objects” as items classified by member state).

(4) **Apart from the costs for lawyers and the return proceedings, the successful plaintiff may be faced with claims for compensation raised by the defendant.** Under Article 9(1) of the Directive, "the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object."¹¹⁰ Similar provisions are contained in the national implementing laws. There is one basic difference in the 1995 UNIDROIT Convention:¹¹¹ whereas under Article 6(1) of this Convention the bona fide possessor has to prove his own due diligence with respect to the foreign export prohibitions, the Directive provides in Article 9(2) that the burden of proof is governed by the law of the requested state. In most member states, there is a presumption of good faith, and it is up to the other party to prove the contrary.¹¹²

Although there has been an increasing number of international agreements and national legislation since 1993, there is no evidence whatsoever that these documents seriously restricted international art trade. The reasons for this vary. As the first endeavor to regulate international art trade and as a non-self-executing agreement, the UNESCO Convention is not very efficient. The UNIDROIT Convention of 1995 may be too ambitious, and the Council Directive of 1993 seems to be too burdensome for the member states of the European Union to initiate return proceedings.

B. *Inalienable Cultural Objects*

All movables may be sold, are subject to prescription and statues of limitation, and can be freely exported. In many countries there are no *res extra commercium* (inalienable objects).¹¹³ All chattels can be sold and transferred without any problem. This may be different in some countries with respect to certain kinds of cultural objects.

110. Council Directive 93/7, *supra* note 72, at 77, art. 9.

111. Emily Sidorsky, *The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration*, 5 INT'L J. CULTURAL PROP. 19, 29 (1996).

112. See, e.g., Burgerlijk Wetboek [BW] [Civil Code] art. 3:118(3) (Neth.); Code Civil [C. civ.] art. 2268 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code] § 932(1) (F.R.G.); Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] act. 3 (Switz.); Código Civil [C.C.] [Civil Code] art. 434 (Spain).

113. See discussion *infra* Parts II.B.1.a-c.

1. Special Status of Cultural Objects

a. Archaeological Objects

Archaeological objects differ from other objects at least in four respects: (1) the original owner is unknown, (2) the state takes interest in the objects and passes legislation protecting as state property archaeological finds of scientific interest, (3) the context of the archaeological object may be more important than the object itself, and (4) the "nationality" of the object can be easily ascertained if the place of discovery is known.

(1) **Archaeological objects are discovered in well-organized excavation campaigns, clandestinely excavated by tomb robbers, or fortuitously found during building activities.** In all these cases the original owner of the discovered objects can no longer be located. Therefore, the objects are attributed to the owner of the piece of land in which the objects were hidden for such a long time, to the discoverer, or to both of them.¹¹⁴

(2) **Many countries provide that title in all archaeological finds of historical, scientific, or cultural interest is vested in the state.**¹¹⁵ In particular, many Mediterranean countries and many American states with a rich pre-Columbian past have enacted statutes that vest in the state title to significant archaeological finds.¹¹⁶ These countries have been inhabited for hundreds of years and, therefore, preserve much hidden testimony of the past. The state feels obliged to care for these witnesses of a glorious past and, hence, provides for state ownership with respect to archaeological objects. One case, *United States v. Schultz*, provides one of the most recent examples of such legislation of source states.¹¹⁷

(3) **The most important indirect quality of archaeological objects as compared to other kinds of cultural objects is the context in which they are discovered.** The value and scientific importance of a Rembrandt painting do not depend on where the masterpiece was discovered. Historians of art and the art trade may find it interesting, but none would argue that the circumstances of discovery are more important than the painting itself. This is different with archaeological objects. With some exaggeration, the context of discovery of archaeological objects is more important than the objects themselves. Take, for example, the

114. THE PROTECTION OF MOVABLE CULTURAL PROPERTY, *supra* note 54, at 30.

115. *Id.* at 28, 30.

116. *Id.* at 38.

117. 333 F.3d 393 (2d Cir. 2003). *United States v. Schultz* dealt with an Egyptian "patrimony law" enacted in 1983 that declares that all antiquities discovered after passage of the law are property of the state. *Id.* at 398.

SEVSO treasure.¹¹⁸ At least three countries claimed that the treasure had been illegally excavated in their territory, but neither Lebanon nor Croatia nor Hungary could convince the New York court that the treasure originated from one of those countries.¹¹⁹ Such a treasure, without any provenance, may be a nice item for exhibiting ancient silverware, but it has no historical or scientific value because nobody knows where it was discovered. This is important for general history, art history, economic history, and social history. All this information was lost because the illegally acting tomb robbers were concerned only with the material value of the treasure and did not know about the importance of the archaeological context.

(4) **If the context of archaeological finds is known, its “nationality” may be easily ascertained.** All archaeological finds are the cultural property of the country where they have been excavated. Cultural property may be evidence of anthropologically different cultures that populated the country centuries ago. A territorial rather than ethnological approach to cultural property prevails.

b. Objects in State Museums

Many museums in Europe are state museums. Even if they are incorporated today as foundations, trusts, or companies, they are still indirectly held by the state and subsidized by public money. The objects exhibited in these museums are either held permanently by the museum or held as loans to the museum for varying durations of time. Public museums appear to forbid deaccession: public museums may give long-term loans to other museums, or they may establish branches in different countries,¹²⁰ but public museums are hardly permitted to sell art objects to balance their budget or to buy other objects important for the museum collection. This practice may change in the future when public museums become more independent and financially autonomous.

c. Objects of the National Heritage

Without going into details of the term “national heritage,” the important aspect of it is not a matter of international law but of national law. Some countries with a Roman law tradition such as France, Italy, and Spain, provide that certain cultural objects are

118. Republic of Lebanon v. Sotheby's, 167 A.D.2d 142, 143–44 (N.Y. Sup. Ct. 1990).

119. *Id.* at 144; Croatia v. Tr. of the Marquessa of Northampton 1987 Settlement, 232 A.D.2d 216 (N.Y. Sup. Ct. 1996).

120. Compare DAS GUGGENHEIM PRINZIP (Hilmar Hoffman ed., 1999) with The State Hermitage Museum, *supra* notes 92–93.

domaine public, *demanio publico*, or *dominio público*; these objects cannot be sold or traded and are not subject to the rules of prescription, laches or statutes of limitations.¹²¹ They are *res extra commercium*—inalienable objects.¹²²

If privately owned cultural objects were also inalienable, art trade would be seriously affected. These objects are not, however, excluded from trade and commerce. Cultural objects owned by the state are exempt from all provisions of commerce. Because these objects cannot be sold without government permission anyway, their additional qualification as *res extra commercium* does not add very much to their exclusion from art trade. In international commerce, however, the quality of an item that cannot be traded might affect art trade considerably. Whether this is a real threat to international art trade remains to be seen.

2. Liberal Attitude with Regard to Foreign Restrictions of Trade

Trade is regulated by the governing rules at every respective market place. Therefore, we have to look at the place of actual art trade and decide whether foreign restrictions on trade will be enforced in domestic markets.

a. No Enforcement of Foreign Trade Restrictions

More than one hundred years ago, Spanish plaintiffs tried to enforce Spanish trade restrictions in France. A piece of church silverware, a ciborium of the cathedral of Burgos forming part of the Spanish *dominio público*, had been sold in France to a French collector, Mr. Pichon.¹²³ The representative of the cathedral of Burgos brought an unsuccessful lawsuit in France for recovery of the inalienable ciborium from Mr. Pichon.¹²⁴ The tribunal in Paris decided that the sale in France was governed by French law and, under French law, a Spanish ciborium was not an object *hors de commerce*.¹²⁵ Therefore, it could be traded in France and validly sold to a French collector.¹²⁶ Since then there have been no reported court decisions that enforced foreign provisions restricting trade in certain goods. Italy also declined to enforce French law on inalienable French

121. See e.g., Ley del Patrimonio Histórico Español (B.O.E. 1985, 155) (Spain).

122. See MARC WEBER, UNVERÄUSSERLICHES KULTURGUT IM NATIONALEN UND INTERNATIONALEN RECHTSVERKEHR 6 (2002).

123. Duc de Frias v. Baron Pichon, Tribunal civil de la seine, Apr. 17, 1885, 13 JOURNAL DU DROIT INTERNATIONAL PRIVE 593 (1886) (Fr.).

124. *Id.*

125. *Id.*

126. *Id.*

tapestries sold in Italy.¹²⁷ Other countries would do the same because it is well-settled private international law in many countries that the transfer of title to movable property is governed by the law of the country in which the piece of property to be transferred is located at the time of the transfer.¹²⁸

Although it is possible to change the law, such action has not been taken. Article 10(e) of the UNESCO Convention obliges the state parties, consistent with the laws of each state, "to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported."¹²⁹ There does not seem to be any state party to the UNESCO Convention that, in its implementing legislation, provides for the enforcement of foreign laws regarding inalienable pieces of cultural property in its domestic courts. The latest statute implementing the UNESCO Convention is the Swiss Federal Act in International Transfer of Cultural Property.¹³⁰ Neither this Act nor the German draft of a statute implementing the UNESCO Convention, however, provide for the enforcement of foreign rules on inalienable artworks.¹³¹

Another proposal has been made by the Institute of International Law. In its Basel Session of 1991, it passed a resolution entitled, "The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage"¹³² and provided the new conflicts rule in Article 2 which states: "The transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country."¹³³ This rule attempts to substitute the ancient and almost universal rule of *lex rei sitae* with the rule of *lex originis*.¹³⁴ Only Belgium, in its very recent codification

127. Cass., sez. un., 24 Nov. 1995, n.12166, *supra* note 59.

128. Kurt Siehr, *International Art Trade and the Law*, 243 RECUEIL DES COURS 50 (1993).

129. Convention on Cultural Property, *supra* note 62, art. XIII(d), 823 U.N.T.S. at 231. U.N. Educ., Sci. & Cultural Org. [UNESCO], *Means Of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, Fr., Feb. 27, 1970, *Final Report*, art. 13(d) [hereinafter UNESCO Final Report].

130. CPTA, *supra* note 95, at arts. 2-13.

131. Unpublished Draft of Oct. 2004 (F.R.G.) (on file with author).

132. 64 II Y.B. of the Inst. of Int. Law 403 (1992).

133. *Id.* at art. 2.

134. ERIK JAYME, *Neue Anknüpfungsmaximen für den Kulturgüterschutz im Internationalen Privatrecht*, in NATIONALES KUNSTWERK UND INTERNATIONALES PRIVATRECHT 95-108 (1999).

of private international law,¹³⁵ copied this new conflicts rule and provided for the principle of *lex originis* in Article 90.¹³⁶

b. No Implementation of Conventions

As mentioned above, there seems to be no state that has implemented the obligation fixed by Article 10(d) of the UNESCO Convention recognizing foreign rules protecting inalienable art objects.¹³⁷ There are at least two reasons for such reluctance. First, the Convention obliges the state parties to recognize such rules "consistent with the laws of each State."¹³⁸ As many states are not familiar with rules on inalienable objects and do not provide for such a protection for their own cultural heritage, they may believe that such a recognition of foreign rules on inalienable art objects is inconsistent with their own domestic law.

The second reason may be even more convincing. It is well known that many states are not very modest in their policy of classifying art objects as being part of their inalienable cultural heritage. For example, France qualified a second-rate van Gogh painting as a French *trésor national*.¹³⁹ Italy included a gouache of Henri Matisse in its list of national patrimony,¹⁴⁰ spent a lot of money

135. Moniteur belge of July 27, 2004, at 57341 (Belg.). "

136. Y.B. of The Inst. of Int'l Law, *supra* note 132, at art. 90. Article 90 on "Droit applicable au bien culturel" reads:

Lorsqu'un bien qu'un État inclut dans son patrimoine culturel a quitté le territoire de cet État de manière illicite au regard du droit de cet État au moment de son exportation, sa revendication par cet État est régie par le droit dudit État en vigueur à ce moment ou, au choix de celui-ci, par le droit de l'État sur le territoire duquel le bien est situé au moment de sa revendication. Toutefois, si le droit de l'État qui inclut le bien dans son patrimoine culturel ignore toute protection du possesseur de bonne foi, celui-ci peut invoquer la protection que lui assure le droit de l'État sur le territoire duquel le bien est situé au moment de sa revendication.

[If an object which a State has included into its cultural patrimony, has left the territory of that country illicitly under the law of that country at the time of export, the recovery claim by that State is governed by the law of that State in force at this moment or, if chosen by that State, by the law of the State in which the object is located at the time of recovery. Whenever the law of the State which includes the object into its national patrimony, does not provide for the protection of the good faith purchaser this person may invoke the protection which is given to him by the law of the State in which the object is located at the time of recovery.]

137. UNESCO Final Report, *supra* note 129, at art. 13(d).

138. *Id.* at art. 13.

139. Agent Judiciaire Du Tresor v. Walter, Cour de cassation [highest court of ordinary jurisdiction], Feb. 29, 1996, J.C.P. 1996, II, 22672 note Yves Chartier (Fr.).

140. Jeanneret v. Vichey, 541 F. Supp. 80, 84 (S.D.N.Y. 1982), *rev'd and remanded*, 693 F.2d 259 (2d Cir. 1982).

to keep a van Gogh painting in the Museo d'Arte Moderna in Rome,¹⁴¹ and tried to prohibit the removal of a private collection of French impressionist paintings to another European country.¹⁴² Germany and Switzerland disputed whether a collection of bugs was part of the German national heritage and, thus, should not be sold or exhibited in Basel, Switzerland.¹⁴³ Spain seems to have the idea that every important painting by Francisco de Goya should be kept in Spain.¹⁴⁴ With this in mind, many states refrain from supporting foreign protectionist policies that seem to be guided by the acquisitive and nationalistic attitudes of cultural authorities. This results in the artworks receiving exaggerated protection by domestic authorities and diminished protection from foreign authorities.

Some countries classify national treasures of their cultural heritage as inalienable objects and have convinced international legislators to include rules for mutual recognition of national protective measures in international conventions.¹⁴⁵ This policy has been unfavorably received: under national conflicts law, unless they have been implemented by the state parties, domestic courts will not enforce foreign restrictions of international art trade and treaty obligations regarding the recognition of foreign classifications as inalienable works of art.¹⁴⁶ It is not very likely that recent proposals to introduce the principle of *lex originis* will be rapidly accepted. The principle of *lex originis* should be restricted to very few cultural objects of outstanding importance for the country of origin.

C. International Lending of Cultural Objects

There is no shortage of cultural objects. Museums exhibit a small percentage of their holdings and preserve the rest in their storage rooms where one can even find many unopened packages with unregistered contents.¹⁴⁷ Occasionally newspapers report the

141. See *Beyeler v. Italy*, 2000-I Eur. Ct. H.R. 57 (pursuing the case for over ten years).

142. *Pagenstecher v. Provincia Autonoma Di Bolzano*, Cons. stato, 24 jan. 1989, *Rassegna Di Giurisprudenza E Dottrina I*, 40, 41 (Italy).

143. *Käfersammlung endlich in Basel*, NEUE ZÜRCHER ZEITUNG, Oct. 25-26, 1997, at 20.

144. See *Kingdom of Spain v. Christie, Manson & Woods, Ltd.*, (1986) 3 All E.R. 28 (Eng.) (citing forged expert documents as support for equitable remedy stopping the foreign sale of an oil painting by Goya).

145. See generally UNESCO Final Report, *supra* note 129 (codifying accepted international practices with regard to cultural objects).

146. Cass., sez. un., 24 Nov. 1995, n.12166, *supra* note 59.

147. See Dalya Alberge, *Curators rubbish minister's vision of 'hidden heritage'*, THE TIMES (UK), Jan. 27, 2005, at 1 (noting that "of seven million items in the collection [of the British Museum], 75,000 are on display").

“discovery” of art treasures in museum storage rooms.¹⁴⁸ This may be explained by the lack of funds, experienced personnel, space, and sometimes, interest. The lack of international cooperation also contributes to this sad state of affairs.

1. Lending Restrictions

a. Preservation of Cultural Objects

Last summer there was a small exhibition in Vienna devoted to the Italian painter, Giorgione (1476?–1510).¹⁴⁹ Very few paintings can be attributed to the Venetian master with absolute certainty. Two especially important paintings were exhibited: *The Three Philosophers* from the Vienna Museum of Art History and *The Tempest* from the Academy Museum of Venice.¹⁵⁰ The third important Giorgione masterpiece, *Sleeping Venus* from the Dresden Art Gallery of Old Masters, was missing.¹⁵¹ The Dresden Gallery declined to transport this precious painting for two reasons. First, it argued that such paintings should not be transported and exposed to different climates and crowded exhibitions for preservation reasons.¹⁵² Second, it believed that no museum wished to disappoint its visitors by lending one the museum’s outstanding masterpieces to another museum for a special exhibition that will not be later shown in the lending institution.¹⁵³

What happened to the Giorgione exhibition in Vienna could feasibly happen in all countries, museums, and exhibitions. Museum directors responsible for the proper preservation of the museum collection refuse to expose outstanding art treasures to the dangers of transportation. In addition, host museums reluctantly agree to lend other pieces on the condition of reciprocity and, of course, are not allowed to deaccession doubles and objects of less interest for the museum. Sometimes they have to set aside their concerns because trustees of private institutions or governments of public institutions exert their authority and promise loans to foreign museums or exhibitions.

148. See, e.g., Tim Cornwell, *Double delight unveiled at National Gallery as new Age of Titian dawns Real Renaissance*, THE SCOTSMAN (Edinburgh), Aug. 4, 2004, at 1 (describing the “discovery” of a Michelangelo in a store room of a New York museum).

149. Paul Holberton, *Giorgione: Myth and Enigma: A Searching Exhibition, Which Has Moved From Venice To Vienna, Enables Giorgione’s Achievement to be Understood With Greater Clarity Than Ever Before*, 159 APOLLO 58 (2004).

150. *Id.*

151. Mark Glazebrook, *Giorgione’s Artistic Poetry*, THE SPECTATOR, June 26, 2004, available at 2004 WLNR 7771231.

152. See generally, *id.*

153. *Id.*

b. Short-term Lending Only

In 1995, the Barnes Collection encountered financial trouble, so it traveled to many European cities and raised entrance fees.¹⁵⁴ In 2004, the exhibition of major works of the collection of the New York Museum of Modern Art in Berlin was a big success, allowing the museum building on Forty-seventh Street in New York City to be finished in the meantime.¹⁵⁵ Such well-planned long-term loans to foreign museums are not very common, however. Many countries and museums grant only short-term loans of their artwork. The difficulty with short-term loans is that exhibitions are very expensive to prepare and the term of the loan is too short, running from the moment the object leaves the lending collection and ending with the unpacking of the returned treasures. Of course, there are some permanent loans to foreign museums or collectors in local museums.¹⁵⁶ Nevertheless, there is still the need for the liberalization of lending policies.

c. Danger in Foreign Countries

At the very end of the exhibition of Egon Schiele paintings at the Museum of Modern Art, two of Schiele's paintings—*Portrait of Wally* and *Dead City II*—were seized in January 1998 by the Manhattan District Attorney, Robert Morgenthau, and taken into custody on behalf of persons who claim to be the owners of paintings.¹⁵⁷ The case regarding *Portrait of Wally* is still pending: the court has yet to decide whether the painting was validly donated by the former owner—the Bloch-Bauer family—to the Republic of Austria, or whether the family suffered illegal expropriation under the Nazi government of Vienna and, therefore, still owns the painting.¹⁵⁸ Since the time of international efforts to reveal the provenance of dubious acquisitions

154. See generally, Jonathan Scott Goldman, *Just what the Doctor Ordered? The Doctrine of Deviation, the Case of Dr. Barnes' Trust and the Future Location of the Barnes Foundation*, 39 REAL PROP., PROB. AND TR. J. 711 (2005).

155. See generally, Lawrence Van Gelder, *Arts Briefing*, NEW YORK TIMES, Sept. 21, 2004.

156. The Kunsthau in Zürich received Arnold Böcklin's *Helvetia* (1891) from the old National Gallery in Berlin and van Gogh painting from the Niarchos Collection of Athens through permanent or long-term loans.

157. Ronald B. Kowalczyk, *Section 1203 of the New York Arts and Cultural Affairs Law: Civil by Association*, 10 INT'L J. CULTURAL PROP. 95–121 (2001).

158. *In the Matter of the Application to Quash Grand Jury Subpoena Duces Tecum Served on The Museum of Modern Art*, 677 N.Y.2d 872 (N.Y. Sup. Ct. 1998), *rev'd and mot. denied sub nom.*; *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000). Kowalczyk, *supra* note 157, at 95–121.

of art objects during and shortly after the Nazi period,¹⁵⁹ museums have been very cautious to lend art objects which might be discovered as former Jewish property and which might be returned to the former owners without taking into account any bona fide purchase or prescription or any similar repose policy.¹⁶⁰ Because of such dangers and the reluctance of the host institution to remove these dangers, exhibitions have had to be cancelled or reduced considerably.¹⁶¹

2. Liberalization of Lending Restrictions

a. Immunity Provisions

The disputes in the Schiele case could have been avoided if the Museum of Modern Art had applied for immunity coverage in the state of New York¹⁶² and received full coverage under the federal immunity statute,¹⁶³ including coverage for looted and expropriated pieces of art. Under those immunity statutes, items on loan cannot be seized by any creditor.¹⁶⁴ The creditor must pursue its claim in the country of the lending institution and cannot take advantage of the temporary presence of the object in another jurisdiction. There are similar provisions on immunity of art objects on loan in Germany,¹⁶⁵ Switzerland,¹⁶⁶ and other countries.¹⁶⁷ As soon as such immunity is granted, creditors are prohibited from seizing the immune work of art and are precluded from appropriating it or selling it at public auction. The lending institution does not have to go to court abroad and defend the loan against creditors in foreign tribunals, thereby facilitating lending.

b. Long-term Loans

In recent years, some countries in Europe modified their lending policies. Italy is the most striking example.¹⁶⁸ The new Italian statute

159. See Rascher, *supra* note 29; Siehr, *supra* note 30; O'Keefe, *supra* note 31; See also Elliot, *supra* note 25; Gethmann-Siefert, *supra* note 26; Kostenewitsch, *supra* note 27.

160. See generally, Rascher, *supra* note 29.

161. This happened when the Sabarsky Gallery in New York wanted to exhibit its collection in Vienna in 2003 and the museum in Vienna could not provide a guarantee that the loaned paintings would not be seized by authorities. See FRANKFURTER ALLGEMEINE ZEITUNG, May 19, 2003, at 48.

162. N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney's 2004).

163. Immunity From Seizure Act (IFSA), 22 U.S.C. § 2459(a) (2005).

164. *Id.*

165. Zum Schutz deutschen Kulturgutes gegen Abwanderung, October 15, 1998, BGBl. I at 1755, § 20 (F.R.G.).

166. CPTA, *supra* note 95, arts. 10–13 (Switz.).

167. ERIK JAYME, DAS FREIE GELEIT FÜR KUNSTWERKE (Wien 2001).

168. Decree Law, Feb. 22, 2004, *supra* note 92, at n.45.

on cultural property, the *Codice Urbani*, provides that Italian state museums are allowed to give long-term loans of up to three years to foreign institutions.¹⁶⁹ This liberal attitude is very likely to promote international cooperation, international exhibitions, and hopefully create a less nationalistic policy by art museums.

c. Multinational Museums

Although national museums have had multiple branches in the same city¹⁷⁰ or country,¹⁷¹ it is not until recent years that national museums have established branches in foreign countries. The Guggenheim Museum of New York asked architect Frank O. Gehry to design a museum Bilbao, Spain; the Guggenheim Museum later established branches in Berlin and other places.¹⁷² The Hermitage of St. Petersburg in Russia, which established branches in London and Amsterdam and will soon establish one in Mantova, Italy, imitated this policy.¹⁷³ Art collectors also "go international." The German art collector Peter Ludwig donated and lent hundreds of works of art to foreign museums and collections; the museums were often renamed "Museum Ludwig" or added the name "Ludwig" to their original name in return for his generosity.¹⁷⁴ Such multinational engagements provide good examples for denationalizing art collecting and stressing the common interest in collecting and preserving what Dr. Croke called the heritage of mankind.¹⁷⁵

Art collectors buy pieces of art. As such, art collectors are not interested in loans. Nevertheless, a liberalization of lending practices may also influence art trade. If museums and public collections relied more on international cooperation, gave more long-term loans, and agreed to deposit permanent loans in foreign museums, art trade would be relieved from competition of museums and could better serve the private collectors.

III. CONCLUSION

In discussing trends toward liberal exchange of cultural objects, it must be stressed that the exchange should be a legal exchange. This, however, is not easy to define because legal systems differ with

169. *Id.*

170. DAS GUGGENHEIM PRINZIP, *supra* note 89.

171. *Id.*

172. *Id.*

173. *Id.*

174. For example, the Antikenmuseum Basel became the "Antikenmuseum Ludwig Basel" in Switzerland. Bude, *supra* note 94.

175. SOMERUELES, *supra* note 1.

respect to the qualifications of legality of art trade. Since *United States v. Schultz*,¹⁷⁶ there is less of a disparity between Europe and the United States as to the characterization of illegal excavations as a kind of theft in countries claiming that archaeological finds are state property. Also, with respect to export prohibitions, there is not much disagreement so far: in all countries, foreign export prohibitions are not enforced unless confirmed by domestic import barriers enacted in implementing international agreements. Basic differences still exist, however, with respect to bona fide purchases of diverted or stolen goods. In almost all continental European countries, diverted or stolen goods may be acquired by a bona fide sale or prescription, and are thereby cleaned of their dubious provenance and permitted to enter the legal art trade. The common law tradition, however, is less forgiving than the practice in most continental European countries: the fact that a stolen good was acquired by a bona fide purchaser does not rid it of its dubious provenance and the stolen good remains barred from the legal art trade. So far, nothing has changed and no trend for a change can be seen.¹⁷⁷

There are, however, three trends that may liberalize the international exchange of cultural objects. The violation of foreign export prohibitions must be tried in the courts of the state to which the objects have been exported.¹⁷⁸ These court proceedings—brought in the state of export—are burdensome and expensive. These barriers may be responsible for the fact that the Directive on the return of illegally removed cultural objects and the implementing national instruments have not yet been considered by the courts. There is no case in which a member state of the European Union has asked for the return of an illegally removed national treasure. Also, the UNESCO Convention has been applied only in *obiter dicta* of cases in which the objects had been stolen and were not to be returned unless legally acquired by the defendant.¹⁷⁹

In addition, another trend continues to prevent major insecurity of trade in normal works of art: all states decline to enforce foreign classifications of art works as inalienable objects.¹⁸⁰ Because the use of that classification is not limited to very important national art treasures, the wide use of that classification, and the lack of a public register of objects classified as national treasures confirms the

176. 333 F.3d 393.

177. *Id.*

178. *Id.*

179. Cass., sez. un., 24 Nov. 1995, n.12166, *supra* note 59; Bundesgerichtshof [BGer] [Federal Court] April 1, 1997, 123 Entscheidungen des Schweizerischen Bundesgerichtshofs [BGE] II 134 (Switz.).

180. John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y. U.J. INT'L L. & POL. 1-14 (1998), *reprinted in* Merryman, *supra* note 22, at 300-11.

suspicion of the other states that art trade will be ruined and break down if these classifications are respected. Finally, the changed attitudes toward lending policies have to be evaluated and recognized as a trend for liberalizing nationalistic cultural policy.

There is still much to do to liberalize the legal exchange of cultural objects: if public and private collections—especially collections of archaeological mass objects (e.g., vases, oil lamps, etc.)—are sold more, the trade in illegally excavated objects would decrease, thereby contributing to the protection of sites.¹⁸¹

In summary, it is very unlikely that the legal art trade will be liberalized by national statutes or international agreements. Several of those instruments still await national implementation and ratification. The daily application of existing legal provisions, however, may liberalize the international exchange of cultural objects. States should be more cautious than before in protecting minor cultural objects as national treasures. States should also grant export licenses more liberally to escape expensive compensations of the artwork's owners and should liberalize their lending policies.

181. *Id.*