III. KEYNOTE

CULTURAL PROPERTY, INTERNATIONAL TRADE AND HUMAN RIGHTS

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"Cultural Property Trade Law" is a phrase that some might think anomalous. Most source nations[1] have laws that, in practice, prohibit or sharply limit the export of cultural objects. The primary purpose of these retentionist laws is to keep cultural objects from leaving the national territory.[2] Such laws *oppose* trade in cultural property.

Although history reveals earlier examples, laws restricting international trade in cultural property were widely adopted by source nations only in the present century, and an international group of scholars seriously interested in the field did not begin to coalesce until the 1970s. The first major international legislation on the topic, the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of cultural Property*,[3] was promulgated in 1970 and was supplemented in 1994 by the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*.[4] The leading scholarly journal, the *International Journal of Cultural Property*,[5] began publication only in 1992. Cultural property trade law is still an infant.

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[1] "Source nations" are the sources of cultural objects for which there is a world market. When they leave source nations, cultural objects flow to "market nations." Many nations, obviously, are both exporters and importers of cultural objects, but if the trade were unimpeded by export controls it would seldom be in balance. Thus, under present world conditions Italy would be a heavy net exporter of cultural property and Switzerland a substantial net importer.

[2] *See* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477 (1988) (discussing retentionism in cultural property policy), *reprinted* in John Henry Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 122 (2000) [hereinafter *Critical Essays*].

[3] *See* Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971), *available at* http://www.unesco.org/culture/laws/1970/html_eng/page1.htm (last visited Nov. 27, 2000) [hereinafter 1970 UNESCO Convention].

[4] *See* Convention on Stolen or Illegally Exported Cultural Objects, *opened for signature* June 24, 1995, *reprinted in* 34 I.L.M. 1322 (1995), *available at* http://www.unidroit.org/english/conventions/c-cult.htm (last visited Nov. 27, 2000) [hereinafter 1995 UNIDROIT Convention].

[5] The *International Journal of Cultural Property*, published by Oxford University Press since 1998, is "a major forum for the discussion of all questions relating to cultural prop-

As a new field of study, cultural property trade law understandably lacks consistency, coherence and elegance. Key concepts have not been refined. Important questions await legislative, judicial and scholarly attention. Interested parties take stances that harden into inflexible positions, and there is little fruitful dialogue between them.[6] As signs of a possible escape from this *impasse,* I will describe some foreign developments that may significantly affect international cultural property law in the coming decades. Two oddly paired forces are driving these developments. One is the international commitment to free trade. The other is the international commitment to protect human rights and fundamental freedoms. We look first at free trade.

FREE TRADE

In discussing trade in cultural objects, it is important to understand that we deal only with the voluntary transfer of privately held works. Art works, antiquities, historical objects and other articles of cultural property in museums, monuments, public collections and storehouses do not figure significantly in international trade. It is trade in cultural objects in private hands—principally private individual and corporate collections and the stocks of dealers and auction houses—with which we are here concerned.[7]

National Treasures. What is (and what is not) a "national treasure?" The answer to that question has been made important by the growing international commitment to free trade and by the awkward position that cultural objects occupy in relation to that commitment. The two major international agreements underlying trade liberalization, the European Union Treaty ("EU Treaty")[8]

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erty policy, ethics, preservation, economics and law." *International Journal of Cultural Property, at* http://www3.oup.co.uk/intjcp/scope (last visited Nov. 27, 2000).

[6] *See* John Henry Merryman, *The Free International Movement of Cultural Property,* 31 N.Y.U. J. INT'L. L. & POL. 1 (1998) (describing the ideologies and discourses at play in the cultural property dialogue), *reprinted in Critical Essays, supra* note 2.

[7] I do not here focus on the special problems raised by trade in archaeological objects, which are discussed in an earlier article: John Henry Merryman, *A Licit International Trade in Cultural Objects,* 4 INT'L J. CULTURAL PROP. 13 (1995), *reprinted in both* INTERNATIONAL CHAMBER OF COMMERCE, LEGAL ASPECTS OF INTERNATIONAL TRADE IN ART 3 (Martine Briat & Judith A. Freedberg eds., 1996), and *Critical Essays, supra* note 2.

[8] *See* Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter EU Treaty]. The EU Treaty renamed and amended the Treaty of Rome, Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, and established the Economic and Monetary Union (EMU). The EU Treaty required ratification by member states, which sometimes was politically difficult (in France, the referendum passed by 51%, and Denmark rejected it, and hence the EMU, by referendum). It entered into force on November 1, 1993. Further amendments to the EU Treaty were made in the Treaty of Amsterdam, Oct. 2, 1997, 1977 O.J. (C340)1.

and the World Trade Organization ("WTO"),[9] both prohibit export controls on "goods," which the European Court of Justice ("ECJ") has expressly held includes works of art and other cultural objects.[10]

While generally prohibiting export controls, both treaties—the EU Treaty in Article 30 and WTO in Article XX—make an express exception for restrictions "imposed for the protection of national treasures[11] possessing artistic, historic, or archaeological importance."[12] Cultural property export controls that "protect national treasures" accordingly do not violate European Union or World Trade Organization members' treaty obligations. Restrictions on the export of cultural objects that do not meet the definition of "national treasures," however, would presumably be found invalid by the ECJ. And so we need to know what is a "national treasure." For convenience I will discuss the EU Treaty and assume that similar considerations apply to the equivalent, and practically identical, WTO provisions.

One arguable approach is to accept whatever the source nation's authorities designate to be a "national treasure." After all, the argument might go, who is better qualified to decide what has the kind of national importance implied by the term "treasure" than the representatives of that nation itself? That approach would avoid the necessity, difficulty and uncertainty cost of making and justifying distinctions between one cultural object and another. Is it likely that such a *laissez-faire* approach to the problem will prevail?

Treasures? As yet there have been no decisions on the meaning of "treasures" by the ECJ. We do, however, have a number of scholarly contributions to the subject, including a leading article by

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9 *See* General Agreement on Tariffs and Trade 1994 ("GATT"), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization ("WTO"), Annex 1A, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 21, 33 I.L.M. 1125, 1154 [hereinafter WTO].

10 The European Court of Justice held in Case 7/68, Commission v. Italy, [1968] E.C.R. 617 [1969] C.M.L.R. 1 at 8, Common Mkt. Rep. (CCH) 8057, at 7881 (1968), that works of art are "goods" within the meaning of the EU Treaty and thus, in principle, subject to the same trade liberalizing rules as other "goods."

11 The English version of the EU Treaty uses "national treasures," as does the French version. The German version is *nationales Kulturgut* and the Italian is *patrimonio nazionale. See* Andrea Biondi, *The Merchant, the Thief & the Citizen: The Circulation of Works of Art within the European Union*, 34 COMMON MKT. L. REV. 1173 (1997) (commenting on this difference in nomenclature). "However, there is no doubt that the definition should be uniform, and considering the ECJ's case law on other exceptions, it might be argued that the expression 'national treasures' should be preferred as it is narrower." *See id.* at n.27.

12 EU Treaty, *supra* note 8, at art. 30; WTO, *supra* note 9, at art. XX.

Pierre Pescatore, published while he was a Judge of the ECJ.[13] Judge Pescatore's position is clear and firm: "exceptions from the rules barring export controls are to be strictly construed."[14] The term "treasures" must be treated as restrictive. It cannot apply to the generality of cultural objects, but only to those having unusual value because of their uniqueness and their importance to a people. The purpose of the exception, according to Judge Pescatore, is not to preserve the totality of an artistic patrimony, but to safeguard its "essential and fundamental elements."[15] In speaking of works of art another scholar, Professor Biondi, states that: "[o]nly when the object is of outstanding artistic importance, can it qualify as a 'national treasure, regardless of its connection with a certain country.'"[16] A third scholar, Dr. Carducci, draws attention to the principle of proportionality:

> Les mesures de protection nationales sont conditionnées au principe de proportionnalité entre la nécessité de la mesure et son résultat effectif, eu égard surtout à l'interdiction que ces mesures aboutissent à des discriminations arbitraires ou des restrictions déguisées.[17]

Assuming that these observers are right, would an ancient vase of no particular distinction, one of many that for most purposes are unremarkable and fungible, be considered a "treasure?" What about the allegedly huge numbers of redundant antiquities in storehouses in major source nations? Picasso made thousands of paintings and sculptures. Is every one of them a "treasure?" Every

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[13] *See* Pierre Pescatore, *Le commerce de l'art et le Marché commun*, 21 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 451 (1985).

[14] *Id.* at 455. Judge Pescatore was a member of the Court when it decided *Commission*, [1969] C.M.L.R. 1 at 10 (deciding that Article 30 exceptions must be strictly interpreted); *see also* Biondi, *supra* note 11, at 1178-79 (adding that the burden is on the nation to justify the reliance on the exception).

[15] Pescatore, *supra* note 13, at 456. We are given additional guidance concerning the effective scope of the Article 30 exception for "treasures" by European Council Directive 93/7 of 15 Mar. 1993, which provides for "the return of cultural objects unlawfully removed from the territory of a member state." Council Directive 93/7 1993 O.J. (L 74) 74. The Annex to the Directive lists categories to which objects classified as national treasures "within the limits of Article 30 of the Treaty" must belong in order to qualify for return. For example, an oil painting must not only meet the Article 30 definition of a "national treasure," but it must also be more than fifty years old, must not belong to its creator, and must have a value of at least 150,000 ecus. *See* Biondi, *supra* note 11, at 1182ff.

[16] Biondi, *supra* note 11, at 1181. *See* MANLIO FRIGO, *Gli Aspetti Giurdici*, *in* ISTITUTO REGIONALE DI RICERCA DELLA LOMBARDIA, IL MERCATO DELLE OPERE D'ARTE ED I PROBLEMI DELLA CIRCOLAZIONE A LIVELLO EUROPEPO 77 (Franco Angeli ed., 1995) (providing a discussion that adopts a less strict interpretation of the Article 30 exception).

[17] GUIDO CARDUCCI, LA RESTITUTION INTERNATIONALE DES BIENS CULTURELS ET DES OBJECTS D'ART (1997) at 90 ["National protective measures involve balancing the need for the measures and their efficacy with the need to ensure that such measures do not result in arbitrary discrimination or disguised restrictions."].

Fra Angelico? Every Monet? Or, as Dr. Carducci, in speaking of France, has put it: *La question reste posée de savoir si ce vaste ensemble d'objets peut rentrer dans la notion, en soi assez élitaire, de "tresor national" au sens de [l'article 30].*[18]

Perhaps the matter is better approached from another direction. Suppose we were called upon to list the "treasures"—the "essential and fundamental" elements of the artistic patrimony of a nation? How would we go about it? Recall that we are talking about privately held objects. How many cultural objects in private hands in the United States would be considered "essential and fundamental" elements of the American artistic patrimony? Thousands? Hundreds? A dozen or two? A mere handful?

National? The term "national" adds another problem of interpretation. Does "national" refer to the State territory in which the object was created? Where it was found? The nationality of its creator? The place it represents or to which it refers? Is a gold platter made in Greece, but found in Sicily, Greek or Italian or both?[19] Whatever "national" is taken to mean, could water colors of Austrian scenes painted by Adolf Hitler, held in a private Italian collection, be considered Italian national treasures? Was Italy's refusal to permit export of the Hitler watercolors justified under the EU Treaty?[20] How about Italy's *notificazione* of a Matisse painting of a French interior, painted in France,[21] or the van Gogh painting *le Jardinière,* also painted in France?[22] Would the ECJ agree with the French authorities that a painting of a Turkish scene by the Swiss artist Jean-Etienne Liotard was a French national treasure?[23] How about a Chinese jar of the Yuan period,[24] and a group of drawings by Italian artists[25] for which export permits were refused by French authorities? Were they French national treasures?

We do not know the definitive answers to these questions,

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18 *Id.* at 92-93 ["The question still remains as to whether this vast group of objects can be included in the selective notion of 'national treasure,' in the sense of article 30."].

19 These are the facts in United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999).

20 *See* Alan Cowell, *Hitler's Watercolors Too Hot for Italy's Comfort,* N.Y. TIMES INT'L, Nov. 20, 1992, at A4.

21 *See* Jeanneret v. Vichey, 693 F.2d 259 (2d Cir. 1982).

22 Verusio ed altri v. Ministero per i beni culturali ed ambientali ed altri, Italy, Corte cost., (14 giugno) 20 giugno 1995 n. 269, 40 Giur. It. 1918 *note* Scino *id.* 1930, Illari *id.* 3704.

23 *See Export Ban Rocks Paris,* ARTNEWSLETTER, Sept. 7, 1993, at 5.

24 *See Ministre de la culture c. Consorts Genty,* Conseil D'Etat 7 Oct. 1987, 1988 D. Jur. 269, note J. Laveissière.

25 *See Talleyrand-Périgord,* Conseil D'Etat, Ass. 12 Déc. 1969, J.C.P. 1972.II.17105, note A.-H Mesnard.

since these cases have not been taken to the ECJ,[26] which has the ultimate power to distinguish between "treasures" and other cultural objects, and to decide whether a disputed object, even if it is a "treasure," is also "national." If and when they occur, such cases will provide clamorous litigation, and the ultimate decisions will excite strong emotions. It will be interesting to see what happens.

Protection. Recall that in the EU Treaty the exception from trade liberalization rules applies to restrictions imposed for the "protection" of national treasures. That makes it necessary to consider what "protection" means. Here again it seems possible that the ECJ might decide to accept national usage and decline to impose a uniform rule or standard. In fact, however, it has already done otherwise. In *Commission v. Italy,*[27] in response to Italy's claim that the export tax on works of art was a protective measure, the Court disagreed, stating that the tax had "the sole effect of rendering more onerous the exportation" of works of art "without ensuring attainment of the aim intended by [Article 30], which is to protect the artistic, historical or archaeological heritage."[28] The Court thus recognized that retention and protection are quite different concepts.

Normally, when we speak of "protection," we mean taking measures to preserve something or keep it safe from harm. When we say we want to "protect" cultural objects, it would seem that we want to: (1) preserve them from physical damage or destruction; (2) preserve meaning and information that would be lost by removal of an object from its context; and (3) preserve the integrity of complex objects by preventing their dismemberment.[29] "Protec-

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[26] In 1997, in a casual conversation with an official of the EU Commission I was told that the Commission had encouraged litigation to supply meaning to the exception for national treasures but that, for unexplained reasons, the collectors and dealers involved were reluctant to do so. Nor did he comment on the possibility that the Commission itself might bring an action, as it did in the Italian Tax case.

[27] [1968] E.C.R. 617 [1969] C.M.L.R. 1 at 8, Common Mkt. Rep. (CCH) 8057, at 7881 (1968).

[28] *Id.*

[29] As originally drafted by the UNIDROIT Working Group, Article 5 (3) of the UNIDROIT Convention, listing the categories of illegally exported cultural objects that a foreign court should order returned to the source nation, specified two additional categories: objects of ritual/ceremonial importance to living cultures (exemplified by the U.S. Native American Graves Protection and Repatriation Act of 1990, 25 U.S.Code §§2001ff., which provides for retention by and return of cultural objects to indigenous American Indian tribes and Native Hawaiian organizations), and objects "of outstanding cultural importance for the . . . nation." *See* Merryman, *supra* note 7, at 13 (providing a fuller discussion of special treatment of ritual objects of living cultures), *reprinted in Critical Essays, supra* note 2. The logical appeal of each of these special cases is evident. When finally promulgated, however, "outstanding" had been reduced to "significant," a pallid term that deprived the clause of meaning, justifying retention of anything a State chooses. Can one conceive of an object that has "insignificant importance?" *See* John Henry Merryman, *The*

tion" clearly seems to be an appropriate term for such cases. But suppose, as is often the case, that the export of an easel painting by Tintoretto, or a coin collection or an antique ceramic offers no significant threat of physical damage, loss of information or dismemberment. If export is prohibited in such a case, is "protection" the proper term, or would "retention" be more accurate? If the question were properly presented to the ECJ, would it be likely to find that Italian denial of an export permit would "protect" the Hitler watercolors, or the Matisse or van Gogh paintings?

Of course the court might approach the meaning of "protection" in a different way, treating the totality of objects classified as "national treasures" under Article 30 as a coherent collectivity of related objects, using such terms as "cultural patrimony" or "cultural heritage" (compare the Italian version of the Treaty, in which the term is "*patrimonio nazionale,*" rather than "national treasures"). The argument would be that export restrictions protect the patrimony or heritage by keeping it whole; any removal is a dismemberment, and retention equals protection. That appears to be the basic cultural property retentionist position, but it clearly is inconsistent with the impressive scholarly interpretation of Article 30 of the EU Treaty described above.

Consider the case of the Cleveland Poussin. The Director of the Cleveland Museum bought a Poussin painting from a French collector and had it shipped to the Museum, where it now hangs. The French government protested that the painting was removed from France without an export permit and charged the Director with criminal violation of French law (the Director had impressive expert legal advice that an ambiguous passage in the French law, properly interpreted, made such a permit unnecessary, but the French authorities obviously disagreed). Eventually the matter was settled,[30] but observe what had in fact happened. A great work of art from a private collection in France, where it was unavailable for public viewing, today hangs in a public room in a great museum, where it is properly identified as a Poussin and honored as a great work of art by the important French artist. In the Cleveland Museum, the Poussin is still a Poussin. What harm has been done to this French "national treasure?" In what way would retention in the French private collection have "protected" the Poussin?

UNIDROIT Convention: Three Significant Departures from the Urtext, 5 INT'L. J. CULTURAL PROP. 7 (1996), *reprinted in Critical Essays, supra* note 2.

[30] The Cleveland Poussin *affaire* never reached the courts. *See Dispute with Louvre Ends*, N.Y. TIMES, Mar. 28, 1987, at L11, col. 4 (providing a discussion of the case and its resolution).

Compare the case of the proposed export of one of Egon Schiele's most important paintings, which was being sold by its Austrian owner to a major American museum. The competent Austrian Ministry denied export permission. In overruling the Ministry, the Austrian Administrative Court said that it should have considered that the State's interest in retaining the Schiele was outweighed by its interest in propagating Austrian art abroad.[31] Such examples are of course rare. In most source nations, cultural nationalism[32] prevails; the sentiment and the rhetoric generally support the retention of cultural goods in the name of "protection." When the proper case arrives before the ECJ, will it agree? We do not know and can only speculate. Perhaps, but perhaps not.

National Ownership Laws. Up to this point we have been discussing the exception for "national treasures" in Article 30 of the EU Treaty and Article XX of WTO. We now leave those treaties and turn to another topic. In the latter half of the twentieth century, an increasing number of nations have adopted legislation declaring that broad categories of cultural objects, including those in private hands, are property of the state, or the nation, or the people. These "national ownership laws" raise interesting and as yet, unresolved questions.

Some of these laws were adopted for a reason that may not be obvious to the casual observer. It is an established principle of private international law that nations will judicially enforce foreign private law rights, including rights of ownership.[33] If a thief steals my Jackson Pollock painting in California and takes it to Canada, I can sue him in a Canadian court and recover my Pollock. In the absence of a treaty, however, a court will not enforce another nation's export controls. It is a principle of international law, ultimately based on the principles of the independence and equality of states, that courts have no obligation to enforce foreign public laws, of which export controls are obvious examples. Thus, if an Italian collector moves to New York and takes his Matisse painting with him without obtaining export permission, the American court will not, in the absence of a treaty, enforce Italy's claim for return

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[31] *See* Austria, Administrative Court, Decision No. 2031 (A)/1951.

[32] *See* Merryman, *The Retention of Cultural Property, supra* note 2 (discussing Cultural Nationalism).

[33] Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982) is a leading case illustrating this point. This rule is universally recognized but is, of course, subject to the rules protecting good faith purchasers. *See* French Minister of Cultural Heritage v. Italian Minister of Cultural Heritage and De Contessini, Cass. Sez. I, 24 Nov. 1995.

of the Matisse.[34] The painting was removed from Italy by its owner. No theft had occurred. No private law right was at stake.

This clear distinction between theft and illegal export becomes cloudy in the face of national ownership laws. Consider two American decisions. In the first, *U.S. v. McClain*,[35] archaeological objects taken from an undocumented Mexican site were brought by Americans into the United States for sale. This looks like a simple case of illegal export, but the applicable Mexican law states that all pre-Columbian objects found anywhere in Mexico are property of the Mexican people. The U.S. Government brought a criminal proceeding against the McClains under an American law, the "Stolen Property Act,"[36] making it a crime to transport "stolen" property in interstate or foreign commerce.

Were these objects "stolen" within the meaning of the U.S. statute? The court, looking to the Mexican law declaring that all such objects were owned by the Mexican State held that they were stolen, and the looters went to prison.[37] Despite its arguable inconsistency with the language of the 1970 UNESCO Convention[38] and with the principle that one state will not enforce another's public laws, the *McClain* case has not been overruled.

In a later case, *The Government of Peru v. Johnson*,[39] Peru brought a civil action to recover Moche objects in an American collection, alleging that they were "stolen" under Peru's law declaring such objects to be property of the State. This was clearly an attempt to extend the *McClain* doctrine. In *McClain,* the criminal action was based on the federal statute, and the Court looked to

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[34] These are the facts in an American case, Jeanneret v.Vichey, 693 F.2d 259 (2d Cir. 1982).

[35] 593 F.2d 658 (5th Cir. 1979) (challenging the second round of convictions for having received, concealed and/or sold stolen goods in interstate or foreign commerce and also for conspiracy to do the same).

[36] *See* 18 U.S.C. § 2314 (1994).

[37] *See generally McClain,* 593 F.2d 658. An earlier case, *United States v. Hollinshead,* 495 F.2d 1154 (9th Cir. 1974), concerning a Mayan Stela illegally removed from Guatemala, had resulted in a similar conviction, but the *McClain* decision more fully considered the legal questions and is the leading precedent. Observe that the United States had, in 1972, ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. *See* 1970 UNESCO Convention, *supra* note 3. Under Article 7(b)(I), parties to the Convention agreed to prohibit the import of cultural property "stolen from a museum or a religious or secular public monument . . . provided that such property is documented as appertaining to the inventory of that institution." *Id.* This definition of "stolen" obviously would not have included the *McClain* objects and probably would not have included the *Hollinshead* Stela.

[38] *See* 1970 UNESCO Convention, *supra* note 3. In 1983, Congress finally enacted legislation implementing U.S. adherence to the Convention: the Convention on Cultural Property Implementation Act, 19 U.S. Code §§2601ff. (1999). The definition of "stolen" cultural property in this legislation parallels that in the UNESCO Convention.

[39] 720 F.Supp. 810 (C.D. Cal. 1989). The trial court decision was affirmed on other grounds in an "unpublished" opinion at 1991 U.S. App. LEXIS 19385.

the Mexican law to help it determine the meaning of the key term "stolen" in that statute. In the *Peru* case, the action itself was based on the foreign law. This distinction was not discussed by the *Peru* Court. Instead, in considering the Peruvian law claiming national ownership, the Court stated:

> [T]he domestic effect of such a pronouncement appears to be extremely limited. Possession of the artifacts is allowed to remain in private hands, and such objects may be transferred by gift or bequest or intestate succession. There is no indication in the record that Peru has ever sought to exercise its ownership rights in such property, so long as there is no removal from the country. The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions . . . .[40]

Since the Court would not enforce Peru's export restrictions, relief was denied.

Other civil actions to recover illegally exported objects brought in US courts by foreign nations on the basis of their national ownership laws, had ended in settlements or were decided on other grounds until the *Steinhardt* case,[41] in which the Government of Italy intervened as a civil claimant, alleging ownership of the antiquity in question, a gold Phiale from Sicily.[42] The trial court held for Italy, but the appellate court affirmed on other grounds, and the question whether the *McClain* doctrine properly extends to civil actions remains open.

I have found only one case in which a nation successfully brought an action in a foreign court to assert a right of ownership based on its own national ownership law. This was a civil action by Ecuador to recover archaeological objects exported without permission to Italy, where they found their way into a private collection. Basing its decision on the language of Ecuador's antiquities legislation, the Tribunal of Torino ordered the artifacts returned to Ecuador.[43]

These three cases: *McClain, Peru* and *Danusso,* raise a host of unanswered questions about the foreign legal effects of national

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[40] *Id.*

[41] *See* United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999).

[42] *See id.*

[43] *See Repubblica dell'Ecuador c. Danusso, Matta ed altri,* Trib.Torino, 25 marzo 1982, 18 Riv. dir. int. priv. proc. 625 (1982). The language of the Ecuador law actually fell short of claiming ownership and was interpreted by the Italian court to create a right of *dominio eminente* in the Ecuadorian State. There is an extensive discussion of the case in MANLIO FRIGO, LA PROTEZIONE DEI BENI CULTURALI NEL DIRITTO INTERNAZIONALE 315ff (Milano 1986).

ownership laws. Do such laws mean what they say? Should the forum look behind the words of the foreign law to determine its meaning in application in the source nation, as the court did in *Peru*? Do such laws actually convert private property to public ownership? If so, do they satisfy constitutional requirements of notice, hearing and compensation? If the source nation seeks to exert its ownership in a foreign action, should the defendant be permitted to question the constitutionality, and thus the validity, of the law on which the plaintiff's action is based? It is time to consider individual rights and freedoms.

INDIVIDUAL RIGHTS AND FUNDAMENTAL FREEDOMS

We can begin with a Costa Rican case. According to Article 3 of the Costa Rican Law on National Archaeological Patrimony of 28 December 1981, "[a]ll archaeological objects that are discovered in any way after this Law takes effect are property of the State." Does it surprise you to learn that in 1983, the Costa Rica Supreme Court found this law unconstitutional because it sought to expropriate private property without observing the procedural requirements and without awarding the compensation required by the Costa Rican Constitution?[44]

Many other nations have adopted laws declaring large categories of cultural property to be state property. If enforced, they significantly affect the market value of privately held cultural objects. Indeed, the mere prohibition of export itself reduces value, since cultural objects generally bring higher prices on the international market than on the national market. Although collectors complain, courts in source nations often reject the claim that such laws are expropriative. In Italy, for example, the Constitutional Court has on several occasions rejected such arguments.[45] The Costa Rica decision is unusual.

The topic is a very large one, which arises in every constitutional jurisdiction, since almost any public measure produces both winners and losers, and the losers naturally would prefer to be compensated. Such a question recently came before the European Court of Human Rights, under Article 1 of the First Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[46] which provides:

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[44] *See* Costa Rica, *Boletín Judicial* No. 90 of 12 May 1983.

[45] *See, e.g.*, Italian Constitutional Court decisions 55/1968, 56/1968, 79/1971, 202/1974 and 245/1976.

[46] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221.

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[47]

The case of *Beyeler v. Italy*,[48] decided January 5, 2000, concerned a van Gogh painting, *Portrait of a Young Peasant*, in a private collection in Italy. The painting had been classified by the Italian Government as a work of historical and artistic interest. The owner sold it in 1977 for 600 million Italian Lire (less than $1 million) and reported the sale to the appropriate Ministry as required by law. The statutory two-month period for exercise of the Government's right of preemption under section 32 of the law expired without exercise.

There then ensued a remarkable series of events set out in detail in the court's decision. The Ministry disingenuously employed evasions, formalisms, contradictory reasons, administrative inertia and other bureaucratic devices to frustrate efforts by the painting's owner, Swiss dealer Ernst Beyeler, to export the picture or to sell it to the Peggy Guggenheim Collection in Venice. In 1988, Beyeler finally succeeded in selling the painting to the Peggy Guggenheim Collection for $8,500,000 and gave the required notice of the sale to the Ministry, which then announced that it "exercised its right of preemption in respect of *the 1977 sale*"[49] (emphasis added) and offered Mr. Beyeler 600 million Italian Lire (which was now worth less than $600,000).

Mr. Beyeler sued the Italian Government, and the case eventually reached the European Court of Human Rights. That Court held for Beyeler, finding a violation of the right of property in Article 1 of the First Protocol, and reserved judgment for six months on the amount of damages in order to give the parties an opportunity to reach an agreed resolution. The six months expired June 5, 2000.

The expropriation of value question was earlier faced in non-

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47 *Id.*

48 App. No. 33202/96, Eur. Ct. H.R. (2000). For a discussion that antedates this important decision, *see* E. Llana Nakonechny, *Protection of Property Rights Under the European Convention for the Protection of Human Rights and Fundamental Freedoms: Recent Cases*, 3 CAN. INT'L LAW 89 (1998). The author briefly discusses six Article 1 decisions of the Commission/Court (none of which involved cultural property) and concludes that: "[t]he cases have created a criteria [sic] for examining the restriction of property rights by States, and in particular, have acknowledged the need for appropriate compensation when an expropriation takes place." *Id.* at 93.

49 *Beyeler*, App. No. 33202/96 Eur. Ct. H.R.

constitutional form in France in the *Walter* litigation.[50] M. Walter, owner of yet another van Gogh painting, *Jardin á Auvers,* applied for an export permit to send it to London for sale. When the permit was denied, M. Walter sold the picture at a French auction, where he received a price of something less than $10 million. He then sued the State for the difference between that amount and the price he would have received on the world market, basing his action on a seldom-used 1913 French Law. In the *Tribunal,* he won an enormous judgment for over $70 million, which was reduced on appeal to approximately $24 million.[51]

Subsequently, the French adopted new legislation (law of 31 Dec. 1992 and Decree of 29 Jan. 1993),[52] which provides that a first application for an export permit for a work of art may be denied without State liability. After thirty months, a second application may be made, at which time the State must either grant export permission or offer to buy the work. The price the State must offer is determined by a panel of experts, "taking account of prevailing prices on the international market."[53] This statutory development has brought the French much closer to the widely admired British and Canadian schemes, which give public or private institutions a limited time–usually a few months–within which to buy an important work offered for export, failing which export permission must be granted.

A different possibility is suggested by a recent Italian decision. On July 22, 1999, the Court of Cassation dramatically changed Italian administrative and tort law by discarding a doctrinal distinction between "subjective rights" and "legitimate interests," by expressly subjecting the public administration to liability for the consequences of their actions, and by adopting the principle that liability should be based on injury, rather than conduct.[54] Although the decision had nothing to do with cultural property, it raises the interesting possibility that Italian courts may, for the first time, find that an export prohibition produces a compensable injury, *a la* the *Walter* decision in France.[55]

Finally, the European Human Rights Convention in Article 2

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[50] There is an interesting discussion of the *Walter* case and its implications in CARDUCCI, *supra* note 17, at 69ff.

[51] *See id.* at 69ff.

[52] *See* Lois 477 of 31 December 1992, *as amended by* Lois 643 of 10 July 2000.

[53] *Id.*

[54] *See* Cass., sez. un. 22 luglio 1999, n. 500, 5 Giornale di diritto amministrativo 832 (n. 9, 1999). There is an accompanying comment on the decision by Luisa Torchia. *See id.* at 843.

[55] *See, e.g.,* CARDUCCI, *supra* note 17, at 69ff.

of the Fourth Protocol, states that "[e]veryone shall be free to leave any country, including his own."[56] Professor Erik Jayme of Heidelberg has suggested that this right of travel necessarily includes the right to take along one's goods, because one who must leave her goods behind if she leaves a country is not truly free to leave it: "*Die Freizügigkeit der Person wird behindert, wenn sie die in ihrem Eigentum stehenden Kulturgüter nicht in die neue Heimat mitnehmen darf.*"[57] According to Professor Jayme's reasoning, a Peruvian collector who for business or personal reasons moves to Spain, and an Italian dealer who decides to reestablish his business in Switzerland, should be free to take their cultural property out of the country when they leave it.

If Professor Jayme's view were accepted, it would be necessary to consider Article 3 of the Protocol.[58] Article 3 states that the permissible restrictions on the freedom to leave a country are those that "are necessary in a democratic society in the interests of national security or public safety for the maintenance of *'ordre public,'* for the prevention of crime, or for the protection of rights and freedoms of others."[59] Is a law prohibiting the export of cultural property by its emigrating owner "necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime or for the protection of the rights and freedoms of others?"[60] Perhaps, but perhaps not. Once again, the answers to such questions must await clarifying litigation. Until then we can only speculate.

A More Basic Question

This discussion has identified questions that, when pursued, demonstrate how thin and porous is the fabric of the law applicable to international trade in privately held cultural objects. These questions will eventually have to be answered by scholars, courts and legislatures. I will conclude by introducing the more basic questions that are implied by those we have already discussed: Why should a nation's law prohibit the export of privately held works of

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[56] Protocol (No. 4) to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the Protocol Thereto, Sept. 16, 1963, E.T.S. 46, 7 I.L.M. 978 (1986), 58 A.J.I.L. 334 (1964) [hereinafter Fourth Protocol].

[57] Erik Jayme, Nationales Kunstwerk und Internationales Privatratrecht (Gesammelte Schriften Band I) 201 (1999) ["A person's freedom of movement is restricted if he cannot take his cultural property with him to his new home."].

[58] *See* Fourth Protocol, *supra* note 56.

[59] *Id.*

[60] *Id.*

art? Why should other nations be expected to recognize and enforce such laws?

The obvious response is the traditional one: there is a public interest in cultural property,[61] and the State, as guardian of the public interest, acts to protect it. We have seen, however, that this answer raises a variety of troubling questions.

Its acceptance is further undermined by such modern developments as the international liberalization of trade in the WTO and the EU Treaty,[62] the decision in the *Walter* case[63] and the post-*Walter* French legislation,[64] the Austrian Administrative Court and the Costa Rican Supreme Court cases,[65] the decision of the European Court of Human Rights in *Beyeler*,[66] and a significant, growing body of scholarship. The traditional position is ripe for reconsideration.

Suppose that a deceased Italian collector owned important paintings by Goya and Caravaggio. The heirs, who live in New York, would like to sell the Goya at auction in London and donate the Caravaggio to the Boston Museum of Fine Arts. The paintings are moveable without significant threat of injury or destruction. Neither is germane to a context that is important to its study and enjoyment.

Given these premises, why should the Goya not be allowed to go to London for sale? The artist was not Italian. The work was painted in Spain and does not have an Italian subject. In private hands it has been unavailable to the public for enjoyment or study. So what remains? The painting is a very valuable object. If it remains in private hands in Italy, it may eventually fall into public ownership by gift or in settlement of taxes, or the State may be able to buy it at a reduced value. Once it leaves Italian territory these opportunities are lost. Is this an acceptable basis for refusal to allow export of the painting? Judge Pescatore thought not:

> Il n'est pas exclu que l'interdiction d'exporter l'oeuvre d'art fasse partie d'une manoeuvre combinée, destinée à permettre à l'État d'acquérir le bien en question à des conditions plus favorable que le seraient celles d'un marché internationalement ouvert. En d'autres termes, dans un tel cas se pose le question de savoir si le recours à larticle 30 ne sert pas plutôt l'intérnèt

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61 This question is discussed at some length in John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL L. REV. 339 (1989), *reprinted in Critical Essays*, *supra* note 2.

62 *See generally* WTO, *supra* note 9, at 188; EU Treaty, *supra* note 8, at 28.

63 *See* CARDUCCI, *supra* note 17, at 69ff.

64 *See id.*

65 *See* Costa Rica, *Boletin Judicial* No. 90 of 12 May 1983.

66 *See* App. No. 33202/96, Eur. Ct. H.R. (2000).

économique et financier de l'État que la protection du patrimoine culturel.[67]

The Caravaggio painting would seem to present a more congenial case for retention. If an important painting by a great Italian artist is not "protected" by a prohibition against export, what remains of the traditional position? Still, we should remember that Caravaggio is already well represented in Italian public collections. In a private collection this painting adds nothing to the publicly accessible body of his work. The painting would be added to the collection of one of the world's great museums where, properly identified as a Caravaggio, it would represent and glorify Italy and the work of a great Italian artist to the millions of viewers and scholars who now would have access to it. In what sense could it be said that export of the Caravaggio painting would impair the Italian cultural heritage or cultural patrimony?

Suppose we look at the question from a different direction. It certainly is reasonable for Italians to favor the eventual addition of major works of art, now in private hands, to the collections of national museums. That is not in question. What is in question is the use of export prohibitions and the rhetoric of cultural nationalism[68] to advance that interest at the expense of private collectors and dealers.

Two well-established and widely accepted legal procedures are already available to governmental authorities to assert the governmental interest in eventual acquisition of privately held works of art: expropriation and preemptive purchase of works offered for sale or export. Both have the disadvantage (to the public administration) that they require compensation to the owner. Both have the arguable advantage that, by requiring compensation, they provide a check on bare retentionism, unrelated to any genuine protective purpose. The impact on the fisc now becomes a factor in the decision to refuse to license export. In contrast, under the traditional approach, the cost to the State is negligible. The obligation to compensate has a disciplining effect: if it is truly important for public reasons that a privately held work of art remain within the territory of the State, then the public authorities are justified in

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[67] Pescatore, *supra* note 13, at 455-56 ["It is not unlikely that the prohibition against exporting works of art is part of a plan aimed at permitting the State to acquire the objects in question on terms more favorable than would be available in an open international market. In other words, in some cases, the question arises as to whether recourse to article 30 better serves the economy and financial interest of the state, rather than the protection of its cultural patrimony."].

[68] *See* John Henry Merryman, *The Retention of Cultural Property*, *supra* note 2 (discussing Cultural Nationalism).

allocating public funds to acquire the appropriate interest in the work—ownership or a servitude—from its owner. If not, not. That is the direction that the British, the Canadians and, more recently, the French have taken. Are they indicators of the future shape of the law in major source nations?

Finally, if the traditional position is indeed in crisis at home in source nations, what does that suggest about international efforts to control the traffic in works of art? Consider privately held easel paintings, free-standing sculptures and loose drawings whose export does not threaten their damage or destruction or the impairment of contextual values, does not incur the dismemberment of complex works and does not deprive a living culture of objects of ritual or ceremonial importance? Should the 1970 UNESCO and 1995 UNIDROIT Conventions,[69] the EU Treaty and WTO be interpreted to support the retention of such works?[70] If such works escape from the source nation's territory, should the courts of other nations be expected to order their return? Why?

CONCLUSION

I am encouraged by these foreign developments. As some readers may know, I have written, with perhaps wearying frequency and at possibly excessive length, about source nation cultural property laws.[71] Some of those laws appear to me, and to a few others in this country and abroad, to be overly inclusive and overly restrictive. The justifications for these excesses have seemed to us to be sustained more by passion and rhetoric than by principled, evidence-based reason. And to some of us in the United States, our nation's eager responses to the concerns of source nations seem occasionally to lack discrimination and proportion.

How interesting it is that the disparate imperatives of free trade and human rights, so far apart in their ideological origins and objectives, appear to be aligning themselves with us in this mutually supportive way. How interesting cultural property law is.

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69 *See generally* 1970 UNESCO Convention, *supra* note 3, at 289; 1995 UNIDROIT Convention, *supra* note 4, at 1322.

70 *See generally* EU Treaty, *supra* note 8, at 28; WTO, *supra* note 9, at 188.

71 The relevant articles are collected in *Critical Essays*, *supra* note 2.