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EEC Measures on the Treatment of National Treasures

TALBOT J. NICHOLAS II*

I. INTRODUCTION

The European Economic Community ("EEC") has adopted a regulation on the export of cultural goods and a directive on the return of cultural objects unlawfully removed from the territory of a Member State.¹ The EEC adopted these measures to coordinate EEC law with the national laws of EEC Member States governing the protection of national treasures possessing artistic, historic, or archaeological value. The EEC legislation establishes among Member States: (1) uniform export controls to prevent cultural objects ranking as national treasures from being transported unlawfully across EEC external frontiers; (2) mutual recognition of national export regulations governing national treasures in claims seeking the return of unlawfully removed national treasures; and (3) standards for compensating bona fide purchasers of cultural ob-

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1. Council Regulation 3911/92/EEC of 9 December 1992 on the Export of Cultural Goods, 1992 O.J. (L 395) 1 [hereinafter Export Regulation]; Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, 1993 O.J. (L 74) 74 [hereinafter Return Directive]. The Export Regulation and the Return Directive will be referred to collectively as the "EEC legislation."

Pursuant to Article 11 of the Export Regulation, the Regulation entered into force on March 30, 1993, the third day following the publication of the Return Directive in the *Official Journal of the European Communities* on March 27, 1993.

Pursuant to Article 7 of the Export Regulation, the Commission of the European Communities is required to adopt provisions necessary to implement the Export Regulation. Such implementing regulations were laid down in Commission Regulation 752/93, 1993 O.J. (L 77) 24 [hereinafter License Regulation].

The EEC legislation is based upon Commission proposals set out at COM(91)447 final—SYN 382 [hereinafter Proposals]. An amended Commission proposal pertaining to the Return Directive is set out at 1992 O.J. (C 172) 7; COM(92)280 final—SYN 382 [hereinafter Amendment].

jects retrieved pursuant to the return procedures. This Article analyzes the EEC legislation as it relates to (1) international efforts to compromise the opposing legal, policy, and practical interests involved and (2) the EEC's single internal market program.²

The coexistence of a single EEC internal market and an illicit international market in fine arts and antiquities has forced the EEC and its Member States to address certain significant problems. These problems include: defining and identifying cultural objects that rank as national treasures; controlling the export of such national treasures; securing the return of national treasures unlawfully transported across national borders; and determining property rights and remedies between persons dispossessed by loss or theft and subsequent bona fide purchasers.³

2. Single European Act 1986, 1987 O.J. (L 169) 30 (entered into force July 1, 1987) [hereinafter SEA]. The SEA amended the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter EEC TREATY]. Both the SEA and the EEC Treaty are reprinted in OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (abr. ed. 1987). References hereinafter shall be to the EEC Treaty as amended or added by the SEA.

Article 8a of the EEC Treaty (as added by Article 13 of the SEA) states:

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992,

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

EEC TREATY, *supra*, art. 8a. See also Completing the Internal Market: White Paper from the Commission of the European Communities, COM(85)310 final [hereinafter White Paper]. The White Paper sets out the program for the SEA and contains a detailed timetable for the adoption of some 300 legislative measures for the removal of trade barriers in Europe.

3. The institutions of the EEC have promulgated numerous pronouncements on the subject, from written parliamentary questions to conclusions of the European Council. Substantive institutional documents are:

- (1) Report on the Return of Objects of Cultural Interest to their Country of Origin, EUR. PARL. DOC. (PE A2-0104) (1989) [hereinafter Report on Return];
- (2) Interim Report on the Movement of Objects of Cultural Interest in the Context of the Single Market, EUR. PARL. DOC. (PE A3-0324) final (1990) [hereinafter Interim Report on Movement];
- (3) Opinion on Proposals from the Commission [on Export and Return of Cultural Goods], EUR. PARL. DOC. (PE A3-0201,-0202) Annex (1992) [hereinafter Opinion]; and
- (4) Communication from the Commission to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archeological Value: Needs Arising from the Abolition of Frontiers in 1992, COM(89)594 final [hereinafter Communication]. The Communication sets out guidelines to reconcile national and EEC measures on the protection of national treasures with single internal market measures.

The illicit international market aggressively thwarts the efforts and procedures of the arts industry, insurance companies, customs officials, police, and courts aimed at preventing and punishing theft and unlawful transport.

Fine art theft is a growing international problem with a total value of at least 3 billion pounds stolen per annum. . . . The growth of international trade in stolen items is caused by the extraordinary rise in the value of fine art and its resulting attraction for the laundering of criminal funds particularly from drugs. This has increased fine art's value as a good "currency" while other targets such as banks have become better protected. There has been an increase in armed robbery and ram raiding of entrances and window displays, and recession brings an increase in fraud and internal theft. For police, other crimes which include terrorism, murder, rape, arson and armed robbery, have a higher priority than property theft, in spite of its cash value. Although there may be some art stolen to order and therefore perhaps destined to be held for many years before being sold, this is a very small proportion. Most stolen items surface sooner rather than later as criminals ultimately want cash, as do their "fences". There is still resistance to marking the best fine art in a way which gives it a unique number, such as a postal code, since the marking can be erased or efforts to do so could damage the item or affect its value Better security, more resources for police, and changes in the law are all required to help reduce the problem.⁴

Each year, the Art Loss Register ("ALR") records more fine art losses.⁵ ALR reports losses since January 1991 totaling 39.3 million pounds, an estimated 16 million pounds of which were uninsured, logged by insurance companies alone.⁶ Smugglers are increasingly

4. Int'l Art & Antique Loss Register, Ltd., Annual Review 1991/1992, at 23 (1992) [hereinafter *The Art Loss Register*] (privately published annual report on file with *Loyola of Los Angeles International and Comparative Law Journal*). The Art Loss Register is a permanent computerized database of stolen art which facilitates the identification and recovery of stolen art prior to sale. *Id.* at 2, 5.

5. The International Foundation for Art Research ("IFAR"), a shareholder (along with insurance companies and institutional investors in the arts industry) in and the operational arm of the ALR has compiled a visual database of 40,000 items, 50% of whose images are computerized. In 1991, 3,150 new losses were reported from insurers, Interpol, police, and the arts industry. The number of losses reported from these sources increased to 4,589 in 1992. *Id.* at 5, 6, & attachments to the Annual Review.

6. Of these, ALR has helped recover only 5.5 million pounds. *Id.* (charts attached to the Annual Review).

organized,⁷ brutal,⁸ and outrageous.⁹ Regardless of how much attention scholars dedicate to the underlying legal, policy, and practical issues,¹⁰ governments and international organizations have addressed cultural property problems merely as adjuncts of other

7. Dalbert Hallenstein, *Criminals Set To Profit from Art Free-for-all/Italy Fears That the Single Market Will Expose Its Vast Artistic Heritage to Unscrupulous Dealers from All Over Europe*, EUROPEAN, Mar. 26, 1992. Hallenstein reports that "[t]he Sicilian and Neapolitan Mafias are becoming increasingly active in organizing the export of stolen art and archaeological material from Italy." *Id.* According to another report, "[i]t is well known that huge quantities of art objects have left . . . [Russia] in recent years under diplomatic cover." *Russia Passes First Art Export Law*, ARTNEWSLETTER, Mar. 2, 1993, at 1.

8. Mary Kay Magistad, *Amid War, Cambodia's Temple Treasures Disappear/Angkor Wat Loses Priceless Art to Crooked Dealers, Thieves, Soldiers—and Chainsaws*, WASH. POST, May 18, 1993, at A16. According to Magistad, at least one piece a day crosses from Cambodia into Thailand, and many pieces are stolen on consignment and sold to private collectors. "No longer content to steal from the temple sites alone, . . . thieves . . . launched a series of armed raids on the [UNESCO guarded] Angkor conservation center in Siem Reap town, where thousands of centuries-old pieces are stored for safekeeping," and at gunpoint forced the guards to pick out the best pieces. *Id.*

9. Alexander Stille, *Art Thieves Bleed Italy of Its Heritage/Among the Most Vulnerable Targets Are the Country's 100,000 Churches*, N.Y. TIMES, Aug. 2, 1992, at H27. According to Stille, armed thieves have overpowered guards to steal the best of the Etruscan art collection at the national archaeological museum in Palestrina and, in Padua, *the bones of Saint Anthony* which were housed in a large silver reliquary elaborately decorated with precious stones. In both cases, the booty was recovered. *Id.*

10. Martin Philipp Wyss, *The Protection of the Cultural Heritage and Its Legal Dimensions: The Heidelberg Symposium 22-23 June 1990*, 1 INT'L J. CULTURAL PROP. 232 (1992) (conference reports) ("After some years of 'sleeping beauty' existence, more and more respect is now paid to questions of how to protect the national cultural heritage in a global context.").

international events¹¹ or within the framework of regional economic and police cooperation.¹²

The legal problems in international protection of cultural heritage arise in two situations. First, in claims for the return of cultural objects based on unlawful transport across national frontiers, the issue is the recognition and enforcement of the export regulations of the state from which an object has been transported in the state in which it is found. Second, in claims for return based on ownership, the issue is the choice of substantive law governing the validity of sales of moveable property. The EEC, under Article 222 of the EEC Treaty, is not competent to "prejudice the rules in Member States governing the system of property ownership."¹³ The EEC legislation therefore avoids conflicts of law between own-

11. Eastern Europe: see *Art Hemorrhage in the East*, WASH. POST, Mar. 14, 1992, at A22 ("subordinate to the pressing daily problems of the economy and day-to-day living"); Robin Cembalest, *Croatia—Destroying the Evidence*, ARTNEWS, Jan. 1992, at 56 (asking, "[w]ith monuments treated as pawns in a political struggle, is it even possible to protect cultural property? In a bitter conflict in which even cease fires go unregarded, what good are international accords such as the Convention on the Protection of Cultural Property in the Event of Armed Conflict?"); Amy Schwartz, *What Outsiders Can't Grasp*, WASH. POST, Sept. 9, 1993, at A21 (writing about the destruction of antiquities in Bosnia-Herzegovina: "In North America there's just no sense that these places with funny names can be repositories of vital heritage, says Shreve Simpson, Islamic curator at the Freer and Sackler galleries. It's all at a remove somehow. It must be for U.N. officials too—I know this is naive—because otherwise how could they let this happen?").

Soviet Union: see Konstantin Akinsha & Grigorii Kozlov, *Spoils of War—The Soviet Union's Hidden Art Treasures*, ARTNEWS, Apr. 1991, at 131 ("The end of the cold war and the climate of glasnost have led . . . [Soviet cultural officials] to hope that the fate of . . . [art] objects displaced from both . . . [the Soviet Union and Germany during World War II] may finally become known.").

Middle East: see *Kuwait City—Safe or Sold*, ARTNEWS, Sept. 1991, at 50 (reporting that most of the 30,000-piece collection, composed of treasures of Islamic art acquired by the Al-Sabah family and ransacked from Kuwait's National Museum by Iraqi forces, is still missing).

Far East: see Magistad, *supra* note 8.

12. Compare African, Caribbean and Pacific States-European Economic Community Convention, Lome, 15 Dec. 1989, 29 I.L.M. 783 (1990) ("Lome IV"), Annex XXIV, Declaration of the ACP States on Return or Restitution of Cultural Property (which only "urges" cooperation); with Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, U.S.-Mex., 22 U.S.T. 494 (providing for specific undertakings). For a discussion of the application of "regional" solutions to protection and return of cultural property, see generally Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L LAW. 627 (1992).

13. EEC TREATY, *supra* note 2, art. 222.

ers dispossessed by loss or theft and subsequent bona fide purchasers. Rather, the EEC addresses the problem within the framework of unlawful transport, primarily through the application of export regulations, both of which are within EEC's competence.¹⁴

II. RELATION TO BASIC EEC LAW

The EEC's legal framework, enshrined in Articles 30 to 36 of the EEC Treaty, begins with the fundamental principle of free movement of goods among the Member States.¹⁵ Articles 30 to 35 ensure the free movement of goods among the Member States by prohibiting quantitative restrictions on imports and exports originating in Member States and on products coming from third countries that are in free circulation within the EEC,¹⁶ and all measures having equivalent effect, also called non-tariff trade barriers. "Quantitative import or export restrictions include all legislative or administrative rules or administrative measures restricting the importation or exportation of one or more products according to quantitative norms."¹⁷ Measures having "equivalent effect" are:

legislative rules and administrative provisions as well as administrative practices forming a barrier to importation or exportation that might otherwise take place, including those provisions and practices which render the importation or the exportation more expensive or difficult in comparison with the sales of home production on the domestic market.¹⁸

The Court of Justice of the European Communities has defined the basic principle as follows: "[A]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."¹⁹

14. *Id.* art. 3(a) (export), 3(e) (transport).

15. *Id.* arts. 30-36.

16. *Id.* arts. 30-35.

17. P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 376 (Lawrence W. Gormley ed., 2d ed. 1989).

18. WQ 64 (Deringer) 1967 J.O. (169) 12, *translated and quoted in* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 17, at 377.

19. Case 8/74, *Procureur du Roi v. Dassonville et al.*, 1974 E.C.R. 837, 852. This case, a reference for a preliminary ruling to the Court of Justice under Article 177 of the EEC Treaty by the Tribunal de Premiere Instance of Brussels, involved Belgium's requirement that imported spirits (in this case two brands of Scotch whiskey) bearing a designation of origin approved by the Belgian Government be accompanied by an official Belgian Government document certifying its right to such designation. In this case, French importers were prevented from bringing whiskey first shipped from England to France into Belgium.

Although the Court of Justice applies this “hindrance” principle in cases concerning import as well as export restrictions, the protection of national treasures is carried out predominately through restrictions on exports. Article 34 of the EEC Treaty explicitly prohibits quantitative restrictions on exports.²⁰ Kapteyn and VerLoren van Themaat suggest that, in analyzing export restrictions, the Court of Justice has departed from the objective “hindrance” principle and adopted a discrimination criterion.

Article 34 of the EEC Treaty concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question.²¹

Article 36 of the EEC Treaty reserves to Member States the competence to apply reasonable non-tariff trade barriers between Member States in derogation of the requirements of Articles 30 through 35 when justified on the grounds of, among several other explicit non-economic justifications, protecting national treasures. Article 36 provides:

The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; *the protection of national treasures possessing artistic, historic or archaeological value*; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.²²

The Belgian requirement made it difficult to import anything into Belgium except directly from the country of origin, thereby infringing upon the principle of free circulation of goods originating in Member States. Finding that it was difficult to obtain the certificate, the Court of Justice held that the requirement had an effect equivalent to a quantitative restriction on imports. *Id.*

20. EEC TREATY, *supra* note 2, art. 34.

21. Case 155/80, Oebel, 1981 E.C.R. 1993, 2009, *quoted in* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 17, at 382.

22. EEC TREATY, *supra* note 2, art. 36 (emphasis added). International law recognizes that nations are entitled to necessary safeguards such as the cultural exceptions to the customs union. Article 36 is modelled after Article XX of the General Agreement on Tariffs and Trade (“GATT”), which provides:

States normally protect national treasures by requiring the issuance or denial of export licenses, thereby implicating Article 36 of the EEC Treaty as a derogation from Article 34. Yet, export restrictions in sectors not otherwise explicitly listed in Article 36 are prohibited.²³ The Court of Justice has construed Article 36 narrowly as allowing only quantitative measures and not allowing such measures as customs duties or charges having equivalent effect.²⁴ In relation to intra-Community trade between Member States, each

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

.....
 (f) imposed for the protection of national treasures of artistic, historic or archaeological value;

General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, art. XX, as amended (entered into force Jan. 1, 1948) (emphasis added) [hereinafter GATT]. See also Treaty Establishing the African Economic Community, June 3, 1991, art. 35(1)(e), 30 I.L.M. 1241; Agreement on Trade Relations, U.S.S.R.-U.S., June 1, 1990, art. XVI(1)(c), 29 I.L.M. 946 (permitting adoption or enforcement by a Party of any measure referred to in Article XX of GATT).

23. Case 53/76, *Procureur de la Republique de Besancon v. Bouhelier et al.*, 1977 E.C.R. 197. This case, a reference for a preliminary ruling to the Court of Justice under Article 177 of the EEC Treaty by the Tribunal Correctionnel [Criminal Court] of Besancon, involved France's requirement that exporters of lever escapement watches and watch movements obtain an export license or have a certificate of quality, neither of which carried a charge, issued by a French technical standards organization. The quality standards were not obligatory for watches marketed for sale within France. *Id.* at 200. The Court of Justice found that both requirements, when imposed on exports alone, were measures having effect equivalent to quantitative restrictions in violation of Article 34, regardless of their purpose. *Id.* at 206.

24. Article 16 of the EEC Treaty ensures the free movement of goods within the EEC by requiring that "Member States . . . abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage [of the formation of the common market, January 1, 1962]." EEC TREATY, *supra* note 2, art. 16.

Case 7/68, *Commission v. Italy*, 1968 E.C.R. 423, involved the Commission's complaint against Italy's continuing levy after January 1, 1962 of a progressive tax on the export to other Member States of articles of artistic, historic, archaeological, or ethnographic interest. The Court of Justice found that the tax, being a charge and not a quantitative restriction, was not within the scope of Article 36 and thus held it to violate Article 16 of the EEC Treaty. *Id.* at 430.

Case 18/71, *Eunomia di Porro v. Italian Ministry of Educ.*, 1971 E.C.R. 811. This case, a reference for a preliminary ruling to the Court of Justice under Article 177 of the EEC Treaty by the Tribunale di Torino, involved the levy of the same progressive tax on a painting exported from Italy to Germany. The exporter sought refund of the tax in the Turin District Court on the basis of the impropriety of the continued imposition of the tax after January 1, 1962. *Id.* at 811. Ruling in favor of refund, the Court of Justice held that Article 16 "conferred individual rights which national courts must protect and which must prevail

Member State must base quantitative measures for the protection of national treasures upon principles intrinsic to the concept of a national treasure. Each Member State has its own rules that govern the definition and control of cultural objects that rank as national treasures. Although, to date, no Member State's rules have been challenged by other Member States as exceeding the scope of Article 36,²⁵ the resulting diversity in national policies has prevented the EEC from taking concerted action in this field.

III. DEFINITION AND CONTROL

National controls on the export of cultural objects ranking as national treasures are aimed at preventing cultural heritage loss by giving special protection to particular objects or types of objects ranked as culturally significant. International rules in this field aim to balance the need to afford national protection to cultural objects with the practicalities of legitimate international trade in fine art and antiquities. In the absence of a uniform international system, differences in (1) legislation defining cultural objects ranking as national treasures, (2) the degree of control governments exercise over the export of such objects, and (3) common law and civil law rules on the acquisition of lost or stolen moveable property have contributed to the growth of the illegal international market in fine art and antiquities.

over conflicting provisions of national law even if the Member State has delayed in repealing such provisions." *Id.* at 816.

25. Nonetheless, on June 7, 1993, Jacques Walter, whose "Jardin a Auvers" by Van Gogh sold at auction in Paris for 55 million French francs after it was classified as an historic monument, was awarded 300 million French francs in lost compensation by the Tribunal d'Instance against the French Government based upon devaluation due to the inability to obtain an export license on the sale. Walter has filed suit against the French Government in the European Court of Justice for "failing to apply the [EEC Treaty], which guarantees free circulation of goods." Nicholas Powell, *Art Law—L'etat Loses to the Citoyen—Historic Court Decision Will Force the French Government To Revise Its Listing System*, ART NEWSPAPER, July-Sept. 1993, at 1, 2.

Such terms as cultural property,²⁶ cultural object,²⁷ cultural resource,²⁸ cultural (or national) heritage,²⁹ cultural (or national) patrimony,³⁰ and national treasure³¹ are used in a variety of na-

26. See European Convention on Offenses Relating to Cultural Property, *opened for signature* June 23, 1985, Council of Europe, Europ. T.S. No. 119, 25 I.L.M. 44 (not yet in force) [hereinafter European Convention], *reprinted in* COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON OFFENSES RELATING TO CULTURAL PROPERTY 32-33 (1985) [hereinafter EXPLANATORY REPORT] (Appendix II listing categories of objects defined as "cultural property");

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention] (Article 1 listing categories of objects defined as "cultural property");

Convention for the Protection of Cultural Property in the Event of Armed Conflict, Hague, 14 May 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention] (Article 1 listing categories defined as "cultural property").

27. John Henry Merryman & Albert E. Elsen, *Hot Art: A Re-examination of the Illegal International Trade in Cultural Objects*, 12 J. ARTS MGMT. L. 6 (1982), *reprinted in* THE PENAL PROTECTION OF WORKS OF ART 135 (Int'l Inst. Higher Stud. Crim. Sci. ed., 1983).

28. INTERNATIONAL COUNCIL OF MUSEUMS, CODE OF PROFESSIONAL ETHICS § 3.3 (Field Study and Collecting) ("Museums should assume a position of leadership in the effort to halt the continuing degradation of the world's natural history, archaeology, ethnographic, historic and artistic resources." (emphasis added)).

29. The Preamble of the European Convention reads: "Believing that [unity between EEC Member States] is founded to a considerable extent in the existence of a European cultural heritage . . ." EXPLANATORY REPORT, *supra* note 26, at 19 (emphasis added). Article 2 of the UNESCO Convention reads: "[T]he illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property . . ." UNESCO Convention, *supra* note 26, art. 2 (emphasis added). The Preamble of the Hague Convention reads:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection

Hague Convention, *supra* note 26, pmb. (emphasis added).

30. Paul M. Bator, *The Conception of the National Artistic Patrimony and Its Protection by National and International Rules Regarding the Illicit Trade in Art*, *reprinted in* THE PENAL PROTECTION OF WORKS OF ART, *supra* note 27, at 135.

31. EEC TREATY, *supra* note 2, art. 36. For the text of Article 36, see *supra* text accompanying note 22. See also Christian D. Dicke, *Commerce international de l'art entre commerce libre et protection des biens culturels*, in INTERNATIONAL SALES OF WORKS OF ART 523, 533 (P. Lalive ed., 1985). Dicke proposes the elimination of the word "national" from the term "national treasures":

In Section 36 of the EEC Treaty, Section 20 of the European Free Trade Association's Treaty and Section 20 of the Free Trade Agreements between member States of the European Association and of the EEC, the word "national" should be eliminated after [French version] the word "treasure." This should be done for two reasons: first of all the fact that a State can only protect its own cultural patrimony is not compatible with the idea of a community. Forbidding the protection of other States' cultural patrimony is therefore not reasonable in this con-

tional and international contexts to identify and characterize the objects that are deserving of protection.³² The use of these terms also implicates contemporary historic preservation policies³³ and the idea of cultural identity,³⁴ and reinforces government's inherent public role in protecting from loss objects deemed to be the constituent parts of cultural heritage.

Cultural property which is *res extra commercium* can neither be acquired in good faith nor constitute the *cause* of the contract. Each country must decide for itself what it understands by *res extra commercium* but the simple fact that the qualification represents a unifying factor already offers the guarantee of a certain degree of effective protection of cultural property.

There exists in each legal system movable property which, on account of its particular characteristics, is not subject to the law which usually governs trade in goods. The legislator has, in respect of such property, enacted special rules (for example *res religiosae* cannot be sold without the authorization of the competent ecclesiastical authorities).³⁵

Implicit in the legal usage of any of these terms is the principle that cultural objects, however defined, are unlike other commercial goods even though they are subject to commercial transactions.

text. Secondly, without a modification of this sort, signing the European Draft Convention of offenses against cultural property would imply violating the good faith rule of nations in public international law.

Id. (original in French).

32. *E.g.*, John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986). Merryman argues that the Hague Convention treats cultural property as belonging to the cultural heritage of all mankind, regardless of place of origin or present location and independent of property rights or national jurisdiction, and that the UNESCO Convention treats cultural property as part of a national cultural heritage. *Id.*

33. *See* European Parliament, Report on the Motion for a Resolution on Measures To Protect the European Cultural Heritage, Doc. 54/74 (May 3, 1974).

34. *Id.* (referring to the "Declaration on European Identity" by the Heads of State and of Governments of the EEC, Copenhagen, Dec. 14, 1973).

35. Gerthe Reichelt, *Second Study Requested from UNIDROIT by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property and in Light of Comments Received on the First Study*, UNIDROIT [International Institute for the Unification of Private Law] 1988 Study LXX—Doc. 4, at 19 (Rome); *see also* John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1184 (1989) ("[P]rotecting certain types of cultural property ought to be mandatory, transcending the authority of national law to do otherwise The nexus between a cultural object and a group [or culture or nation] is the essential measurement for determining whether group rights in cultural property will be effectuated to the fullest extent possible—by holding such objects strictly inalienable from the group.").

The significant feature of cultural heritage items, movable and immovable, is that they are of value for more than the people of their place or culture of origin, and for more than the present generation. It is, however, generally recognized that some cultural objects are of outstanding value in themselves, some important as representing important strands of culture, some as regional or sub-regional variations and so on. It is easier to mobilize international support to protect items of outstanding universal cultural value because everyone recognizes what a deprivation to all their loss would be.³⁶

The European Court of Justice recognizes the value inherent in works of art as being distinct from valuation of commercial goods that serve as the component parts of modern artworks.³⁷ Yet, it is this dissimilarity with commercial goods that endows an object of fine art or an antique with particular value as a commodity.³⁸

36. LYNDEL V. PROTT & P.J. O'KEEFE, 3 LAW AND THE CULTURAL HERITAGE 33 (1989); see also European Parliament, Resolution on the Movement of Objects of Cultural Interest in the Context of the Single Market, 1991 O.J. (C 19) 287, 288 [hereinafter Resolution] ("[C]ultural objects cannot be compared with any other form of merchandise and must therefore be given a special status . . .").

37. Case 155/84, *Onnasch v. Hauptzollamt Berlin-Packhof*, 1986 E.C.R. 1449. *Onnasch* involved an attempt by the Berlin Hauptzollamt (Principal Customs Office) to classify a sculptural wall relief by the American artist Claes Oldenburg under the Common Customs Tariff with reference to the description of the component parts of the wall relief rather than under the declared tariff heading for "original sculptures and statuary, in any material." The wall relief is described as made of cardboard and expanded polystyrene, sprayed with black paint and oil and attached to a wooden panel by means of wire and synthetic resin. *Id.* at 1449. Treated as an original sculpture, the wall relief would be exempt from customs duty; otherwise, the commercial components carried a duty of 14.2% of the declared value. *Id.* at 1450. In holding that the tariff classification of "original sculpture" applied, the Court of Justice observed that "the position adopted by the Hauptzollamt would lead to an unfair result that an article declared as a work of art would have customs duty levied on its full value at the rate laid down for the material used even when the value of the material was insignificant by comparison with the artistic value of the object." *Id.* at 1457 (emphasis added). For a discussion related to classification under the Common Customs Tariff, see also Case 23/77, *Kunstverein* (serigraphies); Case 200/84, *Errika Daiber* (historic Daimler Benz automobile); Case 252/84, *Collector Guns* (pistols).

38. Interim Report on Movement, *supra* note 3, at 9 ("The huge and artistically indefensible sums paid for works of art have encouraged the development of a whole illegal art network."); Hughes de Varine, *The Rape and Plunder of Cultures: An Aspect of Deterioration of the Terms of Cultural Trade Between Nations*, *Museum*, no. 3, 152ff (1983), quoted in JOHN HENRY MERRYMAN & ALBERT ELSÉN, LAW, ETHICS, AND THE VISUAL ARTS 47 (2d ed. 1987) ("The trend to invest cultural goods with materialistic values, which began in Europe and the United States, is . . . spreading rapidly to the rest of the world. . . . [C]ultural property as a whole passes from the cultural to the economic sphere and, accordingly, is henceforth subject to the laws of the latter.").

The liberal export controls of “art poor” but economically wealthy “market” countries advance policies that emphasize a cultural object’s value as a commodity, while comparatively “art (and artifact) rich” but economically poor “source” countries tend to apply restrictive controls with strong interest in protecting their cultural heritage.³⁹ Export controls are applied through the liberal or restrictive interpretation of the legislative definitions of cultural objects subject to control. Reichelt describes three bases for definition: (1) “categorization” is a general description which can encompass a great number of objects that fit the description; (2) “classification” consists of granting special protection to objects by a special decision of a competent authority; and (3) “enumeration” by comprehensive registration seeks to inventory all objects deserving protection.⁴⁰

The application of restrictive export policies are a significant and systemic cause of international smuggling,⁴¹ and national ex-

39. Merryman, *supra* note 32, at 832.

40. Reichelt, *supra* note 35, at 18. Analysis on identification and definition is extensive. See also Patrick J. O’Keefe, *Export/Import Laws—Problems of Drafting and Implementation*, in INTERNATIONAL SALES OF WORKS OF ART 57, 62-68 (M. Briat ed., 1988) (listing other criteria, including: age, origin within the territorial jurisdiction, incorporation into national heritage from a source outside of the territorial jurisdiction, and administrative incorporation into a control list); Hans Koenig, *General Report: Freedom of Collectors To Sell or Give Away All or Part of Their Collections*, in INTERNATIONAL ART TRADE AND LAW 157, 163-66 (M. Briat & J. Freedberg eds., 1991). Koenig distinguishes two types of export control based on “the nature and extent of a government’s intervention . . . [First,] where the State, irrespective of whether the works of art are of national or universal origin, claims an almost all embracing right of control and intervention . . . [Second,] where only a fairly limited number of objects frequently, but not always, incorporated in a list, are subject to government restrictions.” *Id.* at 164. Koenig calls these “total claim” and “selective claim” countries, respectively. *Id.*

41. Resolution, *supra* note 36, at 287 (“[L]egislation [prohibiting or restricting the free movement of cultural objects] varies and is inadequate, especially in the criteria for such objects, which are, moreover, frequently either not catalogued or incompletely catalogued . . .”). According to UNIDROIT:

[T]otal export bans are imposed even in relation to objects which are of no great importance. [This creates] serious distortions in international trade . . . [I]t is evident that the greater the difficulties put in the way of legal traffic, the more illegal traffic will prosper but on the other hand for as long as illegal traffic has not been stopped, it is politically difficult to encourage legal commerce. The two measures go hand in hand.

Explanatory Report, Preliminary UNIDROIT Convention, UNIDROIT 1990 Study LXX—Doc. 19, at 11 (Rome); see also Carol L. Morris, Note, *In Search of a Stolen Masterpiece: The Causes and Remedies of International Art Theft*, 15 SYRACUSE J. INT’L L. & COM. 59, 71 (1988) (“Even with extensive export restrictions, art is still stolen and smuggled out of Great Britain and France.”).

port controls alone are ineffective⁴² in curbing the illicit international market. The ability to transport fine art and antiquities is a major factor in ensuring that owners can sell these objects at full market value. Liberal export policies thus encourage the legitimate international market. Conversely, restrictive export policies deflate the value of such objects in the legitimate international market because international purchasers cannot export them.⁴³ Restrictive export policies thus encourage owners to seek higher prices in the illicit international market.⁴⁴

Differences in export regulations are complicated further by conflict of law and choice of law issues raised by contradicting national laws.⁴⁵ These laws affect the rights and remedies of owners dispossessed by loss or theft and the rights of subsequent bona fide purchasers.⁴⁶ International treatment of rules on public ownership

42. See Interim Report on Movement, *supra* note 3, at 9 n.3 ("Every year at least 60,000 works of art are stolen in Europe. More than 90% of thefts of art treasures handled by Interpol involve EEC Member States, 40% of these involving Italy alone."); William H. Kenety, *Who Owns the Past? The Need for Legal Reform and Reciprocity in the International Art Trade*, 23 CORNELL INT'L L.J. 1, 5 (1990) ("[There is a] growing demand pressing upon a shrinking supply. Hence, the temptation arises to steal, smuggle, and forge, disregarding the restrictions on the trade in art and artifacts.").

43. See *supra* note 25. See also Nicholas Powell, *Paris—Damned If They Sell, Damned If They Don't—Export License Refused on France's Second Highest Lot Last Season*, ART NEWSPAPER, Oct. 1993, at 23. The French Government classified "Portrait de Monsieur Levett et Mademoiselle Glavani assis sur un divan" by Jean-Etienne Liofard as a national monument, and refused an export license to French auctioneers six months after they purchased it. The auctioneers, unable to export the painting or return it to the seller, have refused to pay; the seller has demanded the 9 million French francs purchase price. "[A] piece refused a certificate is a devalued one and reducing the possibility of sale to the French market is prejudicial," said Jacques Henri Pinault, President of the French Syndicat National des Antiquaires." *Id.*

44. See John E. Putnam II, *Common Markets and Cultural Identity: Cultural Property Export Regulations in the European Economic Community*, U. CHIC. LEGAL F. 457 (1992) (comparing the export regulations of England, Netherlands, and Italy and demonstrating that the restrictiveness or liberality of any export control depends on how officials apply legislative definitions, regardless of the basis of definition).

45. See Thomas W. Pecoraro, *Choice of Law in Litigation To Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 VA. J. INT'L L. 1, 1 (1990) ("When such [illegal] sales occur across national boundaries, parties often take advantage of jurisdictions with favorable laws in order quickly to quiet title in their favor.").

46. For a comprehensive analysis of property law as it relates to international protection of cultural property, see generally Gerte Reichelt, *Study Requested by UNESCO from UNIDROIT Concerning the International Protection of Cultural Property in Light of the UNIDROIT Draft Convention Providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables of 1974 and of the UNESCO Convention of 1970 on the Means of*

of cultural property is unsettled,⁴⁷ and rules on private bona fide purchase and title are in conflict.⁴⁸ Moreover, criminal law is ineffective in protecting cultural property because defendants do not face jail time,⁴⁹ fines are not severe,⁵⁰ and receivers of stolen cultural objects are not exposed.⁵¹

The UNESCO and European Conventions have fostered some international cooperation for protection of cultural property by mandating a system of return and restitution.⁵² Most EEC Member States are not signatories to the UNESCO Convention, however, thus reducing the Convention's potential.⁵³

The practical difficulty seen to implementing the measures which are called for in the [UNESCO] Convention to supplement the export controls of other countries are primarily that

Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNIDROIT 1986 Study LXX—Doc. 1 (Rome); see also Reichelt, *supra* note 35.

47. See, e.g., Attorney-General of N.Z. v. Ortiz, [1982] 1 Q.B. 349, *rev'd*, [1982] 3 W.L.R. 570 (C.A.), *appeal dismissed*, [1983] 2 W.L.R. 809 (H.L.E.). Ortiz involved the illegal export from New Zealand of Maori wood carvings, their sale to a private art collector, the buyer's attempt to auction the carvings in England, and the New Zealand Government's attempt to obtain return in the English courts. New Zealand relied on its Historic Articles Act of 1962, which prohibits removal of a national historic article from the country without a license and requires forfeiture to the Crown if discovered. Applying the terms of the New Zealand law, the House of Lords held that the Crown had not obtained ownership of the carvings under its own jurisdiction, and, applying England's view of the territorial theory of sovereignty, that New Zealand could not reach into England to obtain ownership. *Id.* at 819.

48. *Winkworth v. Christie, Manson and Woods Ltd.*, [1990] 1 Ch. 496, involved the theft in England of Japanese miniature ivory carvings, subsequent sale in Italy to a good faith purchaser, the buyer's attempt to auction the carvings in England, and the original owner's attempt to obtain return in the English courts. Under English law, a purchaser in good faith of stolen goods does not acquire title. Under Italian law, a good faith purchaser from a thief does acquire title. Choosing to apply Italian law as governing the sale in Italy to the good faith purchaser, the English court denied the theft victim's ownership claim in favor of ownership by the good faith purchaser in Italy. See also Pecoraro, *supra* note 45, at 15.

49. Morris, *supra* note 41, at 73 (“[C]riminal sanctions against art thieves rarely include prison sentences because art theft is generally considered a non-violent crime.”).

50. Interim Report on Movement, *supra* note 3, at 9 (“Fines need to be higher than the value of the illegally exported cultural object.”).

51. Report on Return, *supra* note 3, at 14 (“[A] number of highly-placed personalities are party to this trade in stolen antiques.”); Interim Report on Movement, *supra* note 3, at 9 (“Dealers found to have taken part in illicit trade in cultural objects should be temporarily suspended or permanently excluded from their profession.”).

52. UNESCO Convention, *supra* note 26, art. 7(b)(ii); European Convention, *supra* note 26, pt. IV (restitution of cultural property).

53. Interim Report on Movement, *supra* note 3, at 11 (“By 31 March 1990, 69 countries had ratified the convention; disappointingly, Italy, Greece, Portugal and Spain are the only EEC Member States to have done so.”).

there are no ways of distinguishing at the point of importation goods which have infringed the laws or export controls of other countries.⁵⁴

Moreover, the European Convention has not been ratified.⁵⁵ A draft "Convention on the Return of Stolen and Illegally Exported Objects," covering restitution of stolen and return of illegally exported cultural objects, is currently being prepared.⁵⁶ Its completion, however, is not expected until, at the earliest, 1994.⁵⁷ Under these conditions, Europe lacks a uniform or strong system capable of effectively protecting national treasures.

IV. RELATION TO THE SINGLE EUROPEAN ACT

The Single European Act ("SEA") requires the EEC to adopt measures to establish progressively a single integrated internal market by December 31, 1992.⁵⁸ This date "does not create an automatic legal effect."⁵⁹ Nevertheless, achievement of a single internal market is integral to the EEC program, which also includes achievement of monetary⁶⁰ and political⁶¹ union.

The SEA is designed to expedite the unification of the market, which would improve the prospects of monetary and political union.⁶² Three characteristics of the SEA are of relevance to this discussion. First, the SEA mandates a regime of administrative measures that reduce internal trade barriers and accelerate decision making. Second, the SEA places the administrative means of achieving the single EEC market in the hands of the Commission.

54. V. Moore, *Protection of Cultural Property*, in 13 INT'L CONG. COMP. L. 26 (1990) (discussing the position of the United Kingdom on the UNESCO Convention).

55. Resolution, *supra* note 36, at 288. "8. [The European Parliament c]alls on the Commission to propose that the Community as such becomes a contracting party to the 1970 UNESCO Convention . . . and the 1985 Council of Europe Convention . . . and calls on Member States which have not yet done so to ratify those conventions." *Id.*

56. The draft convention and related documents are being prepared under the auspices of UNIDROIT in Rome, Italy. See UNIDROIT Study LXX—Docs. 1-40.

57. Lyndel V. Prott, *Report on the Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 41 INT'L & COMP. L.Q. 160, 167 (1992).

58. EEC TREATY, *supra* note 2, art. 8a.

59. General Declaration on Article 8a of the EEC Treaty, EEC TREATY, *supra* note 2, at 585.

60. Treaty on Economic and Monetary Union, Dec. 20, 1991, Eur. Doc. No. 1752/1753 (Maastricht, Dec. 10, 1991).

61. Treaty on Political Union, Dec. 13, 1991, Eur. Doc. No. 1750/1751 (Maastricht, Dec. 10, 1991).

62. White Paper, *supra* note 2, ¶¶ 221-222.

Third, Article 36 of the EEC Treaty remains a viable reservation of national power in the field of national treasures.

According to the White Paper, the internal frontier customs posts served the Member States' (1) need to enforce their distinct indirect taxation systems for excise duties and value-added-tax and (2) the need to protect against terrorism and illegal drug trade.⁶³ These posts also served to protect against the illegal export of national treasures.⁶⁴ Under the internal market regime, however, customs checks at the internal frontiers have been abolished⁶⁵ and replaced by a system of checks at external frontiers.⁶⁶ Customs documentation also has been simplified.⁶⁷ Goods transferred from one Member State to another are no longer treated as "exports," and customs administrations at the internal frontiers no longer deal with consignments of cultural objects.

Furthermore, both Articles 100a and 100b of the EEC Treaty (added by Articles 18 and 19 of the SEA, respectively) facilitate the establishment of the internal market.⁶⁸ First, the SEA-added Articles widen the choice of methods for harmonization of national laws beyond the exclusive use of directives⁶⁹ to include other measures, such as regulations,⁷⁰ that would directly substitute Community law for national law. Second, the Articles introduce qualified majority voting among the European Council on proposals from the Commission "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment or functioning of the internal market."⁷¹ These decision-making provisions of the SEA

63. *Id.* ¶¶ 26, 31.

64. Interim Report on Movement, *supra* note 3, at 8 ("The removal of checks at the internal frontiers will serve to encourage illicit traffic and may open a floodgate, making it very difficult to prevent the export of cultural property. Open borders after 1993 will make it physically even easier to remove the treasures.").

65. White Paper, *supra* note 2, ¶¶ 12, 24.

66. *Id.* ¶ 29; *see also* Communication, *supra* note 3, at 10.

67. White Paper, *supra* note 2, ¶ 34.

68. EEC TREATY, *supra* note 2, art. 100a-b.

69. *Id.* art. 100. Member States are obligated to amend their national laws to comply with the EEC directives. This resulted in delays in the harmonization of national laws among EEC Member States while legal systems deliberated over national implementation of directives.

70. *Id.* art. 100a(1).

71. *Id.* Qualified majority voting involves a cooperation procedure applicable only to internal market measures, *see id.* art. 8a, whereby the European Council acts on proposals from the Commission only after the European Parliament has expressed its opinion and the Commission has had an opportunity to issue amendments. *Id.* art. 149(2).

are strengthened by the mandate to grant the Commission the pre-eminent role in furthering measures within the field of Article 100a of the EEC Treaty.⁷²

At the same time, the SEA reserves Article 36 of the EEC Treaty to the Member States, allowing the States to continue exercising their authority to impose non-tariff trade barriers.

If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36 EEC, . . . it shall notify the Commission of these provisions.⁷³

One would think that an EEC regulation or directive that harmonized Member States' laws in any of the sectors listed in Article 36 would negate the States' need in that sector to avail themselves of the authority reserved in Article 36 of the EEC Treaty. In order to get qualified majority voting, however, Member States had to be able to retain the authority reserved to them under Article 36.

The SEA also reserves the preexisting "right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques."⁷⁴ This reservation should be read as a statement of political intent on matters that are within the inherent competence of national governments—citizenship and crime—but "do not in all their aspects fall within the scope of the [EEC] Treaty."⁷⁵ Thus, the terms of Article 36 of the EEC Treaty are limited to non-tariff trade barriers, such as export controls, between Member States. In the absence of coordinated EEC measures to stop illegal

72. Declaration on the Powers of Implementation of the Commission, EEC TREATY, *supra* note 2, at 583.

73. *Id.* art. 100a(4).

"[T]he possibility of applying Article 36 . . . permanently after use of Article 100a . . . represents a serious backward step as far as the EEC Treaty is concerned." KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 17, at 475; *contra* Daniel Vignes, *The Harmonization of National Legislation and the EEC*, EUR. L. REV. 358, 367 (Oct. 1990). This approach is very workable for the protection of national treasures because it resolves the basic problems common to all the Member States while providing room to improve the approach based on experience. For the time being, however, Member States shall retain their competence (and the Commission's competence is concomitantly limited) over non-economic grounds of justification listed in Article 36 of the EEC Treaty.

74. General Declaration on Articles 13 to 19 of the Single European Act, EEC TREATY, *supra* note 2, at 588.

75. White Paper, *supra* note 2, ¶ 29.

exports at the external frontier, however, the elimination of internal frontier checks only exacerbates existing problems. The same effect is true of weapons, drugs, terrorism, and other organized crime. Hence, there is still a need for the aforementioned reservation.

V. RELATION TO INTERNATIONAL CONVENTIONS

The need for an EEC-wide system to protect national treasures was made more urgent because many EEC States are not signatories to the UNESCO Convention,⁷⁶ the European Convention has not been ratified,⁷⁷ and an international "Convention on the Return of Stolen and Illegally Exported Objects" does not yet exist.⁷⁸ To remedy the lack of protection, the EEC legislation adopts a number of concepts already set out in the Conventions.

Article 6 of the UNESCO Convention introduces an authorization certificate that would accompany all exported items of cultural property.⁷⁹ Export would be prohibited without the certificate.⁸⁰ This approach presumes the capability of customs authorities to examine exports and accompanying documentation at national frontiers. Thus, the elimination of customs checks at the internal frontiers of Europe renders the UNESCO export certificate meaningless. Because there are no checks over movement of goods among the Member States,⁸¹ the certificate requirement is useless in stopping unlawful movement between EEC Member States as well as in preventing export to the external market through a transit Member State's external frontier. Furthermore,

lack of effective export controls, which the source states are obligated by the [UNESCO] Convention to provide . . . [pursuant to] arts. 5-6, voids or suspends the obligation of the market state to control imports or facilitate the return of any illicitly transferred property that does happen to turn up on its territory.⁸²

76. See *supra* note 53 and accompanying text.

77. See *supra* note 55 and accompanying text.

78. See *supra* notes 56-57 and accompanying text.

79. UNESCO Convention, *supra* note 26, art. 6(a).

80. *Id.* art. 6(b).

81. See *supra* note 65 and accompanying text.

82. Gail M. Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT'L LAW. 755, 775 n.78 (1987). Graham goes on to state:

Although this argument has some practical force—it is hard to ask customs officials to sort through unfamiliar goods without a system of paperwork provided at the point of origin—it is legally weak. All states are presumed to subscribe to the

Applying the UNESCO Convention to the conditions of the single market, the EEC has adopted the concept of a UNESCO-type export certificate issued by the Member State of origin for mandatory presentation at the external frontier of the EEC customs union.⁸³

Recovery, return, and compensation have proven to be the achilles' heel of both the UNESCO and European Conventions because of the existence of differing national export controls and the Conventions' failure to resolve international conflicts of law in rules on bona fide purchasers and title. Article 7 of the UNESCO Convention prescribes a policy of diplomatic cooperation to recover and obtain the return of illegally-removed cultural property,⁸⁴ while the 1985 European Convention relies upon existing measures, such as the use of letters rogatory,⁸⁵ to facilitate cooperation. The EEC has adopted the position that inter-government cooperation in a system of return is an inherent requirement in any successful multilateral system of protection.⁸⁶

Article 7 of the UNESCO Convention facilitates its return policy by requiring requesting States to "pay just compensation to an innocent purchaser or to a person who has valid title to that property."⁸⁷ The European Convention avoids explicitly mandat-

norm of respect for each other's cultural heritage, which is the object of the Convention. The instrument is most plausibly read as a set of covenants, not as a matrix of conditions.

Id.

83. Communication, *supra* note 3, at 10; European Council, Conclusions, E.C. BULL. 11-1990, Nov. 19, 1990, at 1.3.187 [hereinafter Conclusions] ("Further consideration should be given to measures at the external frontiers for the protection of cultural objects."); Resolution, *supra* note 36, at 287 ("[The European Parliament] calls for the establishment of an effective Community system of checks at its external frontiers after 1992.").

84. UNESCO Convention, *supra* note 26, art. 7(b)(ii). See Mary McKenna, *Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property*, 12 U. PA. J. INT'L BUS. L. 83, 119 (1991) ("Using informal diplomatic or private means to deal with such international conflicts [as enforcement of foreign claims to national treasures] not only saves administrative expense and judicial resources and avoids political tension, but also is more congenial to those accustomed to the traditional informality of the art trade." (citations omitted)). Unfortunately, such traditional informality is also more congenial to those in the illicit art trade.

85. European Convention, *supra* note 26, pt. IV, arts. 6-11. The European Convention incorporates into the field of offenses relating to cultural property the application of four existing European Conventions: on Extradition (ETS 24); on Mutual Assistance in Criminal Matters (ETS 30); on the International Validity of Criminal Judgments (ETS 70); and on the Transfer of Proceedings in Criminal Matters (ETS 73). EXPLANATORY REPORT, *supra* note 26, at 6.

86. Conclusions, *supra* note 83; Resolution, *supra* note 36, at 287.

87. UNESCO Convention, *supra* note 26, art. 7(b)(ii).

ing just compensation by requiring that restitution be subject to the law of the requested State.⁸⁸ As it considered the matter, the EEC Commission, which, under Article 222 of the EEC Treaty, is not competent to act in the field of property ownership, posed the issue as follows:

With the completion of the internal market, the question arises of the rights and duties of a person who purchases in good faith an object in Member State B that later proves to have been unlawfully exported from Member State A: [This] situation is comparable—but not necessarily identical—to that of a bona fide purchaser of a stolen object.⁸⁹

The EEC addressed this situation by adopting formalities that apply only to export trade in cultural goods that would afford certainty to purchasers in State B that all export rules had been followed in State A.⁹⁰ This formality, to be given mutual recognition in relation to set categories of cultural goods, has taken the form of the uniform EEC export license.

Even once the matter of export authorization is resolved, implementing a system of return remains administratively complex in that the definition and identification of cultural objects involve coordination among twelve different regulatory regimes. Article 1 of the UNESCO Convention, which lists the categories that signatory states may “specifically designate” as important, encourages the inclusion of more objects within national definitions of cultural property. Each signatory can apply its own considerations of what constitutes its cultural heritage.⁹¹ A potentially infinite number of objects may be subject to an export certificate, the absence of which would be evidence necessary to obtain the return of illegally-removed cultural property.⁹² The European Convention raises the same problems because signatories may unilaterally declare which

88. European Convention, *supra* note 26, art. 8(2).

89. Communication, *supra* note 3, at 8.

90. *Id.* at 15.

91. UNESCO Convention, *supra* note 26, art. 4; see Graham, *supra* note 82, at 774 (“The drafters, recognizing that Western standards of commercial value may provide no measure of the indigenous cultural importance of an artifact, intended the opening definition to embrace far more than the traditional catalogue of cultural property.”).

92. UNESCO Convention, *supra* note 26, art. 3; see Merryman, *supra* note 32, at 844-45 (“This feature of [the] UNESCO . . . [Convention] has been called a ‘blank check’ by interests in market nations; the nation of origin is given the power to define ‘illicit’ as it pleases. Dealers, collectors and museums in market nations have no opportunity to participate in that decision.”).

categories of objects possess cultural interest⁹³ and define specific offenses related to cultural property.⁹⁴ These conditions cause uncertainty in determining the applicable law in cross-border disputes. As a result, the European Convention has not been ratified, and the UNESCO Convention has been ratified by few "market" nations.

One method of establishing national definitions is the much-promoted use of inventories and catalogues, a concept the EEC has promoted to identify protected national treasures among Member States.⁹⁵ Yet, integration of the approach to compile lists of protected, privately and publicly owned art and antiquities into an international system would require bureaucracy more extensive than presently exists.⁹⁶ As a practical matter, any "positive" register or inventory system will have trouble accounting for undocumented antiquities looted from known or unknown archaeological sites.⁹⁷

93. European Convention, *supra* note 26, art. 2.

94. *Id.* art. 3.

95. UNESCO Convention, *supra* note 26, art. 5(b); Communication, *supra* note 3, at 17; Resolution, *supra* note 36, at 288 ("Member States . . . should, as soon as possible, make an inventory (as exhaustive as possible) of national and regional cultural objects, since the possession and proper classification of such data will make it easier to trace the movement of the objects.").

96. See Communication, *supra* note 3, at 14-17.

99. Mandatory documentation for cultural property is clearly the most bureaucratic of all the ideas set out for consideration, but would at least be a clear-cut solution. It links up to some extent with the idea of registers. Thought can be given to the question whether national treasures can be protected at European level on the basis of Member States' registers of national treasures, possibly grouped together to form a European register. The latter theoretically would be the ideal solution, but feasibility of compiling such a European register, possibly in the medium term, should be examined carefully with the Member States.

Id. at 17. See also Kenety, *supra* note 42, at 44 ("a national registry of outstanding works of art vital to the nation's heritage. . . . analogous to the National Register of Historic Places, and a committee . . .") (citations omitted); Pecoraro, *supra* note 45, at 41-45 (distinguishing between a "negative" registry, which includes only missing objects, such as the Art Loss Register, *supra* note 4, and a "positive" registry of objects representing a nation's cultural heritage, such as the National Register of Historic Places); Morris, *supra* note 41, at 74-76 (discussing computerized methods of implementing accurate and accessible documentation). As the technological capacity of such computerized registers improves, the capability of police and customs officials to identify and prevent stolen goods from crossing borders will increase. Public access to such registers will provide the arts industry with a method of determining provenance, title, and theft and a basis upon which legal systems will be able to establish a person's legal status as a legitimate exporter/importer or as a bona fide purchaser.

97. *The Lydian Hoard—Return to Sender*, *ECONOMIST*, Oct. 2, 1993, at 96.

In Europe, the most expedient solution is to identify the lowest number of categories common to all twelve legal systems. A variant is to use an existing administrative system, such as the Combined Nomenclature⁹⁸ that the EEC legislation adopts. Under such a scheme, the definition of cultural objects employs only the necessary and sufficient categories from the Combined Nomenclature to cover only objects that are likely to rank as national treasures in all Member States.⁹⁹ With cooperation among the Member States, the scheme can be made to expand and improve its coverage. The prospect of establishing a comprehensive positive registry, nation-by-nation or EEC-wide, that could be used by police, customs officials, and the arts industry seems unlikely for the time being.

VI. EEC LEGISLATION GENERALLY

The EEC legislation is based on five presumptions. First, in accordance with the principle of "subsidiarity,"¹⁰⁰ the EEC legislation supplements the national laws of the Member States. The authority to define and control the export of cultural objects ranking as national treasures continues to be reserved to the Member States after 1992 under Article 36 of the EEC Treaty.¹⁰¹ Second, the substantive laws of Member States governing the definition, exportability, and ownership of national treasures are diverse. Under Article 222 of the EEC Treaty, the EEC cannot superimpose an international property ownership rule that would affect the rights and remedies of owners dispossessed by loss or theft and subsequent bona fide purchasers.¹⁰² Furthermore, Member States cannot be expected to harmonize or unify these laws in the near future.¹⁰³ Third, EEC measures to eliminate customs checks at the internal frontiers will reduce the effectiveness of national controls and exacerbate the EEC-wide problems of theft and illegal trans-

98. See *infra* note 115.

99. Proposals, *supra* note 1, at 9.

100. Resolution on the Principle of Subsidiarity, EUR. PARL. DOC. (PE 143.504) 13 (1990) ("[F]ar reaching competences will remain with the Member States in the fields of . . . culture."). The Commission will not resolve all problems at the EEC level, but will allow existing national laws and international conventions to continue to operate where they provide adequate solutions. See Commission of the European Communities, Communication on the Principle of Subsidiarity, E.C. BULL. 10-1992, Oct. 27, 1992, at 116-26.

101. EEC TREATY, *supra* note 2, art. 100a(4); Proposals, *supra* note 1, at 2.

102. EEC TREATY, *supra* note 2, art. 222.

103. See Proposals, *supra* note 1, at 6, 8, 19.

port.¹⁰⁴ Fourth, customs facilities at the external frontiers are not equipped to identify the cultural objects that rank as the national treasures of any particular Member State.¹⁰⁵ Under these conditions, national treasures may be removed from the EEC illegally more easily from one Member State through a second transit Member State and across the external frontier of a transit Member State.¹⁰⁶ Fifth, because Member States have not ratified the European Convention and some have not signed on to the UNESCO Convention, the EEC collectively and its Member States individually do not have a consistent system for obtaining the return of national treasures unlawfully removed.¹⁰⁷ Under these conditions, Member States requesting the return of unlawfully-removed national treasures are subject to the legal uncertainty of their return once they are discovered in a second, or transit, Member State.

Under the SEA, there are no longer any "exports" within the EEC, yet Member States retain control over the export of national treasures under Article 36 of the EEC Treaty. Accordingly, the EEC was faced with the difficulty of encouraging free movement of goods among Member States whose export regulations provide differing degrees of control. In light of the differences among export regulations, Member States could not be expected to recognize each other's export regulations. Furthermore, harmonization of substantive law was unlikely because Member States could not be expected to decide for each other whether any particular object is important to another's cultural heritage. Therefore, the EEC chose to establish export and return procedures and require mutual recognition of substantive laws governing the definition of cultural objects ranking as national treasures.

104. *Id.* at 2; Resolution, *supra* note 36, at 287; Conclusions, *supra* note 83.

105. Proposals, *supra* note 1, at 5, 6. The Resolution states:

14. [The European Parliament c]onsiders that the customs staff dealing with legislation in the Member States and European coordination should be given specialized training in view of the requirements of the single market as regards the movement of cultural objects, and underlines the need for better cooperation with the police forces and special customs directorates dealing with the import, transit and export of works of art

Resolution, *supra* note 36, at 288. Customs facilities at the external frontiers come under the control of national customs administrations and are not yet administered by the EEC. KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 17, at 366.

106. External borders for removal out of EEC would be selected on the basis of the "least effective border controls." Joanna Goyder, *Free Movement of Cultural Goods and the European Community: Part II*, 1 INT'L J. CULTURAL PROP. 403, 405-06 (1992).

107. Proposals, *supra* note 1, at 3, 5.

Under this approach, Member States retain their own export restrictions but issue a uniform EEC-wide export license form dedicated exclusively to authorized transport of cultural goods at the external frontier. The requirement ensures that any unlicensed consignment of cultural objects ranking as national treasures will be returned to a requesting Member State. A person dispossessed of a cultural object as a result of the return procedure will be entitled to fair compensation provided the person used due care and diligence in establishing whether the object was unlawfully exported from the Member State.

A. Export Regulation

The Export Regulation advances the EEC's common commercial policy by applying "uniform principles . . . in regard to . . . the achievement of uniformity in measures of liberalization, export policy and measures to protect trade."¹⁰⁸ The Regulation prescribes a "uniform [export] control"¹⁰⁹ at the external frontier. The implementation of the control is mandatory for Member States and affects the movement of goods from the EEC to non-member states. Uniform control only applies to certain categories of cultural goods¹¹⁰ and leaves to the Member States a substantial amount of legislative, policy, and law enforcement authority in the protection of national treasures.

Pursuant to the principle of mutual recognition¹¹¹ and in reliance upon the existing EEC regulations on mutual assistance

108. EEC TREATY, *supra* note 2, art. 113. The Preamble to the Export Regulation specifically refers to Article 113 of the EEC Treaty. Export Regulation, *supra* note 1, at 1 (pmb1).

109. Proposals, *supra* note 1, at 6.

110. The Annex to the Export Regulation prescribes categories of cultural objects subject to uniform export control. Archaeological objects more than 100 years old; elements forming an integral part of artistic, historical, or religious monuments which have been dismembered, of an age exceeding 100 years; and pictures and paintings executed entirely by hand more than 50 years old are three examples from the 14 categories. Export Regulation, *supra* note 1, Annex.

111. Proposals, *supra* note 1, at 6 (para. 7: "uniform controls"; para. 8: "cultural objects recognized by all Member States as being of special interest"). The principle of mutual recognition (of goods, laws, or standards) is characterized as a substitute for all-encompassing harmonization. See KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 17, at 469-70. In the case of national treasures, it is unlikely that Member States will fully and unconditionally recognize one another's definitions, export regulations, or bona fide purchaser rules. Hence, there is a need for effort at limited mutual recognition.

among administrative authorities of Member States,¹¹² the Export Regulation supplements existing national measures with a uniform export license.¹¹³ Valid throughout the EEC, the license is issued by an administrative authority of the Member State from which a qualifying object originates and is required by customs officials at the external frontier for export outside of the EEC.¹¹⁴ An EEC-wide definition of cultural goods is classified according to categories derived from the Combined Nomenclature.¹¹⁵ The annexed categories of cultural goods give guidance to customs officials at the external frontier as to which objects require the export license. The licensing system ameliorates the effects of the internal market regime by identifying a finite list of qualifying categories of cultural goods subject to control at the external frontier.

The Regulation employs a working administrative definition of cultural goods calculated to cover the types of objects that are entitled to national protection under Article 36 of the EEC Treaty. Customs officials at Member States' external frontiers are familiar with these definitions. The Annex, common to both the Export Regulation and the Return Directive, adopts classifications from the Combined Nomenclature. Under the subsidiarity principle, the Annex affects neither existing national definitions and controls nor the capacity of Member States to refine their definitions and controls. This is consistent with Article 36 of the EEC Treaty.¹¹⁶ National treasures under the law of any particular Member State of origin that do not fall within the Annex are exempt from the export license requirement.¹¹⁷ On the other hand, cultural goods listed in the Annex, even if not considered national treasures in the

112. Council Regulation 1468/81, 1981 O.J. (L 144) 1, *amended by* Council Regulation 945/87, 1987 O.J. (L 90) 3. The Regulation provides for mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters. *Id.*

113. License Regulation, *supra* note 1. The license regulation sets out a specimen license form and rules on drawing up, issuing, and using the form.

114. Export Regulation, *supra* note 1, art. 2(1).

115. Regulation 2658/87, 1987 O.J. (L 256) 1 (Annex 1), *as amended*. The Combined Nomenclature consists of the classifications of goods produced outside of the EEC upon which a customs duty, set by the Common Customs Tariff, is charged upon import into the EEC; *see also supra* note 110 and accompanying text.

116. Proposals, *supra* note 1, at 9; Export Regulation, *supra* note 1, at 1 (pmb1.).

117. Those treasures also are not subject to the procedures set out in the Return Directive.

Member State of origin, must be accompanied by a license.¹¹⁸ This is the inevitable consequence of using a working administrative definition, for the convenience of customs officials, that is limited to protecting common interests of constituent Member States.

The Export Regulation is "binding in its entirety and directly applicable in all Member States."¹¹⁹ The export license is "valid throughout the Community"¹²⁰ regardless of where it is issued, and both the Regulation and the license are intended to function in coordination with the administration of the Return Directive.¹²¹ The first governmental point of contact for an exporter is the competent licensing authority of the Member State where a qualifying cultural object originates.¹²² Upon issuing a license, the licensing authority keeps a copy.¹²³ This way, a record is available for a "requesting Member State . . . seek[ing] a specified cultural object which has been unlawfully removed from its territory."¹²⁴ The notification procedure set out in the Return Directive¹²⁵ ensures that the licensing authority can establish whether another Member State seeks the cultural object.

Article 2 of the Regulation engages the licensing authorities of all Member States to apply foreign national protection to qualifying cultural objects that have traversed the borders of Member States. The export license can be issued to an exporter only

—by a competent authority of the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993,

—or, thereafter, by a competent authority of the Member State in whose territory it is located following either lawful and definitive dispatch from another Member State, or importation from a

118. Listed cultural goods that do not rank as national treasures are not subject to the Return Directive either.

119. Export Regulation, *supra* note 1 (final provision following Article 11).

120. *Id.* art. 2(3).

121. *Id.* art. 6 (Administrative Cooperation); Return Directive, *supra* note 1, art. 4 (listing activities requiring consultation between Member States' competent national authorities).

122. Export Regulation, *supra* note 1, art. 2(2); License Regulation, *supra* note 1, art. 2.

123. License Regulation, *supra* note 1, art. 6(5).

124. Return Directive, *supra* note 1, art. 4(1)-(2).

125. *Id.* art. 4(2)-(3). A "requesting" Member State's formal recourse to the return procedure *before* issuance of a license in the "requested" Member State has the effect of enjoining issuance of a license in the "requested" Member State. See discussion *infra* preceding note 156.

third country, or reimportation from a third country after lawful dispatch from a Member State to that country.¹²⁶

Authority to issue an export license is vested in the Member State in which the cultural object is "located" at the time a license is requested.¹²⁷ This authority, however, is subject to safeguards protecting other Member States with superior or competing interests in the protection of the cultural object.

Based on the principle of mutual recognition and pursuant to EEC policy on mutual assistance, the competent authority of the Member State in which a qualifying cultural object arrives after January 1, 1993 must recognize the law of any other Member States from which a cultural object originates. Thus, the licensing Member State must consider whether the issuance of a license would violate the law of the Member State from which the object has been dispatched, either from within the customs territory of the EEC or through a third non-member country.¹²⁸ The licensing Member State must recognize foreign law and policy independently, or, "[w]here necessary, . . . [by] enter[ing] into contact with the competent authorities of the Member State from which the cultural object in question came."¹²⁹ This safeguard ensures that the licensing Member State evaluates the lawfulness and definitiveness of the presence of such cultural objects in its own territory.

If the licensing Member State finds that the object has been stolen, smuggled, or illegally exported in violation of a temporary use arrangement or a national treasure protection law, it may deny the export license, and the cultural object may be kept within the external frontier.¹³⁰ Furthermore, "contact with the competent au-

126. Export Regulation, *supra* note 1, art. 2(2); Proposals, *supra* note 1, at 16 ("Goods dispatched for the purposes of cultural exhibitions are covered by appropriate customs rules and consequently do not fall within the scope of this proposal.").

127. Export Regulation, *supra* note 1, art. 2(2).

128. Member States must refuse the license if "the cultural goods in question are covered by legislation protecting national treasures . . . in the Member State concerned." *Id.*

129. *Id.*

130. The Export and Licensing Regulations constitute administrative system for the granting and recognition of export licenses. They are not the basis for a crime detection system. Yet, a serious question could be raised as to whether the regulations should include an explicit admonition to licensing and customs authorities to check the Art Loss Register or other "negative" register, *see supra* note 96, before granting a license or allowing passage across the external frontier in order to establish whether the object or contents of a consignment have been reported stolen. As a standard operating procedure, such a check would permit officials to (1) deny a license, (2) deny export of a previously licensed object of a consignment, and (3) if warranted, trigger the Return Directive.

thorities of the Member State from which the cultural object in question came"¹³¹ should trigger a formal request that an export license be denied or formal proceedings under the Return Directive to enjoin the issuance of an export license.

Presentation of the license is part of the customs procedure for export of goods from the EEC. The license must accompany and conform to the declarations set out in the Single Administrative Document ("SAD").¹³² Customs officials must check whether cultural goods listed in the SAD are accompanied by and identified on a corresponding export license.¹³³ If there is some disparity between the declarations and the license, or if there is no license, the goods in question must remain in the EEC customs territory.

Member States are required to furnish the Commission with a list of "national authorities empowered to issue export licenses for cultural goods,"¹³⁴ and, when Member States choose to limit their number, a list of the "customs offices empowered to handle formalities for the export of cultural goods."¹³⁵ The C Series of the Official Journal of the European Communities would publish both lists.¹³⁶

B. Return Directive

The Return Directive advances the EEC's internal market program for the "approximation of . . . law . . . in Member States which have as their object the establishment and functioning of the internal market."¹³⁷ In accordance with the subsidiarity¹³⁸ principle, the Return Directive applies to EEC-wide categories of cultural objects derived from the Combined Nomenclature. The list

131. Export Regulation, *supra* note 1, art. 2(2).

132. *Id.* art. 4; License Regulation, *supra* note 1, art. 8; *see also* Council Regulation 678/85, 1985 O.J. (L 79) 1, *as amended*. Council Regulation 717/91, 1991 O.J. (L 78) repeals the original and amended regulations governing the SAD as they affect EEC goods moving across internal frontiers after 1992. The SAD will, however, continue to be required at the external frontiers in connection with imports into and exports from the EEC as well as in trade between Spain or Portugal and other Member States. Decision of the Council 87/415, 1987 O.J. (L 226) 1, extends the use of the SAD to EFTA countries.

133. License Regulation, *supra* note 1, art. 6.

134. Export Regulation, *supra* note 1, art. 3.

135. *Id.* art. 5.

136. *Id.* arts. 3(2), 5(2).

137. EEC TREATY, *supra* note 2, art. 100a(1). The Preamble to the Directive specifically references Article 100a. Return Directive, *supra* note 1, at 74 (pmb.).

138. *See sources cited supra* note 100.

of categories of cultural objects is common to both the Export Regulation and the Return Directive.¹³⁹

A requesting Member State, but not a private person,¹⁴⁰ has standing to make a claim for return of a cultural object in the competent court of the requested Member State where the unlawfully removed cultural object is found.¹⁴¹ Provided that the object meets both the requesting Member State's definition of a national treasure and one of the annexed common categories, that the requesting Member State can prove that the cultural object was removed unlawfully from its territory and that the period of limitation is not exceeded,¹⁴² the court of the requested Member State is required to order return of the cultural object to the requesting Member State.¹⁴³ The EEC has eased the burden of obtaining the return of some objects by allowing Member States to classify them as national treasures "before or after . . . unlawful removal from the

139. See *supra* text accompanying note 115.

140. Proposals, *supra* note 1, at 24 ("The right to institute return proceedings . . . is reserved solely for Member States. A private owner of a cultural object wishing to take action against the holder could not resort to this procedure; he would be able to bring against . . . [the holder] only such proceedings as are provided for by ordinary law.")

141. A "requesting" Member State is defined as a Member State *from* whose territory a cultural object is unlawfully removed. A "requested" Member State is defined as a Member State *in* whose territory a cultural object unlawfully removed from the territory of another Member State is located. "Unlawfully removed" is defined as removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of the Export Regulation, or in breach of the time limits or other conditions of a lawful temporary removal arrangement. The Directive does not distinguish the nature of illegality, be it theft, smuggling, or violation of national export regulations. "Return" is defined as the physical return of a cultural object to the territory of a requesting Member State. Return Directive, *supra* note 1, art. 1.

142. Article 7(1) provides that return proceedings may not "be brought more than one year after the requesting Member State became aware of the location of the cultural object or the identity of its possessor or holder. Such proceedings may . . . not be brought more than 30 years after the object was unlawfully removed" from the requesting Member State. *Id.* art. 7(1).

143. For purposes of analogy, compare Georges A.L. Droz, *La protection internationale des biens culturels et des objets d'art, vue sous l'angle d'une convention de droit international privé*, in INTERNATIONAL SALES OF WORKS OF ART, *supra* note 40, at 543. Droz suggests an interesting comparison to the international law of child abduction:

One could . . . ensure the return of a work of art to its State of origin in the same way that the . . . [Hague] Convention [on the civil aspects of international child abduction] guarantees the return of a child to the country from which it was illegally removed. The Convention would simply reestablish the status quo ante, without obliging the State where the object is situated to decide on any other aspects of the question. . . . [T]he illegal nature of the removal of an object should be determined solely by the law of the country of origin.

Id. (original in French) (emphasis added).

territory of a Member State.”¹⁴⁴ On one hand, Member States will have significant discretion to classify an object as a national treasure after it is transported across intracommunity borders, pending the processing of an export license in a transit Member State, or awaiting customs clearance at the external frontier. This power will be particularly valuable to governments in claims for the return of previously unidentified antiquities taken illegally from archaeological sites. On the other hand, persons engaged in legitimate commerce in art and antiquities are subject to risk that such classification will thwart a closed transaction. This suggests that the art and antiquities market will have to resolve classification questions in advance of transactions.

In turn, the successful requesting Member State may be required to compensate a bona fide possessor¹⁴⁵ in the requested Member State. The Directive “appl[ies] only to cultural objects unlawfully removed . . . on or after 1 January 1993,”¹⁴⁶ and requires Member States to adopt national laws, regulations, and administrative provisions to comply with the Directive.¹⁴⁷

The working administrative definition of “cultural objects”¹⁴⁸ under the Return Directive is related to, yet different from, that of “cultural goods” under the EEC export license. Under the Return Directive, as under the Export Regulation, only cultural goods as defined in the Annex require an EEC export license. Under the Export Regulation, however, a national treasure that is not included in the Annex does not require a uniform EEC export license at the external frontier.¹⁴⁹ On the other hand, under the Return Directive, only an object included in the Annex *and* classified as a national treasure under the law of the requesting Member State is subject to return. Therefore, regardless of whether it is accompanied by an export license, an item of cultural goods that is not also classified as a national treasure under the law of the re-

144. Return Directive, *supra* note 1, art. 1(1).

145. A “possessor” is defined as a person physically holding a cultural object on his own account. A “holder” is defined as a person physically holding the cultural object for third parties. *Id.* art. 1.

146. *Id.* art. 13.

147. *Id.* art. 18.

148. *Id.* art. 1(1).

149. See *supra* text accompanying note 117.

questing Member State is not subject to return pursuant to the procedures set out in the Directive.¹⁵⁰

Article 4 of the Directive is comparable in purpose to Article 7(b)(ii) of the UNESCO Convention. It prescribes the initiation of reciprocal government cooperation and consultation among designated central authorities to recover and obtain the return of a "specified" cultural object.¹⁵¹ Requested Member States are responsible to help search for, assist in identification, preserve, and prevent the loss of cultural goods over which a prospective claim is anticipated. Once a requesting Member State establishes that a recovered object meets its definitions, the requested Member State is obliged to act as an intermediary between the object's current possessor and the requesting Member State in attempting to achieve an amicable settlement concerning its return.¹⁵² Member States have leeway in determining how to administer a system of reciprocal government cooperation and consultation. The list of non-judicial methods,¹⁵³ which includes arbitration,¹⁵⁴ is "not exhaustive,"¹⁵⁵ and Member States must adapt their existing bureaucracies to facilitate the use of these methods.

As a practical matter, three events trigger the cooperation requirement: (1) discovery of a theft; (2) application for a license; and (3) attempted export at the external frontier without an EEC export license or with improper documentation. Requesting Member States invoke cooperation when a theft is discovered or other unlawful intra-Community export is traced. Requested Member States invoke cooperation upon receiving an application for an EEC export license for an object that originated within another Member State¹⁵⁶ or upon attempted export at their external fron-

150. See *supra* text accompanying note 118. The different terminology is appropriate, as "cultural goods" that require an export license would not meet the definition of "cultural objects" subject to return if they do not also have the status of national treasures in a requesting Member State.

151. Return Directive, *supra* note 1, art. 4(1).

152. A serious question could be raised as to the fairness of allowing a requesting Member State to classify an object as a national treasure after the object enters a requested Member State's territory pursuant to an otherwise good faith commercial transaction, see *id.* art. 1(1), and then to use the requested Member State's administrative authorities to obtain its return. *Id.* art. 4(1)-(6).

153. *Id.* art. 4.

154. *Id.* art. 4(6).

155. Proposals, *supra* note 1, at 22.

156. See *supra* text accompanying note 125.

tier.¹⁵⁷ Cooperation on recovery of stolen objects involves the central authorities of all Member States. Cultural goods not accompanied by an export license are handled bilaterally between requested and requesting Member States.

There are situations, however, where more than one Member State has an interest in a cultural object. For example, an object may be legitimately residing temporarily in one Member State while on loan for exhibition from a Member State of origin when it is stolen, and the object is recovered at the external frontier of a third Member State. Under such circumstances, the Member State with temporary use would have notified all central authorities of the theft. That State should be accorded status as a participant in the cooperation procedures, as the borrower may have a right to continued temporary use under the loan arrangement if without fault in the theft.

Should the cooperation requirement produce no agreement between a requesting Member State and the holder of a cultural object, the central authorities involved must yield to judicial authority. A requesting Member State has to initiate a legal claim for return against the possessor or holder in the competent court of the requested Member State¹⁵⁸ which has "sole jurisdiction to order the return of . . . [an] object to the requesting Member State."¹⁵⁹ The cooperation requirement should, however, be a mandatory administrative prerequisite before a requesting Member State can begin judicial proceedings.

The Directive, as drafted, specifies no distinct point in the administrative process at which cooperation is deemed to have failed and a suit then required. Before judicial jurisdiction takes effect, there should be a timeframe, starting at the time of a request for return, within which the cooperation procedure runs its course. Recourse to judicial proceedings before that time would be premature, at least until an administrative act, such as failure to adopt a non-binding arbitration decision,¹⁶⁰ indicates the futility of further

157. See *supra* text accompanying notes 130, 133.

158. Return Directive, *supra* note 1, art. 5. Initiation of a judicial proceeding triggers a concurrent requirement that all EEC central authorities be notified of the suit. *Id.* art. 6.

159. Proposals, *supra* note 1, at 24.

160. The Directive encourages the central authority of the requested Member State, "without prejudice to Article 5 [(initiation of judicial proceedings), to] facilitate the implementation of an arbitration procedure, in accordance with the national legislation of the requested Member State." Return Directive, *supra* note 1, art. 4(6). Thus, as presently

administrative cooperation in obtaining return. By requiring a mandatory timetable or a definitive act before commencement of a judicial proceeding, Member States would have an opportunity to measure their administrative efforts. At the end of such a timetable, a requesting Member State would have recourse to a requested Member State's courts. Such a procedure would not prejudice a requested Member State's ability to intervene as a concurrent requesting Member State in court or its obligation to take measures to preserve the requested cultural object.

Once suit is filed, the preservation-oriented purposes of Article 4 are served. The possessor, whether a smuggler, a purchaser, or an exporter, is identified. The only outstanding issues are return and compensation, which, presumably, could not be resolved by cooperation. A requested Member State's central authority cannot overrule a decision of its courts over return and compensation. It must serve as an ongoing intermediary to facilitate return and compensation during the pendency and at the conclusion of a suit.

Filing documents must include a description of the object sought, a certification that the object is a national treasure under the law of the requesting Member State and a cultural object under the common Annex, and a declaration by the competent authorities of the requesting Member State of the object's unlawful removal from its territory.¹⁶¹ The competent court of the requested Member State is required¹⁶² to order return if (1) the requested object meets the Directive's definition of "cultural object," (2) the object was unlawfully removed¹⁶³ after January 1, 1993, and (3) return proceedings were brought within the time limits set out in Article 7. Should the possessor of a cultural object disprove any element, the court must refuse the request for return.

worded, arbitration could be initiated at any time before a court's final decision, even during the pendency of judicial proceedings. Instead, the EEC could have interposed an arbitrator's decision as a jurisdictional prerequisite to initiation of judicial proceedings.

161. *Id.* art. 5.

162. "The court has no discretion and can refuse the request only where the requesting Member State is not entitled to return of the object as a result of the application of" time limitations, change in the national law of the requesting Member State, or unlawful removal before January 1, 1993. Proposals, *supra* note 1, at 27. The Directive includes no substantive guidance as to competing claims for return.

163. *See id.* ("[T]he holder of a cultural object must return it to the requesting Member State even if he did not know or could not have been expected to know when he acquired it that it had been unlawfully removed from the territory of that Member State.").

The courts of requested Member States must interpret the substantive law of requesting Member States to establish the sufficiency of the filing documentation required under Article 5. Given the finite nature of the common Annex and its explicit derivation from the Combined Nomenclature, disputes over whether a cultural object under the common Annex ranks as a national treasure under a requesting Member State's law should be kept to a minimum.¹⁶⁴ Rather, when the requesting Member State's law characterizes a particular object as a national treasure, the likely issue would be whether that characterization is proper or constitutes a "means of arbitrar[y] discrimination or a disguised restriction of trade" forbidden under Article 36 of the EEC Treaty.¹⁶⁵

Because resolution of that issue involves an interpretation of the EEC Treaty, the court of the requested Member State may, under Article 177 of the Treaty, seek a preliminary ruling from the European Court of Justice "on the interpretation of the Directive and/or the compatibility of national legislation with EEC law"¹⁶⁶ before rendering judgment. Furthermore, complications arise if other Member States, including the requested Member State, with proof of a legitimate interest take part in the proceedings or independently institute their concurrent return proceedings. These complications would require the requested Member State to rule on conflicting claims to return.¹⁶⁷

Where return is ordered, the requesting Member State may be required to pay fair compensation. The ordering court determines

164. COM(91)447 final—SYN 382 states:

The way in which the requesting Member State may certify that the cultural object claimed is one of its national treasures depends on its own rules on the protection of cultural objects. If, for example, the requesting Member State has a detailed list of cultural objects that are classed as national treasures on which the object in question appears, it will be sufficient to append a copy of that list to the document instituting the proceedings. If, on the other hand, the laws of the requesting Member State define "national treasures" in general terms, the documents instituting the proceedings would have to be accompanied by a statement explaining why the object whose return is requested belongs to the category of cultural objects regarded as national treasures.

Id. at 24. Under such a regime, the requests of "total claim" countries, *see* Koenig, *supra* note 40, are exposed to a challenge that a statement explaining why the object whose return is requested is regarded as a national treasure is really a post-hoc rationalization that brings the requested object within the ambit of an overly general export control.

165. EEC TREATY, *supra* note 2, art. 36.

166. Proposals, *supra* note 1, at 27, 34a.

167. Return Directive, *supra* note 1, art. 6.

fair compensation to the possessor or the acquirer¹⁶⁸ of the object "according to the circumstances of the case, provided that . . . [the court] is satisfied that the possessor exercised due care and attention in acquiring the object."¹⁶⁹ The due care requirement pertains only to the acquirer's notice of the unlawful removal. Return can be required of anyone in possession of a cultural object, whether owner, shipper, or thief; however, compensation will depend upon whether the acquirer diligently looked into the legality of removal.¹⁷⁰ As a practical matter, the acquirer has the burden of proving that he exercised due care,¹⁷¹ and the courts must determine whether he "took all necessary precautions when acquiring the object."¹⁷² The nature of "necessary precautions" is not set out in the Directive. Preliminarily, any purchaser should check the Art Loss Register or some other "negative" register¹⁷³ before purchasing. An acquirer should establish whether the object is imported and inquire into previous export formalities, e.g., were the exporting country's national treasure (cultural heritage) laws and formalities followed? To avoid getting tied up in the EEC return procedure, a shipper should require the owner to obtain or produce the EEC export license before accepting the consignment.

The amount of compensation is left to the requested Member State court "according to the circumstances of the case."¹⁷⁴ The Commission explains compensation as follows:

The amount of compensation will not necessarily be equivalent to the purchase price paid by the acquirer. According to the case in point, it may be more or less than the purchase price because the court also has to take other factors into account, e.g. the objective value of the object, its sentimental value for the acquirer, the costs he has incurred in preserving it and, above

168. "[C]ompensation . . . is payable only to the 'acquirer', i.e. the person who acquired the cultural object whose return is requested *after* it was unlawfully removed from the territory of requesting Member State." Proposals, *supra* note 1, at 28 (emphasis added).

169. Return Directive, *supra* note 1, art. 9.

170. "The owner of a cultural object who himself removes it or has it removed unlawfully is never entitled to compensation . . . because he is expected to know whether or not the object is allowed to be exported or dispatched from the territory of the requesting Member State." Proposals, *supra* note 1, at 28.

171. Technically, though, the Directive provides that the "burden of proof shall be governed by the legislation of the requested Member State." Return Directive, *supra* note 1, art. 9.

172. Proposals, *supra* note 1, at 28.

173. See *supra* note 96.

174. Return Directive, *supra* note 1, art. 9.

all, whether or not he remains—under the law of the requesting Member State (see Article [12])—owner of the cultural object once returned.¹⁷⁵

A more explicit schedule of allowable costs based on the commercial law of the requested Member State or uniform throughout the EEC, supported by documentary evidence, would simplify the standard and provide an element of certainty to possessors and to the central authorities of requesting Member States.

A possessor who fails to prove he exercised due care, and so obtains no compensation, still may avail himself of legal remedies under national laws “against . . . , for example, the vendor or a person responsible for unlawful dispatch or export, with a view to obtaining (contractual or otherwise) compensation.”¹⁷⁶ On the other hand, a requesting Member State that has to pay just compensation to an acquirer may seek indemnification under its national laws from the same persons responsible for unlawful conduct.¹⁷⁷

Finally, staying within the limitation on EEC competence set out in Article 222 of the EEC Treaty, the Directive nevertheless resolves the uncertainty inherent in Article 7(b)(ii) of the UNESCO Convention by providing that “[o]wnership of the cultural object after return shall be governed by the law of the requesting Member State[]”¹⁷⁸ once the predominant EEC interest, i.e., protection (return) of national treasures, is accomplished. To this end, the Directive operates “without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen.”¹⁷⁹

VII. CONCLUSION

Under the EEC legislation, Member States retain competence under Article 36 of the EEC Treaty to grant or deny export licenses pursuant to their national export regulations governing the protection of national treasures. The innovation introduced into the single internal market program is that a cultural object not ac-

175. Proposals, *supra* note 1, at 28.

176. *Id.*

177. Return Directive, *supra* note 1, art. 11.

178. *Id.* art. 12.

179. *Id.* art. 15.

accompanied by an EEC export license cannot be taken out of the customs territory of the EEC. Thus, customs officials at the external frontier and licensing authorities in the Member States provide the safeguards that make the return procedure effective.

Given the EEC's interest in certainty, the court of a requested Member State must apply the substantive law of a requesting Member State on protection (definition) of national treasures because the requesting Member State normally has the strongest interest in the return of national treasures unlawfully removed from its territory. The application of a requesting Member State's substantive law applies only within a limited framework: (1) only governments may request return; (2) requests are limited to cultural objects that fall within the common Annex; (3) the EEC's definition of a cultural object includes the requirement that an object meet a requesting Member State's definition of a national treasure; (4) the validity of this definition is further tested against Article 36 of the EEC Treaty; and (5) the return procedure is not affected by conflicts of law as to the validity of the acquisition by the person in possession at the time of the requested return¹⁸⁰ or as to title, whether private or public.¹⁸¹

To advance the valid interest in protection of the legitimate trade in cultural goods, the EEC provides some protection to persons engaged in commercial transactions across the internal frontiers by requiring compensation for good faith acquirers in requested Member States who can show due care and attention in establishing exportability in advance of purchase. As the Return Directive stands, two types of claims are not covered: (1) private claims to possession and ownership of cultural goods that are subject to the export license but are not ranked as national treasures, and (2) state claims to national treasures that are not subject to the export license. The first type must be prevented under the protections set out in the Export Regulation or settled via private international civil litigation, and the second type has to be taken up in the existing systems of diplomatic cooperation under the UNESCO Convention.

180. The interest in the reasonable expectations of a purchaser is left to be handled in private litigation once the requesting Member State's governmental interest in protection is satisfied. Cf. *Winkworth v. Christie, Manson and Woods Ltd.*, [1990] 1 Ch. 496; see *supra* note 48.

181. It avoids the "automatic vesting" issue New Zealand raised in *Attorney-General of N.Z. v. Ortiz*, [1982] 1. Q.B. 349; see *supra* note 47.

Other problems, not dealt with in this Article, are obstacles to accomplishing the goals of protecting national treasures and removing obstacles to trade. First, the international community must find a satisfactory (i.e., inexpensive and unbureaucratic) solution to the registry and inventory problem. The concept is useful in solving the bona fide purchaser problem on an international scale by providing prompt notice of provenance, status, and theft to prospective purchasers. So-called "negative" registries such as the Art Loss Register provide all parties to a transaction, from purchasers to shippers and from licensing to customs authorities, a quick method establishing impediments to sale and export of an object. The viability of the concept of "positive" registers is open to debate owing to a variety of systemic impediments: differences in the way states define objects subject to national protection; the possibility that national protection may be conferred on an *ad hoc* basis to prevent export of an object purchased for export; and the impossibility of identifying undiscovered archaeological antiquities. Any solution to the problem of "positive" registers will have to include the elements of (1) thorough cataloguing through separate (and independent) inventories of known but finite categories of cultural goods, such as those employed through the common Annex, and (2) automation (including lexicography and imaging) to provide instantaneous information.

The second problem is the harmonization of value-added-taxes ("VAT") among EEC Member States. Differences in VAT rates are generally recognized as creating deflections in trade in general and "distortions of competition between Community auction rooms"¹⁸² in particular.

182. Pursuant to Article 32 of the Sixth VAT Directive, Council Directive 77/388, 1977 O.J. (L/145) 1, France and the United Kingdom allow virtually tax-free entry pursuant to systems under which only the profit margin of the dealer is taxed. See Written Parliamentary Question No. 1154/87, by Lambert Croux to the Commission, Subject: Common Market in Antiques and Works of Art—Complaint by the Belgian Auctions Federation, 1988 O.J. (C 154) 6. See also Anthony Mair, Adviser to the U.K. Fine Art Trade Working Party, *Fighting VAT on Art Imports/It's for Europe's Good, Say the British*, ART NEWSPAPER, Oct. 1993, at 23 ("The absence of VAT on imports has been a major contributor to the prosperity of London dealers and auctioneers . . . [Commenting on British intransigence in EEC negotiations over harmonized VAT for art, antiques and collector's items, why kill the golden goose . . . ?]"). For a description of VAT rules as they pertain to second-hand goods, works of art, antiques, and collector's items, see Gordon Fotherby, *Current Developments: EC Law, III. Customs and Excise Duties and Value Added Tax*, 39 INT'L & COMP. L.Q. 226 (1990).

Third, an international convention addressing private international conflicts of law in rules relating to bona fide purchasers and title will increase certainty and accountability among the arts industry and enhance the legitimate international market in arts and antiquities. Add to these international measures a substantial increase in the use of criminal sanctions and an increase in institutional security¹⁸³ at the national level, and then the hope of strengthening the legitimate international market in cultural objects and providing international protection of national treasures will be closer to achievement.

183. As reported in ARTNews:

In Rome the new head of the cultural department of the city council, Paolo Battistuzzi, announced that the first detailed inventory undertaken in 30 years of the collection of the Municipal Gallery of Modern Art revealed that 430 works had "disappeared." . . . [T]he Municipal Gallery . . . is the only museum that allows the reconstruction of the story of Roman art between 1800 and the 20th century. . . . The average commercial value of each work is about \$15,000, roughly \$6.5 million. . . . [T]he fact that security in Italy's cultural institutions is overly lax was demonstrated It was almost by chance that a guard stopped [an employee] last fall as he was leaving the grounds of the National Print Cabinet with \$700,000 worth of Goya etchings under his arm. "They were pretty," replied [the employee] candidly when he was questioned. "I didn't realize that they were so important."

Turner, *Rome—Missing Madonnas*, ARTNews, Jan. 1992, at 48.