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COMMENT

THE UNIDROIT CONVENTION: ATTEMPTING TO REGULATE THE INTERNATIONAL TRADE AND TRAFFIC OF CULTURAL PROPERTY

I. INTRODUCTION

International art theft and illegal trafficking of cultural property¹ has reached epidemic proportions.² In value transferred, the illicit art trade ranks second only to narcotics trafficking.³ Art theft is rampant in many countries that are rich in art and archaeological resources, and stolen pieces are rarely recovered.⁴ Furthermore, current statistics do not reflect the countless archeological artifacts which are secretly

1. For the purposes of this article, "cultural property" refers to works of art that are considered an integral part of a country's cultural heritage, history or ethnicity.

2. Over \$2 billion worth of art stolen each year. John Larrabee, *Price Is Placed On The Priceless*, USA TODAY, March 17, 1995 at 4A [hereinafter Larrabee]. The rate of theft increases 10% each year. Frances Gibb, *High Art And Low Cunning*, THE TIMES, July 4, 1995 (Features) [hereinafter Gibb].

3. Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469, 473 (1994) [hereinafter Lenzner].

4. William D. Montalbano, *Big Business Art Thieves Find Italy Is a Gold Mine*, LOS ANGELES TIMES, August 25, 1988, at 16 [hereinafter Montalbano]. For example, in Italy, thieves rob churches, museums and private collections of their art objects at a rate of more than one per hour. *Id.* Worldwide, the recovery rate of stolen art ranges between ten and fifteen percent. John Rockwell, *Rome Has a Show of Stolen Artworks to Highlight a Fight*, THE NEW YORK TIMES, May 25, 1994, at C13, C19 [hereinafter Rockwell] In Italy, of the 29,000 works of art stolen in 1993, only 5,500 were recovered. *Id.*

excavated and illegally exported every year.⁵ Intensifying the problem are conflicting laws among nations regarding property rights and the export of cultural property which often facilitate art theft and illicit trade of cultural objects.⁶ The recent removal of internal borders within the newly formed European Union has made illegal export of cultural property even easier.⁷ Consequently, the member states of the European Union have sought increased protection of their cultural property.⁸

This Comment will begin by providing a background of the various types of art theft and the steps, including the UNESCO Convention, the US Cultural Property Implementation Act and the EC Directive and Regulation, that European countries and the United States have taken to curb the illicit trade in works of art.⁹ This Comment will then examine the recently enacted UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects¹⁰ (hereinafter "UNIDROIT Conven-

5. John H. Merryman, *A Licit International Trade in Cultural Objects*, 4 INT'L J. CULTURAL PROP. No.1, 13, 34 n.100 (1995) [hereinafter Merryman, *A Licit International Trade in Cultural Objects*].

6. Victoria Vitrano, *Protecting Cultural Objects in an Internal Border-Free EC: The EC Directive and Regulation for the Protection and Return of Cultural Objects*, 17 FORDHAM INT'L L.J. 1164, 1169 (1994) [hereinafter Vitrano].

7. *Id.* at 1165. The removal of internal borders within the European Union results in the elimination of customs posts and border checks. *Id.* Thieves can easily transport stolen objects from one European country to another. Richard Mangnall, *UK: Special Report - Fine Art and Specie - Highlighting Causes of Theft Can Aid Prevention*, LLOYD'S LIST, REUTER TEXTLINE, April 10, 1993, available in LEXIS, *World Library, Txtnews File* [hereinafter Mangnall].

8. Vitrano, *supra* note 6, at 1164. According to Jean-Michel Mimerand, director of the Office for Repression of Art Thefts, in Paris, "France and Italy, closely followed by Spain, are the most pillaged countries. The criminal networks are well organized to get the merchandise out to transit countries very quickly." William Tuohy, *Art Thievery Is Thriving*, L.A. TIMES, August 16, 1994, (World Report) at 4 [hereinafter Tuohy].

The fifteen member states of the European Union presently include Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom. Treaty on European Union or Maastricht Treaty, 31 I.L.M. 297 (1992) [hereinafter EEC Treaty].

9. See *infra* notes 54-195, examining the types of export laws and international accords the member States of the European Union and the United States have implemented to deter the theft and illegal export of art and cultural property.

10. The International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects, June 23, 1995 [hereinafter UNIDROIT Convention]. See Appendix for the text of the UNIDROIT Convention.

tion”) and discuss why art importing nations oppose it. This Comment will conclude that because the final draft of the UNIDROIT Convention contains many provisions that the museum community and commercial art world find unacceptable, the Convention risks losing art importing nations as signatories.¹¹ Consequently, the UNIDROIT Convention may be just as ineffective as previous legislation in providing legal remedies to prevent the theft of, and facilitate the return of, stolen cultural property.

II. BACKGROUND

The sky-rocketing value of art has made international art theft and trade especially attractive to thieves.¹² Art theft has increased rapidly throughout the world because the objects are extremely valuable, easily hidden and transported, and the legal owner of the work is difficult to identify.¹³ Generally, art theft is divided into two categories, private theft and illegal export.¹⁴ In order to curb both private theft within a country and the illegal export of art, numerous countries, including many European nations and the United States, have enacted laws regulating art trade within their own borders.¹⁵ In addi-

11. See *infra* notes 199-263 and accompanying text.

12. Julian Radcliffe, *UK: Art Loss Register to Help Combat Increase in Fine Art Theft*, REUTER TEXTLINE, REVIEW, April 6, 1991, available in LEXIS, *World Library, Txtnews File* [hereinafter Radcliffe]. Since World War II, a rising interest in antiquities has caused a dramatic increase in their monetary value. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 291 (1982) [hereinafter Bator]. Exorbitant prices have provoked a world-wide search for antique objects and have fueled the black market. *Id.* Paintings are bringing in prices never seen before. Lenzner, *supra* note 3, at 475 n.25. Van Gogh's *Iris* sold for \$53.9 million in 1987; Van Gogh's "Portrait of Dr. Cachet" which sold for \$82.5 million in May, 1990, is the most expensive work ever sold in an auction. *Id.*

13. Robin Morris Collin, *The Law and Stolen Art, Artifacts and Antiquities*, 36 HOW. L.J. 17, 20-21 (1993) [hereinafter Collin]. Even if an art thief is caught, the police must prove where the art objects came from. Tuohy, *supra* note 8, at 4. According to Scotland Yard's Detective Inspector Jill McTigue, "Our biggest problem is finding where the artistic loot is stolen from." *Id.*

14. Lenzner, *supra* note 3, at 471. Lenzner explains that art theft exists in two distinct forms: the theft of works of art from their owners and the illegal export of art. *Id.*

See *infra* notes 19-53 and accompanying text discussing private art theft and the illegal export of cultural property.

15. See *infra* notes 54-92 and accompanying text discussing various national laws restricting the export of cultural property.

tion, governments have combined efforts to reduce the illicit trade of cultural property by signing international agreements and accords.¹⁶

A. TWO FORMS OF ART THEFT: PRIVATE THEFT AND ILLEGAL EXPORT OF CULTURAL PROPERTY

Art theft occurs in two distinct ways.¹⁷ First, private theft occurs when art thieves steal directly from the owners of art, including private collections, museums, galleries, and the State.¹⁸ Second, the illegal export of art occurs when the cultural property of nations that regulate the movement of these types of objects is transported outside those national borders.¹⁹

1. Private Art Theft

Private theft occurs when thieves rob collections, museums and institutions, whether public or private, of their art and archaeological objects.²⁰ In Italy and much of Western Europe, churches are the prime targets of art thieves.²¹ In the United States, galleries and private collections are the most common targets of art theft.²² Although criminals now prefer art theft

See infra notes 131-164 and accompanying text discussing the United States' Cultural Property Implementation Act and United States court rulings defining legislation on cultural property in this country.

16. *See infra* notes 93-130, discussing the UNESCO Convention of 1970, the EC Directive and EC Regulation on the movement of cultural property. *See infra* notes 93-263, discussing the UNIDROIT Convention passed in June, 1995.

17. Lenzner, *supra* note 3, at 471.

18. *Id.*

19. *Id.* at 472. Illegal export does not necessarily imply theft. *Id.* at 472 n.16. Although countries with restrictive export laws claim illegally exported objects are "stolen," the United States has traditionally rejected this view. *Id.*

20. *Id.* at 471.

21. Daniel Golden, *HOT ART; With Picassos Going for \$38 Million, Art Theft Has Become a Booming Billion-Dollar Illegal Business, Second Only to Narcotics*, BOSTON GLOBE, February 12, 1989, (Magazine), at 16, 24 [hereinafter Golden].

22. *Id.* In March 1990, thieves stole \$200 million in paintings from the Isabella Stewart Gardner Museum in Boston, in the most expensive art theft in history. Radcliffe, *supra* note 12. The thieves entered the museum disguised as policemen, bound and gagged the guards, removed the film from surveillance cameras and disarmed the alarms. *Id.* They made off with one Vermeer, one Manet

over bank robbery, museums cannot afford to install the most sophisticated security systems.²³ Additionally, private collections are rarely better equipped to protect themselves from thieves.²⁴

Large and small-scale thefts of valuable art works occur continually. In 1990, masked men broke into a storeroom at ancient Herculaneum near Pompeii and stole over 200 antiquities worth over \$18 million.²⁵ In 1991, armed robbers broke into Amsterdam's Van Gogh Museum and escaped with twenty Dutch Impressionist works.²⁶ In 1994, thieves demanded \$1 million ransom for Norway's most famous painting, Edvard Munch's "The Scream", stolen from the National Gallery in February of that year.²⁷ Usually, rare and famous art objects are safer from theft than lesser known pieces because rare objects draw too much attention to be sold discreetly.²⁸ However, some wealthy art collectors will commission thieves to steal famous works who then ship them to South America, Switzerland or Japan.²⁹

and three Rembrandt paintings. *Id.* The thieves irreparably damaged the two Rembrandts when they cut them from their frames. *Id.*

23. Mangnall, *supra* note 7.

24. *Id.* Criminals recognize art theft is a lucrative crime and are using violence at an increasing rate. *Id.* Professor Norman Palmer, Rowe & Maw Professor of Commercial Law at University College London says that, "not only is art theft more common, it is less discriminate, more violent, less scrupulous, better organised and more closely tied to organised crime generally." Gibb, *supra* note 2, at 33.

25. James Walsh, *It's a Steal*, TIME, November 25, 1991, (Art), at 86 [hereinafter Walsh].

26. *Id.* A flat tire on the thieves' getaway car allowed authorities to recover the stolen paintings which exceeded \$500 million in value. *Id.*

27. Tuohy, *supra* note 8, at 1. Luckily, police succeeded in finding the painting before delivering the ransom. *Id.* In June, 1994, a thief managed to steal a 17th century portrait from the Louvre, in Paris, between the rounds of the guards. *Id.* Later, in July of 1994, thieves bound and gagged the guard at Frankfurt's Schirn Kunsthalle after the gallery closed, then took three paintings insured for \$45 million. *Id.* The paintings stolen included two oil paintings by English Romantic painter J.M.W. Turner and a landscape painting by the German Master Caspar David Friedrich. *Id.* The Turner paintings were on loan from the Tate Gallery in London, and the Friedrich was on loan from a museum in Hamburg. Tuohy, *supra* note 8, at 1.

28. Golden, *supra* note 21, at 24. "Fame is a kind of reverse insurance policy. Sometimes when thieves realize they have stolen a piece so well known that it is impossible to sell, police receive an anonymous call saying where it is abandoned." Montalbano, *supra* note 4, at 3.

29. Radcliffe, *supra* note 12. These countries have laws that are conducive to

Sophisticated crime rings have made private art theft even more pervasive and complex.³⁰ For example, art theft is often linked with the sale of drugs, narcotics dealers accept paintings as partial payment in drug transactions and then sell them at auctions to receive "clean money."³¹ Furthermore, drug money can be laundered by purchasing high priced art at auctions, which can later be used as collateral or resold.³² Moreover, highly sophisticated art thieves commit insurance fraud by holding an object for ransom. Increasingly, thieves negotiate with insurers to pay them an amount that is lower than the amount due under the legal owner's policy.³³

art theft. For example, in Switzerland, once one obtains a stolen painting he or she can lock it in a Swiss bank vault, and after five years, the object becomes their property as long as he or she is not the thief. *Id.* In Japan, there is only a two-year statute of limitations on stolen goods. Peter Plagens, *To Catch a Thief*, NEWSWEEK, April 2, 1990, (Arts), at 52.

30. See *Britain Wants International Art Theft Squad*, REUTERS WORLD SERVICE, May 24, 1995, available in LEXIS, *News Library, Curnws File*. See Mark Palmer, *Focus on Art Theft: Antiques Rogue Show Mark Palmer Goes on the Trail of a New Generation of Artful Dodgers - the Gangs Who Have discovered a Fast Road to Riches With the Easy Pickings of the Creme de la Creme*, THE SUNDAY TELEGRAPH, September 29, 1991, at 10 [hereinafter Palmer]. According to Mr. Philip Saunders, managing director of TRACE, a monthly magazine which publishes details regarding stolen art: "[art theft] is now so interlinked with serious crime, particularly the narcotics trade and the laundering of dirty money, that even if the police do not wish to look at it in its own right they must deal with it because of its associations." *Id.*

31. Palmer, *supra* note 30, at 10. Detective Richard Ellis of the Art and Antiques Squad at London's Scotland Yard explains how the art market is used to launder drug money: "If you have a bundle of money which has been acquired through a drug sale, you can go to an auction, buy in cash and then use it as collateral. You can recoup the money later on with a receipt. Then you have clean money." Kate Dourian, *Traffic in Stolen Artwork Faces Attack; Insurance: Police in Europe Fear That Theft Will Increase When Border Controls Are Dropped Next Year*, L.A. TIMES, Nov. 24, 1991, at A30 [hereinafter Dourian].

32. Dourian, *supra* note 31, at A30. British investigators believe that the Italian Mafia has used Italy's "single most valuable missing artwork," Caravaggio's 1609 "Nativity," as security for drug deals for over 20 years. Walsh, *supra* note 25, at 87. The work was stolen from the Oratory of San Lorenzo in Palermo, Sicily in 1969 and is worth approximately \$50 million today. *Id.* U.S. authorities suspect that Columbian drug lords also possess priceless works of stolen art. *Id.*

33. Kimberly A. Short, *Preventing the Theft and Illegal Export of Art in a Europe Without Borders*, 26 VAND. J. TRANSNAT'L L. 633, 639 (1993) [hereinafter Short]. Insurance companies often pay 10% of an object's value or more to recover stolen art. Larrabee, *supra* note 2, at 4A.

2. Illegal Export of Cultural Property

The second form of art theft is the illegal export of cultural property.³⁴ This occurs when objects of cultural significance are transported or smuggled from a country that seeks to retain them within its national borders.³⁵ The illegal export of artifacts and art work that a government considers cultural property differs from private art theft in that it is committed by taking an object across that nation's borders, regardless of whether the object is exported by its true owner or a thief.³⁶

Illegal export is a crime against the State, because such action is in direct violation of State law.³⁷ Until recently, the majority of legislation regarding the return of cultural property specified that only a government or a public institution could bring a cause of action against the "good faith possessor"³⁸ of a stolen object.³⁹ As a result, private art collectors had little recourse to obtain the return of art stolen from their collections.⁴⁰

34. Lenzner, *supra* note 3, at 472.

35. *Id.*

36. John H. Merryman, *Cultural Property Export Controls*, 111 UFITA: ARCHIV FUR URHEBER-FILM-FUNK-UND THEATERRECT 63, 68 n.14 (1989) [hereinafter Merryman, *Cultural Property Export Controls*]. For example, a tourist has the legal right to buy a work of art in a country such as Greece or Italy. *Id.* However, since the governments of these nations prohibits the removal of such objects, it is illegal for the tourist to take the art when he or she leaves the country. *Id.*

37. *See generally*, Lyndel V. Prott & Patrick J. O'Keefe, UNESCO, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY, (1988) [hereinafter Prott & O'Keefe], citing the cultural export laws of over 180 countries.

38. A good faith purchaser is "one who buys without notice of circumstance which would put a person of ordinary prudence on inquiry as to the title, or as to an impediment on the title of a seller." BLACK'S LAW DICTIONARY 693 (6th ed. 1990).

39. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972). [hereinafter UNESCO Convention]. The UNESCO Convention specifies that only works of art considered "cultural property" that have been "stolen from a museum or a religious or secular public monument or similar institution" are covered under the Convention. *Id.* at art. 1.

40. *Id.* at art. 1. The UNESCO Convention, the principal piece of legislation regarding cultural property since its adoption in 1970, only provides the governments of signatory states the right to sue for the return of art stolen from "a museum or a religious or secular public monument or similar institution." *Id.*

Traditionally, conquering powers would export a country's art as a show of strength and domination.⁴¹ For example, the Louvre houses the treasures that Napoleon brought back from his invasions of Italy.⁴² On display at the British Museum are the marble friezes that Lord Elgin removed from the Parthenon almost two centuries ago.⁴³ Today, however, most art is moved by an elaborate, international stolen art market, or "black market," as evidenced by the stolen European art that is frequently recovered abroad.⁴⁴

"Looting"⁴⁵ is another significant source of the cultural property illegally exported on the black market.⁴⁶ The illegal excavation of artifacts and their eventual sale has occurred for centuries.⁴⁷ The magnitude of the black market is greatly attributed to the restrictive national export laws which prevent the existence of any legal market for artifacts.⁴⁸ The looters⁴⁹ who dig for artifacts now use modern technology such as metal detectors and all-terrain vehicles to conduct nighttime excavations of archaeological sites in hopes of finding valuable treasures.⁵⁰ Local art dealers buy these archaeological finds and

41. Short, *supra* note 33, at 634.

42. Alexander Stille, *Was This Statue Stolen?*, NAT'L L.J., Nov. 14, 1988, at 32 [hereinafter Stille].

43. *Id.*

44. Bator, *supra* note 12, at 293-294.

45. "Looting" is the illegal excavation of ancient artifacts. It is a problem that runs rampant in Mediterranean countries. Areas rich in archaeological objects left by previous civilizations are being stripped clean by local residents who can make a sizable profit by selling these treasures on the black market. *See generally* Montalbano, *supra* note 4, at 16.

46. *See* Bator, *supra* note 12, at 301. Bator states that the escalating prices paid for antiquities on the international art market stimulates the looting of archaeological sites. *Id.*

47. Montalbano, *supra* note 4, at 17. For example, the Etruscan tombs north of Rome have been looted by such various groups including the ancient Romans, soldiers of the Napoleonic era and 19th century tourists. *Id.*

48. Merryman, *A Licit International Trade in Cultural Objects*, *supra* note 5, at 20. *See also* Bator, *supra* note 12, at 318.

49. "Clandestini" is the Italian nickname for those art thieves who dig up archaeological sites at night. Montalbano, *supra* note 4, at 16. In the region around Rome these looters are called "tombaroli." *Id.* In South America they are known as "huaqueros." Merryman, *Cultural Property Export Controls*, *supra* note 36, at 96.

50. Montalbano, *supra* note 4, at 17. The looting at the archaeological sites in Sicily and north of Rome and Morgantina, is so severe the sites look as if they have been shelled due to the number of freshly dug holes. *Id.* at 16.

sell them outside the country, in violation of national export laws.⁵¹ Although no museum will buy an obviously stolen artifact, Swiss dealers can successfully “launder” newly found and unrecorded objects by selling them to other dealers, collectors and museums without an export certificate.⁵² Tragically, looters often destroy the historic and scientific value of an archaeological site with their reckless digging.⁵³

B. EUROPEAN LAWS REGARDING STOLEN ART AND CULTURAL PROPERTY

Today, many European countries have laws regulating the export of cultural property.⁵⁴ Some countries allow the export of cultural property upon review by a government committee, while others simply prohibit it entirely.⁵⁵ Some countries,

51. *Id.* at 16.

52. *Id.* Swiss law does not require the proof of the origin of a piece of art, or any export documents from the country it came from. *Id.* Once a piece is sold by a dealer, it is considered legitimate. See Montalbano, *supra* note 4. Furthermore, a stolen piece of art can be stored in a Swiss bank vault for five years and come out with clear legal title to the possessor. Radcliffe, *supra* note 12.

53. Thomas Maier, *Nations Fight To Recover A Past They Say Was Plundered*, NEWSDAY, May 23, 1995, B29 [hereinafter Maier, *Nations Fight To Recover A Past They Say Was Plundered*]. According to American archaeologist Martin McAllister, “archaeological sites are now like endangered species . . . systematically targeted and destroyed, and they can never be replaced. Once it's looted it's gone.” Thomas Maier, *History as an Endangered Species*, THE BALTIMORE SUN, May 29, 1995, p. 1D [hereinafter Maier, *History as an Endangered Species*]. While sites in Turkey, Greece and Italy are suffering significant losses, American archaeological sites are not immune from looting, either. *Id.* Sites such as the Revolutionary War battlefield in Saratoga, N.Y. and the ancient burial grounds of the Anasazi tribe in the Southwest are also being plundered of their historic objects and scientific value. *Id.*

54. Richard Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1053 (1993) [hereinafter Mastalir]. Professors Merryman and Elsen categorized national export laws into four different types: (1) laws which totally prohibit any exchange (Mexico and Guatemala); (2) laws which prohibit the export of designated objects of national importance (France and Italy); (3) laws which routinely award export licenses (Great Britain and Canada); and (4) laws with no limitations on export (the United States). *Id.*

55. Bator, *supra* note 12, at 315. The countries that allow the export of cultural property based on government permission widely differ in their application of this type of policy. *Id.* Many governments appear to have a presumption against export and allow only unimportant items to leave the country. *Id.* England and Japan, however, award export certificates for all objects of cultural property, except those which have special national importance. *Id.*

such as Italy and Greece, have state ownership laws that claim all "antiquities" as government property, including those pieces not yet unearthed.⁵⁶ Other countries enact export laws that require a governmental agency approve the export of cultural property by granting an "export certificate."⁵⁷ This government agency generally considers whether the object may be sold, traded or loaned to anyone outside of the country.⁵⁸ The agency then issues an export certificate to indicate governmental consent to the export of the object.⁵⁹ Consequently, a mere showing that an object is illegally exported does not mean it is stolen.⁶⁰ Even the lawful owner of a piece of cultural property commits a crime by transporting the object outside national borders if he or she does not have an export certificate.⁶¹

Brazil, Bulgaria, People's Republic of China, Russia and Zaire are countries that prohibit the export of cultural property. *Id.* at 315 n.73. "Cultural property" is typically defined to include virtually all noncontemporary art. Bator, *supra* note 12, at 315.

56. Montalbano, *supra* note 4, at 16. However, governments that claim ownership to all antiquities found in the ground are often not able to pay for objects discovered, motivating people to sell their finds on the black market. Walsh, *supra* note 28, at 88. Turkey, Egypt, Israel, Greece and Italy all claim state ownership to artifacts found in their soil. *Id.* However, if someone does find an artifact in those countries, the government will either confiscate their land to investigate further or take the object in exchange for minimal or no compensation. *Id.* These options encourage people to throw the objects away or sell them on the black market at a fraction of the amount it will sell for later. *Id.*

If an Italian developer digs up an archaeological object at the site of a building project, the object is automatically property of the Italian government regardless of who owns the land. Merryman, *A Licit International Trade in Cultural Objects*, *supra* note 5, at 35. However, such discoveries are considered hazards of business since they result in interminable delays while the government investigates the site and unforeseen expenses to accommodate the excavations. *Id.* Commonly, workmen are paid to keep quiet about the discovery and the antiquities are covered up, destroyed or sold on the black market. *Id.*

57. Vitrano, *supra* note 6, at 1175-76.

58. See generally Prott & O'Keefe, *supra* note 37. For example, in France such approval is given by the Minister of Cultural Affairs. *Id.* at 79. In Italy, the Minister of National Education issues export certificates for cultural property. *Id.* at 113. In the United Kingdom, if an Expert Adviser considers an object of "national importance," the Reviewing Committee on the Export of Works of Art gives public institutions a specified period of time to make a bid on the object. *Id.* at 225. If no bid is made, the Reviewing Committee normally grants the export certificate. *Id.*

59. See generally Prott & O'Keefe, *supra* note 37.

60. Bator, *supra* note 12, at 286.

61. John H. Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. NO. 3, 477, 483 n.14 (1988) [hereinafter Merryman, *The Retention of Cultural Property*]. A tourist is legally allowed to purchase a work of art in a source country, however national export restrictions may make it illegal to take the object

The civil codes of Western European countries provide that an original owner loses title to property stolen from him when the thief sells it to a bona fide purchaser.⁶² However, common law jurisdictions like the United Kingdom and the United States follow the rule that the original owner retains superior title to his stolen property even if a third party innocently purchases it.⁶³ To determine choice of law in multi-national matters, private international law observes the *lex locus situs*

when he or she leaves the country. *Id.* Legal problems also ensue when a rightful owner decides to sell an object of cultural property. *See Id.* at n.15. For example, a Frenchman sold his Nicholas Poussin painting to a dealer. The dealer took the painting out of France without the requisite export certificate and sold it to the Cleveland Museum. *Id.* The French government demanded the return of the painting and when the museum resisted, the French sent out a warrant for the arrest of the museum's director. *Id.* After several years of dispute a compromise was reached. *Id.* The Cleveland Museum retained recognized ownership of the painting, while agreeing to lend it to the Louvre for a period of 25 years. Merryman, *The Retention of Cultural Property*, at 483 n.15.

62. Collin, *supra* note 13, at 22. Article 1153 of the Italian Civil Code states: "He to whom movable property . . . is conveyed by one who is not the owner acquires ownership of it through possession, provided that he be in good faith at the moment of consignment and there be an instrument or transaction capable of transferring ownership . . ." Codice Civile C.C. art. 1153 (It.), *cited in* Vitrano, *supra* note 6, at 1173 n.63.

The German Civil Code states:

- (1) A person, who has a movable thing in his proprietary possession for ten years acquires ownership (usucaption).
- (2) Usucaption is excluded, if the acquirer is not in good faith in obtaining possession or if he subsequently learns that he is not entitled to ownership.

Bürgerliches Gesetzbuch BGB art. 937 (Ger.), translated in *The German Civil Code* (Fred B. Rothman 1975).

The French Civil Code also gives superior property rights to a good faith possessor, except in two instances. Stephen Grover, *The Need For Civil Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1451 (1992) (explaining C. CIV. art. 2279-2280 (Fr.)). First, the original owner has a period of three years, from the time the chattel was stolen, during which he or she may recover stolen goods from a subsequent purchaser. *Id.* Second, Article 2280 provides a market overt exception, where if a good faith purchaser buys stolen or lost goods "in a market, at a public sale, or from a dealer in this particular type of goods," the original owner can recover them from the good faith purchaser in exchange for the purchase price paid. *Id.*

A "bona fide purchaser" is "one who has purchased property for value without any notice of any defects in the title of the seller." BLACK'S LAW DICTIONARY 177 (6th ed. 1990). The principle that a bona fide purchaser holds superior title to the original owner is based upon Roman antecedents that sought to protect the integrity of transactions in personal property in Europe after the devastating plague had ended. Collin, *supra* note 13, at 22.

63. Collin, *supra* note 13, at 21. This principle is known as *nemo dat quod habet*, meaning no one may give better title than he has. *Id.* at 21 n.28.

rule.⁶⁴ This rule dictates that the law of the country where a transfer of personal property takes place governs the rights of those who claim title to it.⁶⁵ Art thieves often take advantage of contrasting national laws and transfer stolen cultural property from common-law to civil-law countries where the original title is extinguished when the item is sold.⁶⁶

Governments apply export laws and restrictions in varying degrees to control the kinds of objects allowed to leave the country.⁶⁷ Many countries enact broad definitions of cultural

64. *Id.* at 22.

65. *Id.*

66. Vitrano, *supra* note 6, at 1167. According to Morris Collin:

It is not lost on sophisticated traffickers that the situs rule, combined with bona fide purchaser laws in continental Europe, can prevail even against a rightful owner. These traffickers possess the contacts and capital to shoulder the costs of a transferring stolen art across borders in order to legitimate them. The lex locus situs rule permits the manipulation of stolen art in such a way that the goods will obtain market value, resulting in substantial profits.

Collin, *supra* note 13, at 24.

67. See generally Prott & O'Keefe, *supra* note 37. For example, Egypt prohibits the export of "antiquities." Law No. 117 of 1983, art. 1, *cited in Id.* at 70. Antiquities are defined as:

[a]ny movable or immovable property which is a product of any of the various civilizations or any of the arts, sciences, literatures and religions of the successive historical periods extending from prehistoric times to a point one hundred years ago and that has archaeological or historical value or significance as a relic of one of the various civilizations established in Egypt or related to it. It also includes human and animal remains from such periods.

Id.

Greece restricts the export of movable or immovable antiquities. Act No. 5351 of 24 August 1932, art. 2, *cited in Prott & O'Keefe, supra* note 37, at 89. These works include "architecture, sculpture, writings and any other works such as buildings, monuments, vases, aqueducts, roads, walls, statues, idols, art, inlaid mosaics, pottery, weapons, jewelry and any other works of whatever material including precious stones and coins. It includes articles from the time of Christianity and from the Greek Middle Ages." *Id.*

France prohibits the export of "classified" objects, which includes any object, whether movable or attached to immovable property, whose preservation is of "national, historic, artistic, scientific or technical interest." Law of 31 December 1913, art. 21, 14, *cited in Prott & O'Keefe, supra* note 37, at 79. This also includes objects of national importance for historical or artistic reasons. Law of 32 June 1941, art. 1, *cited in Id.* This applies to "items of furniture made before

property coupled with restrictive export laws to deter the theft and illegal export of cultural property.⁶⁸ However, these laws often have an opposite effect and increase illegal trafficking by creating a wider range of illegal trade.⁶⁹ Some authorities criticize this approach, claiming the objects are damaged by restrictive exportation laws.⁷⁰ For instance, many characterize a country's effort to guard its cultural treasures as an excuse for hoarding art.⁷¹ This "hoarding" results in huge amounts of art left undocumented, unprotected and hidden from view.⁷² The heavy restrictions on the flow of the legitimate art market create an increased demand for objects considered cultural property.⁷³ As a consequence, these laws promote smuggling

1830, works of painters, engravers, draughtsmen, sculptors and decorators made before 1900 and to objects resulting from excavations carried out in France or Algeria." *Id.*

Italy considers objects of "artistic, historical, archaeological or ethnographical interest" except works of living authors or works less than 50 years old, to be objects of cultural property subject to export control. Law of 1 June 1939 XVI, No. 1089, art. 1, *cited in* Prott & O'Keefe, *supra* note 37, at 113. No object of cultural property is to be exported without an export license. *Id.* at art. 36.

Spain prohibits the export of cultural property without an export license. This includes immovable and movable objects of artistic, palaeontological, archaeological, ethnographic, scientific or technical interest including the documentary and bibliographical heritage. Law 13/1985 of 25 June 1985, arts. 1, 5, *cited in* Prott & O'Keefe, *supra* note 37, at 197.

The United States restricts the export of "archaeological resources." These are defined as any material remains of past human life or activities which are of archaeological interest and includes pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials or parts of any of these items. All items must be at least 100 years old. Archaeological Resources Protection Act 1979, 16 U.S.C. § 470aa (Supp. 1982), *cited in* Prott & O'Keefe, *supra* note 37, at 226.

68. 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, 94 (1991).

69. *Id.* "The exponential increase in illegal trafficking in cultural property reflects not just a surge in activity among art thieves and smugglers, but an expanded concept of 'illicit trade.'" *Id.*

70. John H. Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U.J. INT'L L. & POL. 757, 758-59 (1983) According to Professor Merryman, "the indiscriminate and insensitive use of export controls for this purpose may actually hinder rather than advance the interests that their proponents rightly want to protect." Merryman, *A Licit Trade in Cultural Objects*, *supra* note 5, at 25.

71. Merryman, *A Licit Trade in Cultural Objects*, *supra* note 5, at 19.

72. Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, *supra* note 70, at 758.

73. Bator, *supra* note 12, at 318. According to Paul Bator, "the international

and an active black market trade of cultural property to satisfy that demand.⁷⁴

Each country has its own laws that specify which objects constitute cultural property and, therefore, may not be exported.⁷⁵ "Art source" countries⁷⁶ have an abundance of cultural property and, therefore, more restrictive export policies.⁷⁷ In general, these countries strongly oppose the export of cultural objects,⁷⁸ reasoning that their strict export laws protect the physical safety of these objects and prevent the destruction of the records of earlier civilizations.⁷⁹ An economic interest also promotes restrictive export policies because famous pieces promote tourism.⁸⁰ National pride and identity are often connected to a country's cultural treasures.⁸¹ Furthermore, in southern European countries, the government and the church, the most prominent art patrons, favor keeping national art within the state.⁸²

black market thrives because no alternative exists for either buyers or sellers, all economic incentives are pushed in favor of the *illegal* trade." *Id.* The harder to obtain an item, the higher the demand for it on the black market. *Id.*

74. *See Id.*

75. *See generally* Prott & O'Keefe, *supra* note 37. Under the UNESCO Convention, each signatory state must initiate its own laws regulating the trade of cultural property and implementing the provisions of the Convention. UNESCO Convention, arts. 8 and 10.

Article 8 states: "The States Parties to this Convention undertake to impose penalties or administrative sanctions on any person responsible for infringing the prohibitions referred to under articles 6(b) and 7(b) above.

Article 10 states: "The States Parties to this Convention undertake to restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention . . ."

76. Merryman, *The Retention of Cultural Property*, *supra* note 61, at 479 n.5. *See* Mastalir, *supra* note 54, at 1036. Countries which export large amounts of art and artifacts are commonly classified as "art rich," "art source," "countries of origin," and "artifact-rich." *Id.* These typically include Italy, Greece, Turkey, Eastern Europe, Africa and Oceania. Collin, *supra* note 13, at 19.

77. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986) [hereinafter Merryman, *Two Ways of Thinking About Cultural Property*]. Most source countries attempt to retain art and artifacts within their borders through national laws prohibiting the export of all objects falling under the definition of "cultural property" or severely restricting their export by requiring government permission for export. *Id.*

78. *Id.*

79. Mastalir, *supra* note 54, at 1044.

80. *Id.*

81. Short, *supra* note 33, at 659.

82. *Id.* at 658.

In contrast, the laws of “art importing” or “art poor”⁸³ nations encourage a more active art trade.⁸⁴ These countries often want to enrich their own cultural patrimony through international sources.⁸⁵ Art importing nations also seek to protect the “good faith purchasers” within their borders who do not want to surrender possession of an object or be deprived of compensation.⁸⁶ These nations contend that art should flow where it is appreciated so it can be preserved and used for archaeological research.⁸⁷ Furthermore, these nations assert that a free art trade allows for a more appropriate display, storage and conservation of art works, since many art source nations do not possess the financial resources to care for their overwhelming collections.⁸⁸ Therefore, many works are kept eternally in storage, hidden from view, because the best examples of a particular artist, school or era are already on display within the state.⁸⁹

Despite the myriad of present export laws, an art-importing nation is not required to comply with another country’s restrictions on the export of cultural property.⁹⁰ No person can bring an actionable claim against either the person who brought the work into the country or the party that later acquired possession of the work merely on the basis of its illegal export.⁹¹ Therefore, the illegal export from one country generally does not bar lawful import into the major art market nations such as the United States, England, France, Germany

83. “Art poor” and “art importing” nations include Canada, the United States and Great Britain. See Jessica L. Darraby, CURRENT DEVELOPMENTS IN INTERNATIONAL TRADE OF CULTURAL PROPERTY: DUTIES OF COLLECTORS, TRADERS AND CLAIMANTS, PRACTICING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK, PLI Order No. G4-3851, July 12, 1990, at 659, available on Westlaw [hereinafter Darraby]. “The source nations have the cultural property and the retention laws. The market nations are the ones to which the cultural property would be likely to go if the retention laws did not exist or were evaded. Clearly, a nation may be both a source and a market.” Merryman, *Cultural Property Export Controls*, supra note 36, at 65 n.5.

84. See generally Merryman, *Cultural Property Export Controls*, supra note 36, at 65 n.5.

85. Mastalir, supra note 54, at 1044.

86. *Id.*

87. *Id.*

88. Short, supra note 33, at 659.

89. *Id.* at 660.

90. Bator, supra note 12, at 287.

91. *Id.*

and Switzerland.⁹²

C. THE UNESCO CONVENTION AND OTHER ACCORDS AIMED AT CURBING THE ILLICIT ART MARKET

Various international accords were created to remedy deficient national laws regarding the international traffic of stolen art.⁹³ Three main pieces of legislation have attempted to curb the illicit trade of cultural property.⁹⁴ The first major international agreement was the UNESCO Convention of 1970.⁹⁵ The second important piece of legislation, the United States Cultural Property Implementation Act of 1983,⁹⁶ was enacted by the United States government to implement the UNESCO Convention.⁹⁷ In 1993, the European Union passed the third significant form of cultural property legislation, the EC Directive and Regulation.⁹⁸

1. Provisions of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

Since 1970, the "UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" (hereinafter "UNESCO Convention") has been the primary document for restricting the illegal trafficking of art and cultural property.⁹⁹ The UNESCO Convention was based primarily on public

92. *Id.*

93. *See infra* notes 99 - 198 and accompanying text.

94. *Id.*

95. UNESCO Convention, *supra* note 39. *See infra* notes 99-130.

96. *See infra* notes 131-148. Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601-2613 (1988 & Supp. 1994) [hereinafter CPIA].

97. Maritza F. Bolano, *International Art Theft Disputes: Harmonizing Common Law Principles with Article 7(b) of the UNESCO Convention*, 15 *FORDHAM INT'L L.J.* 129, 134 (1991/1992) [hereinafter Bolano].

98. *See infra* notes 166-191 and accompanying text.

Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, March 15, 1993 O.J. (L 74/74) (hereinafter EC Directive).

Council Regulation (EEC) No. 3911/92 of December 1992 on the Export of Cultural Goods, 1992 O.J. (L 395/1) (hereinafter EC Regulation).

99. Barbara Hoffman, *How UNIDROIT Protects Cultural Property* (pt. 1), N.Y.

international law and administrative law.¹⁰⁰ UNESCO Convention, like the export laws of most source nations, is based on the premise that illicit traffic of cultural property can be reduced by implementing more extensive legal controls.¹⁰¹

The UNESCO Convention requires, under Article 6, that a country exporting an object of cultural property provide an export certificate.¹⁰² This requirement abolishes the right of an art importing country to decide for itself what types of export controls it wishes to enforce.¹⁰³ The United States strongly opposed this provision because it required giving "blank check"¹⁰⁴ credit to a multitude of foreign export laws.¹⁰⁵ As a result, the United States signed the UNESCO Convention with a formal reservation to Article 6.¹⁰⁶

One of the most difficult provisions of the Convention to implement is Article 7, which requires the return of stolen cultural property and payment of restitution to the bona-fide purchaser.¹⁰⁷ Under Article 7(a), the signatory states to the Convention are obligated to prevent their "museums and similar institutions" from acquiring illegally exported works of art.¹⁰⁸ However, the Convention qualifies this obligation by

LAW JOURNAL, March 3, 1995, at 5 [hereinafter Hoffman].

100. *Id.*

101. Merryman, *Cultural Property Export Controls*, *supra* note 36, at 95 n.87.

102. UNESCO Convention, *supra* note 39, at art. 6. Article 6 of the UNESCO Convention provides: "The States Parties to this Convention undertake to introduce an appropriate export certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulation." *Id.*

103. Bator, *supra* note 12, at 377.

104. "Blank check" enforcement of another country's export laws prohibits the import of cultural property without judging whether these laws are consistent with United States substantive policies or interests. *Id.* at 328.

105. *Id.* at 377. As a rule, the United States opposes giving any form of "blank check" to foreign nations by prohibiting the import of cultural property based on foreign export laws without judging whether these laws are consistent with its substantive policies or interests. *Id.* at 328. This would only serve to promote the existing tendency of art source countries to place an embargo on virtually all art. *Id.* at 329.

106. Bator, *supra* note 12, at 377. The United States reserved the "right to determine whether or not to impose export controls over cultural property." *Id.*

107. Hoffman, *supra* note 99, at 5.

108. UNESCO Convention, *supra* note 39, at art. 7(a). Article 7(a) of the UNESCO Convention provides in pertinent part:

requiring its enforcement only to the extent that national legislation would impose the same.¹⁰⁹ Consequently, this clause enables countries, like the United States, to allow museums to acquire illegally exported works of art.¹¹⁰

The UNESCO Convention limits the return of cultural objects¹¹¹ to those stolen specifically from a museum, church or similar institution.¹¹² Article 7(b)(ii) provides for the restitution of an illegally exported object on the payment of just compensation to the bona-fide purchaser.¹¹³ Since the Convention is treated as a federal treaty, this provision creates a basis for foreign claimants to file suit for recovery under federal law when state property law would not provide a reme-

The States Parties to the Convention undertake [t]o take the necessary measures, *consistent with national legislation*, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned.

Id. (emphasis added)

109. *Id.*

110. Lenzner, *supra* note 3, at 484-485. According to this clause, any country that does not recognize foreign export restrictions is exempt from returning illegally exported works of art. *Id.*

111. UNESCO Convention, *supra* note 39, at art. 1. The UNESCO Convention defines "cultural property" as "property which, on religious or secular grounds is . . . of importance for archaeology, prehistory, history, literature, art or science." *Id.* However, each State is left to designate the specific items it considers cultural property. *Id.*

112. *Id.* art. 7(b). Under Article 7(b), parties will undertake:

(i) [T]o prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;

Id.

113. UNESCO Convention, *supra* note 39, at art. 7(b)(ii). Under the relevant provisions in Article 7(b), parties will undertake:

(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after entry into force of this Convention in both States concerned, provided, however, that the resulting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.

Id.

dy.¹¹⁴ However, Article 7(b)(ii) can be invoked only by a museum, a religious or secular public monument or similar institution which had documented its possession of the object before the theft occurred.¹¹⁵ Therefore, the UNESCO Convention affords no remedy for a private individual or institution that has suffered a similar theft.¹¹⁶

Another provision of the UNESCO Convention allows signatory nations to call upon each other in emergency situations and enforce each other's cultural property laws.¹¹⁷ Specifically, Article 9 provides for the ad hoc application of import controls on specific archaeological and ethnological materials where pillage of these objects has jeopardized a country's national patrimony.¹¹⁸ However, Article 9 only calls for signatory states to make a concerted effort to carry out the "necessary concrete measures" to protect the pillaged objects rather than requiring blanket import restrictions.¹¹⁹ The United States was one of thirteen countries that urged the adoption of Article 9 as a substitute for the "blank check" approach of automatically enforcing the export laws of every foreign nation.¹²⁰ This "crisis provision" encourages action when a cultural patrimony is in serious danger.¹²¹

114. Bator, *supra* note 12, at 382-83. Furthermore, the U.S. government is obligated to aid in effectuating the seizure and return of stolen art. *Id.* at 382.

115. UNESCO Convention, *supra* note 39, at art. 7(b)(i).

116. *See Id.*

117. *Id.* at art. 9.

118. Bator, *supra* note 12, at 340. Article 9 provides that:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific material concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

UNESCO Convention, *supra* note 39, at art. 9.

119. Bator, *supra* note 12, at 340.

120. *Id.* at 399

121. *Id.* at 340. Bator states that the two types of pillage contemplated are, "the case in which the remains of a particular civilization are threatened with destruction or wholesale removal . . . and the case in which the international

The UNESCO Convention has aroused some criticism. For example, respected authorities have argued that the UNESCO Convention places more importance on national hoarding than on the international protection of art and cultural property.¹²² By condoning state ownership laws and restrictive export controls, these critics contend that the UNESCO Convention allows innumerable objects to remain “undocumented, unhoused, unprotected, and undiscovered . . . ”¹²³ The provisions for resolving disputes are biased toward art source nations since the litigation costs are allocated “almost exclusively” to the art importing nations that act as the venue for claims for the return of cultural property.¹²⁴ Furthermore, the UNESCO Convention fails to harmonize the multitude of national laws addressing the transferability of title of stolen property or procedural rules regarding burden of proof.¹²⁵

The UNESCO Convention’s most serious problem remains that many of the principal art market countries that would be affected by the accord are not signatories to it.¹²⁶ The United

market for certain items has stimulated the widespread illegal excavations destructive of important archaeological resources.” *Id.*

122. Mastalir, *supra* note 54, at 1045, n.33. According to Professor Merryman, the UNESCO Convention appears to be based on a principle of “cultural nationalism” that places more importance on national hoarding than on international protection of cultural property. *Id.*

123. *Id.* at 1055.

124. Lisa J. Borodkin, Note: *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 389 (1995) [hereinafter Borodkin].

125. Hoffman, *supra* note 99, at 7. In common law countries, a seller cannot transfer better title than he or she has. *See Id.* Therefore even a good faith purchaser can never obtain good title from a thief. *See Id.* In civil law countries, if a buyer purchases a piece of art in good faith that it was not stolen, he or she acquires good title and has the right to keep the art. Vitrano, *supra* note 6, at 1166.

126. Mastalir, *supra* note 54, at 1054. Major art-importing nations which have refused to sign the UNESCO Convention include France, Germany, Japan, The Netherlands, the Scandinavian nations, Switzerland and the United Kingdom. John H. Merryman & James A.R. Nafziger, *The Private International Law of Cultural Property in the United States*, AM. J. COMP. L., 221, 242 (Supp. 1994) [hereinafter Merryman & Nafziger]. This problem is significant due to the *lex situs* rule, namely that the law of the country where the transfer of stolen property took place governs any suit for the return of that property. Hoffman, *supra* note 99, at 7. The UNESCO Convention is clearly inapplicable in an enormous number of cases since “more than 80% of the antiquities trade takes place in non-signatory nations.” Harold Burman, executive director of the US Secretary of State’s Advisory Committee on Private International Law and the State Department representative on the three-member U.S. delegation to UNIDROIT, *quoted in Id.*

Kingdom refused to sign the UNESCO Convention because its definition of cultural property is over-inclusive, interferes with rights of ownership, and the requirements on art dealers are unnecessarily bureaucratic.¹²⁷ Several countries find the UNESCO Convention conflicts with other umbrella agreements regarding free trade.¹²⁸ The United States ratified the UNESCO Convention in 1972 but waited ten years before implementing its provisions with the passage of the Cultural Property Implementation Act in 1983.¹²⁹ Although over 80 nations ratified the UNESCO Convention, only six art importing nations have signed the treaty and adopted legislation for its implementation.¹³⁰

2. United States Implementation of the UNESCO Convention: Cultural Property Implementation Act of 1983

The United States' Cultural Property Implementation Act of 1983¹³¹ (hereinafter "the CPIA") effected legislation corresponding with Articles 7 and 9 of the UNESCO Convention.¹³² Through the CPIA, Congress aimed to prevent the importation of stolen cultural property from other nations and facilitate legal actions by foreign governments for the return of cultural property.¹³³ The CPIA enables the President of the United States to enter into a bilateral or multilateral agreement with other nations to implement import restrictions on artifacts that are in danger of destruction.

127. Barbara Hoffman, *How UNIDROIT Protects Cultural Property* (pt.2), N.Y. LAW JOURNAL, March 10, 1995, 5, 11.

128. Mastalir, *supra* note 54, at 1054.

129. Lenzner, *supra* note 3, at 485. This ten year delay is attributed to a battle in Congress involving those who favored the protective efforts of the Convention (i.e. art historians and archaeologists) and those who disagreed with the measures used by it (i.e. art dealers). *Id.* at 485-86.

130. Hoffman, *supra* note 98, at 7. These countries include Argentina, Australia, Canada, Italy, the United States and Switzerland. *Id.*

131. 19 U.S.C. §2601-2613, *supra* note 96.

132. Hoffman, *supra* note 99, at 10.

133. Bolano, *supra* note 97, at 134. The CPIA is designed to "prohibit the importation of stolen cultural property from the institutions of other signatory nations, to assist in the recovery of cultural property, to exercise import controls over cultural property, and to facilitate legal actions to recover cultural property upon request by a State Party." *Id.*

Section 2606 of the CPIA explicitly implements Article 7 of the UNESCO Convention, providing protection for stolen cultural property.¹³⁴ The CPIA enforces Article 7 by requiring importers to obtain an export certificate from the source country for any work of art qualifying as "archaeological or ethnological material."¹³⁵ However, this protection applies only to stolen cultural property within the definition of the UNESCO Convention,¹³⁶ property that has been inventoried and is appurtenant to a foreign museum, religious or secular institution or public monument.¹³⁷ The CPIA does not specifically pertain to artifacts, either lawfully excavated or looted, if they do not "appertain" to the inventory of an appropriate institution at the time of theft.¹³⁸ Furthermore, the CPIA applies only to cultural property stolen after the statute's effective date, January 12, 1983, or after the date that a State Party enters into a reciprocal agreement with the United States, whichever is later.¹³⁹

Section 2602 explicitly implements Article 9 by inviting signatory governments to the UNESCO Convention to call upon the President of the United States for aid in recovering documented stolen cultural property, pursuant to a bilateral or multilateral agreement.¹⁴⁰ At the request of a foreign country, the U.S. Customs Service can enforce that nation's export laws within the United States by seizing designated archaeological or ethnological material if the importer is unable to present an export certificate.¹⁴¹ However, in order to enter into a bilateral agreement to obtain this assistance, the requesting nation must meet complicated preconditions to prove

134. See Hoffman, *supra* note 99, at 10.

135. 19 U.S.C. §2606 (1995). The Act only considers objects which are over 250 years old to be of "archaeological interest" and subject to import restrictions. 19 U.S.C. § 2601(2) (Supp. 1994).

136. See *supra* note 111, citing the UNESCO Convention's definition of cultural property.

137. 19 U.S.C. § 2607 (1995).

138. Darraby, *supra* note 83.

139. 19 U.S.C. §2607 (1995).

140. 19 U.S.C. § 2602 (1995).

141. 19 U.S.C. § 2606 (1995). However, an importer is excused from presenting an export certificate to U.S. Customs officials if there is "satisfactory evidence" that the material was exported from the State Party at least ten years before the date of importation and that the importer has not owned it for more than one year. *Id.*

import restrictions are necessary.¹⁴² To date, the United States has entered into a bilateral treaty with Mexico,¹⁴³ and executive agreements with Ecuador,¹⁴⁴ Guatemala,¹⁴⁵ Peru,¹⁴⁶ Bolivia¹⁴⁷ and El Salvador.¹⁴⁸

The United States has not resolved the fundamental issue of what constitutes a "stolen" object for the purposes of implementing import restrictions or providing for the return of cultural property.¹⁴⁹ The leading case regarding claims of ownership of cultural property by foreign countries is *U.S. v. McClain*.¹⁵⁰ In *McClain*, an art dealer knowingly excavated pre-Columbian artifacts in violation of Mexican law, subsequently smuggling them into the United States and selling them.¹⁵¹ The Fifth Circuit Court of Appeals upheld the conviction of four American citizens for conspiring to receive and transport unregistered artifacts through interstate commerce,

142. Darraby, *supra* note 83. Under the CPIA, the requesting state must prove 1) its cultural patrimony is in jeopardy due to the pillage of archaeological or ethnological materials; 2) it has already taken measures to protect the cultural patrimony; 3) the requested restrictions would provide a "substantial benefit" in preventing a "serious situation of pillage" if other nations that have a significant import trade in such archaeological or ethnological material apply similar restrictions within a reasonable amount of time; 4) less drastic remedies are not available and 5) the import restrictions are consistent with the general interest of the international community. *Id.* See 19 U.S.C. § 2602 (1995).

143. See 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.

144. See Agreement Between the United States of America and the Republic of Ecuador for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Nov. 17, 1983, U.S.-Ecuador, T.I.A.S. No. 11,075.

145. See Agreement Between the United States of America and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, May 21, 1984, U.S.-Guat., T.I.A.S. No. 11,077.

146. See Agreement Between the United States of America and the Republic of Peru for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Sept. 15, 1991, U.S.-Peru., 33 U.S.T. 1607.

147. The United States granted Bolivia's request for protection of antique ceremonial textiles from Coroma, Bolivia. See Import Restrictions on Cultural Textile Artifacts from Bolivia, 54 *Fed. Reg.* 10,61819 (1989).

148. The United States agreed to grant protection to pre-Hispanic artifacts from El Salvador's Cara Sucia Archaeological Region. See Import Restrictions on Archaeological Material from El Salvador, 52 *Fed. Reg.* 34,61416 (1987).

149. Darraby, *supra* note 83. No American statute, including the National Stolen Property Act (NSPA) and CPIA, defines what constitutes "stolen." *Id.*

150. 545 F.2d 988 (5th Cir. 1977).

151. *Id.* at 993.

under the National Stolen Property Act (hereinafter "NSPA").¹⁵²

The *McClain* court relied on Mexican law to determine that the artifacts had been "stolen," thereby finding a violation of the NSPA.¹⁵³ Therefore, pursuant to *McClain*, an object will be considered "stolen" if a nation's law clearly declares national ownership of cultural goods.¹⁵⁴ The *McClain* holding eliminates the distinction between "stolen" and "illegally exported" cultural property.¹⁵⁵ The ruling also contradicts the long-standing U.S. policy of opposition to agreements that give foreign nations the right to prosecute U.S. citizens according to their nation's legislation regarding cultural property.¹⁵⁶ Despite its controversial implications, *McClain* has not been successfully applied in a replevin action since its decision in 1977.¹⁵⁷ Furthermore, the decision is not binding outside the Fifth Circuit or in an international law context.¹⁵⁸ After *McClain*, the United States courts have made it very difficult for foreign governments seeking the return of cultural property to prove ownership.¹⁵⁹

In order to obtain the return of cultural property, the United States requires a government to establish and prove that the object was found or excavated at a site within its territory.¹⁶⁰ It must also show that its laws vested the state with ownership at the time of the removal.¹⁶¹ In the case *Peru v. Johnson*,¹⁶² the Peruvian government filed a civil action in the Federal District Court in California for the return of

152. *Id.* at 992. See 18 U.S.C. §§ 2311-2320.

153. Merryman & Nafziger, *supra* note 126, at 228.

154. Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U.J. INT'L L. & POL'Y 225, 234 (1993) [hereinafter Fox].

155. *Id.*

156. *Id.* at 235.

157. Hoffman, *supra* note 99, at 10.

158. Darraby, *supra* note 83.

159. Hoffman, *supra* note 99, at 10.

160. *Id.*

161. *Id.* at 10. Governments that have failed to meet the *McClain* proof of ownership requirements include Peru, which sought the return of artifacts it claimed were stolen from the Sipan tomb in 1986, and Croatia and Hungary which tried to recover the "Sevso Treasure." *Id.*

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

some artifacts it claimed had been illegally exported.¹⁶³ However, the court found that Peru failed to prove that these artifacts actually came from Peru or that Peruvian law vested title in the State at the time of export.¹⁶⁴

3. The European Community's Alternative to the UNESCO Convention: The EC Regulation and Directive Regarding Cultural Property¹⁶⁵

As a consequence of encouraging free trade among the member states, the enforcement of export restrictions on cultural property and the detection of stolen art objects has become more difficult.¹⁶⁶ Therefore, efforts to unify the European states have actually facilitated art theft within the European Union.¹⁶⁷ In 1993, the European Community (hereinafter "EC") eliminated internal border checks and terminated passport verification of people passing from one EC member state to another in accordance with Article 8A of the EEC Treaty.¹⁶⁸ Baggage checks are no longer done for travel by land, air or sea within the internal borders of the EC.¹⁶⁹ As a result, a thief smuggling a work of art from one European member state to another no longer has to worry about being stopped and searched at the border.¹⁷⁰ In addition, the inter-

163. *Id.* at 811.

164. *Id.* at 812-14.

165. *See infra* n.97.

166. Dourian, *supra* note 31, at A30.

167. Dourian, *supra* note 31, at A30. Florence Hardinge, marketing director of the Art Loss Register stated, ". . . art has become a movable currency and as the barriers come down, this will be easier because there will be no customs control." *Id.*

The Art Loss Register is a London based private organization that aims to deter art theft by working with insurance companies and the fine art industry to register photographs and descriptions of valuable art in an international computer database. *See Radcliffe, supra* note 12.

168. Short, *supra* note 33, at 643. Article 8A of the EEC Treaty provides:

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.

cited in Id. at 641 n.44.

169. *Id.* at 643.

170. *See generally* Godfrey Barker, *Downtown Goes Out of Town Round-up*, THE

national black market,¹⁷¹ a network of art dealers who launder illicit art, can move works of art very quickly.¹⁷²

In response to growing concerns over increased art theft, the Member States of the European Union implemented a Regulation (hereinafter "Regulation") and a Directive (hereinafter "Directive") regarding the export of cultural property.¹⁷³ The EEC Treaty permits restrictions on import and export for the protection of national art treasures.¹⁷⁴ According to Article 36, each member state may pass its own legislation to protect its "national treasures," thereby giving authority for the Regulation and Directive.¹⁷⁵ However, since the EEC Treaty is based on the principle of free trade, Article 36 specifically prohibits measures which claim to protect cultural property but in fact merely act to restrict intra-community trade.¹⁷⁶

The Regulation requires that any object of cultural property being removed from the European Community be accompanied by an export certificate.¹⁷⁷ The definition of what constitutes "cultural property" is left to the individual Member States and has been broadly construed.¹⁷⁸ In addition, the

DAILY TELEGRAPH, May 30, 1994 at 16, quoting James Emson of Art Loss Register. Emson states, "stolen goods can be spirited out of the country very quickly and easily now the boundaries are down in Europe." *Id.*

171. The black market of cultural property is a highly complex and organized system made up of local and foreign dealers. Bator, *supra* note 12, at 292. Corrupt and inefficient local officials permit the transport of art out of the country by automobile, train, plane and helicopter. *Id.*

172. Tuohy, *supra* note 8, at 4. Jean-Michel Mimerand, director of the Office for Repression of Art Thefts, in Paris explains that "criminal networks are well organized to get the merchandise out to transit countries very quickly." *Id.*

173. EC Regulation, *supra* note 98; EC Directive, *supra* note 98.

174. EEC Treaty, *supra* note 8, at art. 36. Article 36 states that the Treaty provisions eliminating trade restrictions between the Member States "shall not preclude prohibitions or restrictions on imports, exports, or goods in transit justifies on the grounds of . . . the protection of national treasures possessing artistic, historic or archaeological value . . ." *Id.*

175. *Id.* Article 36 provides: "The provisions of Article 30 and 34 shall not preclude prohibitions or restrictions on imports, exports, or goods in transit [to protect] . . . national treasures possessing artistic, historic or archaeological value . . ." *Id.*

176. *Id.* Article 36 concludes by providing: "Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." *Id.*

177. EC Regulation, *supra* note 98.

178. Merryman, *A Licit International Trade in Cultural Objects*, *supra* note 5,

Annex to the Regulation provides a list of categories to which the EC Member States agree the Regulation will apply.¹⁷⁹ The Regulation is based on the premise that by requiring export certificates to accompany objects of cultural property leaving the EC, Member States will be able to show that an object was illegally exported if the purchaser of an object cannot produce the certificate.¹⁸⁰ Nevertheless, since the Regulation did not take effect until January 1, 1993, a significant number of objects exported before that date will not have the export certificate that is now required.¹⁸¹ Therefore, despite the Regulation's intentions, a Member State will not be able to prove that the purchaser obtained an object in bad faith based merely on the absence of an export certificate.¹⁸²

The Directive establishes the legal procedures for the return of cultural property that has been illegally exported from one EC Member State into another.¹⁸³ The Directive also permits a Member State to request the return of a cultural object that is found in the territory of another Member State.¹⁸⁴ Upon such a request, the latter must either act to preserve the object, prevent any action to evade the return procedure or act as an intermediary between the possessor and the requesting Member State.¹⁸⁵ The Directive does not distinguish between "stolen" and "illegally exported" and applies only to "national treasures possessing artistic, historic, or archaeological value."¹⁸⁶ Only national governments are permitted to bring suit

at 16.

179. EC Regulation, *supra* note 98, at art. 1. The Regulation's Preamble states the Annex "is aimed at making clear categories of cultural goods which should be given particular protection in trade with third countries, but is not intended to prejudice the definition, by Member States, of national treasures within the meaning of Article 36 of the Treaty . . ." *Id.* at preamble.

180. Vitrano, *supra* note 6, at 1195.

181. *Id.* at 1196.

182. *Id.*

183. EC Directive, *supra* note 98.

184. *Id.* art. 4.

185. *Id.* However, according to J.L. Hill of Farrer & Co., a solicitor specializing in cultural property in the United Kingdom, the Directive's procedures for the return of cultural property have been criticized for being too bureaucratic to implement. Hoffman, *supra* note 127, at 11.

186. EC Directive, *supra* note 98, art. 1. The EC Directive requires that an object 1) be a national treasure as defined by the Member State's own laws, 2) fit within one of the acknowledged categories of art, and 3) have been exported from an EC Member State after January 1, 1993. *Id.* art. 1 and 13.

against the possessor of a stolen object for its return, and the action must be brought within one year of discovering the object's location or identity of its possessor.¹⁸⁷ The Directive also requires the requesting State to provide fair compensation provision to the dispossessed owner if he or she exercised due diligence in acquiring the object.¹⁸⁸

From the standpoint of art market nations, the Regulation and Directive appear to inhibit the export of cultural property from the European Community by providing the "unconditional Community enforcement of the export controls of each of the member nations."¹⁸⁹ In effect, the Regulation and Directive impose the export controls of each EC Member State on art importing nations around the world.¹⁹⁰ Even within the European Community there is concern that the broad definitions of "cultural property" that countries such as Italy maintain are actually a pretext for restricting trade and a clear violation of Article 36.¹⁹¹

The need for strong, uniform legislation to resolve issues related to stolen cultural property has become increasingly apparent,¹⁹² and although the UNESCO Convention was designed to control the trafficking of illegally exported or stolen cultural property, the Convention has been largely ineffective.¹⁹³ The myriad of laws and legislation established by individual countries only further complicates matters.¹⁹⁴ Mean-

187. *Id.* art. 7.1. Restitution proceedings must be undertaken not more than thirty years after the object has been illegally exported from the Member State which is seeking restitution. *Id.* However, the requesting state has a seventy-five year period in which to request the return of an object belonging to a public collection. *Id.*

188. EC Directive, *supra* note 98, at arts. 9-11.

189. Merryman, *A Licit International Trade in Cultural Objects*, *supra* note 5, at 16.

190. *Id.*

191. Collin, *supra* note 13, at 39.

192. *See infra* notes 17-33 and accompanying text discussing the problems of private theft and looting.

193. Hoffman, *supra* note 99, at 7. Georgina Adam describes the UNESCO Convention as "spectacularly unsuccessful" in facilitating the return of lost and smuggled art. Georgina Adam, *They're Out To Steal Our Stolen Art*, THE DAILY TELEGRAPH, May 22, 1995, at 16 [hereinafter Adam].

194. Hoffman, *supra* note 99, at 7. Hoffman states, "In part, the lack of harmony of national laws on the transferability of title to property sold by a thief, as well as substantive law and procedural rules allocation burden of proof facilitates

while no exhaustive compilation of national cultural property export laws exists.¹⁹⁵ To remedy the deficiencies that caused the UNESCO Convention to be futile, UNESCO requested that UNIDROIT¹⁹⁶ draft a new international accord addressing the problems of illicit art theft.¹⁹⁷ The final draft of the UNIDROIT Convention was adopted in June 1995.¹⁹⁸

III. DISCUSSION: EVALUATING THE EFFECTIVENESS OF THE UNIDROIT CONVENTION

The escalating problem of illegal art trafficking and the difficulties of implementing the UNESCO Convention's restitution provisions prompted the drafting of a new international treaty, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter "UNIDROIT Convention").¹⁹⁹ In comparing the UNIDROIT Convention to its predecessor, UNIDROIT aims to remedy UNESCO's deficiencies.²⁰⁰ In addition, UNIDROIT attempts to establish a unified private law code for resolving international claims demanding the restitution of stolen cultural objects and the return of illegally exported objects.²⁰¹ In doing so, the UNIDROIT Convention seeks to harmonize civil law and common law property principles in order to maximize the number of nations signing the Convention.²⁰² The UNIDROIT Convention will be open for signature until June 30, 1996.²⁰³

the laundering of and illicit trade in stolen art and antiquities." *Id.*

195. Darraby, *supra* note 83.

196. Hoffman, *supra* note 99, at 5. UNIDROIT, a French term meaning "one law," is an acronym for the International Institute for the Unification of Private Law, an international organization based in Rome which is working to create a uniform system of law within the European Union. *Id.*

197. Adam, *supra* note 193, at 16.

198. Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, May 24, 1995, 3 n.15. International diplomatic officials adopted the UNIDROIT Convention on June 23, 1995, at a UNIDROIT Conference in Rome. *Id.*

199. Hoffman, *supra* note 99, at 5.

200. *Id.* at 7.

201. *Id.* at 10.

202. Fox, *supra* note 154, at 231.

203. UNIDROIT Convention, *supra* note 10, at art. 11. Pursuant to Article 11, the UNIDROIT Convention is subject to ratification by the States who have signed it. *Id.*

A. CLAIMS FOR CULTURAL PROPERTY²⁰⁴ UNDER THE UNIDROIT CONVENTION

Claims for cultural property under the UNIDROIT Convention differ in two ways from the UNESCO Convention. First, the UNIDROIT Convention uses private international law.²⁰⁵ Second, while the UNESCO Convention only provides for claims brought from signatory governments to other signatory governments, the UNIDROIT Convention implies that private parties are allowed to bring suit in the court of another signatory nation for the return of stolen artwork.²⁰⁶

The UNIDROIT Convention institutes the common law principle that "stolen" articles of cultural property should be returned to their true owner.²⁰⁷ This provision opposes the civil law notion that one who innocently purchases a stolen object as a bona fide purchaser is released from returning it.²⁰⁸ Under Article 3, the claimant must bring an action for restitution for an object stolen from a private collection within three years from the time they know or reasonably should have known the location of the object and the identity of its possessor.²⁰⁹ Representatives for public collections have a 75-

204. *Id.* at art. 2. Article 2 provides: "For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science . . ." *Id.* These are the same as those listed in Article 1 of the UNESCO Convention. See UNESCO Convention, *supra* note 39, at art. 1. This broad definition leaves the courts to determine whether a work of art is of requisite importance to be returned to its true owner under the Convention. Lenzner, *supra* note 3, at 495.

205. Lenzner, *supra* note 3, at 492.

206. Hoffman, *supra* note 127, at 11. Pursuant to Article 7(b), the UNESCO Convention only gives rise to claims made by a museum, church or similar institution. UNESCO Convention, *supra* note 39, at art. 7(b).

207. UNIDROIT Convention, *supra* note 10, at art. 3. Article 3.1 states, "The possessor of a cultural object which has been stolen shall return it." *Id.*

208. Collin, *supra* note 13, at 22.

209. UNIDROIT Convention, *supra* note 10, art. 3. Article 3.3 provides: "Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft." *Id.*

UNIDROIT imposed a statute of limitations as an incentive to art importing nations to make them exempt from suits for the recovery of stolen art and archaeological objects after specific period of time. Hoffman, *supra* note 127, at 11. However, the implementation of the "discovery rule" is a concession to art source na-

year period to reclaim any stolen property.²¹⁰ However, there is concern that a statute of limitations will allow the possessors of stolen cultural property to hide these objects until the time period has run.²¹¹

B. REASONABLE COMPENSATION FOR THE DISPOSSESSED OWNER

To attract art importing nations, the UNIDROIT Convention provides for reasonable compensation for the dispossessed owner of stolen cultural property.²¹² However, to receive such compensation, art purchasers have the responsibility of exercising “due diligence” in verifying that the works they are buying are not stolen or illicit.²¹³ Under Article 4.1, the possessor of stolen cultural property is provided “fair and reason-

tions who seek the longest period of time in which to bring a claim for the recovery of stolen cultural property. *See Id.*

210. UNIDROIT Convention, *supra* note 10, at art. 3.5. Article 3.5 provides:

[a]ny Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.

Id.

A “public collection is defined in Article 3.7 as:

a group of inventoried or otherwise identified cultural objects owned by:

- (a) a Contracting State
- (b) a regional or local authority of a Contracting State
- (c) a religious institution in a Contracting State; or
- (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognized in that State as serving the public interest.

Id. at art. 3.7.

211. Fox, *supra* note 154, at 237.

212. Hoffman, *supra* note 127, at 11.

213. UNIDROIT Convention, *supra* note 10, at art. 4.1. Article 4.1 states:

The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

Id.

able compensation" as long as he or she had no knowledge that the object was stolen.²¹⁴ Art importing nations favor requiring the payment of compensation to good faith purchasers because it would discourage suits for the return of property if the original owner could not pay.²¹⁵ In addition, to receive reasonable compensation under UNIDROIT, good faith purchasers must prove that they used "due diligence" in verifying that the work of art had not been stolen.²¹⁶ Article 4.4 would require possessors of stolen objects to prove that they exercised the due diligence that a "reasonable person would have in the circumstances."²¹⁷ One would attempt to prove such due diligence by indicating the character of the parties to the acquisition, the price paid and certifying that they consulted a register for stolen cultural objects.²¹⁸

Usually, a good faith purchaser will be able to prove his or her "due diligence" by providing the object's export certificate.²¹⁹ The requirement of "due diligence" was intended to

214. *Id.* This provision also serves to penalize those who are not concerned with whether or not an object has a legitimate title. Hoffman *supra* note 127, at 11.

215. Hoffman, *supra* note 127, at 11. UNIDROIT does not define "reasonable compensation." *Id.* Instead, it requires courts to make this determinations. *Id.* Factors that could be taken into account include the fair market value of the object, the intrinsic value of the object in its source country, the acquisition price paid by the good faith purchaser and costs paid for preservation and restoration. *Id.*

216. UNIDROIT Convention, *supra* note 10, at art. 4.1.

217. *Id.* at art. 4.4. Article 4.4 specifies:

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

Id.

218. *Id.*

219. Richard A. Rothman & James F. Fitzpatrick, *Statement of Position of Concerned Members of the American Cultural Community Regarding the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Objects*, May 31, 1995, at 26 [hereinafter the White Paper]. A group of prominent United States art dealers, museums and auction houses officially voiced their opposition to several provisions of the UNIDROIT Convention in what has become known as the "White Paper." See generally *Id.*

incite art dealers to provide proper documentation for objects they sell and deal strictly with objects with legitimate title.²²⁰ Problems will undoubtedly arise because many objects left their source countries decades or centuries before such a certificate was required.²²¹ In other cases, the original export certificate may have been lost, discarded or simply never transferred by a previous owner.²²² Consequently, an expected repercussion is the forgery of documents provided by dealers to art buyers who demand export certificates and documentation to meet the standard of “due diligence” and thus avoid title disputes.²²³

C. UNIDROIT'S DEFINITION OF “STOLEN PROPERTY”

The UNIDROIT Convention also differs from the UNESCO Convention regarding excavated objects, especially those which have been subject to looting.²²⁴ More importantly, Article 3.2 states that “objects that have been unlawfully excavated or lawfully excavated and unlawfully retained” are considered *stolen*.²²⁵ UNIDROIT added this provision in response to the critical problem of looting at undocumented excavations.²²⁶

Conversely, the United States museum community and

The White Paper cites to a UNIDROIT Staff Report that states “the aim of [Article 8] is to exclude the possibility of the possessor’s successfully invoking its good faith, and hence being entitled to compensation, in the absence of an export certificate for an object which is required by the law of the Contracting State from which the object has been removed.” *Id.* at n.37.

220. Hoffman, *supra* note 127, at 11. This would force dealers and auction houses to change their present practice of keeping the names of sellers confidential. *Id.*

221. White Paper, *supra* note 219, at 28.

222. *Id.* Apparently, this is a common occurrence when an object is passed through inheritance or donation. *Id.*

223. Hoffman, *supra* note 127, at 11.

224. Hoffman, *supra* note 99, at 10.

225. UNIDROIT Convention, *supra* note 10, at art. 3.2. Article 3.2 states: “For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.” *Id.*

226. Hoffman, *supra* note 127, at 5. The Appendix of the Convention expresses concern over the “pillaging of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information . . .” UNIDROIT Convention, *supra* note 10, at Appendix.

commercial art dealers demanded that Article 3.2 be deleted from the UNIDROIT Convention.²²⁷ These groups strongly oppose “found in the ground” laws that transform foreign export regulations into theft.²²⁸ They contend that Article 3.2’s definition of *stolen property*, by including illegally exported objects, “is far broader than U.S. law or any common understanding of the term.”²²⁹ This provision would require even an innocent purchaser, who paid full value for an object, to return it to a government which had neither possession nor actual ownership of that object.²³⁰ Furthermore, the commercial art world argues that the legal trade of antiquities will be burdened by preventing the export of “redundant secondary” objects and will create additional apprehension within the art market.²³¹ Other critics argue this provision is excessive because it illegitimizes otherwise legal forms of art trade.²³²

227. White Paper, *supra* note 219, at 21. The White Paper states that the deletion of Article 3.2 is “critical.” *Id.* Instead, it proposes that “stolen property” be defined as it is in the Cultural Property Implementation Act. *Id.* at 21 n.24. This definition limits stolen property to those documented objects which were removed from an institution. *Id.* Alternatively, the definition of “stolen property” could be based on the traditional United States legal concept that property taken from an individual or entity is “stolen.” *Id.*

228. White Paper, *supra* note 219, at 22. Professor John Merryman states: “Museums have a purpose. Collectors and dealers can be engaged in legitimate activity. The fact that a piece came from a particular country does not automatically give that country an overpowering right to it. It might be better taken care of, better displayed, seen by more people, in a museum in a different country,” *quoted in* Walsh, *supra* note 25, at 88.

229. White Paper, *supra* note 219, at 20. The commercial art world argues that by including illegally excavated objects, Article 3.2 creates too broad a category of objects that would be subject to mandatory return. *Id.* Under this provision, the government of the source country could demand return of an object of which it “never had possession, or actual ownership . . .” *Id.*

230. *Id.*

231. Hoffman, *supra* note 127, at 5.

232. Interview with John H. Merryman, Sweitzer Professor of Law, Stanford University Law School (Sept. 30, 1995) [hereinafter Merryman interview]. According to Professor Merryman, article 3.2 is excessive because it gives foreign export laws “blank check” application in the United States, a policy this country has always rejected. *Id.* The lawful professions of art dealing, art collecting and museum management are made illegitimate by overly retentive cultural property laws of foreign nations. *Id.*

D. THE RECOVERY OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Another highly controversial feature of the UNIDROIT Convention is its provision requiring that illegally exported cultural property be returned to its source country.²³³ This is a significantly departure from the UNESCO Convention which eliminated any obligation to do so.²³⁴ In effect, Article 5 would require the United States to enforce foreign export laws regardless of whether these laws are desirable or serve national or global interests.²³⁵ Furthermore, since most foreign cultural property laws prohibit the export of any cultural objects "found in the ground," a foreign government could rely on Article 5 for the return of illegally exported objects even if Article 3 was deleted.²³⁶ Critics of this provision argue that by agreeing to abide by Article 5, the United States would be giving "blank check" enforcement of any form of export law a foreign government may enact.²³⁷ Consequently, the United States museum and art dealer community urge the United States to reject the UNIDROIT Convention as long as Article 5 remains a provision.²³⁸

The criteria an object must meet in order to justify its return to its source country, outlined in Article 5.3, have proven highly controversial.²³⁹ According to Article 5.3 of the final

233. Hoffman, *supra* note 127, at 11. Article 5.1 states "A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State." UNIDROIT Convention, *supra* note 10, at art. 5.

234. UNESCO Convention, *supra* note 39, at art. 7. See *supra* note 108-110 and accompanying text for discussion of UNESCO art. 7(a).

235. White Paper, *supra* note 219, at 23-24.

236. *Id.* at 22.

237. *Id.* at 30. As a result, American museums would be precluded from collecting any range of works and those who visit these museums would be deprived of learning about these forms of art. *Id.*

238. *Id.* at 21-22.

239. Merryman Interview, *supra* note 232. The 1993 Draft UNIDROIT Convention contained these criteria in article 5.2. See 1993 Draft Convention, *infra* note 241, at art. 5.2. However, the final UNIDROIT Convention lists these same criteria under article 5.3. See UNIDROIT Convention, *supra* note 10, at art.5.3. The American museum community and art trade voiced their demand for the deletion of article 5.2 (1993 Draft Convention) in the White Paper. White Paper, *supra* note 219, at 24. They argued that the criteria of article 5.2 allows for such a

draft, a foreign government can obtain the return of illegally exported cultural property through an administrative body or court, provided it can establish that the object "significantly impairs: the physical integrity of the object or of its context; the integrity of a complex object; the preservation of information of, for example, a scientific or historical character; the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State."²⁴⁰ These criteria are significantly looser than those contained in the preliminary drafts.²⁴¹ Art importing nations, such as Germany, the Netherlands, Switzerland and the United Kingdom proposed limiting the definition of cultural property to objects of "outstanding cultural significance."²⁴² Countries that are rich in artifacts and want to retain them, including Greece, Iran, Mexico, Nepal and Turkey, lobbied to add another category of cultural property: objects of "significance for natural heritage."²⁴³ Although the final draft of the UNIDROIT Convention incorporates neither of these proposals, the definition of cultural property encompasses the broad definition favored by art source nations.²⁴⁴

The American archaeological community supports this provision so that a public agency of the United States could

broad definition of "cultural property" that U.S. courts would be required to enforce all foreign export and cultural property laws. *Id.* at 23.

240. UNIDROIT Convention, *supra* note 10, at art. 5.3. (emphasis added)

241. Merryman interview, *supra* note 232.

Article 5.2 of the 1993 draft UNIDROIT Convention allows for the return of cultural property if its removal "significantly impairs" one or more of the following interests:

- (a) the physical preservation of the object or of its context,
- (b) the integrity of a complex object,
- (c) the preservation of information of, for example, a scientific or historical character,
- (d) the use of the object by a living culture, or establishes that the object is of *outstanding* cultural importance for the requesting State.

Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Study LXX - Doc. 40, at art. 5.2, 1993 [hereinafter 1993 Draft Convention]. (emphasis added)

242. Borodkin, *supra* note 124, at 380 n.15.

243. *Id.*

244. See generally, White Paper, *supra* note 219, at 23.

bring a claim in a foreign court for the return of objects removed in violation of a tribal, state or local law.²⁴⁵ Meanwhile, the commercial art market disagrees with the criteria of Article 5.2 because the scope of objects eligible for return is too broad and will make a significant amount of the art trade illegitimate, only to encourage the over-retention of art in source nations.²⁴⁶ A government may obtain the return of an object by merely showing that the object is of "significant cultural importance" for the requesting State.²⁴⁷ Consequently, the American museum and art dealing community describe the burden created by Article 5.3 as meaningless.²⁴⁸

As the UNIDROIT Convention provides no guidelines quantifying an object's cultural importance, a country will need only to obtain an expert to testify that the object is indeed of "significant cultural importance" to meet this vague standard.²⁴⁹ The museum and art dealing community contends that, as a result, the United States will have to enforce all foreign export and cultural property laws.²⁵⁰

IV. CONCLUSION

Although the illicit art market is thriving and will undoubtedly continue to be a lucrative form of business, effective legislation governing the legitimate flow of cultural property could minimize the demand for black market art trade and promote the protection of national treasures.²⁵¹ The free flow

245. Hoffman, *supra* note 127, at 11. The U.S. Department of the Interior, which has legal and regulatory responsibility for the preservation and protection of archaeological objects in this country also supported the extension of protection to "illegally exported cultural objects." *Id.* at 5.

246. Merryman interview, *supra* note 232.

247. UNIDROIT Convention, *supra* note 10, at art. 5.3.

248. White Paper, *supra* note 219, at 22. The wording of the draft Convention, which the White Paper opposed, required a government to prove an object was of "outstanding cultural importance" to obtain its return. 1993 Draft Convention, *supra* note 241, at art. 5.2. (emphasis added). However, the final UNIDROIT Convention, passed one month after the White Paper was submitted, creates an even less stringent standard than the wording of the draft Convention. *See generally, supra* note 240.

249. White Paper, *supra* note 219, at 23.

250. *Id.*

251. Stille, *supra* note 42, at 33. Professor Merryman believes "as much above-ground movement of cultural property is a good thing all around. There should be

of art can be balanced with the desire to retain objects of cultural significance if source countries agree to allow secondary pieces to go to foreign museums while keeping national treasures within their borders.²⁵²

The UNIDROIT Convention had the potential for balancing the various interests and eradicating some of the legal issues that have been problematic in the past for claims for the return of stolen cultural property.²⁵³ Unfortunately, the final draft of the UNIDROIT Convention contains critical provisions that would disadvantage art importing nations while giving art source nations the increased power to restrict export and regain possession of cultural property.²⁵⁴ Furthermore, this convention requires art market nations to give "blank check" credit to foreign cultural property export laws.²⁵⁵ Since the UNIDROIT Convention favors the retentive policies of art source countries, it is doubtful that major art importing nations like the United States will ratify it.²⁵⁶ Only a document that gives comparable weight to the competing interests of art importing and art source nations will be widely adopted and successfully utilized.²⁵⁷

Wide-range acceptance is crucial to the Convention because it will only have an impact if a significant number of countries become signatories to it.²⁵⁸ The UNIDROIT Convention is applicable in situations where it has been adopted by both the State requesting the object and the State where the request is brought.²⁵⁹ Consequently, if major art importing

a rational, sensible trade in art," quoted in *Id.*

252. *Id.*

253. Merryman Interview, *supra* note 232. UNESCO requested UNIDROIT design a new accord to replace the ineffective UNESCO Convention. Hoffman, *supra* note 99, at 5.

254. See generally White Paper, *supra* note 219.

255. Merryman interview, *supra* note 232.

256. *Id.* The main contentions that art importing nations have with the UNIDROIT Convention are found in articles 3.2 and 5. *Id.* These articles strongly favor retentionist policies of art source nations and are contrary to the interests of the United States. *Id.*

257. See generally Merryman Interview, *supra* note 232.

258. See generally Hoffman, *supra* note 99, at 7. One of the downfalls of the UNESCO Convention was that it was not ratified by enough countries. See *supra* note 126.

259. UNIDROIT Convention, *supra* note 10, at art 10.2. Article 10.2 provides:

countries refuse to sign this accord, UNIDROIT will be powerless in regulating the traffic of stolen cultural property.²⁶⁰ Only a cooperative effort among nations, based on a scheme that balances the various interests of art source and art importing countries, can achieve this goal.²⁶¹ Unfortunately, the UNIDROIT Convention fails to create this vital balance.²⁶²

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"The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought." *Id.*

260. Merryman Interview, *supra* note 232.

261. *Id.*

262. *See generally* White Paper, *supra* note 219.

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APPENDIX

UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

(ARTICLES 1 - 11)

CHAPTER 1 - SCOPE OF APPLICATION AND DEFINITION

ARTICLE 1

This Convention applies to claims of an international character for:

(a) the restitution of stolen cultural objects

(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects").

ARTICLE 2

For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS**ARTICLE 3**

(1) For the possessor of a cultural object which has been stolen shall return it.

(2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years of the theft.

(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of the possessor.

(5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.

(6) A declaration referred to in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession.

(7) For the purposes of this Convention, a "public collection" consists of a group of inventoried or otherwise identified cultural objects owned by:

- (a) a Contracting State
- (b) a regional or local authority of a Contracting State
- (c) a religious institution in a Contracting State; or
- (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognized in that State as serving the public interest.

(8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.

ARTICLE 4

(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

(2) Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.

(3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.

(4) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant

information and documentation which it reasonably could have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

ARTICLE 5

(1) A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.

(2) A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

(3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:

- (a) the physical preservation of the object or of its context;
- (b) the integrity of a complex object;
- (c) the preservation of information of, for example, a scientific or historical character;
- (d) the traditional or ritual use of the object by a tribal or indigenous community,

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or establishes that the object is of significant cultural importance for the requesting State.

(4) Any request made under paragraph 1 of this article shall contain or be accompanied by such information of a factual or legal nature as may assist the court or other competent authority of the State addressed in determining whether the requirements of paragraphs 1 to 3 have been met.

(5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article.

ARTICLE 6

(1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.

(2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.

(3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide:

(a) to retain ownership of the object; or

(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.

(4) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

ARTICLE 7

(1) The provisions of this Chapter shall not apply where:

(a) the export of a cultural object is no longer illegal at the time at which the return is requested; or

(b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.

(2) Notwithstanding the provisions of sub-paragraph (b) of the preceding paragraph, the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.

CHAPTER IV - GENERAL PROVISIONS

ARTICLE 8

(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

(2) The parties may agree to submit the dispute to any court or other competent authority or to arbitration.

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(3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

ARTICLE 9

(1) Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.

(2) This article shall not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention.

ARTICLE 10

(1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that:

(a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or

(b) the object is located in a Contracting State after the entry into force of the Convention for that State.

(2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.

(3) This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is ex-

cluded under paragraphs (1) or (2) of this article, nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before entry into force of this Convention.

CHAPTER V - FINAL PROVISIONS

ARTICLE 11

(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and will remain open for signature by all States at Rome until 30 June 1996.

(2) This Convention is subject to ratification, acceptance or approval by States which have signed it.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Ratification, acceptance, approval or accession is subject to the deposit of a formal instrument to that effect with the depositary.