THE EFFECT OF EFFORTS TO CONTROL ILLICIT ART TRAFFIC ON LEGITIMATE INTERNATIONAL COMMERCE IN ART

I. INTRODUCTION

Many art rich nations that have had their treasures looted for centuries or depleted by illegal market transactions which capital rich nations have instituted strict export controls to stem this illegal art flow. The effects of such restrictive laws have been to criminalize what would otherwise be legitimate exchanges, thereby increasing the cost of art. Strict controls, however, have been ineffective because of the large market for art treasures and the strong economic incentives to violate these regulations. As a result, the export controls serve only to threaten legitimate art exchange, while having little effect on the illicit art traffic. This Note will examine both selected national controls on art exportation and bilateral and multilateral attempts to regulate the illegal art flow. In addition, it will suggest ways in which a nation’s goal of preserving its cultural heritage can be reconciled with the international community’s goal of facilitating the free exchange of art.

II. BACKGROUND

All nations, particularly the culturally endowed ones, have experienced looting of their art treasures. In response, many nations have instituted strict export controls to protect their national patrimony. Underlying such laws is the assumption that the State has the duty to protect its art objects, as well as the right to retain designated art objects within its physical borders; this assumption is based on the premise that the art of a nation influences that nation’s level of self-respect while providing its citizens with insight into their country’s past. However, these attempts by various nations to protect their cultural treasures have sometimes been indiscrimi-

1 Rogers, The Legal Response to the Illicit Movement of Cultural Property, 5 LAW & POL. INT’L Bus. 932, 935 (1973). Rogers points out that a nation’s art not only attracts tourists, encourages scholarship, and contributes to the intellectual life of the nation, but it is also a source of pride and identity to the citizens, stimulating a sense of continuity with past generations.

2 Coggins, Illicit Traffic in Pre-Columbian Antiquities, 29 ART J. 94 (1969):

In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market. Not since the sixteenth century has Latin America been so ruthlessly plundered. . . . The theft and mutilation of monuments is not confined to little known, or unknown, sites where their loss and concomitant tomb-robbing destroys all archaeological evidence. Monuments from sites which have been scientifically excavated and completely published and which are known Guatemalan national monuments are also appearing in the market, and even in reputable museums.
nate; nations have simply failed to distinguish items that are essential to their cultural heritage.

As a result of the national efforts to protect art works, a "war" has developed between art collectors and dealers on one side and certain nations' scholars on the other side. This war has been precipitated by a conflict of values—the preservation of a nation's art versus the promotion of international art exchange.

Although protection of art is a commendable endeavor, there is an equally valid need for commerce in international art. Exposure to foreign culture expands tastes and sympathies and decreases parochialism:

art is a communication channel that can take people and open them up in a unique way. Art can help us not only look at ourselves, but also it makes it possible to see others with greater sensitivity and insight. It is particularly useful when cultural barriers are involved. The more we are exposed to the art of other countries, the better we are able to understand and communicate with the people from whose culture the art comes.

If the international exchange of art is totally restricted, a nation will be exposed only to its own product. The social identity of a country resides in a community of thought and ideas which can be developed only through the exchange of representations of other's cultural heritage. Furthermore, art is often a merging of many nationalities and not merely the heritage of one country. Thus, it is difficult to justify the retention by one country of such pieces. In addition, international commerce in art may actually preserve art which would be destroyed if left in situ.

This conflict of interests has been aggravated by the methods chosen by many nations to preserve their cultural patrimony—nations have statutorily characterized art as public or quasi-public property. By such characterization, these nations have placed restrictions on both public and private collections and have placed a premium on the physical retention of cultural objects.

This Note will particularly focus on the effect of such strict export controls on the free flow of art. Existing controls not only have been ineffective, but have tended to promote a black market trade. While some con-
controls are necessary, it is essential to accept only those controls that show an appropriate consideration of the varied interests involved. Any regulation of art must take into account the relative importance of objects to the source nation's culture, the probability of preservation of an object both within and outside the source country, and the need for international art exchange. Therefore, any resolution of such a conflict of values must take into account the items that should be protected by legislation and the extent and form of control which any government should exercise over the export of its art.

Nations have also ignored another important consideration, that art objects do not all fall in the same categories, and thus, do not all require the same degree of protection. Recently created items and duplicates cannot be equated with unique items. But, although nations have come to no agreement concerning the criteria to be used to evaluate art works, they have, because of the need for some type of art exchange regulation, instituted controls which ignore the competing values of international art exchange versus art preservation.

III. FOREIGN CONTROLS

A. France

France uses a very restrictive export system in which all cultural property is classified and listed on an official inventory of national monuments. Movable and immovable articles whose preservation is required for historical or artistic purposes are identified by the Minister of Culture. But privately owned property may be identified and classified by the same procedure as state property. The exportation of both state and private classified objects is forbidden. Through this classification procedure, the State monitors the sale of important works of art.

The Government may refuse export licenses for non-classified cultural works of the pre-1900 period with the exception of contemporary works whose creator is still alive. As an alternative to state refusal to issue export licenses, the French Government has the option of acquiring the object for national collections within six months of the application for an export license.

B. Ghana

Ghana has attempted to retain its antiquities by strict control of excavations.
tion and export. The National Museum Decree of 1969 requires the issuance of an export license and a waiting period prior to the export of any antiquities. This Decree also provides the State National Museum Board with the opportunity to purchase the antiquity for its market price in lieu of exportation.

C. Great Britain

Great Britain is less restrictive in its controls of international art exchange than most countries. Certain large categories of works are freely exportable, but an export license is still required from the Export Licensing Board. Two types of licenses may be issued under British law: (1) open general licenses which permit exportation of any antiquity that was not produced more than one hundred years prior to the date ofexportation and whose value is less than £4,000 or (2) specific licenses which are required for all other cultural items.

Antiquities that were not imported within the last fifty years, were made more than a hundred years ago, and are of a value of £4,000 or more, are scrutinized to see if the objects are of such importance that they should not leave the country. If the decision is made to refuse an export license, the Government has the right to purchase the object at a price it considers

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2 National Museum Decree of 1969, supra note 16. Paragraph 1 provides:

(1) No person shall export any antiquity except in accordance with an export permit issued by the Board.

(2) Application for an export permit shall be made in writing to the Director of the National Museum at least three months before the proposed date of export unless the Board, in its discretion, accepts a lesser period.

(3) Every application shall contain the name of the antiquity, its function, a full description with dimensions, its local cost or an estimate of its value, and the date when, the place where, and the person from whom it was obtained.

(4) Unless the Director otherwise requires, the application shall be accompanied by an adequate photograph or photographs of the antiquity.

3 Id. Paragraph 6 provides:

(1) Where the Director himself is of the opinion that any antiquity is likely or intended to be exported (whether lawfully or otherwise), or where an application for an export permit has been made and refused, the Director may—

(a) require the owner of the antiquity to surrender it to the National Museum; and

(b) pay for the antiquity at a price which is assessed by the Board and which is, in the opinion of the Board, the fair market price of the antiquity in Ghana.

4 Merryman, supra note 9 at 255,260.


6 English Notice to Exporters, supra note 20, at § 14.

"Archaeological material is subject to special scrutiny irrespective of value."
The decision whether to grant a specific license is vested in a Reviewing Committee which must decide on the basis of three criteria: (1) Was the object so closely associated with British history and national life that its departure would be a misfortune? (2) Is the object of outstanding aesthetic importance? (3) Is the object of outstanding importance for the study of some branch of art, learning, or history? In order for the government to refuse to grant a license, the item must meet one or more of the above criteria. But if the British Government refuses the license and fails to purchase the item within a reasonable time then the export license has to be granted.

D. Italy

Italian legislation provides for extensive state involvement in the protection, preservation, and commercial exchange of both publicly and privately owned art treasures. The governing legislation is the Law of June 1, 1939, on the Protection of Things of Artistic or Historical Interest. This statute applies to all movable and immovable objects of artistic, historical, archaeological, or ethnographic interest to the country. Works of living artists, authors, and composers, and works created no more than fifty years previously, are not subject to the operation of this statute.

The Ministry of Education is responsible for the identification of objects within the scope of the statute, including privately owned works, and for

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21 Id. at § 17.

The Committee's decision is notified to the applicant by the Secretary to the Committee without reasons. If the decision is that an export license should not be allowed, this decision is subject to an offer being made within a reasonable time for the purchase of the object; failing such an offer an export license is granted. The price offered is that which the Reviewing Committee considers reasonable, after taking advice if necessary. The Committee takes account, to such extent as they think fit in each case, of any saving of Estate duty obtained under section 40 of the Finance Act, 1930, by selling the object to the National Gallery, British Museum or any other similar national institution, any University, County Council or Municipal Corporation in Great Britain, the National Art Collections Fund or the Friends of the National Libraries. If the Committee's decision is to allow the export, further correspondence about the export license is dealt with by the Department of Trade and Industry.

20 Id. at § 16.

21 Id. The decision whether or not to refuse an export license on grounds of national importance depends on how high the object stands in one or more of these categories and on whether a reasonable offer to purchase can be made to ensure its retention.

24 Id. at § 16.


22 Merryman, supra note 26 at 239.

25 Id.
notifying private owners of objects that are of particular importance.\textsuperscript{29}
Conservation efforts of all identified property, including works held by
private owners, are directed by the Ministry.\textsuperscript{30} Private owners are generally
held to be responsible for conservation costs, but if a private owner is
financially unable to bear the cost, the burden is assumed by the State.\textsuperscript{31}
However, where the State carries the cost of conservation, the Ministry has
the option to acquire the object after fair compensation.\textsuperscript{32}

Works identified as important are not transferable where the conserva-
tion of the collection would be jeopardized, public interest is endangered,
or the works belong to a state or a public entity.\textsuperscript{33} An exchange between a
private owner of a designated work and a foreign purchaser may be pre-
empted by the State, which has the first option to acquire the work.\textsuperscript{34}
Furthermore, the exportation of objects within the scope of the statute
constituting a great injury to the national art collection is forbidden.\textsuperscript{35}

But regardless of whether exportation would injure the national patri-
mony, an exporter must in all cases obtain an export license.\textsuperscript{36} For this
purpose he must file an application and present it to the Office of Exporta-
tion, stating the items he intends to export and declaring the market price
of every item.\textsuperscript{37} Any disagreement between the exporter and the Office of
Exportation regarding the value of the object is to be resolved by the
Ministry of Education.\textsuperscript{38} Within two months of the application, the Minis-
try has the power to acquire works that are of importance to the nation
for the value stated in the application.\textsuperscript{39}

Archaeological investigations to discover art objects may be conducted
on private property by the State, or by the owner himself if granted a
license to do so by the State.\textsuperscript{40} In all cases, the objects found belong to the
State, but the owner is entitled to compensation for damage done to his
property and to a reward for some fraction of the value of the item found.\textsuperscript{41}
Even a fortuitous discovery belongs to the State.\textsuperscript{42}

\begin{enumerate}
\item Id.
\item Marchisotto, supra note 26 at 708.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Merryman, supra note 26, at 239.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
E. Japan

Japan has an elaborate set of regulations which severely control almost all cultural property. The tangible cultural properties viewed as important to Japanese heritage are designated and, therefore, made subject to control.\(^4\) There are three grades which distinguish the more important pieces from the rest: (1) "National Treasure," (2) "Important Cultural Property," and (3) articles and monuments fixed in place.\(^4\) While there are prohibitions against exporting Important Cultural Property and National Treasures, special exception may be made by the Cultural Properties Protection Commission to allow exportation, but requests will probably be denied if the art object falls into the designated categories.\(^5\) Both public and private property are under the protection of this statute, and the State may preempt sales by paying the requested consideration.\(^6\)

F. Mexico

1. Mexican National Response

The most extreme example of the destruction of man's history has taken place in Mexico.\(^7\) Consequently, the nation has responded with stringent

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\(^4\) Protection of Cultural Property, Law No. 214 of May 30, 1950, MIMPo art. 27 (Japan). Of the tangible cultural properties, the Commission may designate important ones as cultural properties. Of the important cultural properties, the Commission may designate as national treasures those properties which are of a high value from the viewpoint of world culture and which are the unique treasures of the nation.

\(^5\) Id.

\(^6\) Id. art. 44.

Important cultural properties shall not be exported; provided that this shall not apply when the Commission has given the permission therefor from the viewpoint of international exchange of culture or from other considerations.

\(^7\) Id. art. 46.

If a person desires to assign an important cultural property for a consideration, he shall file with the Commission a document stating therein the name of the assignee, and the estimated value of the consideration (which value has to be calculated in money at the current price in case the consideration stipulated consists in things other than money); hereinafter the same and any other matter prescribed by the Regulations of the Commission, declaring at the same time that the said property be sold to the State before any other party if the Commission so desires; provided that where the Commission recognizes the special circumstances favoring the sale of the same property to the said (provisional) assignee, this provision shall not apply.

If, within twenty days from the offer of sale referred to in the preceding paragraph, the Commission has given notice that the State will buy the said important cultural property, a bargain shall be deemed to have been closed at a price corresponding to the estimated value of the consideration stated in the paper referred to in the same paragraph.

\(^4\) Coggins, *Illegal International Traffic in Art: Interim Report*, 30 ART J. 384 (1970). Coggins discusses the looting of sites evidencing the Maya civilization in Guatemala and Mexico and the attempt to document the items that have been pillaged. Coggins states that over fifty
export controls. Mexican law, since 1934, has established ownership of all immovable archeological material to be in the public domain and prohibited the export of all works of art without a license.\textsuperscript{48} Artifacts belong to the nation even when lost or unknown.\textsuperscript{49} The Law of 1970 was so stringent that it was ineffective, and reform was necessary to effectively regulate the illegal art traffic.\textsuperscript{50} However, the new law enacted in 1972 did not retreat significantly from the concept of strict statutory controls.\textsuperscript{51} Every pre-Columbian item is held to belong to the nation and may not be exported.\textsuperscript{52} Moreover, under the 1972 law, national ownership is extended to private collections, and even the smallest objects are covered by this law.\textsuperscript{53} Furthermore, while the prior law permitted exportation when an export certificate was obtained, under the new law exportation of pre-Columbian items is absolutely forbidden.\textsuperscript{54}

2. Combined Mexican—United States Response

The Mexican-United States response consists of both bilateral control and specific legislation in each country to regulate the illegal commerce. A United States-Mexican treaty entered into in 1970 recognizes that export control alone is not enough.\textsuperscript{55} This treaty is designed to protect designated cultural material from illegal export and to promote exchange of antiquities. As an initial duty, each party agrees to deter illegal excavation of archaeological sites and theft.\textsuperscript{56} Secondly, the treaty provides that both important sites are known to have been looted in the Maya area and that the list of looted sites grows steadily.


\textsuperscript{49} Id.

\textsuperscript{50} Id. See also Rogers, supra note 1, at 944-45; Gonzalez, New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities, 12 COLUM. J. TRANSNAT'L L. 316, 326-27 (1973). Because Ley Federal Del Patrimonio Cultural de la Nación encompassed every item, both movable and immovable which was a product of a pre-Columbian civilization, the government's attempt to regulate such an amorphous and widespread category of art by an export licensing system was impractical. Had the government narrowed the scope of regulated items, the incentive to engage in black market operations would have been stultified.


\textsuperscript{52} Gonzalez, supra note 50, at 328.

\textsuperscript{53} Rogers, supra note 1, at 945.

\textsuperscript{54} Gonzalez, supra note 50, at 328.


\textsuperscript{56} Id. Art. II states:

1. The Parties undertake individually and, as appropriate, jointly
   (a) to encourage the discovery, excavation, preservation, and study of archaeological sites and materials by qualified scientists and scholars of both countries;
parties will facilitate exhibition and circulation of their cultural property, the purpose of which is to enhance the mutual understanding and appreciation of artistic and cultural heritage of both countries. In addition, the United States and Mexico also agree to allow international art exchange, provided that such exchange is consistent with national and international laws concerning archaeological, historical, and cultural property.

The treaty applies to pre-Columbian art objects, religious art, colonial period artifacts, and documents from official archives up until 1920 that are of outstanding importance. Determination of importance is left to governmental agreement. Theoretically, the treaty does not affect private ownership rights as only property of the federal, state, or municipal governments fall within its scope. However, because of Mexico's stance that all pre-Columbian art belongs to the nation, there is a practical limitation on private rights.

3. The United States Response

Customs controls over the importation of national art treasures was
enacted by statute in 1972. Thus, federal law makes it illegal to import into the United States pre-Columbian monumental or archeological sculptures or murals which have been exported contrary to the laws of the country of origin. Only those pre-Columbian stone carvings and wall art that are accompanied by an export certificate may enter the United States. Determination of what articles can enter the United States is left to the United States Secretary of State.

G. United States

The United States has also imposed statutes to preserve, restore, and maintain the cultural environment of the nation. The scope of these regulatory provisions of these acts is limited to objects and buildings located on government lands. However, assistance to individuals and state

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63 Id. § 2095(3).
64 The term "pre-Columbian monumental or architectural sculptures or mural" means any stone carving or wall art which
(A) is the product of a pre-Columbian Indian culture of Mexico, Central America, South America, or the Caribbean Islands;
(B) was an immobile monument or architectural structure or was part of or was affixed to any such monument or structure; and
(C) is subject to export control by the country of origin; or
(D) any fragment or part of any stone carving or wall art described in subparagraph (A) of this paragraph.
65 Id. at § 2092(a).
66 No pre-Columbian monumental or architectural sculpture or mural which is exported (whether or not such exportation is to the United States), from the country of origin after the effective date of the regulation listing such sculpture or mural pursuant to section 2091 of this title may be imported into the United States, unless the government of the country of origin of such sculpture or mural issues a certificate, in a form acceptable to the Secretary which certifies that such exportation was not in violation of the laws of that country.
67 Id. at § 2091.
69 Exec. Order No. 11593, supra note 66, states in its first section that [1]he Federal Government shall provide leadership in preserving, restoring, and maintaining the historic and cultural environment of the Nation. Agencies of the executive branch of the Government (hereinafter referred to as "Federal agencies") shall (1) administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations, (2) initiate measures necessary to direct their policies, plans, and programs in such a way that federally owned sites, structures, and objects of historical, architectural or archaeological significance are preserved, restored and maintained for the inspiration and benefit of the people, and (3) in consultation with the Advisory Council on Historic Preservation (16 U.S.C.
and local governments for preservation activities is provided by the federal government. A cataloguing system authorized by the National Historic Preservation Act was put into effect in 1973 and now the sale of catalogued items is prevented without the consent of an advisory council.

\[470 \ S \ (i), \ institute \ procedures \ to \ assure \ that \ Federal \ plans \ and \ programs \ contribute \ to \ the \ preservation \ and \ enhancement \ of \ non-federally \ owned \ sites, \ structures \ and \ objects \ of \ historical, \ architectural \ or \ archaeological \ significance.\]

National Historic Preservation Act, supra note 66, states at § 470, the intent of Congress to be:

(a) that the spirit and direction of the Nation are founded upon and reflect in its historic past;
(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and
(d) that, although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

Exec. Order No. 11593, supra note 66, at § 2 states that the designated Federal agencies shall:

(a) no later than July 1, 1973, with the advice of the Secretary of the Interior, and in cooperation with the liaison officer for historic preservation for the State or territory involved, locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts, and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places;
(b) exercise caution during the interim period until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered. The agency head shall refer any questionable actions to the Secretary of the Interior for an opinion respecting the property's eligibility for inclusion on the National Register of Historic Places. The Secretary shall consult with the liaison officer for historic preservation for the State or territory involved in arriving at his opinion. Where, after a reasonable period in which to review and evaluate the property, the Secretary determines that the property is likely to meet the criteria prescribed for listing on the National Register of Historic Places, the Federal agency head shall reconsider the proposal in light of national environmental and preservation policy. Where, after such reconsideration, the Federal agency head proposes to transfer, sell, demolish or substantially alter the property he shall not act with respect to the property until the Advisory Council on Historic Preservation shall have been provided an opportunity to comment on the proposal.
H. Other Countries

The typical approach of other countries surveyed is a total ban on the exportation of cultural works that the country considers important. But the approaches for prohibiting exportation varies. Some countries prohibit exportation of all items while others will allow exportation of works of living artists or recently created works. Still other countries utilize an inventory system listing all works of outstanding importance to the country's cultural heritage and prohibiting the exportation of such registered items. Furthermore, in many countries, the state has the right to physically acquire the work for conservation purposes.

I. Summary and Assessment of Foreign Controls

It is clear that laws similar to those of Mexico, Ghana, and Italy do not effectively regulate the international art flow. The high state involvement, with the government controlling the export of both publicly and privately owned antiquities, has the potential for destroying most legitimate art exchange. The Mexican laws actually proceed a step further by forbidding, without qualification, the exportation of certain items.

These laws are difficult to enforce because of the lack of sufficient investment in enforcement mechanisms. However, even rigid enforcement mechanisms are likely to fail. These countries' cultural patrimony are large and diverse, reducing the likelihood that the states can supervise all art works. These laws, instead of preventing illicit art exchange, may encourage black market operations. As long as a demand for such items exists in art importing nations, the prohibited items will become available illegally if no legal channels are open.

The United States' response to the plight of such countries as Mexico will only reinforce the restrictive controls of these nations. Such importa-

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70 Austria's stringent controls give the State the power to introduce any method of registration or regulation to prohibit the exportation of items of exceptional value. See Fishman & Metzger, note 13 supra, at 59-60. See also K. Meyer, note 7 supra, at 241.

71 Turkish law, instead of a licensing system whereby exportation is permitted in certain cases, absolutely forbids exportation of any antiquity. But Indian law states that any work of art created by an artist no longer living can be declared an art treasure with the right of exportation vested solely in the State. However, Austria will allow exportation and sale of historical, artistic, or cultural interests which are created by a living artist or one who has been dead for less than twenty years. See Fishman & Metzger, note 13 supra, at 59-62. See also K. Meyer, note 7 supra, at 241, 246.

72 Hungary utilizes an inventory system whereby the exportation of all registered items is prohibited with the exception of temporary exhibitions. Items on the national inventory include all documents, materials, and monuments of outstanding importance to archaeological, historic, or artistic heritage. See Fishman & Metzger, note 13 supra, at 60-61.

73 In Turkey all cultural property is, in reality, owned by the State, and the State has the right to physically acquire any work. Also, in India, the State has the authority to acquire any art treasure for conservation and maintenance purposes. See Fishman & Metzger, note 13 supra, at 61-62.
tion controls are likely to be read in light of the laws of the foreign country from which a particular art work originates. Thus, enforcement will lead to a reduced flow of art.

The effect of bilateral treaties between countries is also contingent upon the respective laws of the parties. For example, the United States-Mexican treaty was completed under the Mexican law of 1970 which permitted export of cultural items with an export license. Therefore, when Mexico enacted the 1972 law prohibiting these exports, it departed from the treaty. Thus, the provisions encouraging art exchange may have, in effect, been rendered nugatory by the current Mexican law.

Inventory systems such as those utilized by France and Japan have the advantage of not restricting the alienability of unregistered items. However, inherent in such schemes is the danger that a nation, as in the case of France, will include in the inventory items that are not of exceptional importance to the nation's culture. However, such systems are indeed workable when a nation, such as Japan, adopts a classification scheme based on the importance of an item. The most beneficial effects, from the standpoint that free alienability of items is desirable, are maximized when a country such as Great Britain freely allows exportation, restricting export prohibitions to a limited category of items.

IV. MULTILATERAL CONTROLS

Illegal trafficking of art between nations can be most effectively combated by implementing controls at the international level. Although, until recently, the necessary agreement and cooperation has been lacking, significant developments have occurred.

A. Organization of the American States (OAS) Treaty

The General Assembly of the OAS has unanimously adopted a Convention on the Protection of the Archaeological, Historic, and Artistic Heritage of the American Nations. Its stated purpose is to identify, register, protect, and safeguard properties comprising the cultural heritage of the American nations. Its stated goal is to prevent the illegal exportation or importation of cultural properties as well as the promotion of cooperation among the states and mutual appreciation of their cultural property. The cultural property includes American monuments and fragments thereof dated prior to contact with European culture, monuments from the Colom-
nial Era and the 19th century, objects originating after 1850 that the states have recorded as cultural property, and all other cultural property that any of the parties has specifically declared to be within the scope of the Convention. 78

States may identify not only objects found or created within their territories, but also those items of foreign origin that have been legally acquired.77 The exportation of the cultural property within the scope of the Convention is considered unlawful except when authorized by the owner-state for the purpose of promoting knowledge of national cultures.78

Each state has the responsibility of identifying, registering, protecting, and preserving its cultural heritage.79 To achieve this goal each state is encouraged to prepare and maintain a national inventory of all cultural property and to draft legislative regulations for effective protection of this property.80 Also, every party is to undertake whatever measures it may consider necessary to prevent the unlawful exportation, importation, and removal of cultural property.81

The Convention does represent a step towards preventing illegal art traffic. However, the guidelines established by the Convention are too ill-defined to foster legitimate art exchange, even though the Convention does provide for states to cooperate in the expansion of mutual knowledge and appreciation of their respective cultures by facilitating the circulation, exchange, and exhibition of cultural property.82 Therefore, the Convention does not effectively balance the twin concerns of the promotion of art exchange and the preservation of a nation's heritage.

B. European Convention on the Protection of Archaeological Heritage

The European Convention undertakes to protect archaeological objects in Europe. These are defined as all remains, objects, or any other traces of

78 Id. art. 2.
77 Id. art. 5.
76 Id. art. 3.

The cultural property included in the above article shall receive maximum protection at the international level, and its exportation and importation shall be considered unlawful, except when the state owning it authorizes its exportation for purposes of promoting knowledge of national cultures.

79 Id. art. 8.
80 Id. art. 8(c).
81 Id. art. 10.
82 Id. art. 15.

The States Parties bind themselves to cooperate in the mutual knowledge and appreciation of their cultural values by taking the following measures:

a. Facilitating the circulation, exchange, and exhibition, for educational, scientific, and cultural property from other nations and of their own cultural property abroad, when authorized by the pertinent governmental agencies;

b. Promoting the exchange of information on cultural property and on archaeological excavations and discoveries.
human existence, which bear witness to civilizations for which excavations and discovery are a main source of scientific information. Each contracting party is to establish a national inventory of both publicly and privately owned archaeological objects and facilitate the circulation of archaeological objects. The Convention does seem to subordinate exchange to protection, stating that circulation shall in no way prejudice the protection of the objects. However, the Convention remedies this uncertainty somewhat by providing that its provisions cannot restrict lawful trade in, or ownership of, archaeological objects.

C. United Nations Education and Social Council (UNESCO) Convention

The United Nations Education and Social Council Convention on Illicit Movement of Art Treasures is designed to increase international cooperation in art preservation. This Convention, in recognizing that national efforts alone are often not sufficient and that international action is necessary, places responsibility on exporting nations to control the flow of art. Each nation is to establish a national inventory of property to be protected. The Convention limits the categories of items that may be designated as cultural property to those that are important to archaeology, his-

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Id. arts. 4-5.
Id. art. 6.
Each Contracting Party undertakes to cooperate in the most appropriate manner in order to ensure that the international circulation of archaeological objects shall in no way prejudice the protection of cultural and scientific interest attaching to such objects.
Id. art. 8.
Id. art. 5.
To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:
(a) . . .
(b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage.
tory, literature, art, or science. Cultural property within the ambit of the Convention is subject to export only upon the authorization of the state of origin and the issuance of an export certificate. The Convention also recognizes the right of each state to designate items that are inalienable and therefore ineligible for exportation.

Each state is given broad discretion in defining its cultural property and establishing guidelines; there is no requirement confining designation to any particular time period. Thus, there exists a wide range of items that

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**Id. art. 1.**
For the purposes of this Convention, the term “cultural property” means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins, and engraved seals;
(f) objects of ethnological interest;
(g) property of artistic interest, such as:
   (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
   (ii) original works of statutory art and sculpture in any material;
   (iii) original engravings, prints and lithographs;
   (iv) original artistic assemblages and montages in any material;
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments.

**Id. art. 6.**

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each state:

(a) cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
can be designated as cultural property. Physical presence is not in itself always sufficient to qualify an item as cultural property. The Convention establishes no minimum residency period and specifies only that the object must have been created or discovered within the territory. In spite of the broad coverage of protected cultural property, the Convention does adopt a positive sensitivity to the advantages of cultural exchange as expressed in the preamble.

The United States Senate has given its advice and consent to this Convention with seven formal reservations and understandings. They include the understanding that the Convention does not modify pre-existing property interests, the reservation of the right to determine whether export controls should be imposed, and the understanding that the Convention is not self-executing. The latter means the United States will withhold formal ratification until enabling legislation is approved by Congress. The proposed legislation empowers the President to enter into an agreement with signatory and other states to restrict importation of archaeological or ethnological materials that are listed as protected items.

D. Summary and Assessment of Multilateral Controls

The primary deficiency of existing multilateral controls has been the failure of the instruments to precisely define the cultural property within the ambit of the conventions. Thus, the degree of restrictiveness of such conventions is generally left to the participating states. Both the UNESCO Convention and the recently-adopted OAS Treaty suffer from these defects. Although conventions such as UNESCO express the goal of cultural exchange, the success of such expression is dependent

(b) cultural property found within the national territory;
(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
(d) cultural property which has been the subject of a freely agreed exchange;
(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

1 Id.
2 Id. at 4(c)-(e).
3 Id. at the Preamble. The Convention was adopted because "the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations . . . ." But see Emmerich, Importing Antiques: A Moral Issue?, Wash. Post, Feb. 6, 1978, § A, at 23, col. 1 for a viewpoint that the need for continued art exchange is not fostered by the UNESCO Convention.

5 Id.
upon how member states regard the convention. If a convention is viewed as a method of prohibiting cultural flow as opposed to merely regulating illicit traffic, the goal of cultural exchange will be defeated.

Restrictive export actions by one state may induce retaliatory measures by other counties. Where a convention, such as the European Convention, attempts to define more precisely the type of property within the scope of the Convention and to recognize that ordinary property rights should prevail, no insurmountable barriers to legitimate art flow will be created. Unless nations adopt a more regimented system whereby only those items truly important to a nation's culture are within the prohibition, legitimate art flow will be stifled.

V. Resolution

Prevention of international art commerce has become a means for achieving the essential aim of preventing illegal art exploitation. What is needed is a combination of new legal tools that will affect the market in such a way as to maximize transactions through legitimate channels. No one system of controls can effectively prevent illicit art exchange and concomitantly promote international art exchange. However, a modified combination of individual national export controls, bilateral agreements, and multilateral agreements could achieve this balance. Present export controls are generally too restrictive to be productive, for any effective approach must in some manner satisfy the demand for art exchange.

Individual nations can undertake several methods of regulation to resolve these conflicting values. Nations could permit duplicate pieces and minor ethnographic specimens to be exported to satisfy the demand without draining the country of significant art. If such works are made available for sale, the effect on illegal traffic in similar works would be dramatic. But this solution would only partially satisfy the demand, as there would always exist a demand for the unique item.

Another control that could be instituted by individual states is a selective exportation certification system as used in Great Britain that discerns which objects are of paramount importance to cultural patrimony. For the most important items, which would be determined by the combined criteria of age, value, and contribution to the nation's cultural heritage, it would be necessary to apply for an export license. In determining whether or not to grant an export license, several factors should be considered: the importance of the particular work in question relative to the artist's other accomplishments, existence of duplicates, and the loss to the nation's cultural heritage if export were permitted. If denial of the license is proper, the state national museums could be given the option to purchase the item within a certain period of time.

Bilateral action is best suited to the situation where art-rich and art-poor nations could agree on their respective needs. There are two measures that should be utilized in such agreements. First, import controls could be
implemented whereby nations would agree upon a defined list of articles essential to each nation's heritage. These items would not be imported without an export certificate from the source nation. Second, a policy of encouraging museums to adopt a system of self-control could be utilized whereby the museums would bargain only for legally obtained items. Several museums in the United States have already expressly adopted such a system. For example, the University Museum of the University of Pennsylvania decided that they would not purchase art objects unless accompanied by information about the prior owners, place of origin, legality of export, and other data relevant to the individual piece.99 Also, Harvard University officially adopted several governing principles regarding acquisition of art and antiquities.100 These include responsibility of the Museum director to assure that the University can acquire legal title to the object and that the object has not been exported from the country of origin in violation of that country's laws.101 If these tests are not met, the University will not acquire the work.

Of course, a nationwide system of museum self-control would not directly deter private collectors from purchasing illegally exported art objects. However, such a policy might have an indirect deterrent effect on collectors making large investments in such items, since it would be impractical to purchase items without regard to the alternatives available for resale. Collectors who are faced with a nationwide museum policy of refusal to deal with illicitly obtained items will be more reluctant to make such purchases.

However, unilateral and bilateral controls alone are not sufficient, since objects illegally smuggled out of a country would find markets elsewhere. Thus, a multilateral approach is necessary. However, a multilateral approach alone would not of itself suffice as shown by the intrinsic weaknesses, dilution, and generality of existing multilateral instruments. A multilateral approach needs to be revised to include a more refined and less wide-ranging definition of cultural property. It is not necessary that specific items or types be listed within the agreement. Rather, there could be a general requirement that the object be of a certain age and value and that it have been located within the country for fifty years or more. Additionally, objects with numerous duplicates could be excluded.

These different control mechanisms would give maximum protection to a nation's cultural heritage and, if used in unison with other nations' actions would do much to stem the flow of illicit art. These same controls would not, however, inhibit all legitimate art traffic. By continuing to promote legitimate art exchange, there will be a resultant effect on illegal

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100 Id. at 255.
101 Id.
art exchange. A world market for art objects which is being met by legally transferred items will have less impetus to resort to illegally-obtained items. In conclusion, nations need not isolate their art works in order to protect their cultural heritage. Rather, it is only by facilitating legitimate art exchange and balancing this need against national interests of preservation that nations will be able to elicit worldwide cooperation that is essential to any preservation endeavor.

VI. Conclusion

In recent years art preservation has become a major international concern. Many nations have enacted strict export laws to curb the depletion of their art and have participated in multilateral conventions stressing the same goal. The national regulations have often neglected to take into account the necessity for international art exchange. Moreover, although multilateral efforts have recognized the value of art commerce, broadness and generality in the instruments have allowed nations to perpetuate their restrictive controls.

National and international preservation efforts, in order to permit legal art exchange, must be directed only towards those cultural works that are vital to each nation’s heritage. Unless the opportunity for legitimate art traffic exists, nations will continue to evade controls and resort to illegitimate channels.

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