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THE TRADE OF CULTURAL PROPERTY: LEGAL PLURALISM IN AN AGE OF GLOBAL INSTITUTIONS

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I. A LEGAL PLURALIST APPROACH TO CULTURAL PROPERTY TRADE

Cultural property trade arouses the interest of comparative lawyers for at least three reasons. It does so, first, because of the difficulty in determining the legal ontology of cultural property. The legal notion of "cultural property" emerged for the first time at the level of international law with the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, as meaning "anything [movable or immovable] which bears witness to the artistry, history and identity of a particular culture".[1] As Antonio Gambaro puts it, "the problem of cultural property is that it includes any object which is capable of conveying a meta-individual message".[2] The

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[1] Stamatoudi, I.A., *Cultural Property Law and Restitution*, Cheltenham-Northampton, MA, 2010, 5.

[2] Gambaro, A., *Il diritto di proprietà*, in *Trattato di diritto civile e commerciale*, Cicu-Messineo-Mengoni, Milano, 1995, 426 (my translation); Graziadei, M. *I beni culturali: alcuni temi e motivi di interesse comparatistico*, in Alpa, G. et alii (curr.), *I beni culturali nel diritto. Problemi e prospettive*, Napoli, 2010, 17 ff.

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cultural relevance of this message depends on the subjects using the cultural property, or having access to it. Indeed, their values may change in space and time, in the same way as culture changes.[3] The many functions that cultural property can play as well as the plurality of its users have thus led to a legal regime which is complex and intricate.[4]

This intricacy introduces the second point of interest for comparative lawyers. It is the transnational, global character of cultural property that strongly impacts on the domestic regimes, creating a 'multilayered' and 'decentralized' structure of the sources of cultural property law. This fragmentation of the sources of law has been emphasized by globalization[5] and the internet,[6] and has resulted in the blurring of the classic separation between private and public actors in the law-making activity. The structure of the global network of cultural property rules, and particularly the relationships between the hard-law and soft-law layers, call for careful analysis.

The third striking feature is the close link existing between cultural property trade and human rights issues which adds another layer of global regulation involving potentially conflicting values. On the one side, and staying with Merryman's categories,[7] there are the 'source' countries, that is the countries which are rich in cultural property but are often poor in economic resources and which defend a "retentionist" approach under the umbrella of the right to dignity and self-determination. On the other side,

[3] Merryman, J.H., *Two Ways of Thinking About Cultural Property*, 80/4 *Am. J. Int'l L.* 831, 1986; *Idem*., *The Public Interest in Cultural Property*, 77 *California L. Rev.* 339, 1989; *Idem*, *Cultural Property Internationalism*, 12 *Int'l J. Cult. Prop.* 11, 2005; Prott, L. and O'Keefe, P.J. *Cultural heritage or cultural property?*, 1 *Int'l J. Cult. Prop.* 307, 1992; Prott, L., *The International Movement of Cultural Property*, 12 *Int'l J. Cult. Prop.* 225, 2005; O'Keefe, R., *The meaning of 'cultural property' under the 1954 Hague Convention*, XLVI *Netherlands Int'l L. R.* 26, 1999; Frigo, M., *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, 86 *Int'l Rev. of the Red Cross* 367, 2004.

[4] The value-based model has been elaborated by P. Bator in his seminal work *An Essay on International Trade in Art*, 34 *Stanford L. Rev.* 275, 1982; for a critical analysis of the arguments supporting this model, *see* Bauer, A.A., *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquity Trade Debate*, 31 *Fordham Int'l L.J.* 690, 2008; an extensive survey on the ontology of cultural property can be found in C. Forrest, *International Law and the Protection of Cultural Heritage*, London-N.Y., 2010, 3 ff.

[5] The literature on globalization and the law is vast. Suffice here to mention: Cassese, S., The Globalization of Law, 37 *N.Y.U. J. Int'l. L. & Pol.* 973 (2006); Shapiro, M., *Globalization of Law*, 1 *Indiana Journal of Global Legal Studies*, 37, 1993.

[6] Segura-Serrano, A., *Internet Regulation and the Role of International Law*, 10 *Max Planck UNYB* 191, 2006; M.E. Katsh, *Law in a Digital World*, N.Y., 1995; Rodotà, S., *Il diritto di avere diritti*, Roma-Bari, 2012, p. 378 ff.

[7] Cultural property issues cannot be properly understood without reference to Merryman's work in this field: *see* above fn. 3.

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there are the 'market' nations, that is countries which do not have a great deal of cultural property, but which are often rich and will seek to acquire cultural objects. These countries promote the international trade of cultural property, especially if privately owned.

In this paper I assess these three global issues concerning cultural property trade from the perspective of legal pluralism. I will not deal specifically with legal pluralism itself,[8] rather I will use a legal pluralism approach to analyze and better understand the multi-layered dimension of the law(s) of trade in cultural property. Legal pluralism generally aims to underline the social and cultural dimension of law, thus showing how law is an open system, made of intertwining official and unofficial rules, produced by a variety of state and non-state actors. In the age of globalization, legal pluralism has thus become a useful prism through which to analyze the complexity of global legal regimes,[9] including that governing the transnational trade of cultural movables, particularly pieces of art.[10]

The survey starts by outlining some of the global hard-law regimes that regulate the market of tradable movable property, that is the international law layer (paragraph 2) and the supra-national layers of the WTO and EU systems (paragraph 2.1). The problems arising from the interaction of these two systems are specifically highlighted (paragraph 3). The analysis then moves on to consider the role played by soft-law rules which have been developed worldwide by national and international organizations (paragraph 4). In particular, the paper explains how unofficial rules have led to the development of alternatives to the transfer of title of cultural objects. These alternatives allow circulation of, and public access to, cultural property, while avoiding the legal problems associated with transfer of title (paragraph 5). Moreover, national and international organizations have also been involved in practical arrangements which have led to the

[8] *See*, Merry, S.E., *Legal Pluralism*, 22/5 *Law & Society Rev.* 869, 1988 and B.Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 *Sydney L. Rev.* 375, 2008, all with further references.

[9] On globalization and legal pluralism *see*, Michaels, R., *Global Legal Pluralism*, 5 *Annual Review of Law and Social Science* 243 (2009); Koskenniemi, M., *Global legal pluralism: multiple regimes and multiple mode of thought*, available at: *http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf*.

[10] The interest in this sub-area of cultural property law lies in the increasing economic, cultural and even geopolitical significance of the art industry at the global level, thus making the quest for effective legal regimes a contemporary problem. *See* the paper by UNESCO Director-General Irina Bokova, *From Baghdad to Cairo – combating trafficking in cultural property*, in *Mondes, les cahiers du Quai d'Orsay*, Autumn 2011, also available at: *http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ERI/pdf/RevueMondesCahiersduQuaidOrsayENG.pdf*.

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buildup of registers, data banks, coordination and research activities, thus creating an infrastructure indispensable for the effective operation of the global legal regimes (paragraph 6). Then a further perspective will be added to the analysis —that of the human rights dimension of the global trade of cultural property— by examining the clash between potentially conflicting values, such as a peoples' right to dignity and self-determination, on the one hand, and the protection of the individual right to ownership, on the other. The aim of this review is to determine how these two conflicting sets of human rights can be balanced and used to assist in the creation of an effective global regulatory regime (paragraph 7). The concluding remarks highlight how a legal pluralist approach to the global trade of cultural property helps identify four potential paradigms for future development in this field and one public global interest to be pursued by global regulators (paragraph 8).

II. Multi-Layered Supra-National Hard-Law Regimes for the Trade of Cultural Property. The International Law Layer

Let us begin our examination by separating the different layers of regulations for the global trade of cultural property and identifying the main implications of the intricate web of relationships that link them.

Illicitly exported cultural property must be returned to its state of origin. This is a principle of international law. It was codified initially by the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 1970 as a principle of public international law, and reaffirmed afterwards by the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* from the perspective of substantive law.

These two international Conventions complement each other and form almost a single regime addressing illicit cultural property trade at the international level, though they adopt different means for doing so. The chief goal of the UNESCO 1970 Convention was to ensure compliance with national protective regimes for cultural property between state nations in their bi-lateral relationships. The key objective of the UNIDROIT Convention was to restrict the applicability of the private law rule that, "as far as movable property is concerned, *possession vaut titre*" (Article 2276 French c.c., ex Article 2279) on the assumption that such rule makes it more difficult for states to protect their cultural movables. As is well-known, the '*possession vaut titre*' rule is acknowledged in most civil law countries worldwide, though

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with varying nuances.[11] For example, some states, such as Italy, protect an acquisition made in good faith from a person who is not the owner in the case of stolen or involuntarily lost goods (Article 1153).[12] Other countries, such as France (Article 2276, ex 2279 c.c.) and Germany (§ 935 BGB), protect an acquisition made in good faith only if the goods are not stolen or involuntarily lost. The approach of common law jurisdictions is different. The true owner (in principle) prevails over all other purchasers, including those who do so in good faith (that is without notice of the illegal provenance of the goods).[13] At the international level, these differences have created inconsistencies which have been exploited by those engaged in practices such as "artwork laundering". This occurs when a piece of art is stolen in a country where the rule of good faith acquisition does not apply to stolen goods and is then subsequently brought to a country, such as Italy, in order to "clean" the title by way of the principle upholding good faith acquisition of stolen movables (Article 1153 c.c. mentioned above).[14]

The different approaches and contents of the two Conventions have been deeply analyzed by specific literature, therefore will not be dealt with in these pages. For the purposes of this survey, and given the long time these international law instruments have been in force, it is rather interesting to stress what impact they have had on the global art market.[15] In doing so, one

[11] This rule derives from the development of Germanic customary law applied in the French territories during the *Ancien Régime* and was first codified by the French c.c. in Article 2279 (now 2276 after the 2008 reform of prescription). From this starting point it has been adopted by most civil law countries in Europe and around the world, for instance in Germany (§ 932 BGB) and Italy (Article 1153 c.c.), although with some variations in scope from one country to the other. *See*, Siehr, K., *Vereinheitlichung des Mobiliarsachenrechts in Europa, insbesondere im Hinblick auf Kulturgüter*, *RabelsZ für ausländisches und internationales Privatrecht* 454 (1995); Id., *The Protection of Cultural Heritage and International Commerce*, 6/2 *Int'l J. Cult. Prop.* 304 (1997).

[12] Cp. Sacco, R. e Caterina, R., *Il possesso*, in *Trattato di diritto civile e commerciale* già diretto da Cicu e Messineo, continuato da Mengoni, vol. VII, 2a ed., Milano, 2000, 483.

[13] *See* Goode, R., *Commercial Law*, 2nd edn, London, 1995, 62 ff. for an exposition of the common law "*nemo dat quod non habet*" rule and its relevant limitations in practice. The result is that the true owner is protected against a non domino acquisition save in case of acquisition by a bone fide purchaser for value.

[14] In the famous case *Winkworth v. Christie Manson & Woods Ltd* [1980] Ch. 496 , [1980] 1 *All E.R.* 1121, cultural goods stolen in England had been brought to Italy and acquired under Article 1153 c.c. by an art collector (who was unaware of the fact that they were stolen goods). They were then moved back to England and sold on auction. The original owner claimed ownership, but the court refused the claim stating that there had been a good faith acquisition by the art collector according to the law of the country where the acquisition took place (Italy).

[15] Centre d'Etudes sur la Coopération Juridique Internationale, *Study on preventing and fighting illicit trafficking in cultural goods in the European Union*, CECOJI-CNRS-UMR 6224, Contract No.

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may focus on the number of countries that have ratified the Conventions. In this regard, the UNESCO Convention has been ratified by 123 states, including many market states,[16] whereas the UNIDROIT Convention has only been ratified by 33 states (mostly source nations already equipped with advanced protective regimes).[17] Some scholars[18] argue that this demonstrates that market nations have been reluctant to join the UNIDROIT Convention because they are wary of its potential to protect national, "retentionist" cultural property interests. However, other experts[19] have stressed the existence of a continuing trend over the years towards a more progressive approach with increased ratification of both Conventions. It is a development that is sometimes slow due to the (wise) choice of many states to adopt adequate internal legislation before ratifying the Convention(s).[20] Nevertheless, the issue remains that many states still find it difficult to adapt their internal legislation after ratification and that, even when international conventions are ratified and implemented, national judges sometimes refuse to apply the law of a foreign state in a domestic court.[21]

Home/2009/ISEC/PR/019-A2, Final Report, October 2011, available at: *http://ec.europa.eu/home-affairs/doc_centre/crime/docs/Report%20Trafficking%20in%20cultural%20goods%20EN.pdf*, 201 ff.; L.V. Prott, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On*, *Unif. L. Rev.* 215 (2009).

[16] *See* the chronological and alphabetical lists at: *http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html#STATE_PARTIES.*

[17] *See* the updated list of signatures, ratifications and accessions at: *http://www.unidroit.org/english/implement/i-95.pdf.*

[18] Magri, G., *La circolazione dei beni culturali nel diritto europeo, Limiti ed obblighi di restituzione*, Napoli, 2011, 39.

[19] Prott, L.V., *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On*, 231 with statistical evidence.

[20] For instance, after a thorough reform of its national law, New Zealand ratified the UNIDROIT Convention in 2006 and the UNESCO Convention in 2007. Germany only ratified the UNESCO Convention in 2007 (*Kulturgüterrückgabegesetz* of 18.5.2007, BGBl. I S 757, 2547, simultaneously implementing EC Directive 7/1993 as amended in 2001).

[21] *See*, for instance, *Attorney-General of New Zealand v. Ortiz* [1984] *AC* 1, according to which foreign public law rules do not enjoy extra-territorial application. Moreover, in 2004 the Paris Court of Appeal rejected a claim by Nigeria under Article 13 of the UNESCO Convention for the return of the Nok statues illegally exported from its territory by a French antique dealer on the basis of the argument of the non-extraterritorial application of foreign public law (despite ratification of the UNESCO Convention by both countries): Paris Court of Appeal, 5.4.2004, No. 2002/09897, *Federal Republic of Nigeria v. Alain de Montbrison*, JurisData No. 2004-238340; and Court of Cassation, 1ère civ., 20.9.2006, No. 04-15.599, JurisData No. 2006-034988. In 2005, the Swiss Federal Court refused to take account of an Indian public law ruling declaring the export of two ancient gold coins illegal on the basis of the argument that only an international agreement could oblige a state to apply the public law of

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Despite these obstacles, the UNESCO and UNIDROIT Conventions have had remarkable achievements in their effect on the art industry. First, at the level of hard-law developments, they have contributed to the increasing tendency to classify cultural property rights as human rights (see paragraph 7 below). In turn this has led to a growing interdependence between public and private international law.[22] Second, they have promoted a 'moralization' of the art industry. To avoid complex and expensive litigation "dealers and purchasers who are presented with evidence that a cultural object does not have a good provenance do not now wait for litigation to start, but come to an agreement to return, or to compensate a purchaser who returns".[23] This is a new trend in a market well used to dubious transactions,[24] a trend that displays "the birth of a moral duty to return […] accompanied by the development of solutions deriving from methods of alternative conflict resolution in the domain of cultural property".[25] Last, but not least, a growing body of national case law demonstrates that the principles enshrined in the Conventions are beginning to influence judicial approaches to restitution issues, despite the technical

another state. This was upheld despite ratification of the UNESCO Convention by India in 1977 and its acceptance by Switzerland in 2003: Decree Swiss Federal Court 8.4.2005, ATF III 418, JdT 2006 I 63. There have been similar rulings in Germany. For instance, in BGHZ 59, 82, the Bundesgerichtshof held that the export of cultural objects does not need to be protected by private law rules; in Italy by Cass., 24.11.1995, no. 12166 (*Gov. Francia c. Pilone e altro*), in *Foro it.* 1996, I, 907, and in the U.S. by *Government of Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989). On this case law *see* M. Graziadei, *Beni culturali (circolazione dei) (diritto internazionale privato)*, in *Enc. Dir.*, *Annali*, II, tomo 2, Milano, 2008, 91 ff., 97 ff.

[22] Prott, L.V., *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On*, 234.

[23] *Ibidem*, 223.

[24] Watson, P., Todeschini, C., *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, From Italy's Tomb Raiders to the World's Greatest Museums*, N.Y., 2006, referring to the Italian legal actions brought against Giacomo Medici, a dealer, and Marion True, a respected curator of the J. Paul Getty Museum in Los Angeles, following which the Getty, the Metropolitan Museum in N.Y. and the Boston Museum of Fine Arts returned cultural objects to Italy. Giacomo Medici has been condemned by the Italian Court of Cassation in 2011 (Cass. Criminal, Sec. II, 7.12.2011, no. 47918, in CED Cass. pen. 2011), while the action against Marion True was dropped in 2011 due to expiration of the prescription period. *See* also Briggs, A.K. *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 *Chi. J. Int'l L.* 623, 2007, on the agreement signed in February 2006 on the Euphronios Krater which came about as a consequence of this litigation.

[25] Centre d'Etudes sur la Coopération Juridique Internationale, *Study on preventing and fighting illicit trafficking in cultural goods in the European Union*, quoted above, fn.15, at 201; E. Barkan, *Making Amends: A New International Morality?*, in *Witness to history: a compendium of documents and writings on the return of cultural objects*, UNESCO, 2011, 78 ff.

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issue of the applicability of international law in domestic jurisdictions. In the well-known English *Barakat* case of 2007, the Court of Appeal of England and Wales applied both Iranian public and private law protecting cultural property. The court also referred to the UNESCO and UNIDROIT Conventions as well as to EC Directive 7/1993. The judges stated that even if some of those instruments have no direct effect in national law, they nevertheless indicate the willingness of the UK to cooperate in cases of illicit export of cultural property and, therefore, need to be taken into account.[26]

The WTO and EU Systems

In the multilevel structure of cultural property law, the UNIDROIT and UNESCO Conventions are not the only supra-national sources of hard-law. Rather, they operate in tandem with other supra-national hard-law regimes, like the global WTO system and the regional regime of the EU, on which I will now focus.

Let us start with the GATT-WTO system. During the Uruguay Round of negotiations held between 1986 and 1994, a distinct opposition emerged between the U.S.A. and Europe regarding the inclusion of cultural goods (particularly "cultural industries") in the regime for global trade set out in GATT 1994.[27] As far as cultural goods were concerned, this conflict is still governed by Article XX (f) GATT (the so-called "cultural [goods] exception").[28] This rule allows restrictions on the free trade

[26] *Government of the Islamic Republic of Iran v. The Barakat Gallery Ltd* [2007] EWCA (Ethiopian Wildlife Conservation Authority) Civ 1374 (CA). This trend began in the U.S., with the famous case *United States v. McClain*, 593 F2d (5th Circ. 1979) and in *United States v. Schulz*, 333 F3d 393 (2nd Circ. 2003). The first decision applied Mexican law establishing public ownership on archeological goods to objects located in the U.S. The second case followed the first one with reference to analogous Egyptian law.

[27] For an account of this story, see Cahn, S., and Schimmel, D., *The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or is Affected by the Agreement on TRIPS*?, 15 *Cardozo Arts & Ent LJ* 281, 1997.

[28] M. Burri, *Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects*, 2 *Diversity* 1059 (2010); T. Broude, *Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO*, 26/4 *U. Pa. J. Int'l Econ. L.* 623 (2005). This paper does not deal with "cultural exception" regulated by Arts. XX (a) GATT 1947 and XIV(a) GATS relating to "public morals", nor with TRIPS 1994, since it deals with cultural movables only. Neither does this paper address Article 2101 of NAFTA which incorporates Article XX GATT. Also excluded are similar provisions established by other regional associations like Mercosur, for which see Article 50 of the Montevideo Treaty of 1980; European Free Trade Association of 1960, Article 13; European Economic Area of 2.5.1992, Article 13.

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of goods if they are "imposed for the protection of national treasures of artistic, historic or archaeological value". Yet, the derogation is subject to compliance with the non-discrimination principle, reciprocity between states, and non-disguised restriction on international trade.[29] As such, it may be argued that the WTO regime is undermined by the lack of precise definitions of cultural goods, which may result in an incoherent application of the GATT rules.[30] Moreover, GATT rules establishing "cultural exceptions" were only designed to apply to audiovisual media and not to cultural goods in general.[31] Efforts to clarify the scope of these exceptions by relying on other international conventions, such as the UNESCO Conventions (see paragraph no. 3 below) have thus far not been successful. Therefore, some argue that a general principle of free tradability of cultural goods can be inferred from the GATT system, provided that states do not adopt restrictive measures. One should note, however, that in spite of the many uncertainties, this provision has not led to any GATT-related dispute so far.[32]

In many respects, the WTO system for cultural property law closely resembles the EU regime. Under EU law, the principle of the free movement of goods is one of the fundamental milestones of the internal 'common' market (Articles 26, 34 and 35 of the TFEU). In the internal market, competences are shared between the Union and the Member States. The EU Treaty formally establishes that the Union has only what it is called "attributed competences", that is it can only act when the Treaty specifically confers power on it according to the objectives set by the Treaty (Article 5(1) of the TEC, now Article 5(1)(2) of the TEU). On the basis of this

[29] In order to determine whether or not there has been compliance with the above mentioned principles of non-discrimination, reciprocity and non-disguised restriction on international trade, one may look to the case law on the "cultural exception" of "public morals" (Article XX (a) GATT 1947 and XIV (a) GATS) and argue that: "First, the trade-restrictive measure must be within the scope of the "cultural protection" exception; second, the measure must be "necessary" for the protection of local culture and cultural diversity": Broude, T., *Taking "Trade and Culture" Seriously*, 683.

[30] Peng, S., *International Trade in Cultural Products: UNESCO's Commitment to Promoting Cultural Diversity and Its Relations with the WTO*, 11 *Int'l Trade & Business L. Rev.* 218 (2008).

[31] The GATT system is much more developed for the film industry. According to Articles IV and III, paragraph 10, GATT 1947, included in GATT 1994, states can introduce so-called screen quotas as a more favorable treatment for national audiovisual goods to the disadvantage of goods of the same kind by foreign states. These favorable treatments consist mainly of public financing for the specific industry: M. Burri, *Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects*, 1061.

[32] Matz-Lück, N., *Article XX lit. f GATT*, in Wolfrum, R., P.-T. Stoll, A. Seibert-Fohr (ed.), *WTO. Technical Barriers and SPS Measures*, in *Max Planck Commentaries on World Trade Law*, Leiden, 2007, 137 ff.

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principle, numerous legislative acts have been enacted (by way of Regulations and Directives) to remove the obstacles which may hinder the working of the internal market.[33]

The traditional core of EU policy on the free movement of goods — including cultural property— is embedded in Articles 28, 30 and 34-36 of the TFEU. Articles 28 and 30 prohibit customs duties on imports and exports between Member States, including charges having an equivalent effect and customs duties of a fiscal nature. Articles 34 and 35 prohibit quantitative restrictions on the import and export of goods between Member States, including measures having an equivalent effect. However, Article 36 (similarly to the WTO regime under Article XX (f) GATT mentioned above) exempts "national treasures possessing artistic, historic or archaeological value".[34] Nevertheless, these restrictions must not constitute a means of "arbitrary discrimination" or a "disguised restriction" on trade between Member States (Article 36). In order to understand the meaning of Article 36 it must be stressed that, first, there is no general EU definition of what amounts to "national treasures possessing artistic, historic or archaeological value" and therefore Member States are free to select the objects they wish to include. Second, under the EU system, it is up to the Court of Justice of the EU to determine what measures are permitted under Article 36 and what are not. In order to satisfy the requirements of the CJEU test under Article 36, any measure must be subject to both the principle of proportionality as laid down in Article 5(4) of the TFEU[35] and the principle of subsidiarity as laid down by Article 5(2) of the TFEU.[36] These requirements may lead one to conclude that the CJEU's interpretation of the exceptions under Article 36 will be somewhat

[33] *See*, Bussani, M., *A Streetcar Named Desire: The European Civil Code in the Global Legal Order*, 84 *Tul.L.R.* 1083 (2009) and Id., *Faut-il se passer du common law (européen)? Réflexions sur un code civil continental dans le droit mondialisé*, in *Revue Internationale de Droit Comparé*, 7, 2010.

[34] For the inclusion of unique works of art in the notion of 'goods' inasmuch as they can be valued in money and be subjected to commercial transactions for the purposes of Article 28(1) of the TFEU ("The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries"), *see* Case 7/68, *Commission v. Italy*, 1968, ECR 618.

[35] Article 5(4) of the TFEU states that EU action shall not exceed what is necessary to achieve the objectives of the Treaties.

[36] Article 5(2) of the TFEU states that "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States […] but can rather […] be better achieved at Union level".

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restrictive.[37] To date, there are no precedents of the CJEU on the meaning of "arbitrary discrimination" or "disguised restriction" on trade between Member States" with reference to the protection of national treasures as contained in the wording of Article 36.[38]

As far as cultural property law is concerned, it must be stressed that there is no general EU competence to legislate for substantive cultural property law. Member States retain their exclusive power on the matter, also on the basis of the expressly declared Member States' competence in the area of substantive property law according to Article 345 of the TFEU (former Article 295 of the TEC). This position remains unaltered by Article 167 of the TFEU, devoted to EU cultural policy. It states that "[t]he Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore". The provision then lists a series of cooperation actions and measures that the Union must undertake for this purpose. However it expressly excludes any requirement to harmonize national laws on the matter (Article 167(5)).[39] This exclusion under Article 167 explains why the adoption of EU "secondary legislation" (that is Regulations and Directives) only refers to specific issues of cultural property related to the formation of the internal market.

Regarding the content of EU secondary legislation on cultural property,[40] Regulation (no. 3911/1992, now substituted by Regulation) no. 116/2009 "on the export of cultural goods", establishes a common export policy for cultural goods exported outside EU borders and which are subject to an export license. The scope of cultural objects falling under the Regulation has been defined in a list of objects annexed to the Regulation. The Annex also sets out chronological and monetary bases for identifying

[37] Stamatoudi, I.A., *Cultural Property Law and Restitution*, 112-117; B. Pasa, *Beni culturali (diritto dell'Unione Europea)*, 73 ff., 83; Centre d'Etudes sur la Coopération Juridique Internationale, *Study on preventing and fighting illicit trafficking in cultural goods in the European Union*, quoted above, fn.15, 41-45.

[38] But there is case law on the notions of "arbitrary discrimination" and "disguised restriction" in relation to the other exceptions contained in Art. 36 and this case law could help draw some arguments by analogy with relation to the exception of "national treasures": Stamatoudi, *Ibidem*, 114.

[39] Article 167 of the TFEU does not provide for an exclusive, nor a shared competence of the Union, but simply a complementary competence in relation to the competences of the Member States with a view to supplementing them (Article 6 of the TFEU).

[40] *See* also Council Directive 94/5 of 14.2.1994 supplementing the common system of value added tax and then Council Directive 2006/112 of 28.11.2006 on the common system of value added tax.

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cultural goods.[41] It is important to note that the definition of cultural goods in the Regulation is not identical to the definition of "national treasures" referred to in Article 36 of the TFEU. According to Recital 7 of the Regulation, "Annex I to this Regulation is aimed at describing the categories of cultural goods that 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". Therefore, there may be cultural objects that do not fall under the scope of the Regulation, but that do fall into national categories of cultural property, to which national export controls apply.

Directive 1993/7/EEC, modified by Directive 2001/38/EEC, "on the return of cultural objects unlawfully removed from the territory of a Member State", forms a complementary regime to that of Regulation no. 116/2009. The Directive's purpose is to secure the return to the Member States' territory of cultural objects that have been removed from their domain in breach of national or EU law (cp. Article 2). It does so by setting up a system of extraterritorial enforcement of national protection measures between Member States. It does not aim to change national laws on movable property (in accordance with the prohibition under Article 345 of the TFEU as mentioned above). The Directive provides for a definition of "cultural objects" (Article 1) that partially overlaps with that set forth in the Regulation, but is broader. Indeed, for the purpose of the Directive, cultural objects are those that are (a) classified under national laws or administrative procedures as "national treasures possessing artistic, historic or archeological value" and (b) either belonging to one of the categories listed in the Annex to the Directive or forming an integral part of public collections listed in the inventories of museums, archives or libraries' conservation collections or the inventories of ecclesiastical institutions. Member States may extend the categories of objects listed in the Annex in order to bring them under the Directive.[42]

Basically the EU Directive 7/1993 regulates the conditions under which a Member State can bring an action for the return of cultural objects unlawfully removed from its territory on or after the 1st of January 1993, as against its possessor or holder (Article 5). This action can be initiated only

[41] Cultural goods listed in the Annex to the Regulation are divided into 15 categories, including archaeological objects, paintings, engravings, books and photographs. The criteria for an article to qualify as a "cultural object", which vary according to the category, are age (over 100, 75 or 50 years, depending on the case), and minimum financial value (from 0 Euros for certain cultural goods, up to 150,000 Euros for pictures).

[42] Details in I.A. Stamatoudi, *Cultural Property Law and Restitution*, 141 ff.

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by a state and not by individuals, and it is subject to a very short limitation period of one year after the requesting Member State becomes aware of the location of the object and of the identity of its possessor/holder (Article 7). Due to the short limitation period, the lack of retroactivity and other drawbacks (related, for instance, to the different definitions of cultural goods in the Directive and the Regulation), the Directive has not had a wide application and case law on Article 5 appears to be scarce.[43]

III. The Interactions Between the Hard-Law Supra-National Regimes

The interactions existing between the abovementioned hard-law supranational regimes for cultural property trade lead one to identify a series of coordination difficulties between them.

For instance, the interaction between national and supranational regimes requires the modification of national laws by the supranational layer of rules. This is done either automatically, as is the case for EU law that has direct effect, or indirectly, that is by means of ratification of international conventions. In this context one can notice that the relationship between national legal systems and the UNESCO 1970 Convention has been difficult. This is due partly to the lack of detailed rules facilitating the transposition of the international legal instrument into national law and partly to the absence of control mechanisms (such as sanctions) within the international rules.[44]

One can detect the same difficulties at the regional level, in the interaction between national legal orders and the EU regime. The different definitions contained in the EU legal instruments, as well as their different scopes of application demonstrate that the EU regime is somewhat fragmented. Moreover, EU law relies on the national laws of the Member States, to which it continuously needs to refer in order to complete the definition of cultural objects, or to identify export controls, the breach of which calls for the application of the Directive. It may be concluded, therefore, that the EU regional regime does not achieve uniformity. Rather it creates a complex

[43] The most recent data available on the number of cases initiated on the basis of Art. 5 of the directive (return proceedings) are contained in the Third report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2009) 408 final – not published in the Official Journal), available at: *http://europa.eu/legislation_summaries/culture/l11017b_en.htm#AmendingAct*. According to the Report (at p. 8), between 2004 and 2007 only 8 legal actions have been instituted under this provision.

[44] Stamatoudi, I.A., *Cultural Property Law and Restitution*, 53 f.

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interrelation between the two level of regulations that in large part remain distinct one from the other.

Moreover, the relationship between EU law and international law is also problematic. For instance, Article 13(3) of the UNIDROIT Convention states that "in their relations with each other, Contracting states which are Members of organizations of economic integration or regional bodies may declare that they will apply the internal rules of these organizations or bodies and will not therefore apply as between these states the provisions of this Convention the scope of application of which coincides with that of those rules". This rule seeks to ensure that there is coordination between the different regimes of regional or supranational organizations, such as EU legislation and other international conventions. However, it should be noted that problems of coordination will inevitably arise between EU Directive 7/1993 and the UNIDROIT Convention. This is due to the fact that many states parties to the Convention are also Member States of the EU. While both instruments contain provisions on the return of cultural objects illicitly exported/unlawfully removed from one state to another, these provisions still differ in their scope of application and in their substantive requirements. Whereas the EU Directive 7/1993 applies to a much more restricted category of goods than the UNIDROIT Convention,[45] the Convention does not contain rules on the substantive property law rules of the Member States. Moreover, under the Directive, actions for return can only be brought by a Member State, whereas under the UNIDROIT Convention, if goods are stolen, even private persons can claim return of the objects.[46] Furthermore, the instruments contain different limitation periods for a return action. Under the Directive, the period is one year after the requesting Member State became aware of the location of the object and of the identity of its possessor (Article 7). Under the Convention, the period is three years from the same point of time (Articles 3(3) and 5(5)). These differences explain why it is argued that the possibility of obtaining return under the UNIDROIT Convention is easier than under the EU Directive.[47]

Finally, similar difficulties of coordination can also be detected between the UNESCO and the WTO systems.[48] Under the UNESCO re-

[45] *See* above paragraph no. 2.1. On the broad scope of the UNIDROIT Convention, even in comparison with that of the UNESCO Convention of 1970, *see* I.A. Stamatoudi, *Cultural Property Law and Restitution*, 72-76.

[46] *Explanatory Report on the UNIDROIT Convention on Stolen or illegally Exported Cultural Objects*, *Unif. L. Rev.* 476, 506 (2001/3), also available at: *http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm*. *See* also above paragraph no. 2.1.

[47] Study on preventing and fighting illicit trafficking in cultural goods in the European Union, quoted above, fn. 15, at 58; Stamatoudi, I.A., *Cultural Property Law and Restitution*, 156 f.

[48] D'Alterio, E., *Il commercio*, 100 f.

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gime, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005[49] (also known as the Convention on Cultural Diversity), is of particular interest. To date, 125 countries are states parties[50] and the Convention is widely regarded as an effective response to economic globalization and to the emergence of enforceable multilateral trade rules through the WTO. For those advocating the "cultural exception" doctrine, the Convention is viewed as a success. Some are of the view[51] that the Convention could help enlarge the scope of protection of cultural diversity within the WTO system. In this perspective, the UNESCO Convention on Cultural Diversity could be used to help interpret what is meant by the term "cultural exception" to the general principle of free tradability of cultural goods within the WTO rules (Article XX (f) GATT 1994). However, coordinating this Convention with the WTO agreements is a difficult task. While Article 20 of the Convention states that relationships with other international law instruments should be based on the principles of "mutual supportiveness, complementarity and non-subordination", there would appear to be a clear technical separation between the UNESCO and the GATT instruments. This is particularly clear with regard to enforcement. For example, it is highly unlikely that UNESCO provisions would be explicitly enforced by the WTO Dispute Settlement Body.[52] As such, the relationship between these UNESCO and WTO regimes may be better described in terms of conflict rather than cooperation.

All these examples of interrelations between legal regimes are illustrative of the so-called "self-contained" nature of global regimes[53] emerging in the field of cultural property.

[49] Text available at: *http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/convention-text/*.

[50] *See* the alphabetical order of the states parties at: *http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E&order=alpha*.

[51] Voon, T., *UNESCO and the WTO: a Clash of Cultures?*, 55 *Int. & Comp. L. Q.*, 635-652 (2006); D'Alterio, E., *Il commercio*, 100.

[52] According to Burri, M., *Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects*, 1072, this is showed by the *China-Publications and Audiovisual Products* case: Appellate Body Report *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*; WTO: Geneva, Switzerland, WT/DS363/R, adopted 12 August 2009 and WTO Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China-Publications and Audiovisual Products)*; WTO: Geneva, Switzerland, WT/DS363/AB/R, adopted 21 December 2009.

[53] Pauwelyn, J., *Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands*, 25 *Mich. J. Int'l Law*, 903 f. (2004); Lindross A., and Mehling, M., *Dispelling the*

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IV. The Complementary Role of Soft-Law and the Development of a Global Public Interest

The number of 'soft-law' rules issued by non-state regulators is another striking feature regarding the sources of law for the global trade of cultural property. It is interesting to view this phenomenon through the lens of legal pluralism. Unofficial law has always been, and still is, an effective way to shape legal relationships among individuals and communities, in both western and non-western legal traditions.[54] A legal pluralism approach helps detect this 'unofficial' legal layer and analyze it distinctly from other branches of 'hard' law.[55] In the area of cultural property law, this means examining the unofficial rules produced by the global regulators of cultural property law, that is, essentially, the rules produced by international professional organizations. These organizations, that can be private or mixed (private-public) entities, act both as rule-makers and addressees of these rules, by issuing codes of conduct for professionals in the global art market.[56]

Despite the different origins and contents of these codes, they share some common features. Firstly, their 'soft' character does not mean that they are ineffective. On the contrary, professional rules of conduct may provide sanctions against members who do not comply with them, such as the dismissal from the association and the ensuing loss of reputation. Moreover,

Chimera of Self-Contained Regimes. International Law and the WTO, 16/5 *Eur. J. Int'l L.*, 857, 2006.

[54] Bussani, M., *A Pluralist Approach to Mixed Jurisdictions*, in 6 *Journal of Comp. L.*, 161, 2011.

[55] For some examples of how unofficial rules shape global financial law, and the law of international trade, *see* Bussani, M., *Il diritto dell'Occidente. Geopolitica delle regole globali*, Torino, 2010, respectively at p. 26 f.; 72 ff., 94 ff. *See* also the essays gathered in Van, H., Schooten and Verschuuren J. (eds), *Governance and Law. State Regulation and Non-state Law*, Cheltenham-Northampton, 2008 and the seminal study of S. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 228 *Am. Sociol. Rev.* 55 (1963).

[56] It must be recalled that codes of conduct have been primarily fostered by the UNESCO Convention 1970, Article 5 lit. e). It has been noted that this provision seems to legitimize the imposition of codes of conduct even by state entities: Magri, G., *La circolazione dei beni culturali nel diritto europeo*, 40. Among the many codes of ethics and best practices in the global trade of cultural property, the following are worth mentioning: the Guidelines on Loans of Antiquities and Ancient Art of 2006, issued by the Association of Art Museum Directors (AAMD); the Code of Ethics for Museums by the International Council of Museums (ICOM) issued in 1986 and revised in 2004; the International Code of Ethics for Dealers in Cultural Property of 2000 by the Confédération internationale des négociants en oeuvres d'art (CINOA); the Codes prepared by the American Alliance of Museums (AAM, former American Association of Museums); the EAA Code of Practice, 1997, the EAA Principles of Conduct for Contract Archeology (1998) and the Code of Practice for Fieldwork Training, 2004, all by the European Association of Archeologists, and the Code of Ethics adopted in 1996 by the International Council on Archives.

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compliance with best practices can result in advantages, for instance, in case of claims for return of cultural property under the 1995 UNIDROIT Convention. The buyer who acquires a cultural object from a dealer complying with the UNESCO International Code of Ethics for Dealers in Cultural Property (1999-2000) will most probably be considered a bona fide purchaser and, as such, will be entitled to compensation.[57]

Secondly, unofficial law is not deemed (nor suited) to regulate general interests because it comes from professional groups.[58] Yet, if it is certainly true that soft-law is not neutral *vis-à-vis* the interests represented by the given professional group, it is also true that it nevertheless seeks to conciliate these particular interests with public expectations focusing on fairness and transparency. This is why the various sources of soft-law tend to share core ideas linked to the need for transparency and fairness in the art market, such as "acting with due diligence" and "preventing trade in illicit or stolen cultural property". Such principles enjoy worldwide acceptance.[59]

Thirdly, soft-law codes refer to international law conventions and their hard-law provisions when regulating important matters, such as the trade of art, the duty to cooperate with the state of origin of the traded artwork, the duty to comply with national and international rules on cultural property protection, and other matters. By incorporating international law provisions, soft-law rules are capable of playing a very important role in supplementing international instruments.[60] For instance, codes of conduct are often applied in negotiations to settle restitution disputes between museums, and in alternative dispute resolution mechanisms where neither international conventions, nor EU law, can apply. In these contexts, codes of conduct can on the one hand ensure (at least a certain degree of) uniformity of core principles in dealing with cultural property disputes,[61] and, on the

[57] Stamatoudi, I.A., *Cultural Property Law and Restitution*, 161 and 168. Yet, an empirical research by S.R.M. McKenzie, published in *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, London, 2005, 106 and *passim* showed that from the interview of a sample of dealers, it could be inferred that codes of ethics are not respected.

[58] Frigo, M., *Ethical Rules and Codes of Honour Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property*, in Venturini, G. and Bariatti S. (eds), *Liber Fausto Pocar – New Instruments of Private International Law*, Milano, 2009, 371 ff., at 389.

[59] Stamatoudi, I.A., *Cultural Property Law and Restitution*, 161.

[60] Frigo, M., *Ethical Rules and Codes of Honour Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property*, 371; O'Keefe, P.J., *Codes of Ethics: Forms and Functions in Cultural Heritage*, 7 *Int'l J. Cult. Prop.* 147, 1998.

[61] Stamatoudi, I.A., *Cultural Property Law and Restitution*, 187.

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other hand, permit the arbitrators and/or mediators to take into account certain factual elements and to give weight to soft-law rules in a manner that ordinary judges would not be able to do.[62]

Comparative administrative law scholarship has also pointed out that, in general, soft-law contributions to the field of global cultural property trade respond, at the international level, to the same needs that, at the domestic level, are addressed by principles of public/administrative law (such as fairness, transparency, participation, the right to reasons). To this extent, soft law may be said to express a "global public interest" which could serve as a reference point for tomorrow's policy choices in this sector.[63] In fact, "globalization means that the international civil society articulates its interests independently from those of states and nations. It has become a worldwide concern that states do not sufficiently account for mankind's interests independently from states or national interests".[64] Soft-law acts as the guardian of the global public interest in cultural property trade insofar as it can be framed in terms of (i) public access to artworks and (ii) free movement of cultural objects for international exhibitions. These aspects will be now examined.

V. Alternative Forms of Circulation of Cultural Property: Art Loans

In the global art industry, there is an increasing number of alternative methods for the circulation of cultural objects. These new methods can be called 'alternative' because they do not rely on traditional trade based on

[62] Yet, recourse to ADR in cultural property disputes is not very frequent, despite its endorsement by the International Law Association and the Permanent Court of Arbitration. This is probably due to the tension between the parties in a restitution dispute, that can scarcely be reconciled with the friendly dispute settlement of ADRs; and to the weak endorsement of ADR mechanisms in international conventions on cultural property: Magri, G., *La circolazione dei beni culturali nel diritto europeo*, 42, with further references. It has been noted that usually recourse to courts takes place if the claim for restitution is crystal-clear in terms of facts and legal argument, and if there are private parties involved such that the influence of a state cannot be used for an out-of-court settlement: Stamatoudi, I.A., *Cultural Property Law and Restitution*, 189. On ADR and cultural property *see* also Varner, E., *Arbitrating Cultural Property Disputes*, 13 *Cardozo J. Conflict Resol.* 477, 2012; Bohe, N., *Politics, Leverage and Beauty: Why the Courtroom is not the Best Option for Cultural Property Disputes*, 1 *Creighton Int'l & Comp. L.J.* 100, 2011. For the need to develop tailored dispute resolutions techniques in the field of art law *see* A.L. Bandle and S. Theurich, *Alternative Dispute Resolution and Art Law – A New Research Project of the Geneva Art-Law Centre*, 6/1 *J. Int'l Comm. L. & Tech.* 28, 2011.

[63] Casini, L.,"*Italian Hours": The globalization of cultural property law*, especially at pp. 391-393.

[64] Jayme, E., *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 *Vand. J. Transnat'l L.* 927 (2005).

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the transfer of title with the well-known related legal problems.[65] Rather they by-pass the title-related technicalities by focusing on possession.[66] We are referring to the growing trend in which museums prefer to use art loans and exchanges instead of acquiring (or claiming back ownership and/or possession of) artworks.[67]

As a preliminary consideration, it is important to underline that the term "loan" is not (cannot be) herein used in a technical sense. Rather it refers to a variety of schemes through which the temporary disposition of cultural objects is provided for exhibitions (or research purposes) and not for sale.[68] What deserves attention for our purposes is that there is no hard-law regulating this phenomenon in a standardized way at the international or the European level.

The UNESCO Convention of 1970 does not address the problem of art loans and exchanges. Existing bilateral agreements between states vary in their content,[69] making it difficult to devise a generalized international

[65] The problem is acute especially in common law countries and in the federal U.S. system where property law falls within the states' competences: DePorter Hoover, D., *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 *Geo. Wash. L. Rev.* 443, 1983; Kreder, J.A. and Bauer, B., *Protecting Property Rights and Unleashing Capital in Art*, 3 *Utah L. Rev.* 881, 2011, interestingly advocating creation of a U.S. federal registration system for documented works of art and antiquities, based on the Torrens registration system.

[66] Cornu, M. and Renold, M.A., *La mise en forme d'un intérêt commun dans la propriété culturelle: des solutions négociées aux noveaux modes possibles de propriété partagée*, in Renold, M.A. *et al.* (eds), *Resolving Disputes in Cultural Property – La résolution des litiges en matière de biens culturelles*, Geneve-Zurich, 2012, 251 ff.

[67] *See* generally Patterson, R.K., *The "Caring and Sharing" Alternative: Recent Progress in the International Law Association to Develop Draft Cultural Material Principles*, 12 *Int'l J. Cultural Prop.* 62, 2005.

[68] *See* Reeves, V.K., *International Transactions in the Art Market*, in Kaufman, R.S. (ed), *Art Law Handbook*, N.Y., 2000, 461. N. Palmer, *Adrift of a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title*, 38 *Vand. J. Transnt'l L.* 947, 953, 2005.

[69] For example, the U.S. and Italy Memorandum of Understanding of 19.1.2001, imposing import restrictions on pre-Classical, Classical, and Imperial Roman archaeological material from Italy. The MoU was amended and extended for a five year period on 1.1.2006 and then amended and extended for an additional five-year period on 1.1.2011. In Article II lit. G, it provides for incentives use art loans for lending from Italy to U.S. museums. See *http://eca.state.gov/files/bureau/it2001mou.pdf.* Often these bilateral agreements are adopted as an alternative means of dispute resolution to determine ownership of artworks. They are normally used when states claim back artworks detained by foreign museums and the agreement provides for recognition of the claimant state's ownership but obliges the state to lend the object to the detaining museum for a certain period of time. On this practice *see*: Wolkoff, J.S., *Transcending Cultural Nationalist and Internationalist Tendencies: The Case for Mutually Beneficial Repatriation Agreements*, 11 *Cardozo J. Conflict Resol.* 709, 2010; MacKintosh Ritchie, A., *Victorious Youth in Peril: Analyzing Arguments Used in Cultural Property Dispute to Resolve the Case*

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hard-law regulatory model. This is why the development of art loans is mainly based on the *ad hoc* practices of institutions involved. These practices have only recently been acknowledged by leading global regulators in general documents and are themselves akin to soft-law rules. Similar to the ethics codes discussed above, their effectiveness will depend on the degree of acceptance they enjoy from their addressees, as well as the threat of moral sanctions, like the loss of reputation and the consequent expulsion from the relevant market (circumstances that, of course, also have economic consequences).[70]

At the international level, the main soft-law 'code' dealing with art loans are the *General Principles on the Administration of Loans and Exchange of Work of Arts between Institutions*, also known as the "London Principles", issued in 1995 and revised in 2002.[71] These principles have been prepared and accepted by the Réunion des musées nationaux, an international group of organizers of large-scale exhibitions consisting of European, North American and other institutions. The Cultural Heritage Law Committee of the International Law Association also produced the *Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material* in 2006.[72]

At the EU level, it is particularly interesting to note the development of a coherent policy towards achieving soft-law regional standardization for art loans. The legal basis for this policy is Article 167 of the TFEU. As mentioned above (no. 2.1), Article 167 of the TFEU states that "The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore". It then lists a series of actions and measures that the Union must undertake for this purpose, excluding, however, harmonization of national laws. In 2007, on the basis of this Article, the EU Commission issued a Communication entitled "Euro-

of the Getty Bronze, 9 *Pepp. Disp. Resol. L.J.* 325, 2009; *see* also A.K. Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 *Chi. J. Int'l L.* 623, 2007 for the agreement signed in February 2006 on the Euphronios Krater.

70 I. Chiavarelli, I., *Il prestito e lo "scambio"*, in L. Casini (ed), *La globalizzazione dei beni culturali*, 113 ff.

71 Available at: *http://www.lending-for-europe.eu/fileadmin/CM/public/documents/policy/Lending_to_Europe.pdf*. In North America, the *Guidelines* on Loans of Antiquities and Ancient Art issued by the Association of Art Museum Directors in 2006 are also relevant, available at: *http://www.aamd.org/papers/documents/Loans_and_PressRelease.pdf*.

72 They are published in 13 *Int'l J. Cult. Prop.* (2006), 409; Nafziger, J.A.R., *The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material*, 8/1 *Chi. J. Int'l L.* 147 (2007).

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pean Agenda for Culture in a Globalizing World".[73] According to this Communication, the Commission has adopted the EU's Culture Programme for the period 2007-2013 with a budget of 400 million euro. The program aims to achieve three main objectives: to promote cross-border mobility of those working in the cultural sector; to encourage the transnational circulation of cultural and artistic output; and to foster intercultural dialogue.[74]

Another EU initiative was the Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards of 2006.[75] It sought to facilitate access to Europe's cultural heritage, to make it available for all citizens and to find new ways to improve cooperation, trust and good practices for lending between museums.[76]

Digitalization of collections and data banks, together with the networking activities carried out at the European level by national and EU institutions, and more generally by private working groups and professional organizations, help spread the practice of art loans worldwide.

However, a few barriers still exist. They stem from differences between national laws. First, national laws on insurance often differ. An art loan arrangement will usually include an insurance policy for the items which normally represents about 20% of the exhibition costs. Self-insurance or non-insurance agreements are only permitted in a small number of states. Self-insurance agreements operate between entities financed by the same source, that is between public museums, and exclude payment of insurance for reciprocal loans (counter-loans) of artworks. Non-insurance agreements have the same content, but operate between subjects financed by different sources, such as a public and a private museum. Sometimes a state in-

[73] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2007/242 final, of 10.5.2007.

[74] More information are available at: *http://ec.europa.eu/culture/our-programmes-and-actions/culture-programme-(2007-2013)_en.htm*.

[75] Available at: *http://www.ne-mo.org/fileadmin/Dateien/public/topics/Collection_Mobility/Members/Action_Plan_for_the_EU_Promotion.pdf*. It contributes to the implementation of Council Resolution Nr 13839/04 which established mobility (works of art, art collections and exhibitions) as one of five priorities in the Work Plan for Culture 2005-2006.

[76] The implementation of the Action Plan was supported by the creation of working groups that were asked to propose practical solutions related to their areas of responsibility, *see*: *http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm*. On the basis of their documents, the Network of European Museum Organizations (NEMO), a consulting body of the EU and of European museums, has developed a standard loan agreement in the form of an online-tool-kit. It is available at: *http://www.ne-mo.org/index.php?id=110*.

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demnity is available, but usually the indemnity does not cover the entire value of the loaned items and, therefore, private insurance is still needed.[77] Moreover, even aside from the cost issue, a problem with insurance also lies in the vast array of schemes available throughout Europe. Often some institutions refuse to enter into a loan because they are unwilling to accept the insurance scheme offered by the foreign institution.[78] In light of the above, it would seem that a good case can be made for the standardization of insurance schemes in Europe and internationally, so as to strengthen the art loan industry.

Second, the cross-border lending of art increases access to, and information on the existence and location of the loaned items, and this consequently increases the risk of litigation. Art loans are destabilized by third party claims that seek to dispossess the borrower by asserting an overriding title or right of possession for the claimant.[79] This can happen when the claimant relies on a former theft of the item and asserts that the subsequent purchase contract does not extinguish her/his right; or when the claimant is the victim of prosecution, but his dispossession —though morally condemnable— cannot be defined as theft in legal terms; or when states are claimants relying on state ownership of undiscovered antiquities.[80] These situations fully demonstrate the so-called cultural property paradox, that is the intrinsic tension existing between those who are of the view that cultural objects should be regarded as property and those who argue that cultural objects should be regarded as culture.[81]

Some measures could be taken in order to avoid the problems created by these two conflicting points of view. The first could be to make it easier for the borrower to search the title of a particular item. This could be achieved by the aforementioned standardized insurance schemes. Even more effective, although more difficult to implement, could be the design of a digitalized registration system of art works and antiquities, an idea

[77] See the outcome of the 2010 Report by the OMC Working Group on *State Indemnity and Shared Liabilities Agreements*, available at: *http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm*.

[78] Chiavarelli, I., *Il prestito e lo "scambio"*, 134-136.

[79] It might be useful to remember that insurance can also cover the legal risk related to art loans, but this of course increases its cost.

[80] Palmer, N., *Adrift of a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title*, 947 ff.

[81] Mezey, N., *The Paradoxes of Cultural Property*, 107 *Colum. L. Rev.* 2004 (2007).

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that has been proposed by some academics from the U.S.[82] The second measure could be to introduce generalized anti-seizure laws. This could be done on the basis of reciprocity between states. Indeed, anti-seizure legislation in the country of the borrower is a protection which is in the interest of both parties, because it makes the loaned artworks immune from any dispossession actions for the duration of the exhibition.[83]

VI. International Organizations and the Infrastructure for the Global Trade of Cultural Property

As well as contributing to the development of soft-law, international organizations have also created an operational structure which has proved indispensable for the effective application of both global hard-law and soft-law. UNESCO and its main partner, the International Council of Museums (ICOM), have been at the forefront of this activity, as have the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), the International Council of Monuments and Sites (ICOMS), the International Foundation for Art Research (IFAR), the Art Loss Register,[84] INTERPOL (and EUROPOL within the EU),[85] and also the World Customs Organization (WCO).[86] These organizations have set up administrative bodies and funds[87] to promote greater cooperation among

[82] Kreder, J.A. and Bauer, B., *Protecting Property Rights and Unleashing Capital in Art*, 3 *Utah L. Rev.* 881 (2011).

[83] The immunity conferred to by anti-seizures laws may have different meanings. It can be construed as immunity from any lawsuit involving the given item; or as immunity from any action to seize it; or as immunity of the lender from any action related to title to the artwork or, finally, as a guarantee of return. For a detailed world overview on this topic, *see* N. van Woudenberg, *State Immunity and Cultural Objects on Loan*, Leiden, 2012, and also R. Pavoni, *Sovereign Immunity and Enforcement of International cultural Property Law*, EUI Working Paper 2012/30, available at: *http://cadmus.eui.eu/bitstream/handle/1814/24554/LAW_2012_30_Pavoni.pdf*.

[84] This is a private database of stolen art and antiques set up in London in 1991 by a partnership between auction houses, trade associations, the insurance industry and the International Foundation of Art Research. *See http://www.artloss.com/en*.

[85] Europol is the EU law enforcement agency facilitating the exchange of criminal intelligence between police, customs and security services: *https://www.europol.europa.eu*.

[86] In 2005, the WCO and UNESCO signed a Memorandum of Understanding and have jointly developed a UNESCO-WCO Model Export Certificate for Cultural Objects: *http://portal.unesco.org/culture/en/ev.php-URL_ID=27288&URL_DO=DO_TOPIC&URL_SECTION=201.html*.

[87] The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in Case of Illicit Appropriation in 1999

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states and to facilitate international agreements and conventions. They have promoted educational initiatives that have enhanced public awareness of cultural property trade and restitution.[88] Furthermore, they have developed expertise and practical initiatives that are essential to the issue of restitution of cultural property, such as legal databases,[89] registers of stolen cultural objects[90] and identification systems for cultural objects.[91]

This progress could not have been possible without digitalization. It has made the mapping of cultural objects easier and has facilitated, at least in terms of cost reduction, international cooperation among national and supranational organizations and agencies. Yet, there are many factors which still impede the smooth functioning of the international network that protects cultural property and combats trafficking. These obstacles lie in coordination difficulties. Variety across national legal regimes results in the unequal treatment of cultural property. The traceability of cultural objects is still hindered by a lack of coordination between national and supranational registers, inventories and classification systems. The different kinds of items covered by the notion of cultural property or cultural heritage produces discontinuity in the degree of risk to which those objects are exposed. Political factors also affect the level of protection surrounding cultural property because wars and economic crises inevitably weaken the resources available to protect property. Therefore, in order to better protect cultural property, we need coordination at the political, legal and operational levels so as to avoid

has set up a fund for supporting Member States in their efforts to pursue the return or restitution of cultural property: *http://portal.unesco.org/culture/en/ev.php-URL_ID=36346&URL_DO=DO_TOPIC&URL_SECTION=201.html*.

[88] Further details in Stamatoudi, I.A., *Cultural Property Law and Restitution*, 178 ff.

[89] The Cultural Heritage Laws Database was set up by UNESCO in 2003 as a means of fighting illicit trafficking in cultural property: *http://www.unesco.org/culture/natlaws/*.

[90] For example, the INTERPOL database on stolen works of art, set up in 1947, is accessible not only to law enforcement agencies but also to members of the public who have been provided with specific access rights while a certain set of data are available to the general public. *See http://www.interpol.int/Crime-areas/Works-of-art/Works-of-art.* Another database is the Art Loss Register mentioned above. There is also the ICOM Red List that classifies the endangered categories of archaeological objects or works of art in the most vulnerable areas of the world, in order to prevent them being sold or illegally exported: *http://icom.museum/programmes/fighting-illicit-traffic/red-list/*.

[91] The Object ID is the international standard for describing cultural objects, in order to facilitate their identification in case of theft. It has been developed by the Getty Information Institute and is promoted by FBI, Scotland Yard, Interpol, UNESCO, museums, cultural heritage organizations, art trade and art appraisal organizations and insurance companies: *see http://archives.icom.museum/object-id/*.

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overlap and resource waste. This calls for nothing less than strong coordination at the global level.[92]

VII. Global Trade of Cultural Property and Human Rights

The problems surrounding the global trade of cultural property reveal a link between cultural property issues and human rights, but what are the implications of such a relationship?

To answer this question we may stay with Merryman's categories and consider the approach of source nations to cultural property. Their perspective is generally focused on cultural significance, and aims to retain cultural objects within the national territory. These states will usually adopt laws that nationalize cultural objects in order to prohibit or sharply limit their export.[93] They often frame their arguments in terms of human rights, such as the right to dignity or self-determination, as recognized by the UN Universal Declaration of Human Rights of 1948.[94] Indeed, the right to cultural property of individuals and communities has been expressly recognized in recent years as a fundamental human right by both the UN Declaration of the Rights of the Indigenous People (1993)[95] and the Stockholm Declaration published in 1998 by the International Council of Monuments and Sites for the fiftieth anniversary of the UN Universal Declaration of Hu-

[92] This is a view also expressed at the European level by the Centre d'Etudes sur la Coopération Juridique Internationale in their *Study on preventing and fighting illicit trafficking in cultural goods in the European Union*, quoted above, fn.15, at 167 ff.

[93] For example, the Mexican Law on National Assets (Ley General De Bienes Nacionales) of 2004, last modified in 2007 and published in DOF, 31.8.2007. On the Mexican system of protection of cultural property *see* J. Sánchez Cordero, *Mexico*, in T. Kono (ed), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century*, Leiden-Boston, 2010, 495 ff.

[94] *See* in particular Articles 1 and 17(1) of the UN Universal Declaration of Human Rights of 1948 recognizing private and collective property. Both the United Nations Human Rights Committee, charged with the task of monitoring UN member states on their compliance with the International Covenant on Civil and Political Rights of 1966 (ICCPR), and the Inter-American Court of Human Rights have recognized that indigenous people hold a property right over their ancestral land, on the basis of Articles 1(2) and 27 of the ICCPR and 21 of the American Convention of Human Rights of 1969, respectively. *See* the concluding observations of the Human Rights Committee to Paraguay in document CCPR/C/PRY/CO/2 of 26.4.2006, available at: *http://uhri.ohchr.org/document/index/e464cf1a-a2c9-42b7-8a36-a196600bcf9d*, and the case decided by the Inter-American Court of Human Rights, *Mayagna(Sumo) Awas Tingni Community c. Nicaragua*, 31.8.2001, paragraph 148 and f.

[95] Available at: *http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf*, *see* especially Arts. 11 and 15.

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man Rights,[96] as well as by the Council of Europe Framework Declaration on the Value of Cultural Heritage for Society of 2005.[97]

However, on the other hand, human rights considerations have also recently been used to support the interest of those who are more inclined to foster cultural property trade, especially with regard to privately owned movables (this interest coincides with that of market nations). From this point of view, any public law restriction on free trade of cultural property which enables the state to compulsorily purchase a work of art that is considered to be of particular artistic and historical importance, must satisfy the constitutional requirements of legitimate expropriation.[98] An example of this can be found in Article 1 of the First Protocol to the European Convention on Human Rights of 1950 which provides that "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". From the abundance of case law on this provision, it is clear that expropriation must: (i) be in the public interest, and (ii) be accompanied by a compensation determined on the basis of the market value. The exercise of state preemption rights that do not comply with these requirements will constitute a violation of the ECHR.[99] This same constitutional argument, based on the constitutional requirements of legitimate expropriation, has also been adopted by the Supreme Court of Costa Rica. It did so in an unusual decision in 1983 in which it ruled that the Costa Rican Law on National Archeological Patrimony of 28.12.1981 was unconstitutional because it resulted in the expropriation of private property in violation of the requirements imposed by the Costa Rican Constitution, which included compensation.[100]

These examples show that constitutional arguments articulated in terms of human rights can be used as a two-edged weapon to direct policy on cultural property law. They can promote repatriation actions or, on the contrary, they can require compensation to be paid by states to the foreclosed

[96] Available at: *http://www.icomos.org/charters/Stockholm-e.pdf*.

[97] Available at: *http://conventions.coe.int/Treaty/en/Treaties/Html/199.htm*, *see* especially Articles 1 and 4.

[98] Merryman, J.H., *Cultural Property, International Trade and Human Rights*, 19 *Cardozo Arts & Entertainment L.J.* 51 (2001); Siehr, K., *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 *Vand. J. Transnat'l L.* 1067, 1079 f., 2005.

[99] It was so decided in the famous case *Beyeler v. Italy*, of 5.1.2000, App. No. 33202/96, Eur. Ct. H.R., 2000.

[100] Costa Rica, Boletin judicial No. 90 of 12.5.1983.

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possessor and therefore encourage countries to limit their restrictive policies in this area. At first glance, one could be tempted to conclude that the human rights perspective on cultural property is caught in its own paradox.[101] Yet, upon closer analysis, one may argue that the vagueness of the human rights narrative is not necessarily a disadvantage. On the contrary, it may prove to be a useful tool in that it allows national and supranational judges to exert transnational control based on the balancing of conflicting constitutional/universal values. The potential of the human rights apparatus lies in its power to affect national policies on cultural property by placing both incentives and constraints on certain types of conduct. For instance, human rights norms, by imposing compensation in cases of expropriation, may help to avoid the unnecessary retention of cultural property.[102] This would thereby prompt national regulators to address the proper level of market regulation. In this context, judicial interpretation of constitutional texts may reinforce soft-law rules by acting as the guardian of the global public interest. In doing so, they would be guaranteeing public access to artwork, while at the same time respecting and balancing conflicting interests.

VIII. Concluding Remarks: Four Layers of Regulation for One Global Public Interest

Although not exhaustive, this overview allows us to make some observations on the trends taking place affecting cultural property trade in the age of globalization. We may do so by identifying a series of paradigms of development or —using the words familiar to legal pluralists— layers of regulation.

The rise in global regimes was caused by the need to combat illicit trade in cultural property that violates fundamental individual, public and collective interests, such as basic property rights, human rights and the principle of state sovereignty, both in wartime and in peace time. This need has significantly expanded with globalization.[103]

We have seen that these problems were first addressed by public international legal instruments, such as multilateral and regional treaties and conventions. The primary aim of these instruments was to ensure mutual recognition of national barriers to the art market, whether they were barri-

[101] Mezey, N., *The Paradoxes of Cultural Property*, 107 *Colum. L. Rev.* 2004, 2007.

[102] Merryman, J.H. *Cultural Property, International Trade and Human Rights*, 66, 2001.

[103] *See* above, paragraph no. 1.

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ers created by laws about title to certain properties or as a result of export controls.[104] Yet, it soon became apparent that public international law did not provide a complete solution. As noted above, this is due to the fact that international regimes are usually fragmented,[105] and their relationship is often one of conflict and not one of coordination, as it is demonstrated by the different definitions of cultural property and by the lack of appropriate enforcement mechanisms.[106] We may consider this first stage as the "traditional public international law layer".

This layer was subsequently integrated by the 1995 UNIDROIT Convention which was drafted in collaboration with UNESCO. It sought to counterbalance some of the shortcomings of the UNESCO Convention by addressing private international law issues. We have noted above that these two instruments are complementary and form an almost single regime for addressing illicit international trade in cultural property. Despite a number of drawbacks,[107] the cooperation between the UNESCO and the UNIDROIT regimes has made remarkable achievements in the art market. These achievements can be assessed in three ways. First, at the level of hard-law, this cooperation has contributed towards more interdependence between public and private international law which seems to be the only effective way to tackle global issues in cultural property law. Second, the partnership between these two organizations has prompted a 'moralization' of the art industry through dissuasion and deterrence.[108] In order to avoid complex and expensive litigation, dealers and purchasers who are presented with evidence that a cultural object does not have good provenance do not now wait for litigation to commence, but come to an agreement to return, or to compensate a purchaser who returns the object.[109] Third, national case law has begun to demonstrate that the principles enshrined in both Conventions are influencing judicial approaches to restitution issues, such as with the English *Barakat* case of 2007.[110] These

[104] *See* above, paragraphs. nos. 2 and 2.1.

[105] *See* Koskenniemi, M., *Global Legal Pluralism: multiple regimes and multiple mode of thought*, quoted above fn. 9 and International Law Commission (M. Koskenniemi, Chair), *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, 4.4.2006, UN Doc. A/CN.4/L.682, pp. 1-256.

[106] *See* above paragraph no. 3.

[107] *See* above paragraph no. 2.

[108] *Idem*.

[109] *Idem*.

[110] *Government of the Islamic Republic of Iran v. The Barakat Gallery Ltd* (2007) EWCA (Ethiopian Wildlife Conservation Authority) Civ 1374 (CA). *See* above paragraph no. 2.

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developments have led to another layer of regulation: the "mixed public and private international law layer".

Then, another change of paradigm occurred: the art industry moved from an international hard-law framework, essentially based on the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, to a global one, composed of guidelines, policies and other so-called soft-law mechanisms created and enforced by a variety of non-state actors. We may call this the "narrative layer".[111] The shift shows that traditional international hard-law instruments alone are not sufficient to address the problems facing the global cultural property trade. This is something that was envisaged in the UNESCO Convention, for instance when it invokes cooperation between states under Article 13(b), including the stipulation of bilateral agreements (Article 15). The Convention also foresees that states parties may call on the technical assistance of UNESCO (Article 17(1)) which, in turn, may call on the cooperation of nongovernmental organizations (Article 17(3)). The provisions demonstrate that already in 1970, UNESCO had established the architecture needed for a shift from the traditional international law framework to the global one, with the involvement of non-state actors as co-regulators, together with states. This apparatus has enormous potential to correct the deficiencies created by over-lapping supranational regimes.[112] In particular, as we have noted above, soft-law provisions and operational activities of non-state actors have led to what we have called the global infrastructure for cultural property trade[113] and have replicated a series of classical principles of public/administrative national law (fairness, transparency, participation, the right to reasons) at a global level. As such, this has produced a new "global public interest", that is, the interest in a *legal* trade in cultural property, which could serve as a point of reference for tomorrow's policy choices in this field.[114]

[111] This wording is in part borrowed from L. Casini, *"Italian Hours": The globalization of cultural property law*, at p. 393, who uses the expression "narrative norms" to refer to the same phenomenon, borrowing this expression in turn from Jayme, E., *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 *Vand. J. Transnat'l L.* 927, 943 (2005) and *Idem.*, *Die Washingtoner Erklärung über Nazi-Enteignungen von Kunstwerken der Holocaustopfer: Narrative Normen im Kunstrecht*, in *Museen im Zivilrecht —Anknupfungspolitik 1933-1945 – die eigene Geschichte— Provenienzforschung an deutschen Kunstmuseen im internationalen Vergleich*, Magdeburg, 2002, 247, 251.

[112] *See* above, paragraphs nos. 4, 5, and 6.

[113] *See* above paragraph no. 6.

[114] Casini, L., "*Italian Hours*": *The globalization of cultural property law*, especially at pp. 391-393. *See* also above paragraph no. 4.

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In addition to this interplay of law-makers in a multi-level, de-centralized system of regulation we must also include the contribution made by national and supranational judges on the basis of the human rights discourse. This trend can be identified as a fourth and promising path of development of the global art industry: the "human rights dimension". If pursued, this trend could promote homogeneity throughout the world by operating as a check on any excessive protective measures used by states that result in inefficient barriers to the free trade of cultural property.[115]

In conclusion, one can realize that the above four paradigms or layers of developments are complementary in showing that the right to free circulation of cultural property (private or public), on the one hand, and the protection of cultural property/heritage of humankind and cultural diversity, on the other, are not necessarily incompatible with one another. Indeed, commodification of art is an unavoidable[116] emerging trend in the globalized market.[117] UNESCO itself has endorsed it as it is revealed by its last efforts at safeguarding the intangible cultural heritage and cultural diversity. UNESCO seems to distinguish between "commodification", denoting the positive/legitimate side of cultural property trade and "commercialization" of culture which denotes the negative side of cultural property trade such as looting. While the 2001 *Convention on the Protection of the Underwater Cultural Heritage* expressly forbids the commercial exploitation of such heritage,[118] the 2005 *Convention on Protection and Promotion of the Diversity of Cultural Expressions* promotes commodification of culture as a means of fostering economic development.[119] In this regard, "culture as the common patrimony of humankind becomes an important tool to counterbalance sovereignty […] and to foreclose the objection of "domestic jurisdiction" so often invoked to preserve the power monopoly of the sovereign state".[120]

[115] *See* above, paragraph no. 7.

[116] Merryman, J.H., *Cultural Property Internationalism*, quoted above, fn. 3, at 11.

[117] For an anthropological view on this phenomenon *see* Appadurai, A., *Modernity at Large: Cultural Dimensions of Globalization*, Minneapolis-London, 1996, and generally *Idem* (ed), *The Social Life of Things: Commodities in Cultural Perspective*, Cambridge, 1986.

[118] Article 2(7) states that "[u]nderwater cultural heritage shall not be commercially exploited".

[119] *See* Article 1 lit. (f). Recital no. 18 of the Convention reads as follows: "Being convinced that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value". See also Article 4(4) for the definition of "cultural goods and services". *See* also Article 4(4) for the definition of "cultural goods and services".

[120] Francioni, F., *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 *Mich. J. Int'l L.* 1209, 1220, 2004.

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The protection of a *legal* trade in cultural property is part of this common interest of humankind and, as such, has emerged as a global public interest. As a legal pluralism perspective neatly shows, the effectiveness of this *legal* trade is ensured by a plurality of actors, operating at a variety of levels and through a variety of methods to protect the legality of the trade and, more or less directly, the cultural property itself. To be sure, overlapping of, and contrasts between global regimes and patterns of development are an unavoidable reality. Legal pluralism is —methodologically— a powerful tool for a better understanding of the law under which global cultural property trade operates.