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CULTURAL HERITAGE LAW

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DRAFT REPORT

At the 72nd Conference of the International Law Association (2006), the Committee on Cultural Heritage Law adopted a two-part agenda for work during the next biennium: (1) a study of the concept of safe havens for temporary deposit of cultural material rescued from circumstances of armed conflict and other serious threats, and (2) a study of the relationship between international trade law and cultural heritage law.

At a meeting in London, May 17-18, 2007, the Committee reviewed papers by Kurt Siehr on the concept of safe havens for threatened cultural material and by Sabine von Schorlemer and Robert Paterson on the relationship between international trade law and cultural heritage law. The Committee decided to focus at this meeting on the preparation of a set of guidelines for establishing and managing safe havens for cultural material. Accordingly, the Committee first reviewed Professor Siehr's paper and a written critique of it by Lyndel Prot, and, after extensive discussion, developed a rough set of guidelines. The Committee asked the Chair and Reporter to prepare draft guidelines on this basis, upon which Professor Siehr would prepare explanatory comments and a Safe Haven Model Contract. After further review and any revisions by the Committee, the composite document would then be submitted for adoption by the ILA at its 73rd Conference. Concluding discussion at the London meeting focused on the two papers related to international trade law. The Committee decided to focus that initiative primarily on culture-related exceptions in the World Trade Organization (WTO)'s General Agreement on Tariffs and Trade (GATT) and in regional agreements. Professor Paterson agreed to prepare a working paper with that focus for discussion at the 73rd Conference.

What follows in Part I are annotated Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material, together with a Safe Haven Model Contract (Annex). The document, having gone through a drafting and editing process by the Chair, Reporter and Professor Siehr, has been modified and finally approved by the Committee for review and eventual adoption by the ILA at its 73rd Conference. Part II is a working paper by the Committee's Reporter on the relationship between international trade law and cultural heritage law.

Part I.

Numerous catastrophes and other circumstances may threaten cultural material—for example, armed conflict (such as Europe during World War II, the former Yugoslavia during its civil war, Iraq and Afghanistan); and natural disasters (floods in Florence, New Orleans, and Dresden, volcanic eruptions in Italy and Indonesia, earthquakes in Pakistan and Iran, and fires in California, Greece, and Weimar). Consider also the threats of unauthorized excavations (Guatemala, Iraq, Italy, and Turkey); and public projects (dam construction in China and highway construction in Greece). Whatever the cause, cultural material may need to be removed temporarily to safe havens for safekeeping and proper preservation until it can be returned to its original site. The initiator of this temporary relocation may be a state, a private owner, a museum, or another entitled person or entity. The following Guidelines are intended to provide a framework for the establishment and conduct of such safe havens and for the return of cultural material held for safekeeping and preservation there.

Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material

Recognizing the crucial need to rescue cultural material threatened by armed conflict, natural disaster, illegal excavation, or other insecurity;

Noting the uncertainty of standards and procedures for safekeeping and preserving cultural material that has been rescued by removal from the territory of one state to the territory of another state;

Noting also the uncertainty about requirements for returning cultural material after a threat necessitating its removal to the territory of another state has ended;

Observing the importance of engaging both governmental and nongovernmental bodies in safekeeping and preserving cultural material;

Convinced therefore of the need for and efficacy of international guidelines, engaging state authorities, for safekeeping, preserving, and returning cultural material within the source state and after it has been removed from the territory of one state to that of another state;

Confirming therefore the following Guidelines for the establishment and conduct of safe havens for cultural material; and

Perceiving the efficacy of a model contract to formalize essential terms of the relationship between a source state or entity and a safe haven;

The International Law Association hereby adopts these Guidelines:

1. Definitions

- a) “Cultural material” includes all objects defined as cultural property in Article 1 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

COMMENTS:

Instead of creating a new definition, the Guidelines adopt the most widely-accepted definition of “cultural property” in Article 1 of the 1970 UNESCO Convention. This definition has been only slightly modified in other instruments such as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

- b) “Source state” is the state in which cultural material is in need of a safe haven, either in the state itself or in the territory of another state.

COMMENTS:

For the purpose of these Guidelines, the source state is the state in which cultural material is in need of a safe haven, whether that is the state of origin of the material—that is, where it was created—or a state to which the material has been later removed from the state of origin.

2. Safe Havens for Cultural Material

Safe havens are created in order to care for cultural material that has been endangered by armed conflict, natural disasters, illegal excavation, or other insecurity and has therefore been removed for safekeeping and preservation from the territory of the source state to the territory of another state or to a place of safety in the source state.

COMMENTS:

There is often a critical need for safe havens when endangered cultural material is removed for safekeeping and protection from one state to another. There is also a need for safe havens to protect material within a source state—for example, material that is imperiled by calamities, has been seized as contraband, or is of unknown origin or suspect provenance. An example of international cooperation in establishing a safe haven involved the removal and temporary storage of Afghan cultural material at the privately owned Afghanistan Museum and Library in Bubendorf, Switzerland (1999-2007).

3. Governmental Establishment and Supervision of Safe Havens

State authorities shall establish safe havens or supervise such havens within their territories as governmental or nongovernmental institutions may otherwise create.

COMMENTS:

3.1. Under these Guidelines, safe havens are national and not international facilities that are established and managed under national law. The Guidelines provide for and help harmonize the obligations of these facilities (see Guideline 4).

3.2. Safe havens may be established as either nongovernmental or governmental facilities under national law.

3.3. Safe havens need not be specific organizations or institutions. They may be simply facilities within national museums or other institutions that receive cultural material for safekeeping, restoration, and preservation. One example involves the designation of facilities in national museums as trustees of material whose ownership is either unknown or disputed.

4. Obligations of Safe Havens

- a) A safe haven shall be responsible for safekeeping and preserving cultural material that has been entrusted to its care. This general responsibility shall extend to the exceptional case of an unknown source state. A safe haven shall take all reasonable measures to avoid deterioration or endangerment of cultural material by applying the highest standards of care.
- b) A safe haven is governed by the law of the state in which it is located, but shall accord due respect to the laws and traditions of the source state of cultural material.
- c) A safe haven shall accept no cultural material received from another state in violation of its export provisions, unless it is satisfied that the material has left that country under circumstances precluding the issuance of an export certificate.
- d) A safe haven shall take all possible measures to make an inventory of all cultural material entrusted to its care and guarantee public access to the information in the inventory.
- e) A safe haven may exhibit cultural material in its care unless to do so would be inappropriate under the laws and traditions of the source state. All such material on exhibit shall be identified as safe haven material.

- f) A safe haven may not lend safe haven material without the consent of the source state or entity.
- g) Any proceeds from exhibition or loans may be used only for safekeeping and preserving safe haven material.
- h) A safe haven shall not engage in any activity the result of which would be to stimulate illegal trafficking in cultural material or other threats to it.
- i) A safe haven must return cultural material items as soon as the established owner or other established source of the material so requests, provided that the safe haven is satisfied with the conditions for safekeeping and preserving the material by the requesting state or entity.
- j) Nothing in these Guidelines shall require the safe haven to do or refrain from doing anything inconsistent with an order of a court of competent jurisdiction.

COMMENTS:

4.1. Under 4 a), safe havens are responsible for safekeeping and preserving cultural material even if the material is owned by a foreign state or citizen or there are no prospects for compensation of attendant expenses by the owner. In keeping with the highest standards of care, any necessary restorative work should be planned and its cost discussed with the source state or entity before the work is done.

4.2. Under 4 b), safe haven authorities, in fulfilling their responsibilities for safekeeping and preserving cultural material of foreign origin, must respect the laws and customs of the source state and of customary international law. This means, for example, that safe havens ordinarily must store human remains with dignity and, whenever possible, preserve and restore religious objects according to the religious and cultural traditions and practices in the source state. Otherwise, local or national law applicable in safe havens governs the standard of care for the pertinent cultural material.

4.3. Under 4 c), states to which material is to be removed for safekeeping must respect the export laws of source states unless, under the often difficult circumstances that give rise to the need for removal, the issuance of an export certificate is impossible.

4.4. Guideline 4 d) requires safe havens to apply the general principle of transparency. Safe havens must inventory cultural material and guarantee public access to it. Because safe havens are trustees or custodians of material for the benefit of legitimate owners, they must ensure the rights of those owners. It is also imperative that safe havens ensure public access to all records and inventories of cultural material and, in response to return claims, to the cultural material itself.

4.5. Under 4 e), safe havens may exhibit entrusted material, but they must ensure that the material is clearly described and identified as “cultural material entrusted to the exhibiting institution as safe haven,” or other words to that effect. Such an exhibition has the added benefit of drawing public attention to the good offices of safe havens and the threats to cultural material in foreign countries. Cultural material should not be exhibited, however, when it would be inappropriate to do so under the legal rules or customs of the state or culture of origin.

4.6. According to 4 f), loans of entrusted cultural material should be strictly limited to instances where source states, private owners, museums, or other institutions, as appropriate, give their consent in writing or when the purpose of the loan is to unite dismembered cultural material or to have it conserved in third countries for exhibition to the public. Such “functional” loans are compatible with the obligations and duties of conscientious trustees.

4.7. Guideline 4 g) makes clear that entrusted cultural material should not be used by safe havens to generate income. All proceeds from exhibitions, loans, and photographs must be used for safekeeping and preservation of the material.

4.8. Under 4 h), it is incompatible with the fiduciary duties of safe havens to engage in illicit trade in the cultural material for which they have assumed responsibility or to engage in any activity that might stimulate illegal trafficking, such as cooperating with thieves and smugglers in defiance of the very purposes and obligations of safe havens.

4.9. Guideline 4 i) makes clear that safe havens are only temporary homes for endangered cultural material. Therefore, they must return protected cultural material after the threat prompting its removal has come to an end and material can again be protected in the source state. It is expected that safe havens normally will agree to requests for the return of entrusted cultural material under applicable national law.

Safe havens can also initiate an appropriate return in order, for example, to minimize the expenses of safekeeping and preservation.

4.10. Under 4 j), safe havens are generally bound by court decisions governing entrusted cultural material. Among courts with concurrent jurisdiction, courts in the territory of safe havens have the final word on what should be done or not done regarding safeguarded material.

5. Obligations of Source States or Entities

- a) A source state or entity of safe haven material shall give all information to the safe haven which is necessary to fulfill the safe haven's obligations.
- b) A source state or entity shall be expected to compensate the safe haven for reasonable costs of safekeeping, preserving, and returning cultural material.
- c) A source state or entity shall ensure that requested cultural material whose return it has requested will be secured and preserved after its return to that state or entity.

COMMENTS:

5.1. The obligation to give all information necessary to ensure the effectiveness of a safe haven includes facts concerning the material removed for safekeeping as, for example, the risk of its exposure to air, water, temperature, insects and other vermin. In addition, the required information should include such legal data as the identity of the titleholder or other interested parties so as to facilitate a return, if appropriate, to the correct person or entity and any relevant information concerning legal rules or customs of the source state or culture of origin that may affect how the cultural material is to be treated in the safe haven.

5.2. In principle, a source state is expected to compensate a safe haven for its reasonable expenses of safekeeping and preservation. This principle is grounded in both fairness to the safe haven and the importance of overcoming any reluctance, for financial reasons, on the part of a prospective safe haven to safeguard endangered material. However, the parties may stipulate conditions more favourable for the source state (see Guideline 6 and Annex). Normally compensation is due after material has been returned and the costs of safekeeping can be calculated precisely.

5.3. Parties may stipulate their own necessary special conditions regarding the security of safeguarded material, however difficult it may be to enforce those conditions (see Annex). If a safe haven has valid reason to believe that in case of return the objects will not be protected properly, it may decline to return material until the safe haven is satisfied that the requesting source state is able to protect it. The requirement of 5 c) may further encourage source states to take measures to protect their material. Conversely, the failure of a source state to preserve its own cultural material may discourage other states from returning material.

6. Party Autonomy

A safe haven and a source state or entity may stipulate conditions of care which are different from those in these Guidelines. Whenever possible, such conditions shall be expressed in the form of a written agreement.

COMMENTS:

These Guidelines are not legally binding. Parties to a contract for the establishment of a safe haven (see Annex) may therefore stipulate other conditions for safekeeping and return of cultural material besides those contained in these Guidelines. Such stipulations should be in writing.

7. International Instruments

Nothing in these Guidelines shall be interpreted so as to affect the application of any international agreement or other instrument.

COMMENTS:

These Guidelines do not abrogate binding international agreements or other instruments otherwise applicable and are not intended to affect mandatory national laws.

8. Assistance of UNESCO and Other International Bodies

- a) A safe haven state is encouraged to request the United Nations Educational, Scientific and Cultural Organization (UNESCO) for assistance in maintaining the safe haven.
- b) States in need of assistance are encouraged to request UNESCO to help coordinate their cooperation with states that are ready to provide such assistance for safekeeping and preserving cultural material.
- c) Safe havens of cultural material and source states are also encouraged to seek the assistance of other international and regional bodies that are engaged in the protection of cultural material.

COMMENTS:

As a specialized organization with an excellent international network, UNESCO is in a good position to facilitate communication between the source state and the state on whose territory a safe haven is or will be established. The parties are urged, therefore, to contact UNESCO and other international organizations such as the International Council of Museums (ICOM) and the International Council on Monuments and Sites (ICOMOS) to ask for assistance and help.

9. Implementation

- a) These Guidelines are intended to be integrated into the rules and practices of museums, archaeologists, ethnologists, other professionals including state authorities, and pertinent professional organizations.
- b) Whenever possible, responsible states and entities are encouraged to call upon the International Council of Museums (ICOM) and other organizations and institutions for technical assistance in support and implementation of these Guidelines.
- c) These Guidelines are also intended to serve as a basis for the development of rules and policies of governmental and nongovernmental bodies.
- d) If a dispute arises between the source state or entity and the safe haven concerning a request for return of cultural material, the parties shall attempt to resolve it whenever possible by good-faith negotiations and consultations before proceeding to more formal means of dispute resolution such as those provided for by UNESCO.
- e) These Guidelines encourage the source state or entity and the safe haven to formalize their relationship within the terms of the annexed Safe Haven Model Contract

COMMENTS:

9.1. Museums and other institutional users of these Guidelines should incorporate them into their rules of ethics or practice and interpret them broadly and purposefully. The Guidelines also afford institutions a model for drafting their own guidelines or rules.

9.2. Users of the Guidelines should review them periodically and modify them as may be appropriate.

9.3. Users of these Guidelines should consider adopting the Safe Haven Model Contract and, in particular, provide for a method to resolve any dispute under the contract.

Annex

Safe Haven Model Contract

The Source State or Entity _____ and the
Safe Haven _____ agree that
the items

- 1) _____
- 2) _____

or the Collection _____, consisting of the items in the inventory or catalogue, as
follows: _____ shall be removed for safekeeping and preservation to
_____.

Special conditions for safekeeping:

- 1) _____
- 2) _____

The items may be exhibited, but may not be lent without the consent of the Source State or Entity.

The items will be returned at the request of the Source State or Entity provided that the Source State or Entity reasonably can ensure that the items will be kept safely and preserved properly after their return.

The Source State or Entity will compensate the Safe Haven for any reasonable expenses, including cost of restorative work done in order to preserve the entrusted objects.

This contract is governed by the law of the state in which the Safe Haven is located. The parties will seek to resolve any dispute under the contract or related to it by recourse to a court in the territory of the Safe Haven, UNESCO dispute resolution procedures, arbitration, or other dispute resolution procedures as the parties may so agree.

Signed _____ Date _____ Place _____

Signed _____ Date _____ Place _____

Part II.

Revised Working Paper on the Relationship Between International Trade Law and Cultural Heritage Law

1. Introduction

At an interim meeting in London in May 2007 the Cultural Heritage Law Committee (“the Committee”) discussed a project on the relationship between international trade law and the protection of cultural heritage. Sabine von Schorlemer and Robert Paterson formulated memoranda on the topic, and it was decided that, at least initially, the Committee would focus on the “national treasures” exception in Article XX(f) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and similar exceptions in other trade agreements. The Committee also decided to consult with the ILA’s International Trade Law Committee. Subsequently, Talia Einhorn has provided a memorandum on this subject (“National Treasures and WTO/GATT Law”). What follows is an overview of the issues surrounding this stage of the project and some suggestions as to how the Committee might proceed.

2. Culture and Trade Liberalization

As the preeminent international organization concerning trade in goods and services, the World Trade Organization (“WTO”) has been at the centre of discussions concerning the elimination and reduction of barriers to trade and the protection of culture. The WTO’s role has been significantly strengthened by its effectiveness in resolving trade disputes between members. As Mary Footer stated in her 1999 Draft Issues Paper for discussion by the International Trade Law Committee of the ILA (“A Cultural Exception to Trade and Recommendations on an ITLC Position”):

“As the pace of trade liberalization proceeds unabated many countries have expressed an increasing desire to protect national identity, values and beliefs through a range of cultural policies.

The current status of the underlying conflict between trade and culture can basically be characterized as a difference in approach between the United States which gives priority to the commercial value of culture and the approach of European countries, Canada, Australia, India, Egypt, Brazil and a few others that believe trade liberalization masks a cultural invasion, led by the U.S. with its global domination of the film and television industry, which challenges national cultural expression, linguistic diversity and alterity. The U.S. in turn has labeled such national cultural expression as an excuse for continued protection of national film, television and media industries.”

Tania Voon points out in *Cultural Products and the World Trade Organization* (Cambridge, 2007) that while the aspects of culture affected by international trade are many and varied, the most contentious aspect so far has surrounded certain defined “cultural products” (such as audio-visual products and magazines) created or furnished by certain “cultural industries” (at 18). Thus, Canada and the United Kingdom provide tax incentives for the production of “national” films and Canada funds the production of Canadian book titles. The negotiation of the *General Agreement on Trade in Services* (“GATS”) during the Uruguay Round of Multilateral Trade Negotiations highlighted the lack of consensus on how to achieve agreement on issues surrounding exemptions for cultural industries. As Voon points out in her book, it is primarily because “cultural products” have the dual character of being both objects of economic value and manifestations of culture that they have become a focus of debate.

3. GATT 1994, Article XX(f): the “National Treasures” Exception

(a) Introduction

Article XX of GATT 1994 has long been the focal point of the intersection between the trade liberalization standards established by the Agreement and the legitimacy of certain national measures based on justifiable policies such as those seeking to protect human health or exhaustible natural resources. The wording of these exceptions has remained unchanged since the establishment of the GATT in 1947, but they have continually been the focus of many

trade disputes at the GATT and now the WTO. Essentially they represent the “defences” available to WTO members whose measures are alleged by other members to violate the rules of international trade law.

(b) *GATT 1994, Article XX(f)*

This provision, which has never been the subject of interpretation under GATT or WTO dispute resolution processes, reads as follows:

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

•••

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

(c) *The Process of Interpreting Article XX Exemptions:*

Article XX only applies to measures which have first been found to be inconsistent with another provision of the Agreement. A two-tier test is then applied to measures sought to be justified on the basis of an Article XX exception as follows:

A WTO Member that wishes to defend a measure must first prove that the measure can be provisionally (that is, *prima facie*) justified under one of the exception clauses. For example, the Member has to show that the measure “is necessary to protect human health” (XX(b)), or “imposed for the protection of national treasures” (XX(f)), or “relating to the conservation of exhaustible natural resources” (XX(g)). The onus of proof that the measure is provisionally justified under an exception clause has to be discharged by the Member seeking to rely upon it.

Subsequently, a further appraisal of the same measure will follow to verify whether it also complies with the chapeau of Article XX. Regarding this requirement, the WTO Appellate Body has held that, “a balance must be struck between the right of a Member to invoke an exception under Art. XX and the duty of that same member to respect the treaty rights of the other Members...the location of the line of equilibrium, as expressed in chapeau, is not fixed and unchanging, the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.” The onus of proof that a measure, which is *prima facie* justified, does not constitute an abuse of such an exception under the chapeau, likewise rests on the Member invoking the exception.

The two steps must be made in this order, since, according to the WTO Appellate Body, “[t]he sequence of steps indicated above in the analysis of a claim of justification under Art. XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Art. XX...the task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exceptions provided for in Art. XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse.”

The final element in establishing that a measure is within an Article XX exception is, of course, whether it fits within the language of a particular paragraph. The use of different adverbs in the Article XX exceptions suggests that the degree of connection or relationship between the measure, and the interest or policy sought to be achieved, differs as between exceptions. With respect to Article XX(f) the words “imposed for the protection of” suggest that it would be enough if there was a reasonable or substantial connection between the measure imposed and the “national treasure” sought to be protected. The phrase “relating to” (Article XX(g)) has been interpreted by the WTO Appellate Body as meaning “primarily aimed at” (US-Gasoline 1996). This analogy suggests that the “imposed for” language in Article XX(f) does not require as high a level of justification as some other Article XX exceptions (such as XX(a) “necessary”).

(d) *The Meaning of “National Treasures of Artistic, Historic or Archaeological Value”*

(i) *Introduction*

Though the meaning of this phrase remains unclear, it is close to the criteria for export controls of works of art developed by the Waverley Report (England, 1952). That Report recommended;

“... (i) that export control is best applied to a small number of objects of high importance, and becomes progressively less effective and more irksome the larger the number of objects it is sought to control;

(ii) that great uncertainty and unfairness can result unless it is accompanied by a clear statement of policy and adequate safeguards;

(iii) but that, even then, the fact that it operates at so late a stage is bound to cause frustration and disappointment.

For these reasons it seems clear that it ought only to be applied to limited categories of objects of high importance” (Paras. 96 and 97).

The report went on to establish what became known as the “Waverley Criteria”:

“The tests for assessing the importance of an object of national importance are:

- (1) Is it so closely associated with our history and national life that its departure would be a misfortune?
- (2) Is it of outstanding aesthetic importance?
- (3) Is it of outstanding significance for the study of some particular branch of art, learning or history?”

These criteria have been adopted as the basis for cultural property export controls by such countries as New Zealand, Canada and the United Kingdom. Clearly, such a selection process depends on the culture that is characteristic of an individual state and an objective test may be elusive.

(ii) *Objects From Local and Regional Cultures*

It is unclear whether an object that only has particular significance to a region of a country or to a sub-set of its population (such as a minority indigenous population) could qualify as a “national treasure” under Article XX(f).

(iii) *Export Restrictions on Objects of Foreign Origin*

The cultural property export controls in place in Canada apply to objects that are not of Canadian origin but have been in Canada for at least 35 years. Similar laws apply in the United Kingdom and elsewhere. Can something be a “national treasure” if it originated elsewhere than in the country seeking to restrict its export? The requirement that such objects have been in the country with the export controls in place for a certain period of time might be used to argue that they have acquired new “citizenship”. The authors of the Waverley Report also thought that “no distinction can be based on a nationality alone”.

(iv) *Import Restrictions on Foreign National Treasures*

Another question involving the origin of the objects involved is whether the XX(f) exception applies to measures restricting the import of the national treasures of other states? Such measures are an important aspect of the implementation of the provisions of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* and the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects*. There is GATT/WTO jurisprudence which questions such “extraterritorial” measures, but the priority that UNESCO and other organizations have placed on the protection of

the cultural heritage worldwide suggests that no such limitation needs to or should be placed on the scope of Article XX(f).

(v) *The Relationship of International Law to the Interpretation of Article XX(f)*

The WTO *Dispute Settlement Understanding* establishes that customary public international law can be used to interpret provisions such as Article XX(f). This exception is by its very nature evolutionary and must be seen as having evolved in meaning since its inception. The decades since 1947 track the evolution of UNESCO as a law-making body – and, in particular, the 1970 UNESCO Convention – which specifically addresses trade in cultural objects.

More recently, the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* provides that all states have “a sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions” (Article 5). See also Article 20 (Relationship to other Treaties).

The 2005 UNESCO Convention has implications for the relationship between trade and culture far beyond assessing the scope of Article XX(f), but other UNESCO treaties and instruments constitute a rich source for assessing the current meaning of that exception.

4. The European Community Treaty

European law – both at the community and the national level – is rich in references to cultural values and policies. Article 30 is the only provision in the Treaty, however, specifically concerned with the movement of cultural objects. Like GATT 1994, Article XX(f), Article 30 comprises an exception to the guarantee of free movement of goods within the Community in order to protect “national treasures possessing artistic, historic or archeological value”.

In *Commission v. Italy* (First Art Treasures) [1968] E.C.R. 423 the European Court of Justice found that an Italian charge on the export of works of art and archaeological treasures was equivalent to an export duty and, therefore, in violation of Article 23. Italy was unable to rely on Article 30 to justify the measure since Article 30 only applies to the prohibition of quantitative restrictions (quotas) and not to that on export taxes. The scope of Article XX exceptions is wider.

5. The North American Free Trade Agreement (NAFTA)

Unlike the WTO Agreements, NAFTA does contain a “cultural industries” exception (Article 2106) which has been broadly interpreted. The apparent effectiveness of the measure is undermined, however, by the fact NAFTA Parties can still take compensatory steps in response to cultural industry measures that (apart from the exception) are inconsistent with the NAFTA.

More specifically, the NAFTA, along with several other regional and bilateral free trade agreements, incorporates the exceptions contained in Article XX into its provisions. This type of practice opens up the possibility of further interpretation of the scope of Article XX(f) outside of WTO dispute settlement processes.

NAFTA also suggests another approach to upholding measures to protect cultural heritage. Article 104 of NAFTA provides that when certain international environmental treaties (such as the *Montreal Protocol on Substances that Deplete the Ozone Layer*) are inconsistent with a specific trade obligation in NAFTA, the provisions of the environmental treaty will prevail – provided the measures concerned are the least trade restrictive options available. This suggests a strategy for enhancing the stature of international treaties on cultural heritage by acknowledging their validity as exceptions to compliance with trade liberalization rules.

6. Conclusion

The “national treasures” exception in Article XX of GATT 1994 has been largely neglected in relation to the development of international cultural heritage law by UNESCO and others. Against the background of an ongoing

debate about the relationship between trade liberalization and national cultural policies, it seems appropriate that Article XX(f) now be reconsidered in the light of a growing body of international law concerning the protection of cultural heritage. At the same time, it should be noted that the scholarly literature on Article XX(f) is modest, and the discussion of Article XX exceptions generally is largely dominated by international trade lawyers who may not bring to the table as developed a sense of the need to protect cultural heritage as this Committee is capable of.

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