GUEST EDITORIAL

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"National Treasures": Limits on Private Property and Cross-Border Movements

"National treasure" is a term often employed in legal scholarly works to indicate movable or immovable objects of exceptional importance for the cultural patrimony of a State, such as monuments, archaeological sites, or works of art. The most important international treaties promoting the free trade of goods provide for exceptions in order to ensure the protection of "national treasures of artistic, historic or archaeological value". These include the Treaty on the Functioning of the European Union (TFEU, Article 36)[1] and the General Agreement on Tariffs and Trade (GATT 1994, Article XX(f)),[2] which are administered by the European Union (EU) and the World Trade Organization (WTO), respectively. According to these exceptions, export controls that protect "national treasures" do not violate EU or WTO members' treaty obligations, whereas export restrictions for items that do not meet the definition of "national treasure" are invalid. As such, these exceptions recognize the right of States to regulate this sensitive area of national public interest.

Regrettably, neither the TFEU nor the GATT provide a definition of the term "national treasure". In addition, thus far there have been no judicial decisions on the meaning of this notion. Moreover, the boundaries of this definition remain unclear due to the ways in which it is translated in the EU or WTO members' various languages. In effect, whereas the terms in English, German, and French ("national treasure", "nationales Kulturgut", and "trésor national", respectively) denote a restrictive interpretation, the Italian and Spanish terms ("patrimonio culturale" and "patrimonio cultural", respectively) express a broader understanding.

[1] Consolidated version, OJ C 202, 7.06.2016, p. 47.

[2] General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

On the one hand, the terminology used in national legislation and policy generally reflects whether a State is a "source" nation (i.e. a country which is richer in cultural materials and which focuses on their protection and on the integrity of the national cultural heritage), or a "market" nation (i.e. a country which is poorer in cultural assets but which is the home of affluent collectors, museums, dealers, and auction houses which invest in foreign art). At the same time, it also indicates whether a State espouses a "nationalist" or "internationalist" approach in relation to the issues of private property and free trade in cultural heritage. While some governments, mostly market countries, have adopted a liberal approach, others, mostly source States, have taken a protectionist view in seeking to keep cultural objects they consider to be of national importance within their territory.

The articles contained in the present issue of the "Santander Art and Culture Law Review" critically explore the meaning of the term "national treasure" in the light of current practice and examine its implications for both the cross-border trade in cultural objects and its regulation. These articles have been selected following a two-day conference, jointly organized by the Art-Law Centre of the University of Geneva and the Art Law Foundation, which was held at the University of Geneva in November 2018. Given the fact that not a single week passes without an art export issue hitting the news, this issue – and the Geneva conference – could not be more timely.

The General Articles section contains the bulk of the articles aimed to explore the term "national treasure" and its ramifications. The first article, by Gabriele Gagliani, analyses Article XX(f) of the GATT 1994, combining previous jurisprudence and public international law rules on treaty interpretation and application in order to elucidate the scope of this provision. It argues that not all uncertainties concerning Article XX(f) can be resolved at once, due to the inherently fluid and ever-evolving nature of artistic, historic, and archaeological value attached to cultural objects. Sabrina Ferrazzi, on the other hand, aims to assess whether EU institutions have the competence to verify the conformity of domestic rules identifying goods as belonging to their "national treasures" within the meaning of Article 36 TFEU, and whether EU law establishes a threshold definition of the concept under consideration. The next article, by Anna Frankiewicz-Bodynek and Piotr Stec, examines the scope of EU Member States' right to designate national treasures for the purpose of Directive 2014/60/EU on the return of cultural objects,[3] by relying on EU law, human rights law, and constitutional law. Robert Peters explains the provisions of Germany's new Cultural Property Act (*Kulturgutschutzgesetz*), which entered into force in August 2016, amending export and import provisions and introducing

[3] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012 (Recast), OJ L 159, 28.05.2014, p. 1.

new due diligence provisions in dealing with cultural property.[4] In turn, Charlotte Woodhead discusses the practice of the United Kingdom where the clash between the rules on the designation of national treasures and those on the restitution of Nazi-looted art is apparent in the case of a Meissen figure of "Pulcinell". Next, Eliana Romanelli's article focuses on photography and describes how it has become a "cultural good" under EU law and how it is regulated under Italian law following the 2017 reform of export rules. In her article, Arianna Visconti provides a more in-depth examination of the reform of Italian law on cultural property. In particular, she not only traces the evolution of the legal definition of "cultural property" over the years, but also critically analyses the main traits of the 2017 reform and puts a special emphasis on the complex set of criminal law provisions which – in theory – should contribute to the safeguarding of the Italian cultural heritage.

The Legal Commentaries section contains three articles from either the authorities' or the practitioner's perspective, starting with an article by Carine Simoes from the Swiss Federal Office for Culture. She presents the new Swiss national inventory of cultural property, which consists in a list of objects belonging to the State that can only be temporarily exported and that cannot be legally acquired, even in good faith. Frances Wilson from the United Kingdom's Arts Council describes the UK's export control system for works of art and cultural property and the protection of national treasures that meet the "Waverley Criteria". Last but not least, Mara Wantuch-Thole, attorney-at-law based in Berlin, discusses the German *Kulturgutschutzgesetz* and its actual impact from a practitioner's perspective.

Finally, the article by Derek Gillman, in the section Varia, offers a fascinating perspective on the issue of the definition of "national treasure" by discussing the restitution debate relating to the set of bronze zodiacal water spouts – designed by brother Giuseppe Castiglione for the Yuanmingyuan (Garden of Perfect Brilliance), situated some 20 km north-west of the Forbidden City in Beijing – which were looted during the Second Opium War (1856-1860).

The Guest-editors would like to express their special thanks to the "Santander Art and Culture Law Review" for hosting the scientific outcomes of the third edition of the All Art and Cultural Heritage Law Conference. After being "hosted" in the "Studies in Art Law" and the "International Journal of Cultural Property", it is a pleasure for us to continue our journey through the specialized journals devoted to the fascinating matters of our common interest. A special thanks goes to Andrzej Jakubowski for his excellent supervision of the editorial process.

[4] *Gesetz zum Schutz von Kulturgut* [Act on the protection of cultural property], Bundesgesetzblatt 2016, Part I, p. 1914.