International treaties and art

Sandra Braman*

Department of Communication, University of Wisconsin-Milwaukee, Milwaukee, WI, USA

International treaties shape the legal context for the arts, provide policy tools for political ends, and reveal roles of the arts in state identity. Culture-specific instruments, general agreements with cultural provisions, general agreements without culture-specific provisions, and general statements of principle are all pertinent. Since 1990, treaties have intervened in the global division of labor and the entry of works into the art market, forced transformations of domestic law, and illuminated ways in which differences in legal cultures are valuable for those who would break the law. Treaties highlight complexities of national identity, exacerbate national/regional tensions, support restitution, and draw attention to human rights issues. Conflicts over art have also become an explicit part of the world of foreign policy.

Keywords: restitution; international trade; art market; cultural heritage; borders; European Commission

When Immanuel Wallerstein argued in 1990 that ‘culture is the battleground of the world system’, he implicitly issued a challenge: those who are interested in law and society need to attend to culture, and those engaged in the production, distribution, consumption, and domestication of culture must think about the legal consequences of their actions. Sixteen years later, that challenge has been taken up, demonstrated in such trends as the encouragement of political scientists to use visual art in the analysis of conflict (Smith 2004) and growing attention to culture by scholars of international relations (Checkel 1998).

One among the many issues this challenge raises for those in the arts is the question: How do international treaties affect the art world? The state, of course, comes between the individuals and organizations involved in the arts, on the one hand, and international governance, on the other. In some instances this impact is an unintended side-effect of agreements directed at other goals, but in other cases treaties deliberately reflect the growing interest of national governments in using the arts to achieve policy and political ends. Governments are interested not only because there are times when manipulations of the art market or other interventions may have particular efficacy relative to a specific problem, but also because the arts are so important to the identity of the state and to its ‘capacity’, or ability to act. Since the international system and states are mutually constitutive, this is a self-reflexive set of activities of great importance: if culture is the battleground of the world system, international treaties set the rules of war.

Four types of instruments are pertinent: those that are culture-specific (e.g., UNESCO’s World Heritage Convention); general agreements with some provisions specific to culture (e.g., the Treaty of Amsterdam); agreements without any explicit provisions dealing with

*Email: braman@uwm.edu

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art or culture, but which have significant direct or indirect effects on the arts (e.g., the Treaty of Rome); and influential statements by international organizations that affect legal developments as a result of normative and narrative pressure (e.g., the Washington Conference Principles on Nazi-Confiscated Art). (Conventions, which fill many of the same functions as treaties though they are slightly less formal in nature, are included in this study.) Pertinent research, as a review of the literature (Braman 2006) demonstrated, is thin with the notable exception of work on intellectual property rights. Most of the existing scholarly work has been stimulated by issues raised by the European Commission, debates over international trade agreements, and high-profile struggles over repatriation problems that continue to result from World War II. There is a great deal more research on popular culture from this perspective than there is on 'high' art.

The research reported upon here sought to inductively map the categories of effects of treaties as perceived by art elites, using The Art Newspaper as a proxy. This internationally distributed print and electronic monthly, which serves dealers, collectors, gallery owners, museums, and others in the art world, was used as a filtering mechanism to identify issues deemed by sector experts to be of global importance. Its electronic archive started in 1990; the analysis presented here examines every piece available in The Art Newspaper archive since 1990 in which treaties are mentioned.¹ Based in London, The Art Newspaper is also part of an international network of art-oriented periodicals that share news with each other, so the editors’ informational resources are global. While a myriad of other periodicals dealing with the arts exist, this monthly is particularly directed at elites often, though not always, with institutional interests. As such, it reflects only the perceptions and experiences of those in the high or elite world of art.

The definition of ‘art’ used here is that of The Art Newspaper. Of course various theoretical and pragmatic concerns may drive other ways of defining what is and is not art for any given purpose. The perspective put forward by The Art Newspaper, with its institutional orientation, takes into account the historical processes through which archaeological finds and other types of objects become art objects when they cross time, space, or cultural boundaries.

While this method provides insights into only one facet of the complex sociological, political, and economic processes through which the art world and the world of international politics affect each other, it does make it possible to inductively identify major categories of effects of political agreements on the arts for further research. Three stories turned out to be important, each placing art in turn in a successively broader context. The first involves the ways in which treaties specifically affect art as a particular category of content through interventions into the structure of the art market. The second explores art as cultural heritage that marks national boundaries. And the third involves deliberate state uses of art-related treaties — or refusal to comply with them — in the exercise of political power. The conclusion offers a research agenda.

**Treaties and the international art market**

Treaties are of growing importance to the conditions under which the international art market operates. They influence the global division of labor, affect the entry of goods into the market, and often require interventions in domestic markets. The rhetorical structure of the global art market itself can be read in political terms. Because of differences in national legal cultures, however, neither consensus around principles nor ratification of a common legal document means that implementation of treaties will necessarily yield the same results in all participating countries.
The global division of labor

The global division of labor in the art market distinguishes among ‘source’, ‘buyer’, and ‘entrepôt’ countries. The first includes states in which art has been produced that is of interest internationally to collectors and museums (e.g., Kaufman 1995, Pratt 1997), whether that is high art such as Renaissance paintings (e.g., Italy and France), ancient art (e.g., Egypt and Ethiopia), or art of other cultures (e.g., El Salvador and Guatemala). Buyer countries are those in which there is the most acquisitions activity by individuals and institutions; the most important today are the US and the United Kingdom, with Japan and other countries playing important roles from time to time in response to economic swings. Entrepôt countries are neither producers of nor markets for art but, rather, are places that are critical to the global art market because they make it possible to transfer art from producers to buyers – often offering opportunities for laundering goods that have been stolen or are being exported illegally. Switzerland long served as an entrepôt for the global market, warehousing illicitly obtained goods for the five years necessary to make their sale legal (Regazzoni 2002), and Hong Kong plays this role re transfers of Chinese art to the West (Napack 1999).

Treaties reinforce this market geography by supporting the ability of states to continue to play traditional roles, as has happened with interpretations of the Treaty of Rome that permit the French state to continue to regulate its art market, though less tightly than during earlier periods of government control (Schmitt 1999, Tariant 2001). Treaties can also undermine the ability of particular states to maintain their historical places in the global division of labor, as happened when dealers from Hong Kong (Napack 1997) became able to challenge US and UK operators who historically dominated the world’s capacity for underwater salvage as a source of art market goods (Ruiz 2000).

The lack of harmonization of national laws offers opportunities for those involved in the illegal art market, who can choose to locate various activities and transactions in those jurisdictions with the most favorable laws (Pratt 1997). This positive side of globalization, however, is counterbalanced by a negative side: art theft has developed into a multi-billion dollar business estimated to be second in size only to drug trafficking as the most profitable form of illegal trade. Appreciation of the profits to be made has even lead to the involvement of drug rings (Grover 1992) and others involved in organized crime (Ruiz 1999) in the art trade, increasing the violence and sophistication of techniques used.

The entry of works into the market

The diversity of the ways in which treaties can affect the entry of works into the art market is surprising, ranging from freeing up funds that can then be devoted to the development of collections to freeing up goods that were previously not available. For this reason, treaties are sometimes used by historians to delineate artistic periods; the Treaty of Versailles, for example, marks a turning point because resources released by the close of the war between Holland and Spain were then turned to the development of what was at the time the largest royal art collection in existence (The Art Newspaper 1998, Jerosme 1998).

The explosion of artworks from Cambodia into the global art market following the 1996 peace treaty between the Khmer Rouge and the Cambodian government provides a heart­breaking example of some of the unexpected impacts of treaties. The agreement made it possible to begin removing the estimated 4–5 million landmines from 3,000 km² of Cambodia (Spanier 2004). Removing these mines is such a slow process that only about 10 km²/year can be cleared, and the process will take decades. As soon as all of the mines have been dug up from an area, local residents – often with limited, if any, other sources of income – come
in to filter the upturned earth for artefacts. The Cambodian government, already financially and logistically overburdened by the landmine problem, cannot assign a heritage security team to each location, and it can be difficult to identify sites of particular importance from the surface because often there are no signs of what lies below. In essence, then, this treaty launched an industry that brought massive amounts of previously unavailable artworks into the international market by making it possible for a population devastated by war to earn an income by selling off its heritage.

Sometimes the purpose of treaties is to restrict the entry of works into the global market, or to establish certain criteria that must be met before works can enter the market. Instruments such as the 1970 UN Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property; Convention concerning the Protection of World Cultural and Natural Heritage; and the Convention for the Protection of Cultural Property in Times of Armed Conflict all are intended to prevent the entry of artworks illicitly acquired from entering the national market. National governments signatory to these instruments can designate items as important to their heritage and prevent those works from leaving their country.

Recent developments regarding items found in shipwrecks in international waters that are over 100 years of age and have archaeological value provide another example of the use of treaties to restrict the entry of goods into the market. The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage applies to a massive amount of material — estimates of still undiscovered shipwrecks range from 3–30 million. It was proposed that the convention include a provision that would forbid salvage operations that ignored the need for conservation and, ultimately, display of recovered artefacts as a coherent collection by a museum that would be permanently barred from deaccessioning the objects (Ruiz 2000). Arguments against the provision included the difficulty — and in some cases impossibility — of making such a commitment regarding deaccessioning; the likelihood that few museums would be willing to take on such large collections of materials when they are interested only in a few of the best items; the possibility that currently legal activity would in response be driven underground; and fear that items involving valuable materials would as a result simply be melted down. In the end the convention included only the requirement that any government involved with underwater cultural heritage shall take into account the public interest, including the needs for conservation, research, reassembly of a dispersed collection, and public access.

Treaties can also affect the art market by intervening in the duration of property rights. Most peace agreements make provision for the extension of copyright in order to compensate for the loss of rights during the period of hostilities. Thus the 1951 San Francisco Peace Treaty, which formally ended the war between Japan and the Allies, excluded the period between December 7, 1941 and the date the treaty came into force from the running of copyright. As a result, copyright owners were given almost an extra decade of protection before their works became freely available to anyone (Fry 1998).

**Intervention into domestic markets**

In order to ratify treaties, states often have to change their domestic laws so that they can comply with treaty terms. The need to do so can delay ratification for decades; Japan, for example, only ratified a key 1970 UNESCO convention in 2002 (The Art Newspaper 2002). The issues that can make ratification difficult vary from state to state, however, as demonstrated by a comparison between recent developments in the US, France, and China.
In the US, the 1977 5th circuit court case *US v. McClain* set a precedent that conflicted with the 1983 Cultural Property Implementation Act. The court decision allowed other nations to criminalize importation of any cultural property into the US if the importer knew that the objects had been exported in violation of a national patrimony law, whether stolen in the ordinary sense or simply long held in private hands outside of the country of origin. The statutory law, however, set up a system that used selective, narrowly targeted, bilaterally negotiated import restrictions as the basis for evaluations by a Cultural Property Advisory Committee (CPAC) to evaluate foreign requests regarding importation of goods into the US. (Criteria of concern include the cultural significance of the restricted objects; the applicant's efforts at conservation, preservation, and site protection; the applicant's record of granting museum loans and export permits; whether other significant market nations have imposed similar restrictions; and whether current looting in the source country has reached crisis proportions.) Though critics argued that the decision-making committee had an undue amount of power and had opportunities for abuse, ultimately it was determined that the 1983 law should govern (Gerstenblith 2005, Pearlstein 2003).

For France a key domestic issue was whether or not the French government could continue to control auction houses in that country through regulation managed by a regulatory body specific to the activity (see, e.g., Schmitt 1999, Tariant 2001). This regulation was so tight that the French government was considered to essentially have monopolistic control over art auctions that took place in France. Since these auction houses deal with many kinds of art that cannot legitimately be considered important cultural heritage, however, such monopolistic control contravened the Treaty of Rome's requirement that goods be allowed to circulate freely. It was a number of years before liberalization of regulation of art auctions in France opened up the market to foreign companies. (And French reservation about the outcome of such liberalization was borne out—by 2006 Sotheby's and Christie's dominated the French market [Adam 2006].)

For China the need to monitor and prevent corruption in the very strong internal art market is a major domestic issue following the signing of a bilateral treaty with the US to restrict the smuggling of cultural relics and make it easier for China to get back items that had already been exported. According to Maggio (2000b), bureaucrats at the Chinese State Bureau of Cultural Relics responsible for the treaty were so focused on the possibility of increasing China's stature in global cultural affairs that they neglected internal matters altogether. It was only after the treaty was signed that it was discovered that compliance with its provisions required changing the operations of the domestic market in such a way that the positions of a number of key stakeholders were undermined and relationships among various facets of the sector needed to be reorganized.

Other examples: In Cambodia domestic political disagreements regarding who should have the right to give permission to remove artefacts of cultural importance from the country almost derailed a major exhibition of Khmer art scheduled for Paris and Washington (Heywood 1996). And Switzerland had to change its laws and practices regarding the treatment of stolen art in order to comply with the 1970 UNESCO Convention on Movement of Cultural Property, which it signed in 2003 (Beatty 2005). A new Swiss legal stipulation, going beyond the requirements of the convention, requires all art dealers to demand written proof of identity and right to ownership from anyone selling them cultural property.

In the US, there are also treaties with tribal groups located within the geographic boundaries of the country that affect the arts. By the late 1980s the market for art produced by North American tribes was nearing a billion dollars a year, so the 1990 Indian Arts and Crafts Law criminalized the counterfeiting of tribal art to protect genuinely indigenous artists. This law required any 'Indian' works offered for sale to be accompanied by proof.
that their makers are members of a federally recognized tribe. Penalties can include fines of up to $250,000 and imprisonment. This was immediately problematic for many leading figures whose tribes had never signed official peace treaties with Washington (D'Arcy 1993). There were also questions about whether the determination of tribal membership should be based on knowledge about traditions, practice, or genetics. If genetics, what proportion of one's bloodline needed to be from a particular tribe? Ultimately, it was decided, each tribe was to establish its own criteria for membership.

Intra-state cultural borders often yield particularly intractable legal difficulties. The first code dealing with protection of cultural property during time of war was the Lieber Code of 1863 that governed the conduct of Union forces during the American Civil War. Three of its provisions specifically protected classical works of art and libraries; institutions such as libraries, schools, and museums; and directed works to be removed if doing so would protect rather than damage them (Merryman 1991). The influence of the Lieber Code was evident in a number of subsequent 19th and 20th century agreements. Similarly, agreements regarding ownership of works of art, the division of cultural property, and the care of cultural objects and monuments that could not be moved were key among the treaties drawn up between Czech and Slovak republics prior to 1994 dissolution of Czechoslovakia (Cook 1993).

Institutional and political complexities can make the resolution of questions such as these particularly difficult. As Burton and Ruppert (1999) note, perceptual contrasts between diverse government entities within a single culture can be just as complicated as those that occur across cultural and/or national boundaries. Municipal and regional developments are not always in sync with EU directions on cultural matters (DaMosta 2000). Things can move quickly – the history of EU treaties dealing with art and culture shows that some issues that seemed important in 1992 were already off the table by 2000 (M. 2000b). In some cases domestic political impact might be expected but the form it will take may not be clear. There has been no explanation, for example, of why the bilateral treaty between the United States and Canada was allowed to lapse in 2002 (Czegedli 2004).

**Differences in legal cultures**

There are several dimensions along which differences in legal culture shape the ways in which treaties affect the global art market. As legal scholar Grover (1992) points out, civil law and common law countries even differ regarding resolution of the ancient question of how to treat ownership of a stolen work once it has been sold to a good faith buyer – civil law countries generally favor the purchaser while common law countries typically favor the original owner. Identifying the country of a stolen artwork after it crosses borders is similarly difficult: according to private international law, the nationality of the artwork is determined by its location at the time of acquisition by a new owner (*lex situs*). For the European Commission, however, the nationality of such a piece is the country from which it originated (*lex originis*). In legal cultures such as those of Italy and France, art theft is considered of such importance that police units focused on the problem will be heavily staffed, while in other societies few personnel will be devoted to the problem. (Grover reports that in the UK in 1992 the police had only three people assigned to art theft.)

**Treaties and the role of art in state identity**

A large proportion of the media discussion about international treaties and the arts involves the movement of works across borders, whether for the purpose of restitution (the return of
works removed during time of war) or sale of objects potentially or undeniably a part of a country’s national cultural heritage. The question of how to determine which artworks are critical to geopolitical and/or cultural identity, the impact of changes in the nature of the state itself on the answer to that question, and issues raised by demands for the right of access to artworks and for universal human rights are all involved. Disputes over cross-border transfers of artworks – whether or not they are exclusively discussed in terms of national heritage – very often also touch upon conflicts among economic sectors, such as the tension between tourism and other economic interests.

Art and geopolitical identity

The habit of commissioning artists to celebrate political leaders and events is of course ancient, but the first recorded intervention into what we refer to as the fine art market for the explicit purpose of protecting state identity occurred in the 17th century, when Pope Urban VIII ordered an Italian painter to send a copy of a painting commissioned by the Queen of England rather than the original in order to prevent Italy from being deprived of the piece. By the early 19th century, artworks were appearing that were self-consciously intended to commemorate the nation in culture form, such as the sculpture in Florence of a person mourning at the tomb of the national poet (Jayme 2005). A number of questions come up, however, when trying to reach agreement regarding just what constitutes cultural objects important to a particular nation’s identity.

It is even not consensually clear what should be defined as the country of origin of a particular work. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970) offers several categories that can be used for this purpose, including work created by the ‘individual or collective genius of nationals of the State concerned’, ‘cultural property of importance to the state concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory’ (quoted in Jayme 2005, p. 935). This doesn’t solve the problem: painters of one country may produce works in others, even on behalf of other governments. Cultural identities change over time. Artworks are also of importance for ethnically defined nations as distinct from bureaucratically defined states (The Art Newspaper 1991). And defining artwork as of national importance can pit private and public interests against each other when owners of those works find they cannot sell them outside of the country even though doing so would significantly increase profit (Powell 1993a,b,c). In at least one case (involving the Sevso silver collection), three different countries claimed the same items as their own national treasures (Shapiro 1996).

There have been other approaches. The International Council of Museums (ICOM) speaks of ‘those objects and documents which are indispensable to people in understanding their origin and culture’, and the drafters of the Unidroit agreement took the position that every country has a right to at least an adequate representative collection of its own national cultural heritage (Pratt 1997). The US government has discussed requiring every government with which it deals to develop itemized lists of every object that would fall into this category; as further discussed below, since this is a clearly impossible task, going down this route would effectively eviscerate laws and regulations intended to protect cultural heritage. Part of the difficulty is that just as there is no one trait that distinguishes all ethnic groups from each other (some use food, some use dress, etc.), or is used for cultural differentiation by the same group in all contexts (e.g., the Romany people use dress in some places and language in others) (Greenfeld 1992), so while every country in the world treats at least some aspect of its domestic cultural life as a public good, there is enormous variance in what that is (Grasstek 2005).
The desire to build and protect national identity must also be balanced against other needs that may sometimes come into conflict. Geopolitical developments can affect the extent to which a given government is concerned about art and its national identity, and the ways in which this concern is expressed. When negotiations opened in 1987 regarding the possible entrance of Turkey into the European Union, the Danish minister of cultural affairs developed materials depicting key Danish cultural treasures and distributed them to every citizen, arguing that ‘We must know why we are and how we are’ (quoted in Jayme 2005, p. 933). Eastern European analysts explicitly link closely related restitution issues to changes in the nature of the state, reflecting recent regions in which claims by the state to guarantee a distant future lost ground to an interest in responding to contemporary social needs (Luflcin 2006b).

The British government chose not to include all scheduled heritage sites and objects on the list of things to be protected during wartime because there are so many that, it was feared, enemies could legitimately argue they needed to ignore them all (B. 2005). Personal passions may intervene, as happened when President Eisenhower was deeply reluctant to let go of a painting he loved when the call for restitution came (Janssen 1991). (This work, which transfixed the future president when he first encountered it in Germany during World War II, ultimately hung over the dining table in the White House.) French reluctance to let go of government control of the art auction business (The Art Newspaper 1995, 1997) suggests that the marketing of art itself should be added to the list of things that might be defined as part of national heritage. For Singapore, it is important to emphasize that works important to cultural heritage may not necessarily be old, and that heritage is important even for those countries that have not played in role in building the ancient cultural heritage of humankind (Lee 2004).

The World War II Soviet ‘trophy brigades’ demonstrate the intricate interactions between the concept of national heritage and economic concerns. After the Nazis had destroyed Slavic cultural objects and taken those deemed to be Germanic, the Soviets developed a list of items they wanted from enemy museums as compensation. When it became difficult to quantify, and to locate, items in territory still occupied, they shifted to any masterpieces they could find and the focus shifted from replacing what was lost to removing cultural objects as a penalty (Monten 2004). Various economic interests can also be in conflict with each other. Negotiations over restitution of German art in recent years has been so complex, in part, because of competition for the profit to be earned from art and culture tourism (Dankert 1992).

Techniques used to reinforce – or enable – the export of works considered important to national cultural heritage are quite various. One such technique, for example, is to strategically choose which jurisdiction should govern in international situations involving multiple possible choices of jurisdiction. When German artist Joseph Beuys sold works in London, the transaction was not subject to German law even though the works had to be shipped to London for the sale and the deal setting up the sale was made in Germany, because no legal nexus with Germany was identified (Jayme 2005). Recognition of a jurisdiction can itself be a technique; the 1922 Treaty of Rapallo was critical to the sell-off of Russian art Stalin began in 1928, for example, because the agreement permitted Germany to recognize the Soviet government and, thus, the legitimacy of its nationalization – and subsequent sale – of private art collections (Markova 1994). Granting and withholding export licenses provides a third example of the diversity of techniques that can be used to force or prevent movement of cultural heritage items across borders. In response to the concerns of owners of important works who fear they may lose profits if they are not able to sell on the international market, the UK defers export licenses in order to buy time to allow domestic
buyers to meet prices offered by collectors or museums outside of a country (The Art Newspaper 2003).

The history of EU treatment of works related to cultural heritage demonstrates how difficult it is to resolve conflicts between the sustained interest in cultural heritage at the national level and the cultural dimension of regional formations. The Maastricht Treaty (1992) required the EU to promote culture while simultaneously respecting diversity (M. 2000b) – but the requirements of that treaty include insisting that what the EU does has to be additional to member states' own policies; EU decisions in this area had to be unanimous; and the European Parliament can veto decisions. Implementation of and change to these provisions have been slow, though the Treaty of Amsterdam (1997) did move to majority voting.

The logistics of implementing treaties related to cultural heritage have resulted in some very interesting procedural developments. According to the 1995 Unidroit Convention on Stolen and Illegally Exported Cultural Objects, a requesting nation desiring to recover cultural property must prove that loss or removal impairs the physical preservation of the object or its context, the integrity of a complex object, the preservation of information, the traditional or ritual use of the object by an indigenous community, or is of significant cultural importance for the requesting state (Prot! 1997). Evidence to support such claims can include documentation of the influence of the piece in art, uniqueness, the extent to which the work introduces new techniques or iconography, and the religious significance of the work.

Unidroit has had a significant impact on another procedural matter, confidentiality between art dealers and their clients. Until this agreement was put into effect, cultural property had been the last valuable asset which could be traded without full disclosure of title, and it was the only one for which concealment of provenance had been defended. Both of these features contributed to the attractiveness of the international art trade for those who sought to use it as a means of laundering money gained during other illegal activities, such as those involving drugs (Prot! 1997).

**Restitution**

When restitution works, the return of artworks taken during time of war to the source country offers high moments in political life. The return of a Dürer panel, looted by the Soviets from Bremen during World War II, to Germany (The Art Newspaper 2004) and the US return of a gold platter to Sicily (Mason 1998) are fairly typical examples of successful restitution, even though courts did have to become involved in achieving these outcomes. In Berlin, the reuniting of paintings divided between East and West since World War II was deemed a form of political communication worthy of a national celebration (Hopkins 1998). There are times, however, when the problems raised by restitution appear to be irresolvable. The Austrian government, for example, refused to pay the market price in order to return paintings by Gustav Klimt to their rightful immigrant American owner after World War II-era seizure of the works from her Austrian family (Luflkin 2006a). Istriana works were never returned to the former Yugoslavia because the treaties mandating restitution were never formally signed (The Art Newspaper 2000).

Restitution issues that used to be a matter only of interest to the cognoscenti are now becoming the subjects of popular culture, getting wide coverage in such venues as tabloids and investigative reportage on television (D’Arcy 1997). Events that have taken place in support of the Ethiopian demand for Italian restitution of the Axum Obelisk provide a vivid example. Return of this enormous 4th century obelisk, moved to Rome
with Mussolini’s first visit to Ethiopia in the 1930s, was specifically mentioned in the 1947 peace treaty between Italy and the African country. The long and complex story involving the obelisk includes a couple of decades of demands for its return that were ignored, a 1968 Ethiopian Parliament request that Haile Selassie refuse any further travel to Italy until the object was returned, a 1972 decision by an Italo-Ethiopian team that the obelisk was too fragile to travel, a recommendation that Italy provide support for a new Ethiopian hospital instead, and development of a technique that would make it possible to transport the object. By the early 1990s, the matter had become of such popular interest that 40,000 soccer fans chanting ‘Let It Return’ carried posters with their demands during a match that was broadcast on television (N. 1992). It was only after the work was damaged by natural causes that Italy agreed to return the work to Ethiopia.

**Human rights, art, and treaties**

Over the last couple of centuries, debate over issues involving the transfer of artworks across borders have increasingly come to be viewed as a matter of human rights. The polity first appeared in state considerations regarding how artwork would be handled under treaties in 1815 at the Paris Conference. A request for the return of artwork Napoleon had taken from Italy to France was rejected because, it was argued, doing so would disperse the objects involved with the result that they would become unavailable to the public. It was only when the promise was made that the artworks involved would be made accessible in a public gallery that the negotiators supported the return of the works of art from France to their places of origin (Jayme 2005).

The concept of universal human rights was embedded in the World Heritage Treaty, which was set up in 1972 after a major rescue operation was mounted to save the temples of Upper Egypt by UNESCO in 1960 (Haywood 1995). This is one of UNESCO’s most prestigious and visible programs; even when the UK and the US were not members of UNESCO, they continued to adhere to this treaty. Unfortunately, this link with human rights has not prevented governments from using the treaty for political purposes: China refused to add Tibetan sites it occupied since the 1950s until very recently; Turkey refuses to put forward any proposals relating to Armenian culture; Chile was very slow to move on Easter Island; and Syria chooses to ignore sites that are reminders of the Crusaders’ presence during the Middle Ages. For sites that are designated as world heritage under the treaty, however, there is an additional feature that serves the public interest – no polluting facilities can be built near world heritage sites.

Concern about public access to works as a human right continues to be voiced in a number of contemporary cases involving restitution. At times, however, the notion of a right to individual access to works becomes blended with the concept of competitor access to markets or services. Thus international tours, museums, art fairs, and international exhibitions are all now being discussed in terms of the equity and fairness with which dealers or gallery owners may have access.

There are other human rights issues. Some claim that the very universalism inherent in human rights treaties may be abusive of cultural and religious practices in ways that may have implications for the arts (Zechenter 1997). And there is a danger that extreme art practices, such as Santiago Serra’s practice of paying very poor individuals with cash or drugs to serve as a medium for his work (Mariño 2006), may themselves be in abrogation of human rights treaties.
Art as a policy tool

The use of art as a policy tool can be seen in the incorporation of information policy tools first developed for military defense use in international treaties dealing with art and culture, in the use of tariffs as a means of creating and information architecture, and in the flexibility offered to states by treating art as an information sector in the implementation of general treaties.

The use of information policy tools

The phrase ‘confidence- and security-building measures’ (CSBMs) came into use following the establishment of the Conference on Security and Co-operation in Europe (CSCE) in 1975 to refer to mandated flows of information and communication among states as a way of reducing international tensions and building peace (Braman 1991). This same set of policy tools is now being applied to art. The use of satellite surveillance to track illegal movement of artworks, the exchange of information among national policing units, and the establishment of databases identifying all artworks of interest are examples of this trend. As has been the case with environmental information collection, this raises the research and policy question of the extent to which information collection and distribution for purposes related to the arts and culture contribute to information-gathering for military and other purposes, and vice versa.

CUSPIS - the Cultural Heritage Information Management System - uses satellite monitoring to try to fight illicit trade in art in support of treaties. CUSPIS, part of the Galileo satellite project (established by the European Space Agency and funded by the European Commission) has been established to protect cultural assets as part of Europe’s infrastructure. Its use is being incorporated into bilateral treaties regarding illicit trade, such as the treaty between Italy and China (Harris 2006).

Another CSBM-like technique involves mandating the collection and distribution of information. Current practices in the art world now include establishing channels for the rapid exchange of information on matters relating to the smuggling of antiquities, including the development of publicly accessible websites to report on and help track illicit trading (Maggio 2000a). In the early 1990s, the EC began discussing asking every cultural artefact that would need protection to be accompanied by an identity certificate. At the time the argument was rejected because, as Spain vigorously pointed out, doing so would be a logistical impossibility (The Art Newspaper 1999). A decade later, however – as discussed above – the same concept was included in a proposal for US law that would require all countries to identify, individually, every single item to be protected as cultural heritage (Luflkin 2000). In both Europe and the US such a requirement would shift the burden of proof from the buying country to the source country, and from rule-driven identification of goods to item-by-item identification and certification. In the US case, accompanying provisions include requiring evidence that particular objects were in danger of pillage rather than evidence of a history of abuse, and labor-intensive annual reviews of all import restrictions. Perhaps most controversially, public disclosure of details of foreign nations’ requests for relief would be mandated, including a full description of the sites at which looting was a concern. As critics of the proposal point out, providing this type of detail would offer a road map for future looters and actually encourage theft.

While this type of law has not yet been put into place, the fact that it continues to be mentioned suggests there is still a chance that it will be in future. International agreements regarding common language to describe artworks as they move across borders are likely to
encourage government officials to believe that some of the logistical barriers to this approach have been resolved.

**Tariffs as information architecture**

For taxation as well as national security and other reasons, governments find it important to define just what type of object something is when it crosses a border. For the arts, this means that tariff regulations now play important roles in defining just what art is, what distinguishes the art market from other markets, and even what it means to be an artist. Tariffs are established at the national level, but in today’s environment most countries participate in the World Trade Organization (WTO) and must therefore subject their decision-making on specific tariffs to the international commitments they have made.

While courts and legislatures really began to think about legal issues raised by the unique characteristics and status of art towards the close of the 20th century, in the US the Customs Court has struggled with these types of problems at least since the early 19th century because fine art work was subject to lower import duties than other items (Fishman 1977). A 1916 court case yielded a definition that focused on art as ‘something more than ornamental or decorative’, ‘imitative of natural objects as the artist sees them’, and ‘appealing to the emotions through the eyes alone’ (quoted in Fishman 1977, p. 485). While this definition could have been challenged in any era, it was certainly difficult during a period that saw the rise of modern, nonrepresentational forms of art. The Customs Court in 1928 did finally agree with Edward Steichen that his sculpture by Constantin Brancusi was art and could therefore enter the US free—not an object of manufactured metal to be taxed at 40% of its value upon entry into the United States. However, it took 30 more years before changes to the Tariff Act removed substantially all barriers to the free entry of modern and abstract works.

The European Community took up the definitional problem for art beginning in 1968, when the European Court of Justice determined that works of art were ‘goods’ for the purpose of the EC treaty (Goyder 1997). In 1992, the EC began the process of distinguishing among categories of art (Marsan 1992). As one observer commented when the EC’s Customs and Indirect Taxation Department began to draw up proposals, ‘The movement of objects of cultural interest is a big pot in which everybody throws their concerns and then stirs it up’ (quoted in Marsan 1991).

With the establishment of the WTO, the concept of cultural trade itself needed definition. Distinctions were drawn between cultural goods and services, core cultural tradeables and tradeables related to culture, and cultural hardware and cultural software (Grasstek 2005). WTO agreements require specific commitments, by sector and mode, for each of the four different ways a cultural good or service can be exported: when cross border supply takes place, services by a supplier in one country are provided to a consumer in another country (direct broadcasting services [DBS] is an example). When consumption takes place abroad, a consumer travels to the point of delivery (tourism provides multiple examples). With commercial presence, there is temporary or permanent establishment abroad of a supplier through investment (film co-production, for example). And with the presence of natural persons, people move to a foreign country on a non-permanent basis to supply a service (e.g., a foreign cameraman is hired to work on a particular film). Illegal exports introduce another set of categorical distinctions, among goods that may have been stolen prior to being smuggled out of a country, goods that are smuggled out by their rightful owner with the purpose of being sold abroad, goods that are legally purchased within a country and then smuggled out, and objects that are not returned at the end of a lawful temporary export (Marsan 1992).
In a related vein, it is up to European Court of Justice to even decide whether or not a particular activity – such as curatorial practice – involves a profession for purposes of application of EC rules regarding free movement of persons throughout Europe.

Art and foreign policy

There are times when art is explicitly used in pursuit of foreign policy goals, as in public diplomacy programs that send artists abroad as a ‘soft’ form of political persuasion. In a vivid recent example, the US rejoined UNESCO after 18 years in order to use the organization’s cultural programs to serve American public diplomacy purposes in the war against terror (Kaufman 2003). Art is a key element of foreign policy when calls for restitution raise foreign policy concerns, when treaties can be used as enforcement mechanisms to achieve other goals, and when art must be treated as an exceptional category in treaties.

Restitution as a foreign policy problem

Because calls for restitution are by definition the result of changing inter-state relations, they involve not only redress, but also service to present and future foreign policy objectives. This came to the fore in a recent high profile case involving several paintings by Klimt that had been confiscated from a Jewish owner during World War II and subsequently imported into the US. Both the Bush Administration and the Austrian government argued that Austria must be treated as immune from a challenge in US courts because of claimed serious foreign policy implications. The two governments claimed that the paintings ceased to be stolen under US federal law when American military forces recovered them, but the court rejected this argument because the US military was not acting as an agent of the original owner at the time. The Bush Administration also took the position that the 1976 US Foreign Sovereign Immunities Act (FSIA), which allows an otherwise immune foreign nation to be sued in US courts, could not be applied retroactively. However, the US Supreme Court held that the political intentions involved when the artwork was seized voided the possibility of claiming immunity (Lufkin 2004b).

The rhetorical power of treaties

While much of the power of treaties is instrumental and structural, there are times when treaties are used for their symbolic power. Examples include calling upon treaties for authority even when they don’t exist, and using the terminology of treaties to talk about relations among art institutions.

Treaties can serve as enforcement mechanisms even when it is not their own provisions being enforced. States can, for example, use the potential for treaties as justification for action, as when Canadian police asked Interpol to extricate individuals in a Canadian art fraud case from Anguila, a country with which Canada did not have an extradition treaty. The request for help was based on the justification that Canada could have such a treaty, and therefore it was legitimate to ask Interpol to intervene (Zagor 1998). In a similar way, the existence of the UNESCO and Unidroit treaties was used to support an opinion in a Swiss court involving the return of a stolen painting, even though Switzerland itself is not a signatory to those treaties (Jolles 1998).

In international relations, ‘unequal treaties’ are treaties between states that are vastly different in relative negotiating power. Interestingly – and perhaps evidence of the growing salience of treaties for those in the arts – the same language is now being used to refer to
agreements between arts institutions of different states, level of resources, and relative importance to the global art world. Thus the Japanese described the arrangement between the Boston Museum of Fine Arts and Nagoya Museum as the result of an unequal treaty because the Boston institution refused to take into account Japanese input when designing what should have been collaborative projects. (The Japanese museum ran into serious financial trouble when it failed to attract audiences to US-driven exhibits on such themes as ‘Tea Drinking in the West’ and ‘Voice of Mother Earth: Art of the Pueblan People of the Southwest’ though the Japanese curators argued that the audience would have preferred to see Boston’s famous Impressionist paintings and Japanese works of art [Itoi 2003].) In China, too, the concept of an unequal treaty among arts institutions is being used (Wang 2003). A Guggenheim proposal to establish a museum in Taichung was opposed, for example, because the city felt the terms offered were like those of an unfair treaty imposed on a defeated country (Kaufman 2004).

Art as an exceptional category in treaties
Art and artists are often treated as exceptions in international treaties in ways the art world sometimes finds problematic, and sometimes prefers. Under the Treaty of Maastricht and follow-on European Union treaties through the Treaty of Amsterdam, for example, artworks do not participate in the same type of free market put in place for other types of goods. Instead, nations retain jurisdiction for those works classified as national treasures (The Art Newspaper 1999). There is a desire for exceptional treatment of artworks that are not national treasures from the perspective of their treatment as goods as well. Swiss national law, for example, makes no distinction between art and other types of commodities. In combination with the Swiss law that the previous owners of stolen goods have only five years to approach new owners who bought in good faith (believing the artworks were legitimately for sale) before the buyer’s property rights are deemed legitimate, this long created an arbitrage industry for illegally exported or acquired art. The label entrepôt has been applied to Switzerland because of its history as a place where dealers warehoused illicit artworks long enough for them to become legitimately available for sale (Regazzoni 2002).

The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage – which applies to items salvaged from shipwrecks in international waters – raises two issues of concern to those in the art world (The Art Newspaper 2000). First, it focuses on archaeological value but does not acknowledge artistic value in works to be protected, even though many items recovered are of deep interest in the art world, are commoditized as artworks, and wind up in art collections or museums. Second, the convention protects only works that are at least 100 years old, though important artworks created more recently are also involved in shipwrecks. In both of these ways, art becomes an exception. (Another interesting feature of this convention is that it highlights the impact of high technology – in this case, digital sensors – on the entry of works into the global art market. It is for this reason that shipwrecks are known as archaeology’s ‘final frontier’ [Ruiz 1998].)

While labor is now free to move throughout Europe, artists and museum curators find it almost impossible to work in a country not their own either because their low income isn’t sufficient for a residence permit, jobs or grants from public bodies may have residency requirements, and work in relation to heritage issues may also raise constraints. Here three different principles come into conflict with each other – the right of free movement and freedom of establishment, the principle of mutual recognition of each nations’ certification of professional qualifications, and the right of each state to protect its cultural heritage (M. 2000a).
This tension among different treaty provisions, whether within the same treaty or in different treaties to which the same country is signatory, can also show up in international trade in artworks. The long struggle over opening up French auction houses to foreign auction firms oriented around the issue of whether French government control over art sales was acceptable under the Treaty of Rome, which does permit exclusion from the free market of anything connected with national governments unless that government (Tariant 2001, The Art Newspaper 1997). An individual who owned a Van Gogh painting that failed to achieve the expected sales price after it was designed an item important to French cultural heritage — and therefore was not available to potential buyers outside of France — also claimed that the Treaty of Rome’s provision for the free circulation of goods had been abrogated (Powell 1993b).

Research questions
This inductive mapping of key effects of international treaties upon the arts, derived from analysis of reportage about and analysis of treaty-related matters that affect high art in the elite periodical The Art Newspaper since 1990, suggests numerous areas in which sociological, political, economic, and legal research would be valuable. In addition to questions about just how certain processes work, where the points of intervention might be, the relative roles of various forms of power in particular circumstances, etc., at least three broader questions involving art-society relations in the 21st century in general are suggested.

A taxonomy of art forms?
A wide range of cultural forms, from high art to traditional oral story cycles, are now the subject of international treaties and, often in reaction, at the national level. Dimensions of difference among these art forms include whether the artwork under consideration is tangible or intangible, the product of an individual or of a community, new or ancient, produced or owned domestically or not from a given state’s perspective, and of importance to the identity of a particular state or not. Several hundred years ago similar dimensions of difference in texts were key to the development of genre distinctions — such as those between fact and fiction, and those between history and news — that have become deeply embedded in the law in ways considered critically important to our political lives.

Is a matrix of distinctions for differential application of the law to diverse art forms currently being developed, led by international law?

Interactions among policy issue areas
While news reports and policy analysis tend to treat developments in particular issue areas in a siloed manner, there are often political and economic aspects of any given policy principle, tool, or program that serves other interests as well. Environmental use of satellite surveillance information gathered for national security reasons is a positive example of such dual uses of policy. Now that the chemical-pharmaceutical-agricultural-food mega-industry has recognized the value of indigenous knowledge for identifying economically valuable genetic information in plants and animals, there may be a negative element in international protections for traditional bodies of knowledge — particularly in those treaties and conventions that mention ‘utility’ as a characteristic designating specific stories, songs, and communal forms as valuable.
In what ways are laws and policies directed at protecting art also useful to those with interests in other areas such as defense, civil liberties, or environmental concerns? To what extent, if at all, do these multiple uses of international treaty provisions support or confound the ability to achieve the arts-oriented goal?

**Impact on historically important arts policies**

As states become ever-more aware of the potential of the arts as a policy medium to achieve goals in other areas, historically important types of arts policies are being revisited. Multiple social processes interact to exacerbate the effect of any single development. Nervousness about direct governmental funding for the arts derived from sensitivity to sexual or political content might be encouraged by a reorientation towards cultural heritage issues as a way of changing the frame for the conversation. Conversely, heavy emphasis on artists in public diplomacy may stimulate other means of addressing content.

What will the addition of new types of relationships between the arts and geopolitical power mean for traditional types of arts policies that have historically provided important forms of support such as direct funding and tax exemptions?

Addressing these questions provides an opening for exploring the roles of art as political communication in an era in which culture is the global battleground of the world-system—and, in turn, the impact of international treaties in creating a context within which that type of communication can effectively take place. These questions point to a further research agenda, for their answers require knowledge of provenance, authenticity, and the cultural narratives that provide the lenses through which work is perceived.

**Notes**

1. Those stories dealing with sales of artworks through ‘private treaty’ appeared in response to the search terms, but were not included in this analysis because this is a very different use of the word ‘treaty’.
2. The case was taken to the US Supreme Court, which denied certiorari, declining to review the matter.
3. The painting was *Nozze di Bacco e Arianna*.
4. The painting was Manet’s *Winter Garden*.
5. UNIDROIT is the International Institute for the Unification of Private Law, an independent intergovernmental organization.
6. An important facet of this case for US politics was that, as was pointed out in the dissenting opinion by justices Rehnquist, Kennedy, and Thomas, the court’s position that the White House could enter a statement of its interest in particular cases with a court was significant because it increased executive branch power over both Congress and the courts (Lufkin 2004a).

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