

SWITZERLAND'S NEW FEDERAL ACT ON THE INTERNATIONAL TRANSFER OF CULTURAL PROPERTY

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“How will we know it's us without our past?”
John Steinbeck, *The Grapes of Wrath* (1939)

1. INTRODUCTION

What our parents and ancestors have left to us is important, and it is equally important that we leave something for our own children. A community's heritage is a vital part of its identity. Unfortunately, the cultural heritage of some communities is being threatened by the illegal art trade that, notoriously, has become a serious problem over the last few decades.¹

Switzerland is one of the four leading art markets in the world, together with the USA, England and France.² It is also the country with the highest density of museums.³

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1 Exact figures concerning the world's illicit trafficking in cultural property are not available, see <http://www.interpol.com/Public/WorkOfArt/woafaq.asp> (last visited 31 January 2005), where the International Criminal Police Organization (Interpol) states: “In fact, it is very difficult to gain an exact idea of how many items of cultural property are stolen throughout the world and it is unlikely that there will ever be any accurate statistics.”

2 German version of the Message of the Federal Council on the UNESCO 1970 Convention and the Federal Act on the International Transfer of Culture Property (CPTA) of 21 November 2001 (hereinafter ‘CPTA-Message’), 545, available on <http://www.admin.ch/ch/d/ff/2002/535.pdf> (last visited 31 January 2005). The CPTA-Message is also available in French and Italian, see <http://www.admin.ch/ch/f/ff/2002/505.pdf> and <http://www.admin.ch/ch/i/ff/2002/457.pdf>. (both last visited 31 January 2005).

3 CPTA-Message, *ibid.*, at 548.

However, until now Switzerland has had neither a specific statutory mechanism regulating the trade of cultural property, nor been bound by any international agreement governing such trade. Consequently, the Swiss Confederation has not had an adequate legal mechanism to protect domestic and foreign cultural property within its territory.⁴ Facing these facts, and in order to satisfy the requirements for being a reputable art trading and modern cultural centre, Switzerland sought to amend its law.

Following several years of eager debates between various interest groups, the Swiss Parliament passed the Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA)⁵ on 20th June 2003.⁶ The enactment of the CPTA has also entailed amendments to the Swiss Civil Code of 10th December 1907 (CC), the Swiss Law of Obligations of 30th March 1911 (CO), the Federal Act on Private International Law of 18th December 1987, and the Federal Act on the Protection of Nature and Home Country of 1st July 1966.⁷ The enactment of this new legislation is in fact the implementation of the non-self-executing UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14th November

4 Switzerland has therefore been predestinated as one of the 'clearinghouses for stolen antiquities', compare Zainab Bahrani, 'In the Fray: British and Swiss Get Tough about Smuggling', *Wall Street Journal*, 18 February 2004, D4, and been reproached with lying "at the heart of the global trade in illicitly excavated artifacts and looted art", compare *Art Newspaper*, No. 127, July/August 2002, 11; see also *TIME Asia*, 20 October 2003, Vol. 162 No. 15, where Switzerland is designated as "an ideal transit port for laundering illicit art".

5 The CPTA is available in English on http://www.kultur-schweiz.admin.ch/arkgt/files/kgtg2_e.pdf (last visited 31 January 2005).

6 The parliamentary consultation procedure of the first bill, which has been the result of some ten years of work and public discussion (hereinafter 'the first bill'), started on 30 October 2000; taking into account the results of that consultation, the first bill was revised and subsequently presented on 21 November 2001 (hereinafter 'the bill'); a counter-draft, conceived under the lead of Prof. Frank Vischer, Basle, was presented on 4 October 2001 (hereinafter 'the counter-draft'); after some revisions of the bill the final version of the new Act was passed on 20 June 2003; the deadline for a referendum against this new Act expired on 9 October 2003.

7 See Article 32 CPTA listing amendments to the concerned statutes. Additionally, an amendment to the Federal Act on the Prevention of Money Laundering in the Financial Sector of 10 October 1997 (Money Laundering Act, MLA) is the subject of the current parliamentary consultation which commenced on 12 January 2005, see below, 3.

1970 (UNESCO 1970 Convention), which Switzerland ratified on 1st October 2003.⁸ In June 2004, the Federal Department of Home Affairs presented the draft of the ordinance of the CPTA (Ordinance of the Cultural Property Transfer Act, OCPTA).⁹ The Act and its ordinance are expected to come into force on 1st April 2005.¹⁰

This article will discuss the gist of the eventual formulation of the CPTA and the first draft of its corresponding ordinance, the OCPTA.¹¹ It will include the substantial amendments made to the CC and CO. In addition, it will set out the ways in which the CPTA differs from the bill as originally proposed,¹² and point out the moot issues which have been debated before Parliament and in public since then. This will be the core issue explored in the article

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- 8 For the full text of the UNESCO 1970 Convention see http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited 31 January 2005); the UNESCO 1970 Convention enunciates principles ensuring a minimal standard of protection of cultural property. The CPTA is basically also compatible with the EC law, compare Council Directive 93/7/ECC of 15 March 1993 and Council Regulation (ECC) No. 3911/92 of 9 December 1992; see also CPTA-Message, *supra* note 2, at 616.
- 9 See Article 31 CPTA stating that the Federal Council (the Confederation's highest executive authority heading all Federal Departments) shall enact the provisions for implementation, i.e. the ordinance. Ordinances are considered to be subsidiary to statutes (Acts). The ordinance is available in the three national languages German, French and Italian: see for German http://www.kultur-schweiz.admin.ch/bak/files/kgtv/d_kgtv_300604.pdf, for French http://www.kultur-schweiz.admin.ch/bak/files/kgtv/f_kgtv_300604.pdf and for Italian http://www.kultur-schweiz.admin.ch/bak/files/kgtv/i_kgtv_300604.pdf (all three last visited 31 January 2005). A report explaining the provisions of the ordinance is attached to the OCPTA (hereinafter 'OCPTA-Report'). The enactment of a second ordinance governing the Federal Register is expected, see OCPTA-Report, 9.
- 10 At the date of writing (31 January 2005), the Federal Council has yet to confirm officially that the CPTA and its ordinance will definitely come into force on 1 April 2005.
- 11 The final text of the OCPTA was still not published at the date of writing (31 January 2005). Changes to this ordinance are to be expected.
- 12 The bill is available in the above-mentioned three national languages on <http://www.admin.ch/ch/d/ff/2002/622.pdf> (German), <http://www.admin.ch/ch/f/ff/2002/589.pdf> (French), and <http://www.admin.ch/ch/i/ff/2002/544.pdf> (Italian) (all three last visited 31 January 2005). The first bill has been set out by the Federal Department of Home Affairs (also called Federal Department of the Interior) in 'Federal Act on the International Transfer of the Cultural Goods (Transfer of Cultural Goods Act, TCGA)', (2001) VI *Art Antiquity and Law*, 176 *et seq.*, and the bill by Roman Plutschow in 'Will Switzerland Finally Ratify the UNESCO 1970 Convention?', (2002) VII *Art Antiquity and Law*, 163 *et seq.*

(see 2. Contents of the CPTA and the Amendments to the CC and CO). It will also refer to possible alterations to the Money Laundering Act (MLA) which are the subject of the current parliamentary consultation (see 3. Excursus: Money Laundering and the Art Trade). The article will end with a short conclusion (see 4. Conclusion).

2. CONTENTS OF THE CPTA AND THE AMENDMENTS TO THE CC AND CO

2.1. Scope, Purpose and Terminology

2.1.1. Scope and Purpose

The first stipulation of the CPTA deals with its scope and purpose. The CPTA regulates the import of cultural property into Switzerland, its transit and export as well as its repatriation from Switzerland.¹³ With the adoption of this Act, the Confederation seeks to make a contribution to the maintenance of the cultural heritage of humankind and prevent theft, looting, and illicit import and export of cultural property.¹⁴ In other words, the CPTA seeks to enhance the protection of the cultural heritage of both the Confederation and other States.¹⁵

2.1.2. Key Terminology

The second stipulation of the CPTA defines five concepts, in particular the crucial concepts of 'cultural property' and 'cultural heritage'.¹⁶

'Cultural property' is defined as significant property from a religious or universal standpoint for archaeology, pre-history, history, literature, art or science belonging to one of the categories under Article 1 of the UNESCO 1970 Convention.¹⁷ In assessing whether or not cultural property

13 Article 1(1) CPTA.

14 Article 1(2) CPTA.

15 CPTA-Message, *supra* note 2, at 572.

16 Article 2(1) and (2) CPTA. The other three concepts are 'contracting States', 'specialised body', and 'illicit import'. Regarding the 'specialised body' see below, 2.6.1.

17 Article 2(1) CPTA. For various interpretations of the definition of cultural property under the UNESCO 1970 Convention see Patrick J. O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* (Leicester, Institute of Art and Law, 2000), 36 *et seq.*

is significant, both the community it belongs to and its further context are to be considered.¹⁸ The market and aesthetic value of the cultural property are irrelevant. The term 'cultural property' also clearly differs from the term 'work' according to the Federal Act of Copyright and Neighboring Rights of 9th October 1992 (Copyright Act); even though in many cases an object may satisfy the requirements of both terms.¹⁹ Only movable objects ('cultural goods') may be cultural property under the CPTA's definition.

The term 'cultural heritage' means the entirety of cultural property belonging to one of the categories stated in Article 4 of the UNESCO 1970 Convention.²⁰ Accordingly, cultural property is part of a State's cultural heritage if it is to be considered to have a special affiliation to the State in question; either created by a State's national or within the State's territory by non-nationals, found within the State's territory, or lawfully acquired from the country of origin. Cultural property can be part of the cultural heritage of more than one State. Both movable and immovable objects may form part of a country's cultural heritage.

Equally critical is the concept of 'significant importance'. Certain crucial measures under the CPTA, i.e. the registration of the Confederation's cultural property in the Federal Registry and the regulation of the import and the repatriation of cultural property, concern only cultural property which is of significant importance to the cultural heritage of the State in question.²¹ In the absence of any definition of this concept in the CPTA, the OCPTA contains a description of cultural property of significant importance for the cultural heritage – independent of its material and aesthetic value, it may be archaeological or palaeontological objects; cultural property that belongs to the religious, social or cultural life of a community; elements of artistic or architectural monuments or parts of significant collections; archival goods of scientific or historical value; and cultural property being particularly representative for the cultural

18 CPTA-Message, *supra* note 2, at 572 *et seq.*

19 Compare Article 2 Copyright Act.

20 See Article 2(2) CPTA.

21 Articles 3(1) and 7(2)(a) CPTA. Regarding these measures see below, 2.2.1. and 2.3.1.

heritage of a member State.²² Since this description is not laid down in the statute, it is a mere guide for construction.²³

It is necessary to point out that the notion of 'cultural property in the strict sense' has been abolished in the CPTA.²⁴ The bill provided this notion in the context of some cultural goods that are of enormous importance to a community's cultural identity and are in a particular manner jeopardised by illegal traffic.²⁵ However, the legislator has discerned that this notion is superfluous and rather more confusing than useful.

2.2. Protection of Swiss Cultural Heritage

One of the central planks of the CPTA is the protection of Swiss cultural heritage. The Act differentiates between protection afforded by the Confederation and by the cantons.

2.2.1. Protection at the Federal Level

Cultural property which belongs to the Confederation and is of significant importance for Swiss cultural heritage will be registered in the Federal Registry.²⁶ A body known as the 'specialised body'²⁷ publishes the Federal Registry in the form of an electronic database.²⁸ Such registration has, in particular, the effect (1) that cultural property may neither be acquired by adverse possession nor be acquired in good faith;²⁹ (2) that the Federal Council will claim the right of repatriation against other contracting States

22 Article 2 OCPTA. These objects correspond to a wide extent to Article 1(a),(c),(d),(f), and (j) UNESCO 1970 Convention, see OCPTA-Report, *supra* note 9, at 14.

23 From a legislative point of view it is odd that this term, being connected with such important consequences, has not been defined on a statutory level.

24 Compare Article 2(1) and (2) of the bill and Article 2(1) and (2) CPTA.

25 CPTA-Message, *supra* note 2, at 573. Only Articles 7(2)(a) (Agreements) and 17(1) (Duty of record) of the bill referred to cultural property in the strict sense. Article 7(2)(a) CPTA refers to cultural property of significant importance for the cultural heritage instead. In Article 16(2) CPTA the term cultural property in the strict sense has been abolished without being substituted.

26 Article 3(1) CPTA. In establishing this registry the Federal Act on Data Protection of 19 June 1992 (Data Protection Act) is to be observed (Article 30(2) CPTA).

27 Regarding the 'specialised body' see below, 2.6.1.

28 Article 3(4) CPTA.

29 Article 3(2)(a) CPTA.

involved in the illicit export from Switzerland;³⁰ and (3) that property's temporary export hinges on the granting of an export licence by the 'specialised body'.³¹ The request for such a licence must be submitted to the 'specialised body' at least 30 days before the intended export.³²

2.2.2. *Protection at the Cantonal Level*

Owing to their autonomy in this matter each canton decides how, and to what extent, it will protect both cultural property of the cantons and that of private parties within its cantonal territory.³³ A canton may establish a Cantonal Registry and connect it to the federal database to simplify checks at the border.³⁴ Presumably, most cantons will make use of this option. The moot question whether, and under what conditions, private cultural property can be registered in the Cantonal Registry has been resolved as follows: privately-owned cultural property will be registered in the Cantonal Registry only with the approval of the private party in question.³⁵ This solution, providing protection if wished by private parties, is adequate since it respects the constitutional right to property and makes the vexed question of expropriation redundant.

2.2.3. *Protection of Swiss Archaeological Heritage*

Moreover, it should be mentioned that the CC has been clarified and amended to enhance the protection of Swiss archaeological heritage. Derelict natural bodies or antiquities of scientific value are the property of the canton in which the items are found.³⁶ Further, it is stipulated

30 Article 6(1) CPTA.

31 Article 5 CPTA; Article 23(1) OCPTA. See also Article 3(2)(c) CPTA.

32 Article 4(1) OCPTA. Failure to respect this time limit means that the request will possibly not be dealt with by the intended export date. For the contents of the request see Article 4(2) and (3) OCPTA. The repatriation to Switzerland must be communicated to the 'specialised body' within 30 days (Article 5 OCPTA).

33 Articles 3 and 69(1) Swiss Federal Constitution of 18 April 1999 (Swiss Federal Constitution) and Article 4(2) CPTA; compare CPTA-Message, *supra* note 2, at 576 *et seq.* The transfer of cultural property comes within the competence of both the Confederation and the cantons; while the import of cultural goods falls under the jurisdiction of the former, their export is subject to the jurisdiction of the latter, see CPTA-Message, *supra* note 2, at 545 *et seq.* and 576.

34 Articles 4(1) and 19(1) CPTA. See also Articles 3 and 23(2) OCPTA.

35 Article 4(1)(b) CPTA is, despite its unclear wording, newly stating this. See also OCPTA-Report, *supra* note 9, at 17.

36 Article 32 CPTA and Article 724(1) CC.

that such items may not be sold without the permission of the competent cantonal authority, and may otherwise be reclaimed at any time by the canton concerned.³⁷

2.3. Protection of Cultural Heritage of Other Countries

The protection of the cultural heritage of other countries is another pivotal component of the CPTA. The following three protection measures are central and will be illuminated in the ensuing sections: (1) the regulation of the import and repatriation of cultural property (including compensation in case of repatriation); (2) temporary measures according to Article 8 CPTA; and (3) financial assistance.

2.3.1. Regulation of the Import and Repatriation of Cultural Property

The most complex measure is the regulation of the import and repatriation of cultural property. The CPTA does not directly govern the import of cultural property from other countries. Following the US implementation of the UNESCO 1970 Convention,³⁸ the Federal Council is authorised to form international agreements with contracting States on the import and repatriation of cultural property under the following conditions: (1) the cultural property is of significant importance to the cultural heritage of the contracting State in question; (2) that it is subject to export provisions in the State in question for the purpose of protecting cultural heritage; and (3) that the contracting State grants reciprocal rights.³⁹ Only upon the conclusion of such an agreement is the CPTA-regulation on the import and repatriation of cultural property applicable to the contracting State.⁴⁰

Article 9 CPTA deals with the repatriation claim based on Articles 7 or 8 CPTA.⁴¹ Any person who is in possession of

37 Article 32 CPTA and Article 724(1bis) CC.

38 CPTA-Message, *supra* note 2, at 579.

39 Article 7 CPTA. Unlike the bill, the CPTA requires that the cultural property in question is of significant importance to the cultural heritage of the corresponding contracting State; by contrast, Article 7(2)(a) of the bill provided that it was a “cultural property in the stricter sense”, a term that has been abolished in the CPTA, see above, 2.1.2.

40 CPTA-Message, *supra* note 2, at 579 and 585 *et seq.*

41 CPTA-Message, *supra* note 2, at 581. See also Article 2(5) CPTA. Regarding Article 8 CPTA, see below, 2.3.2. Besides the claim under Article 9 CPTA, suits based on other legal foundations, e.g. *rei vindicatio* pursuant to Article 641(2) CC, can also be filed, see CPTA-Message, *supra* note 2, at 581.

cultural property can be sued for its return.⁴² Unlike the bill, the CPTA now expressly states that the country filing suit must show that the cultural property is of significant importance to its cultural heritage and was illicitly imported.⁴³ Such claims for repatriation by a State are subject to a limitation period of one year after its authorities gain knowledge of where, and with whom, the cultural property is located; with a longstop of 30 years after the date when the property in question was illicitly exported.⁴⁴ Not surprisingly, the limitation period was one of the most controversial topics right from the outset, and continued to be so until the end of the parliamentary consultations and public discussion.⁴⁵ Rightly, the 30-year period, in line with EC law,⁴⁶ prevailed.

Any person who acquires cultural property in good faith and is forced to return the said property has a claim for compensation at the time of its return.⁴⁷ Regarding good faith, it is necessary to highlight that the Federal Supreme Court has held – in the context of the art trade – that a higher degree of diligence is required in businesses frequently encountering offers on objects of dubious origin and, consequently, facing a higher risk of deprivation.⁴⁸

Another much-debated item was the determination of compensation; in particular, whether full or appropriate compensation should be paid, and whether it should be based on the purchase or market price of the object to be returned. Whereas the bill provided an ‘appropriate compensation’ at the time of repatriation corresponding to the purchase price, as well as necessary and useful expenses for protecting and maintaining the cultural property, the CPTA now provides ‘compensation’ under the

42 Article 9(1) CPTA.

43 Article 9(1) CPTA.

44 Article 9(4) CPTA.

45 Both the first bill and the bill provided for a limitation period of 30 years; the counter-draft suggested a period of ten years; during the consultation the National Council (the people’s parliamentary representation) tried to reduce it from 30 to 15 years; the Council of States (the cantons’ parliamentary representation), however, persisted in 30 years.

46 See Article 7(1) Council Directive 93/7/ECC of 15 March 1993.

47 Article 9(5) CPTA.

48 Federal Supreme Court decisions BGE 122 III 1 E. 2 and BGE 123 II 134 E. 6.

aforesaid measure.⁴⁹ Uncertainty exists as to the meaning and consequences of the deletion of the word ‘appropriate’. Since the *bona fide* acquirer should not suffer any loss, it is sufficient that he receives compensation equal to the purchase price paid, corresponding interests and transaction costs, in addition to all necessary expenses for the conservation. It is also correct to determine the amount of compensation according to the purchase price, rather than the market price, since no profit shall be made by a purchaser without title, and since no risk of loss shall be borne by a purchaser in good faith.

2.3.2. *Temporary Measures*

Moreover, the Federal Council may take temporary measures to protect another State’s cultural heritage being “jeopardised by exceptional events”.⁵⁰ Both the CPTA and OCPTA fail to expound the meaning of the term ‘jeopardised’. Jeopardy under these provisions is met as soon as damage, loss or unlawful seizure is seriously possible. ‘Exceptional events’, exemplarily described in the OCPTA, include wars, political unrest, natural disasters, terrorist acts, extreme financial crises obstructing the upkeep and maintenance of cultural heritage, or any other extraordinary occurrence able to jeopardise a State’s cultural heritage.⁵¹

This provision applies to all States regardless of whether or not they are a State Party to the UNESCO 1970 Convention and whether or not they have formed bilateral agreements with Switzerland.⁵² This flexible provision enables the Federal Council to take swift and appropriate action tailored to the specific needs of the case in question. The possible measures mentioned in Article 8(1) CPTA are not comprehensive. A combination of several actions or co-operative actions with another State are also possibilities. It is at the Federal Council’s discretion to decide on a case-to-case basis what form, nature and period of time of action is appropriate, and whether or not conditions shall be tied to it.⁵³ For example, the Council may offer temporary

49 Compare Article 9(5) of the bill and Article 9(5) CPTA.

50 Article 8 CPTA.

51 Compare Article 1(h) OCPTA and OCPTA-Report, *supra* note 9, at 12.

52 CPTA-Message, *supra* note 2, at 580 and 586.

53 Compare CPTA-Message, *supra* note 2, at 580 and Article 8(1)(a) CPTA. See also Article 7 OCPTA,

fiduciary custody and conservatory care of cultural property by a federal museum or similar institution.⁵⁴ Temporary measures can be extended, provided that the requirements under Article 8 CPTA are still fulfilled.

2.3.3. *Financial Assistance*

Furthermore, the Confederation may grant financial assistance. Such assistance may be rendered (1) for projects to maintain the cultural heritage of other contracting States (e.g. international research cooperation and excavation projects);⁵⁵ (2) for the temporary fiduciary custody of cultural property that is part of the cultural heritage of another State and is jeopardised as a result of exceptional events;⁵⁶ and (3), newly added in the CPTA, to ease the restitution of the cultural heritage of contracting States under exceptional circumstances.⁵⁷ Financial aid may be coupled with conditions.⁵⁸

2.4. **Promotion of International Exchange of Cultural Property**

Going beyond the UNESCO 1970 Convention, the CPTA provides a return guarantee in favour of the party temporarily lending cultural property to an institution in Switzerland in order to foster the international exchange of cultural goods between museums and similar institutions.⁵⁹ This return guarantee has to be requested by the borrowing party at the 'specialised body'⁶⁰ at least three months prior to the intended import into Switzerland.⁶¹

54 Compare Article 14(1)(a) and (2) CPTA.

55 Article 14(1)(b) CPTA. This provision has been materially amended: the bill referred only to 'moveable cultural heritage' whereas the CPTA refers to 'cultural heritage' in general, compare Article 14(1)(b) of the bill and Article 14(1)(b) CPTA; hence, it now also applies to immovable heritage. Regarding examples of possible projects see CPTA-Message, *supra* note 2, at 587. Concerning the term cultural heritage, see above, 2.1.2.

56 Article 14(1)(a) CPTA.

57 Article 14(1)(c) CPTA. See also Article 9 *et seq.* OCPTA.

58 Article 15 OCPTA.

59 Articles 10 to 13 CPTA; CPTA-Message, *supra* note 2, at 582 *et seq.* Compare OCPTA-Report, *supra* note 9, at 19.

60 Regarding the 'specialised body' see below, 2.6.1.

61 Article 10 CPTA; Article 8(1) OCPTA. Failure to comply with the three-month period means merely that it is possible that the guarantee request will not be approved by the time the exhibition commences, see OCPTA-Report, *supra* note 9, at 19. For the contents of the request see Article 8(2) to (4) OCPTA. For the procedure of requesting and issuing the guarantee see Articles 11 and 12 CPTA.

The guarantee has the effect that neither private parties nor authorities may make legal claims on the cultural property as long as the cultural property is located in Switzerland.⁶² Unlike the bill, the CPTA does not require that the lending party be a museum or cultural institution: any natural person or legal entity, either private or public is entitled to benefit from this protective provision.⁶³ However, the borrowing party is required to be either a museum or another cultural institution.⁶⁴

The issuance of a return guarantee is subject to the payment of a fee ranging from the sum of 100 up to 2,000 Swiss Francs, which in turn depends on the corresponding administrative expenditure.⁶⁵

2.5. Principles regarding Conveyance of Cultural Property and Duty of Diligence

Another key subject matter of the CPTA is contained in section 6 which deals with the principles regarding conveyance and the duty of diligence in the art trade.

2.5.1. Conveyance of Cultural Property

The federal institutions are prohibited from acquiring or exhibiting cultural property that was stolen, lost against the will of the owner or illegally excavated.⁶⁶ The cantons, i.e. cantonal and private institutions, should adopt and adhere to this fundamental rule, as well.⁶⁷ Otherwise,

62 Article 13 CPTA.

63 Article 10 of the bill referred only to cultural property from 'museums and other cultural institutions', and the CPTA-Message, *supra* note 2, at 583 explicitly excludes cultural property from 'private collections'; this restriction has been abolished in Article 10 CPTA so that this provision applies to any person or institution, including private collections; Article 1(d) OCPTA confirms this interpretation.

64 Article 10 CPTA.

65 See OCPTA-Report, *supra* note 9, at 19.

66 Article 15(1)(a) CPTA. This provision is in accordance with the Code of Ethics for Museums of the International Council of Museums (ICOM Code), see sections 2.3, 2.4, and 8.5 ICOM Code. The ICOM Code is available on http://icom.museum/code2004_eng.pdf (last visited 31 January 2005).

67 Article 15(1)(a) CPTA by analogy; explicitly FAQ-paper 'Verordnung über den internationalen Kulturgütertransfer (KGTV); Häufig gestellte Fragen' of Federal Office of Cultural Affairs of 30 June 2004, 2, available on http://www.bak.admin.ch/bak/files/kgtv/d_faq_kgtv_220604.pdf (last visited 31 January 2005); see also CPTA-Message, *supra* note 2, at 588 *et seq.* Certainly, many of these museums are also subject to the obligations under the ICOM Code.

the undesirable situation could arise that cantons failing to regulate this critical issue could benefit by allowing the exhibition of certain objects that other cantons and the Confederation could not display by law. It is in the interest of the entire Confederation that such a situation is prevented and that Switzerland is regarded as a reputable and trustworthy cultural centre.

Importantly, in the art trade and auction business cultural property may be transferred only when the person transferring it may assume, under the given circumstances, that the cultural property was neither stolen, lost against the will of the owner, nor illegally excavated or imported.⁶⁸ Infringement of this duty of diligence leads to criminal sanctions under Article 24 CPTA.

2.5.2. *Duty of Diligence*

Under the CPTA, persons active in the art trade or auction business are obliged:⁶⁹

- to establish the identity of the supplier or seller and require a written declaration from the same of his or her right to dispose of the cultural property;⁷⁰
- to inform their customers about existing import and export regulations of applicable Swiss and foreign law;⁷¹
- to maintain written records on the acquisition of cultural property and to store them for 30 years;⁷² the record must contain data about the seller's or supplier's identity, the declaration according to Article 16(2)(a) CPTA, a description of the cultural property, the origin

68 Article 16(1) CPTA. See also below, 2.7.

69 Note that the duty of diligence was subject to material and formal changes, compare Articles 16 to 18 of the bill and Articles 16 and 17 CPTA. Consider also that neither the CC nor the CO or another statute provide a specific duty of diligence for people active in the art trade.

70 Article 16(2)(a) CPTA, and Articles 17 and 18 OCPTA. It is to be considered that the identification of the supplier and seller is a critical duty in fighting the illicit transfer of cultural property since only those who know their clients are able to draw conclusions on their trustworthiness and probity, see OCPTA-Report, *supra* note 9, at 20.

71 Article 16(2)(b) CPTA.

72 Article 16(2)(c) and (3) CPTA, and Article 19 OCPTA. The 30-year period begins with the expiration of the business year in which the last entries have been made (Article 16(3)(sentence 2) CPTA in connection with Article 962(2) CO).

of the cultural property, the dates of the present and former dispositions of the cultural property, and its sale price or estimated market price;⁷³ and

- to provide, to the ‘specialised body’, all necessary information on fulfilling this duty of diligence.⁷⁴

The cantons can still enunciate duties of diligence for cantonal and private institutions within their territory, since only the federal institutions and persons active in the art trade or auction business are bound by the rules of Article 16 CPTA.⁷⁵ Nevertheless, it is expected – and very much hoped – that the cantons will also provide a similar duty of diligence.

2.5.3. *Persons Active in the Art Trade and Inspection of Compliance*

Persons active in the art trade or auction business are defined as natural persons or legal entities which either professionally acquire cultural property for the purpose of reselling it on their own account or who professionally trade with cultural property on another’s account.⁷⁶ ‘Acting professionally’ (or in a commercial manner) is defined as achieving gross revenue of more than 20,000 Swiss Francs in the course of a calendar year or closing more than ten trade deals relating to cultural property within such a period.⁷⁷

Legal entities active in the art trade or auction business must (a) designate a member of the management to be responsible for the implementation and observance of the duty of diligence on the transfer of cultural property, and (b) appoint a contact person to be available for the authorities’ enquiries.⁷⁸

73 Article 19(2) OCPTA; see also Article 1(a),(b),(f) and (g) OCPTA. In keeping these records the Data Protection Act is to be observed (Article 30(2) CPTA).

74 Article 16(2)(d) CPTA.

75 Article 69(1) in connection with Article 95(1) Swiss Federal Constitution. See also OCPTA-Report, *supra* note 9, at 10 *et seq.*, stating that the cantons would have to determine what duty of diligence they should impose on the cantonal and private institutions.

76 Article 1(e)(sentence 1) OCPTA.

77 Article 1(e)(sentence 2) OCPTA. This appropriate limit to professional activities corresponds to the criteria of Article 3 *et seq.*, of the Ordinance of the Money Laundering Control Authority concerning the Financial Intermediation in the Non-banking Sector as a Commercial Undertaking of 20 August 2002.

78 Article 20(1) and (2) OCPTA.

The 'specialised body'⁷⁹ inspects compliance with the duty of diligence of persons active in the art trade or auction business.⁸⁰ Under the new ordinance OCPTA, such inspections will be announced in advance except in cases of imminent danger.⁸¹ This solution differs from that of the bill, which provided that such inspections can generally be carried out without prior announcement.⁸² It is hard to understand how an inspection can be effective and credible when it must be announced in advance. Inspections should be expedited without prior announcements not only in cases of imminent danger, but also in cases of strong suspicions of non-compliance with the duty of diligence.

2.6. Authorities, Sanctions and Non-retroactivity of the New Legislation

Furthermore, the provisions regarding the authorities in charge, the criminal sanctions and the non-retroactivity of the new legislation are of particular importance.

2.6.1. Authorities in Charge

Four authorities play a critical role in the context of the CPTA. The 'specialised body' is in charge of the execution of the new Act.⁸³ It is deemed to be the head office for general matters concerning the CPTA. It is led by the Federal Office of Cultural Affairs.⁸⁴ The customs authorities and criminal prosecution authorities basically carry out the duties relating to customs and criminal prosecution.⁸⁵ Also very important is the Federal Council which has the task of concluding international agreements according to Article 7 CPTA.⁸⁶

79 Regarding the 'specialised body' see below, 2.6.1.

80 Article 18(i) CPTA.

81 Article 21 OCPTA.

82 Article 18(2) of the bill. This provision has been abolished in the CPTA.

83 Articles 2(4) and 18 CPTA, the latter listing several tasks of the 'specialised body'. See also its tasks regarding the official and legal assistance in Articles 21 and 22 CPTA.

84 Article 22(1) OCPTA. For more information regarding this Office see <http://www.kultur-schweiz.admin.ch> (last visited 31 January 2005).

85 See Articles 19, 20, 27, and 29 CPTA. See also Articles 23 to 25 and 27 OCPTA.

86 See above, 2.3.1. Regarding the Federal Council's competence to conclude these agreements see CPTA-Message, *supra* note 2, at 580.

2.6.2. *Criminal Sanctions*

The CPTA distinguishes between 'misdemeanour' and 'violation'.⁸⁷ Depending on the specific criminal act, and if the offence is not threatened with a higher sanction pursuant to another provision of Swiss criminal law, the sanctions provided for by the CPTA are, in the case of misdemeanour, either punishment of imprisonment up to one year or a fine of up to 100,000 Swiss Francs.⁸⁸ Misdemeanours include: specifically-described trade actions with cultural property stolen or otherwise lost against the owner's will, the appropriation of excavation finds in terms of Article 724 CC, the illicit import of cultural goods and illicit export of registered goods, and the incorrect declaration of imported goods or exported registered goods.⁸⁹ If acting on a professional basis, imprisonment can be extended to a maximum of two years and the applicable fine may be increased to 200,000 Swiss Francs.⁹⁰

In the case of violation, and under the premise that the offence is not threatened with a higher sanction in accordance with another provision of the criminal law, no punishment of imprisonment, but only fines of up to 20,000 Swiss Francs are the possible sanctions.⁹¹ Violations are: failure to observe the duty of diligence and the frustration of inspections by the 'specialised body'.⁹² It should be highlighted that the disregard of the duty of record according to Article 16(2)(c) CPTA is deemed to be a mere violation rather than a misdemeanour as originally provided in the bill.⁹³

Attempts and aiding and abetting are punishable acts relating to both misdemeanours and violations.⁹⁴

87 Compare Articles 9 and 101 Swiss Criminal Code of 21 December 1937 (Swiss Criminal Code) providing harsher punishments for misdemeanours than for violations.

88 Article 24(1) and (2) CPTA. In the case of misdemeanours the punishments of imprisonment and fine can be combined, see Article 50(2) Swiss Criminal Code.

89 Article 24(1) CPTA.

90 Article 24(3) CPTA.

91 Article 25(1) CPTA.

92 Article 25(2) CPTA.

93 Compare Article 24(1)(e) of the bill and Article 25(1)(a) CPTA.

94 Article 25(2) CPTA; see also Articles 21 *et seq.* and 104 Swiss Criminal Code.

2.6.3. Non-Retroactivity of the New Legislation

The CPTA and the amendments to the other statutes are not applicable retroactively. In particular, they do not apply to acquisition activities that took place before this new legislation entered into force.⁹⁵ Thus, only actions from 1st April 2005 will be subject to this new legislation.⁹⁶

2.7. Enhancing the Rights of the Owner and the Acquirer of Stolen Goods

The five-year time limit for adverse possession according to Article 728 CC and the forfeiture of the right to restitution under Article 934 CC were considered to be one of the major problems confronting owners of stolen goods. Once five years had elapsed, the dispossessed owner could no longer commence proceedings for the return of the stolen goods if those goods were obtained in good faith in the course of trade. This very short time limit has been adapted to international standards by increasing it to 30 years in respect of cultural property.⁹⁷ Hence, the dispossessed owner can recover goods stolen in Switzerland or abroad, as well as goods removed against his will or otherwise lost by him, from the good-faith acquirer for a period of 30 years from the date of theft or loss. This absolute time limit is supplemented by a relative limitation period of one year commencing with the date on which the dispossessed owner obtained knowledge of the location of the missing goods and the identity of the possessor.⁹⁸ The party who purchases the cultural property in good faith in the course of trade is required to return it only in exchange for compensation of the price paid.⁹⁹

Accordingly, the time limits for guarantee claims for the purchase or auctioning of such goods are to be increased to 30 years, as well.¹⁰⁰ This measure eases recourse claims against the seller and auctioneer.

95 Article 33 CPTA.

96 This is the date the CPTA is expected to come into force, see above, 1.

97 Article 32 CPTA and Articles 728(1bis) and 934(1bis) CC.

98 Article 934(1bis) CC.

99 Article 934(2) CC remaining unchanged.

100 Article 32 CPTA and Articles 196a and 210(1bis) CO.

3. EXCURSUS: MONEY LAUNDERING AND THE ART TRADE

Currently, art dealers are not subject to the Money Laundering Act (MLA).¹⁰¹ However, the Federal Council expressly states in its MLA-Message that the scope of the Act could in future be extended to, amongst others, art dealers.¹⁰² On 12th January 2005, the Federal Council opened the consultation procedure on a number of legal amendments; *inter alia*, amendments to the MLA.¹⁰³

According to the proposed amendments, art dealers will fall within the scope of the MLA.¹⁰⁴ Thus, if these proposals are enforced, art dealers will be subject to various strict obligations under the MLA, namely the duty of checking the identity of the counter party to a contract and of financial beneficiaries, to make repeated checks on their identity, to clarify specific situations, to obtain documentation and to record all transactions, to implement organisational measures, and to report suspicious transactions without delay to the Money Laundering Reporting Office.¹⁰⁵

Hence, the art dealers' duty of diligence would be twofold: (a) the one under the CPTA in relation to the purchase of cultural property; and (b) the one under the MLA in relation to the sale of such property.

4. CONCLUSION

The enactment of the CPTA and the amendments to other legislative provisions constitute an important first step

101 See Article 2 MLA and German version of the Message of the Federal Council on the Money Laundering Act of 17 June 1996 (hereinafter 'MLA-Message'), 1116. The MLA is available in English on http://www.eda.admin.ch/washington_emb/e/home/legaff/swilaw/laund_.Par.0013.UpFile.pdf/dc_971010_moneylaund_e.pdf (last visited 31 January 2005).

102 MLA-Message, *ibid.*, at 1115 *et seq.*

103 See <http://www.efd.admin.ch/e/dok/medien/medienmitteilungen/2005/01/gafi.htm> (last visited 31 January 2005). The consultation procedure will continue up to mid-April 2005.

104 See Consultation Paper, 'Korrigierte Version (...) Erläuternder Begleitbericht zum Vernehmlassungsverfahren' of 13 January 2005, 35 *et seq.*, available on <http://www.efd.admin.ch/d/dok/gesetzgebung/vernehmlassungen/2005/01/gafi1.pdf> (last visited 31 January 2005).

105 See Articles 3 to 9 MLA.

which will considerably aid the fight against the illicit transfer of cultural property, and make a substantial contribution to the maintenance of humankind's heritage. The CPTA implements the UNESCO 1970 Convention effectively and complies with the corresponding EC law. Even though some of the provisions of the CPTA are arguable, the Act as a whole is definitely to be welcomed, in particular its core intentions: an effective protection of the State's cultural property that also respects the cantons' autonomy; proper legal parameters for the protection of other countries' cultural property; and a clear and tangible regulation of the duty of diligence for people active in the art trade or auction business.

Nonetheless, more legal steps must follow. First and foremost, the Federal Council should promptly conclude agreements with other countries; in particular, with less-developed countries running the danger of being exploited and becoming culturally impoverished. Without these agreements the CPTA will be powerless in relation to the protection of the cultural heritage of other countries.

Secondly, the cantons should also enact laws within their autonomy that comply with the minimal standard of the UNESCO 1970 Convention. Otherwise, Switzerland still lacks of an effective legal mechanism that fully prevents unlawful art trade within Swiss boundaries.

Thirdly, to be a reputable and trustworthy art trade centre it is imperative to have a strict and effective law preventing any sort of criminal acts in the context of art trade. This also includes effective legal measures against money laundering through the art trade. Thus, the Money Laundering Act must be amended soon, otherwise Switzerland risks serving as a 'cleaning house' for 'dirty money' by misuse of the art trade.