

# NOTE

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## The Problem of National Treasure in International Law

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|------|--|-----|
| I.   | To Whom Do Important Art Objects Belong? .....                                       | 144 |
|      | A. Where Does Art Belong: The United States as an<br>Analogy .....                   | 146 |
|      | B. Cultural Property .....   | 147 |
|      | C. Trade Agreements .....  | 151 |
|      | D. Differing Interpretations and the Language Barrier .....                          | 153 |
|      | E. The List Approach.....  | 155 |
|      | 1. Inability to Agree on a Definition .....  | 156 |
|      | 2. Balance of Power Between the EU and its<br>Member States .....                    | 157 |
|      | F. <i>Commission of the European Communities v. Italian<br/>Republic</i> .....       | 160 |
| II.  | Free Trade Versus the Protection of National Treasure. ....                          | 162 |
|      | A. National Laws on National Treasure.....   | 163 |
|      | 1. United Kingdom.....   | 166 |
|      | 2. France .....  | 168 |
|      | 3. Italy.....  | 170 |
| III. | The Current Understanding of “National Treasure” and<br>Where to Go from There ..... | 171 |
|      | Conclusions .....  | 172 |

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In 1911, Vincenzo Peruggia, an Italian national, stole the *Mona Lisa* from the Louvre. After hiding the infamous painting in his Parisian apartment for two years, he returned to Italy with it and attempted to sell it to a local antiques dealer. When he was caught and tried, he declared at trial that such masterpieces—all the Italian masterpieces housed in the Louvre—should never have left Italy.<sup>1</sup> The painting was exhibited throughout Italy and finally returned to the Louvre in 1914. The subject of the painting is Lisa del Giocondo, a member of the prominent Gherardini family of Florence and Tuscany. Leonardo began working on the painting while still in Florence and he took the painting with him when he moved to France at the invitation of François I, who eventually bought the *Mona Lisa*. The famous painting is now owned by the French government. Peruggia is considered a patriot in Italy and, although he was found guilty at trial, only served a sentence of a few months.<sup>2</sup> Peruggia's theft of the *Mona Lisa* raises these questions: what does “national treasure” mean, and where do certain art objects, so important that they are considered national treasures, belong?

“National treasure” is a term used in international trade agreements, such as the General Agreement on Tariffs and Trade (GATT) and the Treaty Establishing the European Economic Community (Treaty of Rome).<sup>3</sup> The term is meant to refer to objects of “artistic, historical, or archaeological value” that are exceptions to the normal trade agreement obligation to reduce barriers to international trade.<sup>4</sup> The “national treasure” problem stems from the vague guidance that “artistic, historical, or archaeological value” affords, and the lack of guidance from anywhere else. Compounding this problem are the differing, often conflicting, opinions about how people relate to art and how the law should treat artworks. The international law on national treasures is under-developed; it has been unable to achieve any sense of harmony among the differing national laws on national treasures. This lack of harmony is an obstruction to the achievement of a concrete level of legal predictability. This Note

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<sup>1</sup> JEANNETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 313–14 (2d ed. 1995).

<sup>2</sup> Howard Chua-Eoan, *Crimes of the Century: Stealing the Mona Lisa, 1911*, TIME, Mar. 1, 2007, <http://www.time.com/time/2007/crimes/2.html>.

<sup>3</sup> General Agreement on Tariffs and Trade art. XX(f), Oct. 30, 1947, 55 U.N.T.S. 187; Treaty Establishing the European Economic Community art. 36, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

<sup>4</sup> General Agreement on Tariffs and Trade art. XX(f), Oct. 30, 1947, 55 U.N.T.S. 187; see also Treaty of Rome, *supra* note 3, art. 36.

will discuss the nature of the problem and how the international community may be able to achieve a concrete level of legal predictability when it comes to objects of artistic value that may rise to the level of “national treasure.”

National treasures are unique; they are not “ordinary” goods for trade. The trade in art objects raises a number of issues and there is debate over whether art in general should be a tradable commodity at all.<sup>5</sup> This much is clear: the international legal regime treats art objects, particularly those regarded as national treasures, differently from ordinary goods.

“Cultural property” is another relevant term in the discussion of unique art objects, particularly the international movement of such objects.<sup>6</sup> This Note will focus on the approaches taken by three States in which the national laws on national treasure are comparatively more developed: the United Kingdom, Italy, and France. I have derived the use of the term “national treasure” from the Treaty of Rome and GATT; the three States are signatories to both treaties. The two major organizations governed by these treaties, the European Union and the World Trade Organization, respectively, ought to provide clearer guidelines for “national treasure” and define that term in a more succinct manner. As with most international agreements, such definition will necessarily be minimalistic, otherwise it is unlikely to achieve sufficient acceptance from Member States. The best approach is for the legislative branches of these organizations to provide the courts—national, regional, and international—with a very basic, but functional, guideline for dealing with “national treasure” on a case-by-case basis. Such an approach has the built-in flexibility needed for dealing with an area of law that requires many subjective determinations and myriad considerations.

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<sup>5</sup> See, e.g., Judith H. Dobrzynski, Commentary, *Brandeis' Wretched Museum Closure*, FORBES, Feb. 4, 2009, [http://www.forbes.com/2009/02/04/rose-brandeis-art-opinions-contributors\\_0204\\_judith\\_dobrzynski.html](http://www.forbes.com/2009/02/04/rose-brandeis-art-opinions-contributors_0204_judith_dobrzynski.html) (“Museums themselves are . . . nonprofit ventures, tasked with selecting and preserving art for current and future generations. Though their collections are worth millions or billions, in practice they are not listed as assets on museum balance sheets. Art is too precious for numbers.”).

<sup>6</sup> The term “cultural property” is used in numerous international and regional agreements. See, e.g., Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971) [hereinafter UNESCO]; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

## I

## TO WHOM DO IMPORTANT ART OBJECTS BELONG?

National treasure is first a national property law issue, then an international trade issue. The designation “national treasure” affects property rights to certain art objects. A property right is “the right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership.”<sup>7</sup> The owner of a private property right has the right to determine the services of the resource and the right to sell or rent out the resource.<sup>8</sup> The right to property is a fundamental human right. Article 1, paragraph 2 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) states: “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.”<sup>9</sup> Article 1 of Protocol 1 to the European Convention on Human Rights states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>10</sup>

Article 21 of the American Convention on Human Rights states:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.<sup>11</sup>

The Fifth Amendment of the U.S. Constitution states: “No person shall . . . be deprived of life, liberty, or property, without due process

<sup>7</sup> BLACK’S LAW DICTIONARY 1252 (8th ed. 2004).

<sup>8</sup> *See id.*

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) art. 1, para. 2, Dec. 19, 1966, 993 U.N.T.S. 3.

<sup>10</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

<sup>11</sup> American Convention on Human Rights art. 21, Nov. 22, 1969, 1144 U.N.T.S. 123.

of law; nor shall private property be taken for public use, without just compensation.”<sup>12</sup> Such covenants, conventions, and constitutions affirm the fundamental nature of the right to property by restricting the State’s power to abridge that right. However, the restriction on the State is not absolute and the State retains the power to abridge property rights in some instances, including when an object is treated as a national treasure.

The terms themselves, “national treasure” and “cultural property,” indicate that property rights to certain objects of artistic value are not merely vested in the individual: a *nation* claims rights to a “national treasure” and a *culture* claims rights to “cultural property.” The terms imply that, in a certain sense, these objects of artistic value are property belonging to entire communities. “[T]he greater the art, the greater number of people ‘own’ it. The greater its power, the more it expands our lives.”<sup>13</sup> When a great work of art is destroyed or made inaccessible, a multitude will suffer the loss. Governments are sensitive to this sentiment, hence the passage of laws requiring owners to preserve works of art and the reluctance to let certain art treasures leave their jurisdiction.

States have claimed works that were not created by one of their nationals, were not created within its territory, and do not depict subject matter referring or relating to the State as part of their national patrimony or cultural heritage.<sup>14</sup> However, many of the greatest works of art can be owned by anyone, anywhere, so long as that person can afford the price.<sup>15</sup> This is a great cause of concern for States desiring to preserve their history, wealth, and prestige; they worry about the depletion of their national patrimony but are unable to compete with wealthy foreigners in the free market.<sup>16</sup>

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<sup>12</sup> U.S. CONST. amend. V.

<sup>13</sup> Roberta Smith, *In the Closing of Brandeis Museum, a Stark Statement of Priorities*, N.Y. TIMES, Feb. 2, 2009, at C3.

<sup>14</sup> The United Kingdom’s claim on the Parthenon Marbles is an example of such behavior. I will discuss the Parthenon Marbles in greater detail below.

<sup>15</sup> Yves Saint Laurent possessed the works of Picasso, Matisse, Duchamp, and Mondrian in his private collection; in February 2009, Christie’s auctioned off works from this private collection for more than \$264 million. Stevan Erlanger, *Saint Laurent Art Sale Brings In \$264 Million*, N.Y. TIMES, Feb. 23, 2009, at A8.

<sup>16</sup> For example, Bill Gates purchased Leonardo’s *Codex Leicester* in 1994 for \$30.8 million from Armand Hammer, who had acquired it in 1980. Carol Vogel, *Leonardo Notebook Sells for \$30.8 Million*, N.Y. TIMES, Nov. 12, 1994, <http://www.nytimes.com/1994/11/12/us/leonardo-notebook-sells-for-30.8-million.html?pagewanted=1>.

**A. *Where Does Art Belong: The United States as an Analogy.***

The idea that some important art objects belong in their places of origin arises not only in situations of nation-to-nation movement of art, but also in the smaller scope of regional movement of art within a country. Examples in the United States of the battle to keep certain artworks within certain cities or states are analogous to the battles to keep artworks within certain nations. The battle to keep Thomas Eakins's *Gross Clinic* in Philadelphia, the city that had always been home to it, is like the efforts of the British relating to what they considered their patrimony.<sup>17</sup> Eakins was born in Philadelphia and lived there the majority of his life; the subject of the painting, Samuel D. Gross, was a surgeon in Philadelphia's own Jefferson University Medical College; and the painting itself depicts the intellectual culture of Philadelphia.<sup>18</sup> In 2006, the trustees of the University voted to sell the painting for \$68 million, a decision that led to public outcry.<sup>19</sup> Interestingly, it was the threat of sale that made the previously ambivalent Philadelphian public interested in the painting.<sup>20</sup> The Philadelphia Museum of Art and the Pennsylvania Academy of the Fine Arts were given the option to price-match and eventually able to raise funds in order to match the offer by Wal-Mart heiress Alice L. Walton and the National Gallery of Art in Washington, D.C., in order to keep a piece of art that Philadelphians now consider inextricably linked to their city.<sup>21</sup>

The idea of selling Jackson Pollock's *Mural* from the University of Iowa's art museum faced similar resistance. The governor of Iowa called *Mural* "a treasure that belongs to the people of Iowa, for the people of Iowa, and should be preserved for future generations of Iowans."<sup>22</sup> The director of the Des Moines Art Center said that "the citizens of Des Moines, the citizens within the state of Iowa have just

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Historically, it is the wealthy and the Western states that have been accumulating great works of art from around the world. Wealth and art follow economic or military power.

<sup>17</sup> The United Kingdom utilizes a system where export of the object is restricted until a British citizen can raise sufficient funds to match the price offered by a foreign buyer. See discussion *infra* Part III.A.1.

<sup>18</sup> Michael J. Lewis, *Gross Misconduct*, COMMENTARY, Jan. 18, 2007, <http://www.commentarymagazine.com/blogs/index.php/lewis/53>.

<sup>19</sup> Michael Kimmelman, *In the Company of Eakins*, N.Y. TIMES, Jan. 12, 2007, at E39.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Felix Salmon, *Market Movers: Selling Iowa's Pollock*, PORTFOLIO, Aug. 13, 2008, <http://www.portfolio.com/views/blogs/market-movers/2008/08/13/selling-iowas-pollock>.

as much right as citizens on the right coast or the left coast to experience the art of our time.”<sup>23</sup>

The discussion and public unrest generated by these two proposed sales to other institutions even within the United States is analogous to that generated by proposed international sales. The idea that such sales amount to losing the work of art raises the question of whether the physical location of the artwork has much to do with its aesthetic force and social significance.<sup>24</sup> In the *Gross Clinic* case, an answer in the affirmative is easily justified because of the deep connection between the artist, the work, and the city. But this raises yet another question: “can a painting [or other work of art] really be so connected to the cultural life of a city that it should never move—or is this just a convenient argument to preserve a status quo that benefits places like Philadelphia at the expense of places like Bentonville?”<sup>25</sup> Rephrased with an international slant, the question becomes: can a work of art really be so connected to the cultural life of a nation that it should never move, or is this just a convenient argument to preserve a status quo that benefits places like wealthier nations at the expense of poorer nations, who would neither be able to price-match to prevent export, nor afford the price to bring back works already lost?

### ***B. Cultural Property***

National treasure can be considered a subset of cultural property; aside from the differing legal treatments and contexts, national treasure and cultural property both evoke the idea that certain art objects are connected to certain places. “Cultural property” has received more detailed international legal treatment than “national treasure.” The broader category “cultural property” is more often used in laws dealing with the illicit trade in art objects and returning important works to their “home.” Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter UNESCO) defines cultural property as:

[P]roperty which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

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<sup>23</sup> *Id.*

<sup>24</sup> See Lewis, *supra* note 18.

<sup>25</sup> Daniel Brook, *Art for the Ozarks*, BOSTON GLOBE, Jan. 7, 2007, at E1.

....

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

....

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material.<sup>26</sup>

Article 4 sets out categories of cultural property that form part of the cultural heritage of each State:

(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and 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;

(b) cultural property found within the national territory;

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<sup>26</sup> UNESCO, *supra* note 6, art. 1. Included are the parts of the definition that may be relevant to the discussion of “national treasure.” The excluded sections are:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

....

(f) objects of ethnological interest;

....

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

. . . .

(d) cultural property which has been the subject of a freely agreed exchange;

(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.<sup>27</sup>

UNESCO does not use the term “national treasure.” The law about cultural property is more well-settled in this context because States agree that cultural property is worthy of protection from illicit transfer. However, this definition for cultural property cannot be transplanted to the law on the licit trade of art objects because States cannot restrict the licit trade in the totality of cultural property—the term is too broad and States will not reach an agreement and accept it. In the context of restrictions in legal trade, “national treasure” can only be a narrow exception.

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter UNIDROIT) uses language similar to UNESCO to define “cultural objects.” It states, “For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.”<sup>28</sup> Although using a slightly different term, UNIDROIT also essentially focuses on the broader category of “cultural property” and the protection of cultural heritage. The Commentary on UNIDROIT provides some guidance to signatory States regarding how they should classify items of national importance. It suggests that schemes for the protection of cultural heritage should classify items of national importance by virtue of one or more of the following criteria:

- (a) [T]he close association of the item with the history or life of the country;
- (b) the aesthetic qualities of the item;
- (c) the value of the item in the study of the arts or the sciences;
- (d) the rarity of the item;

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<sup>27</sup> *Id.* art. 4.

<sup>28</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects art. 2, June 24, 1995, 34 I.L.M. 1322. The Annex uses the same categories that the UNESCO Convention uses. See UNESCO, *supra* note 6.

- (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;
- (f) the archaeological significance of the item.<sup>29</sup>

On the regional level, the EU Council Directive 93/7/EEC of 15 March 1993 deals with the return of cultural objects unlawfully removed from the territory of a Member State. Unlike UNESCO and UNIDROIT, the Directive uses the term “national treasures” in order to distinguish those cultural objects that should be returned:

‘Cultural object’ shall mean an object which:

—is classified, before or after its unlawful removal from the territory of a Member State, among the ‘national treasures possessing artistic, historic or archaeological value’ under national legislation or administrative procedures within the meaning of Article 36 of the Treaty,

and

—belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of:

—public collections listed in the inventories of museums, archives or libraries’ conservation collection.

For the purposes of this Directive, ‘public collections’ shall mean collections which are the property of a Member State, local or regional authority within a Member State or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority;

—the inventories of ecclesiastical institutions.<sup>30</sup>

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<sup>29</sup> LYNDEL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION ON STOLEN AND ILLEGALLY EXPORTED CULTURAL OBJECTS 118 (1997) [hereinafter PROTT, COMMENTARY]. South Korea takes this kind of approach. *See, e.g.*, Korean National Heritage Online, [http://www.heritage.go.kr/eng/nat/nat\\_01.jsp](http://www.heritage.go.kr/eng/nat/nat_01.jsp) (last visited Mar. 22, 2010).

<sup>30</sup> Council Directive 93/7/EEC, On the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, art. 1, 1993 O.J. (L 074) 74 (EC) [hereinafter Council Directive]. The Annex lists the following categories:

- 2) Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, more than 100 years old.
- 3) Pictures and paintings . . . executed entirely by hand, on any material and in any medium . . . .
- 4) Mosaics . . . other than those falling in categories 1 or 2, and drawings . . . . executed entirely by hand on any medium and in any material.
- 5) Original engravings, prints, serigraphs and lithographs with their respective plates and original posters.

UNESCO, UNIDROIT, and EU Council Directive 93 are intended to deter illicit trade in cultural objects, and act mostly upon non-State actors. They do this by having signatory States pledge to take action to prevent illicit trade, punish perpetrators, and return objects that are part of the illicit trade; they are intended to deter clear wrongdoing. While their primary objective is to deter wrongdoing, a secondary implication of these agreements is that certain cultural objects “belong” in certain places and to certain States.

### *C. Trade Agreements*

In contrast to UNESCO, UNIDROIT, and EU Council Directive 93, the General Agreement on Tariffs and Trade (GATT) and the Treaty of Rome are direct controls on the behavior of its Member States: they are intended to directly control how the Member States conduct trade. They are not so much concerned with deterring crime as they are in making free trade possible and maximally profitable. But like UNESCO, UNIDROIT, and EU Council Directive 93, GATT and the Treaty of Rome are consistent with the strong notion that certain cultural objects, those that are national treasures, “belong” in certain places. GATT, the Treaty of Rome, and other regional agreements contain articles dealing specifically with “national treasure.”<sup>31</sup>

Article XX of GATT provides a list of general exceptions to GATT obligations, and Article XX(f) specifically permits controls “for the protection of national treasures of artistic, historic or archaeological value.”<sup>32</sup>

Title I, Article 9 of the Treaty of Rome, one of the foundational treaties of the European Union (EU), provides that

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6) Original sculptures or statuary and copies produced by the same process as the original . . . .

*Id.* Annex (footnotes omitted).

<sup>31</sup> See General Agreement on Tariffs and Trade, *supra* note 3, art XX(f); Treaty of Rome, *supra* note 3; North American Free Trade Agreement (NAFTA) art 2101(1), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (incorporating Art XX of the General Agreement on Tariffs and Trade); Treaty Establishing the African Economic Community art. 35(1)(e), Jun. 3, 1991, 30 I.L.M. 1241 (1991) (providing, among its exceptions and safeguard clauses, for “the protection of national treasures of artistic or archaeological value or the protection of industrial, commercial and intellectual property.”).

<sup>32</sup> General Agreement on Tariffs and Trade, *supra* note 3, art. XX(a)–(f).

[t]he Community<sup>33</sup> shall be based upon a customs union covering the exchange of all goods and comprising both the prohibition, as between Member States, of customs duties on importation and exportation and all charges with equivalent effect and the adoption of a common customs tariff in their relations with third countries.<sup>34</sup>

Article 36<sup>35</sup> provides an exception, allowing controls for “protection of national treasures of artistic, historical or archaeological value . . . Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.”<sup>36</sup>

UNESCO and UNIDROIT deal with a moral issue—the illicit trade in art objects is morally wrong. Trade is not a *prima facie* moral issue; the moral facet of UNESCO and UNIDROIT gives these obligations more weight than trade obligations. Cultural property is deserving of protection from illegal activities, such as illegal purchase or sale, but in the eyes of signatory States only national treasure deserves protection in the course of legal trade activities.<sup>37</sup> In order to reach compromise among the States, the drafters of GATT and the Treaty of Rome differentiated between “cultural property” and “national treasure” by deeming “national treasure” a narrow subsection of “cultural property.” In this way, the drafters have used a common denominator agreeable to the greatest number of signatory States. Free trade, the major goal of these two treaties, is a substantial obligation and exceptions such as this make free trade more palatable because States want to keep as much of their cultural property as possible, but also be able to obtain the cultural property of other States, deem it the cultural property of mankind, and be enriched by it. Herein lies the problem: States are protective of what they consider to be their own cultural property, but at the same time are unwilling to acknowledge that a certain desirable artwork is the protectable, potentially unattainable, cultural property of another State.

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<sup>33</sup> The European Economic Community is now commonly referred to as the European Union.

<sup>34</sup> Treaty of Rome, *supra* note 3, tit. I, art. 9.

<sup>35</sup> *Id.* art. 36; *see also* Treaty on European Union art. 30, Feb. 7, 1992, 1757 U.N.T.S. 3.

<sup>36</sup> Treaty of Rome, *supra* note 3, art. 36.

<sup>37</sup> *See* Council Directive, *supra* note 30, pmbl. (“[W]hereas the Annex to this Directive is consequently not intended to define objects which rank as ‘national treasures’ within the meaning of the said Article 36, but merely categories of object which may be classified as such and may accordingly be covered by the return procedure introduced by this Directive.”).

This self-serving view can partially be attributed to the economic advantage in a State's possession of significant art objects. One way that a prestigious art collection is economically advantageous to a State is the significant funds the collection can attract through tourism. By narrowing the exception from "cultural property" to "national treasure," both interests—keeping cultural property and obtaining cultural property—can be balanced. This narrow exception is consistent with the general preference for free trade in trade agreements.

Exceptions in treaties are usually narrow and must be strictly construed. The Vienna Convention on the Law of Treaties provides the general rule of interpretation, which calls for a treaty to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>38</sup> The object and purpose of most international and regional trade agreements is to have free trade among Member States to the greatest degree possible, and this is why the "national treasure" exception is a narrow one. This exception is problematic because it is unclear how the exception should be practically applied.

#### ***D. Differing Interpretations and the Language Barrier***

Within the EU, Article 36's use of "national treasure" has two diverging interpretation trends: an "extensive" interpretation favored by exporting countries, and a "restrictive" interpretation favored by importing countries.<sup>39</sup> An extensive interpretation provides exporting countries with more discretion and broader protection powers; a restrictive interpretation makes it easier for importing countries to obtain the cultural wealth of others.

The decisive criteria for cultural goods under the Treaty of Rome are that the object must be more than fifty years old (with some exceptions for certain collections or certain objects of particular interest) and have a minimum value of between zero and €150,000.<sup>40</sup>

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<sup>38</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

<sup>39</sup> Barbara T. Hoffman, *European Union Legislation Pertaining to Cultural Goods*, in ART AND CULTURAL HERITAGE 191, 192 (Barbara T. Hoffman ed., 2006).

<sup>40</sup> *Id.* at 191.

Also, the object must not belong to its creator,<sup>41</sup> which usually is not a problem given the requirement that the object must usually be more than fifty years old. The problem of lack of predictability when it comes to applying the national treasure exception is thus highlighted by these diverging interpretations. Member States have little guidance on what cultural objects meet the definition of “national treasures.” EU States are left to guess: a wrong guess may lead the European Court of Justice (ECJ), which has the ultimate authority to decide whether a Member State is following the law, to invalidate the restriction and hold the Member State to have violated its free trade treaty obligations.<sup>42</sup> At this time, there are no decisions by the ECJ on the meaning of this term as potential disputing litigants have so far chosen to avoid the ECJ, thus preventing, perhaps intentionally, the ECJ from putting forth an authoritative standard.<sup>43</sup>

In addition to the problem of diverging interpretation trends, the Treaty of Rome is written in several authentic language versions, and the different translations of “national treasure” have slightly different meanings. According to Professor Frigo, the Italian, Spanish, and Portuguese texts appear *prima facie* to give the State broader discretionary power to protect “*patrimonio artistico, storico o arqueologico nazionale* (‘*patrimonio artistico, o arqueologico nacional,*’ ‘*patrimônio nacional de valor artistico, histórico ou arqueológico*’)” than the English and French texts, which refer to “national treasures of artistic, historic, or archaeological value” and to “*trésors nationaux ayant une valeur artistique, historique ou archeologique.*”<sup>44</sup> The language difference causes the Member States to interpret the national treasure exception in different ways, possibly inconsistent with other Member States but consistent with their own authentic language version of the text. While the Italian, Spanish, and Portuguese version vests more power in the Member States, the English and French versions vests more power in the EU to make decisions regarding the propriety of a national treasure designation.<sup>45</sup>

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<sup>41</sup> John Henry Merryman, *Cultural Property, International Trade and Human Rights*, 19 CARDOZO ARTS & ENT. L.J. 51, 54 n.15 (2001) [hereinafter Merryman, *Cultural Property*].

<sup>42</sup> *See id.* at 54.

<sup>43</sup> *See id.* at 56 n.26. The closest the ECJ has come to defining national treasure is *Commission of the European Communities v. The Italian Republic*. *See infra* Part I.F.

<sup>44</sup> Hoffman, *supra* note 39, at 193.

<sup>45</sup> *Id.*

### ***E. The List Approach***

Some States have taken the approach of simply accepting whatever the source nation's authorities designate as "national treasure;" this is similar to UNESCO which defines cultural property as "property . . . designated by each State as being of importance . . . ."<sup>46</sup> South Korea has taken such an approach; the government has created a distinct list of tangible treasures, artifacts, sites, and buildings which are recognized by the nation as having exceptional artistic, cultural, and historical value.<sup>47</sup> The problem with such an approach is that each nation's definition of "national treasure" cannot be a completely independent consideration on account of the nation's trade obligations. Nonetheless, Professor Biondi of King's College London favors this approach: the correct interpretation of "national treasure" should not refer to the "generality of all art or cultural goods but to a specific category that forms an indissoluble link with the cultural heritage of a particular nation."<sup>48</sup> This approach favors Member State discretion, and without specific guidelines on the composition of these lists, this approach can be easily abused. For example, an exporting State may attempt to add items to the list only after a sale has been proposed. On the other hand, if States are required to create exclusive lists ahead of time, the task of creating such an inventory is onerous and expensive.

An interpretation favoring exporting States tends to keep cultural objects where they are rather than disperse them—a state of things that is acceptable to some degree, but unacceptable in the extremes. The collective European position, solidified by a resolution passed by the 1983 Council of Europe, stresses one European cultural heritage and the notion of Europe as a united regional cultural entity.<sup>49</sup> On the international level, there is the notion of the "cultural heritage of mankind," rather than simply "national cultural heritage," and the idea behind the cultural heritage of mankind is that cultural objects should circulate relatively freely; in this way it can enrich the cultural

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<sup>46</sup> UNESCO, *supra* note 6, art. 1; *see also* PROT, COMMENTARY, *supra* note 29, at 118 (outlining items covered by such a scheme).

<sup>47</sup> *See* Cultural Heritage Administration, Statistics of All Designated Cultural Properties, <http://english.cha.go.kr> (follow "Heritage Info" hyperlink; then follow "Heritage Statistics" hyperlink) (last visited Mar. 22, 2010).

<sup>48</sup> Hoffman, *supra* note 39, at 193 (paraphrasing Andrea Biondi, *The Merchant, the Thief and the Citizen: The Circulation of Works of Art Within the European Union*, 34 COMMON MKT. L. REV. 1173 (1997)).

<sup>49</sup> GREENFIELD, *supra* note 1, at 111.

life of all.<sup>50</sup> For those individuals or States that subscribe to these ideas, having each State define their own “national treasures” is an unattractive solution because this would cause circulation to be restricted and prevent more widespread access.

### 1. *Inability to Agree on a Definition*

Part of the reason why there is still no clear definition or set of guidelines for national treasure is that there has not been great impetus for establishing clear guidelines (hence the avoidance of the ECJ by potential litigants who have been choosing to settle cases). One problem with having a universally applicable definition, set by a non-national body like the EU, is that this may devalue Member States’ existing rules on the protection of national treasures.<sup>51</sup> The meaning of “national” is not clear: “national” could refer to where the object was created, where it was found, the nationality of the creator, or the place that it represents or to which it refers.<sup>52</sup> An understanding of “national” must not be overbroad and must be checked by considering whether an object is an “essential and fundamental element”<sup>53</sup> of a State’s artistic patrimony. National treasure that is “national” based on where it was created, where it was found, the nationality of the creator, or the place that it represents or to which it refers is more readily justified as essential and fundamental to the cultural patrimony than objects that are not.

However, such a restriction of national treasure would not reflect the status quo that States seem intent on preserving; the status quo allows States to deem something a national treasure even though it may have been created in a foreign State, found extraterritorially, created by a foreigner, and depicts or refers to a subject outside the State. There is not even complete agreement regarding using the term “national treasure”: “national cultural property” or “cultural goods of national importance” have been suggested as alternatives for the EU because they are terms that can better convey the EU’s intentions and

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<sup>50</sup> JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 114 (5th ed. 2007) [hereinafter MERRYMAN, LAW].

<sup>51</sup> Ignaz Seidl-Hohenveldern, *National Report on Topic 1: the Regulatory Framework for the Free International Circulation of Objects of Art*, in IV LEGAL ASPECTS OF INTERNATIONAL ART TRADE 49, 51 (Martine Briat & Judith Freedberg eds., 1993).

<sup>52</sup> Merryman, *Cultural Property*, *supra* note 41, at 55.

<sup>53</sup> I derive this term from a comment by ECJ Judge Pierre Pescatore. *See infra* Part I.F; *see also* Merryman, *Cultural Property*, *supra* note 41, at 54.

avoid misunderstanding.<sup>54</sup> “Treasure” is misleading because it wrongly implies that only objects of extraordinary financial value are meant to be protected; one well-established criterion for “national treasure” in the EU is that the object has a minimum value between zero and €150,000.<sup>55</sup> The criterion merely requires that the work have some monetary worth—a low threshold since almost everything can be said to be worth something. Another word that has been thrown around in the discussion of national treasure is “heritage,” which could be misunderstood to exclude those cultural goods that the nation has not produced itself, but has acquired from other nations’ cultural heritage.<sup>56</sup> “National” shares some of the problematic connotations of “heritage.” Such an understanding of “heritage” or “national” would not accurately reflect the realities of the status quo: it is not the case that all important French art is in French hands, all important Italian art in Italian hands, all important British art in British hands, etc. Additionally, such an understanding is unlikely acceptable to States that want to preserve the status quo.

Another problem with words like “national” and “heritage” is that they raise implications about race and ancestry: no culture is purely inherited, all civilizations are either hybrids of or influenced by other civilizations, and the legitimacy of cultural continuity is questionable.<sup>57</sup> Because of this, one proposal would be to abandon “national” designations of art and protect certain works as part of the cultural property of mankind with a unified common history. But such arguments do not dispel the connection that modern cultures feel towards ancestor cultures, however distant those cultures may be. Also, nations are unlikely to accept such an idea in the same way Philadelphians insisted on keeping *Gross Clinic* and deeming it Philadelphian rather than American.

## 2. *Balance of Power Between the EU and its Member States*

Aside from controversy over the term “national treasure” itself, there are varying views on what role the trade organizations should play in relation to its Member States regarding controls on the

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<sup>54</sup> Reinhard Mußgnug, *Germany: National Report on Topic 1: The Regulatory Framework for the Free International Circulation of Objects of Art*, in IV LEGAL ASPECTS OF INTERNATIONAL ART, *supra* note 51, at 63, 64.

<sup>55</sup> See, e.g., Council Directive, *supra* note 30, annex.

<sup>56</sup> Mußgnug, *supra* note 54, at 63–64.

<sup>57</sup> GREENFIELD, *supra* note 1, at 70–71.

international art trade. In the EU, there are varying perspectives on Article 36. Several States have specifically addressed this issue. Below is a sampling of how the views compare and contrast.

According to Germany, the EU should be responsible for uniformly applying the “cultural goods clause” in Article 36 of the Treaty of Rome, and it should restrict Article 36 to only mean “works of art, documents, and other cultural goods that are public property . . . ; archaeological findings; other works of art and cultural goods of evident and extraordinary national importance with regard to their creators’ nationality. . . .”<sup>58</sup> Trade in contemporary art should be excluded from this exception.<sup>59</sup> The exclusion of contemporary art is consistent with the settled EU criteria that to be considered national treasure the object usually must be more than fifty years old. However, the German view does not carve out any exceptions for some contemporary works. Germany’s view is deferential towards the EU’s decision-making power, and it empowers the EU to maintain individual States’ cultural heritage because it explicitly points to the creators’ nationality and by implication the creator’s connection to the State as an important consideration.

According to the Netherlands, cultural goods protected under national law should be distinguished from all other cultural goods.<sup>60</sup> The Netherlands argues that Article 36 permits Members to protect their national cultural heritage because removal from the territory would be a blow to the national heritage.<sup>61</sup> Since this is a highly subjective determination, an EU definition setting forth what constitutes “national treasure” or “cultural heritage” is not appropriate. Member States should retain the right to decide on the criteria by which they determine what constitutes their national heritage; it is more appropriate for the Member States to make these highly subjective determinations for themselves. The aim of the EU in setting a definition would be to seek a common denominator. But a just result cannot be reached in this way: a common denominator cannot achieve national diversity in the field of cultural heritage.<sup>62</sup>

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<sup>58</sup> Mußgnug, *supra* note 54, at 64 (emphasis omitted).

<sup>59</sup> *Id.* at 65.

<sup>60</sup> Sabine Gimbrère, *The Netherlands: National Report on Topic 1: The Regulatory Framework for the Free International Circulation of Objects of Art*, in IV LEGAL ASPECTS OF INTERNATIONAL ART TRADE, *supra* note 51, at 87, 88.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

This view is very different from the German view of deference to the EU.

According to Spain, the EU Policy is an interplay of two opposing principles in the international art trade between Member States: the general principle of free trade and the principle of protection of national treasures. Article 36 creates throughout the EU a harmonized restriction to the free circulation of goods and allows Member States to restrict trade to the extent necessary to protect their national cultural heritage.<sup>63</sup> However, the States do not have unlimited freedom to adopt measures: they must operate within the boundaries justified in light of Article 36.<sup>64</sup> The Member States have the power to define national treasure, while the ECJ has the power to limit these national definitions.<sup>65</sup> Specifically, the works of living artists may be excluded, since contemporary art is not considered to fall under the umbrella of “national treasure.”<sup>66</sup> The cultural relevance of a work of art is relative; it would be very difficult for an EU definition or valuation of “national treasure,” so far removed from national connections and realities, to be satisfactory to its Member States.<sup>67</sup> In short, the Spanish position is that in order to preserve and enhance cultural heritage and value, national authorities should not transfer their general vested powers of control to the EU officials.<sup>68</sup> Unless or until the EU Member States unify and becomes a single State, the idea of an “EU cultural heritage” cannot replace “national heritages.”<sup>69</sup>

If Germany and the Netherlands represent the two ends of the spectrum on deference to the EU, then Spain certainly falls somewhere in between, even though its views are closer to that of the Netherlands. Whether Spain’s view is the proper balance is debatable, but it does present the more palatable and reasonable option; this is the option that academics tend to favor.

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<sup>63</sup> Miguel Virgós Soriano, *Spain: National Report on Topic 1: The Regulatory Framework for the Free International Circulation of Objects of Art*, in IV LEGAL ASPECTS OF INTERNATIONAL ART TRADE, *supra* note 51, at 93, 94.

<sup>64</sup> *Id.* at 95.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 96.

<sup>68</sup> *Id.* at 97.

<sup>69</sup> *Id.*

The United States, although not part of the EU, has also opined on the role of the EU in the international trade in art. Because of other trade agreements, namely GATT, the EU's policy on national treasure has an effect on non-EU trade partners such as the United States. America's position is that "national treasure" and "cultural heritage" would be best interpreted by each Member State, and the Member States would interpret according to some agreed-upon definition.<sup>70</sup> The United States also points out the obvious difficulty in getting the Member States to agree on uniform standards for "national treasure." "Art is different from other property controlled by the [EU] since it produces such strong feelings of emotion and nationalism."<sup>71</sup> Because of this, the United States views a straightforward objective economic approach as inappropriate and perhaps impossible. This difficulty certainly provides a good explanation for why the state of things in the international art trade is what it is.

#### **F. Commission of the European Communities v. Italian Republic**

The ECJ came close to settling the issue of "national treasure" in *Commission of the European Communities v. Italian Republic*.<sup>72</sup> The Italian Government had imposed a progressive tax, pursuant to Article 37 of Italian Law of 1 June 1939, no. 1089,<sup>73</sup> on the export to other EU Member States of objects having artistic, historic, archaeological, or ethnographic value.<sup>74</sup> Italy argued that Article 36 justified its export tax.<sup>75</sup> The ECJ rejected this argument, holding that Italy violated its free trade obligations.<sup>76</sup> Further, it held that Article 36 did not excuse the violation because the prohibitions and restrictions contemplated by that Article are not the same as the customs duties imposed by Italy in this case.<sup>77</sup> Article 16 calls for the abolition of customs duties on exportation and charges with equivalent effect and it is the fundamental rule.<sup>78</sup> Exceptions must be strictly construed,

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<sup>70</sup> Ralph E. Lerner, *United States: National Report on Topic 1: The Regulatory Framework for the Free International Circulation of Objects of Art*, in IV LEGAL ASPECTS OF INTERNATIONAL ART TRADE, *supra* note 51, at 105, 111.

<sup>71</sup> *Id.* at 113.

<sup>72</sup> MERRYMAN, LAW, *supra* note 50, at 116; *see* Case 7/68, *Comm'n v. Italian Republic*, 1968 E.C.R. 423.

<sup>73</sup> MERRYMAN, LAW, *supra* note 50, at 116.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 117.

<sup>76</sup> *Id.* at 118.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 117.

which the ECJ did in this case, and found that the means Italy employed, i.e. the progressive tax, implicated Article 16 rather than Article 36.<sup>79</sup>

This case demonstrates the consequences that follow a Member State's violation of its trade obligations: the offending State is brought before the ECJ and the Court has the authority to overturn the State's restrictions on the export of national treasure or other cultural objects. The ECJ, having found that Article 16 was implicated and not Article 36, declined to set forth a definition of "national treasure," and thus missed a rare opportunity to do so.

Pierre Pescatore, the ECJ judge who wrote the opinion for *Commission of the European Communities v. Italian Republic*, later wrote on the case: "exceptions from the rules barring export controls are to be strictly construed."<sup>80</sup> "National treasures" must be treated as a restrictive term:

It cannot be applied to the generality of cultural objects, but only to those having unusual value due to their uniqueness and their importance to a people. The purpose of the exception . . . is not to preserve the totality of an artistic patrimony, but to safeguard its 'essential and fundamental elements.'<sup>81</sup>

Only those "essential and fundamental elements" should be exempt, keeping the exception narrow.<sup>82</sup> While Judge Pescatore's comments are helpful and they echo Professor Biondi's argument, they are not law and they are silent as to who is to make the determination: Judge Pescatore merely implies that the power to make these highly subjective determinations of "uniqueness and importance to a people" is vested in the Member States, who are obligated to interpret "national treasure" narrowly. Such discretion is easily subject to abuse. These comments do not settle what or how much of a role the EU should play in relation to these determinations. Different States give different significance and values to their cultural property.<sup>83</sup> This can lead to unpredictable results, a lot of guesswork, and risk-taking on the part of Member States. Spain's view on the balance of power, because it is a fairly moderate view, may be most

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<sup>79</sup> *Id.* at 118.

<sup>80</sup> Merryman, *Cultural Property*, *supra* note 41, at 54.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 246 (1994).

satisfactory. It is unlikely that States would accept anything much more detailed than what is currently in place; anything more detailed could infringe on their freedom to make determinations regarding their important art objects. Courts are better able to deal with making such determinations by applying legal tests. Courts can deal with this issue on a case-by-case basis, tailoring solutions to the problems when they occur, rather than wholesale prevention of problems through detailed law.

## II

### FREE TRADE VERSUS THE PROTECTION OF NATIONAL TREASURE.

The interest in preserving national patrimony by retaining possession of national treasures must be balanced with the free trade obligations, mainly those outlined in GATT and the Treaty of Rome. The pervasive notion is that the national artistic patrimony will be depleted if certain art is exported.<sup>84</sup> Some important art objects, despite being privately owned, have a distinct legal status whereby it may also be registered as a “national treasure,” thus indicating that the national community has an interest in the object.<sup>85</sup> The differing and sometimes opposing values—whether they be financial, psychological, or both—placed on the national patrimony are major complicating factors for settling the problem of national treasure. From the nationalistic perspective, art is a component of the national wealth: the national patrimony consists of all works of arts within, and some even without, the State’s borders that are subject to the State’s power or jurisdiction. This holds true of works even if the artworks were not produced in that country, were not produced by its nationals, and lack connection with its culture.<sup>86</sup> All such works are part of the nation’s capital because they may generate income and bring social and psychological benefits to the nation’s inhabitants.

However, according to this perspective that the value of art is primarily economic, if it is more profitable to the State to export the State should allow export of the art object to realize its maximum value. In contrast, from the reciprocal perspective, preserving the nation’s cultural inheritance is primary; art is special and some works

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<sup>84</sup> PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 26-27 (1981).

<sup>85</sup> Paul M. Bator, *Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275, 315 (1982) (In “France and Japan, certain highly important works of art are ‘classified’ or ‘registered’; these may not be exported.”).

<sup>86</sup> BATOR, *supra* note 84, at 27. Under this perspective, the Parthenon Marbles are considered part of United Kingdom’s national patrimony.

must stay within the nation even if it would be more profitable for the State to allow export abroad. Art's worth is not so much monetary as it is educational and unifying; it is a manifestation and mirror of culture, especially a common (national) culture, and it brings with it the existence and awareness of a sense of community and common identity.<sup>87</sup> These opposing views are equally valid, thus making it difficult to settle on one satisfactory definition of "national treasure" because it is near impossible to find a meaningful common denominator for the two opposing views.

#### *A. National Laws on National Treasure*

One concern for art leaving the State's jurisdiction is uncertainty regarding whether the new owners of the art object will have the proper respect for that object: owners that are beyond the State's jurisdiction can treat their possessions in any way they please, according to their own fancy or eccentricity.<sup>88</sup> Some States have in place laws to ensure that private national owners preserve the works; States do not have similar extraterritorial jurisdiction over private foreign owners. Professor Sax describes some particularly disturbing instances of what private owners of art objects have intended for or have done with their valuable possessions: Grout, a leading nineteenth century French collector, wanted to have his collection burned before he died; Ryoei Saito, a Japanese businessman, bought Renoir's *Au Moulin de la Galette* and van Gogh's *Portrait of Dr. Gachet* at auction, kept them locked away in a warehouse, and said that he wanted the works to be cremated with him; and there have been numerous instances in which paintings by masters such as Sasseta, Rogier van der Weyden, Jan van Eyck, and Jackson Pollock, were cut into fragments and sold separately to increase economic value.<sup>89</sup>

While the concern about the potentially destructive intentions of private owners is legitimate, artworks have not fared much better in public hands. Museum staff, visitors, and others have, throughout the years, done great damage to the objects housed in museums and galleries: a child vomited over some bronze tiles forming part of Carl Andre's *Venus Forge* at the Tate Museum in London; at least two visitors have tripped and left imprints on Barnett Newman's oil

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<sup>87</sup> *Id.* at 28.

<sup>88</sup> JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT 1 (1999).

<sup>89</sup> *Id.* at 7–8.

painting *Adam*, also at the Tate; at a corporate event in the Victoria & Albert Museum, someone damaged the nineteenth-century plaster cast of Giovanni Pisano's pulpit in the Pisa Cathedral by climbing on it; vandals punched a four-inch hole in Claude Monet's *Le Pont d'Argenteuil* at the Musée d'Orsay; and a French museumgoer kissed a painting by Cy Twombly at the Museum of Contemporary Art in Avignon, smearing lipstick onto the white canvas.<sup>90</sup>

Given the fragile nature of unique art objects in either public or private hands, preservation and protection is not a good enough argument for keeping an object within the interested State's jurisdiction.

National laws on the export of cultural property tend to fall into five general categories, from most restrictive to least restrictive: (1) blanket nationalization, (2) embargo, (3) restricted permit, (4) liberal permit, and (5) free export.<sup>91</sup> Blanket nationalization laws hold the cultural property to be property of the nation or the people, rather than the private property of the individual owner.<sup>92</sup> The owner is not only prohibited from exporting the object, but his property rights in general are limited, e.g., the law can require the owner to preserve the object.<sup>93</sup> Embargo, like blanket nationalization, is a total prohibition of export; however, unlike blanket nationalization, it is generally not a limitation on the owner's other property rights.<sup>94</sup> Restricted permit laws place a total prohibition on works of great national importance and requires a burdensome export permit process for other works.<sup>95</sup> Liberal permit laws require export permits for broad classes of works, but the permit is usually easily granted without substantial expense, inconvenience, or delay.<sup>96</sup> Free export places no restriction on the export of works of art.<sup>97</sup>

National laws favor generally broader protections for cultural property, and many States utilize restricted permit laws when it comes to the trade in cultural property. "National treasure," if the term

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<sup>90</sup> Jason Bennetto, *Oops! Gallery Art Takes a Battering*, THE OBSERVER, Sept. 28, 2008, <http://www.guardian.co.uk/artanddesign/2008/sep/28/art1>; Benjamin Ivry, *Paris Art Woes*, COMMENTARY, Oct. 15, 2007, <http://www.commentarymagazine.com/blogs/index.php/ivry/1078>.

<sup>91</sup> MERRYMAN, LAW, *supra* note 50, at 115.

<sup>92</sup> Merryman, *Cultural Property*, *supra* note 41, at 58.

<sup>93</sup> *See id.* at 61–64.

<sup>94</sup> MERRYMAN, LAW, *supra* note 50, at 115.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

appears at all, usually appears in national laws insofar as to account for the State's concern and acknowledgment of its trade obligations. States are more concerned with protection of the broader category "cultural property," and they would likely prefer to use the more expansive category rather than the more limited exception "national treasure." Trade agreement obligations may also prevent States from utilizing blanket nationalization or embargo. The protection of cultural property and cultural heritage are given constitutional significance in some countries such that constitutional provisions make it a national duty to preserve and protect cultural property.<sup>98</sup> This is one of the ways in which a private owner's property rights can be restricted. Unsurprisingly, national legislation dealing with cultural property varies greatly as to their main objectives, definitions, forms of ownership, permitted or prohibited activities and practices, and sanctions.<sup>99</sup> One requirement common to almost all national laws is that the object should be of "specific historical, artistic or scientific value and significance for the country."<sup>100</sup> This requirement is broad and lacks specific guidelines.<sup>101</sup> Newly adopted national laws, however, tend to take changing international circumstances into consideration, and newer laws include provisions that take the "national treasure" exception into account.<sup>102</sup>

In addition to trade agreement obligations, the fundamental right to property included in the ICESCR and most national constitutions is one check on the States' potentially unrestrained desire to keep cultural objects within its power. One common tactic for keeping a cultural object within a State's jurisdiction is raising trade barriers, such as export taxes. While this is technically legal because of the national treasure exception, States must tread carefully, as demonstrated by *Commission of the European Communities v. Italian Republic*.

Aside from raising trade barriers, legal procedures such as expropriation and preemptive purchase are tactics States employ to keep a cultural object within the State's jurisdiction.<sup>103</sup> The

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<sup>98</sup> JOTE, *supra* note 83, at 127; *see, e.g.*, 1975 Syntagma [SYN][Constitution] 18 (Greece); Konstitutsiia Rossiikoi Federatsii [Konst. RF][Constitution] art. 44(3).

<sup>99</sup> JOTE, *supra* note 83, at 127–28.

<sup>100</sup> *Id.* at 128.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 127.

<sup>103</sup> Merryman, *Cultural Property*, *supra* note 41, at 66.

fundamental right to property forces the State to use such tactics, because outright takings violate that fundamental right. The requirement to compensate a private owner for expropriating his property, rather than allowing him to export it out of State, forces the State to seriously consider whether it would be worth allocating the public funds. The object is only worth the expenditure of State funds and efforts if the work is truly important, it is within the public's interest to pay to keep it, and losing the work would be a huge detriment to the national patrimony. The State must ask itself: do very beautiful and valuable works have a single true home *here*, or can they be displayed anywhere, and do these works engender the civic and national pride such that the nation ought to pay to keep it inside its borders?<sup>104</sup> The problem with preemptive purchase is that the price that the State has to pay is less than what a foreign private buyer might pay. The national seller is unable to realize an optimal price, and in this way, his freedom is restrained. Usually, the State will find that this infringement is slight compared to the important interest of keeping the artwork.

The requirement to pay is one check on a State's exercising an impermissible level of export restriction in light of their trade obligations. The United Kingdom, Italy, and France are cognizant of this requirement when determining which works to retain.<sup>105</sup> Unchecked State expropriation power plus a broad understanding of "national treasure" would likely lead to States exercising an impermissible level of export restriction despite their trade and treaty obligations.

### 1. *United Kingdom*

The United Kingdom has historically been interested in importing art treasures, but upon acquisition, it is interested in its freedom to retain those treasures. In this way, the UK's position is contradictory because the British Museum would not contain the wealth of art it now contains if the UK had not been able to gain from other States' losses. In order to balance the UK's interests in art with its international trade obligations, the UK formed the Reviewing

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<sup>104</sup> Derek Fincham, *Export Restrictions, the Waverly Criteria and Eakins' "The Gross Clinic,"* ILLICIT CULTURAL PROPERTY: A WEBLOG ABOUT ART, ANTIQUITIES, AND THE LAW, Nov. 20, 2006, <http://illicit-cultural-property.blogspot.com/search?q=waverly>.

<sup>105</sup> See *id.*; U.N. EDUC., SCIENTIFIC, AND CULTURAL ORG. [UNESCO], HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 79, 115 (1988) (*prepared by* Lyndel V. Prott & Patrick J. O'Keefe) [hereinafter UNESCO, HANDBOOK].

Committee on the Export of Works of Art and Objects of Cultural Interest.<sup>106</sup> The Committee has developed the Waverly Criteria to aid in determining whether an art object is of sufficient national importance to justify delay or denial of export, i.e., whether an art object is a “national treasure.”<sup>107</sup> The UK has a limited export restriction scheme by which the Department of Culture, Media, and Sport temporarily stops export of an art work if it falls within one of the three criteria: “[1] Is the object so closely connected with our history and national life that its departure would be a misfortune? [2] Is it of outstanding aesthetic importance? [3] Is it of outstanding significance for the study of some particular branch of art, learning or history?”<sup>108</sup> If the work does fall under one of the three criteria, export is restricted in order to enable a British buyer time to raise enough money to buy it and thus keep the work in British hands.<sup>109</sup> In addition, the Reviewing Committee will seek the advice of three independent assessors, who are experts in the relevant field and are often the preeminent authority in that field. The independent assessors assess and vote on the Waverly status of the cultural object in question.<sup>110</sup> These criteria are quite broad; according to Dr. Greenfield, “[A]ll art treasures within the United Kingdom from whatever source are clearly included under the umbrella of ‘English cultural heritage’ [and] the treasures covered by British legislation are not limited to English art.”<sup>111</sup> “Cultural heritage” in this context is more like the cultural heritage of all mankind, rather than specific to one national culture. The UK’s idea of national patrimony is so broad that it claims to include Italian Antonio Canova’s statue *Three Graces* and also the sculptures of the Italian artist Vincenzo Foggini.<sup>112</sup>

Even though this does not directly implicate the issue of the licit trade in art, the Parthenon Marbles<sup>113</sup> are perhaps the most notorious example of the vast umbrella of British cultural heritage. If the UK

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<sup>106</sup> Museums, Libraries & Archives (MLA), Reviewing Committee, [http://www.mla.gov.uk/what/cultural/export/reviewing\\_cttee](http://www.mla.gov.uk/what/cultural/export/reviewing_cttee) (last visited Mar. 22, 2010).

<sup>107</sup> Fincham, *supra* note 104.

<sup>108</sup> GREENFIELD, *supra* note 1, at 110.

<sup>109</sup> Fincham, *supra* note 104 (“The restriction begs the question though, if the work is not generally on display to the public, do UK residents get some kind of inherent benefit out of having the work in private hands?”).

<sup>110</sup> Museums, Libraries & Archives, *supra* note 106.

<sup>111</sup> GREENFIELD, *supra* note 1, at 111 (footnote omitted).

<sup>112</sup> *Id.*

<sup>113</sup> Alternatively known as the Elgin Marbles.

can justify the Marbles as an invaluable part of its national patrimony, and thus as a British national treasure, then it will be able to justify virtually anything as British national treasure. In the early 1800s, the Earl of Elgin obtained permission from the Ottoman Empire, then the territorial rulers of Greece, to remove the Marbles from the Acropolis and bring them back to Britain.<sup>114</sup> The UK now claims the Marbles as part of its own national patrimony and refuses to return the Marbles over Greece's requests and protests. The debate over the propriety of the original removal and current retention is ongoing.<sup>115</sup> Those who have argued for the return of the Marbles to Greece have argued that the Marbles are part of the "glorious tradition of Athens, of which these pathetic ruins are the everlasting embodiment," that they are an integral part of the Acropolis, which is a national symbol of Greece, not Great Britain.<sup>116</sup> Nevertheless, the Marbles remain in the British Museum.<sup>117</sup> A December 31, 1940, memo from the British Museum declared: "The principle of tying works of art to their places of origin is not recognized by Western Nations . . . ."<sup>118</sup> Those that argue for retention of the Marbles claim that the Museum is an "international cultural institution, which was doing a service for the international community" because it was preserving the Marbles and making it accessible to more people.<sup>119</sup> The retention of the Parthenon Marbles by the UK, a wealthy Western power, demonstrates that the status quo consists of an unequal distribution of great art works that could rightfully be considered part of the cultural heritage of mankind.

## 2. France

Historically, France has been protective of its art treasures, whether they be those created by its nationals, or, like the UK, purchased abroad or brought back to France as spoils of war.<sup>120</sup> French laws regarding its national treasures and patrimony are very developed compared to similar laws from the rest of the world. Law No. 92-1477 of December 31, 1992, amends a 1913 French statute and

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<sup>114</sup> GREENFIELD, *supra* note 1, at 55–56.

<sup>115</sup> *See id.* at 65–75.

<sup>116</sup> *Id.* at 65.

<sup>117</sup> *Id.*; Michael Kimmelman, *Elgin Marble Argument in a New Light*, N.Y. TIMES, June 23, 2009, at C1.

<sup>118</sup> GREENFIELD, *supra* note 1, at 66.

<sup>119</sup> *Id.* at 67.

<sup>120</sup> *Id.* at 108. Napoleon brought back to France many art treasures from conquered countries and much of the art in the Louvre is from Napoleon's conquests. *Id.*

defines “national treasure” to include works of major interest for the national patrimony, as opposed to the broader category of works of artistic interest.<sup>121</sup> The French Ministry of Cultural Affairs keeps an up-to-date list of classified objects.<sup>122</sup> In the Jacques Walter matter, the French Ministry of Culture refused to issue an export license for van Gogh’s *Le Jardin à Auvers*.<sup>123</sup> Instead, the painting was listed as a “national treasure” and as a result, it could not leave the country even if sold.<sup>124</sup> The painting was eventually sold at an auction in France, but for less than it would have made if Walter had been able to export it; he successfully sued the French Government for damages.<sup>125</sup> Walter originally came to possess the painting by purchasing it in New York in 1955.<sup>126</sup>

The connection between van Gogh’s *Le Jardin à Auvers* and French culture is an easier argument to make than some other cases in which France prevented export of important art objects. L’Conseil d’Etat dans l’arrêt Genty du 7 October 1987 affirmed an administrative determination denying a permit to export certain Chinese jars because the jars presented a national interest in art and history.<sup>127</sup> From a non-French perspective, the argument that these Chinese jars were “national” to France seems to be a stretch. In another instance, France fought to retain a Turkish scene painted by Swiss-French artist Jean-Etienne Liotard, claiming it to be a French national treasure.<sup>128</sup> Liotard was born and died in Geneva, Switzerland. Although he did study in France, he also studied in Italy and traveled extensively. The argument that a painting depicting a Turkish scene by a Swiss-French artist is “national” to France is still a

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<sup>121</sup> *Id.* at 109. Article 2.2 on the protection of cultural goods states that “[t]his certificate shows that the cultural goods in question are not national treasures and can leave the country freely and permanently . . . . Cultural goods, which are of significant value for the national heritage, may be refused a certificate. They are then listed as ‘national treasures.’” *Id.*

<sup>122</sup> UNESCO, HANDBOOK, *supra* note 105, at 79.

<sup>123</sup> Hoffman, *supra* note 39, at 192.

<sup>124</sup> See Timothy P. Ramier, *Agent Judiciaire du Trésor v. Walter; Fat du Price and a King’s Ransom*, 6 INT’L J. OF CULTURAL PROPERTY 337, 337 (1997) (describing the history of the case and the decision of French Cour de Cassation, the highest court of appeal); see also *Agent Judiciaire du Trésor v. Walter*, Cass. Civ. Ire, 20 Feb. 1996, Bulletin de la Cour.

<sup>125</sup> Hoffman, *supra* note 39, at 192.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Merryman, *Cultural Property*, *supra* note 41, at 55.

stretch. France's laws reflect an attitude that favors the State's freedom to determine what works constitute French national treasure and to interpret the term liberally.

### 3. *Italy*

Some of the earliest laws for the protection of cultural property come from Italy, even before Italy became a unified country. The Papal Doria edict (October 1802) made it illegal to export any cultural property, not just "national treasure" from Italy, without authorization.<sup>129</sup> Persons engaged in or accessories to illegal export were subject to severe punishment.<sup>130</sup> The Pacca edict (April 1820) allowed export from the city of Rome and the Papal States, but first the exporter had to apply for permission from the State and the State would either buy the object or grant the permit.<sup>131</sup> If the State and the exporter could not come to an agreement over price, the owner was entitled to retain the property, but must undertake to preserve it.<sup>132</sup>

In modern Italy, no object of significance may be exported if export "endangers the national heritage."<sup>133</sup> Like France, Italy's laws reflect an attitude that favors a State's freedom to regulate exports more strictly and determine its own national treasures. In the past, Italy has expropriated a Matisse painting of a French interior which was painted in France;<sup>134</sup> it fought to retain van Gogh's *le Jardiniere*, which was also painted in France; and it classified van's Gogh's *Portrait of a Young Peasant* as a work of historical and artistic interest.<sup>135</sup> Furthermore, the Italian court in 1913, accepting to a degree Vincenzo Peruggia's defense that he stole the *Mona Lisa* for the sake of patriotism, gave him a lenient sentence. Although Italy acknowledged that Peruggia had committed a crime and returned the *Mona Lisa* to its legal owner, France, the Italian people and government demonstrated a degree of approval for Peruggia's "patriotic" crime.

France, Italy, and the United Kingdom, all major players in the international art trade and all wealthy first world countries, share the tendency to use a broad interpretation so as to cover many objects. In

<sup>129</sup> JOTE, *supra* note 83, at 126.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> UNESCO, HANDBOOK, *supra* note 105, at 113.

<sup>134</sup> Merryman, *Cultural Property*, *supra* note 41, at 62.

<sup>135</sup> *Id.*

the spectrum of national legislations from most restrictive to least restrictive, these States have passed laws that are maximally restrictive while still generally avoiding sanctions arising out of their trade obligations, though free trade principles generally forbid embargo and check the State desire to be even more restrictive. National definitions of national treasure have been broad, but they cannot be overly broad because one State's designation of an object as a "national treasure" has implications on another State in that it deprives the other State of the chance to obtain the object.

### III

#### THE CURRENT UNDERSTANDING OF "NATIONAL TREASURE" AND WHERE TO GO FROM THERE.

GATT and the Treaty of Rome provide that national treasures are objects of "artistic, historical, or archaeological value."<sup>136</sup> States have generally taken it upon themselves to define their own national treasures. For States that have taken the list approach or something like it to classifying their national treasures, objects on the list must be considered essential and fundamental elements of the State's artistic patrimony. "Essential and fundamental" is unofficial language from scholars and from at least one ECJ judge, Pierre Pescatore. While it is easy for a State to defend its classification of an object as an essential and fundamental element of the State's artistic patrimony, potential abuse can be checked by the requirement that the State must justify itself if it is challenged. These are vital considerations in order to keep the exception narrow, consistent with the Vienna Convention.

In the EU, the ECJ has the ultimate power to draw the line between national treasures and cultural objects and also to decide whether, even if it is a "treasure," the object is also "national."<sup>137</sup> In order to be accepted, any definition for "national treasure" the ECJ may ultimately set forth will need to take into account the realities of the status quo: States will fight to retain works that have a connection to the State, however tenuous, as long as the work may be considered a valuable part of the national patrimony or cultural heritage of the State. Whether these works were really "essential and fundamental" is debatable and an objective determination would be practically

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<sup>136</sup> General Agreement on Tariffs and Trade, *supra* note 3, art. XX(a)-(f); Treaty of Rome, *supra* note 3.

<sup>137</sup> Merryman, *Cultural Property*, *supra* note 41, at 55-56.

impossible. As mentioned above, none of the potential cases or any similar cases have reached the ECJ, having been resolved through other means. The ECJ would probably have ruled against the States in such cases; in the case of the Cleveland Poussin, the French government protested against the removal of the Poussin from France to the United States without first seeking an export permit.<sup>138</sup> The matter was eventually settled and it is not clear why; one implication is that the French government would not be able to provide a strong enough argument that this painting by a French painter was an essential and fundamental element of its national patrimony, the loss of which would severely deplete the national cultural heritage. The work regarding national treasure has so far been unofficial and academic; what is needed now is an official clarification from the ECJ settling the matter and solidifying guidelines.

### CONCLUSIONS

The international art trade is good and useful, and enjoyment of important art objects would be severely limited if all art were to remain at “home.”<sup>139</sup> A definition of “national treasure” should not be broad enough to keep all cultural property within its nation of origin because this might discourage the use of art as a foreign ambassador of its home nation. The other benefit of exporting art is that “[f]oreign recognition may thus lead to a reevaluation of a nation’s own art; indeed, international recognition may help define what constitutes a national art treasure.”<sup>140</sup> This was certainly the case in the United States with Eakin’s *Gross Clinic*; the risk of losing the painting greatly increased Philadelphian interest in the painting. There is also a benefit to the rest of the world that would be lost if all art were to remain at home; importing foreign cultural property enriches the national patrimony of the importing State. States importing foreign cultural property gain great benefits from the art, which provides the State’s citizens with more ready access to the foreign cultures of other nations and peoples, thus broadening tastes and sympathies, educating, and fostering unity on an international level and the creation of a world community.<sup>141</sup>

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<sup>138</sup> *Id.* at 57.

<sup>139</sup> BATOR, *supra* note 84, at 30.

<sup>140</sup> *Id.* at 30–31.

<sup>141</sup> *Id.* at 31.

The nationalistic and reciprocal perspectives are polarized views on the value of art, and although they attach different values to art, they are both valid: art has economic value and it has an intangible, intrinsic value. The study and appreciation of art elevates and civilizes people, and it stimulates other art.<sup>142</sup> But which people are deserving of the benefits of art? Merely those who can afford it? Just how should art be distributed, or redistributed, around the world? Should culture be internationalized or should individual cultures retain their differences?<sup>143</sup> The answers to these questions implicate the politics behind the national treasure problem.

It is not possible to satisfy everyone; there will always be differing opinions as to where art “belongs.” Peruggia’s theft of the *Mona Lisa* and his subsequent lenient sentence demonstrate that despite France’s legal and historical ownership of the painting, Italians, to some extent, harbor the idea that the painting “belongs” to them, having been painted by Italy’s most famous painter and depicting a woman from a prominent family of Florence. “Who would suffer the greater injury” should be an important consideration. In the extremes, if the EU or the WTO removed the exception for national treasures and thus forced the Member States to allow export of its national treasures, or if the EU or the WTO deferred to the exporting State’s designations, and thus deprived importing States of the opportunity to obtain great works of art, who would suffer the greater injury? If those are the two ends of the spectrum, less harm can be done to the importing countries than to the exporting countries because losing a part of the State’s own national patrimony is more harmful than not being able to buy a piece of another State’s cultural property. Since it is such a subjective determination, the exporting State should be able to make its own determination on what is so vital to the national patrimony that loss of it will be harmful to the national cultural heritage. But the EU and WTO must maintain the power to stop Member States from abusing their powers. For cultural property that is less than a “national treasure,” what really is the harm in having the State’s cultural property be owned by another State? The Cleveland Poussin went from a private collection in France, unavailable to the public for viewing, to a public room in a well-known museum, where it is identified and honored as a masterpiece by a great French artist.<sup>144</sup>

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<sup>142</sup> *Id.* at 30.

<sup>143</sup> *Id.*

<sup>144</sup> Merryman, *Cultural Property*, *supra* note 41, at 57.

The removal of this work hardly seems like the great loss that the French had feared it would be.