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Common Markets and Cultural Identity: Cultural Property Export Restrictions in the European Economic Community

John E. Putnam II†

In the first decade of the nineteenth century, Thomas Bruce, Earl of Elgin, removed much of the statuary from the Parthenon (the "Elgin Marbles") and shipped it to London.1 Bruce may have exceeded his authority as Ambassador to the Ottoman Empire by removing the Marbles, although the Ottomans acquiesced.2 In the process of removing the statuary, the Parthenon was seriously damaged.3 In 1816, Bruce sold the Marbles to the British Museum, where they remain today.4

The Elgin Marbles story is among the most infamous examples of a nation's loss of cultural artifacts. Responding, in part, to such incidents, European nations have enacted laws restricting the export of art, historical artifacts, and other types of cultural property.5 However, the Member States of the European Community

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1 Lord Elgin removed 247 feet of the 524 foot long frieze around the main inner chamber, fifteen of the 92 metopes, seventeen statuary figures from the pediments, and several other architectural fragments. John Merryman, Thinking About the Elgin Marbles, 83 Mich L Rev 1881, 1884 (1985).

2 The Ottomans knew about Elgin's activities and had opportunities to stop shipment of the Marbles. Id at 1897-99. Tzannis Tzannetakis, the Greek culture minister, now claims that "[h]ad our ministers been in touch, [the Elgin Marbles] would have never left home." Art Exports; Old Italian Customs, The Economist 100 (Mar 23, 1991) (emphasis added).

Efforts to force the U.K. to return the Marbles to Greece have not yet succeeded. Moreover, a proposed Commission directive from January 1992 would allow Britain to keep the Marbles. See Tom Walker, Elgin Marbles Set to Stay in London, The Times (Jan 16, 1992).

3 Merryman, 83 Mich L Rev at 1884 (cited in note 1) (some of the fragments removed were integral parts of the Parthenon's structure, and the artist responsible for removal conceded that he had "even been obliged to be a little barbarous[].")

4 Id at 1882.

("EC" or "Community") have also committed themselves to the free movement of goods within the Community, and the drive for a market without frontiers will surely impair Member States' ability to control exports. Nonetheless, Article 36 of the Treaty establishing the European Economic Community ("EEC Treaty" or "Treaty") exempts from the free-movement-of-goods requirement measures designed to protect "national treasures." However, the EC has yet to agree on the limits of this exception and on what types of export restrictions are permitted under Article 36.

This Comment argues that many of the national laws restricting the export of cultural property to other Member States are overly restrictive and violate Treaty provisions. Part I examines three Member States' regulation of cultural property exports. Part II explores the scope of Community law on cultural property trade. Part III discusses EC law on other exceptions to the free-movement-of-goods requirement. Part IV sets out a "public life" definition of "national treasures," consistent with Article 36 case law. Finally, Part V outlines a two-tier export system that respects protection of "national treasures" and promotes the free movement of goods.

I. European Regulation of Art Exports

Many European states have restricted exports of art and other cultural property since 1464, when the Papal States forbade the export of art. Today, all of the Member States of the EC place some restrictions on the export of cultural property. The restrictions vary widely both in the scope of objects protected as "national treasures" and in the methods of regulation. This Comment

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* See Treaty Est Eur Eco Comm, Arts 30-34.
* EEC, Art 36, states that:
  [t]he provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
* The difficult question of how to retrieve stolen or illegally exported cultural property exceeds the scope of this Comment.
* For a brief description of applicable legislation on European cultural property laws, see Lyndel V. Prott and Patrick J. O'Keefe, Handbook of National Regulations Concerning the Export of Cultural Property (UNESCO, 1988) (Belgium at 18; Denmark at 65; France at 79; Germany at 86; Greece at 89; Ireland at 110; Italy at 113; Luxembourg at 130; Netherlands at 154; Portugal at 174; Spain at 197; and United Kingdom at 224).
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examines three representative systems: the United Kingdom, the Netherlands, and Italy.

A. The United Kingdom

After World War II, the U.K. appointed the Waverley Committee in 1950 to systematize restrictions placed on the export of cultural property.\(^\text{11}\) The guidelines this Committee developed continue to inform U.K. export policy today.\(^\text{12}\) According to these guidelines, the U.K. requires potential exporters to obtain licenses for any goods falling within one of several categories of cultural property, but it will automatically grant a license if these goods were imported into the U.K. within the last 50 years.\(^\text{13}\) The Department of Trade then sends the license applications to an “appropriate expert,” usually an official at one of the U.K. museums.\(^\text{14}\) The expert then decides whether the item qualifies as a national treasure.

Pursuant to the “Waverley Criteria,” the reviewing expert must determine if

(i) the item is so closely connected with British history and national life that its departure would be a misfortune; or

(ii) the item is of outstanding aesthetic importance; or

(iii) the item is of outstanding significance to the study of some particular branch of art, learning or history; or

(iv) the collection to which the item belongs is so closely connected with British history and national life or of such outstanding significance to the study of some par-


\(^{12}\) Id.

\(^{13}\) The categories are: (1) archeological items from the territory of the United Kingdom; (2) photographic positives or negatives more than 60 years old and worth more than a certain value; (3) manuscripts or documents more than 50 years old and architectural, scientific, or engineering documents of any value; (4) paintings worth more than £40,000 and other works of art worth more than £20,000; and (5) British historical portraits worth £5,000 or more. Id at 21; Boris Johnson, EC Nations Fear for their Art Treasures in Single Market, The Daily Telegraph 17 (Oct 10, 1990); Adrian Barr-Smith, Freedom of Museums to Sell, Trade or Otherwise Dispose of Objects in their Collection, in Martine Briat and Judith Freedburg, eds, International Art Trade and Law 15 (ICC Publishing, 1991).

\(^{14}\) Turnor, 14 Intl Legal Practitioner at 21 (cited in note 11).
ticular branch of art, learning or history that its departure would be a misfortune.\textsuperscript{15}

If the item does not fall into one of these categories, the government will issue the applicant an export license.\textsuperscript{16} However, if the item does fall into one or more of these categories, the export application passes to the Reviewing Committee on the Export of Works of Art.\textsuperscript{17}

The Reviewing Committee makes the final decision on whether an item falls within one of the Waverley Criteria. If it decides that the item falls within one of the specified categories, the Reviewing Committee will deny the applicant a license to export the property for six months.\textsuperscript{18} During this time, public collections and national museums are given an opportunity to buy the item.\textsuperscript{19} Private parties from the U.K. may also buy the item if they agree to keep it in the country.\textsuperscript{20}

U.K. export controls are among the most liberal in the EC.\textsuperscript{21} The Waverley Criteria allow more flexibility than programs that

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\textsuperscript{15} Id; Prott & O'Keefe, \textit{Handbook of National Regulations} at 225 (cited in note 10).
\textsuperscript{16} Turnor, 14 Intl Legal Practitioner at 21 (cited in note 11).
\textsuperscript{17} Id.
\textsuperscript{18} Barr-Smith, \textit{International Art Trade and Law} at 151 (cited in note 13); Johnson, Daily Telegraph at 17 (Oct 10, 1990) (cited in note 13); Turnor, 14 Intl Legal Practitioner at 21 (cited in note 11).
\textsuperscript{20} Robin Oakley, \textit{Ministers' Saving Graces Likely to Infuriate Art World}, The Times (Apr 30, 1990); Greig, Sunday Times (July 14, 1991) (cited in note 19).
\textsuperscript{21} An example of how the system operates is instructive. In 1987, the Getty Museum (Malibu, CA) wanted to buy one of Nicolas Poussin's finest paintings, "The Finding of Moses," for £7.25 million. The painting had been in the U.K. since 1772, and it had hung in the Powis Castle in Wales, inaccessible to the public. The Reviewing Committee decided that the painting met the second Waverley Criterion of aesthetic importance, and it accordingly postponed the license to export for six months. During this time, the National Museum of Wales and the National Gallery in London jointly bought the painting for £7.25 million. For a more complete description of this incident, see \textit{Roosting Poussin}, The Economist 61 (June 11, 1988); \textit{Art Exports; Goodbye Moses}, The Economist 62 (Nov 21, 1987).

Nonetheless, critics have expressed increasing dissatisfaction with the effectiveness of the Waverley system in keeping art treasures in the U.K. Tim Renton, the current Minister of the Arts, has proposed that the U.K. create a list of non-exportable works of art and other cultural property instead of using the Waverley system. See Geordie Greig, \textit{Saving But Not Prospering}, Sunday Times (Oct 13, 1991).

Renton's plan faces criticism from many circles. For example, a member of the Museums and Galleries Commission is concerned that "[l]isting would be damaging to the heritage of [Britain] in that it would certainly preserve key masterpieces at the expense of lesser objects and at the risk of increased smuggling," \textit{They Shall Not Pass}, The Times (Dec 5, 1991). It would also reduce the value of listed objects, perhaps without providing compensation, since international markets would generate higher prices than local ones. List-based
comprehensively list national treasures. Moreover, the system accommodates the interests of those wishing to sell cultural property and reduces the incentive to smuggle, since owners receive full market value for their property.22

B. The Netherlands

The Netherlands has a very simple system of cultural property export control. The Conservation of Cultural Heritage Act authorizes the government to list and control privately owned works of great importance to the national heritage.23 Publicly owned artworks are typically not listed or subject to the Act, because the government is presumed to hold these items in trust for the nation.24 The Minister for Welfare, Health, and Cultural Affairs, in consultation with the State Commission for Museums, can place or remove items from the national list.25

The Netherlands has strict requirements for what types of items should appear on its list. Indeed, only about 300 objects are now on the list,26 which contains only 30 to 40 paintings, including only one Rembrandt and one Frans Hals.27 The implementing decree for the Act sets forth in rather strict terms the qualities an item must exhibit in order to merit inclusion in the list:

If an object can be classified as irreplaceable and essential it is of such cultural-historical or scientific significance that it should be preserved for the Dutch cultural heritage and to that end should be placed on the List.28

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28 Id at 47 (citation omitted).
This limited protection of cultural property suits well a nation like the Netherlands, which possesses both a rich artistic heritage and a desire to trade.\textsuperscript{29}

In the Netherlands, the owner of a listed item is restricted in the use of that item. The owner must notify and receive the permission of the Minister of Welfare, Health, and Cultural Affairs before moving, auctioning, selling, assigning, or lending listed property.\textsuperscript{30} The Minister can object to the sale of a listed item to a non-resident, but only if the State also offers to purchase the item on the same terms.\textsuperscript{31} The owner can then sell the item to the government or decide not to sell at all.\textsuperscript{32} The Minister can also withdraw her objection within a month after the establishment of the purchase price.\textsuperscript{33}

Both the British and Dutch approaches are quite liberal. They prevent only a small number of items from leaving their countries. Both also ensure that an owner receives compensation at close to international market value for an unexportable item. Moreover, the Dutch system's value assurance and the narrow scope of its list probably discourage smuggling, and the list makes all parties certain of the status of any particular item.\textsuperscript{34}

C. Italy

As an art-rich country, Italy places the most restrictive controls on the export of cultural property.\textsuperscript{35} Italian law requires a license to export cultural property more than 50 years old.\textsuperscript{36} The

\textsuperscript{29} Thus, Not very many works qualify as "protected objects," which is what was specifically intended by the lawmakers. What they envisaged was no more but that "the public may receive an impression of the surviving expressions of the cultural history of the Netherlands, from at least a few good examples in each field." Id at 47 (citing P. J. J. Van Buuren and S. C. H. Koning, Wet tot Behoud van Cultuurbezit, Ars Aequi 84 (1985)).

\textsuperscript{30} Id at 49; Prott & O'Keefe, Handbook of National Regulations at 154 (cited in note 10).

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} The Dutch system also includes an emergency procedure for listing an important work, yet unlisted, that comes to auction or is otherwise sold. Quaedvlieg, The Netherlands: Introduction at 46 (cited in note 23).

\textsuperscript{34} The Economist at 100 (Mar 23, 1991) (cited in note 2).

\textsuperscript{35} Law of 1 June 1939 XVI, No 1089 ("concerning the protection of objects of artistic and historic interest"); Prott & O'Keefe, Handbook of National Regulations at 113 (cited in note 10); Lyndel V. Prott and Patrick J. O'Keefe, 3 Law and the Cultural Heritage 271 (Butterworth's, 1989).
government prohibits export if the loss of the object would threaten the "Italian national heritage." Although protecting "Italian heritage" sounds similar to some of the regulatory language used by the U.K. and the Netherlands, the Italian Government uses its discretion to greatly restrict the export of many artworks. Moreover, the Italian Minister for National Education has the power to preempt the sale of any work to either domestic or foreign buyers. These rules allow the Minister to step into any transaction and buy an object for the state.

These restrictive export laws have created serious problems. Most importantly, such restrictions have generated friction within the Community, because they virtually prohibit non-contemporary artworks from leaving Italy. Thus, the Commission is presently attempting to pressure the Italians into loosening their restrictions. Additionally, the highly restrictive laws have depressed the prices of art within the country. Indeed, one estimate suggests that Italian art prices are 30 percent lower than they would be if international purchasers could export them.

Not surprisingly, such price deflation has encouraged theft and smuggling. It has also fed a thriving black market for art, and illegally traded art often serves as collateral for drug arrangements, tax evasion, and other illicit enterprises. Although Italy has imposed strong criminal penalties on those convicted of illegal art trade, these measures have not significantly reduced smuggling and theft.

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37 Prott & O'Keefe, 3 Law and the Cultural Heritage at 271 (cited in note 36).
38 John Henry Merryman and Albert E. Elsen, 1 Law, Ethics and the Visual Arts 53 (U of Pennsylvania Press, 1987). See also, The Economist at 100 (Mar 23, 1991) (cited in note 2) ("The officials in charge of granting export permits for works of art are so strict they have practically killed off all legal trade from Italy").
41 The Economist at 100 (Mar 23, 1991) (cited in note 2).
42 Id.
44 Id. Indeed, 80 percent of all stolen artworks reported to Interpol, the international agency which tracks art theft, are stolen from Italy. The Economist at 100 (Mar 23, 1991) (cited in note 2).
46 See Prott & O'Keefe, Handbook of National Regulations at 113 (cited in note 10).
47 Indeed, "[i]nsofar . . . as the conventional criminal law depends on after-the-fact detection and punishment, it is likely to be a tool of limited effectiveness in reducing steal-
II. THE EEC TREATY AND COMMUNITY TRADE IN CULTURAL PROPERTY

Articles 30-34 of the EEC Treaty make quantitative restrictions on exports and imports among Member States illegal. Specifically, Article 34 states that "[q]uantitative restrictions on exports, and all measures having equivalent effect shall be prohibited between Member States." However, Article 36 exempts from this prohibition measures designed to "protec[t] . . . national treasures possessing artistic, historic or archeological value." While the Treaty thus gives Member States the power to protect cultural property, the language of Article 36 limits such protection to "national treasures." "This more restrictive wording reflects . . . a desire to avoid over-extending [the] provision for exception to the free circulation of goods . . . ."

The European Court of Justice ("ECJ") has yet to agree on what export restrictions the Article 36, "national treasures" clause allows. Only one case, Re Export Tax on Art Treasures: E. C. Commission v Italy, has discussed art export laws in light of the national treasures clause of Article 36. In this case, the Commission sued the Italian Government for imposing an eight to thirty percent duty on exported artworks. The Commission alleged that such duties violated Article 16 of the EEC Treaty.

The Italian Government argued that cultural property differs from the types of goods to which the EEC Treaty generally, and

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44 EEC, Art 34.
45 Id, Art 36. The wording of the "national treasures" clause is identical to that of analogous provisions included in article 20 of the General Agreement on Tariffs and Trade ("GATT") and article 20 of the Agreement Between the European Community and the Swiss Confederation (1972). Prott & O'Keefe, 3 Law and the Cultural Heritage at 683 (cited in note 36).
48 The ECJ has been faced with the question of whether the national treasures clause or other parts of Article 36 might save laws setting minimum book prices if these laws intended to protect creativity and cultural diversity in the publishing industry. Because the ECJ interprets Article 36 strictly, however, it has summarily rejected such arguments. See Leclerc, 1985 ECR 1; Case 95/84, Boriello v Darras, 1986 ECR 2253. See also, Case 168/86, Procurer General v Rousseau, 1987 ECR 995; Case 355/85, Driancort v Cognet, 1986 ECR 3231, 1987:3 CMLR 942.
49 Article 16 provides: "Member-States shall, as between themselves, abolish customs duties on exports and taxes having equivalent effect."
Article 16 specifically, applies. Italy also argued that Article 36 exempts cultural property restraints from the general prohibition against limiting the free movement of goods. The European Court of Justice rejected both arguments and held that export duties imposed on cultural property violated the EEC Treaty.

The ECJ refused to distinguish export of cultural property from other types of Community trade subject to the EEC Treaty:

Under Article 9 of the Treaty, the Community is based on a customs union "which shall cover all trade in goods." By goods, within the meaning of that provision, must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions. [Because artworks are valued in money and are the subject of commercial transactions,] these goods are subject to the rules of the Common Market, subject solely to the exceptions expressly provided by the Treaty.

Thus, because Article 36 makes a special exception only for "national treasures," the EEC Treaty implicitly governs trade in all other types of cultural property. To interpret Article 36 differently would render the "national treasures" clause meaningless.

In Re Export Tax, the ECJ also confirmed its longstanding rule that exceptions to the free movement of goods, such as Article 36, should be narrowly construed:

The provisions . . . of the Treaty embody the fundamental rule of the elimination of all obstacles to the free circulation of merchandise between the member-States by the abolition of . . . quantitative restrictions and measures of equivalent effect. Exceptions to this rule must be interpreted strictly.

Thus, although Re Export Tax does not define "national treasures," it does affirm the Community's authority to regulate

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44 Case 7/68, Re Export Tax, 1969 CMLR at 5.
45 Id at 6.
46 Id at 10. Note, however, that Italy still imposes export taxes on art being exported to non-EC countries. Merryman & Elsen, 1 Law, Ethics and the Visual Arts at 53 (cited in note 38).
47 Case 7/68, Re Export Tax, 1969 CMLR at 8.
49 Case 7/68, Re Export Tax, 1969 CMLR at 10.
trade in such items and it also reaffirms that Article 36 exceptions must be strictly and narrowly interpreted.

The Commission and Council have also discussed art export restrictions in the last ten years, but they have failed to enact any Community measures for regulating cultural property trade. In 1982, the Commission suggested that the Member States reduce barriers to the trade in cultural property:

Although the traditional concept of "national heritage" must not be abolished for any particular works of art, it should be gradually expanded for quite a number of others to culminate in a new concept of "Community heritage", indicating that works taken to another Community country will be less and less felt as a loss to the country of origin.60

However, the Commission did not specify the types of cultural property restraints it considered unsuitable. It merely suggested that a narrow definition of the Article 36, "national treasures" language might best serve Community interests.

The Community's role in regulating cultural property trade has again become important following the passage of the Single Europe Act in 1987, since this Act will eliminate the border checks that make national export restrictions effective.61 Faced with this challenge, the Commission has sought to open a dialogue that will lead to a coordinated Community policy on cultural property trade.62 It has been forced to balance carefully the Community grants of authority on cultural property issues against the realities of an integrated market.63

In the process, the Commission has suggested how it would define the "national treasures" language of Article 36:

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60 Commission of the European Communities, Stronger Community Action in the Cultural Sector, Bull EEC (Supp) 8 (June 1982).
62 Id at 1.
63 Accordingly,
The ideal long term solution would be to develop the idea of a common European heritage. As far as the immediate future is concerned, however, completion of the internal market has to be reconciled with the Member States' desire to protect their national treasures, the legitimacy of which is recognized by the EEC Treaty [Article 36].

Id.
[T]he concept of "national treasures possessing artistic, historic or archeological value" cannot be defined unilaterally by the Member States without verification by the Community institutions. . . . Moreover, Article 36 of the EEC Treaty . . . cannot be relied upon to justify laws, procedures or practices that lead to discrimination or restrictions which are disproportionate with respect to the aim in view.64

Subsequently, Member States have split on this issue between countries with liberal trade restrictions, such as the Netherlands and the United Kingdom ("liberal states"),65 and those with more stringent restrictions, such as Spain, Greece, and Italy ("restrictive states").66

The Commission presented a draft directive in January 1992 that seeks to eliminate the differences between the liberal and restrictive states.67 The directive proposes a system of restitution, whereby Member States will have to return "national treasures" that are "illegally" imported from another Member State.68

Under this proposed system, much will depend on how the Commission defines "national treasures." Thus far, it has sought to

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64 Id at 3. The Commission also argued that, unlike areas of import restriction such as drugs or pornography, harmonization of national laws would not solve the tensions over export restrictions on cultural property. Id at 4.

65 Perry, Reuter Library Report (Oct 17, 1990) (cited in note 26); Suzanne Perry, Commission Promises Laws to Protect EC's National Treasures, Reuter Library Report (June 7, 1991) (LEXIS, Europe Library, Allieur File); The Economist at 100 (Mar 23, 1991) (cited at note 2). The more liberal states want to reduce barriers on trade in cultural goods. Perry, Reuter Library Report (June 7, 1991). One major reason for the desire for more liberal trade is that trade in art and antiques is a large industry in some of these countries. For example, 60 percent of the art sales occurring within the Community take place in Britain. Id. The potentially large bureaucratic burden associated with Community controls like mandatory listing and documentation is thus unappealing to the liberal states. The Economist at 100 (Mar 23, 1991).

66 Id. Restrictive states view the issue from the perspective of national rights to regulate cultural property rather than as an issue of free movement of goods in an integrated market. See Perry, Reuter Library Report (Oct 17, 1990) (cited in note 26).


68 Id. The "illegal export" must have occurred no longer than 30 years before the request. In addition, the party requesting the return may have to compensate good-faith buyers to regain the object.
define "national treasures" broadly, setting out categories of objects that will automatically qualify for protection. For example, all paintings executed before 1600, executed between 1600 and 1900 and worth more than 75,000 European Currency Units ("ECUs") (about $94,000 U.S.), or executed after 1900 and worth at least 150,000 ECUs (about $188,000 U.S.) would qualify as "national treasures." These types of objects form what the Commission calls the "nucleus" of national treasures. Thus, Member States could validly restrict the export of any item falling within one of these broad categories of "national treasures."

This proposed directive retreats from earlier professed desires for greater intra-Community trade in cultural property. Given the high prices of art, the directive's approach would allow Member States to effectively restrain the free movement of large classes of objects, particularly those created before 1900. Although the proposed directive may be a good political compromise, its consistency with Community trade law is uncertain at best. The final verdict will have to await the ECJ's definition of Article 36's "national treasures" language.

III. OTHER COMMUNITY EXCEPTIONS TO THE FREE MOVEMENT OF GOODS

Unlike cultural property export laws, other types of trade restrictions have generated litigation requiring interpretation of Article 36. A state claiming an Article 36 exemption from the free movement of goods provisions of Community law must show that the restrictive measures in question satisfy three tests; the measures: (1) must be necessary to achieve an Article 36 goal ("neces-

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68 Id.
69 Id. The preliminary proposals also do not indicate how the EC will determine the "minimum monetary value" for purposes of defining "national treasures."
71 Of course, by varying the values used in the definition, the Community could enlarge or decrease the volume of legal trade.
72 Most of these cases are also concerned with whether the national laws in question are quantitative restrictions on trade. Articles 30 to 34 do not affect the analysis in this Comment, because art export restrictions are straightforward violations of Article 34. By restricting art exports, Member States directly impose "quantitative restrictions on exports . . . [which are] prohibited between Member States." EEC, Art 34. Thus, a Member State could not argue that art export restrictions do not constitute quantitative restrictions, but it would instead rely on the exemption in Article 36. See II Encyclopedia of European Community Law-B: Community Treaties B10033-B10038/4; Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung fur Brandwein, 1979 ECR 649, 1979:3 CMLR 494; Case 8/74, Procureur du Roy v Dassonville, 1974 ECR 837, 1974:2 CMLR 496.
sity test”);†⁴ (2) must be no more disruptive of trade than required to achieve this goal (“proportionality test”);†⁵ and (3) cannot “constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States” (“discrimination test”).†⁶ These tests are not perfectly discrete, and they often are not discussed clearly in Community case law.†⁷ However, all are applied with reference to the ECJ’s general interpretative principles—most importantly, that exceptions to the free movement of goods should be narrowly construed.†⁸

The necessity test is a threshold inquiry to determine whether a Member State needs the restrictive measure to achieve one of the ends listed in Article 36, such as the protection of health, national treasures, or commercial secrets.†⁹ Thus, to qualify for an Article 36 exception from the free movement of goods, Member States must prove that their cultural property export restrictions are necessary to protect national treasures.

The ECJ assesses the necessity and propriety of a particular law by applying a second, proportionality test. Pursuant to this test, a Member State may not choose highly disruptive measures to accomplish its objectives when less restrictive, viable, alternatives

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†⁵ See, for example, Case 178/84, *Re Purity Requirements for Beer: E. C. Commission v Germany*, 1987 ECR 1227, 1988:1 CMLR 780.

†⁶ EEC, Art 36.

†⁷ The second requirement that the rule be no more restrictive than necessary, may apply to either the first or second sentence of Article 36. Since the ECJ has continued to look at proportionality in terms of the second sentence, this Comment takes this approach as settled and does not inquire as to the few situations in which the distinction between the sentences will make any difference. See, for example, Laurence Gormley, *Newcastle Disease and the Free Movement of Goods II*, 134 New L J 57, 57-58 (1984); Case 178/84, *Re Purity Requirements for Beer: E. C. Commission v Germany*, 1987 ECR 1227, 1988:1 CMLR 780, 809-10.

†⁸ See note 59 and accompanying text.

†⁹ See Case 40/82, *Re Imports of Poultry Meat*, stating that:

Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of member-States but only permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that Article. 1982:3 CMLR at 513 (quoting Case 251/78, *Firma Denkavit Futtermittel GmbH v Minister fur Ernahrung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen*, 1979 ECR 3369, 1980:3 CMLR 513, 536).
are available.\textsuperscript{80} The means a country selects must be proportional to the ends it seeks.\textsuperscript{81} An excessively restrictive law may also violate the third test, which forbids measures that "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."\textsuperscript{82} A restriction fails this test when it treats goods from other Member States differently from those produced domestically.\textsuperscript{83} This discrimination test generally reinforces the first two tests, since an unnecessary measure that is disproportionately restrictive is also likely to be discriminatory or a disguised restriction on trade.

IV. A "PUBLIC LIFE" INTERPRETATION OF "NATIONAL TREASURES"

The EC should interpret Article 36 so as to reconcile the Community's commitment to the free movement of goods and the Member States' concern for the protection of national treasures. Only a narrow definition of "national treasures" can accomplish such a reconciliation. Member States should retain their right to identify and protect particular items that they believe are "national treasures," but they must exercise this right within the strict confines of Article 36. Towards this end, the ECJ will play a crucial role in assuring that Member States comply with Community law.

The language of Article 36 itself suggests that the "national treasures" language should not receive too expansive an interpretation. The drafters of the EEC Treaty could have broadened the exception by making the relevant language read "protection of cultural property possessing artistic, historic or archeological value" or "protection of objects possessing . . . value." However, they instead chose the term "treasure" because it implies a more select category of items—namely, those that are most important to a

\textsuperscript{80} Case 50/85, Bernhard Schloh v Auto Controle Technique, 1986 ECR 1855, 1987:1 CMLR 450, 463 ("[N]ational rules cannot benefit from an exception provided for by Article 36 of the Treaty if the objective pursued by that exception can be as effectively realized by measures which do not restrict intra-Community trade so much.").

\textsuperscript{81} See, for example, Case 178/84, Re Purity Requirements for Beer: 1988:1 CMLR at 807-08 (German prohibition on imported beer using labels with the word "bier" on them held to violate the free movement of goods, because less restrictive alternatives were available to protect consumers).

\textsuperscript{82} EEC, Art 36. See also, Case 40/82, Re Imports of Poultry Meat, 1982:3 CMLR at 535.

\textsuperscript{83} See, for example, Case 50/85, Bernhard Schloh, 1987:1 CMLR at 462 (Belgian roadworthiness tests for imported cars constituted a disguised, and forbidden, means of discriminatory trade policy).
country's heritage. Similarly, use of the modifier "national" suggests that the drafters would have required the existence of some bond between an object and the life of a nation before it will be accorded protection as a "national treasure." Given the Community's overarching goal of creating a common market, this limiting construction of "national" seems the most consistent with the drafters' intent.\(^8\)

Therefore, a Member State should be allowed to designate an object a "national treasure" only where it can show that the object is closely connected to the public life of the nation. In deciding whether an item merits the appellation "national treasure," the EC should apply the U.K.'s first and fourth Waverley Criteria—whether an item is "so closely connected with national history and cultural life that its departure would be a misfortune" or whether "the collection to which the item belongs is so closely connected with national history or life that its departure would be a misfortune." This would allow Member States to adopt either a flexible, case-by-case approach or a listing approach, provided they can justify either by reference to the above criteria.

Under this public life definition, an object closely tied to an artist or the history of the nation, or that has long been accessible and important to the public, would receive protection as a "national treasure."\(^9\) Conversely, objects that are part of private collections, not open to the public, would not qualify for Article 36 protection. While such collections may be treasures within a nation, they are not necessarily "national treasures," and their trade should not be hindered by restrictions. An object's aesthetic or

\(^8\) A comparison of the English version of the Article with the French and German versions reinforces a narrow reading of the "national treasures" clause. The French equivalent of "national treasures" in Article 36 is "trésors nationaux." EEC, Art 36 (French), as found in Common Market Reports (CCH) ¶ 351. As with the English version, the French text uses a strong concept of "treasure," as opposed to a more inclusive property term. The German equivalent, "nationales Kulturgut," also denotes special force and is equivalent in meaning to the English phrase. EEC, Art 36 (German version), as found in Common Market Reports (CCH) ¶ 351; conversation with Thomas A. T. Oppermann, Professor of Public Law at Eberhard-Karls Universität (Tübingen, Germany). See also, Clara-Erika Dietl, 2 Dictionary of Legal, Commercial and Political Terms (German-English) 441 (Matthew Bender, 1988) (Use of the "nationales Kulturgut" language is significant for two reasons: first, the modifying adjective, "nationales" gives special meaning to the noun; second, the use of the root noun "gut" is more forceful than the alternative of "guter.").

\(^9\) Note that whether something qualifies as "public" in this context should turn on the public's access to a particular item, not on public or private ownership of the item. So understood, open churches or private museums are as "public" as a state-owned museum. Additionally, the public life definition should not necessarily apply in the restitution context, that is, for those items illegally removed.
monetary value, if it has no close connection to the nation's public life, will not alone qualify it as a "national treasure."

The public life requirement does not necessarily mean that an object must have been domestically produced to merit the title "national treasure." An item can gain public importance through historical or cultural assimilation. For example, da Vinci's "Mona Lisa," through its residency at the Louvre, has now become as much a part of French public life as of Italian public life. The Egyptian sculpture of Queen Nofretete in Berlin or the Elgin Marbles in London would similarly qualify as assimilated "national treasures."

Moreover, a definition of "national trea-sures" that focuses on an object's connection to the public life of a nation addresses the primary purpose of Article 36: protecting key elements of national culture from permanent loss. The public life definition only restricts trade to the extent necessary to achieve this purpose.

Restrictions on cultural property exports, like other restraints on the free movement of goods, must also satisfy the tests of necessity, proportionality, and non-discrimination. According to the public life definition, the Commission's proposal, as well as some of the restrictive states, classify far too many items as "national treasures." Unless items are within the public sphere, they probably do not "bea[r] witness" to a nation's past. Moreover, use of monetary values and date cut-offs to define "national treasures" is simply too crude a proxy to serve the intended purpose of Article 36.

Further, use of such proxies also allows Member States to use cultural property export restraints to discriminate against other

** See Turnor, 14 Intl Legal Practitioner at 22 (cited in note 11).

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*See notes 74-76 and accompanying text.*

*See Merryman, 21 UC Davis L Rev at 499 (cited in note 87).*
members of the Community. Indeed, Italy’s broadly applicable restrictions may serve as a forbidden “means of discrimination.”\(^9\) At the very least, Italy’s restrictions have driven national prices 30 percent below their international market value,\(^9\) which in turn has given Italian buyers of art an unfair advantage. Thus, if items are unrelated to a nation’s public life, restricting their export may merely encourage preferential treatment for that nation’s citizens.

Even the U.K.’s relatively liberal system of export controls is not immune from criticism under this “public life” interpretation. The U.K.’s definition of national treasures is overbroad: the mere fact that an item is aesthetically impressive (the second Waverley criterion) or useful to scholars (the third Waverley criterion) should not affect the determination of whether an item qualifies a national treasure.\(^2\) If an item is not part of the nation’s public life, the nation gains no benefit from retaining control of it. While purely private items of outstanding aesthetic importance may be within the nation, they do not belong to the “nation,” nor do they necessarily form part of its public life.

V. A Community Policy on Trade in Cultural Property: Two-Tier Export Controls

For intra-Community cultural property trade to function smoothly, the EC also needs a common policy to regulate extra-Community trade. Therefore, the EC needs a two-tier system of cultural property restrictions; one that distinguishes between intra- and extra-Community trade.\(^9\)

The Community’s shared European heritage and its need for internal cooperation justify a two-tier system. Although some Member States may be willing to let some of their cultural property move freely throughout Europe, most are less willing to let their cultural property be exported to other continents. Further,

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\(^9\) EEC, Art 36.
\(^2\) In 1979, the Dutch Rijksmuseum challenged the second and third Waverley criteria using this same analysis. Prott & O’Keefe, 3 Law and the Cultural Heritage at 486 (cited in note 36). The Reviewing Committee felt, however, that an item qualifying under the second or third criteria was still part of the national heritage. Id.
\(^9\) Of course, external export controls will have to be consistent with GATT or other international conventions. However, GATT compliance and other such issues exceed the scope of this Comment.
whereas a shared "European (or Community) heritage" may require abolition of internal barriers to cultural property trade, it also favors restricting extra-Community export of these items to stem the potential loss of "Community treasures." Under this two-tier approach, the EC should review all extra-Community exports of cultural property to ensure that none of the items at issue qualify as national treasures. Member States should also retain their present export controls and apply them to extra-Community trade in cultural property. Because Article 36 applies only to intra-Community trade, it presents no obstacle to such a dual system of export controls.

A Member State should also be able to block extra-Community export of its cultural property, even where such property no longer resides in that Member State—i.e., when smugglers, thieves, or legal owners have moved such property to another Member State. For example, if a person smuggled Italian cultural property to England and then attempted to export it to the United States, Italy should be able to block the export, even if it could not force the U.K. to return the item.

Intra-Community trade in cultural property should remain relatively unencumbered. Member States should be able to protect "national treasures" only to the extent that such protection remains consistent with a common market. Further, encouragement of a Community market for cultural property should help discourage smuggling and theft. As the Italian example demonstrates, overly restrictive rules may beget illegal markets and smuggling.

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* See, for example, Prott & O'Keefe, 3 Law and the Cultural Heritage at 31-33 (cited in note 36); Commission of the European Communities, Stronger Community Action in the Cultural Sector, Bulletin of the European Communities, Supp 6/82 at 8 (1982).

* See Protection of National Treasures, 1989 COM 584 at 10-12 (cited at note 61) ("[T]he presence of an object in the territory of another Member State can still prevent [the national treasure from] being lost for ever, since as long as it has not been exported to a non-member country, it remains within the internal market and subject to Community law.").

* Id.

* Even if extra-Community restrictions continue, intra-Community art trade will relieve some of the pent-up demand pressure, since trade with other Member States will satisfy much of world demand. Indeed, the Europeans, particularly the Italians, are currently the largest net purchasers of art. See The Economist at 13 (Dec 22, 1990) (cited in note 43).

* See Part I C of this Comment. The illegal market phenomenon is best explained as follows:

  If the market cannot be supplied through legal means, it will be supplied illegally. Indeed, the absence of a licit market insures the existence of an illicit one, with the usual consequences: loss of control over a traffic that, if licit, could be regulated; criminalization of the traffic; enrichment of the criminal element who exploit the illicit market; official bribery and other forms of corruption.
In order to keep great art safe, the Community must maintain a sufficiently robust legal market.\textsuperscript{99}

Effective regulation of extra- and intra-Community cultural property trade also depends on the establishment of an adequate cultural property registration and recordation system. A mandatory "passport" that would accompany objects is one feasible means of establishing such a system. This passport would accompany an item of cultural property and record its country of origin and all subsequent transfers.\textsuperscript{100} A Community agency would then be responsible for monitoring compliance with such regulations and ensuring that records remain current. Such a system would permit the Community to effectively enforce export restriction laws both within and at the borders of the Community—a particularly difficult task once the Single European Act goes into force and intra-Community customs checks are demolished.\textsuperscript{101}

The major drawback of such a system would be its cost. Setting up this type of system, similar in aim to the American real estate title system, would be expensive. Nonetheless, the costs need not be prohibitive, and objects worth less than a certain minimum value could be exempted from the passport requirement. The EC could also integrate the passport system with Value Added Tax ("VAT") collections, since much of the data needed to collect the tax is the same as that required to track the movement of cultural property. Thus, tracking may not dramatically increase costs. Of course, freer intra-Community trade in cultural property should also enlarge VAT revenues, some of which in turn could be used to fund the passport system.\textsuperscript{102}

Merryman & Elsen, \textit{3 Law, Ethics and the Visual Arts} at 63 (cited in note 38).

\textsuperscript{99} See Bator, \textit{International Trade in Art} at 46 (cited in note 9) ("The best way to keep art is to let some of it go.").

\textsuperscript{100} See \textit{Protection of National Treasures}, 1989 COM 594 at 17 (cited in note 61).

\textsuperscript{101} Indeed,

[A] mandatory system [of registration] would greatly facilitate application of the common rules on exports, since the owner or new purchaser would not have to initiate investigations . . . in order to determine which Member State was responsible for issuing an authorization, . . . since the information would appear on the identification sheet. . . . [I]f establishment of an identification sheet also constituted an assurance that the object were not stolen, the public authorities could combat the receiving of stolen works of art much more easily, since unscrupulous dealers could no longer claim that they were unaware of an object's true status.

Id.

\textsuperscript{102} The cost of paperwork is also likely to be dwarfed by the value of the regulated cultural property. Since a passport system would make establishing title easier, the system would reduce risk in art transactions. This increase in certainty and security with respect to art works (and the reduced demand for stolen items) would bring additional benefits.
Conclusion

The Community must reconcile its commitment both to the free movement of goods and to the protection of national treasures. The best way to achieve this goal is to interpret Article 36 narrowly: Member States must show a strong national or public interest in an object to block its export as a “national treasure.” With coordinated extra-Community export controls and some form of cultural property registration and recordation, Europe can both keep its treasures and meet its free movement objectives.