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Moving Culture: The Future of National Cultural Property Export Controls

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MOVING CULTURE: THE FUTURE OF NATIONAL CULTURAL PROPERTY EXPORT CONTROLS

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Widespread border controls on the export of cultural property are for the most part a relatively recent phenomenon.[1] Such controls only apply to physical objects that can be moved across national boundaries, but can vary considerably from regimes that operate as embargoes on the export of whole categories of tangible property (such as those in place in Egypt and Mexico) to more selective systems that only limit the export of objects perceived to be significant properties (such as the systems operative in the United Kingdom and Canada).[2] The United States is notable for being the only important art market country that has never had a comprehensive system of cultural property export controls. There are several possible explanations for this. These include opposition from dealers and collectors and perhaps a perception that there are adequate resources available inside the United States to acquire objects about to be sold abroad which might be seen as nationally important.

There was no comprehensive international legal instrument pertaining to cultural property export controls ("export controls") until the 1970 UNESO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("The UNESCO Convention").[3] The UNESCO Convention has so far attracted one hundred twenty signatories, including the United States, the United Kingdom, Japan, Switzerland, France, Australia, and New Zealand. The participation of these so-

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1. *See* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 313-14 (1982).

2. *See* Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. . L. REV., 123, 127 - 130 (2010).

3. 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.

called "market states" is considered crucial to the long-term effectiveness of the UNESCO Convention. The UNESCO Convention does not furnish a model law for individual states to frame their own export controls. Instead, it has served as a legal basis for countries to have their export controls recognized by other countries. However, the UNESCO Convention does not mandate the form such recognition must take. Thus, the United States primarily gives effect to the UNESCO Convention through entering into separate bilateral agreements with other state parties to the UNESCO Convention.[4]

Export controls present a number of complex issues in both international and domestic law. Under international trade law, export controls on goods ("quantitative restrictions") are prohibited by Article XI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), which forms part of the 1995 Agreement Establishing the World Trade Organization.[5] However, Article XX(f) of GATT 1994 contains an exception for measures imposed for the protection of national treasures of artistic, historic, or archaeological value.[6] The scope of this exception to Article XI has never been the subject of interpretation by any World Trade Organization or GATT dispute settlement mechanism, so its exact scope is uncertain.[7] Nevertheless, the continued erosion of barriers to trade in goods, may have increased scrutiny of any national laws that limit trade between countries, especially if they are perceived to exceed what is permissible under international trade law. The sort of export controls that operate as virtual embargoes on the movement of cultural property may arguably exceed what is legitimate under the Article XX(f) exception.

Depending on the laws of the particular country concerned, export controls may also face constitutional or other legal challenges

4. *See* Convention on Cultural Property Implementation Act, Pub. L. No. 97- 446, 96 Stat. 2329 (codified as amended at 19 U.S.C. §§ 2601-2613 (2006); *See* U.S. DEPT. OF STATE INTERNATIONAL CULTURAL PROPERTY PROTECTION, http://culturalheritage.state.gov/implemen.html.

5. *See* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS (Cambridge Univ. Press 1999).

6. The relevant part of Article XX reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures [*inter alia*]. . .(f) imposed for the protection of national treasures of artistic, historic or archaeological value. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187, 262 (incorporated in General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 33 I.L.M. 1154).

7. *See* Tania S. Voon, *Cultural Products and the World Trade Organization*, (Cambridge Univ. Press, Legal Studies Research Paper No. 342, 2007) at 100-105, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1211605.

under its domestic property rights law. Concern about such laws violating the "takings clause" of the Fifth Amendment to the United States Constitution may have contributed to them not being adopted in this country.[8] In other countries, however, these sorts of arguments do not appear to have received widespread support.

Export controls present many important policy issues that need to be carefully considered when developing new laws, as well as considering amendments to existing ones. Amongst these issues are the following:

I. THE SCOPE OF EXPORT CONTROLS

As noted above, controls vary from those protecting certain limited categories of objects, such as those of particular historical significance to the source country or those produced by well-known artists or craft persons, to controls of much broader scope that apply to the export of whole categories of objects relating to particular cultures or peoples. The latter often concern antiquities for which there is strong international demand from collectors and museums.

In Canada the so-called "Waverley criteria" apply to objects for which permission is sought to export. These read as follows:

> (a) whether [the] object is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts and sciences, and (b) whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.[9]

This test suggests there are fairly narrow circumstances for when an object will be refused an export permit. Originally developed in the United Kingdom, the Waverley criteria are often cited as achieving a reasonable balance between the demands of collectors and others to be able to trade in cultural property and the national interest in restricting the removal of certain objects thought to be of special significance to the source country.[10]

Which of these two approaches to export controls will apply turns on a variety of circumstances peculiar to the source country. The

8. *See* Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2079-82 (2004).

9. Cultural Property Export and Import Act, R.S.C. 1985, c. C-51, sec.11 (Can.).

10. *See* David A. Walden, *Canada's Cultural Property Export and Import Act: The Experience of Protecting Cultural Property*, 1995 U.B.C. L. REV. (SPECIAL ISSUE) 203, 205, 216; Vivian F. Wang, *Whose Responsibility? The Waverley System, Past and Present*, 15 INT'L. J. CULTURAL PROP. 227 (2008).

countries with the broadest controls are usually those with a history of colonialism and proven vulnerability to loss of cultural material through plundering of sites. Countries with better developed infrastructures (both legal and physical) may feel less vulnerable to illicit activity and choose to adopt narrower export control regimes.

II. EXPORT CONTROLS ON MATERIAL NOT ORIGINATING IN THE EXPORTING STATE

Canadian and United Kingdom export controls apply to cultural property originating from outside either country as well as within it. This may have seemed especially appropriate in the case of the United Kingdom in light of its vast collections of artworks originating from elsewhere in Europe and around the world. It seems only reasonable, however, to ask if such controls with similar scope are appropriate elsewhere? The Waverley report, whose recommendations led to the Waverley criteria being implemented in the United Kingdom, viewed, without much discussion, export controls on both British and foreign objects as appropriate.[11] Canada has adopted a similar approach, apparently justifying the inclusion of "foreign" objects on the basis that they acquire a sort of "Canadian citizenship" if they have been in Canada long enough.

The application of export controls to objects of foreign origin may have seemed appropriate in the case of a former imperial power with vast storehouses of cultural material from around the world. For a country like Canada, however, it may arguably be less justifiable to apply export controls to foreign objects. It is suggested that the only situation where restrictions on the export of "foreign" cultural material are justified is where the imported objects have some special connection with the source state – such as having long formed part of a historically significant collection or being the work of an expatriate artist. In the absence of some meaningful "cultural connection" objects that do not originate in the source state should not be deemed to have become localized merely through the passage of time. A further legal complication is that such controls may be subject to greater risk of not being within the language of GATT 1994, Article XX(f) insofar

11. Committee on the Export of Works of Art, Etc. (1952). *The Export of Works of Art etc. Report of a committee appointed by the Chancellor of the Exchequer*, London: HMSO; *see also* Neil Broady, *The Licensing of Archeological Material from the United Kingdom*, HOUSE OF COMMONS, http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/00413 08.htm.

as that exception only applies to "national treasures" and in so doing perhaps suggests it is limited to material of local origin.[12]

III. Should Export Controls be Accompanied by Judicial or Administrative Review Mechanisms?

A frequent criticism of the administration of national export controls is that no meaningful system is available for applicants to challenge a refusal of permission to export a particular object. In Canada, the Cultural Property Export Review Board (the "Review Board") reexamines refusals of export permits on request.[13] The Review Board currently consists of nine persons, from the museum, art gallery, artistic, and archival communities. There is no special statutory procedure in place in Canadian law to challenge decisions of the Review Board and there are no reported examples of such challenges having occurred. Were one to happen it would be based on the rules set out for judicial review of administrative decisions in the *Federal Courts Act*.[14] It is unlikely that a Canadian court would disagree with the merits of a Review Board decision, but would only interfere if it thought that the Review Board had failed to observe procedural fairness or the principles of natural justice. To achieve fairness and inspire confidence, any system of permits to export cultural property needs transparency and a credible system of administrative review.

IV. Addressing Problems of Enforcement

There is a fairly general consensus that enforcement is a major problem surrounding export controls. This appears to be a result of a combination of circumstances. First, there is often widespread, public unawareness of the existence of the controls that are in place which, in turn, may lead to widespread inadvertent non-compliance. Second, border inspections are usually more thorough in the case of imports than exports. Third, border officers may lack the skills and training to be able to identify objects that require permission to be exported. Fourth, in many instances the source country may lack the financial resources and infrastructure to be able to adequately implement the system of export controls it already has in place. Fifth, in most countries the art market is largely unregulated and sales of cultural property are usually carried out in private. These, and other factors, may

12. General Agreement on Tariffs and Trade, *supra* note 6, at 262.
13. Cultural Property Export and Import Act, *supra* note 9, at sec. 20.
14. Federal Courts Act, R.S.C. 1985, c. F-7 (Can.).

cause export controls to lose credibility. They will need to be addressed if such controls are to be more effective.

V. WHAT DOES THE FUTURE HOLD FOR EXPORT CONTROLS?

Before thinking about where export control regimes might be in 2021, we need to distinguish between two very different types of source country situations. On the one hand, there are a number of countries, often whole regions, where unprotected or poorly protected cultural sites and objects are vulnerable to damage, destruction, illegal interference, or outright theft. These situations demand some sort of regulation, usually including export controls, as well as means to achieve their recognition by other countries. On the other hand, developed countries with well-developed legal systems, such as Canada, Australia, and New Zealand, do not typically face such critical situations and their approach to export controls should be different. The question that then arises is, "how different"? Approaches to export controls amongst developed countries are highly variable, particularly in the absence of any universally agreed-upon model for such legislation.[15] Many British Commonwealth countries have adopted some version of the "Waverley Criteria" that apply in the United Kingdom. Overall, amongst developed countries there is a patchwork of national laws that often bear little resemblance to one another, in wording and implementation.[16]

For many countries, like Canada and Australia, the focus in the future may shift from policing the export of significant cultural objects to the acquisition abroad of objects with significant connections to a country's history and traditions. Canada and Australia make such purchases with government funds which private funding may increasingly supplement. Following in the tradition of Picasso, there are often situations where a person born in one country has only achieved artistic recognition as an expatriate in another. The country of the individual's birth may often wish to acquire examples of her work produced while she was living abroad. Such acquisitions can only serve to enrich local appreciation of the role of individuals in a country's cultural history.

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15. *See* Robert K. Paterson & Tore Modeen, *Canadian and Finnish Cultural Property Export Controls as the Basis for a Model Law*, 9 ART, ANTIQUITY & L. 21 (2004).

16. New Zealand has recently revised its export control regime and though it implements the Waverley Criteria, it appears that in practice permissions are not granted to export any Maori artifacts, regardless of their overall significance. *See* Piers Davies & Paul Myburgh, *The Protected Objects Act in New Zealand: Too Little, Too Late?*, 15 INT'L. J. CULTURAL. PROP. 321 (2008).

Another force for change is the growing diversity of populations in many Western countries (such as those of Western Europe, North America, and Australasia). As populations change, so do perceptions of what objects are "important" to different countries. This in turn raises complicated issues about whether some immigrant populations are large enough to justify the perception that the cultures of their source countries have become a facet of the country they and their ancestors have immigrated to.

Another dynamic is the increasing globalization of wealth that creates "islands" of affluence (often in large cities, such as New York, London, Paris, and Hong Kong) which have, in turn, become centres of art consumption. The sophisticated buyers in these places often compete for the same objects based less on their place of origin than for their stature in the international art market. How will export controls evolve in this increasingly globalized context?

Export controls are, after all, more about nationalism than globalization. They are premised on a perceived need to retain material symbols of national character and identity.[17] Sometimes this is further complicated when indigenous groups in source countries argue that their histories of exploitation justify a special focus on the removal of objects of their cultures.[18] Many historical objects from indigenous cultures (such as the Maori of New Zealand) left their source long before export controls were in place.[19] This suggests that acquiring some of these objects from abroad, through purchase or otherwise, will become more of a priority than restricting exports.

While it is difficult to generalize, the countervailing forces of globalization and nationalism suggest that the future may see the emergence of some sort of compromise. When courts or governments in market states are asked to recognize source state export controls, they are likely to increasingly turn to some sort of "reasonableness" test to discriminate between foreign laws which appear too broad and indiscriminate and those that represent a determination to retain vulnerable or iconic properties but allow the free movement of material of less significance or more universal value. Not only will such an approach present less risk of challenge under international trade law,

17. *See* Robert K. Paterson, *The Legal Dynamics of Cultural Property Export Controls: Ortiz Revisited,* 1995 U.B.C. L. Rev. (SPECIAL ISSUE) 241, 244-46.

18. *Id.* at 254-57.

19. *See* Robert K. Paterson, *Taonga Maori Renaissance: Protecting the Cultural Heritage of Aotearoa/New Zealand, in* CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 107, 110 (James A.R. Nafziger & Ann M. Nicgorski eds., Martinus Nijhoff Publishers 2009).

but it will better reconcile pressures from market states to acquire objects for public and private collections with the reasonable expectations of source countries to retain important examples of their own cultural material. What is needed now is a vigorous and friendly debate at the multilateral level about the continued viability of export controls in the case of developed countries that do not face serious challenges to the integrity of their cultural sites and properties. There can be few who oppose realistic measures to deal with cultures under threat of theft or willful damage, but the appropriate export control measures to apply in less critical situations still await consensus.