

THE GREAT MALL OF CHINA:
SHOULD THE UNITED STATES RESTRICT
IMPORTATION OF CHINESE CULTURAL PROPERTY?

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I. INTRODUCTION

Standing in line at the airport to enter through United States customs, a gentleman holding his luggage is not concerned about the valuable objects he held within the suitcase.¹ He has made this entry from China numerous times and each time a person waited for him next to baggage claim, ready to hand him an envelope in exchange for his services. This man is one part in a long chain of cultural property smuggling operations between China and the United States. He does not have drugs or weapons with him; rather, in his bag, he transports from China a jade carving from the Zhou Dynasty. In case the authorities question him, he has a good story: he will tell them that this gift for his wife was a cheap knock-off from a market, and with this story he will hand the authorities an envelope of money, quieting them of further questioning.

Meanwhile, at an auction house in Hong Kong a similar jade carving is being sold at an auction for hundreds of thousands of dollars. The buyer, hesitant to inquire, did not look too deeply into the provenance of the carving. The auction house's reassurance that the carving came from a Western collection is enough for the buyer.

In yet another area of the region, an antiquities dealer receives valuable objects from the hands of an art smuggler. The dealer knows that the only reason these objects are now in his hands was that just a few nights earlier local peasants had raided an ancient tomb and stolen as much as they could before any authorities could find them. As stories like these emerge and the awareness of Chinese cultural property increases, museum curators, galleries, and private collectors are forced to ask, should this piece of Chinese cultural property be in my possession or does it belong in China?

China's rich historical and cultural heritage is now at risk because of the considerable demand for, and the ease with which a dealer can purchase and import Chinese cultural relics into his country. In 2004 alone, China handled forty criminal cases involving 222 artifacts stolen from the country's *protected* sites and museums of cultural heritage.² Since there is no official record of

¹ This and the subsequent scenarios are fictional, but they are accurate depictions of what actually occurs.

² Jiang Zhuqing, *Cultural Relics See High-Tech Crime Risk*, CHINA DAILY, Feb. 28, 2005, at 2, http://www.chinadaily.com.cn/english/doc/2005-02/28/content_420056.htm. Of the forty cases in 2004, according to a report by the State Administration of Cultural Heritage, twenty-one involved relic protection units, eleven took place in museums, and eight occurred in government offices responsible for relics. The figure does not include thefts from illegal excavations. *Id.*

stolen goods, one can only imagine the number of cultural objects that have been stolen from *unprotected* sites.³ There are many reasons why China must work hard to regulate and protect its cultural heritage sites. These reasons include: (1) the country's rapid urbanization and development rates, (2) the lack of supervision over cultural heritage sites, and (3) the escalating international demand for Chinese cultural property.⁴ Many regions in China are involved in campaigns to conserve the country's rich cultural heritage.⁵

The sites containing cultural heritage are vast—both in quantity and breadth. China struggles to protect cultural property ranging from colossal imperial palaces and monuments to smaller, localized village arts and crafts; from Neolithic times to the late Ming Dynasty. China may never discover the full scope of the treasures located within the country.⁶

To facilitate the reduction of illicit looting and trade, in May, 2004, the People's Republic of China requested that the United States embargo the importation of Chinese antiquities and ethnological items created before 1911.⁷ An embargo would, ideally, prevent antiquities smugglers from transporting stolen Chinese artifacts into the United States. Though restricting imports would defy the current standard of open art and antiquities trade with China, the United States government may nevertheless agree to assist China, as it has similarly done with other crisis-ridden countries, by restricting importation of Chinese antiquities.

This Note surveys the drive to protect cultural property and suggests that a bilateral agreement would assist China in regulating and protecting its cultural property. Part II explains the background of cultural property importation by defining

³ It is difficult to know how much was stolen from unprotected sites since the Chinese authorities have chosen not to enter many of the sites. However, it is estimated that 220,000 tombs have been robbed. See Gregory Elich, *Spoils of War: The Antiquities Trade and the Looting of Iraq*, CENTRE FOR RESEARCH ON GLOBALISATION (Jan. 3, 2004), <http://www.globalresearch.ca/articles/ELI401A.html>.

⁴ For the purposes of this Part, I will use the term "cultural property" to encompass cultural relics as defined by China. For more on the definition, see *infra*, Part II.A.

⁵ Ministry of Culture, *Protection of Intangible Cultural Heritage in China*, CHINAGATE.COM.CN (May 25, 2006), <http://www.chinagate.com.cn/english/reports/48277.htm>. These include Yunnan, Guizhou, Fujian provinces, Guangxi Zhuang Autonomous Region, Xiangxi county of Hunan province, Enshi county of Hubei province, and the Suzhou city of Jiangsu province. *Id.*

⁶ J. DAVID MURPHY, *PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA* 53 (1995). Many archaeological finds remain sealed until China determines that it has sufficient technology to assure that there will be no ruin of the objects within the sites. See *id.* at 67.

⁷ See James D. Frankel, *Questioning the Chinese Embargo*, ANTIQUITIES & FINE ART 20, 22 (2005), http://www.bfletcher-associates.com/article_6.pdf.

cultural property and exploring why cultural property requires special legal protection. Part III explores the United States history of cultural property protection including the relevant federal laws, statutes, and international conventions to which the United States is a party. Part IV examines the distinct problem China faces in preserving its cultural property and the laws China has developed to manage the problem. Part V discusses the theoretical debate and the practical arguments for and against the United States enacting a “bilateral agreement” with China to limit importation of Chinese cultural property. I conclude by arguing that the United States should institute this bilateral agreement as part of greater efforts to protect China’s cultural heritage.

II. BACKGROUND

A. *Defining Cultural Property*

The definition of “cultural property” is broad; the term means many different things to many people. While there is no single accepted definition,⁸ the term has been simply defined as: “objects, collections, specimens, structures, or sites identified as having artistic, historic, scientific, religious, or social significance.”⁹

The significance of cultural property is derived from two features: the *cultural* and the *property* aspects.¹⁰ Cultural significance is what gives particular objects value to a culture or to a collector; as one author states, “[c]ultural property stripped of cultural significance would be merely property, more or less

⁸ See Michael J. Dutra, *Sir, How Much Is that Ming Vase in the Window?: Protecting Cultural Relics in the People’s Republic of China*, 5 ASIAN-PAC. L. & POL’Y J. 62, 65 (2004). The term cultural property “covers almost every item that has some sort of significance or value to individual humans or societies at large.” *Id.*

⁹ American Institute for Conservation of Historic & Artistic Works, *Definitions of Conservation Terminology*, <http://aic.stanford.edu/geninfo/defin.html> (last visited Sept. 24, 2006).

In the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, cultural property is defined as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, pre-history, history, literature, art or science.” UNESCO 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, 9 I.L.M. 289 [hereinafter UNESCO Convention]. As discussed below, this definition is also considered broad and vague by many critics. See Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (2006) [hereinafter CPIA].

[N]o object may be considered to be an object of archaeological interest unless such object (I) is of cultural significance; (II) is at least two hundred and fifty years old; and (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water.

Id.

¹⁰ Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law*, 16 FORDHAM INT’L L.J. 1033, 1037 (1993).

beautiful or rare, and more or less valuable on the basis of that beauty or rarity only. Defining cultural property without reference to its culture is not only foolish, but dishonest.”¹¹ Therefore, while cultural property must be material and of value to the owner, the critical feature is the culture inherent in the object. Ultimately, an object designated as cultural property cannot be stripped of its cultural significance.¹²

The characterization of what is considered cultural property will vary depending on who is using the term and for what purpose; for example, a government classifies cultural property broadly or narrowly for ownership purposes.¹³ Cultural property is defined on a number of planes: the age of the object, the type of object (such as a vase, coin or manuscript), and from where the object originated.¹⁴

However, the multiple uses of the term may lead to conflicting understandings of the meaning. For example, China uses the word *wen wu*, which is translated as “cultural relic” rather than “cultural property.”¹⁵ Although the phrase *wen wu* corresponds with the international understanding of cultural property,¹⁶ Chinese legal scholars Jin Kang-qiang and Feng Ya-lai indicate that cultural relics have three characteristics distinct from “property”¹⁷: (1) the direct value of cultural relics is manifest in history, art, and science; whereas the economic value of the cultural relics is only ancillary;¹⁸ (2) even if cultural relics possess economic value, they cannot be measured, as other commodities are, by the labor and time spent to create the goods;¹⁹ and (3) cultural relics cannot be recreated; any damage to them is irremediable, and therefore a tragedy.²⁰ Because of the differences between cultural relics and mere property, governments must establish special regulations to distinguish and

¹¹ *Id.* at 1039.

¹² However, the cultural significance may not be discoverable if the object is removed from its original context. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 198-99 (2001).

¹³ For instance, a government can assert ownership over all objects of cultural heritage created before a particular year. This can give the country ownership rights over a greater span of property and thereby allow the country to claim greater control over the cultural patrimony. See Mastalir, *supra* note 10, at 1051.

¹⁴ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. NO. 106-1, at 16-17 (1999), available at http://www.unesco.org/culture/laws/hague/html_eng/fulltext.htm [hereinafter Hague Convention].

¹⁵ A CHINESE ENGLISH DICTIONARY (Beijing Foreign Languages Institute ed. 1993).

¹⁶ The term cultural property is based on the UNESCO definition, *supra* note 9.

¹⁷ MURPHY, *supra* note 6, at 83.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

protect cultural relics.

In fact, China has recognized the special status of cultural relics and has enacted legal mechanisms to protect its cultural heritage.²¹ The Chinese laws for cultural relics define relics to include items with historical, artistic, and scientific value ranging from tombs and grottos to buildings and manuscripts.²² These laws complicate the basic definition with a gradation system for the “preciousness” of the property.²³ However, the United States does not classify cultural property in this manner, and regulatory problems may arise as a result.²⁴ The solution to this potential predicament is that any attempt to restrict the importation of cultural property must explicitly define what cultural property is included in the restrictions.

B. *Differences in Source Nations and Market Nations*

Those deciding how to protect cultural property must take into account the different players; however, the diversity of actors complicates the struggle to create meaningful regulations for preservation of cultural property. Each of the interested groups has particular goals and desired ways to achieve those goals, but those interests may not coincide. Differences occur depending on whether the actor is on the supply or demand side of the trade, and because of personal and professional interests.²⁵ Source (or supply) nations are rich with artifacts and often financially poor; market (or demand) nations are limited in cultural property but financially wealthier.²⁶ The interests of source and market nations in protecting cultural property are necessarily distinct because one group wants what the other does not want to give away.²⁷

²¹ Cultural Relics Protection Law (adopted by the Standing Comm. Nat'l People's Cong., Nov. 19, 1982) (P.R.C.) [hereinafter 1982 Law].

²² *Id.*

²³ MURPHY, *supra* note 6, at 59-60.

²⁴ See Anne Carlisle Schmidt, *The Confuciusornis Sanctus: An Examination of Chinese Cultural Property Law and Policy in Action*, 23 B.C. INT'L & COMP. L. REV. 185, 204-05 (2000) (delineating the gradations in Chinese law and the related penalties that arise depending on the grade of the property).

²⁵ MURPHY, *supra* note 6, at 5. “There can be no supply side of the international art trade equation without the involvement and connivance – in the face of official policies of protection and restrictions on export—of elements of the local populations in the developing countries.” *Id.*

²⁶ *Id.* at 2 (“The financially poor or developing countries are often the ‘art rich’ ‘supply’ or ‘source’ countries, while the wealthy, developed countries are most often the ‘art poor’ ‘market’ states. Some commentators distinguish the two camps by one’s ability to take from the other.”).

²⁷ See Mastalir, *supra* note 10, at 1043-44. The interests of source nations include cultural value (taking the property away from the culture in which it is embedded); archaeological interest in preventing destruction of the civilization records; integrity of the artwork; physical safety of the cultural property; economic interest in the financial value of the piece; artistic value independent of cultural significance (such as for a vase); distribution interest (*i.e.*, showing to the world what the country has); retention or

The United States is regarded as a market nation while China is considered a source nation.²⁸ In the United States, dealing in illicit art is ranked just behind drug smuggling with respect to the size of the illicit market.²⁹ “According to the United Nations Educational, Scientific, and Cultural Organization (UNESCO), ‘net imports [of “collectibles and antiques”] to the United States (\$1.1 billion) exceeded those of any other country by more than twenty times in 1998.’”³⁰ The international black market for antiquities has burgeoned alongside economic globalization.

The demand side of the equation consists of interested parties from the market states: dealers, museums, and collectors that may be driven by considerations of money and prestige. Informally, demand also comes from tourists, diplomats, researchers, and art historians.³¹

In supply states, the legal concern is who in the country can sell the goods, or more specifically, who in fact is doing so legally or illegally.³² The supply concerns are twofold: (1) who, if anyone, can legitimately claim ownership of an object; and (2) can a person claiming ownership of an object of cultural property freely pass possession of that cultural property to another?³³ If the government loses control to illicit dealers of its goods, it will also have lost control of the cultural property. The supply chain originates with local peasants working for smugglers.³⁴ Neither the

hoarding interest; national patrimony, pride, identity. The interests of market nations include preservation; dispossessing the conquered of their cultural and artistic treasures; interest of good faith purchasers; enriching one's own cultural patrimony from external source acquisition; maintaining access to cultural property for archaeological interests. *Id.*

²⁸ See MURPHY, *supra* note 6, at 4-7. Because of the large number of objects originating in the United States, it is sometimes classified as a source nation; conversely, with its rapid economic and market growth, China may soon be considered a market nation. Already, there are enormous increases in cultural relics purchased domestically in China.

²⁹ See, e.g., Joel Leyden, *Swift-Find: Terrorism Funded by Stolen Property*, ISRAEL NEWS AGENCY, Oct. 16, 2005, available at <http://msn-list.te.verweg.com/2005-October/001472.html>. A body of evidence has surfaced connecting the trade in looted antiquities with organized crime and terrorism. “Afghanistan's Taliban also looted the Kabul museum. Switzerland became part of the route to ‘wash’ the stolen artifacts. Drugs and stolen art historically came out of Afghanistan, but the Taliban reduced the drug trade and replaced it almost entirely with art theft.” Looters take from museums, but more frequently from archaeological sites. Once removed, the artifacts are often lost to scholarship. *Id.*

³⁰ James E. Sherry, Note, *U.S. Legal Mechanisms for the Reparation of Cultural Property: Evaluating Strategies for the Successful Recovery of Claimed National Patrimony*, 37 GEO. WASH. INT'L L. REV. 511 (2005).

³¹ MURPHY, *supra* note 6, at 4-5. However, domestic demands are an increasingly prominent force as well.

³² *Id.*

³³ *Id.*

³⁴ However, sometimes the ones looting are not unknown peasants; sometimes the excavators are led by the nation's leaders. See, e.g., Orly Blumt, *The Illicit Antiquities Trade: An Analysis of Current Antiquities Looting in Israel*, 11 CULTURE WITHOUT CONTEXT (2002), <http://www.mcdonald.cam.ac.uk/iarc/culturewithoutcontext/issue11/blum.htm>

peasants nor the smugglers have a legal right to pass possession of a good that does not belong to them. Unfortunately, smuggling chains in developing states have been “stunningly systematic,” organized and technical, and a great deal of property is passed this through these chains.³⁵ The policies of a source country such as China should reflect the nation’s desire to protect its cultural relics against the threat of smugglers.³⁶

C. *Dissension Within the Art World Towards Regulation*

It is difficult to protect cultural property because various professions have different interests in cultural property. For example, art collectors often covet the objects for financial value whereas archaeologists prefer to explore the objects, at least initially, in their original context. Though the professionals’ goals vary, many would agree on an overall objective: to preserve evidence of past achievements and cultural traditions, protect areas of architectural and natural beauty, and create energy for development by generating positive identity and civic pride.³⁷ However, even if preservation is a mutually desired end, art collectors and archaeologists still diverge in their means to that end.³⁸

Though art collectors appreciate the physical beauty of the relics, their appreciation often corresponds to financial value. Dollar value has little bearing on archaeological value; archaeology is context-dependent.³⁹ “An object and its context together, when properly recorded and interpreted can reveal much more than either one in isolation.”⁴⁰ An archaeologist would prefer the object to remain in its original context for more

(indicating that smugglers are not the only ones endangering cultural property and that illicit excavations are also spurred by leaders of rich cultural property countries. While Moshe Dayan was the Prime Minister of Israel, he allegedly used the military to help him collect archaeological items, and because of his personal interest in collecting the property, never established laws to curb illicit looting of archaeological digs). *Id.*

³⁵ MURPHY, *supra* note 6, at 5. The smuggling operations are structured in pyramids, with local peasants at the bottom of the pyramid and prominent representatives of the art-collecting world at the top.

³⁶ But of course these same countries are influenced by powerful lobbies and political influences.

³⁷ The World Bank Group, Ningbo, China: Cultural Heritage Conservation in Urban Upgrading, <http://www.worldbank.org/ningbo/overview.htm> (last visited Sept. 24, 2006). The loss of urban neighborhoods and historic sites was once thought to be the price of progress. However, planners now recognize that preserving the past is an essential part of creating livable, sustainable cities. Conservation of a city’s historic and cultural environment enhances the city and the quality of life for residents. *Id.*

³⁸ Ashton Hawkins & Kate FitzGibbon, *In the Fray: This Property Claim Should Be Condemned*, WALL ST. J., Mar. 29, 2005, at D6.

³⁹ See Gerstenblith, *supra* note 12, at 198-99.

⁴⁰ NEIL BRODIE, JENNY DOOLE & PETER WATSON, STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL 10 (2000).

thorough investigation; on the other hand, an art museum wants the ability to trade art freely and believes this will help preserve culture.⁴¹ Since the ability to exchange information and the ability to freely trade are primary to art collectors, they want little regulation in the art arena, particularly across national borders. However, archaeologists would prefer stricter laws regulating excavations to serve their goal of stopping extralegal excavations, which cause permanent loss of information.⁴² Cindy Ho, the Executive Director and founder of Saving Antiquities For Everyone (SAFE), in her testimony to the United States government's Cultural Property Advisory Committee, stated:

Once an artifact is ripped from the ground, most of the knowledge it contained is lost—forever. Once a nation is robbed of its most precious non-renewable resource, its cultural heritage, it is gone—forever. All mankind becomes poorer in the process, no matter where we live, where we were born or where our ancestors came from When a robber blasts open an ancient tomb with explosives in Chifeng, Inner Mongolia, what is stolen along with the jade, stone, silver, lacquer and pottery, is the irreplaceable insight . . . countless details that can only be gathered by archaeologists that illustrate how my ancestors—our ancestors—lived, what they ate, how they farmed, how they thought and what they did.⁴³

Art collectors and archaeologists are not the only groups lobbying in the cultural property arena: governments, city planners, police forces, lawyers, and citizens all have a stake in both the supply and demand sides of the antiquities trade.⁴⁴ In trying to accommodate multiple factors and interests, lawmakers struggle to adopt universally accepted regulations.⁴⁵ This does not, however, mean that the United States should not assist China in protecting and regulating cultural property, it simply suggests that the United States must carefully define its regulations, in this case, as I suggest within the bilateral agreement restricting import of Chinese cultural relics.

There are three major goals in protecting cultural property:

⁴¹ *Id.*

⁴² Martin Barnes Lorber, *U.S. Embargo on Chinese Art*, THE ASIAN ART NEWSPAPER, Apr. 2005, at 1.

⁴³ Cindy Ho, Executive Dir., Saving Antiquities For Everyone, Statement to the Cultural Prop. Advisory Comm. (Feb. 17, 2005), available at <http://www.savingantiquities.org/CindyHoCPAC.doc>.

⁴⁴ MURPHY, *supra* note 6, at 4-5.

⁴⁵ Hawkins & FitzGibbon, *supra* note 38. See Robert B. Zoellick, *Unleashing the Trade Winds: A Building-block Approach*, 8 U.S. FOREIGN POLY AGENDA (Aug. 2003), available at <http://usinfo.state.gov/journals/itps/0803/ijpe/pj81zoellick.htm> (discussing the commitment of the United States to advancing free trade for the goals of improved commerce, economic reform, development, investment, security, and free societies).

(1) stopping looting, (2) stopping illicit trade, and (3) repatriating the objects. A bilateral agreement is one solution for discouraging looting and blocking illicit trade; however, any bilateral agreement must clearly define which goods are to be embargoed. While China should initially set forth its desired definition, the United States should refine the definition in order to provide for effective enforcement at its borders.

III. THE UNITED STATES REGULATIONS FOR PROTECTION OF CULTURAL PROPERTY

Historically, the United States has favored limited control of the art and cultural property trade.⁴⁶ Although the United States has preferred uninhibited art trade, laws in the United States are strict as to stolen goods. For example, a possessor of stolen property can *never* obtain good title of that property.⁴⁷ This does not mean, however, that property that is illegally removed from a country is necessarily stolen. Even if a good is considered stolen in one country, it is not automatically a “stolen good” in the United States.⁴⁸ The United States narrowly tailors its cultural property regulations and laws to suit national goals rather than enacting overbroad, unenforceable rules. However, if a foreign government can demonstrate ownership of a good through patrimony laws or otherwise, the good will be considered stolen if transported into the United States.⁴⁹

Additionally, the United States has legal instruments to actively halt the flow of illegally removed cultural property, both within and outside of its borders. For example, the United States has ratified international agreements such as the 1970 UNESCO Convention, passed narrowly tailored domestic laws, such as the National Stolen Property Act, and has made bilateral agreements with source nations. Each of these has helped the United States and other countries to regulate cultural property.

⁴⁶ *Id.*

⁴⁷ Compare United States law to the laws of France, Switzerland, and Germany. Civil code countries only require that the statute of limitations pass before the possessor gets valid title. These countries make good hideaways for stolen property, at least for a number of years until the statute of limitations runs. See Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT'L L. & POL. 79, 80 (1998).

⁴⁸ See *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003) (noting that goods are considered “stolen” only if they “belong to a person or entity and are taken from that person or entity without its consent”).

⁴⁹ *Id.*

A. *Protection in Relation to Wartime*

Early regulations to protect cultural property were a response to the need for wartime protections.⁵⁰ Particularly, World Wars I and II created crises that called for action in the international community. In response to the looting of the artistic and cultural patrimony in the Second World War, the United Nations adopted the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The parties to the Convention agreed to “undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any act of vandalism directed against, cultural property” in time of war.⁵¹ The Convention also requires that when a state occupies “the whole or part of the territory” of another state party, it is obliged to assist with the protection of its cultural patrimony.⁵² The Convention, like a bilateral agreement, responded to a drastic situation. While this Convention addressed problems during wartime, its strong language also provided a foundation for future international agreements.⁵³

⁵⁰ See, e.g., Jane Warring, *Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227 (2005) (discussing the looting of the Iraq National Museum). See generally *Relic Theft from Museums Now a Booming Business*, TAIPEI TIMES, Mar. 1, 2005, at 5.

Looting during wartime remains a significant problem. In early 2003, the world watched as the National Museum in Iraq was looted and plundered not by opposition forces but by the local population. See, e.g., Elich, *supra* note 3. Relic theft is also a problem in Chinese museums; because of the large number of goods that are not catalogued, looting museums is a booming business. The Chinese authorities are clamping down and have even executed men found guilty of looting Chinese museums. See Spencer P.M. Harrington, *Chinese Thieves Executed but Loot Remains at Large*, ARCHAEOLOGY, Feb. 2, 2000, <http://www.archaeology.org/online/news/china2.html>.

⁵¹ See Hague Convention, *supra* note 14, at pmbl. The Hague Convention provided this recital:

The High Contracting Parties,

Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;

Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April, 1935;

Being of the opinion that such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace;

Being determined to take all possible steps to protect cultural property;

Have agreed upon the following provisions. . . .

Id.

⁵² *Id.*

⁵³ See Sherry, *supra* note 30, at 515.

B. *A Modern International Response: The 1970 UNESCO Convention*

In 1970, after many years of drafting, UNESCO created the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention” or “Convention”).⁵⁴ As of September 20, 2005, 109 countries had signed the Convention, including both the United States and China.⁵⁵

As is clear from the title, one purpose of this Convention was to inhibit “illicit” international trade in cultural objects. The 1970 UNESCO Convention took many years to draft because it was the first convention to regulate treatment of cultural property outside of wartime. “The 1970 UNESCO Convention is perhaps the most visible international undertaking in the field. It was largely an initiative on the part of source states to stem the ‘haemorrhaging’ that could only be stopped with the assistance of the developed market states.”⁵⁶ The result is a Convention structured broadly to meet the needs of many nations and interest groups; however, even when such a convention is broadly structured, countries remain hesitant to sign on to binding international agreements.⁵⁷

The United States actively participated in drafting the 1970 UNESCO Convention. Regarding involvement in the international arena, the United States has stated its desire to “promote leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance to nations from where they originate and greater international understanding of mankind’s common heritage.”⁵⁸

One of the key articles in the Convention is article 9, which states:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected.

⁵⁴ UNESCO Convention, *supra* note 9. See Ian M. Goldrich, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 FORDHAM INT’L L.J. 118, 135 (1999). By addressing cultural property protection outside the scope of armed conflicts, the UNESCO Convention became the primary tool for combating the illegal art trade. *Id.*

⁵⁵ The United States ratified the 1970 UNESCO Convention through the CPIA, *supra* note 9, in 1983; China acceded to the Convention in 1989.

⁵⁶ MURPHY, *supra* note 6, at 144. See Jodi Patt, Comment, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U.L. REV. 1207 (2002). “A notable aspect of the UNESCO Convention is that it encourages national protection measures, rather than international enforcement.” *Id.* at 1219.

⁵⁷ See Mastalir, *supra* note 10, at 1055 (discussing how some international agreements, such as the UNESCO Convention, lack effective means for resolving disputes).

⁵⁸ See Import Restrictions on Archaeological Material From El Salvador, 87 Fed. Reg. 10,487 (1987) (providing text of prior bilateral agreements with Honduras; this language has been used in other bilateral agreements as well).

The State Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.⁵⁹

Under this article, states that are parties to the Convention agree to enact measures to control the importation and exportation of cultural property, thereby making the article useful for a state that wants to request assistance from another state. As both China and the United States are state parties to the Convention, they both have obligations under this tenet; however, in the United States, the 1970 UNESCO Convention requires domestic implementing legislation before the agreement will have any force.⁶⁰

C. *Cultural Property Implementation Act*

In 1983, the United States became the first major art-importing country to implement the 1970 UNESCO Convention when it enacted the Convention on Cultural Property Implementation Act (“CPIA”).⁶¹ The CPIA enabled the 1970 UNESCO Convention and defined cultural property with reference to the 1970 UNESCO Convention:

(6) The term “cultural property” includes articles described in article 1 (a) through (k) of the Convention whether or not any such article is specifically designated as such by any State Party for the purposes of such article . . .

. . . .

(9) The term “State Party” means any nation which has ratified, accepted, or acceded to the Convention.⁶²

Under this definition, both the United States and China, as parties to the 1970 UNESCO Convention, are bound by the agreement as to what is included as cultural property, *whether or not* any such article is designated by the other state party as such.⁶³ Though few cases have been decided in United States courts

⁵⁹ UNESCO Convention, *supra* note 9.

⁶⁰ See Sherry, *supra* note 30, at 516. A more recent agreement, UNIDROIT, has a greater impact on cultural property trade, but the United States is not party to this agreement. Other countries like Norway and Sweden have utilized UNIDROIT to help China protect its culture. See Saving Antiquities for Everyone, Treaties and Legislation, <http://www.savingantiquities.org/f-culher-legtreat.htm> (last visited Sept. 27, 2006).

⁶¹ CPIA, *supra* note 9.

⁶² *Id.* § 2602.

⁶³ *Id.*

pursuant to the CPIA, it may nevertheless be useful to foreign governments seeking to recover cultural property in United States courts.⁶⁴ However, “[c]ultural property of a foreign country is not subject to American cultural property law under [CPIA] if such property fails to conform to [CPIA’s] cultural property classifications.”⁶⁵

Under the CPIA section 303(a), the United States can employ article 9 of the 1970 UNESCO Convention to enter into agreements with other state parties for stronger protection of cultural property. This section defines the four factors that are considered when deciding whether to enact the bilateral agreement.⁶⁶ In general, the factors are geared to assure that the state party has taken measures on its own to protect cultural heritage and to assure that a bilateral agreement will be in line with the particular needs of both countries.⁶⁷

⁶⁴ See Sherry, *supra* note 30, at 516.

Under the CPIA, the United States for the first time imposed import restrictions on archaeological and ethnological materials. The restrictions apply only with respect to states with whom the United States has signed bilateral or multilateral agreements, and then, only if the requesting state can show, among other things, that its cultural patrimony is in jeopardy from pillage and that it has taken measures to protect its cultural patrimony.

Kaye, *supra* note 47, at 84. See also Patt, *supra* note 56, at 1226 (arguing that the CPIA fails to live up to the initial intent of the UNESCO Convention because the restrictions are limited to countries that have multi- or bilateral agreements with the United States).

⁶⁵ JESSICA L. DARRABY, ART, ARTIFACT, AND ARCHITECTURE LAW § 6:116 (2003). See generally Kaye, *supra* note 47, at 87-88.

The development of strong international agreements is still preferable to litigation, which can be both extremely expensive and time-consuming. . . . Indeed, the history of the CPIA reflects a natural development from the use of limited emergency decrees to broader bilateral agreements covering increasing numbers of cultural objects that are at risk of pillage and looting.

Id.

⁶⁶ 19 U.S.C. § 2602 (2006) states:

(1) IN GENERAL. If the President determines, after request is made to the United States under article 9 of the Convention by any State Party –

(A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;

(B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;

(C) that –

(i) the application of the import restrictions set forth in section 307 with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and

(ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and

(D) that the application of the import restrictions set forth in section 307 in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.

Id.

⁶⁷ *Id.*

The body deciding whether to enter into an agreement pursuant to the CPIA is the Cultural Property Advisory Committee.⁶⁸ This Committee employs testimony and research to evaluate the four elements under 19 U.S.C. § 2602, and to make a recommendation to the President. While the determinations of this committee are influential, they are not final; the President may disagree and determine an outcome that is different from the determination of the committee.⁶⁹

D. *National Stolen Property Act*

The National Stolen Property Act (“NSPA”) is criminal legislation directed at preventing and deterring individuals from transporting stolen goods.⁷⁰ The NSPA imposes criminal penalties

⁶⁸ The statutory requirements for the Cultural Property Advisement Committee are as follows:

- (a) ESTABLISHMENT. —There is established the Cultural Property Advisory Committee.
- (b) MEMBERSHIP. —
 - (1) The Committee shall be composed of eleven members appointed by the President as follows:
 - (A) Two members representing the interests of museums.
 - (B) Three members who shall be experts in the fields of archaeology, anthropology, ethnology, or related areas.
 - (C) Three members who shall be experts in the international sale of archaeological, ethnological, and other cultural property.
 - (D) Three members who shall represent the interest of the general public.
 - (2) Appointments made under paragraph (1) shall be made in such a manner so as to insure –
 - (A) fair representation of the various interests of the public sectors and the private sectors in the international exchange of archaeological and ethnological materials, and
 - (B) that within such sectors, fair representation is accorded to the interests of regional and local institutions and museums.
 - (3) (A) Members of the Committee shall be appointed for terms of three years and may be reappointed for one or more terms. With respect to the initial appointments, the President shall select, on a representative basis to the maximum extent practicable, four members to serve three-year terms, four members to serve two-year terms, and the remaining members to serve a one-year term. Thereafter each appointment shall be for a three-year term.
 - (B) (i) A vacancy in the Committee shall be filled in the same manner as the original appointment was made and for the unexpired portion of the term, if the vacancy occurred during a term of office. Any member of the Committee may continue to serve as a member of the Committee after the expiration of his term of office until reappointed or until his successor has been appointed.
 - (ii) The President shall designate a Chairman of the Committee from the members of the Committee.

19 U.S.C. § 2605.

⁶⁹ *Id.*

⁷⁰ The National Stolen Property Act (“NSPA”) holds that:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

on those who are found to have stolen objects and transported them through interstate or international commerce.⁷¹

Besides the criminal penalty, under the NSPA, the objects in question are also subject to seizure and forfeiture. Prior to the enactment of the CPIA, forfeiture pursuant to the NSPA constituted the primary legal means for the return of claimed national patrimony.⁷² The CPIA provided a new mechanism to deal with cultural heritage brought into the United States from another country. However, as described above, the CPIA does not apply to stolen goods, while the NSPA applies only to stolen goods.

Nevertheless, under both the NSPA and the CPIA, countries with national ownership laws can assert ownership rights over a large amount of cultural property found within their country.⁷³ To determine if a good is stolen, one should consider two basic types of legislation: (1) national property laws in which the ownership of antiquities is vested in the state and (2) statutes that limit or prohibit the export of cultural property, including privately owned cultural property.⁷⁴ Ultimately, the good must be stolen for the courts to invoke the NSPA.⁷⁵

United States v. Hollinshead was the first case in which a party invoked the National Stolen Property Act to remedy the theft of cultural property.⁷⁶ The court in *Hollinshead* decided that an object is “stolen” within the meaning of the NSPA if it was taken from its country of origin in violation of the country’s national patrimony laws.⁷⁷ Nevertheless, there is still a difference between a ruling based on another country’s export laws or ownership laws, as in *Hollinshead*, and a ruling that an object is “stolen” simply because that nation declared it as such. The United States addressed this argument in subsequent cases such as *United States v. McClain* and *United States v. Schultz*.⁷⁸ The defendant in *Schultz* purported to sell goods from a fake collection, though the goods were actually Egyptian cultural property. Egypt claimed that its national patrimony laws encompassed the particular goods at issue

Shall be fined under this title or imprisoned not more than ten years, or both.
NSPA, 18 U.S.C. § 2314.

⁷¹ *Id.*

⁷² See Sherry, *supra* note 30, at 523.

⁷³ This is significant because under the NSPA, the United States courts will not rule on foreign countries’ export laws, but will nonetheless consider that country’s ownership laws. See Patt, *supra* note 56, at 1212.

⁷⁴ Kaye, *supra* note 47, at 80.

⁷⁵ *Id.*

⁷⁶ *United States v. Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974) (finding that Guatemalan patrimony law establishing ownership in the government of Guatemala was sufficient to sustain a prosecution for theft under the NSPA).

⁷⁷ *Id.*

⁷⁸ *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

in the case. The Second Circuit, affirming Schultz's conviction, took a step towards punishing those who illegally import stolen antiquities.⁷⁹

E. *Bilateral Agreements*

As discussed above, under the CPIA, the President of the United States is authorized to invoke article 9 of the 1970 UNESCO Convention.⁸⁰ The CPAC must first establish the four factors under CPIA section 303(a)⁸¹, and if the President takes the CPAC's recommendation, he then has the authority under section 303(a)(2) to take action as follows:

- (2) AUTHORITY OF PRESIDENT. For purposes of paragraph (1), the President may enter into
- (A) a bilateral agreement with the State Party to apply the import restrictions set forth in section 307 to the archaeological or ethnological material of the State Party the pillage of which is creating the jeopardy to the cultural patrimony of the State Party found to exist under paragraph (1)(A).

This section provides authority for the President to enter into a bilateral agreement concerning cultural property.⁸² While concerned states have enacted a number of bilateral agreements providing for the protection and, in the event of plunder, repatriation of stolen cultural property, the CPIA provides authority to engage in such decisions. One author writing on the issue has noted that, “[i]n the half-century since the Hague Convention was adopted, concerned states have enacted a number of bilateral and multi-lateral agreements providing for the protection and, in the event of plunder, repatriation of stolen cultural property.”⁸³

El Salvador was the first country with whom the United States restricted importation pursuant to the CPIA, in accordance with a request from El Salvador.⁸⁴ The United States took emergency

⁷⁹ Schultz, the defendant in the case, was a prominent antiquities dealer in the United States. Before his indictment, he served as the president of the National Association of Dealers in Ancient, Oriental and Primitive Art (“NADAOPA”). By no means do all or even most antiquities dealers resort to illicit means; however, the allure of collecting valuable works, particularly when the laws are so vague, may drive dealers to the black market. If there are clear-cut lines on what is impermissible for importation, dealers and collectors will be better suited to adjust their trading practices. Marisa Macari, *Last Shot for Schultz?*, *ARCHAEOLOGY*, May 29, 2003, <http://www.archaeology.org/online/features/schultz/index2.html>.

⁸⁰ See *supra* note 54.

⁸¹ See 19 U.S.C. § 2602 (2006).

⁸² See *id.*

⁸³ See Sherry, *supra* note 30, at 515.

⁸⁴ The government considered the restriction an “emergency import restriction.” Import Restrictions on Archaeological Material From El Salvador, 87 Fed. Reg. 10,487,

action on September 11, 1987, to restrict importation of particular endangered archaeological material from El Salvador. The “emergency action” included unambiguous descriptions of the regulated property from the Cara Sucia region which was to be the subject of the action.⁸⁵

Since 1987, the United States has entered into agreements with Bolivia, Cambodia, Cyprus (regarding archaeological and ethnological material), Guatemala, Honduras, Italy, Mali, Nicaragua, Canada, and Peru.⁸⁶ The agreement with Canada was innovative in that it was reciprocal; Canada also agreed to assist the United States in protecting its cultural property.⁸⁷

There are advantages to using a bilateral agreement to enforce protection of cultural property. One advantage is that because only two parties are involved, the United States can narrowly define exactly what sorts of property will be restricted for importation into the United States.⁸⁸ However, there are also disadvantages to enacting a bilateral agreement. If the country making the agreement with the United States is not prepared to, or capable of, making requisite domestic changes to protect the cultural property, then the agreement will not likely serve its goals.

The agreements vary as to what sorts of cultural property will be impermissible for importation into the United States.⁸⁹ However, there are exceptions to the embargo. Objects may be admitted into the United States if the cultural property is accompanied by a license or if the possessor can show that it left the country prior to the restriction date; sometimes restricted materials can enter the United States for temporary exhibit.⁹⁰

On January 19, 2006, the United States extended its bilateral agreement with Italy to continue assisting Italy in protecting its

(1987). The first importation restriction that was not an emergency action, which was considered a “bilateral agreement,” was also with El Salvador in 1995.

⁸⁵ *Id.* For example, the restriction was on plates that were “made with tripod feet or low vase, usually reddish brown or orange colored. May have painted symbolic designs in red, orange, black, blue or white of human or animal figures. Plates are usually no larger than 15 inches in diameter.” *Id.* However, some of the descriptions leave room for interpretation.

⁸⁶ For an updated, comprehensive list of dates of implementation and expiration of import restrictions, see the Chart of Current and Expired Import Restrictions, <http://exchanges.state.gov/culprop/chart.html> (last visited Aug. 30, 2006) [hereinafter Chart].

⁸⁷ See Kaye, *supra* note 47, at 90 (discussing the controversy and noting that the United States could have used a simple import/export policy with Canada).

⁸⁸ Under the CPIA, once the agreement is enacted, the government will create a precise listing of the materials impermissible for importation. 19 U.S.C. § 2605 (2006). Once the item is seized it will be summarily forfeited in accordance with customs regulations. See *id.* § 2602(1)(C)(i). I will review further some of the advantages and disadvantages of bilateral agreements *infra* Part V.

⁸⁹ See Chart, *supra* note 86.

⁹⁰ See 19 U.S.C. § 2606.

cultural property.⁹¹ Through this bilateral agreement, the United States has embargoed importation of artifacts ranging from the 9th century B.C. to the 4th century A.D.⁹² Categories include stone, metal and ceramic sculpture; decorated vessels in metal and ceramic; metal jewelry; weapons and armor, and inscribed metal sheets; glass mosaic and sculpture; and wall painting. According to statistics from the Carabinieri-Tutela Patrimonio Culturale (“TPC”), the recovery of archaeological artifacts from clandestine digs has declined ninety percent since the signing of the bilateral agreement in 2001.⁹³ Also, in March of 2006, the United States and Columbia signed a Memorandum of Understanding to impose import restrictions on certain pre-Columbian archaeological artifacts and ecclesiastical ethnological materials originating in Columbia.⁹⁴ Ultimately, the United States government is empowered with many venues to regulate cross-border cultural property flow.

IV. CHINA’S ATTEMPTS TO REGULATE THE CULTURAL RELICS MARKET

The art world has characterized China as an archetypal, developing source state with the potential to expand in the art realm.⁹⁵ Governments, public entities, and private individuals interested in art recognize the potential of trading valuable Chinese antiquities in the international market. Moreover, the amount of unexplored Chinese cultural property is immeasurable; many of the sites filled with cultural property will never be accessed because of their remote locations or because of destruction of the sites.⁹⁶ From 2001 to 2005, the Chinese government allocated fifteen million yuan annually for the protection of famous historical and cultural cities.⁹⁷ The protection of these cities includes both the protection of the ancient buildings and historical sectors, and the preservation of the layout, features, and traditional cultures of the ancient cities as

⁹¹ 19 C.F.R. pt. 12 (2006).

⁹² *Say Yes to Italy*, SAVING ANTIQUITIES FOR EVERYONE (Mar. 20, 2006), <http://www.savingantiquities.org/i-safe-mouitalyinfo.php#effective>.

⁹³ *Id.*

⁹⁴ *See* U.S. Protection of Archaeological and Ethnological Materials, <http://exchanges.state.gov/culprop/cofact.html> (last visited Sept. 27, 2006); 19 C.F.R. pt. 12.

⁹⁵ *See* MURPHY, *supra* note 6, at 7.

⁹⁶ *Id.* at 67 (“Leading examples are the inner mausoleums of the tomb of Emperor Qin at Mount Li and the Qian tomb of Qianling, both of which have enormous archaeological potential but which China dares not excavate without expensive technology.”).

⁹⁷ *Preservation of Cultural Relics*, CHINA THROUGH A LENS <http://www.china.org.cn/english/features/China2005/142260.htm> (last visited Sept. 27, 2006).

well.⁹⁸ Still, the combination of the increasing art market and the large number of relics make it necessary for China to establish rules to resolve potential conflicts.

As a part of the solution, China has requested that the United States implement a bilateral agreement to embargo a broad range of cultural objects.⁹⁹ The list of restricted items would include all furniture, paintings, monuments, metals, ceramics, and textiles from the Paleolithic Period to the Qing Dynasty, including any relics created before 1911.¹⁰⁰ This request is one step in the larger goal of impeding the export of looted and stolen property; domestic laws are also part of the regime to protect these items.

A. *The Issues*

The cultural property experience in China is the “country in microcosm”; the cultural property situation reflects larger themes pervading Chinese society.¹⁰¹ China’s cultural relic problem is an amalgamation of three issues: (1) rapid economic development,¹⁰² (2) tomb robbers and illicit smuggling, and (3) China’s lack of domestic control capabilities. Each of these is a considerable concern on its own, but when combined, the impact is exponentially detrimental to China’s cultural property.

For many reasons, the first concern, rapid economic development, is beneficial to the Chinese population. Even in the art market, China’s economic boom brings incredible potential to the country, not only as a source nation, but also as a market nation.¹⁰³ However, rapid economic development and

⁹⁸ *Id.*

⁹⁹ See Protecting Cultural Property Worldwide, 2004 Summary of China Request to U.S. Under Article 9 of the 1970 UNESCO Convention, <http://exchanges.state.gov/culprop/cn04sum.html> (Dec. 17, 2004). See also *Daily Arts News*, ARTSJOURNAL.COM (MAY 31, 2006), <http://www.artsjournal.com/visualarts/20050501archive.shtml>.

¹⁰⁰ Protecting Cultural Property Worldwide, 2004 Summary of China Request to U.S. Under Article 9 of the 1970 UNESCO Convention, <http://exchanges.state.gov/culprop/cn04sum.html> (Dec. 17, 2004).

¹⁰¹ MURPHY, *supra* note 6, at 8.

¹⁰² *Id.* Murphy classifies this as the capitalist boom. He states:

The forces of materialism have been unleashed and are unstoppable. The drive for wealth pervades every aspect of society at every level. Moreover, the growing gulf between the haves and the have-nots is causing breakdowns in social order. A serious crime is developing. Corruption is a fact of life, especially commercial life. There is a concern about a loss of control by the political centre. There is a wide gap between law on the one hand, and administrative and enforcement reality on the other. There is an undermining of traditional values, caused in part by increasing Western influences. And there is a kind of siege mentality in international affairs, accompanied by a recognition that foreign intrusion and participation is inevitable.

Id.

¹⁰³ See *id.* at 9. Murphy suggests that China is the “final frontier” for large-scale art and cultural property finds.

urbanization can also cause a great deal of destruction to cultural property sites.¹⁰⁴ One prominent example is the government-led construction of the Three Gorges Dam, which destroyed thousands of cultural heritage sites.¹⁰⁵ The destruction did not stem from looters, but rather from the Chinese government. Although the government is concerned with creating a powerful infrastructure to accommodate the country's growth, projects such as the Three Gorges Dam harm China's cultural heritage.

Another phenomenon accompanying the increase in the economic market is a more accessible art trade to and from China.¹⁰⁶ Where auction houses were once selling Chinese art in nearby Hong Kong, now both Christie's and Sotheby's are conducting business in China.¹⁰⁷ Christie's, the auction house, has signed an agreement to conduct business in Beijing.¹⁰⁸ The increased trade in art may have both positive and deleterious effects; the legitimate market will make it easier to determine which pieces should not be permitted for trade, yet, this may also induce an increase in the black market for art.¹⁰⁹

¹⁰⁴ *Id.* at 51.

More menacing to the physical preservation of the Chinese cultural heritage are the massive infrastructure and capital projects that too are the products of the capitalist boom of the 1980s and 1990s. Such development is literally changing the face of modern China. Rivers are dammed, gorges flooded, earth moved, and mountains blasted away in a frenzy of economic development that China has not experienced on this scale before

Id.

¹⁰⁵ The Three Gorges Area on the Yangtze River is the site of one of the world's biggest hydropower projects. The project, however, has destroyed many heritage sites despite a massive rescue operation to save the area's cultural relics. Archaeological teams have raced to the area to help with the rescue efforts. The dam is set for completion in 2009, and sites of cultural heritage are still being destroyed. See *Saving the Cultural Relics of the Three Gorges, CHINA THROUGH A LENS*, <http://www.china.org.cn/english/features/Archaeology/96925.htm> (last visited Sept. 27, 2006); see also Elizabeth Childs-Johnson, *Three Gorges Dam Construction Spurs Archaeological Looting, INTERNATIONAL RIVERS NETWORK* (Mar. 14, 1998), <http://www.irm.org/programs/threeg/pr980511.html>.

Chinese journalists and archaeologists report that theft and smuggling of relics is a direct result of the Three Gorges Dam project. "Archaeologists are now in a race against time to protect the wealth of artifacts in the area not only from inundation by the dam's 400-mile long reservoir, but also from the increasingly bold and well-organized looters and smuggling rings operating in the area." *Id.*

¹⁰⁶ Carol Vogel, *Christie's Going, Going to China to Hold Auctions*, N.Y. TIMES, Oct. 20, 2005, at E1. This region is not new to auction houses Christie's and Sotheby's.

Both auction houses opened offices in Shanghai in 1994 to identify property to sell and to contact prospective buyers. Two years later, Christie's opened an office in Beijing. Sotheby's has had a representative there for the past year. As for Hong Kong, Sotheby's has been holding sales in the former British colony since 1973 and Christie's since 1986.

Id.

¹⁰⁷ *Id.*

¹⁰⁸ See MURPHY, *supra* note 6, at 39. As of 1995, Murphy predicted that auctions would not occur in the near future in China. The auction that took place in November, 2005, demonstrates just how quickly the Chinese art market has transformed.

¹⁰⁹ See Simon R.M. Mackenzie, *Dig a Bit Deeper: Law, Regulation and the Illicit Antiquities*

The second major problem is that the illicit trade in art is affected by tomb robbers and illicit smuggling. Though tomb robbers are not a new or localized phenomenon, they nevertheless disturb the integrity of the objects.¹¹⁰ Archaeological groups that desire a further glimpse into ancient Chinese societies are encouraging and fueling controlled excavations. By controlling the excavations, archaeologists are able to manage the safety of the objects within the site as well as the integrity of the site itself. A legitimate excavator can control cataloguing the contents of the site, which objects leave the site, where the objects will go, and who has possession of the objects. Once any of these factors are removed from the equation, the value of the object to an archaeologist may decrease, especially if the object is broken.¹¹¹ In fact, large items are often broken into pieces for purposes of transport.¹¹²

Further, amateur diggers and looters will likely destroy the placement of the antiquity and remove it from its stratigraphic location.¹¹³ Even without the interference of looters, provenance of artifacts is difficult to establish.¹¹⁴ When an item has no provenance and cannot be traced to its origin, the item loses value for research and collection.¹¹⁵

With the high demand for cultural relics and boundless unmanned areas accessible to looters, China faces a severe threat

Market, 45 BRIT. J. CRIMINOLOGY 249 (2005). “The market structure of the global movement of antiquities leads us to see the reduction of demand for the purchase of looted antiquities as a productive avenue to the reduction of looting itself.” *Id.*

¹¹⁰ MURPHY, *supra* note 6, at 53. There is evidence that the tomb of Emperor Qin Shihuang at Xian was looted in 210 B.C.

¹¹¹ Gerstenblith, *supra* note 12.

Careful excavation allows the archaeologist to place a found object in its proper chronological sequence and context, in turn allowing the reconstruction of each of a site’s time periods, the characteristics of society at those times, and the connections among objects found and sites located throughout the world. It also allows those studying past cultures to reconstruct the functions of such objects, to learn more about diet, technology, trade, settlement patterns, religion, and literature. . . . The looting of objects and the destruction of sites results in the irretrievable loss of such information.

Id. at 199.

¹¹² Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 292 (1982).

¹¹³ See Gerstenblith, *supra* note 12, at 199; see also Schmidt, *supra* note 24.

¹¹⁴ See Mackenzie, *supra* note 109, at 253.

Provenance details—in other words documentary evidence of a past chain of ownership—are notable in their absence from most transactions in the antiquities market, and therefore it is, in many cases, impossible for purchasers to tell whether the object that they buy has been recently looted, or has been circulating in the market for many years.

Id.

¹¹⁵ Schmidt, *supra* note 24, at 194. See also Bator, *supra* note 112, at 301. “An antiquity without a provenance—even if perfectly preserved—is of limited historical significance; if we do not know where it came from, it can provide only limited scientific knowledge of the past.” *Id.*

of damage to its cultural heritage. However, the gains are so lucrative for the tomb robbers that citizens who once respected the national cultural heritage may abandon their values for financial return.¹¹⁶ Once the tomb robbers or lower level thieves pass the goods off, the goods are often smuggled to Hong Kong, because of its proximity.¹¹⁷ China has increased awareness at its borders, but the number of goods in transit is so great, that the government must do more to prevent the goods from crossing the border.

This leads to the third problem, the lack of domestic control capabilities. There is a distinct gap between Chinese national policies and practice. According to the Beijing Cultural Heritage Protection Center, “[i]nsufficient public awareness, inadequate training of officials and enforcement authorities, and weaknesses in the judicial system are contributing factors in the continuing loss of cultural heritage.”¹¹⁸ To combat the problem, the Chinese government has increased criminal and civil punishments.¹¹⁹ Nevertheless, the fear of civil and criminal sanctions must be severe enough so that dealers will be stifled in their illicit operations.¹²⁰

Additionally, the government must coordinate with the Chinese national museums to take part in protection. According to Murphy, because there are so many relics not catalogued in storehouses, the museums are unable to determine when something is missing.¹²¹ Moreover, these relics suffer damage from inferior storage conditions. If the government wants to assert ownership over the goods, it must be able to protect the goods from harm within its museums.

B. *The Laws*

China has many regulations directed at protecting Chinese relics. China has had cultural property regulations since 1930, but efforts have largely proliferated only since the early 1980s.¹²² In

¹¹⁶ *See id.*

¹¹⁷ *See* MURPHY, *supra* note 6, at 58.

¹¹⁸ Beijing Cultural Heritage Protection Center (CHP), <http://www.bjchp.org/english/jgjs.asp> (last visited Sept. 27, 2006).

¹¹⁹ *See infra* Part IV.B.

¹²⁰ Dutra, *supra* note 8, at 64 (arguing that China’s current legal system fails to preserve the antiquities. Dutra further suggests that China is incapable of protecting cultural property through a domestic system.).

¹²¹ MURPHY, *supra* note 6, at 63-65.

¹²² *Id.* at 81-83. While the more effective legislation has existed since 1982, China has a long legislative history of enactments regulating cultural relics prior to this date. In 1930, China established the Law on the Preservation of Ancient Objects and its Detailed Rules on the Implementation of the Legislation on the Preservation of Ancient Objects. This legislation forbade export of relics, and prevented any person of foreign nationality from

1982, China adopted the Cultural Relics Protection Law (“1982 Law”).¹²³ Article 1 designates relics as a special class of property.¹²⁴ Article 2 sets out a definition that includes both moveable and immovable relics.¹²⁵ The definition, which incorporates the definition from the 1961 legislation, is broad and highly subjective, including words such as “important” and “valuable.”¹²⁶ Articles 4 and 5 establish a regime of both state and private ownership;¹²⁷ private ownership is permitted when the site is handed down through multiple generations and if the owners abide by the relevant regulations concerning that relic.¹²⁸ As for exportation, Articles 27 and 28 require that relics intended to be taken out of China must be “verified,” or examined, by the cultural relics bureau.¹²⁹ Article 29 permits rewards to those who implement the policies, struggle against criminal acts, and communicate information.¹³⁰

The other recent civil law, the 2002 Law on the Protection of Cultural Relics (“2002 LPCR”), expands and replaces the 1982 Law.¹³¹ Instead of only thirty-three clauses, the new law includes eighty clauses; sixty of which cover the government’s legal duties in relation to the cultural property. The sale, as well as permanent

engaging in any archaeological excavation in China. The legislation also prohibited transfer of cultural objects to foreigners within China. *Id.*

Soon after taking power, the new government of the People’s Republic of China enacted new legislation. In 1950, the newly empowered government implemented The Provisional Measures Prohibiting the Exportation of Precious and Valuable Art Objects, Pictures and Books and the Provisional Measures Governing the Investigation and Excavation of the Sites of Ancient Cultural Ruins and Ancient Graves and Burial Grounds. Here, cultural property meant objects of revolutionary, historical, or cultural interest to the state. Also, field research by foreigners was prohibited without permission from the government. Export of all significant art and archaeological objects was forbidden, except for temporary exchange or exhibition. *Id.*

The 1982 Laws were preceded by the 1961 Provisional Regulations on the Protection and Administration of the Cultural Heritage which regulated buildings, sites and objects of historical interest which recall great events of the past, revolutionary movements or important figures,” ancient sites, “valuable works of art and applied art, regardless of the period to which they belong,” archives, and “representative objects which reflect the social system, social production and the life of society in all periods.

Id. Between 1961 and 1982, a number of particularized legislative and administrative regulations were enacted, but none were as drastic as the 1982 Laws. *Id.*

¹²³ 1982 Law, *supra* note 21.

¹²⁴ *Id.* at art. 1.

¹²⁵ *Id.* at art. 2.

¹²⁶ *Id.*

¹²⁷ *Id.* at arts. 4-5.

¹²⁸ *Id.*

¹²⁹ *Id.* at art. 27.

¹³⁰ *Id.* at art. 29. However, the real award is a mere fraction of the market value of the relic, thus providing the citizen little incentive. MURPHY, *supra* note 6, at 81.

¹³¹ Law on the Protection of Cultural Relics (promulgated by the Standing Comm. Nat’l People’s Cong. Oct. 28, 2002, effective Oct. 28, 2002) (P.R.C.) [hereinafter 2002 LPCR]. See also Dutra, *supra* note 8.

exportation of excavated archaeological objects through state-licensed excavation projects is prohibited.¹³² The 2002 LPCR establishes mechanisms for the temporary exportation of all types of Chinese cultural relics for exhibition purposes.¹³³

Another set of laws, publicized in 2003, are the Regulations on Enforcing the Law on Cultural Relics Protection, Provisional Rules on Administering the Auction of Cultural Relics, and the first special regulation on the protection of the Great Wall—Measures of Beijing Municipality for Administration of Protection of the Great Wall.¹³⁴

Beyond civil sanctions, China also has hefty criminal sanctions for those apprehended looting or illegally transferring cultural property. Section four of the 1997 Criminal Law is titled “Crimes against Control of Cultural Relics”; article 328 specifically addresses illegal excavation.¹³⁵ Since the civil and criminal laws are relatively recent, it is difficult to evaluate their effectiveness.¹³⁶

Additionally, many municipalities have their own regulations. For example, in Beijing, city laws are different from those enacted by the federal government.¹³⁷ Chinese legal commentators

¹³² 2002 LPCR, *supra* note 131, at arts. 50-51.

¹³³ *Id.* at arts. 60-62.

¹³⁴ *Preservation of Cultural Relics*, CHINA THROUGH A LENS <http://www.china.org.cn/english/features/China2005/142260.htm> (last visited Sept. 27, 2006).

¹³⁵ Criminal Law (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.). Article 328 of the Criminal Law states:

Whoever excavates and robs a site of ancient culture or ancient tomb of historical, artistic or scientific value shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years and shall also be fined; if the circumstances are relatively minor, he shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also be fined; if he falls under any of the following categories, he shall be sentenced to fixed-term imprisonment of not less than 10 years, or life imprisonment or death and shall also be fined or be sentenced to confiscation of property:

- (1) excavating and robbing a site of ancient culture or ancient tomb which is designated as a major site to be protected at the national or provincial level for their historical and cultural value;
- (2) being a ringleader of a gang engaged in excavating and robbing sites of ancient culture or ancient tombs;
- (3) repeatedly excavating and robbing sites of ancient culture or ancient tombs; or
- (4) excavating a site of ancient culture or ancient tomb and robbing valuable cultural relics therein, or causing serious damage to such relics.

Id.; see also Dutra, *supra* note 8, at 89-93.

¹³⁶ Letter from Patty Gerstenblith, President, Lawyers’ Comm. for Cultural Heritage Prevention, to Jay Kislak, Chair, Cultural Prop. Advisory Comm. (Feb. 4, 2005), *available at* http://www.archaeological.org/pdfs/archaeologywatch/China/Gerstenblith_CPACChinaLetter.pdf (suggesting that the new laws help China intercept looters and prevent illegal exportation).

¹³⁷ Schmidt, *supra* note 24, at 198; see XIAN FA art. 22 (1982) (P.R.C.) *translated in* People’s Daily Online, Constitution of the People’s Republic of China, <http://english.people.com.cn/constitution/constitution.html> (last visited Sept. 27, 2006). Article 119 specifies that the governments of the autonomous regions are to

criticize the myriad of provisions because of “the large number of relevant laws and regulations, the ill-organized legal system and the lack of coordination between the relevant legal provisions.”¹³⁸

V. UNITED STATES BILATERAL AGREEMENT WITH CHINA: THE DEBATE

A bilateral agreement between the United States and China would: (1) delineate which objects would not be permitted for importation and (2) regulate the penalty once the objects are brought into the United States. Under the CPIA, the relevant objects would include archaeological or ethnological material exported from China (whether or not such exportation is to the United States) and defined in the agreement, unless China issues a certification or other documentation which states that such exportation was not in violation of Chinese laws.¹³⁹ The penalty of any such importation would be immediate seizure and forfeiture of the objects.¹⁴⁰ “All provisions of law relating to seizure, forfeiture, and condemnation for violation of the customs laws shall apply to seizures and forfeitures incurred . . . under this title, insofar as such provisions of law are applicable to, and not inconsistent with, the provisions of this title.”¹⁴¹ The question is whether the United States should agree to implement these restrictions. On February 17, 2005, the CPAC held a public hearing to debate these matters, but as of yet there has been no comment from the State Department.¹⁴² Representatives both for and against the bilateral agreement were at this meeting.¹⁴³

A. *The Theoretical Debate: Cultural Nationalism vs. Cultural Internationalism*

The nationalistic argument regarding cultural property is that nationalism “elevates concern for the cultural aspect over concern for the property aspect of cultural property. Its aim is to ensure that the cultural significance of objects is respected even at the expense of long-standing principles of property law.”¹⁴⁴ Some members of this school of thought might even argue that property

“independently administer” their own cultural affairs.

¹³⁸ *Id.* at 200.

¹³⁹ 19 U.S.C. § 2606(a) (2006).

¹⁴⁰ *Id.* §§ 2609-2610.

¹⁴¹ *Id.*

¹⁴² U.S. State Dep’t Int’l Cultural Prop. Protection, What’s New, <http://exchanges.state.gov/culprop/whatsnew.html> (last visited Sept. 27, 2006).

¹⁴³ Saving Antiquities for Everyone, SAFE Supports China’s Request for Help to Protect Its Cultural Heritage, <http://www.savingantiquities.org/i-safe-china.htm> (last visited Sept. 27, 2006).

¹⁴⁴ Mastalir, *supra* note 10, at 1064.

law principles are simply inapplicable.¹⁴⁵ The export of artifacts became a symbol of colonialism where possession of cultural property helped define who possessed the land.¹⁴⁶ In some specific cases, nationalism is stoked by the move of one very precious, symbolic object or collection of objects such as the Elgin Marbles.¹⁴⁷

“‘Protection’ . . . is sometimes used as a euphemism for nationalistic retention of cultural property. . . . The objects are so much a part of the cultur[e] . . . that they must remain in or be returned to that country even if the physical safety of the objects cannot be assured.”¹⁴⁸ China, as does other countries, espouses a nationalistic sentiment towards the cultural property that originated on its soil. Under nationalistic principles, China would be granted unquestioned control and ownership of its cultural relics.

In contrast, those advocating internationalism suggest general principles that govern all cultural property; these principles favor the *property* aspect of the cultural property. Cultural property is a component of a common human culture, and as such it should be made available for all to appreciate.¹⁴⁹ This group argues that preservation will happen through market forces. As a critique of nationalism, internationalists would suggest that by prohibiting a licit trade of cultural property, source nations assure the existence of an active and corrupt black market.¹⁵⁰

Internationalists would compare the cultural property problem to the ozone layer problem: the flow of cultural property is too cosmopolitan for any one nation to control. Cultural property dilemmas may be resolved in similar ways as the ozone layer problem: with funding, expertise, technology, long-term cooperative loans, and mechanisms of transfer (through

¹⁴⁵ *Id.*

¹⁴⁶ Schmidt, *supra* note 24, at 192 (“The nationalistic attitudes of source nations spring largely from the origin of the cultural property trade in the colonial era, a humiliating period of history for most source nations.”).

¹⁴⁷ *See id.* The Elgin Marbles, or the Parthenon Marbles, is a large collection of marble sculptures that Lord Elgin brought from Greece to Britain in 1806. The Marbles have remained in Britain since then. The Greek government wants the objects returned to Greece, while the British government proposes legislation banning the return of permanent museum exhibits to the country of origin. *See* John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1181 (1985).

¹⁴⁸ Mastalir, *supra* note 10, at 1045-46. *See, e.g.*, Bator, *supra* note 112, at 294 (“Extreme claims are made on behalf of ‘national patrimony’ without much thought as to the meaning of the limits on that concept.”).

¹⁴⁹ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 831-32 (1986).

¹⁵⁰ *Id.* *See* Bator, *supra* note 112, at 317.

international agencies).¹⁵¹ The internationalists support free flow of Chinese cultural relics guided by international standards.¹⁵²

There is no resolution to this theoretical debate. However, the debate is useful to bear in mind when focusing on the practical interests of the advocates of implementing or denying the request for the bilateral agreement. Regardless of the theoretical debate, for the bilateral agreement to be enacted, it must meet the four conditions as determined by the Cultural Property Advisory Committee.¹⁵³

B. *For a Bilateral Agreement*

The advocates of a bilateral agreement are led by organizations such as Saving Antiquities For Everyone (SAFE), which has a membership of professors, archaeologists, art historians, curators, lawyers, and anthropologists.¹⁵⁴ The advocates argue that China has established the four requirements under the CPIA and that the United States should enter into the requested bilateral agreement.¹⁵⁵

The first consideration of whether to establish a bilateral agreement is to determine if Chinese cultural patrimony is in jeopardy because of the pillage of archaeological or ethnological materials within China. As described above, China is in a drastic situation because of the extreme looting occurring within its borders and the black market that has gone beyond China's borders. Advocates of the agreement would suggest that the first condition is met because of the large-scale at which the theft is occurring.¹⁵⁶ The advocates would further argue that the most direct way of proceeding is by severing the supply and demand chain.¹⁵⁷ Since the United States is a significant outlet for the treasures, the restriction on imports into the United States will deter looters from proceeding with their thievery.

Second, China must have taken measures consistent with the 1970 UNESCO Convention to protect its cultural patrimony. Supporters argue that China is doing what it can to stem the

¹⁵¹ Mastalir, *supra* note 10, at 1080-81.

¹⁵² *Id.*

¹⁵³ *See* 19 U.S.C. § 2602 (2006).

¹⁵⁴ For more on this organization, see Saving Antiquities For Everyone, www.savingantiquities.org (last visited Sept. 27, 2006). As of November 17, 2005, the group had collected over 700 petitions to support China's efforts in saving its public heritage. *Id.*

¹⁵⁵ *Id.* SAFE's campaign to "Stop the Plunder of China's Cultural Heritage" is largely focused on China's request for a bilateral agreement with the United States.

¹⁵⁶ *See* 19 U.S.C. § 2602.

¹⁵⁷ *Id.*

problems.¹⁵⁸ As outlined above, China imposes civil and criminal penalties on violators for looting and illegally excavating sites. Additionally, China has acceded to the 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects, which provides an extra layer of protection both domestically and internationally.¹⁵⁹

The next condition is two-fold: (1) that other major Chinese art-importing nations will implement similar restrictions and (2) that less drastic remedies are not available. As for the first prong, the world's largest market nations, including the United Kingdom, Switzerland, Japan, France, Italy, Australia, and Canada, are all parties to the 1970 UNESCO Convention. Furthermore, many of these countries have also acceded to the UNIDROIT Convention. These countries have both an interest in and an obligation to assist China in preserving its cultural heritage. Advocates argue that this measure will be consistent with the 1970 UNESCO Convention and is the best available means of protection.¹⁶⁰ As the United States market for Chinese cultural relics is enormous, this is one remedy that can actually have an impact on the market. Advocates also suggest that past bilateral agreements have been effective.¹⁶¹ For example, the bilateral agreements with Peru, Cambodia, and Italy serve as examples where cultural property has been protected as a result of the remedy. Furthermore, following the United States successes, other countries have implemented similar regulations.¹⁶²

The last condition is that the application of the import restrictions is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes. The supporters of the agreement argue that the agreement encourages good-faith academic exchange, particularly because objects may enter the United States when on loan to museums or with other permits.¹⁶³ This good-faith exchange can work for two reasons. First, the United States has an interest in a legitimate international exchange of cultural heritage. Second, the United States and China can work together to develop technology for proper uncovering methods. Advocates argue that the United

¹⁵⁸ See Gerstenblith, *supra* note 12.

¹⁵⁹ The United States is not a party to this Convention.

¹⁶⁰ Ho, *supra* note 43.

¹⁶¹ *Id.*

¹⁶² See Gerstenblith, *supra* note 12. Going even further, Australia and Canada have implemented legislation that automatically prevents the import of illegally exported cultural materials from other State Parties. Switzerland has also implemented bilateral agreements in a similar form to the United States system. *Id.*

¹⁶³ 19 U.S.C. § 2606 (2006).

States ability to study China will improve because it can help create a regime in which objects are carefully extracted from the sites; the illegal looting caused the objects to be “dumb” when removed and destroyed from their context.¹⁶⁴

The proponents also argue that museums in the United States are not lacking in Chinese cultural relics to study.¹⁶⁵ “Currently, there are forty-seven museums with collections of Chinese antiquities. Between 2000 and 2004, there were fifteen museum exhibitions focusing on China alone and in 2005, thirty more are planned.”¹⁶⁶ Lastly, the Chinese government has had to spend millions buying back looted treasure. The advocates argue that this money would be better spent on technologies to protect cultural heritage sites.

C. *Against a Bilateral Agreement*

Critics of the bilateral agreement argue that China has not met the four requirements under the CPIA.¹⁶⁷ These opponents are in large part auction house staff, museum curators, private collectors, lawyers representing dealers and collectors associations, and art dealers. As to the first condition, that the cultural property be in jeopardy, the critics may agree that China has a crisis, but not one that requires United States assistance. Opponents to the bilateral agreement suggest that the United States is only a small part of the Chinese art problem; other countries import much larger quantities of Chinese cultural property.¹⁶⁸ Additionally, the opponents argue that the looting in China has taken place for a long time; the import ban will not help China.¹⁶⁹ Further, critics dispute the statistics regarding the effects of looting, suggesting that the numbers are inflated.¹⁷⁰

Next, the critics argue that China has not met the second condition because it has not taken sufficient measures, consistent with the 1970 UNESCO Convention, to protect cultural

¹⁶⁴ Gerstenblith, *supra* note 12, at 199. *See also* Dutra, *supra* note 8, at 67-68. Illegal looting and excavating of cultural property has caused gaps in historical knowledge as falsified export papers often distort the provenance of cultural objects, making it easier for forgeries to flood the market. *Id.*

¹⁶⁵ Saving Antiquities For Everyone, Stop the Plunder of China’s Cultural Heritage, <http://www.savingantiquities.org/i-safe-alertchina.htm> (last visited Mar. 20, 2006).

¹⁶⁶ *Id.*

¹⁶⁷ *See* Frankel, *supra* note 7, at 2.

¹⁶⁸ Hawkins & FitzGibbon, *supra* note 38 (“Auction houses in China, established with the support and protection of the Chinese government, sold \$680 million of Chinese art last year alone. When you take into account global auction sales of Chinese art in 2004, American sales amounted to less than 4% of the total.”).

¹⁶⁹ *Id.* In 2004, Sotheby’s and Christie’s recorded \$224 million in their world-wide sales of Chinese art. Sales from American branches consisted of only \$34 million of the \$224 million. *Id.*

¹⁷⁰ *See* Hawkins & FitzGibbon, *supra* note 38.

patrimony.¹⁷¹ The critics argue that not only is China failing to do enough in the way of regulation, but that the Chinese government is itself destroying much of its own cultural property by building on potential excavation sites.¹⁷²

A strong argument on behalf of the critics is that the third condition has not been met, because other market nations may not implement similar restrictions. These critics argue that the embargo will not end the exploitation of Chinese artifacts, as the demand will remain high in Europe and other parts of Asia.¹⁷³ Additionally, the critics contend that singularly targeting the United States market will not impede those involved in pillaging the sites.¹⁷⁴ The embargo will only restrict the flow of Chinese art and artifacts into the United States, while the trade in these objects will continue unimpeded in Europe and Asia, where the annual volume of trade currently far exceeds the trade in the United States market.¹⁷⁵ If all market countries do not make restrictions, China will still have the same problem. The opponents further argue that the numbers regarding the United States market for Chinese goods are inflated.¹⁷⁶

The second part of the third condition states that this remedy is less drastic than other available remedies. Those arguing against the agreement say that the agreement would be too broad in that China's request encompasses all moveable and non-moveable objects.¹⁷⁷ Critics of the agreement claim that the provision delineating which property is not available to be imported into the United States is far too broad.¹⁷⁸ Even if there were to be an agreement, the critics contend there is no reason to include moveable objects, such as vases or furniture.¹⁷⁹ As an example, opponents would argue that coins are included in the embargo, and such a restriction would affect coin collectors unnecessarily, since coins do not have the same value as other artifacts. The broad scope of the agreement, according to critics,

¹⁷¹ Bator, *supra* note 112, at 299.

Presumably, we preserve art so that it can be seen and known and studied Visibility and accessibility are therefore interests to take into account in deciding whether art stays at home or moves abroad. . . . Is it not better for a Greek vase to be seen and studied in an American museum than to sit, unwanted and functionally invisible in the basement of an Italian museum?

Id.

¹⁷² See, e.g., Childs-Johnson, *supra* note 105.

¹⁷³ See Frankel, *supra* note 7, at 1.

¹⁷⁴ See Hawkins & FitzGibbon, *supra* note 38.

¹⁷⁵ *Id.*

¹⁷⁶ See Frankel, *supra* note 7, at 2.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ James J. Lally, *CPAC Holds Public Hearing*, ANCIENT COIN COLLECTORS GUILD (Feb. 28, 2005), <http://www.accg.us/issues/news/cpacsummary>.

and the excessive restrictions on access to Chinese cultural heritage is reason enough not to implement the agreement.¹⁸⁰

Another strong point of contention is the final condition, which requires that the agreement must be consistent with the general interests of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes. Critics argue that the embargo will block education and the experience of Chinese art in other countries,¹⁸¹ and further contend that China may not yet be ready to manage and utilize the large number of antiquities that will not be exported because of the embargo.¹⁸²

As for the last condition, the opponents suggest that import restrictions will not be consistent with the interest of the United States because it will be difficult to study Chinese antiquities unless they are already in a museum's permanent collection.¹⁸³ The opponents suggest a number of advantages in creating more interaction with China, rather than halting it.¹⁸⁴ For example, creating a licit market can increase the ability for Chinese art historians and art dealers to interact with their peers.¹⁸⁵ Allowing the trade could work in two ways: Chinese museums will be more willing to trade with museums if they help bring American art exhibits to Chinese museums,¹⁸⁶ and the Chinese government can work with private companies to excavate sites as well as permit the currently restricted sale of multiples (for example, 40,000 equestrian warrior figurines from the Han Dynasty).¹⁸⁷

Additionally, the critics suggest that there is an increasing propensity of the CPAC to ignore the United States interests; they argue that it is unfair for the Cultural Property Advisory Committee to make decisions because the result is partly

¹⁸⁰ *Id.*

¹⁸¹ Hawkins & FitzGibbon, *supra* note 38. "Museums would be denied access to Chinese art that circulates freely elsewhere. Scholars would be placed at a disadvantage. The art trade would suffer. And the public at large would be deprived of the opportunity to fully appreciate an important world culture." *Id.*

¹⁸² The counter-argument is that western dealers are being overly critical and that management of the museums is sufficient. *Id.*

¹⁸³ See Frankel, *supra* note 7, at 2 ("One need only imagine if such embargos were the norm over the last hundred years, to appreciate the great loss the world would experience in not having shared access to great cultural artifacts. How much poorer we would all be if the world's museums only had objects from their own cultures.").

¹⁸⁴ "Nations should freely allow and encourage the export of art treasures that cannot or will not be adequately protected and conserved at home." Bator, *supra* note 112, at 309.

¹⁸⁵ Letter from Anita M. Difanis, Dir. of Gov't Affairs, Ass'n of Art Museum Dirs., to Jay Kislak, Chair, Cultural Prop. Advisory Comm. (Mar. 15, 2005) (on file with author).

¹⁸⁶ See Lorber, *supra* note 42.

¹⁸⁷ Saving Antiquities For Everyone, Safe Supports China's Request for Help to Protect Its Cultural Heritage, <http://www.savingantiquities.org/i-safe-china.htm#no> (last visited Sept. 27, 2006).

dependent on who is on the committee.¹⁸⁸

The critics do not suggest that China does not need assistance; rather, they would prefer to help China develop a legitimate market, regulations, and protection of the property as opposed to writing an agreement involving the United States. The proponents of a legitimate market suggest that if China creates such a market available to those inside and outside China, there will be more incentive for legal excavations.¹⁸⁹ However, none of this can occur until China has created a licit market and established successful ways to control pillaging and looting.

VI. CONCLUSION: DECIDING THE QUESTION IS NO EASY TASK

Based on the above discussion, I argue that the United States should enter into a bilateral agreement with China to regulate importation of Chinese cultural property into the United States. Based on the art dealers' and collectors' primary motivation—financial concerns—the interest of the archaeologists seems more in line with preserving China's cultural patrimony. However, there are strong arguments against the bilateral agreements: instituting the bilateral agreement without requiring China to improve domestic regulations will not serve China's purpose. Also, China must prepare for this regulation and must be able to properly care for its cultural property, even inside its museums and storehouses. Nevertheless, these arguments are not as convincing as the advocates', in light of the severity of the situation, the necessity of assistance to China, and the accordant between the bilateral agreement and United States interests.

Perhaps the most important aspect of the bilateral agreement is the statement it makes to China: to safeguard its cultural heritage. The message to those in the cultural property field is that the state of Chinese cultural property is in a crisis which cannot be regarded lightly. Though one would hope for a substantial result, as seen from the bilateral agreements in the past, it is important to recognize China's right to these objects and the United States availability to assist.

While I have advocated that the bilateral agreement should be implemented, the discussion must continue and China must

¹⁸⁸ See Hawkins & FitzGibbon, *supra* note 38 ("There is a limited but vocal U.S. constituency headed by people in the archaeological community that is willing to sacrifice access to art without examining either the facts or the potential damage to U.S. museums and scholarly interests. It has pushed for the signing of an agreement with China despite the fact that hundreds of thousands of objects fitting the request criteria have circulated in the world market for centuries, almost all without the ironclad provenance that would allow them to pass through U.S. Customs.").

¹⁸⁹ *Id.*

feel pressure to continue reforming its system. It will not be enough for the United States to act on China's behalf; China must also act on China's behalf.

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