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THE RAPE AND RETURN OF CHINA'S CULTURAL PROPERTY: HOW CAN BILATERAL AGREEMENTS STEM THE BLEEDING OF CHINA'S CULTURAL HERITAGE IN A FLAWED SYSTEM?

Jason M. Taylor[†]

I. Introduction

Beneath the impoverished villages of the Henan province in the People's Republic of China lays a wealth of Chinese antiquity.¹ Louyang, once the capital city of at least nine royal Chinese dynasties, exists underneath earth, rock, and gravel in the form of historical antiquity and yet undiscovered imperial tombs.² Despite the aesthetic splendor and incalculable scholarly value these tombs possess to archaeologists and scholars, the fields of Louyang have been repeatedly raped of much of their buried treasure. Tomb raiders, poor farmers, and rural families with little money and crude weaponry, seek and loot countless cultural relics beneath their fields each year in hopes of earning a buck. Because one major discovery can amount to a year's worth of farming income, the temptation to pillage relics is often too great to resist.³ Even more startling is the fact that the destruction and pillaging of Chinese cultural relics has increased in recent decades.⁴ China's National Cultural Relics Bureau estimated that between 1998 and 2003 over 220,000 Chinese tombs have been broken into and looted with the pieces illicitly sold throughout the world.⁵

The illicit exportation and illegal trade in Chinese cultural property has a large domestic component. In 2002, a museum security chief in Chengde, China, was accused of stealing 158 artifacts over a twelve-year period.⁶ One such artifact, "The Buddha of Infinite Life," sold for \$295,000 at a Hong Kong auction.⁷ Over 500 stone statues have been reported stolen from Buddhist temples and monas-

† Jason M. Taylor is a May 2007 J.D. candidate at Loyola University Chicago School of Law. I would like to thank Danielle Petaja, Jennifer Schmidt, Jerome Maes, Julie Luketich, and the entire Loyola University Chicago International Law Review for their continued help editing and aiding the publication of this article.

¹ Hannah Beech, *Spirited Away*, TIMEASIA, October 13, 2003, available at <http://www.time.com/time/asia/covers/501031020/story.html>.

² *Id.*

³ *Id.*

⁴ See U.S. STATE DEP'T, BUREAU OF EDUC. AND CULTURAL AFFAIRS, PUBLIC SUMMARY: REQUEST OF THE PEOPLE'S REPUBLIC OF CHINA TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA UNDER ARTICLE 9 OF THE 1970 UNESCO CONVENTION (2004), <http://exchanges.state.gov/culprop/cn04sum.html> (last visited Jan. 18, 2006) [hereinafter CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9].

⁵ Beech, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

teries, as these types of stone statuary and monuments have become desirable on the art market in recent years.⁸

In addition to China's inability to protect its cultural property within its borders, a large international component contributes to the illicit export and import of cultural goods abroad.⁹ In large part, the current international regime is inadequate in controlling the flourishing black market of international antiquity trade. Despite an international effort to stem illicit import of cultural property, nearly "seventy-five percent of all antiquities offered for sale in London auctions have no published provenance."¹⁰ China is particularly at risk because of its sheer size, vast unexcavated and unprotected cultural sites, and the lure of tomb-raiding to its poor, rural populations.¹¹

Because of the failure of the international regime to prevent looting of Chinese artifacts and the increased demand in the international market for Chinese antiquities, China recently requested the aid of the United States under Article 9 of the 1970 United Nations Educational, Scientific, and Cultural Organization ("UNESCO") Convention to employ a vast importation restriction on numerous forms of Chinese cultural relics.¹² Although the debate is contentious, a bilateral agreement between the United States and China will strengthen protection of Chinese cultural relics and ultimately slow the tide of illicit exportation of cultural property worldwide. This type of bilateral support between nations will ultimately stop illegal exportation of cultural property and, in turn, provide future generations the opportunity to piece together their own history and cultural identity.

This essay first explains the importance of cultural property. The illicit exportation of cultural property is a real and continued threat to national, cultural, and personal identity. This first section specifically focuses on the escalated "rape" of the cultural heritage of China. Second, this essay details the international approach to the problem of illicit cultural property trade and the mechanisms envisioned for its prevention. Third, a closer look at the specific legal regime of China to thwart illicit exportation of cultural goods is required to understand China's approach to its own unique position as one of the largest "source" states of cultural property. The fourth section analyzes the legal attempts of China to address the loss of cultural property and the increasing illicit international dealing and inadequate international safeguards. This section explains the recent request by the Chinese government asking the United States to implement importation restrictions on many categories of Chinese cultural relics. The last two sections itemize the debate over China's all-inclusive request and what bilateral collabora-

⁸ CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9, *supra* note 4.

⁹ Michael L. 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, 66-67 (2004).

¹⁰ Beech, *supra* note 1.

¹¹ Dutra, *supra* note 9, at 68, 73.

¹² See James J. Lally, *CPAC Holds Public Hearing*, ANCIENT COIN COLLECTORS GUILD, Feb. 28, 2005, <http://www.accg.us/issues/news/cpacsummary>; see also Notice of Receipt of Cultural Property Request From the Government of the People's Republic of China, 69 Fed. Reg., No. 171 (Dep't of State Aug. 26, 2004) (indicating that the request was received on May 27, 2004).

tion of this sort could accomplish for both China and other source nations if the request is granted.

II. Cultural Property and its Increasing Importance in a Globalized World

With today's science and technology, the study of ancient cultural property can write, re-write, and shape our history. Books are scribed, and cultural identities are forged from the knowledge of a nation's cultural treasures. However, crude tomb-raiding and looting, together with increased industrialization, threatens many archaeological sites and their treasures. To understand why cultural property is so important in our globalized world, we must first define what is cultural property and outline the independent significance of the buried past.

A. What is Cultural Property?

There is no one definition of cultural property. As defined by Article 1 of the November 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention"), the term cultural property means "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art, or science."¹³ Article 1 lists eleven specific categories in which property must fit to be deemed cultural property including: rare specimens of flora, fauna, or minerals; products of archaeological excavation; elements of historical monuments; original statuary art and sculpture; and rare manuscripts or old books.¹⁴ This broad definition of cultural property ultimately leaves its designation up to each member state. Generally, however, and for the purposes of this article, cultural property refers to any tangible, historical object that has some scholarly, historical, or artistic value.¹⁵

The Law of the People's Republic of China on Protection of Cultural Relics ("2002 Law") uses the term "cultural relics" instead of "cultural property" and places under state protection a more expansive list of cultural property than envisioned by the 1970 UNESCO Convention.¹⁶ The 2002 law includes "sites of ancient culture, ancient tombs, ancient architectural structures, cave temples, stone carvings . . . valuable works of art and handicraft articles."¹⁷ In addition,

¹³ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 19 U.S.C. § 2601(6), 823 U.N.T.S. 232 [hereinafter 1970 UNESCO Convention].

¹⁴ *See id.*

¹⁵ Dutra, *supra* note 9, at 65; *see also* BLACK'S LAW DICTIONARY 407 (8th ed. 2004) (noting that cultural heritage is a term sometimes used broadly to encompass intangibles such as folklore, indigenous crafts, or skills).

¹⁶ Dutra, *supra* note 9, at 65.

¹⁷ Law of the People's Republic of China on Protection of Cultural Relics, (adopted at the 30th Meeting of the Standing Comm. Nat'l People's Cong., Oct. 28, 2002), art. 2, *available at* http://english.gov.cn/laws/2005-10/09/content_75322.htm [hereinafter 2002 Law].

the 2002 Law also protects "important modern and contemporary historic sites, material objects and typical buildings that are related to major historical events, revolutionary movements or famous personalities that are highly memorable or are of great significance for education or for the preservation of historical data" as well as fossils and material objects reflecting the Chinese social system or the life of China's various nationalities.¹⁸ Therefore, items such as stone Buddhist statuary, jade ware, temple carvings, fossilized flora, and archaeological specimens are all included as Chinese "cultural relics."¹⁹

B. Why is Cultural Property Important?

Commentators and scholars espouse several views as to why protection of cultural property is extremely important.²⁰ The most important and seemingly fundamental reasons for cultural property protection include access to the past and cultural traditions, provision of a cultural identity, and in many instances, an economic allure.²¹ As promulgated by the signatories of the 1970 UNESCO Convention,²² a global interest in preserving cultural property in its context acknowledges this shared interest:

[T]he interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations . . . [and] that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.²³

Although enabling the protection of cultural property appears straightforward, a balance must be struck between access to scholarly study and preservation. There are essentially two camps in the international arena: (1) source nations with nationalistic interests, and (2) market nations with internationalism concerns.²⁴ Because the globe can generally be separated into these two conflicting

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 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, 192-194 (2000) (categorizing China's specific interests in Cultural Property protection as nationalistic, economic, historical, cultural, and educational, as well as for prestige purposes); see also LYNDEL VIVIEN PROTT & PATRICK JOSEPH O'KEEFE, LAW AND THE CULTURAL HERITAGE: VOL. III: MOVEMENT 11-14 (1989) (Dr. Prott and Dr. O'Keefe argue that cultural property advances appreciation and understanding of a culture in the eyes of others, inspiration, as well as a source of knowledge and access to the cultural past and traditions).

²¹ *Id.*

²² 1970 UNESCO Convention, *supra* note 13, at Signatory Table, <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E> (contains an up to date list of signatories to the 1970 UNESCO Convention).

²³ *Id.* at preamble.

²⁴ J. DAVID MURPHY, PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA 2-3, 155 (1995); Schmidt, *supra* note 20, at 192-98.

points of view,²⁵ it is appropriate to briefly lay out a framework to the international mode of thought and describe why these views may exacerbate the problem of international cooperation and protection of cultural property.

Source nations are often referred to as "art rich" developing nations.²⁶ Professor John Henry Merryman observes: "In source nations, the supply of desirable cultural property exceeds the internal demand They are rich in cultural artifacts beyond any conceivable local use."²⁷ Generally, these states are economically poor and lack the resources to adequately guard their cultural treasures.²⁸ Because of the relatively poor economy and vast wealth of cultural artifacts distributed throughout a so-called source state, tomb-robbing, artifact mutilation, and corruption are commonly significant problems in these states.²⁹ China is a classic source nation.³⁰

In market nations, or "art poor" developed countries, the demand of cultural property exceeds the supply.³¹ Market nations often have the financial resources and infrastructure to acquire rare and expensive cultural artifacts from abroad.³² In turn, the demand and resources encourage both licit and illicit export from source nations.³³ Examples of market nations include the United Kingdom, France, Germany, and the United States.³⁴

To further delineate the two general camps of cultural property thought, scholars often identify source nations with a "nationalistic" view of cultural property protection versus the "internationalism" approach of market states.³⁵ The nationalistic approach, such as that of China, "gives nations a special interest, implies the attribution of national character to objects, independently of their locations or ownerships, and legitimizes national export controls and demands for the 'repatriation' of cultural property."³⁶ This view ultimately argues that cultural property originating from a source state belongs to that particular state and that cultural property designed and produced by its own people uniquely reflects the country's own history and heritage.³⁷ In the end, cultural nationalism seeks to

²⁵ Cf. MURPHY, *supra* note 24, at 2 (Discussing a third group of states that exists: transit states. A transit state is a nation that "can facilitate movement of cultural property from source to market states. States are 'transit' states by virtue of location Other 'transit' states may provide 'title-laundering' by virtue of their legal system." For example Hong Kong and Macau fit the former category and countries such as Italy and Switzerland fit the latter).

²⁶ MURPHY, *supra* note 24, at 2.

²⁷ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986).

²⁸ Dutra, *supra* note 9, at 65.

²⁹ MURPHY, *supra* note 24, at 5.

³⁰ Schmidt, *supra* note 20, at 190.

³¹ MURPHY, *supra* note 24, at 2.

³² *Id.* at 4-5.

³³ Merryman, *supra* note 27, at 832-33.

³⁴ Dutra, *supra* note 9, at 65-66.

³⁵ Merryman, *supra* note 27, at 845-46; *see also* Schmidt, *supra* note 20, at 192-97.

³⁶ Merryman, *supra* note 27, at 832.

³⁷ *Id.* at 846.

repatriate cultural relics to their country of origin to be studied and displayed by the descendants of their creators.³⁸

On the other hand, cultural internationalism regards cultural property as the product of one common human culture independent of place of origin, property rights, or individual national boundaries.³⁹ "Under this view, the interest in cultural property lies with all nations and people collectively, and claims of individual states are thus subordinate to the common global interest."⁴⁰ This view is generally adopted by market nations eager to retain possession of cultural property that originated in other source nations.⁴¹ One justification for this view centers upon the financial and technological ability of market states to care for, protect, and display cultural relics in contrast to the inability of poorer source states to do the same.⁴²

The current trend in cultural property protection is towards the nationalistic view of cultural property protection.⁴³ This is in part due to the existing international regime that seeks to stem illicit export of cultural property and to stimulate restitution of cultural objects to their countries of origin.⁴⁴

C. The Costs and Consequences of Illicit Cultural Property Trade

The statistics of illicit trade and export of cultural property are alarming. The illicit art trade ranks second in the world in terms of profitability, with only the drug trade ranking higher.⁴⁵ A recent scholarly article claims that practically "every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came."⁴⁶ A lucrative and growing demand on the part of market nations⁴⁷ necessarily increases the output from source nations. With this comes the "attendant problems in the source country in

³⁸ *Id.* at 845.

³⁹ *Id.* at 831; Kevin F. Jowers, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, The United States, and Mexico*, 38 TEX. INT'L L.J. 145, 147 (2003).

⁴⁰ Jowers, *supra* note 39, at 147.

⁴¹ *Id.*

⁴² See Schmidt, *supra* note 20, at 196.

⁴³ Merryman, *supra* note 27, at 846.

⁴⁴ See generally 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm> [hereinafter 1995 UNIDROIT Convention]; 1970 UNESCO Convention, *supra* note 13.

⁴⁵ ISABELLE FELLRATH GAZZINI, CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES xv-xvi (2004).

⁴⁶ 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, 235 (2005) (quoting THOMAS HOVING, MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART (1993)).

⁴⁷ See Ministerial Advisory Panel on Illicit Trade, Dep't for Culture, Media and Sport, *Report of Advisory Panel on Illicit Trade* 46, (Dec. 2000), http://www.culture.gov.uk/NR/rdonlyres/2BF7F816-AA1A-41BC-993F-1161F7E3A42A/0/Report_AdPanel_Illicit_Trade.pdf (estimating that the global art market between 1994-1998 has grown forty percent in the United Kingdom and as high as eighty-one percent in the United States).

the form of destruction of sites, vandalism, loss of scientific data, separation of relics from context, corruption, and general law-breaking."⁴⁸

Pillaging, looting, and illicit trade in China have damaged China's ability to study its own history completely. China's request to the United States under Article 9 cites several examples of looting and its destructive effects caused by the removal of its cultural property.⁴⁹ For example, in Chifeng City of Inner Mongolia, it is estimated that over 6,000 ancient sites have been pillaged and looted in the past twenty years alone.⁵⁰ More alarming is the extent to which international actors have contributed to the relevant damage to China's cultural heritage. One notable incident involves the Tombs of the Marquis of the Jin State in Shanxi Province.⁵¹ The inscribed artifacts excavated from this site are crucial to the study of the history of the Jin State.⁵² However, because the tombs were pillaged and their artifacts smuggled abroad, the continuity of the historical record is now broken.⁵³ In addition, ancient stone Buddhist statues have been looted, seriously compromising the study of the development of style and chronology of Buddhist statuary in China.⁵⁴

Over the past decade, tens, if not hundreds, of compromising examples from China abound.⁵⁵ Escalation of the problem has culminated in China's 2004 request to the United States for broad importation restrictions on Chinese cultural property.⁵⁶ Although this attempt at bilateral support will not cure illicit export of cultural property in general, it would greatly benefit China in its fight against illicit exportation and destruction of cultural property.

III. International Regime: 1970 UNESCO Convention and the 1995 UNIDROIT Convention

Perhaps the first significant piece of international legislation applying to the protection of cultural property was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention").⁵⁷ The 1954 Hague Convention was the first international effort to express a global interest in cultural property protection and introduced a notion of international cooperation and individual state responsibility.⁵⁸ However, the 1954

⁴⁸ MURPHY, *supra* note 24, at 54; PROTTE & O'KEEFE, *supra* note 20, at 11-15.

⁴⁹ CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9, *supra* note 4.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Randy Kennedy & Michael Zao, *China's Request for Art-Import Ban Stirs Debate*, N.Y. TIMES, Apr. 1, 2005, at E31; see CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9, *supra* note 4.

⁵⁷ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, available at <http://www.icomos.org/hague/hague.convention.html> [hereinafter 1954 Hague Convention].

⁵⁸ Warring, *supra* note 46, at 249.

Hague Convention does not have any direct application to cultural property protection during times of peace.⁵⁹ Since 1954, two major international agreements have shaped the global cultural property protection regime during peacetime: the 1970 UNESCO Convention⁶⁰ and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("1995 UNIDROIT Convention").⁶¹ Both conventions are relatively weak insofar as they both set out lofty ideals but do not provide legal mechanisms of enforcement once adopted by member states. Moreover, until recently, both lacked the support of major market states.⁶²

A. The 1970 UNESCO Convention

The 1970 UNESCO Convention marked a decided step away from cultural internationalism and towards cultural nationalism by endorsing "national cultural heritage,"⁶³ and ultimately delegating all the power to signatory states to set up their own protectionist policies.⁶⁴ Indeed, a major criticism of the 1970 UNESCO Convention has been the so-called "blank check"⁶⁵ provision allowing member states to define "inalienable" cultural property that is automatically considered "illicit" if exported.⁶⁶ In other words, source states with vast arrays of cultural history are free to define "cultural property" broadly in terms of what may be ultimately protected.⁶⁷

Article 3 provides, "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."⁶⁸ Additionally, Article 13 requires member states "to recognize the inalienable right of each State Party . . . to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported."⁶⁹ Taken together, these provisions give source nations, such as China, a blank check to classify cultural property, set up national services and policies to protect cultural property, and declare

⁵⁹ See 1954 Hague Convention, *supra* note 57 (the 1954 Hague Convention applies only to the protection and safeguarding of cultural property in the event of armed conflict).

⁶⁰ 1970 UNESCO Convention, *supra* note 13.

⁶¹ 1995 UNIDROIT Convention, *supra* note 44.

⁶² 1970 UNESCO Convention, *supra* note 13, at Signatory Table (the United States did not join as a party to the 1970 UNESCO Convention until 1983, whereas France failed to join until 1997, and the United Kingdom and Japan failed to join until 2002. China joined the 1970 UNESCO Convention on November 28, 1989); Warring, *supra* note 46, at 232.

⁶³ *But cf.* 1954 Hague Convention, *supra* note 57, at preamble (referring to "the cultural heritage of all mankind").

⁶⁴ See 1970 UNESCO Convention, *supra* note 13, art. 5-6.

⁶⁵ Warring, *supra* note 46, at 251-52.

⁶⁶ 1970 UNESCO Convention, *supra* note 13, art. 13.

⁶⁷ Warring, *supra* note 46, at 251-52.

⁶⁸ 1970 UNESCO Convention, *supra* note 13, art. 3.

⁶⁹ *Id.* art. 13.

certain goods "inalienable," making importation and exportation of such property almost *de facto* illicit.⁷⁰

The question then becomes, why would market nations with little of their own cultural property accede to the 1970 UNESCO Convention when, from their perspective, such an international agreement may threaten the economic and political agenda of the market state?⁷¹ Perhaps increased inter-connectedness between nations, the rising awareness of the value of cultural property to national identity, and the international shift beginning with the 1970 UNESCO Convention toward a nationalistic view of cultural heritage explain the relatively recent accession of market states to the international treaties.⁷² However, with regard to the 1995 UNIDROIT Convention, the most recent international treaty concerning cultural property, adoption by market states has been slow.⁷³

B. 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

The 1995 UNIDROIT Convention is a complementary legal mechanism to the 1970 UNESCO Convention and was adopted in Rome, Italy, in June 1995.⁷⁴ The 1995 UNIDROIT Convention is similar to the 1970 UNESCO Convention in that it is not retroactive and applies only between state parties after adoption and entry into force.⁷⁵ The 1995 UNIDROIT Convention differs in that it only covers objects of illicit provenance—either stolen or illicitly exported cultural property.⁷⁶ However, the two Conventions diverge in several respects. One important difference between the two Conventions is their respective focus. "The UNIDROIT Convention affords protection to all publicly and privately owned cultural property, in contrast to the UNESCO Convention's requirement that the state parties specifically designate all cultural property needing protec-

⁷⁰ Warring, *supra* note 46, at 251-52.

⁷¹ See *id.*, at 252; see also 1970 UNESCO Convention, *supra* note 13, art. 2(2), art. 12 (Because there are no specific provisions pertaining to "market states" versus "source states," market nations, those that by definition have little problem with the illicit export and destruction of their own cultural property, are reluctant to sign the 1970 UNESCO Convention because the convention is admittedly "nationalistic" in approach and requires members to take measures to prevent illicit import and promote reparations and restitution—both potential economic and political "hot spots" for governments).

⁷² See 1970 UNESCO Convention, *supra* note 13, at Signatory Table.

⁷³ 1995 UNIDROIT Convention, *supra* note 44, at Signatory Table, <http://www.unidroit.org/english/implement/i-95.pdf> (There are currently only twenty-six states which are party to the 1995 UNIDROIT Convention).

⁷⁴ 1995 UNIDROIT Convention, *supra* note 44, at preamble.

⁷⁵ 1995 UNIDROIT Convention, *supra* note 44, art. 10.

⁷⁶ Conference Celebrating the Tenth Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Paris, Fr., June 16, 2005, *UNESCO and UNIDROIT—Cooperation in the Fight Against Illicit Traffic in Cultural Property*, at 3, CLT-2005/Conf/803/2, June 25, 2005 [hereinafter UNESCO and UNIDROIT Information Note]; see also 1995 UNIDROIT Convention, *supra* note 44; 1970 UNESCO Convention, *supra* note 13.

tion.”⁷⁷ This extends the protection offered by the 1995 UNIDROIT Convention to yet undiscovered and unexcavated cultural property.⁷⁸

Additionally, the 1970 UNESCO Convention provides guidance on a recovery phase for stolen, inventoried cultural property.⁷⁹ In order to claim restitution, the 1970 UNESCO Convention generally operates through the diplomatic channel of cooperation and not through any set of private legal mechanisms.⁸⁰ In contrast, the 1995 UNIDROIT Convention focuses mainly on restitution and the return of stolen or illicitly exported cultural objects.⁸¹ The shift in focus of the 1995 UNIDROIT Convention is due in part to the presupposition that a variety of national schemes have been established to prevent illicit exportation since the conception of the 1970 UNESCO Convention twenty-five years earlier.⁸²

A second stark difference in the two international mechanisms is the introduction of private law provisions to initiate restitution into the 1995 UNIDROIT Convention.⁸³ The 1995 UNIDROIT Convention “enables both States . . . and individual owners who wish to recover a stolen object, to file a complaint before a foreign court” where the object is located.⁸⁴ Under Chapter IV, Article 8(2) of the UNIDROIT Convention, parties may also submit their restitution and return claims to another court or arbitration,⁸⁵ whereas Article 7 of the 1970 UNESCO Convention only requires that state parties take steps to prevent the importation of illegally exported cultural property consistent with their own national legislation.⁸⁶

However, despite the early attempt of the 1970 UNESCO Convention and the fairly recent articulation of the 1995 UNIDROIT Convention, exported artifacts continue to make their way into market states such as the United States.⁸⁷ Article 5 of the 1995 UNIDROIT Convention tries to remedy this situation by requiring the return of cultural objects, notwithstanding the laws of the state where the objects are located.⁸⁸ In addition, to alleviate the harsh effect on good faith pur-

⁷⁷ 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, 140 (1999).

⁷⁸ *Id.*

⁷⁹ 1970 UNESCO Convention, *supra* note 13, art. 7(b)(ii).

⁸⁰ *See id.*

⁸¹ *See* 1995 UNIDROIT Convention, *supra* note 44, art. 3-5.

⁸² UNESCO and UNIDROIT Information Note, *supra* note 76, at n.16.

⁸³ UNESCO INTERGOVERNMENTAL COMM. FOR PROMOTING THE RETURN OF CULTURAL PROP. TO ITS COUNTRIES OF ORIGIN OR ITS RESTITUTION IN CASE OF ILLICIT APPROPRIATION, *Promote the Return or the Restitution of Cultural Property*, at *7, http://portal.unesco.org/culture/en/file_download.php/30e1f1a9fe869fbedd25e871011419adifkite.pdf [hereinafter *The Return or the Restitution of Cultural Property*].

⁸⁴ *Id.*; 1995 UNIDROIT Convention, *supra* note 44, art. 8(1).

⁸⁵ 1995 UNIDROIT Convention, *supra* note 44, art. 8(2).

⁸⁶ 1970 UNESCO Convention, *supra* note 13, art. 7(a).

⁸⁷ *See* CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9, *supra* note 4; *see also* Goldrich, *supra* note 77, at 141.

⁸⁸ The Convention states:

The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its

chasers, the third-party acquirer of the object is entitled to fair compensation for its return if he or she undertook certain conditions of diligence when the object was acquired.⁸⁹

Despite provisions in the 1995 UNIDROIT Convention favorable to individuals and source states that require the return and repatriation of illicitly exported cultural property, as well as the enhancement of provisions in the 1970 UNESCO Convention to establish domestic regimes for protection of such objects, neither international mechanism has been able to stem the rising tide of illicit export. The most important component that the 1995 UNIDROIT Convention lacks is major market state support.⁹⁰ Without ratification of the 1995 UNIDROIT Convention, market states that are a party to the 1970 UNESCO Convention only have a legal responsibility to set up some form of import and export control.⁹¹ As shown above, putting the onus of enforcement on the offending states has been largely ineffective.⁹² In today's cultural antiquity market and without international support for both Conventions, implementation of bilateral import controls by market states may be the only way to curb illicit import and export of cultural property. However, before this latter proposition is developed, a quick look at China's domestic legal regime is necessary.

IV. China's Domestic Legal Regime

As a signatory to the 1970 UNESCO Convention,⁹³ China undertook to establish its own domestic legal regime to protect cultural property and prevent the illegal export of Chinese cultural objects. The two laws that comprise China's domestic legal regime for the protection of cultural property are (1) the 2002 Law⁹⁴ and (2) the People's Republic of China, Criminal Law, adopted in 1997 ("1997 Criminal Law").⁹⁵ Although this regime is strict in its application of regulating discovered cultural relics and punishing offenders for noncompliance,

territory significantly impairs one or more of the following interests: (a) the physical Preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community; or establishes that the object is of significant cultural importance for the requesting State.

1995 UNIDROIT Convention, *supra* note 44, art. 5(3).

⁸⁹ *The Return or The Restitution of Cultural Property*, *supra* note 83, at *6.

⁹⁰ See generally 1995 UNIDROIT Convention, *supra* note 44, at Signatory Table (Currently, the overwhelming majority of signatories to the 1995 UNIDROIT Convention are traditional source states, including China. The 1995 UNIDROIT Convention lacks support from major market states such as the United States, Great Britain, and Japan).

⁹¹ 1970 UNESCO Convention, *supra* note 13, arts. 6-8.

⁹² See Part II(c) and Part III.

⁹³ 1970 UNESCO Convention Signatory Table, *supra* note 22 (China accepted the 1970 UNESCO Convention on November 28, 1989 and the treaty went into force three months later).

⁹⁴ See 2002 Law, *supra* note 17.

⁹⁵ See Criminal Law of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., May 14, 1997), available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php> (P.R.C.) [hereinafter 1997 Criminal Law].

the legislation leaves much to be desired in terms of actually curbing illicit export of cultural property and tomb-robbing.⁹⁶

A. The Interplay of the 2002 Law and the Chinese Constitution

The basis for the Chinese government's authority to regulate the state's cultural property is found in China's 1982 Constitution.⁹⁷ Article 22 of the Constitution provides that the state, in addition to promoting literature and the arts, "protects places of scenic and historical interest, valuable cultural monuments and relics and other important items of China's historical and cultural heritage."⁹⁸ The provisions are simply declarations of policy that fail to establish rights or duties to protect cultural property.⁹⁹ Yet China has used this power to further such protection in the recent decade: first, China has nationalized cultural relics within its boundaries (yet undiscovered or otherwise)¹⁰⁰ and second, the country has placed heavy regulations on cultural relics in the possession of private individuals and public institutions.¹⁰¹

The 2002 Law replaced a 1982 Cultural Relics Protection Law ("1982 CRPL") that was highly criticized for lack of jurisdictional rules and for creating inconsistencies between the national government and regional municipalities.¹⁰² In many ways, the 2002 Law fails to rectify the blatant shortcomings of the 1982 CRPL. The 2002 Law does not provide jurisdictional guidance to regional claims to cultural relics, nor does it provide a uniform standard for cultural property excavation and preservation.¹⁰³ Although it is still early to measure any actual success or failure, the 2002 Law is criticized for its failure to create incentives for returning discovered relics to the State.¹⁰⁴ Furthermore, one commentator argues that the 2002 Law neither promotes awareness of the ill-effects that the illicit cultural relics market has on the Chinese people nor provides sufficient sources of funding to preserve the country's cultural worth.¹⁰⁵

The 2002 Law differs from the 1982 CRPL in several ways. The 1982 CRPL did not allow private individuals to transact in cultural relics with other individuals or foreigners.¹⁰⁶ Articles 24 and 25 of the 1982 CRPL permitted individuals

⁹⁶ Dutra, *supra* note 9, at 79-80.

⁹⁷ XIAN FA [Constitution] art. 22, § 1 (1982) (P.R.C.).

⁹⁸ *Id.* Additionally, Article 119 of the Constitution grants the governing bodies of autonomous areas the power to "independently administer" their own cultural affairs and "sort out and protect the cultural legacy of the nationalities and work for the development and prosperity of their cultures." XIAN FA art. 119, § 1 (1982) (P.R.C.).

⁹⁹ MURPHY, *supra* note 24, at 77.

¹⁰⁰ 2002 Law, *supra* note 17, art. 2.

¹⁰¹ *Id.* art. 6.

¹⁰² See Cultural Relics Protection Law (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 19, 1982 (P.R.C.) [hereinafter 1982 CRPL]; Dutra, *supra* note 9, at 80-81.

¹⁰³ Dutra, *supra* note 9, at 82.

¹⁰⁴ *Id.* at 82-83.

¹⁰⁵ *Id.* at 83.

¹⁰⁶ MURPHY, *supra* note 24, at 93-94; see 1982 CRPL, *supra* note 102, arts. 24-25.

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who owned Chinese cultural relics to only sell them to the state through state sales administration.¹⁰⁷ The 2002 Law, on the other hand, permits individuals and organizations to collect cultural relics in several ways:

- (1) lawfully inheriting or accepting gifts;
- (2) purchasing from cultural relics stores;
- (3) purchasing from auction enterprises engaged in the auction of cultural relics;
- (4) mutually exchanging or transferring lawfully owned relics in accordance with applicable law; or
- (5) other lawful channels prescribed by the State.¹⁰⁸

The government prohibits the sale or exchange of cultural relics owned by the state, including newly discovered or excavated relics, valuable cultural relics in the collections of cultural institutions, and immovable cultural relics such as murals, carvings, or components of ancient buildings.¹⁰⁹

The legalization of private transactions and the creation of a licit cultural property market in China under the 2002 Law may stem from the government's recognition of its inability to pay high market prices for cultural relics.¹¹⁰ This free-market cultural property exchange may drive up the price legitimate collectors or institutions pay for cultural objects, because they are no longer paying for objects from poor villagers, but instead from savvy art dealers or institutions.¹¹¹ However, allowing individuals and institutions to purchase legally obtained cultural relics should eliminate some desire to seek out tomb-robbers and middlemen smugglers who promote destructive techniques in acquiring cultural goods.¹¹² By creating a system that allows the "free trade" of cultural property between organizations, individuals, and licensed auction houses, the state should be able to keep better track of the cultural property trade within China and its sale abroad.¹¹³ But despite these innovations, the 2002 Law does not provide a real disincentive to deter tomb robbers and illegal excavators who still have much to gain from the illicit sale of cultural relics to smugglers.

The 2002 Law also established auction enterprises and cultural relics stores to assist in cataloging and tracking cultural property.¹¹⁴ These two mechanisms for establishing a licit cultural property market are distinct, meaning that auction enterprises cannot establish cultural relics stores and vice versa, but they share the similar requirement that administrative officials must be permitted to examine

¹⁰⁷ 1982 CRPL, *supra* note 102, arts. 24-25.

¹⁰⁸ 2002 Law, *supra* note 17, art. 50.

¹⁰⁹ *Id.* art. 51.

¹¹⁰ *See* Dutra, *supra* note 9, at 84.

¹¹¹ *See* 2002 Law, *supra* note 17, art. 50.

¹¹² This may be true simply by virtue that the 2002 Law provides a legal avenue by which individuals can obtain and transact in Chinese cultural artifacts and who are not otherwise predisposed to break the law.

¹¹³ *See* Dutra, *supra* note 9, at 84.

¹¹⁴ 2002 Law, *supra* note 17, arts. 56-57.

and verify each cultural object for sale or exchange.¹¹⁵ In addition, Article 58 grants the Administrative Department for Cultural Relics broad power to “designate an institution for the collection of state-owned cultural relics to enjoy the priority in purchasing the valuable” objects up for auction during the mandatory examination period under Article 56.¹¹⁶ Finally, cultural relic stores and auction houses must keep records of cultural relics they purchase, sell, or auction, and submit the records to the Administrative Department for Cultural Relics for centralized cataloging.¹¹⁷

Cataloging, examining, and keeping records of cultural relics in the way envisioned under the 2002 Law is a step in the right direction. A licit market for cultural relics and the required examination and verification of such items should at least stem the movement and sale of illegally obtained cultural objects within China. The record keeping system could potentially alert state administrators to “new” cultural relics emerging on the exchange market and provide a way to trace where a particular piece came from. However, even this system has its flaws and limitations.

One such limitation has already been mentioned: a lack of incentive to stop vandalizing ancient sites by tomb-robbers. Additionally, Article 58 grants to the government a purchase option allowing the state to buy valuable cultural relics at a price ultimately determined by the state.¹¹⁸ Illicit export remains desirable to many because smugglers can get more for cultural relics outside the country in market states, and less reputable individuals may be unwilling to sell at an auction house because of a potential below-market offer by the state.¹¹⁹

Defining the scope of export restrictions under the 2002 Law is difficult. This is true, in part, because of the vague definitions set out by the 2002 Law. China has long classified its cultural property into “grades,” and the 2002 Law continues this tradition.¹²⁰ For instance, the 2002 Law divides cultural relics into “valuable” cultural relics and “ordinary” cultural relics.¹²¹ Valuable cultural relics are further broken down into grade-one, grade-two, and grade-three cultural relics.¹²² Grade-one cultural relics are “especially important for historical, artistic, and scientific values.”¹²³ Grade-two are those cultural relics that have “important” cultural value.¹²⁴ Grade-three cultural relics are “relatively important”

¹¹⁵ *Id.* arts. 54-56 (stating that officials of the Administrative Department for Cultural Relics for the People's government of the relevant province or municipality conduct the examination and verification of cultural relics prior to sale or exchange).

¹¹⁶ *Id.* art. 58.

¹¹⁷ *Id.* art. 57.

¹¹⁸ *See id.* art. 58.

¹¹⁹ *See* Dutra, *supra* note 9, at 84.

¹²⁰ *Id.*

¹²¹ 2002 Law, *supra* note 17, art. 3; *see* Rating Standards for Cultural Relics Collections (promulgated by the Ministry of Culture, Apr. 9, 2001, effective Apr. 9, 2001), art. 1, translated in LawInfoChina (last visited Apr. 1, 2006) [hereinafter Rating Standards for Cultural Relics].

¹²² 2002 Law, *supra* note 17, art. 3.

¹²³ Rating Standards for Cultural Relics, *supra* note 121, art. 1.

¹²⁴ *See id.* art. 2.

to China's cultural heritage.¹²⁵ Cultural relics deemed ordinary are those that only have "certain historical, artistic, and scientific value."¹²⁶ The problem, however, is that there is no other substantive guidance to differentiate between the relative grades of cultural property.¹²⁷ This vagueness exacerbates the problem of categorizing both existing and newly discovered objects, as well as tracking illicit and licit export of cultural property, and determining the criminal punishment for offenders.¹²⁸

The 2002 Law contains other shortcomings. For example, the disjointed approach to preservation of cultural property leaves the tasks to local municipalities that often have inadequate resources to properly care for important relics.¹²⁹ The central government takes on the responsibility of preserving and protecting valuable grade-one cultural relics and leaves the preservation of the lower grade antiquities to local levels of government.¹³⁰ Additionally, the 2002 Law prohibits certain valuable grade-one cultural relics from being exported from China at all, except in certain and limited cases for exhibition.¹³¹ This ban on prohibiting the exportation of certain valuable cultural property is difficult to enforce because of the vague definition of what constitutes a valuable grade-one relic.¹³² However, this flaw is arguably balanced by the flexibility that the language of the 2002 Law provides to administrators in issuing or denying export permits for specific pieces because of the broad subjective nature of the classification system.¹³³

B. The 1997 Criminal Law

The 1997 Criminal Law penalizes violators of both the 2002 Law and the 1982 Constitution. The 2002 Law only speaks in terms of "moral encouragement" for the return of illegally acquired or discovered cultural relics.¹³⁴ It does not provide for a readily identifiable punishment for violation of its provisions, but only indicates that violators will be subject to both criminal and civil liability, and punishment "according to law."¹³⁵ The 1997 Criminal Law ultimately determines the consequences for illegal activity as defined by the 2002 Law and the Chinese constitution.¹³⁶

¹²⁵ *Id.* art 3.

¹²⁶ *Id.* art 4.

¹²⁷ *See id.* art. 6. The Ratings Standards for Cultural Relics articulated in April 2001 further defined what constitutes grade-one cultural relics for several categories including woodcarvings, coins, bronze ware, jade ware, stone carvings, and certain pottery, but failed to specifically define those relics that fall into the grade-two or grade-three category.

¹²⁸ *See* Dutra, *supra* note 9, at 84-86.

¹²⁹ Dutra, *supra* note 9, at 86.

¹³⁰ *Id.*

¹³¹ *See* 2002 Law, art. 60-63.

¹³² Dutra, *supra* note 9, at 87.

¹³³ *See id.*

¹³⁴ 2002 Law, *supra* note 17, art. 12.

¹³⁵ *See* 2002 Law, *supra* note 17, ch. VII.

¹³⁶ 1997 Criminal Law, *supra* note 95, arts. 1, 324.

The 1997 Criminal Law specifically addresses "crimes of obstructing cultural and historical relics control."¹³⁷ The Law imposes criminal liability for damaging or destroying cultural property,¹³⁸ selling privately prohibited cultural relics,¹³⁹ selling cultural property for profit,¹⁴⁰ selling cultural property by a museum,¹⁴¹ or illegally excavating ancient sites or remains.¹⁴² The actual criminal penalties for actions prohibited by the 1997 Criminal Law range from fines and confiscation of cultural objects to prison sentences, and in serious or heinous cases, even death.¹⁴³ The 1997 Criminal Law also forbids the cross-border transportation of "prohibited cultural relics" out of China with a minimum five-year prison sentence for violators.¹⁴⁴

The provisions governing cultural property protection suffer from the same vagueness as the 2002 Law. The punishment for illegally transporting cultural property or damaging cultural relics depends upon both the grade of the cultural relic in question and the seriousness of the offense.¹⁴⁵ The 1997 Criminal Law explicitly lists certain conduct which may warrant the imposition of a sentence of imprisonment or even death, such as repeated illegal excavation or acting as a ring leader in a conspiracy to illicitly export cultural property.¹⁴⁶ In other respects, the law fails to clearly delineate how "ordinary," "serious," "heinous," and "exceptionally serious" offenses differ.¹⁴⁷

In theory, the Chinese judiciary can choose between the seriousness of a particular offense and the corresponding penalty.¹⁴⁸ Arguably, this provides for some level of deterrence to potential offenders because the penalty for being caught is relatively unknown prior to engaging in the illegal activity.¹⁴⁹ However, without a consistent application of penalties under the 1997 Criminal Law, including the possibility of receiving light treatment, smugglers and individuals may be willing to take their chances in court, especially with the large payouts from illicit export of cultural property. To provide the most effective level of deterrence, the 1997 Criminal Law must be applied harshly and consistently to offenders.¹⁵⁰

¹³⁷ See *id.* arts. 324-29.

¹³⁸ *Id.* art. 324.

¹³⁹ *Id.* art. 325.

¹⁴⁰ *Id.* art. 326.

¹⁴¹ *Id.* art. 327.

¹⁴² *Id.* art. 328.

¹⁴³ See *id.*; Dutra, *supra* note 9, at 90.

¹⁴⁴ See 1997 Criminal Law, *supra* note 95, art. 151; Dutra, *supra* note 9, at 91-92.

¹⁴⁵ See 1997 Criminal Law, *supra* note 95, arts. 324-28.

¹⁴⁶ See *id.* art. 328; Dutra, *supra* note 9, at 90.

¹⁴⁷ Dutra, *supra* note 9, at 91.

¹⁴⁸ *Id.* at 92.

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at 92-93 (arguing that judges may be unwilling to impose the harsh statutorily prescribed penalties, seemingly because of the highly disjointed and vague nature of the legal system as it exists today).

In summary, the vague nature of the 2002 Law and the 1997 Criminal Law in defining restricted cultural antiquities, coupled with a broad and highly discretionary process for granting export permits, severely handicaps China's ability to control illicit export of cultural property. In the words of Professor Dutra, "The flow of Chinese cultural antiquities will go unstaunched so long as there is an eager market for such items outside of China. The [2002 Law] does little to rectify the situation and its vagueness does not solve the problem."¹⁵¹ Therefore, it seems that without some international or bilateral cooperation, China's domestic regime as it stands is ineffective at preventing the loss of Chinese cultural property. The failure of international mechanisms, namely the reluctance of market states to join the 1995 UNIDROIT Convention to strictly monitor importation of cultural property, combined with the impotence of China's domestic regime, require a new approach to cultural property protection. The subsequent sections detail China's latest attempt to reach out for help¹⁵² and how the forthcoming response of a major market state, such as the United States, could prove to be a key component in stopping the illicit cultural property trade.

V. China's Request to the United States Under Article 9

The failure of both the international and domestic mechanisms for preventing the export of cultural property led the People's Republic of China to request assistance from the United States.¹⁵³ The request to the United States was made under Article 9 of the 1970 UNESCO Convention in December 2004.¹⁵⁴ On February 17, 2005, a public hearing was held before the U.S. State Department Cultural Property Advisory Committee to determine whether the United States would grant China's request for import restrictions on certain objects of cultural property.¹⁵⁵ As of August 7, 2006, China's request was still pending.¹⁵⁶

A. China's Unique Position and Request to the United States

Despite the domestic legal regime of China, the government's recent request recognizes the current law's shortcomings and the increase in the pillaging and smuggling of China's cultural artifacts.¹⁵⁷ What makes this request different, in some respects, is the historical nature and importance of China's unique position

¹⁵¹ *Id.* at 88.

¹⁵² See generally CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9, *supra* note 4.

¹⁵³ *Id.*; see SAFE: Saving Antiquities for Everyone, *Say No to Plunder, Yes to Bilateral Agreements*, <http://www.savingantiquities.org/i-safe-mou.htm> (last visited Apr. 1, 2006) (the request was not completely unprecedented: similar requests, albeit not as extensive nor from source nations as large as China, have been made to the United States from ten nations, including Guatemala, Honduras, Italy, and Mali to impose similar import restrictions on cultural property).

¹⁵⁴ CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9, *supra* note 4.

¹⁵⁵ Lally, *supra* note 12.

¹⁵⁶ See generally U.S. State Department Bureau of Educational and Cultural Affairs, Protecting Cultural Property Worldwide, <http://exchanges.state.gov/culprop/whatsnew.html> (last visited Apr. 1, 2006) (listing pending requests, scheduled upcoming advisory committee meetings, and recent notices).

¹⁵⁷ CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9, *supra* note 4, at *1.

in world history. "China is one of the few cultures in the world with an unbroken cultural record from the prehistory to the present. Chinese history and archaeology is, therefore, key to understanding the process of development of human society and civilization."¹⁵⁸

Today, China boasts one of the largest and most studied cultural histories in the world.¹⁵⁹ Thousands of archaeological sites, many yet unearched, provide rich cultural knowledge and the "potential for reconstructing history . . . related to the origins of man, domestication of rice and millet, origins of writing, paper, and printing, as well as silk and porcelain technology."¹⁶⁰ Additionally, as the market for Chinese antiquities continues to grow and as illegally obtained cultural relics are increasingly found in galleries, auction houses, and Chinese customs offices bound for the United States,¹⁶¹ the threat of losing Chinese cultural knowledge is dangerously real.

China's request to the United States under Article 9 seeks import control restrictions on cultural property from pre-history to 1911 encompassing:

(1) Metals: bronze, gold, and silver vessels, sculpture utensils, jewelry, coins weapons, and armor;

(2) Ceramic: stoneware and porcelain vessels, sculpture, jewelry, and architectural elements;

(3) Stone: vessels, sculpture, weapons, utensils, jewelry, and architectural elements;

(4) Textiles: silk clothing, hangings, and furnishings;

(5) Lacquer, bone, ivory, and horn objects, including inscribed materials; and

(6) Wood and bamboo objects, including inscribed objects.¹⁶²

If granted, United States customs officials could examine and seize all cultural property within the designated scope of the import restrictions that are not accompanied by special export certification granted by the Chinese government.¹⁶³ Additionally, it is likely that the agreement would explain procedures for the preservation and ultimate restitution of all objects denied admittance to the United States.

B. The United States' Response to the 1970 UNESCO Convention and the Convention on Cultural Property Implementation Act

In 1983, when the United States joined the 1970 UNESCO Convention, it created the Convention on Cultural Property Implementation Act ("CCPIA").¹⁶⁴

¹⁵⁸ *Id.* at *10.

¹⁵⁹ *See generally id.*

¹⁶⁰ *Id.* at *10.

¹⁶¹ *See id.*; *see also* Kennedy & Zao, *supra* note 56, at E31 (providing a look at both sides of the debate on whether or not the numbers of Chinese antiquities making their way to the United States market are relatively significant when compared with other market states or over inflated).

¹⁶² CHINA'S REQUEST TO THE UNITED STATES UNDER ARTICLE 9, *supra* note 4, at *11.

¹⁶³ Convention on Cultural Property Implementation Act, 19 U.S.C.A. § 2606 (2006). [hereinafter CCPIA].

¹⁶⁴ *See id.* §§ 2601-13.

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Under the CCPIA, nations that are a party to the 1970 UNESCO Convention may submit a request to the U.S. State Department seeking import controls on certain categories of archaeological or ethnological materials.¹⁶⁵ The CCPIA then gives the President of the United States the ultimate power to enter into bilateral or multilateral agreements, the purpose of which is to protect the respective country's cultural patrimony.¹⁶⁶ The CCPIA also establishes a Cultural Property Advisory Committee¹⁶⁷ that conducts an investigation, including calling a public hearing for each individual request, and provides the State Department and President with its ultimate recommendation as to whether to grant or deny the import control restrictions.¹⁶⁸

Whether the Advisory Committee recommends granting the import restriction request and whether the President ultimately adopts its recommendation turns on four determinations spelled out in the CCPIA.¹⁶⁹ Specifically, in the case of China, the Advisory Committee and ultimately the President must determine:

(1) Whether the cultural patrimony of China is in jeopardy from looting of archaeological or ethnological materials;

(2) Whether China has taken internal steps (has effective laws in place and engages in law enforcement to protect its cultural patrimony through a variety of means) consistent with the UNESCO Convention;

(3) Whether other nations with a significant import trade in Chinese archaeological materials are participating in a concerted effort to prevent import of pilaged materials; and

(4) Whether the imposition of import restrictions will assist in the legitimate international exchange of cultural materials in ways that do not endanger China's cultural patrimony.¹⁷⁰

Whether China has satisfied the four requirements for a favorable recommendation was the major topic of debate during the February 17, 2005 public hearing.¹⁷¹ The respective sides of the debate and the importance of a favorable finding for China and the international community will be covered in the remaining sections of this article.

C. The Debate

A range of proponents and opponents to China's request to the United States under Article 9 testified before the Advisory Committee at the February 2005

¹⁶⁵ See *id.* § 2602.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.*, § 2605 (providing that the Cultural Property Advisory Committee is appointed by the President and consists of eleven private citizens who are experts in archaeology and anthropology; experts in the international sale of cultural property; and who represent the interests of museums and the general public).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* § 2602.

¹⁷⁰ *Id.*

¹⁷¹ See generally Lally, *supra* note 12.

hearing.¹⁷² This list includes auction house staff, museum curators, professors, art dealers, and lawyers representing dealers and collectors' associations.¹⁷³ The speakers who advocated accepting China's request for import restrictions are of the opinion that "archaeological investigation and research must be given primacy over all other possible approaches to cultural property, and any proposed restrictions which might enhance the preservation, protection and retention of archaeological materials in China should be implemented."¹⁷⁴ The opponents of China's request argue: (1) that China's domestic legal regime is not sufficient to protect its own cultural property and that China should strengthen its own laws first; (2) growth of China's internal market for illicit trade is the real problem and is far worse than the small illicit market for Chinese antiquities in the United States; and (3) such a broad import restriction on cultural property will deny U.S. scholars, museums, and the international community in general access to cultural knowledge, study, and the ability to exhibit China's heritage.¹⁷⁵

The three main issues behind the opponents' position that the request should be denied (or severely modified) are intertwined. "According to Arthur Houghton, a former CPAC member, currently with the American Council for Cultural Property, China 'cannot be a potted plant,' and it 'must make more efforts at self-restraint.'"¹⁷⁶ In one respect, the lack of internal effectiveness is directly correlated to the growing internal market for antiquities in China. Of the forty-eight major, and many other minor, auction houses operating in China, the government either sanctions or partially owns them all.¹⁷⁷ "Some of these domestic auction houses, notably the Poly Group, have sold excavated tomb figures, even promoting them on the covers of their catalogues."¹⁷⁸ Many opponents suggest that the weaknesses of the Chinese legal regime gives rise to a large domestic market that in turn drives illegal excavation and the sale of cultural property.¹⁷⁹ Logically then, the implementation of a broad import restriction of Chinese antiquities in the United States will do little or nothing to aid the Chinese. China must help itself first.

The last argument of the opponents' position combines two premises: (1) that there is a relatively small market for Chinese antiquity in the United States, and (2) such a broad request and failure to invite other large market states (such as

¹⁷² *Id.*

¹⁷³ *Id.* (Mr. Lally is an art dealer from New York who was present at the CPAC public hearing on China's Request to the United States Under Article 9 and was a speaker against granting China's request. His short online article provides a breakdown of the hearing, its speakers, and his personal impressions of the hearing).

¹⁷⁴ *Id.*

¹⁷⁵ See SAFE, *supra* note 153; see Ashton Hawkins & Kate Fitz Gibbons, *This Property Claim Should Be Condemned*, WALL ST. J., Mar. 29, 2005, at D6.

¹⁷⁶ Laura B. Whitman, *China's Request: Is the US Government on the Verge of Shutting Down the Market in Chinese Antiquities?*, ORIENTATIONS, Apr. 2005, <http://www.orientations.com.hk/hmapr05.htm>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

the United Kingdom, for example) will only hurt the United States' cultural interests while not solving the problem.¹⁸⁰ One speaker hinted at the difficulty of examining and studying Chinese cultural property if the import ban was granted.¹⁸¹ By not being able to import objects into a museum's permanent collection, a dampening of cultural exchange will emerge and museums in the United States would not be able to study cultural property without expensive travel.¹⁸² This, in the eyes of one opponent, "would deny the public at large the opportunity to fully appreciate an important world culture," while access to Chinese art elsewhere in the world would freely be enjoyed.¹⁸³

D. Importance of Granting China's Request and its Effect on International Cultural Property Protection

While the opponents to granting China's request make valid observations and are generally concerned with the protection of cultural property and the rampant problems the illicit market can cause, much of their criticism is overstated and fails to take into account the monumental importance of this first step. At the outset, China's request is admittedly broad.¹⁸⁴ However, that the request attempts to cover a wide range of cultural property should not overshadow the importance of increased dialogue between nations and the ultimate goal of shrinking the illicit export and destruction of cultural property.

First, the most fundamental consequence of granting China's request, and perhaps most overlooked by opponents, would be the dramatic increase in dialogue between the United States and China.¹⁸⁵ The problem of illicit export of cultural property is much larger than between the United States and China, as evidenced by international attempts to prevent and preserve cultural property.¹⁸⁶ However, the problem presented here exists principally between these two states. For example, Chinese antiquities sold at Sotheby's for a total of \$34 million in 2004.¹⁸⁷ Bringing these two large international players together to negotiate a bilateral arrangement for importation restrictions on Chinese cultural property would promote increased cooperation between the two states. This would likely foster better relations in the future and allow state-certified cultural property to travel to the United States, and vice versa, either for study or exhibition.

¹⁸⁰ Whitman, *supra* note 176.

¹⁸¹ *Id.*

¹⁸² Hawkins & Gibbons, *supra* note 175.

¹⁸³ *Id.*

¹⁸⁴ See Whitman, *supra* note 176. "Although technically 15 to 7 in opposition to the request, some pro-request speakers admitted that China's demand was unreasonably broad, and should be modified to focus only on the protection of certain archaeological sites and materials." *Id.*

¹⁸⁵ This may be true simply because representatives must meet, draft, and coordinate terms of any agreement, as well as negotiate from time to time additional memorandums of understanding concerning cultural property protection. See generally U.S. State Department Bureau of Educational and Cultural Affairs, Protecting Cultural Property Worldwide, *supra* note 156.

¹⁸⁶ See generally SAFE, *supra* note 153.

¹⁸⁷ See Hawkins & Gibbons, *supra* note 175.

Second, granting China's request would result in a comprehensive set of importation restrictions and methods for the preservation and return of seized property to China. This legal framework would be the first of its kind on a large scale and would provide other source and market nations with guidance to draft similar bilateral agreements.¹⁸⁸ The ultimate goal of China's request, at least from a global standpoint, should be to create a web of bilateral and multilateral agreements to protect against the illicit importation of cultural property.

Third, and perhaps most importantly, to the extent import restrictions will deny the entry of illicitly exported cultural property to the United States, the market for such objects will begin to shrink. If smugglers in the United States are reluctant to risk spending money to import illegal goods because of the broad protection offered by the import restriction, demand for illegal relics will decrease. Indeed, demand fuels the supply side of the equation.

The argument that granting China's request will deny only United States citizens and museums access to Chinese cultural heritage is unpersuasive. Although many artifacts already on the market lack identifiable provenance, with technology and increased knowledge of ancient China, many can likely be identified as Chinese in origin and returned for examination and further study.¹⁸⁹ This addresses the problem of the current black market in cultural property. In a related respect, a more complete record of Chinese cultural heritage will lead to increased worldwide knowledge through publication, exhibition, and cultural reciprocity. That China would hoard every piece of its cultural heritage and deprive the rest of the world from its past is impractical, at least inasmuch as it would be practical for the United States to do the same thing. Finally, China itself is capable of making advancements and preserving cultural property for study,¹⁹⁰ and the role of the conservator should not belong to the United States alone.

VI. Conclusion

The system for preventing the plundering and black market resale of Chinese cultural property is flawed. International mechanisms and the Chinese legal regime to preserve and prevent the illicit export of cultural property both suffer from shortcomings. However, the recognition of this fact, as well as the fact that the international treaty system is lacking large, influential support from market nations does not mean all hope is lost. Today, the problem of illicit export and destruction of cultural property is at its peak. China's request to the United

¹⁸⁸ To date, the United States has entered into cultural property agreements or taken emergency action to protect archaeological and/or ethnological materials in Bolivia, Cambodia, Cyprus Archaeological Material, Cyprus Ethnological Material, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. SAFE, *supra* note 153. The sheer size and scope of the request and antiquities market in China makes China's request different.

¹⁸⁹ Beech, *supra* note 1.

¹⁹⁰ There is considerable debate as to whether or not China is actually the preferred nation to safeguard the many sites of archaeological and cultural importance. See *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 Aug. 7, 2006). Rapid industrialization and urban expansion are often referred to as large factors in the destruction of Chinese cultural property at the hands of their own government. However, this internal aspect of cultural property protection is not addressed in this article.

States under Article 9 of the 1970 UNESCO Convention represents the first in a large-scale effort of bilateral and multilateral treaties to turn the tide.

By granting China's request, the United States will encourage dialogue in the realm of protecting cultural property. Bringing the two states together will set a precedent of cooperation. Additionally, by closing a large market for illicit Chinese goods, the internal market in China will begin to deteriorate because there will be less demand, and in turn, less return on illicit cultural property. Moreover, increased dialogue and cooperation between parties will foster cultural respect and allow for greater understanding of China's cultural heritage. As part of the increase in international cooperation and study, it is very likely that the flow of exhibitions and state sanctioned export of certain antiquities would follow.

However, granting China's one request will not solve the problem. It will take the concerted effort of all states, market and source states alike, to create an intertwining web of bilateral and multilateral agreements. Agreements that restrict the import of cultural property without state specific certification will call for lost relics to be seized, returned, and cataloged for study. In this way, the illicit demand for cultural property will shrink and this generation will begin to realize the fruits of protecting the history of both China and the world.