

ON RABBITS, RATS AND LOW-HANGING FRUIT: RETHINKING THE IMPACT OF INTERNATIONAL AGREEMENTS ON CHINA'S DOMESTIC CULTURAL PROPERTY PROTECTION

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I. INTRODUCTION	218
II. 1970 UNESCO CONVENTION	222
III. CULTURAL PROPERTY PROTECTION IN THE UNITED STATES	225
IV. THE 2009 MEMORANDUM OF UNDERSTANDING BETWEEN CHINA AND THE U.S.	228
A. <i>The Debate Surrounding China's Candidacy for a Bilateral Agreement</i>	229
1. The Appropriateness of Embargo	229
2. China's Decision to Target the U.S. Market	231
3. Domestic Efforts to Protect China's Cultural Heritage	232
B. <i>The Terms of the U.S.-China MOU</i>	233
1. Education and Training	233
2. Protection of Domestic Sites	234
3. Export Restrictions	235
4. Exchange Among Public Educational Institutions	237
5. International Support	237
V. CONCLUSION	238

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By the light of the burning palace which had been the pride and delight of her Emperors, she had commenced to see that she had been asleep while all the world was up and doing The Summer Palace with all its wealth of art, was a high price to pay for the lesson we there received, but not too high, if it has taught us how to repair and triple fortify our battered armour; and it has done so.

—Marquis Tseng¹

I. INTRODUCTION

On February 23, 2009, Christie's began the three-day auction of the personal collection of fashion designer Yves Saint Laurent and his partner, Pierre Bergé. Realizing €374 million (\$474 million) in total sales,² the auction benefited a new HIV/AIDS research institute.³ Breaking the world record for the highest single-owner sale of art on the first night alone,⁴ onlookers commented that bidders were behaving as if they were "dancing on the Titanic,"⁵ paying unprecedented prices for works ranging from highly regarded paintings by Mondrian and Matisse to whimsical pieces such as Eileen Gray's "Dragons" armchair and Marcel Duchamp's readymade toilet water flasks.⁶ The auction represented to some an indication of a "separate trajectory" for the art market from the increasingly depressed world economy,⁷ and to others the natural recognition that Bergé and Saint Laurent shared a "discerning eye for provenance and museum quality."⁸

Among the most notable works at the auction were the bronze heads of a rabbit and a rat dating to China's Qing Dynasty. Based on the design

¹ As cited in CARROLL BROWN MALONE, HISTORY OF THE PEKING SUMMER PALACES UNDER THE CH'ING DYNASTY 192 (1934).

² Auction Results, Christie's, Collection Yves Saint Laurent et Pierre Bergé, Sept. 26, 2008, <http://www.christies.com/LotFinder/searchresults.aspx?intSaleID=22294#action=refine&intSaleID=22294&sid=a0322868-0bd4-4d94-92b6-48bfe12f6b5a>.

³ Press Release, Christie's, The Yves Saint Laurent and Pierre Bergé Collection, Sept. 26, 2008, <http://www.christies.com/presscenter/pdf/09262008/12319.pdf> (last visited May 22, 2009).

⁴ Souren Melikian, *Paris Auction Reflects a Major Turning Point for Art Market*, INT'L HERALD TRIB., Feb. 28, 2009, at 14.

⁵ Katharine Zaleski, *Yves Saint Laurent Auction: Record Brancusi, Matisse, Mondrian Sales*, HUFFINGTON POST, Feb. 23, 2009, http://www.huffingtonpost.com/2009/02/23/yves-saint-laurent-auction_n_169201.html.

⁶ See Souren Melikian, *Yves Saint Laurent Art Sells for €206 Million*, INT'L. HERALD TRIB., Feb. 25, 2009, at 9.

⁷ Melikian, *supra* note 4.

⁸ Artdaily.org, *The Collection of Yves Saint Laurent and Pierre Bergé Realises \$483.8 Million at Christie's*, http://www.artdaily.org/index.asp?int_sec=2&int_new=29281 (last visited May 22, 2009).

of Italian missionary Giuseppe Castiglione,⁹ these castings represent two of the twelve signs of the Chinese zodiac once seated atop human forms as part of an elaborate water clock, created by the Jesuit Father Benoit for the Western Palaces at the Imperial Summer Palace (*Yuan Ming Yuan*).¹⁰ The fountain fell into disrepair following Father Benoit's death in 1774, and the lengths of copper piping were stripped according to imperial order in 1795.¹¹ It is uncertain whether the fountainheads of the water clock survived the Second Opium War (1856–60) intact—after which Lord Elgin ordered the Anglo-French alliance to loot and burn the palace in retaliation for the imprisonment and torture of a peace delegation under a flag of truce¹²—but it seems an impossibility that the bronzes could have survived the orgy of plunder that took place.¹³ While the text Christie's provided on the history and provenance of the heads emphasized the pre-war dismantling of the fountain, journalists covering the auction almost exclusively describe the artifacts as looted. Of the original twelve heads, five have been returned to China, and five have yet to be found.¹⁴

The announcement that the rabbit and rat were to be auctioned alongside the Yves Saint Laurent estate outraged Chinese ministry officials, who demanded the castings be recognized as stolen property and returned to China.¹⁵ The Chinese government refused a private offer from Christie's to purchase the heads in advance because the asking price was too high.¹⁶ In the face of further pressure to return the objects to Beijing, Bergé obstinately announced that he had valid title to the objects and did not intend to give China any "presents," but that he would happily return the figures to Beijing if China would "observe human rights and give liberty to the Tibetan people and welcome the Dalai Lama."¹⁷ Ma Zhaoxu,

⁹ Announcement from Rosemary Scott, International Academic Director (Asian Art), Christie's, *The Bronze Heads from the Chinese Emperor's Summer Palace* (2009), http://www.christies.com/LotFinder/lot_details.aspx?from=salesummary&intObjectID=5157530&sid=a0322868-0bd4-4d94-92b6-48bfe12f6b5a.

¹⁰ Malone, *supra* note 1, at 149–58. See also GEREMIE R. BARMÉ, *THE GARDEN OF PERFECT BRIGHTNESS: A LIFE IN RUINS* 127 (1996).

¹¹ Barmé, *supra* note 10, at 126. See also Scott, *supra* note 9.

¹² See JAMES LOUIS HEVIA, *ENGLISH LESSONS: THE PEDAGOGY OF IMPERIALISM IN NINETEENTH-CENTURY CHINA* 74–118 (2003) (detailing the conflicting histories on the looting of the summer palace).

¹³ This was not the first time Christie's sold loot from the Summer Palace. Five such sales took place in 1861 and eight more auctions were recorded between 1862 and 1866. *Id.* at 92.

¹⁴ The heads of the boar, ox, monkey, tiger, and horse statues have all been repatriated to China. Le-min Lim, *Row Looms Over Qing Treasures Sale*, SHANGHAI DAILY.COM, Jan. 25, 2009, http://www.shanghaidaily.com/sp/article/2009/200901/20090125/article_389218.htm.

¹⁵ David Barboza, *China Seeks to Stop Paris Sale of Bronzes*, N.Y. TIMES, Feb. 17, 2009, at C1.

¹⁶ Mark McDonald and Carol Vogel, *Twist in Sale of Relics Has China Winking*, N.Y. TIMES, Mar. 2, 2009, at A5.

¹⁷ Steven Erlanger, *China Fails to Halt Sale of Looted Relics at Paris Auction*, N.Y. TIMES ON THE WEB, Feb. 26, 2009, <http://www.nytimes.com/2009/02/26/world/europe/26iht-26auction.20446169.html>.

China's Foreign Ministry spokesman, was not amused, criticizing Bergé for infringing upon the cultural rights of the Chinese people "on the pretext of human rights."¹⁸

Unable to reach a private settlement, lawyers in China and France scrambled to bring the sale of the artifacts to a halt. When the French administrative court rejected the standing of the Global Aixinjueluo Family Clan as a volunteer plaintiff (representing the descendents of the imperial family),¹⁹ the Association for the Protection of Chinese Art in Europe (APACE) began to lead the suit for a last-minute injunction.²⁰ The claim, rooted in a moral rather than legal cause of action, had so little hope for success that the procurer took the unusual step of requesting the court to fine APACE for its abuse of process.²¹ Ultimately, the court denied the injunction, ordering fees of €1000 each to Christie's and Bergé.²² In retaliation for the ruling, the Chinese State Administration of Cultural Heritage (SACH) announced that henceforth all items sold by Christie's would require additional paperwork detailing the object's ownership and provenance before entering or leaving China.²³ This new restriction could severely damage Christie's operations in Hong Kong and also provide a boon to rival art auctioneers such as Sotheby's.²⁴

On February 25, the two heads were sold to an unidentified phone bidder for €15.75 million (\$20.12 million), nearly \$10 million above Christie's initial estimate. The winner, Cai Mingchao, was an advisor for the quasi-governmental National Treasure Funds of China (NTFC),²⁵ who upon revealing himself as the top bidder announced that neither he nor his organization had any intention of paying for the decorative spouts. Cai described the guerilla bidding tactic as a patriotic effort to halt the sale of the objects "on behalf of the Chinese people,"²⁶ risking his reputation as an antiques collector and potentially incurring future legal action against him by Christie's.²⁷ While preventing an easy sale of the castings, Cai

¹⁸ *Id.*

¹⁹ Deng Shasha, *Chinese Lawyers Vow to Carry on Despite French Court Rule on Looted Bronzes*, XINHUA, Feb. 24, 2009, http://news.xinhuanet.com/english/2009-02/24/content_10886512.htm.

²⁰ Gregory Viscusi, *Saint Laurent Sale of Chinese Bronzes Can Go Ahead*, BLOOMBERG, Feb. 23, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aQjBu8z3GzBw>.

²¹ *Ruling in China-Saint Laurent Relics Row Due Late Monday*, AGENCE FRANCE-PRESSE, Feb. 23, 2009, <http://www.google.com/hostednews/afp/article/ALeqM5jWm6k1K3dxbzwG-oSeLQeHCIG8dQ>.

²² Viscusi, *supra* note 20.

²³ Lee-min Lim, *China Slaps Controls on Christie's After Bronzes Sale*, BLOOMBERG, Feb. 26, 2009, <http://www.bloomberg.com/apps/news?pid=20601080&sid=aVRJlc8zoqLk&refer=asia>.

²⁴ *Id.*

²⁵ McDonald & Vogel, *supra* note 16.

²⁶ *Chinese Bidder of Looted Sculptures Refuses to Pay*, XINHUA, Mar. 2, 2009, http://news.xinhuanet.com/english/2009-03/02/content_10927266.htm.

²⁷ It remains unclear whether Cai was working in conjunction with the Chinese government in order to sabotage the auction or if he was working independently.

may have inadvertently prolonged or prevented their return to China, edging out at least one wealthy Chinese businessman who bid €12m to repatriate the heads.²⁸

The controversy surrounding the Summer Palace bronzes reflects an unsettling development in China's efforts to use international law in order to preserve its cultural heritage. Recognizing both the calamitous effects of domestic looting of national monuments and archaeological sites on its cultural patrimony and the difficulty in enforcing domestic cultural property law, China has increasingly relied on international agreements following the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property—a multilateral treaty concluded at the United Nations Educational, Scientific and Cultural Organization in 1970 to which China acceded in 1989—in order to encourage foreign assistance in the return of stolen artifacts, often with notable success.²⁹ The severity of the internal condemnation and government retaliation that followed the Saint Laurent auction could ultimately undermine China's efforts to repatriate its cultural relics by demonstrating a willingness on the part of the Chinese government to resort to extralegal measures in order to pursue historical property far beyond the scope of current international property law.

An underlying concern in maintaining an atmosphere amenable to international cooperation in preventing the illicit trade in art is the tendency on the part of many artifact-originating “source” nations to employ rhetorical strategies to portray contemporary pillage as an external problem. This tendency is in part due to the structural burden the 1970 UNESCO Convention places on art-consuming states to police their imports, but its emotional appeal is indicative primarily of the lingering memory of Western imperial and modern nationalist movements. In considering the impact of international agreements intended to curtail the illicit trade in Chinese cultural relics on domestic cultural property protection in China, it is apparent that the memory of Western plunder not only draws attention away from China's current responsibility in preserving its antiquities and archaeological sites, but also characterizes the Western exploitation of China's national treasures during the 19th century as an ongoing phenomenon.

²⁸ Caveat Venditor, *The Yves Saint Laurent Sale*, *ECONOMIST*, Mar. 5, 2009, available at http://www.economist.com/books/displaystory.cfm?story_id=13226433.

²⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, United Nations Educational, Scientific and Cultural Organization, Nov. 14, 1970, 823 U.N.T.S. 231, [hereinafter 1970 UNESCO Convention]. See also David Murphy, *The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?*, 3 INT'L J. CULTURAL PROP. 227, 230 (1994).

This note is the first effort to evaluate the 2009 Memorandum of Understanding between China and the United States, considering the potential impact of this agreement on cultural property protection in China in light of a growing consciousness of both what China has lost in its opening to the West and what still remains to be preserved and discovered.³⁰ Part I will provide a brief background on the 1970 UNESCO Convention, the primary international agreement relating to the illicit trade of cultural property. Part II will discuss the implementation of the Convention in the United States through the 1983 Cultural Property Implementation Act, which set forth procedures by which the president may form bilateral agreements for the protection of cultural property abroad through the use of U.S. customs restrictions. Part III will focus on the most recent development in the international protection of Chinese cultural property, the U.S.-China MOU, which provides blanket import restrictions on unauthorized Chinese antiquities originating during or before the end of the Tang Dynasty (907 CE) and monumental sculptures and wall art at least 250 years old. It will begin with a discussion about the intense debate surrounding China's initial proposal in 2004, and conclude with a detailed analysis of current terms of the agreement. Within this analysis will be a discussion of the potential each condition has for encouraging development of domestic art protection within China in light of current developments and aforementioned concerns. It will conclude with a discussion of domestic responses to the Yves Saint Laurent auction, the potential it shows for cooperation, and the risks it may raise for developing a national program for the protection of China's cultural patrimony.

II. 1970 UNESCO CONVENTION

Of the international agreements relating to the protection of international cultural property, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property is the most influential,³¹ having found the most support among major art-importing nations.³² This section will

³⁰ Memorandum of Understanding Concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period through the Tang Dynasty and Monumental Sculpture and Wall Art at Least 250 Years Old, U.S.-P.R.C., Jan. 14, 2009, <http://culturalheritage.state.gov/ch2009MOU.pdf> [hereinafter U.S.-China MOU].

³¹ 1970 UNESCO Convention, *supra* note 29.

³² See generally PATRICK J. O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC (Institute of Art and Law 1970) (providing a detailed overview and analysis of the UNESCO provisions); Kate Fitz Gibbon, *Chronology of Cultural Property Legislation*, in WHO

briefly consider the relevant history of the Convention before discussing recent improvements in market state participation in the agreement.

The 1970 UNESCO Convention is the most prominent of several initiatives in the wake of World War II to foster a cooperative atmosphere for the protection of the world's cultural patrimony.³³ Identifying the illicit trade in cultural property as a key cause in "the impoverishment of the cultural heritage" of artifact-originating "source" nations,³⁴ the Convention is aimed at deterring the international exchange of stolen artifacts by encouraging market nations to regulate their importation. Signatory countries agreed to prohibit the import of "cultural property stolen from a museum or a religious or secular public monument or similar institution" of any other member state,³⁵ and to "take appropriate steps to recover and return" such cultural property at the request of the state of origin, which would be responsible for bearing the costs of repatriation.³⁶ The Convention requires signatories to take necessary measures to prevent museums and other similar institutions from acquiring cultural property illegally exported from other signatory states.³⁷ The burden of documenting cultural property consistent with the definitions in Article I³⁸ rests with the state requesting repatriation.³⁹

To date, 118 countries have ratified the Convention. Among these are several of the major international art markets, including the U.S. (1972), Canada (1978), France (1997), Japan (2002) and the United Kingdom (2002).⁴⁰ While states with substantial cultural property resources were quick to ratify the Convention, the delay on the part of art consuming nations was symptomatic of a reluctance to enforce the export laws of other

OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW, (Kate Fitz Gibbon ed., Rutgers University Press 2005).

³³ The first of these was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Agreements aimed at civil protection include the 1996 European Convention on the Protection of Archaeological Heritage; the 1985 European Convention on Offences Relating to Cultural Property; the 1976 Convention on Protection of Archaeological, Historical and Artistic Patrimony of the American Nations (Convention of San Salvador); and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

³⁴ 1970 UNESCO Convention, *supra* note 29, art. 2.

³⁵ *Id.* art. 7(b)(1).

³⁶ *Id.* art. 7(b)(2).

³⁷ *Id.* art. 7(a).

³⁸ *Id.* art. I ("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" The definition is further specified in the subsections within art. I).

³⁹ *Id.* art. 6.

⁴⁰ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, United Nations Educational, Scientific and Cultural Organization, Nov. 14, 1970, <http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha> (listing signatories to the 1970 UNESCO Convention).

nations, particularly when other market states had refused to do so. The Convention's hortatory language gave exporting states significant leeway in determining what cultural property it would restrict, contributing to concerns that source nation laws would be highly subjective and potentially over-retentive.⁴¹ Nevertheless, the Convention may have appealed to countries such as France, Japan and the United Kingdom, which recently ratified the agreement, perhaps as a softer alternative to the more recent Convention on Stolen or Illegally Exported Cultural Objects, developed in 1995 by the International Institute for the Unification of Private Law as a supplement to the UNESCO Convention.⁴² The UNIDROIT Convention would require the restitution of stolen or illegally exported objects to their countries of origin,⁴³ with potential payment of "fair and reasonable compensation" to good-faith possessors who "neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."⁴⁴ To date, France is the only major art market to sign the UNIDROIT Convention (at its adoption in Rome, 1995), and no significant markets have ratified it.⁴⁵

As John Henry Merryman points out in "Two Ways Of Thinking About Cultural Property," there are dual strategies for the preservation of antiquities and archaeological sites.⁴⁶ The dominant approach is that of the 1970 UNESCO Convention, which he describes as "cultural nationalism."⁴⁷ The primary concern of this approach is the de-contextualization of cultural property.⁴⁸ This problem is manifested in at least two ways: historical and archaeological alarm about the destruction and removal of cultural property and more organic misgivings about the entitlement of modern nations to control access to materials created within their borders.⁴⁹ A particular issue for Merryman is the tendency for retentionist approaches to cultural property to "further legitimize questionable nationalist policies while stifling cultural internationalism."⁵⁰

⁴¹ J. David Murphy, *The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?* 3 INT'L J. OF CULTURAL PROP. 227, 232-33 (1994).

⁴² Convention on Stolen or Illegally Exported Cultural Objects, International Institute for the Unification of Private Law (UNIDROIT), June 24, 1995, 34 I.L.M. 1330 [hereinafter UNIDROIT Convention].

⁴³ *Id.* art. 1.

⁴⁴ *Id.* art. 4.

⁴⁵ UNIDROIT Convention, <http://www.unidroit.org/english/implement/i-95.pdf> (listing signatures, ratifications and accessions of parties to the treaty).

⁴⁶ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986).

⁴⁷ *Id.* at 842.

⁴⁸ *Id.* at 844.

⁴⁹ *Id.* at 846.

⁵⁰ *Id.* at 850.

In contrast, “cultural internationalism,” embodied in agreements such as the 1954 Hague Convention, privileges preservation over context. The rationale for cultural protection is based on the risk of collective loss, as illustrated in the Hague Convention’s preamble: “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.”⁵¹ A particular concern that Merryman outlines is the problem of “destructive retention” or “covetous neglect,”⁵² which may occur when a source nation lacks capacity to adequately preserve a site or artifact, but would prefer degradation to possible risks associated with expatriation.⁵³

While by adopting the 1970 UNESCO Convention the United States can be understood to have endorsed a culturally nationalist approach for attempting to curb the trade in illicit property, it is clear from the debate surrounding the Convention’s implementation that both approaches to the protection of cultural patrimony have strong voices in the domestic debate. In this process a number of valid, though at times competing, goals have been articulated: “the prevention of pillage of sites, protection of the most significant and essential aspects of national patrimony, maintaining a link between art and its geographical-historical milieu, preservation, both domestic and international display and education, fostering of reciprocal trade, and avoidance of over-extending customs regimes beyond any realistic prospect of enforcement.”⁵⁴ In the following section, this note will discuss the particular concerns of the United States in implementing the Convention and the process for forming bilateral agreements with source nations.

III. CULTURAL PROPERTY PROTECTION IN THE UNITED STATES

Despite its involvement in the drafting of the 1970 UNESCO Convention and early willingness to sign the agreement, the U.S. Congress did not pass the necessary legislation to implement the Convention until 1983. This delay has been attributed to pressure from domestic art dealers who questioned the efficacy of implementing unilateral import controls where illicit goods could simply be diverted to other major markets that

⁵¹ *Id.* at 836.

⁵² *Id.* at 846.

⁵³ *Id.*

⁵⁴ Murphy, *supra* note 41.

were not yet signatories of the UNESCO Convention.⁵⁵ The final piece of legislation, known as the Cultural Property Implementation Act,⁵⁶ was an effort to “balance the competing goals of archaeologists, anthropologists, academics, art collectors and museums, and government agencies,”⁵⁷ reflecting a reluctance to enforce foreign export restrictions absent a demonstration of good faith effort on the part of source countries to protect their cultural patrimony. The CPIA had the additional benefit of clarifying for U.S. customs agents the limits of the domestic enforcement of foreign export laws, removing confusion about the applicability of the National Stolen Property Act and related unnecessary seizures.⁵⁸

The CPIA mandates the return of illegally exported property⁵⁹ only when the source is previously documented⁶⁰ and determined to be stolen from the inventory of a museum, public monument (religious or secular) or something comparable,⁶¹ or if the United States has a bilateral agreement with the source nation, in which case enforcement is contingent on the risk of pillage and the extent of the source country’s own internal efforts to protect its cultural heritage.⁶² In order to establish a bilateral agreement, the CPIA requires source nations to submit a request for U.S. assistance. The request must demonstrate that (1) the source nation’s cultural patrimony is in jeopardy from domestic pillage;⁶³ (2) it has taken measures to protect its cultural patrimony consistent with the 1970 UNESCO Convention;⁶⁴ (3) it has pursued similar agreements with other market nations or any other countries that would “be of substantial benefit in deterring a serious situation of pillage”;⁶⁵ and that (4) means less drastic than import restrictions are not available.⁶⁶ The CPIA also includes a provision for the implementation of emergency import restrictions in situations where the material is (1) a newly discovered type that is important

⁵⁵ Barbara T. Hoffman, *International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective*, in ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 157, 160 (Barbara T. Hoffman ed., 2006).

⁵⁶ Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (2006) [hereinafter CPIA].

⁵⁷ Hoffman, *supra* note 55.

⁵⁸ National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (2006) [hereinafter NSPA]. The act imposes criminal liability for “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.” 18 U.S.C. § 2314.

⁵⁹ 19 U.S.C. § 2601 (definition of illegally exported property).

⁶⁰ 19 U.S.C. § 2610(2)(a).

⁶¹ *Id.*

⁶² 19 U.S.C. § 2601(2)(c)(ii)(II).

⁶³ 19 U.S.C. § 2602(a)(1)(A).

⁶⁴ 19 U.S.C. § 2602(a)(1)(B).

⁶⁵ 19 U.S.C. § 2602(a)(1)(C)(i).

⁶⁶ *Id.*

for understanding the history of mankind and in “jeopardy from pillage, dismantling, dispersal, or fragmentation”; (2) comes from specific sites of high cultural significance, where the looting is or threatens to be “of crisis proportions”; or (3) remains of a culture or civilization for which the temporary application of import restrictions in the U.S would in whole or in part substantially reduce the incentive for pillage.⁶⁷

Requests for assistance are considered by the Cultural Property Advisory Committee (CPAC), a group of eleven private citizens elected by the President to represent U.S. interests in the fight against illicit trade in antiquities and ethnographic materials. In an effort to adequately represent public and private interests in cultural property heritage, the CPIA mandates that the board consist of two members representing museums, three experts in fields related to anthropology and archaeology, three members who are experts in the international sale of cultural property, and three members representing the general public.⁶⁸ The term lengths for CPAC members are staggered and varied, though members are eligible for reappointment.⁶⁹ The CPAC is responsible for investigating and recommending applicant states to the U.S. Department of State for the purposes of creating bilateral agreements as well as for considering proposals to extend already existing protections.⁷⁰ The United States currently has bilateral agreements with thirteen countries.⁷¹ The majority of these agreements were initiated as emergency actions that later developed into Memoranda of Understanding (MOUs). This was the case for El Salvador (1987), Bolivia (1989), Peru (1990), Guatemala (1991), Mali (1993), Cyprus (1999) and Cambodia (1999). Only one agreement, a controversial MOU with Canada, has been allowed to expire.⁷²

It is important to note that the CPIA is not the only avenue available to those seeking to reclaim cultural property illegally trafficked into the United States. While it is true that the United States will only conditionally support foreign export laws, artifacts imported in violation of domestic import restrictions also risk seizure under forfeiture statutes.⁷³ The Na-

⁶⁷ 19 U.S.C. § 2603(a).

⁶⁸ 19 U.S.C. § 2605(b)(1).

⁶⁹ 19 U.S.C. § 2605(b)(3)(A).

⁷⁰ 19 U.S.C. § 2605(f).

⁷¹ These are Bolivia, Cambodia, China, Colombia, Cyprus, El Salvador, Guatemala, Honduras, Iraq, Italy, Mali, Nicaragua, and Peru. See U.S. DEP'T OF STATE, INTERNATIONAL CULTURAL PROPERTY PROTECTION, U.S. RESPONSE - IMPLEMENTATION, <http://culturalheritage.state.gov/implement.html>.

⁷² Hoffman, *supra* note 55, at 161. The controversy surrounded allegations that the CPIA is biased in favor of source nations.

⁷³ See, e.g., *United States v. Portrait of Wally*, 105 F.Supp.2d 288 (S.D.N.Y. 2000) (referencing 19 U.S.C. § 1595a(c) and 22 U.S.C. § 401(a) (“goods must be forfeited if they were brought into the United States illegally, or if they are to be removed from the United States illegally”)).

tional Stolen Property Act has served as the primary means of retrieving stolen property in the U.S. outside of the CPIA.⁷⁴

In *United States v. McClain* (known as *McClain I*) the NSPA,⁷⁵ which prohibits the transportation of stolen goods in foreign commerce, was found to apply not only to goods stolen under the meaning of the common law, but also goods made national property under clear and valid patrimony laws. In *McClain I* the defendants were found guilty of conspiring to transport pre-Columbian artifacts, which are considered national property under Mexican law.⁷⁶ The court's recognition of the nationalization of undiscovered cultural property as creating an enforceable ownership interest came to be known as the McClain Doctrine, and was vigorously affirmed in *United States v. Schultz*, which found that the CPIA did not bar criminal prosecution under the NSPA.⁷⁷ In *Schultz*, the defendant was found guilty of participating in a conspiracy to smuggle artifacts outside of Egypt in violation of a domestic law that categorized all antiquities found in Egypt after 1983 to be national property.⁷⁸ The risk of criminal liability for trading objects considered illegal for export by foreign law created a great deal of anxiety for institutions involved in international art trade.⁷⁹

IV. THE 2009 MEMORANDUM OF UNDERSTANDING BETWEEN CHINA AND THE U.S.

On January 14, 2009 China and the United States signed a Memorandum of Understanding to restrict U.S. imports of Chinese antiquities dating from the Paleolithic Period to the end of the Tang Dynasty (907 CE) and monumental Chinese sculpture and wall art that is at least 250 years old.⁸⁰ As described in the Federal Register Notice,⁸¹ restricted materials include metal, ceramic, stone, textiles, other organic material, glass and paintings. The MOU will be in effect for the next five years, with an op-

⁷⁴ NSPA, *supra* note 58.

⁷⁵ *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

⁷⁶ *Id.*

⁷⁷ *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

⁷⁸ *Id.*

⁷⁹ These laws have proven problematic to enforce at times. *See, e.g., Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989) (Peru could not establish a case that the goods in question, absent a known site of looting, were excavated in modern day Peru, originating perhaps instead in Colombia, Ecuador or Mexico. Their case was further compromised by frequently changing and vague laws nationalizing undiscovered property.).

⁸⁰ U.S.-China MOU, *supra* note 30, at art. I.

⁸¹ Import Restrictions Imposed on Certain Archaeological Material from China, 19 C.F.R. § 12.2838 (2009).

tion for renewal.

The current bilateral agreement differs substantially from China's initial request for U.S. support of its cultural patrimony. The 2004 request originally sought to prevent U.S. import of all objects manufactured in China through the end of the Qing dynasty (1911).⁸² This request was far beyond the 250 years mandated by the CPIA, and was in large part even broader than the most generous definitions of cultural property outlined in the 1970 UNESCO Convention itself. The over-inclusiveness of the 2004 request, which if implemented would have effectively destroyed the licit Chinese antiquities market in the United States, is undoubtedly a contributing factor to the CPAC's significant delay in reaching a decision to form an agreement with China.

A. The Debate Surrounding China's Candidacy for a Bilateral Agreement

While much of the art world appeared sympathetic to China's problems protecting its heritage, some commentators were unconvinced that China had taken the requisite steps to preserve its cultural patrimony to meet the statutory requirements of the CPIA or that U.S. import restrictions would significantly impact the international trade in looted goods. In many ways, commentators were divided by their professional relationships with the cultural property in question, with archaeologists, art historians and anthropologists favoring trade restrictions and auction houses, private collectors, art dealers and curators against embargoes of cultural property. This section synthesizes arguments on both sides of the U.S. decision to sign a bilateral agreement with China.

1. The Appropriateness of Embargo

Much has been written both for and against the strategy of implementing embargoes on the export of cultural property. Those in favor are frequently site researchers such as archaeologists, who stress the need to protect sites in their totality in order to analyze artifacts *in situ*. Their arguments are supported by statistics indicating the widespread destruction of heritage sites, lending themselves to a sense of crisis and urgency. Ultimately, the decision to undertake embargo legislation requires source nations to balance a number of domestic concerns, among them "the cultural, historic or ethnological value of the relic[s]; archaeological consid-

⁸² U.S. DEP'T OF STATE, 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://culturalheritage.state.gov/cn04sum.html> [hereinafter Public Summary Request].

erations, such as preventing the unscholarly destruction of the only records of a civilization; preservation of the integrity of the work and its physical safety, such as from vandalism; the economic interests—the benefits for the national economy from regulated sales or, alternatively, tourism; local artistic interest; and nationalistic hoarding instincts.”⁸³

Arguments in favor of embargo often take a reductionist approach, linking demand on the part of acquirers of cultural property directly to the looting of archaeological sites, with the accompanying loss of historical data.⁸⁴ Merryman notes the position of archaeologists often aligns with overly retentive domestic legislation on the part of source nations, thereby “reinforcing exaggerated cultural nationalism, excessive source nation retentionism and the atmosphere of sentimentality, romance and rhetoric that sustains them.” Professor Bator, writing before the CPIA, supports Merryman’s assertions: “the endemic habit in the art-rich countries of regulating by over-inclusive and under-enforceable export barriers on all antiquities and archaeological artifacts has created a regressive and rigid climate which deters realistic, sensible, and effective measures of reform. This climate perpetuates the false ideal that all art should stay at home (even if properly excavated and not the product of recent looting), and that it is wrong and unpatriotic to allow and even to encourage some art freely to travel abroad. It creates false expectations that perfect enforcement is attainable.”⁸⁵ The ultimate effect of this rhetoric, according to Merryman, is that further efforts to increase the supply of licit antiquities are stunted alongside any attempts to enhance the quality of discussions about cultural property.⁸⁶

Arguments against embargo approaches highlight that such measures are often ineffective in preventing illegal export, and instead channel goods into the black market.⁸⁷ As Murphy notes, “embargo or retention legislation is toothless, absent the resources to enforce the laws, and meaningless unless there exist the means to preserve, catalogue and display the relics that the state means to protect.” This problem can be exacerbated by corrupt domestic officials, who may oppose domestic legislation supporting the development of licit export in order to continue receiving bribes from black market traders.⁸⁸ In light of limited resources for domestic institutions to preserve and catalogue artifacts as they are discovered and for public museums to acquire them for display to the public, the

⁸³ Murphy, *supra* note 41.

⁸⁴ John Henry Merryman, *Archaeologists Are Not Helping*, THE ART NEWSPAPER, Jan. 1996, at 26.

⁸⁵ Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 326 (1982).

⁸⁶ JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 228 (Kluwer Law International 5th ed. 2007).

⁸⁷ Murphy, *supra* note 41, at 234.

⁸⁸ *Id.* at 233.

risk for destructive retention in source nations is particularly high.⁸⁹ Critics of pro-retention policies also question the validity of arguments on the part of archaeologists regarding the exceptionalism of sites and artifacts, encouraging the licit trade of duplicates and contemplating the potential of using the national sale of domestic cultural property to protect the objects and sites it considers most essential to its cultural patrimony.⁹⁰

2. China's Decision to Target the U.S. Market

The concerns surrounding the efficacy of implementing a unilateral import restriction on cultural property that were present at the signing of the 1970 Convention and apparent in § 2602 of the CPIA resurfaced with China's proposal to the U.S., which, despite detailing China's increased participation in international agreements for the protection of cultural property, appears to have avoided altogether any mention of agreements with other art consuming nations.⁹¹ Supporters of the agreement such as Patty Gerstenblith, President of the Lawyers' Committee for Cultural Heritage Preservation, argue this omission stems from the potential for already existent import restrictions in art-consuming countries. Such restrictions include the United Kingdom's criminalization of dealing in artifacts excavated contrary to domestic law (comparable with the National Stolen Property Act in the United States) and import bans in Australia and Canada on all objects illegally exported.⁹² It is clear, however, that these measures, while in the spirit of reducing the international trade in illicit cultural goods, are less comprehensive than the Chinese government's requested import restrictions to the United States. If China has chosen to primarily target the United States to the exclusion of other markets, the decision may cast doubt on China's seriousness in pursuing an embargo method of protecting its cultural patrimony.

Gerstenblith also points to the emergency provisions outlined in the CPIA, which allows for implementing import restrictions where they have the potential to significantly reduce the problem of pillage without the requirement that similar agreements be made with art-consuming countries.⁹³ However, it is not apparent that the U.S market for Chinese antiquities is substantial enough to justify an emergency agreement. The United States falls far behind in other art consuming nations in the pur-

⁸⁹ *Id.*

⁹⁰ *Id.* at 235.

⁹¹ Public Summary Request, *supra* note 82.

⁹² Letter from Patty Gerstenblith, President of the Lawyers' Committee for Cultural Heritage Preservation, to Jay Kislak, Chair of the Cultural Property Advisory Committee (Feb. 4, 2005) (on file with the author).

⁹³ *Id.*

chase of Chinese art, specifically France, Great Britain, Japan, South Korea, and China itself. Of the \$224 million Sotheby's and Christie's made in international sales of Chinese art in 2004, the year of the request, only \$34 million (roughly 15%) was purchased in the United States.⁹⁴ Critics of the China agreement point to the overwhelming success of domestic Chinese auction houses, made legal only as recently as 2004, which that same year sold \$680 million in Chinese art.⁹⁵ While it is ultimately hard to determine if a greater portion of the Chinese antiquities market ultimately is destined for the United States, arguments that a U.S. embargo would have minimal impact on the black market for Chinese art support critical assertions that such trade restrictions may have a substantial and long-lasting effect on the U.S., denying its museums "access to Chinese art that circulates freely elsewhere," damaging the art trade, and denying access to the "great cultural heritage shared by millions of Chinese Americans."⁹⁶

3. Domestic Efforts to Protect China's Cultural Heritage

While pillage is often identified as the main problem for China's cultural heritage protection, privileging economic development over preservation also poses a significant threat.⁹⁷ While some of the 400,000 estimated undiscovered archaeological sites are discovered and raided by smugglers, a great many more are unearthed by building and road construction.⁹⁸ Perhaps the most visible example of China's improving infrastructure trumping the interests of archaeologists and preservationists is the Three Gorges Dam project, which unearthed some 2,500 archaeological sites, only a fraction of the tens of thousands of tombs believed to now be submerged.⁹⁹

Efforts to protect discovered heritage sites are notoriously underfunded. This has led to a rise in the theft of relics not only from archaeological sites but also state owned museum collections, where inventories are often incomplete, security is lax, and museum workers are both under-

⁹⁴ Critics add that when taken together, U.S. consumption is less than 4%. Of course, a great deal of Chinese art could be bought abroad and ultimately imported. Randy Kennedy, *China's Request for Art-Import Ban Stirs Debate*, N.Y. TIMES, Apr. 1, 2005, at E31.

⁹⁵ Ashton Hawkins and Kate Fitz Gibbon, *In the Fray: This Property Claim Should Be Condemned*, WALL ST. J., Mar. 26, 2006, at D6.

⁹⁶ *Id.*

⁹⁷ James J. Lally, Panel Discussion at the Asia Society of New York City: China and Cultural Property, Who Owns the Past? (Apr. 3, 2006) (on file with author).

⁹⁸ Huang Kezhong, *An Overview of Protection of Grottoes in China*, in CONSERVATION OF ANCIENT SITES ON THE SILK ROAD (Dinah Berland ed., 1997).

⁹⁹ Hawkins and Gibbon, *supra* note 94.

trained and underpaid.¹⁰⁰ The boom in domestic tourism primarily among Chinese nationals has also led to significant damage to historic sites, owing to a lack of institutional capacity to meet the newfound demand.¹⁰¹

Particularly disconcerting to critics of China's efforts to preserve its own cultural patrimony is the continued smuggling of looted artifacts from China into the Hong Kong Special Administrative Region.¹⁰² Citing general success in China's ability to restrict other goods from leaving its borders,¹⁰³ the presumed unwillingness to restrict trade in stolen goods has come to be understood as symptomatic of internal corruption on the part of customs officials¹⁰⁴ or a lack of commitment to curbing the black market for Chinese antiquities.¹⁰⁵

Nevertheless, pillage and illegal export does appear to be a valid problem in China. This is in part due to a lack of resources to dedicate to the problem. As Wang Li Mei, General Secretary of the State Administration of Cultural Heritage in Beijing notes, officials in the business of cultural property protection do not match the level of organization of looters, adding that "in terms of the equipment and facilities at their disposal, [Chinese] relics workers in many ways are not at the level of the grave robbers."¹⁰⁶

B. *The Terms of the U.S.-China MOU*

In its final form, the bilateral agreement with China addresses many of the concerns outlined in the debate regarding its implementation. The agreed upon terms of the MOU will be detailed below, with particular attention to the potential for improvement in the domestic protection of Chinese cultural patrimony.

1. Education and Training

In the spirit of the 1970 UNESCO Convention, the MOU includes a requirement that China "educate its citizens about the long term importance of safeguarding its rich cultural heritage and that of other coun-

¹⁰⁰ 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, 72 (2004).

¹⁰¹ *Id.*

¹⁰² Lally, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ Magnus Fiskesjo, Panel Discussion at the Asia Society of New York City: China and Cultural Property, Who Owns the Past? (Apr. 3, 2006).

¹⁰⁵ *Id.*

¹⁰⁶ Wang Li Mei, General Secretary, State Administration of Cultural Heritage, Remarks at the Cultural Property Forum at the Japan Society of New York: The Export Policies of China, Korea and Japan (Apr. 9, 2003).

tries”¹⁰⁷ and make broad efforts to publicize the agreement nationally.¹⁰⁸ The importance of popular education regarding the problem of cultural property preservation is particularly great in China, where archaeological sites are often first unearthed by farmers and construction workers, who are potentially unaware of what they have uncovered. Chinese law includes provisions for “appropriate moral encouragement or material awards” for citizens who implement policies, protect and save archaeological relics, fight looting and donate privately owned relics to the state.¹⁰⁹ Those who do support the effort to preserve China’s heritage often receive approving publicity in the local press, as was the case of five farmers who discovered twenty-seven rare and tremendously significant bronze pieces in a 2000-year-old tomb on a hillside.¹¹⁰ Reporting the find to local authorities, who quickly excavated the site, the farmers were ultimately allowed to cut the ribbon to the opening of the exhibition of the bronzes in Beijing.¹¹¹ While it appears that in practice there is little financial incentive to turn over such finds to authorities, improvements in publicity for efforts to protect cultural property and advertising the loss of a potential foreign market for looted goods offers some promise in the fight against plunder.

2. Protection of Domestic Sites

Recognizing the problems associated with the lack of domestic funding for site protection, China has agreed to use its “best efforts to increase funding and professional resources” to protect its cultural heritage.¹¹² In 2004, China announced that it increased its central allotment for cultural preservation from 50 to 130 million RMB,¹¹³ and that local governments were making similar contributions in this spirit.¹¹⁴

As a vast amount of China’s cultural patrimony has yet to be unearthed, the MOU includes a provision requiring China to use its best efforts to “make use of surface surveys in order to inventory sites, and to broaden archaeological research and enhance public awareness of its importance.”¹¹⁵ While such cataloguing would be a Herculean task, it is an

¹⁰⁷ U.S.-China MOU, *supra* note 30, art. II § 2.

¹⁰⁸ *Id.* at art. II § 2.

¹⁰⁹ 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, 206 (2000).

¹¹⁰ Wang, *supra* note 106.

¹¹¹ *Id.*

¹¹² U.S.-China MOU, *supra* note 30, art. II § 4.

¹¹³ EMBASSY OF THE P.R.C., PRESERVATION OF CULTURAL RELICS (Oct. 27, 2004), <http://www.fmprc.gov.cn/ce/cenp/eng/Culture/wh/t167622.htm>.

¹¹⁴ *Id.*

¹¹⁵ U.S.-China MOU, *supra* note 30, art. II § 3.

important step in improving domestic protection and identifying opportunities for scientific and archaeological exchange. Knowledge of sites of potential looting may also prove instrumental in implementing protection of China's relics abroad, avoiding conflicts in source attribution and facilitating 1970 UNESCO Convention style claims in signatory countries that have not undertaken blanket import restrictions.

In an attempt to supplement China's domestic efforts, the United States commits to provide technical assistance to the Chinese government for such projects as "creating a national preservation strategy, improving rescue archaeology, stabilizing and restoring sites/buildings, enhancing the capacity of museums to preserve and exhibit collections, and strengthening regulation of the 'cultural relics' market."¹¹⁶

3. Export Restrictions

The bilateral agreement expressly confirms that China commits to improving the effectiveness of its customs officials in identifying Chinese archaeological material and preventing its export.¹¹⁷ The United States, in addition to agreeing to similarly instruct its own officials, agrees where appropriate to assist China in training its own officers.¹¹⁸ One positive development here is a demonstration on the part of the Chinese to work with other source nations to train and implement effective strategies. For example, in 2006 China and Italy signed a treaty allowing for the establishment of a new task force of Chinese special agents who would receive training from the Italian military police in new methods of identifying and tracking cultural artifacts.¹¹⁹

Hong Kong and nearby Guangzhou are the primary destinations for illicit Chinese antiquities before they are sent abroad,¹²⁰ owing to the presence of British rule and its different standard of regulation following its handover to China and the establishment of a Special Administrative Region. Recognizing this vulnerability in its ability to restrict its own exports, China commits to make every effort to prevent looted or stolen property from leaving the mainland to enter the Hong Kong and Macao Special Administrative Regions. By curtailing the flow of illicit goods from these areas, China would satisfy a great deal of skepticism regarding its willingness to reduce its black market trade, demonstrating a commitment against allowing private individuals to profit from looting.

¹¹⁶ *Id.* at art. II § 3.

¹¹⁷ *Id.* at art. II § 5.

¹¹⁸ *Id.*

¹¹⁹ Howard French, *Saving Chinese Artifacts: A Slow Fight*, N.Y. TIMES, Apr. 1, 2006, at B9.

¹²⁰ Dutra, *supra* note 100.

Wary of outright embargos on cultural property, the MOU includes a clause encouraging China to "continue to license the sale and export of certain antiquities as provided by law and will explore ways to make more of these objects available licitly."¹²¹ Similarly, China will be required to regulate its own internal market for antiquities in a manner that will recognize its newfound status as an art-consuming country.¹²²

While China has nationalized all as of yet undiscovered cultural relics, in recent years it has made allowances for private ownership of relics. The 2002 Relics Law modified the 1982 legislation and explicitly permits the private ownership and collection of cultural relics. This includes the right to inherit and gift antiquities, purchase relics from state-owned relic shops, purchase relics offered for auction (auction houses were made legal in China only in 2002), or exchange with other private citizens.¹²³ The right to alienate property depends on the grading of the relic. China distinguishes between two types of relics, precious and ordinary. Precious relics are graded according to their significance: Type I relics are considered *especially* important historically, archaeologically or scientifically; Type II are "important"; Type III are "relatively important."¹²⁴ Ordinary relics are understood to be "of certain value."¹²⁵ China has received heavy criticism for the obvious vagueness of its grading policy, which determines whether an item is available for international exchange or private ownership,¹²⁶ as well as the severity of criminal punishment for their illicit trade.¹²⁷ In 2001, China made efforts to rectify the ambiguity, providing detailed descriptions of jade ware, stone artifacts, pottery and Chinese porcelain, but only for Type I artifacts.¹²⁸ The state is given first right of refusal to all objects deemed rare or precious before they can be exchanged.¹²⁹

Unfortunately, Chinese law is currently contrary to the demand that China make greater efforts to encourage the export of licit antiquities. While "ordinary" objects are approved for export, "precious" relics are not, an export restriction that has frequently been criticized for its ambiguity and over breadth. The 2002 law listed eighty articles of antiquities

¹²¹ U.S.-China MOU, *supra* note 30, at art. II § 9.

¹²² *Id.* at art. II § 11.

¹²³ 中华人民共和国文物保护法 [People's Republic Of China Law On The Protection Of Cultural Relics], (promulgated by the Nat'l People's Cong. Oct. 28, 2002, effective Oct. 28, 2002) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

¹²⁴ *Id.* See also Dutra, *supra* note 100, at 87.

¹²⁵ P.R.C. Law On The Protection Of Cultural Relics, *supra* note 123.

¹²⁶ *Id.*

¹²⁷ Such punishments include the death penalty and imprisonment.

¹²⁸ P.R.C. Law On The Protection Of Cultural Relics, *supra* note 123.

¹²⁹ Wang Li Mei, *supra* note 106.

that by virtue of state ownership or rarity would not be allowed to leave China, but permitted their display abroad for up to twelve months at a time.¹³⁰ This may substantially hinder efforts to promote exchanges between China and U.S. museums, as described below.

4. Exchange Among Public Educational Institutions

Particularly promising in the MOU is the segment encouraging the international interchange of Chinese cultural property for cultural, educational and scientific purposes, acknowledging for example the potential of “long-term loans of archaeological objects of significant interest to a broad cross-section of American museums for public exhibition, education, and research purposes”¹³¹ as a valuable, temporary and legal way to share China’s significant cultural heritage with the United States.¹³² This is particularly important in light of a mutual commitment to prevent both U.S. and Chinese museums from acquiring or exhibiting materials covered by the MOU that are looted and illegally exported from China.¹³³

One mutually beneficial aspect of the agreement is the commitment to increase institution-to-institution collaboration in fields related to Chinese cultural property¹³⁴ and the “exchange of students and professionals in such fields as archaeology, art history, conservation, museum curatorial practices, and cultural heritage management.”¹³⁵ A related commitment on the part of the Chinese government to facilitate the granting of permits to conduct archaeological research in China, beyond aiding in domestic efforts to catalogue its cultural patrimony, may help academics and researchers procure additional funds in the form of grants and fellowships to preserve important archaeological sites.

5. International Support

As mentioned above, the CPIA requires a demonstration on the part of source nations that they have established or will be establishing concurrently agreements with other art-importing nations to restrict the trade of looted antiquities. Interestingly, in the determinations section of the Federal Register Notice, which sets forth the findings of the Assistant Secretary for Educational and Cultural Affairs for the Department of

¹³⁰ *Id.*

¹³¹ U.S.-China MOU, *supra* note 30, art. II § 7(1).

¹³² *Id.*

¹³³ *Id.* at art. II § 10.

¹³⁴ *Id.* at art. II § 7(2).

¹³⁵ *Id.* at art. II § 7(3).

State, there is no discussion of similar agreements implemented or planned between China and other market countries.¹³⁶ While the MOU includes that both China and the United States agree that such additional import restrictions are necessary to sufficiently curtail the demand for illicit cultural property, the agreement reflects only a weak intention on China's behalf to "endeavor to strengthen regional cooperation within Asia for the protection of cultural patrimony" and "seek increased cooperation from other importing nations to restrict the import of looted archaeological material originating in China."¹³⁷ It is unclear why the United States did not insist upon this statutorily mandated condition. Possibilities include diplomatic concerns, a desire to foster cooperation with China to ensure continued access to its cultural property, a genuine belief that the implementation of the 1970 UNESCO convention in other market states satisfied the condition, or a conclusion that a five year import restriction on Chinese antiquities as outlined in the MOU would not substantially undermine the efforts on the part of U.S. museums and other such collectors to acquire licit goods.

V. CONCLUSION

The U.S.-China MOU may be understood as a willingness on the part of the U.S. to undertake the burden on customs officials and unwary collectors in implementing Chinese export restrictions in order to promote a culture of cooperation between the two countries in hopes of preserving ancient sites and facilitating educational exchanges in the form of museum exhibitions, shared academic initiatives, and institutional collaboration. However, considering the conditions of the agreement within the context of the current legal and economic framework in China, it is unclear if the MOU will be able to substantially curtail the trade in illicit cultural property, owing to the absence of similar agreements and the likely perpetuation of a nationalist and overly-retentive antiquities policy.

While the row over the Yves Saint Laurent auction and the debate it generated on a number of Chinese blogs indicates a strengthening national interest in China's cultural patrimony, it is not clear that the Chinese public yet understands its own potential in curtailing the black market for its heritage or its own responsibility for its destruction. In the case of China, neither the sources nor the places of consumption (in China and abroad) possess the requisite resources to prevent the pillage of archaeo-

¹³⁶ 19 U.S.C. § 2602(a)(1)(C)(i).

¹³⁷ U.S.-China MOU, *supra* note 30, at art. II § 12.

logical sites. The embargo approach risks overvaluing the effects of curbing the demand for antiquities abroad, in turn overlooking domestic consumption of cultural relics and ongoing destruction in pursuit of national interests (here the development of China's infrastructure in transportation, housing, power generation and industry).¹³⁸

The controversy surrounding the Summer Palace Bronzes is indicative as well of the sensitivities that surround discussions of cultural property. The strength of the response was in part due to the nature of the objects in question. As James Hevia notes, providing some insight into the rhetoric surrounding the discussion of looted goods, imperial objects such as the zodiac figurines are "an absent presence in a tale of loss, humiliation, and the recovery of national sovereignty,"¹³⁹ the sale of which reflects an international failure to provide a means of "addressing what are obviously understood by the descendants of victims of these events as ongoing forms of humiliation."¹⁴⁰ While the outrage felt regarding illegal plunder during a particularly humiliating national period is certainly understandable, the attempt to twist modern cultural property law to apply recent treaties retroactively and the apparent willingness on the part of the Chinese government to impose extralegal means to reach these ends leave one to wonder if China's strategy in its cultural property protection is the repatriation of long alienated goods rather than the maintenance of its as of yet undiscovered treasures.

¹³⁸ Dutra, *supra* note 100.

¹³⁹ Peter Ford, *China Protests Christie's Auction in Paris of Relics*, CHRISTIAN SCI. MONITOR, Feb. 20, 2009, at 7.

¹⁴⁰ The China Beat, James Hevia on Summer Palace Relics, <http://thechinabeat.blogspot.com/2009/02/james-hevia-on-summer-palace-relics.html> (Feb. 24, 2009).

