

HISTORICAL HEIST: AN ECONOMIC ARGUMENT AGAINST EMBARGOING CHINESE CULTURAL PROPERTY

“Art is not a mirror held up to reality, but a hammer with which to shape it.”¹

—Vladimir Mayakovsky

I. INTRODUCTION

In 2003, *Time* reported on a virulently rampant problem, touching both the silken aristocrat and the lowly peasant. A persistent threat to the memory of human civilization and yet the key to its everlasting sanctum. On a damp, portentous evening in 1997, in the center of a wheatfield, edging the crumbling villages near Luoyang in China’s Henan province, a man named Feng made a decision that would have international reverberations.²

Feng, then nineteen years old, became a tomb raider that night. After drinking sorghum spirits with a group of friends and fellow raiders, the group set out for a local wheatfield. The men quickly located what appeared to be an unmarked tomb by using a small generator to provide light in the late hour. After digging for a short while, stale air began emanating from the freshly uncovered tomb, leaving Feng nauseous yet determined to continue. At least one of the men standing nearby staggered away and promptly vomited from the stench. Feng stood over the exposed pit, staring down into the tomb’s inky depths. Just as his nerves began to falter, Feng’s uncle approached him, explaining that as the youngest of the group, Feng would have the honor of descending into the tomb on a solo reconnaissance mission—an initiation rite.³

Feng descended deep into the cavernous sepulcher using only rope as a guide. Heavy air, paralyzed by time’s stillness, blossomed through the descent. Upon reaching the floor, however, the fumes became overwhelming. Feng wallowed in the stench, gasping for air before finally fainting. Despite having to drag him out, the other raiders recovered five

1. THE MACMILLAN DICTIONARY OF QUOTATIONS 32 (1989) (citing THE GUARDIAN (London), Dec. 11, 1974).

2. Hannah Beech, *Spirited Away*, TIME (Asia Edition), Oct. 20, 2003, available at <http://www.time.com/time/asia/covers/501031020/story.html>.

3. *Id.*

ceramic Tang Dynasty animals, each worth around ten thousand dollars to Western dealers. Despite his ignominious maiden raid, Feng was paid forty-five dollars as his share of the profit. He does not know why Westerners pay so handsomely for such a dingy piece of pottery, and does not care, so long as he is paid.⁴

II. CHINA'S MIGHTY REQUEST

Feng's story is not unique. According to China's National Cultural Relics Bureau, approximately 220,000 ancient tombs in China were breached and looted between 1998 and 2003.⁵ China has an epidemic on its hands, and under its soil.

Thus, on May 27, 2004, the People's Republic of China formally requested that the U.S. Department of State restrict the importation of Chinese archaeological material from the Paleolithic period to the Qing Dynasty due to a concern that Chinese cultural heritage is under attack from pillage.⁶ The request stirred tremendous debate in the U.S. art community. It sought to render illegal the importation of certain categories of metal implements; weapons; vessels; sculpture; jewelry; pottery and porcelain vessels; architectural elements; stone implements; lacquer, bone, ivory and horn wares; and wood and bamboo objects, among others.⁷ Art dealers, museum curators, collectors, and art enthusiasts focused their attention on the State Department to see how it would manage the request.⁸ These individuals were well aware that the United States had

4. *Id.*

5. *Id.*

6. 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, *available at* <http://exchanges.state.gov/culprop/cn04sum.html> [hereinafter Public Summary]. In this public summary, the Chinese government argues that the "[p]illage of archaeological sites and smuggling of cultural artifacts . . . has become rampant in recent years despite the law enforcement efforts of the Chinese government." *Id.* The summary indicates that China has attempted to solve the problem, but is in need of U.S. assistance if there is to be any marked improvement in the situation. The summary also provides a brief history of pillage and looting in China since the mid-nineteenth century. China acknowledges the world-wide popularity and high prices of Chinese archaeological artifacts and attributes this to the illegal excavation and smuggling of cultural property. *Id.*

7. *Id.*

8. Randy Kennedy, *China's Request for Art-Import Ban Stirs Debate*, N.Y. TIMES, Apr. 1, 2005, at E31. Prominent archaeologists, preservationists, and scholars lined up to support the Chinese government, in opposition to antiquities dealers and museum officials who staunchly opposed the request. Opposition leaders argued that any change would be unfair, ineffective in preventing looting, and devastating for the art market and museums. Furthermore, they argued that the United States represents only a small part of a thriving international market for Chinese antiquities. Emphasizing the growing demand among wealthy collectors in China itself, the group argued that China has not fulfilled its obligations to protect its own cultural patrimony. *Id.*

previously approved import restrictions with nations rich in antiquities, in an attempt to curb the export of illicit cultural property. However, China's request came amid a turbo-charged international market that was aggressively collecting Chinese cultural artifacts.⁹

Procedurally, following an initial petition for U.S. import restrictions on cultural property, the Cultural Property Advisory Committee ("CPAC") is granted time to review the request.¹⁰ The Committee's findings are then passed on to a decision-maker in the State Department. This person later confers with officials in the White House and Treasury Department and makes a final decision on the import restriction.¹¹

The CPAC held a public hearing on February 17, 2005, to debate the issue,¹² then discussed it again in closed session on March 31 and April 1 of the same year.¹³ The Committee was to determine whether the Chinese request satisfied the four requirements of the U.S. legislation implementing the 1970 UNESCO Convention (the "Convention"),¹⁴ appropriately named the Convention on Cultural Property Act ("CPIA").¹⁵

9. Michael Wise, *China Urges U.S. to Embargo Import of Cultural Artifacts: A Chilling Effect*, ART & AUCTION MAG., Jan. 2006, at 28, 28–30.

10. Steven Vincent, *The Secret War of Maria Kouroupas*, ART & AUCTION MAG., Mar. 2002, at 62. Following a decade long debate, the U.S. Congress implemented numerous provisions from the 1970 UNESCO Convention. These provisions appeared in the form of the Cultural Properties Implementation Act ("CPIA"), 19 U.S.C. §§ 2601–2613 (2000), sponsored by Senators Spark Matsunaga of Hawaii and Robert Dole of Kansas. The CPAC was designed to be the first step in a process by which source nations could request U.S. bans on the importation of certain types of archaeological material from within their borders. The CPAC is composed of eleven members. These members are appointed by the President and advise the State Department when countries request art import restrictions. Under the CPIA, the CPAC is to be composed of two members representing the interests of museums; three members who are experts in the fields of archaeology, anthropology, ethnology, or related areas; three members who are experts in the international sale of archaeological, ethnological, and other cultural property; and three members who represent the general public. 19 U.S.C. § 2605.

11. Vincent, *supra* note 10, at 65. Import restrictions are enforced by U.S. Customs and Border Protection, which falls under the Department of Homeland Security. Initially, the decision-makers were members of the United States Information Agency (USIA), but in 1999, this agency was subsumed into the State Department.

12. Although the CPAC held a public debate on the issue of Chinese import restrictions, it should be noted that there was but *one* public hearing and participants' remarks were limited to five minutes each. This raised concerns among all groups, including the curators, auction houses, and dealers, as to the transparency of the State Department's deliberations. Jeremy Kahn, *U.S. Delays Rule on Limits to Chinese Art Imports*, N.Y. TIMES, Oct. 18, 2006, at E2.

13. Inbal Baum, *The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?*, 24 CARDOZO ARTS & ENT. L.J. 919, 944 (2006).

14. See 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, 236 (2005).

15. Under § 2605(f), the CPAC must undertake an investigation of the request and prepare a report noting its recommendation together with the reasons for that recommendation. These reports are to be filed with both Congress and the President.

If it were determined that the Chinese request failed to satisfy these four requirements, the request would be denied.¹⁶ If, conversely, the request were found to have satisfied the CPIA requirements, the United States would theoretically have little reason to stall the implementation of import restrictions. Thus, the heated public debate of February 17, 2005, centered on these four requirements.

Under the CPIA, the President must make the following four determinations: (1) that the cultural patrimony of the other member state is in jeopardy from the pillage of archaeological or ethnological materials of the other member state; (2) that the other member state has taken measures consistent with the Convention to protect its own cultural heritage; (3) that any import restrictions would be of substantial benefit in deterring a serious situation of pillage, and that there are no alternative, less drastic remedies than an import restriction; and (4) that import restrictions are consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.¹⁷ In short, the President must determine that cultural property is in danger, that the other state took sufficient actions to protect its cultural property, that import restrictions would be beneficial and not overly restrictive, and finally that there exists a general international interest in restricting the importation of the antiquities in question.

CPAC members were inundated with letters from both those in favor of and against import restrictions. Those opposing China's request observed that it included some categories that are not considered "archaeological" materials, are not over 250 years old, and are not normally found beneath the ground.¹⁸ Furthermore, they insisted that no other market nations have implemented similar restrictions on the importation of Chinese antiquities, a necessary requirement of the CPIA.¹⁹ The opposition also argued that

16. Vincent, *supra* note 10, at 64. Meredith Palmer worked as a cultural officer at the State Department in the 1970s with other pioneers in the cultural patrimony field. She helped develop the legal and intellectual framework for the CPIA legislation. She says of the people who crafted the CPIA legislation, "we took great pains to ensure that any law based on the UNESCO Convention reflected the broad interests of the American people." *Id.* Later, she notes, "we had no intention of giving foreign nations a blank check to demand blanket protections." *Id.*

17. 19 U.S.C. § 2602(a)(1).

18. William G. Pearlstein, People's Republic of China, Request for Import Restrictions on Certain Cultural Materials, Comments of William G. Pearlstein to Cultural Property Advisory Committee (Feb. 17, 2005), *available at* <http://www.golenbock.com/pub-s.htm>. Under 19 U.S.C. § 2601(2)(C)(i), "no object may be considered an object of archaeological interest unless such object (I) is of cultural significance; (II) is at least two hundred and fifty years old; and (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water."

19. Both the opposition and supporters of the import restrictions obfuscate the issue here. Under

China has not met its burden of satisfying the CPIA's "self-help" requirements.²⁰

Conversely, those in favor of import restrictions argued that China has a continually expanding legal regime to protect its cultural property, thus satisfying its obligations under the CPIA.²¹ Supporters of these restrictions further argued that the five largest markets for Chinese cultural property have implemented domestic legislation automatically banning importation of restricted cultural materials from other states party to the Convention.²² Even barring similar foreign legislation, they argued, the President nevertheless retains the power to implement import restrictions under an exception to the CPIA requirements.²³ Despite the rhetoric of these two groups and the escalating black market for Chinese cultural property, no State Department decision has been issued to date.²⁴

This Article will address China's request for U.S. support under the CPIA. Part III will assess the four distinct requirements under the CPIA and address China's failure to comply with three of the four. Part III.C is the heart of this argument. In it, an economic analysis will prove that a U.S. embargo on Chinese cultural property will not deter the ongoing pillage of China's cultural property. Structurally, this argument is designed to show that an embargo will likely *increase* this pillage. Let it be clear—

the CPIA, agreements can take two forms—both contained in Memoranda of Understanding. Both are intended to provide limited, accountable, and temporary protection for cultural property. The first agreement is called an "emergency" restriction. These restrictions are applied to situations in which looting is especially dire or in which the sites and objects are of "high cultural significance." Countries can obtain "emergency" restrictions without demonstrating that other governments are undertaking similar policies. These last for five years, but can later be extended in three-year periods. The second type of agreement is called a "bilateral" agreement. The bilateral agreements are intended to cover a much broader range of objects that do not necessarily have a "high" significance. Unlike emergency restrictions, bilateral agreements are only implemented when the requesting nation has shown that similar restrictions are imposed by other market nations. Bilateral agreements last for five years, and can be extended in five-year periods. China has not specifically sought a "bilateral" agreement—it has merely requested aid under the CPIA in the form of import restrictions. As such, arguing either that China has or has not proven other nations are enacting similar restrictions is a moot point. *See, e.g., Vincent, supra* note 10, at 65.

20. Pearlstein, *supra* note 18.

21. Letter from Patty Gerstenblith, President, Lawyers' Comm. for Cultural Pres., to Mr. Jay Kislak, Chair of CPAC (Feb. 4, 2005), *available at* http://www.archaeological.org/pdfs/archaeology_watch/China/Gerstenblith_CPACChinaLetter.pdf.

22. *Id.* *See also supra* note 19.

23. *Id.* Under 19 U.S.C. § 2602(c)(2), the President still has the power to implement the bilateral agreement restricting importation of Chinese cultural property if he or she feels that U.S. restrictions are essential to deter a serious situation of pillage, even though other nations are not likely to implement their own restrictions.

24. The CPAC was slated to have a closed door meeting on October 4–5, 2007. China still has a pending request for import restrictions, so it would be a good bet that China was discussed at this meeting. However, as of November 9, 2008, no decision has yet been publicly issued.

this author is deeply concerned for the heritage of mankind and wishes in no way to deter the international community from focusing on solutions to this problem. Rather, it is hoped that this small contribution will meaningfully enlighten the ongoing discussion, such that other possible remedies will both be acknowledged and studied.

III. THE UNITED STATES SHOULD REJECT CHINA'S PROPOSED IMPORT RESTRICTION

The United States should reject the proposed Chinese import restrictions because China has failed to meet its burden under the CPIA. Concededly, China's cultural patrimony is in jeopardy of pillage. However, despite the foreseeable and irreparable harm to China's cultural heritage, China has not taken adequate measures to protect her own cultural heritage under the Convention, and may even be said to have breached the spirit of the Convention. Furthermore, the proposed import restrictions will not be of substantial benefit in deterring the pillage of cultural property. Lastly, China's proposed import restrictions are overly broad, such that the proposal may be deemed inconsistent with the general interest of the international community in the interchange of cultural property for scientific, cultural, and educational purposes.

A. *China's Cultural Patrimony Is Under Threat*

To fully understand the current threat to Chinese cultural heritage, it is important first to understand a little about the international market in illicit cultural property.²⁵ In this market, nations are generally classified as either "source nations" or "market nations." The simplest way of distinguishing between a source nation and a market nation is this: if the supply of desirable cultural property exceeds the internal demand, the nation is considered a source nation.²⁶ If, however, the demand exceeds the supply,

25. The terms "cultural heritage" and "cultural property" will be used interchangeably throughout this Note. Traditionally the term "cultural property" has been used to describe objects of "artistic, archaeological, ethnological or historical interest [that are] components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction." John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831 (1986). Recently, however, the term "cultural heritage" has been employed due to its ability to convey a culture's connection to its past heritage, rather than mere property rights. This change was in part brought about by the 1970 UNESCO Convention's focus on cultural nationalism—the view that antiquities are bound up with their place of creation—as opposed to cultural internationalism. *Id.* at 842–45.

26. *Id.* at 832. Source nations typically have extensive human occupational histories, which account for their substantial abundance of cultural property.

the nation is considered a market nation.²⁷ Mexico, Egypt, Greece, and India are examples of source nations, whereas the United States, France, and Germany are famous examples of market nations.²⁸ Inevitably, the demand for antiquities from market nations encourages illicit export from source nations. This trend is even more pronounced when the source nation is relatively poor and the market nation is relatively wealthy.²⁹

The United States is a major market for the purchase of antiquities that have been illegally excavated and exported from China.³⁰ Figures for the looting are jaw dropping. For instance, “China’s State Bureau of Cultural Relics estimates that over 220,000 tombs have been robbed since 1998.”³¹ Some estimates place that number at around four hundred thousand in the past twenty-five years.³²

Exemplifying this black market journey from *in situ* to insidious auction is the story of the Wang Chuzi marble reliefs. In 1994, twelve men used explosives to breach the outer walls of the tomb of Wang Chuzi, a

27. *Id.* Likewise, nations that meet the description of a market nation tend to be industrialized, modern, wealthy nations whose citizens have enough disposable income to support an interest in collecting (generally valuable) antiquities.

28. *Id.*

29. *Id.*

30. Kennedy, *supra* note 8. Several high profile cases of illicit Chinese cultural property have fueled concerns that the United States is a major threat to China’s cultural heritage. In 2000, customs officials reported on the seizure of a tenth-century marble relief panel that had been stolen from an ancient tomb and was slated to be sold at Christie’s. See also 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, 63 (2004).

31. Dutra, *supra* note 30, at 63. China’s State Bureau of Cultural Relics is an administrative organ under the Ministry of Culture in charge of relics and museum work in China. Its major tasks are to:

research and make principles, policies, regulations and plans for relics and museum development, and stipulate and carry out related systems; instruct and coordinate relics management, protection, save [sic], excavation, research, publicity, and going abroad; examine and report key state relics protection departments; be in charge of examining and reporting historical cultural cities and work [sic] cultural legacy projects; examine or approve the excavation, protection and maintenance of key state relics; instruct the construction of big museums and cooperation and exchanges among museums; research and handle significant problems in relics protection; research and stipulate management methods of relics circulation; approve the establishment and cancellation of institutions engaging in export appraisal of relics; make budget for relics protection funds and examine, allocate and supervise the funds; train relics and museum personnel; organize and instruct research of relics protection and museums; administrate [sic] and instruct foreign affairs work and carry out cooperation and exchanges; and do other work handed over by the State Council and the Ministry of Culture.

Embassy of the People’s Republic of China in the Republic of Singapore, Ministry of Culture (Oct. 18, 2004), <http://www.chinaembassy.org.sg/eng/whsw/t165697.htm>.

32. Kahn, *supra* note 12.

military governor during the tenth-century Fifth Dynasty.³³ Using chisels and crowbars, these raiders stripped ten marble sculptures from the walls. In their haste, the looters destroyed priceless archaeological objects and historical knowledge. Five years passed before any of these sculptures were seen in public.³⁴ In 1999, a prominent Hong Kong auction house listed a single Chuzi marble relief for sale with New York auction house Christie's.³⁵ Although the piece was removed from the auction by American authorities and repatriated to China, this story illustrates the threat to Chinese cultural property.

B. China Has Not Sufficiently Protected Its Own Cultural Property

The CPIA's second requirement imposes a duty on the requesting state to take measures consistent with the Convention³⁶ to protect its own cultural heritage. Article 5 of the Convention sets forth a member nation's affirmative duties in this regard. Under Article 5 a member nation is responsible for establishing a national agency to (a) contribute to the formation of draft laws and regulations designed to secure the protection of cultural heritage; (b) establish and maintain a registry of important cultural property; (c) promote the development or establishment of institutions designed to preserve and present cultural property (i.e., museums, libraries, archives, etc.); (d) organize and supervise archaeological excavations to ensure the protection of *in situ* cultural property; (e) establish ethical guidelines for those, such as curators,

33. Dutra, *supra* note 30, at 63.

34. *Id.*

35. *Id.*

36. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, *reprinted in* 10 I.L.M. 289 (entered into force Apr. 24, 1972) [hereinafter 1970 UNESCO Convention]. Fifty nations gathered together in Paris in the spring of 1970 to form a unified front against illicit art and antiquities theft in the form of an international agreement to help member nations curb the international black market in looted antiquities. The Convention is the most significant achievement and agreement on the subject of looted and illegally imported cultural property to date. The Convention obligates parties to protect all cultural property against theft, illegal clandestine excavation, and illegal export. Parties are encouraged to take definitive actions including: drafting laws and regulations; supervising archaeological sites; promulgating rules of ethics for dealers, curators, and collectors; and giving appropriate publicity to the disappearance of any items. The Convention is also significant in that it represents a marked departure from the trend of cultural internationalism towards cultural nationalism. It endorses export restrictions and nationalization of cultural objects. It also observes that one of the biggest causes of the "impoverishment of the cultural heritage" of source nations is the illicit trade in antiquities. This is the first time that the phrase "cultural heritage" is used to denote these objects. In so doing, the Convention implicitly recognized the importance of a culture's antiquities to its heritage and community.

collectors, and antique dealers, who deal with cultural property; (f) take educational measures to engender respect for the cultural heritage of *all* states; and (g) give appropriate publicity to the disappearance of any items of cultural property.³⁷ While not explicitly stated, Article 5 appears to impose an overall duty on nations to protect their own cultural property to the best of their ability. It is this overall duty that may be deemed the “spirit” of the Convention.³⁸

The language of the CPIA does not mandate that China must strictly adhere to every Article 5 guideline.³⁹ As such, nothing precludes the President from applying a balancing approach to the question of whether China has taken “measures consistent with the Convention” in determining the availability of CPIA protection.⁴⁰ However, when it is apparent that a member nation has not observed Article 5’s guidelines in the spirit of the Convention, it would seem that a balancing approach would weigh heavily against offering CPIA protection in the form of a bilateral agreement.

China has passed a variety of laws surrounding cultural property, or relics as they are commonly called by the Chinese government.⁴¹ The underlying basis for China’s cultural property legislation is found in Article 22 of the 1982 Constitution:

The state promotes the development of art and literature, the press, radio and television broadcasting, publishing and distribution services, libraries, museums, cultural centres and other cultural undertakings that serve the people and socialism, and it sponsors

37. 1970 UNESCO Convention, *supra* note 36.

38. See Maria Papageorge Kouroupas, *U.S. Efforts to Protect Cultural Property, Implementation of the 1970 UNESCO Convention*, 28 AFRI. ARTS No. 4 (SPECIAL ISSUE), 32, 33–36 (1995). Kouroupas has been the Executive Director of CPAC since 1993. In this article, she mentions the “spirit of the Convention” two times. In referring to the CPIA, she notes that the “spirit of the Convention was enacted into law to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind’s common heritage.” *Id.* at 33. Later, she observes that “[n]umerous American museums have adopted stricter acquisitions policies in harmony with the spirit of the 1970 UNESCO Convention and the U.S. enabling legislation.” *Id.* at 36. Kouroupas’s background and placement at the helm of the single U.S. agency responsible for international agreements based on the CPIA, lends much credence to her belief in the *spirit* of the Convention.

39. 19 U.S.C. § 2602(a)(1)(B) (2000) merely requires a state party take “measures consistent with the Convention.”

40. *Id.* Courts have previously used balancing approaches when dealing with cultural property. See, e.g., Oliver Metzger, *Making the Doctrine of Res Extra Commmercium Visible in United States Law*, 74 TEX. L. REV. 615, 634 (1996).

41. See *infra* note 45. There appears to be virtually no difference in the meaning of the two terms as they are applied to looted artifacts; however, “relics” also encompasses fossils and other human remains, whereas “artifacts” covers human creations.

mass cultural activities. *The state protects sites of scenic and historical interest, valuable cultural monuments and relics and other significant items of China's historical and cultural heritage.*⁴²

In 1982, China passed the Law on the Protection of Cultural Relics (“1982 LPCR”).⁴³ This law brought cultural property under state control by authorizing municipal, county, and provincial regulations for the management and protection of cultural property.⁴⁴ It covered both unearthed and *in situ* artifacts and made the looting of these artifacts illegal.⁴⁵ Artifacts unearthed by looters were considered stolen property. A system of grading was employed as the means for assigning the duties of protection.⁴⁶ This system of grading is a major flaw in the legislation since only the highest grade of antiquities are protected by the state, leaving ill-funded provinces, autonomous regions, and municipalities to care for the protection of more common antiquities.⁴⁷

In 2002, China added to the 1982 LPCR by passing the Law on the Protection of Cultural Relics (“2002 LPCR”).⁴⁸ The 2002 amendment legalized the purchase, by individuals, of certain cultural property, which

42. Constitution of the People's Republic of China [XIAN FA] art. 22 (1982) (P.R.C.) *reprinted in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979–1982, 10 (Legislative Affairs Commission of the Standing Comm. Nat'l People's Cong. & the Foreign Languages Press) (1987) (emphasis added).

43. The Law of the People's Republic of China on the Protection of Cultural Relics was adopted at the twenty-fifth meeting of the Standing Committee of the Fifth National People's Congress and was promulgated by Order No. 11 of the Standing Committee of the National People's Congress on and effective as of November 19, 1982. *Reprinted in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979–1982, 313 (1987) [hereinafter 1982 LPCR].

44. *Id.* art. 3. See also Anne C. Schmidt, *The Confuciusornis Sanctus: An Examination of Chinese Cultural Property Law and Policy in Action*, 23 B.C. INT'L & COMP. L. REV. 185, 202 (2000).

45. 1982 LPCR, *supra* note 43, art. 4. Article 4 reads “[a]ll cultural relics remaining underground . . . shall be owned by the state. Sites of ancient culture, ancient tombs and cave temples shall be owned by the state. Memorial buildings, ancient architectural structures, stone carvings, etc., designated for protection by the state, unless governed by other state regulations, shall be owned by the state. Cultural relics in the collection of state organs, armed forces, enterprises owned by the whole people and public institutions shall be owned by the state.” *Id.*

46. *Id.* art. 28 (“It shall be prohibited to take out of the country any cultural relics of *significant historical, artistic or scientific value* . . .”). Determination of a cultural relic's significance and value was up to the state, thereby creating a complicated system of value, not easily understood.

47. Schmidt, *supra* note 44, at 205.

48. Law of the People's Republic of China on Protection of Cultural Relics (Order of the President No. 76), Oct. 28, 2002; *reprinted in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 2002, 167 (2003) (Legislative Affairs Commission of the Standing Comm. Nat'l People's Cong. & the Foreign Languages Press) (2003) [hereinafter 2002 LPCR]. In early 2002, the twenty-seventh session of the Standing Committee of the Ninth National People's Congress (“NPC”) engaged in fierce debates over whether or not to legalize private transactions in cultural property. Under the 1982 LPCR, private transactions were illegal. The 1982 LPCR banned people and organizations, other than those approved by the cultural administration authority, from transacting in cultural property. 1982 LPCR, *supra* note 43, arts. 24–25.

had been illegal under the 1982 LPCR.⁴⁹ Chinese officials hoped that such private transactions would disincentivize black market trade and help preserve cultural property.⁵⁰ With these goals in mind, the 2002 LPCR legalized the transfer of non-state-owned cultural property in five instances: legal inheritance or gift, purchase from cultural relics shops, purchase from cultural relics auction enterprises, exchanges or transfers between individual citizens pursuant to law, and other methods authorized by the central government.⁵¹ In an effort to address the rising number of looted tombs, the 2002 LPCR banned any transfer of state-owned cultural relics, including any relics not yet found or documented.⁵²

The 1982 LPCR appears on its face to constitute a meaningful exercise of China's authority and eagerness to concretely address the systematic destruction of her cultural heritage. However, upon a deeper investigation, inconsistencies and loopholes appear unaddressed. Article 50 legalized private collections of antiquities through lawful inheritance or acceptance as gifts. No provisions appear to temper the ability of an individual to "gift" illicit cultural property, regardless of whether or not state-owned cultural property is present.⁵³ Furthermore, neither of these two methods necessitates much in the way of a paper trail—leaving open the danger that the illicit cultural property market will continue behind the veil of legally authorized gifts. Despite Article 50's attempt to clarify by mandating that "valuable cultural relics" may not be collected, China has confused the issue further by injecting the concept of value into what may or may not be collected.

The 2002 LPCR also appears to encourage citizen participation in the preservation of cultural property. However, the rewards are neither concrete nor certain, rendering these incentives useless.⁵⁴ Article 12 of the legislation provides for moral encouragement or material rewards to units and individuals for implementing laws and regulations that protect cultural

49. 2002 LPCR, *supra* note 48, art. 50.

50. *Chinese Lawmakers Fiercely Debated Whether the Country Should Open Its Cultural Property Market to Private Collectors*, MUSEUM SECURITY MAILINGLIST REP. (Museum Sec. Network, Rotterdam, Neth.), May 8, 2002, <http://www.museum-security.org/02/058.html#4>. Zhou Keyu, Vice-Director of the NPC's Law Committee, noted that the 2002 amendment was drafted in response to calls by some legislators to meet the increasing demand of private cultural relics collectors, who believe opening the market will help protect cultural property. Legislator Xie Youqing stated that the "[p]rivate transaction of cultural property will help collect those treasures that have been drained" and will likely help the current looting problem. *Id.*

51. 2002 LPCR, *supra* note 48, art. 50.

52. *Id.* art. 51.

53. *Id.* Article 51 explicitly bans the purchase or sale of state-owned cultural relics, except those that are specifically approved for sale or purchase by the state.

54. *Id.* art. 12.

relics, fighting criminal acts in the interest of protecting cultural relics, donating relics in one's own collection to the state in the interest of protecting the relics, immediately reporting the discovery of relics, making important contributions to archaeology or innovations in the protection of cultural relics, rescuing cultural relics in danger of destruction, and making outstanding contributions to the protection of cultural relics.⁵⁵ Although China may give material rewards to entice nationalistic repatriation, it is not legally bound to do so. Furthermore, these "incentives" will likely not be able to match the rewards offered by black market dealers who pay the equivalent of a year's farming income for a single looted artifact.⁵⁶ The development of a concrete, legally mandated reward structure would be a straightforward method to encourage the notoriously impoverished population that is likely to find these relics. By remaining obscure as to rewards, the 2002 LPCR merely gives lip service to the notion of citizen enforcement.

Also, the 2002 LPCR continues the confusion beset by the 1982 LPCR by mandating that the central government is responsible for protecting only the most precious relics.⁵⁷ In contrast, the new legislation leaves the remaining artifacts under the protection of local, county, and provincial governments that have been shown to have little effect in doing so.⁵⁸ The current Chinese legal system provides local governments wide latitude in balancing the economic development of their region with the conservation of antiquities.⁵⁹ Poverty, lack of educational resources, and economic hardship often make the decision to fund protection for what many view as grimy old statues and pots seem like an unwise choice.

55. *Id.*

56. Beech, *supra* note 2. One of the primary difficulties in curbing looting is the fact that in a single night, a looter who finds a "major haul" can earn a year's farming income upon unloading it to a smuggler. See also Schmidt, *supra* note 44, at 195. Schmidt observes that a "Chinese farmer who turns up the skeleton of an ancient bird can easily make twice his yearly salary if he sells it on the black market." *Id.*

57. Dutra, *supra* note 30, at 86 (citing PEOPLE'S REPUBLIC OF CHINA, RULES FOR THE IMPLEMENTATION OF THE CULTURAL RELICS PROTECTION LAW, art. 8, Apr. 30, 1992). Michael L. Dutra notes that the vagueness of the language also contributes to the difficulty in ascertaining which government level has administrative jurisdiction over a particular cultural relic. *Id.*

58. *Over 200 Cultural Relics Stolen from Official Chinese Sites in 2004*, XINHUA NEWS AGENCY (Beijing), Feb. 22, 2005. In 2004 there was an 81.8% increase in cases involving stolen cultural relics according to a report provided by the State Administration of Cultural Heritage. Despite a 14.6% drop in theft from China's protected sites (as opposed to non-protected sites), 20% of the total cases involved theft from government offices responsible for the care and preservation of relics, pointing to corruption, lack of security, or perhaps both. *Id.*

59. *Id.*

As an example of this problem, in 2001 a rumor raced through the desolate villages southeast of Xi'an that any artifact from the tomb of Empress Dou, a wealthy dowager who died in 135 B.C., would be worth a sizeable amount.⁶⁰ Despite the common belief that Dou's tomb had previously been looted, villagers blasted through the entrance with a fifty-kilogram lump of homemade dynamite. The following morning police spotted five raiders and eventually captured three. Although the press hailed the capture of these looters as a triumph, the under-funded local cultural relics bureau "simply placed wooden planks across the hole, tossed in some dirt and walked away."⁶¹ This neglect led to further looting, which resulted in a loss of at least two hundred artifacts, some valued at approximately eighty thousand dollars.⁶²

Apart from its quite limited statutory protections of cultural property, China has also failed in responding to Hong Kong's booming legalized market in antiquities, which poses a serious threat to the protection of China's cultural patrimony. American experts on the illicit cultural property market estimate that from 2000 to 2004 the total antiquities auction market in China and Hong Kong "increased approximately 700% for the same materials that the U.S. is being asked to restrict."⁶³ Thus, the Hong Kong market seemingly undercuts any usefulness that import restrictions may provide.

Lastly, China has not followed the spirit of the Convention.⁶⁴ Although China has often exhibited defiant behavior, one notable example is its apathy towards the destruction of countless antiquities during construction of the Three Gorges Dam. This twenty-five billion dollar public construction project is causing a scale of cultural property devastation that will dwarf the plundering of individual tomb raiders.⁶⁵ China has notice of the destruction that this construction will cause, and yet has chosen to continue with the plan regardless of known consequences.⁶⁶ It is estimated that the water diversion project will alone submerge 710 historical areas according to statistics from the State Administration of Cultural

60. Beech, *supra* note 2.

61. *Id.*

62. *Id.*

63. Pearlstein, *supra* note 18.

64. See Kouroupas, *supra* note 38; see also *Chinese Minister Apologizes for Not Protecting Cultural Heritage*, XINHUA NEWS AGENCY (Beijing), May 26, 2006. Courtyard homes as many as seven hundred years old will be demolished to make way for a pedestrian commercial area by the time Beijing hosts the Olympics in 2008. Despite citizen protests, China has decided to carry out the demolition. *Id.*

65. Timothy Potts, *Where Quantity Yields to Quality*, APOLLO MAG. LTD., Oct. 1, 2007, at 42.

66. See Wu Chong, *Bone Collectors Race Against Time*, CHINA DAILY, Oct. 12, 2006, at 13.

Heritage.⁶⁷ Thousands of archeologically documented yet unexplored sites as many as four thousand years old will be destroyed by the eventual completion of the Three Gorges Dam.⁶⁸ In at least one area, an ancient cemetery containing approximately 160 graves dating to 500 B.C. will be submerged by the Three Gorges Dam project.⁶⁹ Archaeologists do not have time to excavate, much less gain any valuable information from a thorough analysis of these areas.

Preservation work in the area soon to be submerged by the Three Gorges Dam project has also been slowed by a lack of funding.⁷⁰ Figures show that more than two thousand tombs and over ten thousand artifacts have already been relocated, but this merely accounts for a small part of the artifacts in the area, according to Li Taoyuan, a senior archaeologist from China's Hebei Province.⁷¹ The chief of the Danjiangkou Heritage Bureau claims that archaeologists are competing against grave robbers for artifacts and that unfortunately, due to a lack of government resources, the raiders are winning.⁷² In light of these concerns, China should have altered the timetable of the Three Gorges Dam construction to provide an adequate period for archaeological excavation. China's full knowledge and complacency that its cultural property will be destroyed should be viewed as a direct affront to the spirit of the Convention.

C. Import Restrictions Will Not Deter Pillage and May Very Well Increase It

Under the CPIA's third requirement, any import restrictions must be of substantial benefit in deterring pillage of the cultural heritage of the state party to the Convention, in this case China.⁷³ The concept of deterrence differs from that of prevention and has a lower threshold for success.⁷⁴

67. *Id.*

68. *Id.*

69. *Id.*

70. *Experts Struggle to Preserve Relics from Megaproject*, CHINA DAILY, Sept. 18, 2007, at 3.

71. *Id.*

72. *Id.*

73. 19 U.S.C. § 2602(a)(1)(C)(i) (2000).

74. BLACK'S LAW DICTIONARY (8th ed. 2004) defines "deterrence" as "the act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment." *Id.* at 481. "Prevention," on the other hand, is "to hinder or impede." *Id.* at 1226. *See also* WEBSTER'S II NEW COLLEGE DICTIONARY (3d ed. 2001). To "deter" is "to prevent or discourage from acting, esp. by means of doubt or fear." *Id.* at 309. To "prevent," conversely, is "to keep from happening." *Id.* at 876. Both of these dictionaries imply that the concept of "deterrence" is merely to discourage, although concededly *Webster's* grants that prevention is a

Under the CPIA, proposed restrictions must at the very least be of “substantial benefit in deterring” pillage.⁷⁵ Even under this low standard, import restrictions will fail. An economic analysis explains the inherent weakness of cultural property import restrictions.

Art has value. To conclude otherwise would be a gross distortion of reality. Cultural property is a variety of art. It reflects a people’s history, lifestyle, ingenuity, and hardships, thereby retaining historic and educational value. Cultural property has an unquestionable monetary value.⁷⁶ Both dealers and thieves of cultural property have an intimate appreciation of this value.⁷⁷ Indeed, they stake their livelihood on this truth.

Most collectors have an appreciation of this monetary value, however the great collectors also have an intimate understanding of the full value, monetary and otherwise. For the great collectors, cultural property is an object of great pride, beauty, and history as well as a “good” in the market sense.⁷⁸ Museums, institutional collectors, and private individual collectors regularly sell parts of their collections in an effort to generate funds for future acquisitions that will contribute to the overall development of their holdings.⁷⁹ One small example is the Los Angeles County Museum of

method of deterrence, whereas “prevention” is distinguished from “deterrence” through an implication of harsher physical force.

75. 19 U.S.C. § 2602 (a)(1)(c)(i). The CPIA was designed to be *prospective*. It is more an instrument of prevention than one designed to redress prior losses. The CPIA was implemented to protect cultural property that remains *in situ* in the country of origin—the undocumented material that, when stripped of its provenience, feeds a large clandestine trade that brings high yield with little risk to its participants. As such, CPIA protection should at the very minimum deter future pillage. Kouroupas, *supra* note 38, at 33.

76. On October 7, 2007, Sotheby’s Asia sold approximately \$42.5 million in Chinese art. *See* James Pomfret, *Sotheby’s Bullish on Global Art Market, China*, SAN DIEGO UNION-TRIB. ONLINE, <http://www.signonsandiego.com/news/business/20071008-0242-sothebys-hongkong-.html>.

77. *See* Beech, *supra* note 2. Hannah Beech observes that stealing national treasures through looting is obviously illegal, but there is little to deter smugglers. The reason is that one major haul for a looter can equal a year’s farming income. One looter that she interviewed put himself through medical school with the spoils of his treasure hunts. This particular looter noted that it is easy to tell who has found the best tombs by merely looking at the houses in his native village in Henan province. The luckiest looters will have satellites, big-screen TVs, and video game systems. This doctor’s favorite video game is (not surprisingly) *Tomb Raider*. *Id.*

78. Art collections must undergo renewal to remain current, fresh, and top of the line. For many museums and collectors this means selling off parts of their collections in an effort to raise money for future, better acquisitions. There are a few reasons for such divestiture. First, some museums harbor latent and persistent prejudices against certain artists and are happy to sell their pieces in order to acquire different works. Second, some museums house a tremendous amount of art in storehouses and the sale of such art is merely a way of clearing out these areas. Third, as museums and collectors expand their overall collection, it is wise to sell off some items in an effort to expand. *See* Carol Vogel, *Museums Set to Sell Art, and Some Experts Cringe*, N.Y. TIMES, Oct. 26, 2005, at A24.

79. *Id.* Imagine a museum known for its collection of Mayan sculpture. Suppose also that at

Art's recent auctioning of forty-three works at Sotheby's in an effort to improve its expanding collection.⁸⁰ Some critics denounce these sales as tantamount to museum heresy in that certain works should not be publicly distributed, but rather should be housed in national institutions for their preservation. However, the majority of museums and collectors realize the necessity of such sales if they are to continue to bolster their principal collections.⁸¹

Museums and collectors must be attuned to the market if they are to improve their collections. Being attuned to the market means that the collector must have information on what art is soon to become available and its approximate value. This is necessary to ensure that collectors are able to purchase art that will best improve their collections, while at the same time paying a price that will provide the maximum acquisition without depleting their coffers. As such, museums and collectors are constantly analyzing the availability of art, market value of desirable types of art, and legal scenarios that may hinder or promote the sales of these desirables. Such buyer sophistication inevitably leads to market fluctuations when a deficit is perceived in the number of any given desirable object.

Buyer sophistication is slightly different when contemplating antiquities for a few reasons. First, sophisticated buyers of cultural property can never be sure of the total number of a given class of antiquities. Since often these cultural artifacts are buried with little record of their existence, no one can be sure of their existence until they are unearthed. This leads to widespread speculation and an unpredictably volatile market. Second, since the transport and sale of cultural artifacts is a tremendous black market enterprise, any regulations or embargoes on it will drastically affect the market price. Perceived availability therefore affects market price. Perceived availability and actual availability are two distinct concepts and will be treated as such.⁸²

some point in the past it acquired many exquisite pieces of Delft pottery. This fictional museum may be inclined to slowly sell off its Delft collection to raise money for the purchase of exquisite Mayan sculptures to aid in the development of its principal collection.

80. *Id.* The auctioning is expected to return between \$10.4 and \$15.4 million. Among the works auctioned is a Modigliani portrait of the Spanish landscape painter Manuel Humbert, estimated to bring \$4 million to \$6 million. *Id.*

81. *Id.*

82. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 318–19 (1982). Bator observes the following:

For the foreigner interested in acquiring a certain category of antiquity, a simple logic operates: The harder it is to obtain objects within that category legally, the more intense the demand to acquire them on the black market. As the embargo becomes more and more

Oil is exemplary of this principle. Admittedly oil is a commodity,⁸³ whereas cultural property is valuable due to its inherent uniqueness. However, these two markets are comparable in a few respects. First, oil is highly desirable.⁸⁴ Second, the overall amount of remaining oil in the world is unknown.⁸⁵ Third, oil is purchased on a tremendous scale by extremely sophisticated buyers.⁸⁶ Fourth, fluctuations in the market price of oil are largely the result of perceived unavailability, international conflict, or any other disturbance in the general chain of production and shipment.⁸⁷ While the actual availability of oil changes on occasion, the price is largely controlled by perceived availability. War does not necessarily indicate any reduction in the amount of oil actually available, yet it tends to contribute to a perception that oil will be difficult to obtain; it therefore raises the market price.

By most academic standards and economic indicators, the United States economy operates under what is known as a semi-strong market, which is a division of the Efficient Capital Market Hypothesis (“ECMH”).⁸⁸ Under this theory, investors are sophisticated and quantitatively large enough that the market price of any good should reflect perceived notions of availability and quality on a continuous basis.⁸⁹ Thus, when it is proven that many sophisticated investors in a

inclusive within a particular category, the number of purchasers willing to deal illegally and the amount of funds available on the illegal market also increases. The black market, in sum, is a product of scarcity. Buyers are willing to pay the cost of conniving in illegal export because there is no alternative supply, if legal export were permitted, the illegal market would shrink.

Id.

83. Generally the term “commodity” is used to describe a mass-produced, non-specialized good supplied without qualitative differentiation across a given market. Other examples of commodities are most agricultural goods, ethanol, gold, and iron ore.

84. See *Shock Treatment*, *ECONOMIST*, Nov. 17, 2007, at 92. Oil is so highly desired that the lack thereof has been the primary cause of two major global recessions, in 1973 and 1979. *Id.*

85. See Clifford Krauss, *Tapping a Trickle in West Texas: High Prices Revive Oil Fields*, *N.Y. TIMES*, Nov. 2, 2007, at B1. The nation’s oil fields are mostly tapped out, leading to a steady decline in U.S. oil production over the past six years. *Id.*

86. See, e.g., ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES: OPEC LONG-TERM STRATEGY (2006), available at <http://www.opec.org/library> (scroll down to “OPEC LONG-TERM STRATEGY” and follow “read more” hyperlink).

87. See *Vote For Me, Dimwit*, *ECONOMIST*, June 16, 2007, at 42. Nearly all economists agree that fluctuations in the price of oil are due to the mechanisms of supply and demand, not due to greed on the part of large oil companies. *Id.*

88. Ronald Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency*, 70 *VA. L. REV.* 549, 554–55 (1983).

89. *Id.* Market efficiency is maximized when prices fully reflect all available information. A semi-strong market is one in which investors are of such sophistication that information is subsumed into the marketplace instantly. This synergy of all available information including perceptions of availability leads to the constant fluctuation of a good’s true value in the marketplace. *Id.*

given good exist and are attuned to a complex information network providing accurate data on that good, it may also be assumed that any perceived decline in that good's availability will cause the market price of that good to rise almost instantaneously. Following this logic, if it were proven that (1) an intricate network of highly sophisticated investors existed for Chinese cultural property, and that these investors are attuned to an available information network, it may be deduced that any perceived decline in the availability of these goods will cause the market price of Chinese cultural property to skyrocket.

Taking that logic a step further, if it were then proven that (2) perceived availability did not accurately reflect actual availability, (3) demand for the good will not subside, and (4) suppliers generally incorporate the concept of risk into the price of any good, it follows that the market price of that good will remain high regardless of any decline in actual availability. Rephrased, if an embargo on Chinese cultural property frightens investors, the market price of this cultural property will increase despite the fact that there is no actual decline in the number of looted cultural objects being shipped into the United States. To complicate matters, the price of the cultural property will remain high because producers (i.e., looters and middlemen) must incorporate into their price structure the risk that they undertake in shipping the illicit antiquities. Since looters generally raid tombs for profit, an increase in the price paid for such goods will likely draw greater numbers of people into the "profession." Thus, if the United States imposes import restrictions on nearly all Chinese cultural property, there is a high probability of further escalating the problem of looting.

1. An Intricate Network of Sophisticated Investors Exists

It is commonly accepted that eighty to ninety percent of cultural property on the market is illicit.⁹⁰ The tremendous demand for Chinese cultural property is fueled by wealthy Western and Eastern collectors looking to decorate their living quarters with the treasures of the past.⁹¹ These collectors are investors in cultural property, eager to purchase artifacts many experts, and looters, would not have imagined anyone would actually collect. The appetite for Chinese cultural property is so voracious these days that investors are collecting chipped and dirty clay

90. Beech, *supra* note 2. This statistic came from Kathryn Tubb, Conservator of the Institute of Archaeology at the University College of London.

91. *Id.*

pots, gnarled ceramic statuettes, and other detritus of burial rites.⁹² Museums are also investors, as discussed earlier.⁹³ Often museum curators make the decision to invest in certain artifacts with the full knowledge that these artifacts will be used as pawns down the road to purchase an even grander, more desirable object.⁹⁴

The network by which these artifacts travel is generally poorly documented and notoriously difficult to stop. Farmers, peasants, and villagers get word that Westerners are very interested in purchasing old Chinese artifacts from ancient burial sites near their village. This message is spread by a middleman with connections to wealthy Western and Eastern antiquities dealers. The villagers hunt at night for artifacts, knowing full well where they are likely to be found from either stories of burial sites, passed down for generations, or sophisticated land survey techniques.⁹⁵ By the morning, when there is evidence of looting, the goods found have been safely stored away.⁹⁶ Any goods are sold to a middleman who informs his Western and Eastern dealers of the find and makes the sale.

At the beginning of 2002, an interesting case in New York caught the attention of antiquities dealers worldwide. Although having little to do with Chinese cultural property, the case provides a rare glimpse into the illicit looting of antiquities and the complicated path they take on their journey through the black market.⁹⁷ In 1994, laborers excavating a building site in Akhmim in Upper Egypt discovered a four foot high hieroglyphic-incised slab of limestone.⁹⁸ A few months later a man named Ali Farag was blindfolded and driven to the spot where the stele had been discovered. Rather than turn over the artifact to the government, the

92. *Id.*

93. *See supra* notes 78–81 and accompanying text.

94. Vogel, *supra* note 78.

95. Paul Watson, *Archaeologist Views Past As Lesson for New China*, TORONTO STAR, Dec. 17, 1997, at A1. Baoping Wang, a twenty-one-year veteran of Chinese archaeology who began his career as an eighteen-year-old, uses techniques similar to those used by looters. Using a luoyang spade, a tool named after the place where tomb robbers invented it eight hundred years ago, he can detect underground vaults built more than two thousand years ago. Wang detects these vaults by analyzing subtle changes in the soil color of a core sample, produced by the luoyang spade. He claims that it takes merely five minutes to produce the information. *Id.*

96. Bator, *supra* note 82, at 311. Often in remote areas, evidence of looting is unknown for years. Until such a discovery, there is no one to complain. Even if there is a complaint, often the harm is not widely appreciated and the perpetrator goes unpunished. *Id.*

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

98. Barry Meier & Martin Gottlieb, *LOOT: Along the Antiquities Trail; An Illicit Journey out of Egypt, Only a Few Questions Asked*, N.Y. TIMES, Feb. 23, 2004, at A1 (providing a much more detailed account of this fascinating journey).

builders decided to sell it on the black market. After showing Farag the artifact along with blueprints of the project, Farag departed the site, presumably having purchased the stele and a few other artifacts for approximately seventy thousand dollars.⁹⁹

Farag later contacted a Cambridge-educated Englishman named Jonathan Tokeley-Parry, a talented antiquities restorer who was adept at smuggling. Tokeley-Parry agreed to help Farag. He first established the stele's authenticity through manipulating Dr. Jaromir Malek, director of the world's foremost archive of Egyptology.¹⁰⁰ After establishing its authenticity, Tokeley-Parry faxed the galleries of Frederick Schultz in Manhattan, which agreed to purchase the object. Schultz wired fifty-two thousand dollars as a down payment for the stele and awaited its arrival—but it never appeared. Tokeley-Parry had created a false company called H.H. Antiques. The stele was supposed to have arrived in Zurich under that name before being shipped to Schultz, but it never arrived. Shipping manifests, later discovered, suggest that it had arrived in Zurich, but was then placed on a truck to Geneva.¹⁰¹

Once in Geneva, the stele resurfaced in 1997 at the Phoenix Ancient Art Gallery. The owners, two brothers, claim that their father had purchased the stele from H.H. Antiques many years back, however no records substantiate this claim. In 1998, Bernard Blondeel, a Parisian gallery owner of Belgian heritage, walked into the Geneva gallery and purchased the stele. Blondeel toured the object through Europe and purchased a full-page advertisement in the *Revue du Louvre*, a Paris gallery guide, to tempt a buyer.¹⁰² His efforts paid off when in May of 1999 a New York developer named H. Henry Elghanayan agreed to purchase the stele for \$210,000. Authorities finally recovered the stele in Elghanayan's grand foyer, across the street from the Metropolitan Museum of Art.¹⁰³ This circuitous journey illustrates both the difficulties

99. *Id.*

100. *Id.* The Griffith Institute of the Ashmolean Museum at Oxford University boasts this honor. Tokeley-Parry posed as a lawyer who was researching the piece. He was attempting to determine whether the stele had been stolen from a known archaeological site or storeroom. Knowing this information would allow him to smuggle the artifact much more smoothly. And if the artifact were found to have been stolen from a known site, the value would likely be depreciated because it could not be sold on the open market. *Id.*

101. *Id.*

102. *Id.* Ironically, during an annual antiques show at the Seventh Regiment Armory in Manhattan, where Blondeel was attempting to sell the stele, he had a booth only feet from one owned by Frederick Schultz. *Id.*

103. *Id.* Apparently authorities began investigating the stele when Tokeley-Parry was arrested and convicted in a British smuggling case and began asking questions about Schultz. *Id.*

of preventing smuggling and the sophistication of the art investors involved.

A similar path awaits most illicit Chinese antiquities. This type of black market is difficult to initially prevent because the tombs yielding profitable artifacts are not marked, leading to confusion on the part of guards, police, and the Chinese government as to where to position themselves.¹⁰⁴ Middlemen are largely responsible for the connectivity of the network. They are paid handsomely for finding villagers to complete the looting and a network of smugglers to do the rest.¹⁰⁵ Oftentimes these smuggling rings are based out of legitimate antique shops in major cities, where police are overworked and underpaid.¹⁰⁶ This complicated system is highly attuned to the market and will respond quickly to a perceived threat of embargo.

2. *Perceived Availability Does Not Equal Actual Availability in This Black Market*

Despite persistent threats of death, the Chinese villagers responsible for devastating the tombs of their ancestors continue digging.¹⁰⁷ The black market system that exists at present shows no signs of slowing. In this context, any embargo imposed in a vacuum is bound to fail. First, the broader and more inclusive the embargo, the more difficult it becomes physically, economically, and politically to enforce effectively.¹⁰⁸ Furthermore, a comprehensive embargo is extremely expensive, cumbersome, and inefficient. The cost of the United States implementing an embargo on nearly every Chinese archaeological artifact would be

104. Lisa Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 393 (1995).

105. Some of these networks are extremely sophisticated. In India, police arrested a fifty-five-year-old, graying, unassuming handicrafts trader named Vaman Narayan Ghia as the leader one of the largest antiquities-smuggling rings of all time. Inside Ghia's home, police found hundreds of photos of looted ninth- to eleventh-century statues, a long list of private collectors' phone numbers and sixty-eight auction-house catalogs that featured some of the same artifacts. According to his confession, Ghia spent thirty years smuggling an estimated fifty thousand idols, paintings, and statues from protected monuments in India. Charges were filed against Ghia and twenty-one other looters alleged to be in his smuggling ring. Beech, *supra* note 2.

106. *Id.* Hong Kong's Hollywood Road is a transit point for many looted Chinese artifacts. Beech notes that one Hollywood Road dealer (who declined to be named) said that if someone walked in off the streets and wanted to see some "real" antiques, he would show them fakes, but if someone walked in and inquired about a very specific item and also knew what the market rate was for that item, he would bring out looted goods. *Id.*

107. *Id.* In 2002 Chinese authorities sentenced at least four looters to death. *Id.*

108. Bator, *supra* note 82, at 329.

outlandish.¹⁰⁹ Currently the United States has 361 commercial ports that receive 95% of U.S. imports by weight and 75% by value, with approximately nine million shipping containers arriving annually.¹¹⁰ Chinese fleets of shipping vessels are growing rapidly.¹¹¹ The port of Los Angeles, the largest container port in the world and the likely destination of containers from China, moves 7.3 million containers annually.¹¹² Interestingly, 80% of port operations at the port of Los Angeles are controlled by foreign firms, which may undermine any U.S. initiative barring Chinese antiquity imports.¹¹³ Inspection costs would fall either to China or the United States, inevitably deterring trade, which neither nation wants. Thus, inspection and, consequently, an embargo is at most an empty promise.

Widespread corruption also undermines any intended embargo.¹¹⁴ In 2004, Li Haitao, former head of the Cultural Relics Protection Department for a historically important Chinese imperial villa, was found guilty of stealing 259 cultural objects from the site and selling 152 of these pieces abroad.¹¹⁵ Structurally, an embargo “creates an irresistible pressure against

109. *Id.* Paul M. Bator observes:

It is easy to say that illegally exported art may not be imported. But effectuating such a policy, in a society in which millions of people cross the borders every year, and into which art objects numbering hundreds of thousands are brought, would be a nightmare. The problem is not only the physical discovery of every item crossing the border; a further process to determine whether each such item was legally exported must be created. . . . A brisk trade in forged export certificates would . . . arise . . . so that the authenticity as well as the existence of each documentation would have to be verified.

Id.

110. Randall Beisecker, Monterey Inst. of Int'l Studies, Issue Brief: DP World and U.S. Port Security (2006), available at http://www.nti.org/e_research/e3_75.html.

111. Bei Hu and Irene Shen, *CSCL Wins \$1.9 Billion Shanghai Share Sale Approval*, BLOOMBERG NEWS, Nov. 23, 2007. Chinese exports rose 26.5% in the first ten months of 2007 and imports rose 19.8%. As a result of this growth, China Shipping Container Lines Co., Asia's second largest cargo box carrier, announced a \$1.36 billion order to purchase eight ships from Samsung Heavy Industries Co. The company is seeking to grow its shipping fleet to 162 ships by 2009. *Id.*

112. *Id.*

113. *Id.*

114. See Warring, *supra* note 36, at 237. “Karim Abu Shanab, right-hand man to Zawi Hawass, the current Secretary General of Egypt’s Supreme Council for Antiquities (‘SCA’) was arrested for accepting a bribe to help smuggle artifacts out of [Egypt].” *Id.* Constantine Mitsotakis, former Prime Minister of Greece, and his deputy police chief were implicated in a scheme to cooperate with an international syndicate of antiquities smugglers. *Id.* at 237–38 (quoting Lisa J. Barodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 393, (1995)).

115. *Chinese Official Sentenced to Death for Stealing Cultural Relics*, XINHUA NEWS AGENCY (Beijing), Aug. 17, 2004. Haitao was sentenced to death for these crimes. However, his four accomplices were given jail terms that did not exceed seven years and fines that did not exceed thirteen thousand dollars. These are relatively light sentences and fines considering Haitao pocketed

itself.”¹¹⁶ “Most current export control systems are self-destructive. The international black market thrives because no alternative is allowed to exist for either buyers or sellers, so that all economic incentives are pushed in favor of the *illegal trade*.”¹¹⁷ This lack of alternatives is directly responsible for the widespread corruption evident in international antiquities smuggling.¹¹⁸ Since it remains impossible to stop either the import or export of cultural property, the perceived availability of cultural property will never equal its actual availability. Perception will only serve to inflate the current pricing structure.

3. *The Demand for Chinese Cultural Property Shows No Signs of Slowing*

On October 7, 2007, Sotheby’s recorded its best ever sale of Chinese art in Asia, selling over \$42.5 million worth of art in a Hong Kong auction.¹¹⁹ Overall, the Chinese market for art in October 2007 was stunning.¹²⁰ Merely nine sales by Sotheby’s accrued over \$200 million.¹²¹ Chinese works were in extremely high demand, accounting for over \$83 million.¹²² An imperially inscribed “Tai Shang Huang Di” white jade seal sold for \$5.9 million, a record for white jade at auction.¹²³ The U.S. and Western European appetite for Asian cultural property is not the sole cause of this epidemic.¹²⁴ Admittedly, Western dealers have grown increasingly

nearly half a million dollars from the illegal actions. Parts of the area that Haitao managed had been placed on the World Heritage List in 1994. *Id.*

116. Bator, *supra* note 82, at 318.

117. *Id.*

118. Raymond Fisman & Shang-Jin Wei, *The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques* 12 (Nat’l Bureau of Econ. Research, Working Paper No. 13446, 2007). Researchers have found

strong and robust evidence that the percentage under-recording of exports of cultural objects is highly correlated [to] the exporting country’s level of corruption as measured by a commonly used subjective index. Furthermore, the association between the two is stronger for countries that are particularly well-endowed in export restricted objects that are considered to be desirable in major markets.

Id. at 12–13. This study indicates that source nations are underreporting their exports of illegal cultural property. Such underreporting is a direct result of corruption on many fronts.

119. Pomfret, *supra* note 76. The author notes that this sale was “fuelled by broadbased buying from Asian, Chinese and Western buyers.” *Id.*

120. *Sotheby’s Announces 2007 Third Quarter and First Nine Months Results*, PR NEWSWIRE, Nov. 9, 2007.

121. *Id.* This is forty-six percent higher than Sotheby’s 2006 sales, which totaled \$137.2 million. *Id.*

122. *Id.*

123. *Id.*

124. It is commonly accepted that there is a growing indulgence in Asian cultural property.

interested in Chinese cultural property, in part due to the ease with which Chinese artifacts can be acquired.¹²⁵ Yet, one of the greatest contributions to the growing market for Chinese cultural property is the Chinese economic boom.¹²⁶

Recent international economic prosperity has led to the emergence of new collectors in Russia, India, and China.¹²⁷ For most of its modern history, China easily qualified as a source nation due to its relatively poor population living among hills filled with artistic treasures.¹²⁸ However, in recent years, the Chinese economic explosion has generated a great deal of wealth and, consequently, a large population that can afford the luxury of collecting antiquities.¹²⁹ In the past two decades alone, China has observed sustained annual economic growth of 9.5%.¹³⁰ Incomes in China have skyrocketed.¹³¹ Since 1990, Chinese exports have grown 1200%.¹³² There

International auction houses have reported record sales for Chinese cultural property. Recently, a New York auction by Christie's attracted huge amounts for Chinese items ranging from jades to ceramics. A collection of eighteenth-century Chinese snuff bottles fetched nearly four million dollars. *China's Art Boom Fueled by Asian Money*, AGENCE FRANCE-PRESSE, Oct. 16, 2007, available at <http://afp.google.com/article/ALeqM5jQkodU7aNG3sY-pDSLztg-PhGHQw>.

125. The ease with which looted Chinese antiquities can be moved from underground to the showcase is a major contributor to the booming market. An interview with a Hong Kong dealer revealed the following:

Dealers . . . adore the recently created fifteen-hour nonstop flight[] from Hong Kong to New York. It allows them to bring looted Chinese antiquities to the best American galleries quickly and easily without the two-day ordeal of stopovers and connections they used to endure, with all the risk of seizure, delay, or breakage that entailed. Artifacts can go from tomb to dealer to plane in a matter of hours.

ROGER ATWOOD, *STEALING HISTORY* 31 (2004).

126. Baum, *supra* note 13, at 938–39. The accessibility of the art trade in China is clearer than ever. Both Christie's and Sotheby's are now conducting business in mainland China and Christie's "has signed an agreement to conduct business in Beijing." *Id.* at 939.

127. Pomfret, *supra* note 76.

128. Beech, *supra* note 2. In the desolate villages of Xi'an, villagers are "dirt poor." However, some of the most valuable antiquities in the nation have been found in that dirt, including China's famed terra-cotta warriors. *Id.*

129. *See Tutto in Famiglia—Italian Luxury Goods*, *ECONOMIST*, Apr. 14, 2007, at 83. In 2006 the luxury goods industry grew ten to twenty percent internationally, however in China the industry grew by fifty percent. Historically, the luxury goods industry gains foothold when a nation's per capita GDP reaches approximately seven thousand dollars. An example of this trend is the Japanese investment in luxury items at the end of the 1970s, when Louis Vuitton sales increased dramatically. In 2006, China's wealthiest cities noted an average per capita GDP at seven thousand dollars. According to Giancarlo Di Risio, head of Versace, China is currently the most interesting market because it has some 120 million consumers who can afford his "super-luxury" wares. *Id.*

130. David Lague, *Private Firms Drive China's Growth*, *INT'L HERALD TRIB.*, Sept. 17, 2005, at 21.

131. *Id.* A study by the Paris-based Organization for Economic Cooperation and Development ("OECD") surveyed 250,000 Chinese companies. The OECD concluded that China has sustained one of the world's fastest economic developments in the past fifty years. Furthermore, the group concluded

is little doubt that China has indeed become a country with a sizable population of wealthy individuals.¹³³ Sustained economic growth has led to China's new position as a hybrid source-market nation.¹³⁴ Wealthy Chinese individuals and corporations are avid collectors of Chinese antiquities.¹³⁵ In the late 1990s antique markets began appearing throughout China, especially in the more prosperous cities such as Beijing, Shanghai, and Guangzhou.¹³⁶ The combination of a red-hot Chinese market for Chinese cultural property, the growing ease with which antiquities can be obtained, and plenty of cash flow has resulted in a booming market for illicit Chinese cultural property.

Perhaps part of the reason for such intensity in the Chinese cultural property market stems from a "rekindled interest in antiquarianism and collecting relics" that emerged alongside the economic liberalization of the last decade.¹³⁷ This rekindled interest may be a response to the Confucian veneration and respect for history.¹³⁸ It may also be a product of Chinese socialist thought. Socialism refers to a socio-economic system in which property and the distribution of wealth are subject to control by the community.¹³⁹ Socialism advocates community growth and by so doing

that Chinese businesses have all but completely integrated themselves into the world market and may become the world's largest exporter in the very near future. *Id.*

132. Conn Hallinan, *China: A Troubled Dragon*, FOREIGN POL. IN FOCUS, May 11, 2006, available at <http://www.fpif.org/fpiftxt/3264>.

133. The relatively recent Chinese interest in collecting Chinese antiquities may stem from a revitalization of an ancient tradition of antiquarianism, which dates back hundreds of years in China. This Confucian respect for the past led Chinese collectors to pursue an astonishing array of antiques for hundreds of years, ending with the Mao Zedong Revolution. Modern Chinese economic growth has produced a resurgence in antiquities collecting, and with a population of over 1.3 billion, antiquities collecting has led to ever-increased looting of Chinese archaeological sites. *See* Dutra, *supra* note 30. Indeed, by the late sixteenth century, increased prosperity led to the widespread collection of antiques and works of art. Collecting these goods was said to be one of the "indispensable pastimes of a gentleman." *Id.* at 69 (quoting ROSE KERR, CHINESE ART AND DESIGN: ART OBJECTS IN RITUAL AND DAILY LIFE 222 (1991)).

134. The term "hybrid source-market nation" is not a generally known term, however the concept is not unique. The United States is sometimes considered both a source and market nation due to the international appetite for Native American antiquities and the American appetite for Greek, Asian, and South American antiquities. *See, e.g.,* Warring, *supra* note 36, at 233 n.32 (citing John Henry Merryman, *A Licit International Trade in Cultural Objects*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW, 176, 209–11 (2000)).

135. Pomfret, *supra* note 76. Sotheby's International Chief Executive, Robin Woodhead, noted that the Chinese interest in that culture's own artwork is a result of the growing participation of China in the global world and its growing prosperity. *Id.*

136. J. DAVID MURPHY, PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA 51 (1995).

137. Dutra, *supra* note 30, at 72.

138. *Id.*

139. Terence Ball & Richard Dagger, *Socialism*, in ENCYCLOPEDIA BRITANNICA ONLINE (2006), <http://www.britannica.com/EBchecked/topic/551569/socialism>.

espouses the necessity of a connection to one's community. The collection of antiquities was historically a significant method by which the Chinese sought this connection.¹⁴⁰ Regardless of the ultimate reason for such a booming Chinese cultural property market, it seems clear that the international desire for these objects shows no signs of slowing.

4. Risk Calculation in Market Value

Under the ECMH, prices should at any time fully reflect all available information.¹⁴¹ Information in this context is data that has the capacity to alter one's beliefs about the world or, in a more limited context, one's beliefs about the appropriate price of an asset.¹⁴² Legal changes and bilateral embargoes qualify as examples of such information. Any perceived fluctuation in asset availability has the capacity to raise asset price. The risk of being imprisoned for smuggling looted artifacts most certainly is calculated into the cost of an asset.¹⁴³ Thus, asset price should increase as risk increases. The illicit trade in alcohol during Prohibition exemplifies this principle. During Prohibition, when production and consumption of alcohol were made illegal,¹⁴⁴ prices of whiskey in Iowa rose to between \$16 and \$25 per gallon.¹⁴⁵ Adjusting for inflation, this is the equivalent of paying between \$180 and \$280 for a single gallon of whiskey!¹⁴⁶ The risk of producing and smuggling whiskey was responsible for such astronomical prices.¹⁴⁷ Despite this risk, there was virtually no decrease in actual production.¹⁴⁸ As bootlegging grew more commonplace,

140. Dutra, *supra* note 30, at 69.

141. Gilson & Kraakman, *supra* note 88.

142. *Id.*

143. This is not to propose that impoverished peasants complete complex risk calculations prior to looting. Rather, whenever an individual is posed with two options, one of which is decidedly riskier, that individual will inevitably choose the less risky of the two options, unless the material rewards for the riskier option are sufficiently large to outweigh the detrimental effects of the risk. The determination of what is sufficient to induce risky behavior is an individual decision, and may be based primarily on what is stood to be lost, rather than gained. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979).

144. U.S. CONST. amend. XVIII.

145. Lisa Ossian, Iowa Pub. Television Online, Iowa's Prohibition Years, 1920–1933, http://www.iptv.org/iowapathways/mypath.cfm?ounid=ob_000162.

146. Inflation was calculated using The Inflation Calculator, <http://www.westegg.com/inflation/>.

147. Mark Thornton & Chetley Weise, *The Success of the Great Depression Tax Revolts* 23 (Ludwig von Mises Inst., Working Paper, 1999), available at <http://www.mises.org/journals/scholar/Thornton1.pdf>. Thornton notes that the price of alcohol was higher primarily due to the risky nature of the business during that time. Black markets typically are associated with higher transaction costs and reduced information. It is also noted that alcohol prices jumped five hundred percent during prohibition. *Id.*

148. See Nat'l Comm'n on Marihuana & Drug Abuse, History of Alcohol Prohibition,

the risk of punishment was distributed over a greater number of individuals. This caused prices to fall to \$5 per gallon of whiskey by the end of Prohibition.¹⁴⁹

The persistent dream of riches drew many Iowa farmers to begin producing whiskey during Prohibition.¹⁵⁰ It is this same dream of riches that draws many farmers and villagers in China to loot ancient tombs. If a bilateral agreement banning all cultural artifacts is instituted, there is little doubt that the increased risk will be incorporated into the price of Chinese artifacts. Unfortunately, this result will likely draw more looters into the illicit network.

5. Increased Looting Following Previous Import Restrictions on Cultural Property

Previous cultural property import restrictions have proven themselves an inferior method of resolving this dilemma. On May 7, 1990, the United States imposed weighty restrictions on Peruvian cultural property.¹⁵¹ Under Article 9 of the CPIA,¹⁵² the United States sought to bar the importation of certain materials flowing from the Sipán archaeological region in northern Peru, due to excessive and systematic looting as a result of international and U.S. demand for those goods.¹⁵³ Then, in 1997, the United States renewed these restrictions with a Memorandum of Understanding (“MoU”), but extended the coverage to pre-colonial and

<http://www.druglibrary.org/schaffer/LIBRARY/studies/nc/nc2a.htm>. In 1921, two years after Prohibition had begun, 95,933 illicit distilleries were seized by the government. By 1925, that number was up to 172,537, and shortly thereafter in 1930, the number sat at 282,122. In connection with these seizures, 34,175 persons were arrested in 1921; by 1925, the number had risen to 62,747, and to a high in 1928 of 75,307, according to the Internal Revenue Service. *Id.* Speakeasies sprung up around the nation. Estimates of the number of speakeasies during Prohibition have been set at between 200,000 and 500,000. *Id.* Interestingly, figures published by the Department of Commerce in the Statistical Abstract of the United States support a theory of increased alcohol consumption during Prohibition. The Department of Commerce lists the annual per capita consumption of hard liquor from 1910 to 1914 at 1.46 proof gallons, whereas the same consumption during Prohibition was computed to be 1.63 proof gallons. Note that there is dissent as to the implications of these statistics. *Id.*

149. Ossian, *supra* note 145. Nevertheless, five dollars in 1930 is still the equivalent of paying more than seventy dollars by today’s standards, a hefty price for a gallon of whiskey.

150. *Id.*

151. U.S. Dep’t of State, Bureau of Educ. & Cultural Affairs, Peru: U.S. Protection of Archaeological and Ethnological Material, <http://exchanges.state.gov/culprop/pefact.html>.

152. This is the same article of the 1970 UNESCO Convention on which China has based its recent request.

153. *Id.* See also Carol Strickland, *A Writer Tracks down Rich Pre-Incan Mystery*, N.Y. TIMES, Nov. 22, 1992, at L112. In the late 1980s Sipán artifacts were so valuable that a single gold item sold for \$750,000 on the black market. *Id.*

colonial artifacts from all areas of Peru.¹⁵⁴ The MoU was extended again in 2002 for five years, and then in 2007 it was once again extended for five years.¹⁵⁵

Despite these restrictions, the trade in Peruvian antiquities has hardly abated. Following the initial approval of these import restrictions, the goods began flowing heavily towards Japan, Germany, and Switzerland.¹⁵⁶ André Emmerich, a famed modern art dealer who handled archaeological materials from Central and South America during the 1970s and 1980s, stated, “[b]y the 1990s, the trade in major [Peruvian] objects had largely shifted to Europe, where they don’t have these regulations—leading us to wonder what exactly the State Department had accomplished.”¹⁵⁷ In 1999, CNN reported an increase in looted cultural property flowing out of Peru.¹⁵⁸ In 2005, U.S. Immigrations and Customs Enforcement (“ICE”) recovered and seized 322 pre-Columbian artifacts that were looted in Peru.¹⁵⁹ In August 2006, British authorities arrested a millionaire sportsman, well known in the art world, for illegal trafficking in looted Peruvian antiquities.¹⁶⁰ In the first seven months of 2007, the Peruvian National Institute of Culture (“INC”) seized more than three thousand looted artifacts.¹⁶¹ According to one estimate by the Peruvian government, as much as eighteen million dollars’ worth of Peruvian artifacts is stolen and smuggled abroad yearly.¹⁶² A former Peruvian art smuggler,

154. U.S. Dep’t of State, Bureau of Educ. & Cultural Affairs, *supra* note 151.

155. *Id.*

156. ATWOOD, *supra* note 125.

157. Vincent, *supra* note 10, at 64.

158. *Peru Moves Against Stolen Artifact Smugglers*, CNN.COM, Sept. 11, 1999, <http://www.cnn.com/WORLD/americas/9909/11/peru.inca.robbers/index.html>. According to CNN, a main cause of the increase in looting was the growing disparity between rich and poor. *Id.* A similar trend is being felt currently in China.

159. Press Release, U.S. Immigration & Customs Enforcement, U.S. Agents Recover More Than 300 Stolen Peruvian Antiquities (Sept. 23, 2005), <http://usinfo.state.gov/wh/Archive/2005/Sep/26-972780.html>. The items recovered were ancient pottery, burial shrouds, and gold jewelry. According to an art historian at Florida International University, the seizure was one of the largest in history. The total number of items eventually returned to Peru was 412. Press Release, U.S. Immigration & Customs Enforcement, ICE Returns More Than 400 Pre-Columbian Artifacts to Peruvian Government (June 13, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/070613miami.htm>. An Italian national pled guilty to the trafficking charges and spent seventeen months in a federal prison. *Id.*

160. Adam Fresco, *An Artful Dodge Recovers Peru’s Stolen ‘Mona Lisa,’* THE TIMES (London), Aug. 18, 2006, at 5.

161. *Taking on the Tomb Robbers*, ECONOMIST, Sept. 8, 2007, at 42. The INC is working to repatriate trafficked artifacts from abroad. Recently, the group has joined forces with auction houses, customs officers, art dealers, and collectors to identify items that might have been stolen. A “red list” of sensitive artifacts is currently being developed by the International Council of Museums, a body linked to UNESCO. Peru is only the third country, after Iraq and Afghanistan, to have such a list. *Id.*

162. *Id.*

responsible for the British capture, noted that “the international trade in looted Peruvian artifacts is worth hundreds of millions of pounds a year.”¹⁶³

The growing illegal trade has not slowed as a result of U.S.-Peruvian cultural property import restrictions. Much to the contrary, the demand for looted Peruvian artifacts has grown in recent years, and along with the demand has grown the supply. Millions of dollars are spent on these goods yearly, and the methods by which looted art is smuggled out of Peru have grown increasingly sophisticated.¹⁶⁴ This should come as no surprise, however. A legal system that merely diverts the smuggling regime elsewhere, provides virtually no disincentives, and encourages black market sophistication is bound to fail.¹⁶⁵

6. *Bringing It All Together*

Superficially, import restrictions appear beneficial, however, it is apparent that at times other forces (in this case market forces) undermine the intended good. In the case of Chinese cultural property, it has been well established that a sophisticated network of investors exists and that network is highly attuned to the market for these goods. If this network perceives a decline in availability, despite the irrationality of that perception, we will see a distinct increase in the prices of Chinese cultural property due to added risk burdens. Since generally, in this fluid system, perceived availability does not equal actual availability, these goods will continue to flow out of China, unabated by the legislation. Thus, the United States should withhold imposing import restrictions due to the likely risk of further escalating import restrictions, and thereby undermining the intended effect of such legislation.

163. Fresco, *supra* note 160.

164. *Id.* A recently captured major smuggler was a leading figure in the art world and a well known millionaire sportsman. This smuggler was only captured after being conned into traveling to London, where he was arrested while trying to sell what is known as the “Mona Lisa of Peru’s heritage.” *Id.*

165. Will Grant, *US Hands Back Artefacts to Peru*, BBCNEWS.COM, June 14, 2007, <http://news.bbc.co.uk/2/hi/Americas/6751167.stm>. The Italian national responsible for one of the largest smuggling operations of Peruvian artifacts in U.S. history spent seventeen months in federal prison. *Id.* Contrast this with the mandatory five- to twenty-year sentence for simple possession of cocaine base (crack cocaine) under the Controlled Substances Act, 21 U.S.C. § 844 (2000). For a first time offender, the amount need only be five grams.

D. Import Restrictions Are Not Consistent with the General Interest of the International Community in the Interchange of Cultural Property Among Nations for Scientific, Cultural, and Educational Purposes

China's request is overbroad. The request seeks an embargo on virtually all archaeological material from the Paleolithic period to the Qing Dynasty.¹⁶⁶ The CPIA limits restricted archaeological materials to those with cultural significance that are more than 250 years old and normally discovered as a result of excavation, clandestine digging, or exploration on land or under water.¹⁶⁷ The Qing dynasty ended in 1912, and thus only half of that dynasty's cultural property would retain protection. Furthermore, it is unclear whether the archeological materials listed in China's request would fall under the CPIA's definition of "archaeological interest."¹⁶⁸ Any state seeking protection of its antiquities under the CPIA must meet these criteria. Experts believe that certain categories subject to China's request are not generally found in the ground and are not normally discovered through methods mandated by the CPIA.¹⁶⁹ As such, China's request appears overbroad and unclear.

A brief comparison of past recipients of CPIA protection provides further support for this argument. El Salvador's first request noted the necessity of protecting a well-defined archaeological zone where an estimated five thousand looter pits had already been dug.¹⁷⁰ Peru's initial request sought protection of Moche material that had recently been discovered on its northern coast at Sipán.¹⁷¹ Likewise, Guatemala's first petition for an emergency import ban sought to restrict only Mayan artifacts originating in the Peten region.¹⁷²

166. Public Summary, *supra* note 6.

167. 19 U.S.C. § 2602(a)(1) (2000).

168. 19 U.S.C. § 2601(2)(A). According to the CPIA, "archaeological material of the State Party" means "any object of archaeological interest," leaving the definition of "interest" to the U.S. government.

169. Pearlstein, *supra* note 18. According to William G. Pearlstein's research, experts believe that certain objects of the Ming, Qing, and certain other dynasties are entirely non-archaeological. These experts believe that only certain categories of the Three Kingdoms, Western and Eastern Jin, and Southern and Northern Dynasties and the earlier periods are "normally discovered" as a result of excavation, digging or exploration. *Id.*

170. Kouroupas, *supra* note 38, at 34.

171. *Id.*

172. *Id.*

Recent import restrictions have concededly been broader.¹⁷³ However, this was not the purpose of the CPIA.¹⁷⁴ The proposed import restrictions will frustrate the CPIA's purpose of maintaining consistency with a general international interest in promoting interchange of cultural property for scientific, cultural, and educational purposes. Overbroad restrictions unduly hinder such educational interchange by denying cultural institutions the materials necessary to promote such learning.¹⁷⁵

IV. CONCLUSION

Antiquities are collected by an infinitesimally small percentage of the overall human population. Few bathe in the limelight of these artifacts. As a result, the shadows of poverty, famine, disease, war, and tyranny seem to extinguish their importance in the minds of most. So the question is posed: why concern ourselves with dusty pots, chipped statuaries, and the detritus of forgotten civilizations? Who benefits from these efforts?

China has not met the requirements mandated by the CPIA. However, its cultural property nevertheless deserves protection. This protection should come by way of greater Chinese legal and educational reforms in the area of cultural property. As its economy grows, and looting increases, China will need to examine the value that it places on its ancient history. Yet, Chinese history is the history of mankind. China is home to the oldest

173. Vincent, *supra* note 10, at 66. Canada is one example. Eugene Thaw, an old masters dealer who was a member of the CPAC from 1995 to 1998, observed that the Committee "never saw any compelling evidence that Canada had a looting problem." *Id.* This largely seems to be the influence of Maria Kouroupas's leadership in the CPAC. Many former Committee members have noted her position that the antiquities trade is a dirty thing and should be eliminated. As a result the CPAC has been more apt to enter into import restrictions despite an adequate showing of a problem.

174. *Id.* at 63. When it was made clear that under Ms. Kouroupas, import restrictions had grown broader, New York Senator Daniel Patrick Moynihan sponsored a proposal to reform the CPAC. One of his aides acknowledged that under her leadership, the CPAC has become dominated by archaeologists who seek to destroy the trade in antiquities and have no tolerance for alternative views. Interestingly enough, despite her hatred for the antiquities trade, her leadership has not led to sweeping Chinese cultural property import restrictions. *See also* Jeremy Kahn, *Is the U.S. Protecting Foreign Artifacts? Don't Ask*, N.Y. TIMES, Apr. 8, 2007, at 26. Meredith Palmer, who helped establish the CPAC, argues that "Congress intended the committee to protect only the most significant artifacts from pillage, not grant broad restrictions on the import of entire categories of objects." *Id.*

175. *See* Laura B. Whitman, *China's Request: Is the US Government on the Verge of Shutting Down the Market in Chinese Antiquities?*, ORIENTATIONS ASIAN ART MAG., Apr. 2005, at 89. Marc Wilson, Director of the Nelson-Atkins Museum in Kansas City, Missouri, recently completed a "major survey" of Chinese archaeology. He noted that if a bilateral agreement blocking Chinese cultural property were implemented, the only real losers would be the American people, due to their lost opportunity to understand and appreciate Chinese culture. He was quoted as saying that the request "will not save a single chopstick," and would be equivalent to a McCarthy-era restriction. *Id.* He also argued that construction and development are more destructive than the looters. *Id.*

continually existing civilization on Earth, with about five thousand years of art, culture, architecture, and politics. If China loses its heritage to pillage, mankind loses a magnificent and irreplaceable insight into the development of civilization. And therein lies the answer to the question posed. Mankind benefits from the protection of cultural property. Every nation must strive to confront pillage head on. For if we fail to stand together and issue a united front against the looting of ancient sites, our shared past will simply continue its flow along the path of least resistance.

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