

February 4, 2005

Mr. Jay Kislak  
Chair, Cultural Property Advisory Committee  
U.S. Department of State  
301 4<sup>th</sup> Street, S.W.  
Washington, D.C. 20547

Dear Mr. Kislak,

I am submitting this letter on behalf of myself and the Lawyers' Committee for Cultural Heritage Preservation<sup>1</sup> in support of the request of China under Article 9 of the 1970 UNESCO Convention and the Convention on Cultural Property Act (CPIA), 19 U.S.C. § 2602, for the United States to impose import restrictions on archaeological materials that are illegally exported from China. While it is clear that the archaeological heritage of China has suffered from considerable looting of sites<sup>2</sup> and that this creates jeopardy to the cultural patrimony of China, I will focus my comments on certain aspects of the second and third determinations that the Committee will consider under the CPIA.

The second determination concerns the question of whether China "has taken measures consistent with the Convention to protect its cultural patrimony," 19 U.S.C. § 2602(a)(1)(B). There are numerous factors that the Committee will consider in this regard, one of which is whether the legal regime in China serves to protect its archaeological heritage in a manner consistent with the 1970 UNESCO Convention.

China's earlier Cultural Relic Protection Law, enacted in 1982, vested ownership of all archaeological materials in the nation and prohibited the export of all archaeological materials.<sup>3</sup> This law was extensively amended in 2002 by a new law, the 2002 Law on the

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<sup>1</sup> The Lawyers' Committee for Cultural Heritage Preservation is an association of lawyers who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy. I am Professor of law at DePaul University College of Law and Director of its Arts and Cultural Heritage Program. I served as a public representative on the Cultural Property Advisory Committee from 2000-2003.

<sup>2</sup> See, e.g., He Shuzhong, *Illicit Excavation in Contemporary China*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* 19, 20-22 (Neil Brodie, Jennifer Doole & Colin Renfrew, eds. 2001).

<sup>3</sup> PEOPLE'S REPUBLIC OF CHINA, CULTURAL RELICS PROTECTION LAW (adopted at the 25<sup>th</sup> Meeting of the Standing Committee of the 5<sup>th</sup> National People's Congress, Nov. 19, 1982) in *THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982* 313 (1982). This earlier law and its enforcement are discussed in detail in J. DAVID MURPHY, *PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA* 83-142 (1995); see also J. David Murphy, *An Annotated Chronological Index of People's Republic of China and Statutory and Other Materials Relating to Cultural Property*, 3 INT'L. J. CULTURAL PROP. 159 (1994), and Anne Carlisle Schmidt, *The Confuciusornis Sanctus: An*

Protection of Cultural Relics (2002 LPCR).<sup>4</sup> The 2002 LPCR continues the vesting of ownership of all cultural relics obtained through licensed excavation or accidentally in conjunction with agriculture and construction projects in the state.<sup>5</sup> The sale, as well as permanent export, of such newly excavated archaeological objects is prohibited.<sup>6</sup> The 2002 LPCR also establishes mechanisms for the temporary export of all types of Chinese cultural relics for exhibition purposes.<sup>7</sup> The law permits such exports for up to a year, which may be extended an additional year. While little information seems as yet available as to enforcement of the 2002 law,<sup>8</sup> examples of enforcement of the earlier law are reported in the literature.<sup>9</sup>

In evaluating the second determination, one therefore concludes that China has created a domestic legal regime that is consistent with the 1970 UNESCO Convention and that is intended to protect the archaeological heritage in a manner that is similar to what numerous other countries with a rich archaeological heritage do. Furthermore, there is evidence that China attempts to enforce this law, both by intercepting looters illegally

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*Examination of Chinese Cultural Property Law and Policy in Action*, 23 B.C. INT'L. & COMP. L. REV. 185 (2000). According to Murphy, state ownership of unexcavated archaeological materials dates back to the 1961 Provisional Regulations on the Protection and Administration of the Cultural Heritage of 17.11.60, approved by the 105<sup>th</sup> plenary session of the State Council, *see* MURPHY, PLUNDER AND PRESERVATION, *supra*, at 82.

<sup>4</sup> PEOPLE'S REPUBLIC OF CHINA, LAW ON THE PROTECTION OF CULTURAL RELICS (adopted at the 30<sup>th</sup> Meeting of the Standing Committee of the 9<sup>th</sup> National People's Congress, Oct. 28, 2002), *available at* LEXIS PRCLEG 2506. *See also* Michael J. Dutra, *Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China*, 5 ASIAN-PACIFIC LAW & POL. J. 62, 82 n.88 (2004).

<sup>5</sup> LPCR 2002, *supra* note 4, Articles 5, 32 and 34; *see also* Dutra, *supra* note 4, at 83.

<sup>6</sup> LPCR 2002, *supra* note 4, Articles 50 and 51. *See also* Interim Provisions on the Administration of Cultural Relic Auction, 14.7.2003, *available at* LEXIS PRCLEG 3012, Article 12, which states: "The following cultural relics shall not be considered as cultural relic objects of auction: (1) the cultural relics excavated inside the territory of China which shall be turned into the State in accordance with the law ...".

<sup>7</sup> LPCR 2002, *supra* note 4, Articles 60-62; *see also* REGULATION FOR THE IMPLEMENTATION OF THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON THE PROTECTION OF CULTURAL RELICS, 1.7.2003, (adopted by the 8<sup>th</sup> executive meeting of the State Council on May 13, 2003), *available at* LEXIS PRCLEG 2796, Articles 44-51; Presentation of Wang Li Mei, *Cultural Property Forum: The Export Policies of China, Korea, and Japan*, Japan Society, New York, April 9, 2003, *available at*: [http://www.japansociety.org/email\\_images/gallery%20transcript.pdf](http://www.japansociety.org/email_images/gallery%20transcript.pdf).

<sup>8</sup> Administrative, civil and criminal penalties are listed in Articles 64-79 of the 2002 LPCR, *supra* note 4. Criminal sanctions are also imposed in Articles 151, 263-64, and 324-329 of the PEOPLE'S REPUBLIC OF CHINA, CRIMINAL LAW, 1.10.1997 (adopted at the 5<sup>th</sup> session of the 8<sup>th</sup> National People's Congress, Mar. 14, 1997), *available at* LEXIS PRCLEG 354; *see also* Dutra, *supra* note 4, at 89-93. Article 328 specifically addresses illegal excavation.

<sup>9</sup> Wang Li Mei reported that in 1997, over 600 incidents of attempted illegal removal of cultural artifacts were detected. In addition, numerous cases of antiquities being smuggled via container have been prevented, one of which involved over 4000 items in a single container. In 1999, Customs intercepted 11 shipments with over 1000 items. *Cultural Property Forum*, *supra* note 7; *see also* Dutra, *supra* note 4, at 92. He Shuzhong reported that Customs intercepted more than 110,000 cultural objects (both archaeological objects and other types of cultural objects) between 1991 and 1995, more than 12,000 in 1997, and more than 5000 in 1998, *see supra* note 2, at 23 [note that this article was written in 1999 and so presents the most recent statistics available at the time]. David Murphy recounts the interceptions of antiquities being smuggled out of China in the 1980's and early 1990's in J. David Murphy, *Hong Kong, 1997, and the International Movement of Antiquities*, 4 INT'L. J. CULTURAL PROP. 241, 242 & note 9 (1995).

plundering archaeological sites and by preventing illegal export of such items. At the same time, China with its large population, long history, and rural poverty undoubtedly faces a difficult task. The changes introduced by the 2002 law, which are intended to permit a regulated trade in other types of cultural relics, may also complicate the legal treatment and protection of archaeological objects.<sup>10</sup>

The third determination that the Committee must address is the “concerted action” requirement, that is,

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

19 U.S.C. § 2602(a)(1)(C)(i). This requirement is probably the most complex of the four determinations because it embodies several elements.

The first step is to analyze actions taken by other nations, regardless of whether they are parties to the 1970 UNESCO Convention, to prevent the import of or trade in illegally exported Chinese archaeological artifacts. There are now 106 States Parties to the 1970 UNESCO Convention, and these include many of the world’s largest market nations such as the United Kingdom, Switzerland, Japan, France, Italy, Australia, and Canada. Several other significant market nations are either considering ratifying the Convention (such as Germany) or on the verge of signing the Convention (such as Belgium), which signifies the nation’s intention to ratify soon. The largest markets for Chinese cultural artifacts have been identified as Britain, the United States, France, Japan and South Korea.<sup>11</sup> All of these nations are now party to the UNESCO Convention.

Many of these nations, such as Australia and Canada, have enacted domestic implementing legislation that automatically prevents the import of illegally exported

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<sup>10</sup> China uses a grading system, which divides cultural relics into “precious cultural relics” and “ordinary cultural relics.” The first category is divided into three classes. Rating Standards for Cultural Relic Collections, 4.9.2001, *available at* LEXIS PRCLEG 1829. The grading system, which predates the 2002 CPLR, applies to archaeological artifacts (and to all other cultural relics) for the purpose of setting standards of care in public institutions and other purposes; it now also applies to other types of cultural relics as part of the regulation of trade and export. The use of this grading system for these various purposes seems to have produced some confusion in the relevant literature. Grade 1 relics are subject to greater regulation. For example, Article 39 of the 2002 CPLR states that Grade 1 state-owned relics are recorded with the department of cultural relics administration under the State Council. Article 41 states that borrowing of Grade 1 relics requires approval of the department of cultural relics administration under the State Council. Article 48 provides that damage to Grade 1 cultural relics must be reported to the department of cultural relics administration under the State Council for investigation. This system is also relevant in determining the severity of the punishment meted out for violations of the law. For example, Article 264 of the 1997 Criminal Law, *supra* note 8, applies only to theft of “precious cultural relics”. *See also* Dutra, *supra* note 4, at 91.

<sup>11</sup> *Cultural Property Forum*, *supra* note 7 (comments of Wang Li Mei).

cultural materials from other States Parties. These nations have therefore *already* implemented restrictions that are *similar* to, albeit much broader than, any import restrictions that would be imposed by the United States pursuant to the CPIA.<sup>12</sup> Switzerland has enacted implementing legislation that establishes a system of bilateral agreements, which is similar to the United States' CPIA system.<sup>13</sup> The United Kingdom has implemented the Convention through creation of a new criminal offense. This legislation criminalizes the dealing in archaeological objects that are excavated contrary to local law. Thus, since unlicensed excavation is prohibited in China and the products of all excavations are the property of the nation, it is clear that anyone who knowingly deals in or transports archaeological objects from China is violating this statute. Thus, although the United Kingdom has chosen a different method of implementing the UNESCO Convention, this legislation is aimed at controlling the same problem of illegal excavation.<sup>14</sup>

China was one of the first nations to accede to the 1995 Unidroit Convention on Stolen and Illegally Exported Cultural Objects, of which there are currently twenty-three other States Parties, including Italy. Several nations, most notably France and Sweden, are considering or in various stages of ratification of this convention. Unlike the UNESCO Convention, the Unidroit Convention focuses on requiring nations to create private rights of action for recovery of stolen and illegally exported cultural objects. Of greatest significance in the context of China's request is Article 3(2), which recognizes all illegally excavated archaeological objects as stolen property, when this is consistent with local law where the illegal excavation took place. This offers a potentially powerful legal tool for China to recover looted archaeological materials from the other States Parties.

In assessing the third determination, it is also necessary to keep in mind the exception provided in the statute, as follows:

Exception to restrictions. Notwithstanding paragraph (1), the President may enter into an agreement if he determines that a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions, but--

(A) such restrictions are not essential to deter a serious situation of pillage, and

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<sup>12</sup> These restrictions are much broader because they apply to *all* illegally exported cultural materials and are therefore not restricted to archaeological materials that are older than 250 years or to specifically designated categories of archaeological and ethnologic materials. *See, e.g.*, Canada Cultural Property Export and Import Act, R.S.C. 1985, c. C-51, § 37; Australia Protection of Movable Cultural Heritage Act 1986.

<sup>13</sup> The most significant difference is that the Swiss bilateral agreements do not have an automatic termination date. Federal Act on the International Transfer of Cultural Property, Article 7, *available at* [http://www.kultur-schweiz.admin.ch/arkgt/kgt/e/e\\_kgt.htm](http://www.kultur-schweiz.admin.ch/arkgt/kgt/e/e_kgt.htm).

<sup>14</sup> Dealing in Cultural Objects (Offences) Act 2003, 2003 Ch. 27, Articles 1 and 2(2), *available at* <http://www.uk-legislation.hmso.gov.uk/acts/acts2003/20030027.htm>. This provision applies regardless of whether the illegal excavation occurs in the United Kingdom or in a foreign country. Importation of archaeological or ethnological materials in violation of a CPIA bilateral agreement does not result in criminal liability (unless some other law is also violated). The only consequence for violation of the CPIA is the forfeiture of the materials at issue.

(B) the application of the import restrictions . . . in concert with similar restrictions implemented, or to be implemented, by other nations (whether or not State Parties) individually having a significant import trade in such material would be of substantial benefit in deterring a serious situation of pillage.

19 U.S.C. § 2602(c)(2). In accordance with this exception, even if another nation with a significant import trade is not taking similar actions, then the United States may impose its own import restrictions if the U.S. restrictions would still be of substantial benefit in deterring the pillage. This means that if there is a significant trade in looted Chinese archaeological materials in the United States, then preventing the import of such materials would be of significance in deterring or reducing the incentive to loot archaeological sites in China.

China has previously sought and received assistance from other countries in repatriating looted archaeological objects. Probably the most spectacular example is the relief chiseled out of the tomb of Wang Chuizi of the 10<sup>th</sup> century and offered for sale by Christie's in New York. The relief was recovered and returned to China under Section 308 of the CPIA, which prohibits the import of stolen cultural property that has been documented in the inventory of a museum of another State Party.<sup>15</sup> China has also recovered cultural objects smuggled into Britain and New Zealand.<sup>16</sup>

China's request satisfies the most essential elements of the second and third (as well as the first and fourth) determinations required to support its request for a bilateral agreement restricting the import into the United States of looted and illegally exported archaeological materials. China has in the past participated in numerous examples of cultural interchange that do not threaten its archaeological heritage and a bilateral agreement will only help to further such mutually-beneficial cooperation. It is in the interest of the United States to grant assistance to other nations under the UNESCO Convention in preserving their archaeological heritage because we all gain from the increased understanding of our shared past that results from such preservation.

Sincerely,

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Professor and President,  
Lawyers' Committee for  
Cultural Heritage Preservation

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<sup>15</sup> Dutra, *supra* note 4, at 63-64. The recovered relief is only one of ten that were stolen from the tomb. China also recovered four container loads of stolen cultural objects that were intercepted by U.S. Customs in Seattle in 1997. *Cultural Property Forum*, *supra* note 7.

<sup>16</sup> *Id.* China also persuaded the Miho Museum in Japan to return a Buddha head without legal actions. *Id.* Murphy recounts seizures of illegally exported artifacts in the early 1990's by Hong Kong officials. Murphy, *supra* note 9, at 242-43.