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<td><strong>Author(s)</strong></td>
<td>Murphy, JD</td>
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<td><strong>Citation</strong></td>
<td>International Journal of Cultural Property, 1994, v. 3, p. 227-242</td>
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<td><strong>Issued Date</strong></td>
<td>1994</td>
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<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/10722/42396">http://hdl.handle.net/10722/42396</a></td>
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The People’s Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?

J. David Murphy*

1 Introduction

“Cultural property” may be loosely defined as a category of property that includes works of art and archaeological, historical and ethnological objects which are generally considered as being the material evidence of a certain stage of civilisation.¹ The trafficking in stolen or illegally-exported art and cultural objects is a problem of immense international proportions — thought to be third only to drug and arms smuggling, or perhaps even in second place.² As respected commentators have observed:

“[T]he publicity surrounding the volume of the art trade, its soaring prices, the aggressive promotion by auction houses and the continual emphasis on the record-breaking sums reached, have done much to promote cultural property as a lucrative field for dishonest activities, and to attract illicitly acquired goods to the auction and sales rooms of the ‘art market’ states.”³

And:

“[t]he respectable part of the art world [can] no longer pretend that the looting of ancient art [is] a matter involving only a few obscure peasants, corrupt local officials and unscrupulous

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dealers. Splendid national treasures, stolen and mutilated, [can] within a few years find their way into the halls of America’s most sumptuous museums.

Antiquities are thought to be the largest single class of items smuggled out of the People’s Republic of China. With the memory of the removal to Taiwan in 1949 of the treasures of the National Museum all too vivid in the minds of Chinese officials, they now face the spectre of wholesale removals of artifacts by smuggling networks. The Preamble to a 1982 Standing Committee decision painted a graphic picture of “economic criminal activities such as seeking exorbitant profits through smuggling ... theft and sale of precious cultural relics ... and state personnel who participate in, protect or connive at these criminal activities.”

Statistics from the China State Bureau of Cultural Relics indicate that over 40,000 tombs were reported plundered in 1989 and 1990 alone. PRC customs officials themselves claim to have intercepted since the early 1980s 70,000 pieces bound for the “transit states” of Hong Kong and Macau. Apart from clandestine excavations, a significant proportion of the outflow comes direct from museum thefts and even thefts from government facilities used to store pieces confiscated or surrendered to the state. There are accounts of details and photographs of important relics in Chinese museums being faxed to dealers, in anticipation of later “delivery” through theft and smuggling networks.

It is one of the ironies of the cultural property trade that the financially poor or developing countries are the “art rich”, “supply”, or “source” countries, while the wealthy, developed countries are most often the “art poor”, “market” states. Though in most respects developing countries encourage foreign trade with a view to foreign exchange and domestic development, the pattern does not hold true where cultural property is involved – at least at the official governmental level. Cultural property is usually regarded by developing countries as an inappropriate subject matter for trade. The reasons given are sometimes anthropological and historical, but are very often purely nationalistic, without much regard for whether there are any religious, cultural or social reasons why the relics in question have significance for today’s cultures. As Professor Merryman has observed, “…the basic questions about cultural property policy are submerged under layers of prejudice, rhetoric and romanticism.”

The question, “Who owns the past?” is a difficult and explosive one, bound up with political, economic, social and legal currents. Most developing states face an internal tension that is not often appreciated when issues of trade policy are being considered: on the one hand there are official policies aimed at preventing most, if not all, cultural relics from leaving the state; and, on the other, there are economic forces from without and within that seek to force an outflow by whatever means.

2 The Inadequacy of International Law

One type of nationalist-interference in cultural property is represented by those who feel that the rules as to who has rights in cultural property should be dictated by them. There are several others -- dealers, collectors, curators; those who believe that cultural property is a right, and those who, more pragmatically, see it as a tool for increasing trade, prestige; and the particular trade process who are only likely as not, the object handles to be the “national patrimony” means.

Even for those who espouse the concept of a “national patrimony, there is another question to consider -- the various attempts to curb the illicit trade in art and cultural property are being thwarted by breaches of domestic law. The topic is well beyond the scope of this article, but the attempts here is a brief mention of some of the current efforts. These include a few international conferences, voluntary repatriations, and negotiations. Generally it says that the illicit trade in artifacts has numerous forms, including political difficulties, efforts to sell them as]

Taking the PRC as an example, the legal and practical issues raised by the cultural property trade are highly relevant to the domestic export embargoes. The domestic export of cultural property is a serious problem that must be addressed by countries facing similar issues.
This is perhaps related to another phenomenon identified by de Varine — (predominantly) Europeans have failed to understand the essential values of non-European cultures, while at the same time non-Europeans have been assaulted with non-traditional values as part of the developmental process.

“This has led to a sudden discovery of ‘primitive art’ at the very moment when its creators are turning away from it in a search for the symbols of so-called modern civilization. The trend to invest cultural goods with materialistic values, which began in Europe and the U. S., is thus spreading rapidly to the rest of the world”.13

Taking the PRC as an example, this paper highlights some of the legal and practical issues raised by the most prominent method employed by developing countries to stop the outflow of cultural relics, the domestic export embargo.

2 The Inadequacy of International Efforts

One type of nationalist-internationalist dichotomy in the area of cultural property is represented by the opposing positions of those who for economic or other reasons favour freer trade in relics, and those who for political or other reasons favour a retention of national relics within national boundaries. It should be observed that the first group is comprised of several constituents: the “enlightened” art experts who feel that the rules as to the international movement of cultural property should be dictated by considerations of science; the acquirers — dealers, collectors, museums — who are driven by money and prestige; and the participants in the domestic theft and smuggling process who are only driven by money, and for whom, as likely as not, the object has no real cultural meaning — for them “national patrimony” means merely a resource to be exploited.

Even for those who espouse some type of protection of cultural patrimony, there is another form of “internationalism” that merits attention — the various attempts that have been made in international forums to curb the illicit traffic in cultural property resulting from theft or breach of domestic export laws. A treatment of this broad topic is well beyond the scope of this paper; all that will be attempted here is a brief mention of the most notable developments.14 These include a few international conventions, bilateral treaties and voluntary repatriations; and General Assembly and UNESCO pronouncements. Generally it can be said that their real impact on the illicit trade in artifacts has been minimal.15 Apart from the usual political difficulties, efforts in this area have, not surprisingly, run full tilt into private property considerations.
Perhaps the most visible international undertaking was the 1970 UNESCO Convention.16 This was largely an initiative on the part of “source” states to stem the “haemorraging” that could only be stopped with the assistance of the developed market states. It is really the only international cultural property treaty in the civil area; international efforts prior to 1970 focussed mainly on the consequences of wars. In contrast with, say, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,17 the UNESCO Convention is essentially nationalist and retentionist in scope – aiming at enlisting the cooperation of market states to protect the interests of source states; its thrust is not to preserve a “common human culture”.

The PRC acceded to the UNESCO Convention in 1989. Though the PRC is a classic source state and the Convention attempts to curb the traffic in stolen and illegally exported cultural property, the Convention will not likely be of much practical assistance to the PRC. While the developing countries would originally have outlawed all international movement of cultural property, they were forced to abandon that position; and the final version of the Convention must be regarded as reflecting a very moderate compromise position. As it is, very few of the leading market states (or transit states, such as Switzerland) have ratified the Convention. This is perhaps the most glaring reason for its failure.

The weaknesses in the Convention’s provisions can be briefly summarized. The definition of “cultural property”18 is thought to be too broad and vague, particularly since it relies upon a subjective designation by each state (“specifically designated by each state as being of importance”) rather than on objective criteria. It is not clear whether such designation must result from prior inclusion in some national inventory, or whether the decision can be left until export (the so-called “passport” approach). These difficulties impact directly on the provisions in Article 6 for an export certificate regime.

Portions of the Convention are merely rhetorical, for example articles that simply affirm intentions or declare practices illicit. Article 5 obliges states parties to establish a system of “national services” such as inventories, regulations, institutions, technical services and the like to preserve the cultural heritage. These requirements only raise a double difficulty for developing states, such as the PRC, given the potentially huge volume of sites and artifacts involved and the small resources allocable to the problem.19 The addition in Article 5 of the qualification, “as appropriate for each country”, signalled the difficulty most developing countries anticipated in finding the means to develop any sort of effective domestic preservation programme.

The main operative provisions of the UNESCO Convention were meant to be those in Article 7(a) – obliging market states to take steps to prevent their museums and similar institutions from acquiring illegally-exported cultural property from another state party; and

Article 7(b) – prohibiting the states to take steps to return or cover a rather small sum to a museum, public monument, etc. only, and cover a rather small sum to a museum, public monument, etc. for which the problem is mainly the development of documentation, this may well be lacking in the Convention’s text. In practice, must be consistent with a requirement that the states are free to interpret their own legal system.

More recently, efforts have been made through a working group of the United Nations’ Convention on Stolen or Illegally Exported and Illegally Taken Cultural Property.15 The main concern is the protection of cultural property – a legal principle that underlies the Convention on Stolen or Illegally Exported Cultural Property. This is perhaps the most glaring reason for its failure.

The preliminary United Nation Convention on Stolen or Illegally Exported Cultural Property is a recent step toward finding a process that will likely lead to the return of the object to its original home. The Convention sets out a process for the return of stolen or illegally exported cultural property, and it is hoped that this will lead to a new system for the international trade in cultural property.

3 The Domestic Export of Cultural Property

In the absence of any workable system of control, the most developing nations have had to rely on the UN Convention to regulate the export of cultural property. This is often difficult, as the Convention is only advisory and not binding. The Convention is not perfect, but it is a step in the right direction.

Beyond the scope of the Convention on Stolen or Illegally Exported Cultural Property, there are other international agreements that govern the export of cultural property. These include the UNESCO Convention on the Protection of the World Cultural and Natural Heritage, and the UNESCO Convention on the Means of Protection of Cultural Property in the Event of Armed Conflict.

The Convention on the Protection of the World Cultural and Natural Heritage is designed to protect cultural and natural heritage sites from damage caused by armed conflict and other situations of armed violence. The Convention on the Means of Protection of Cultural Property in the Event of Armed Conflict is designed to protect cultural property from damage caused by armed conflict and other situations of armed violence.
al undertaking was the 1970 gely an initiative on the part praging” that could only be developed market states. It is property treaty in the civil area; discussed mainly on the conse- the 1954 Hague Convention is in the Event of Armed Con- tentially nationalist and retening the cooperation of market states; its thrust is not to Convention in 1989. Though the Convention attempts to exported cultural property, the practical assistance to the would originally have out-cultural property, they were the final version of the Convention—very moderate compromise among market states (or transmit the Convention. This is failure.

The Convention’s provisions can be briefly property” is thought to be it relies upon a subjective designated by each state as objective criteria. It is not clear from prior inclusion in some vision can be left until export. These difficulties impact di- an export certificate regime. uly rhetorical, for example art-ned practices illicit. Article system of “national services” nations, technical services and age. These requirements only states, such as the PRC, stes and artifacts involved and tem. The addition in Arti- rate for each country”, sig- nitories anticipated in finding effective domestic preservation the UNESCO Convention were obliing market states to take inar institutions from acquire from another state party; and

Article 7(b) — prohibiting the import of cultural property stolen from a museum, public monument or institution, and obliging market states to take steps to return it. These provisions are prospective only, and cover a rather small class of cases (though arguably Article 7(b) covers objects most likely to be essential to the national patri- mony and for which the provenance is likely to be known). A well-developed documentation system is essential for enforcement, and this may well be lacking in the source states. Enforcement measures, in practice, must be consistent with national legislation; indeed, the Convention reverts to a territoriality theory of enforcement — states are free to interpret their own obligations.

More recently, efforts have been made through Unidroit, initially through a working group of experts and later with full governmental representation (including the PRC) to draft a convention that addresses private law issues raised by the UNESCO Convention. The main concern is the bona fide purchaser rule in civil law countries — a legal principle that undoubtedly facilitates the illicit movement of art.

These deliberations have resulted in a preliminary draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects. The primary aim of the draft convention is to put the responsibility on the buyer to verify that an object is being legally traded; failure to do so will lead to the object being returned. Stolen objects will be returned to the original owner, subject to limitations provisions and compensation being paid to the buyer where necessary diligence was shown. As to illegally exported cultural property, such objects will be returned, but only where their export has injured certain important defined cultural interests of the state requesting their return; the process involves a request to a court in the market state.

The preliminary Unidroit draft is the most imaginative and positive recent step toward finding a solution to illicit trade. The drafting process continues and a new convention in this area is, however, far from a reality. Market states can be expected to remain leery about any perceived exercise of extraterritoriality and restraint on market forces. In addition, it remains to be seen whether the civil law juris- dictions — most notably European market states — will react positively.

3 The Domestic Export Embargo Approach

In the absence of any workable international scheme of enforcement, most developing nations have resorted to embargo legislation of one form or another — usually a prohibition of the export of privately-owned works of art classified in some way as “national treasures” or the like.

Beyond the scope of this paper are situations involving simple theft, arguably the least complicated ethically if not legally, and
so-called “rhetorical ownership laws” — domestic laws making designated relics, monuments, contents of tombs and other items the property of the state so that a “national (or notional) theft” will trigger the usual private law remedies.24

Embargo or “national retention” legislation may take the form of a total prohibition, in which case there will be no licit international market for a state's relics. Other variants may involve a total prohibition of listed objects with a permit requirement for other objects, or a scheme based on export permits for broad classes of goods.

The PRC’s 1982 Cultural Relics Law generally “places under the state’s protection” broad defined classes of cultural property.25 Apart from deeming classes of objects such as unexcavated relics to be the property of the state,26 the PRC regime imposes restrictions on the private sale of relics “in private collections” and forbids private sales to foreigners.27 State organs are involved in the grading, and decisions on the sale, of all cultural relics. Chapter VI of the 1982 Cultural Relics Law reads as follows:

“Taking Cultural Relics out of China

Article 27. Cultural relics to be exported or to be taken out of the country by individuals must be declared to the Customs in advance and examined by the department for cultural administration of a province, an autonomous region or a municipality directly under the Central Government designated by the state department for cultural administration before export certificates are granted. Cultural relics leaving the country may be shipped out at designated ports. Cultural relics which, after examination, are not permitted to leave the country may be requisitioned by the state through purchase.

Article 28. It shall be prohibited to take out of the country any cultural relics of significant historical, artistic or scientific value, with the exception of those to be shipped abroad for exhibition with the approval of the State Council.”28

In addition, “valuable cultural relics” and “ordinary cultural relics” appear as prohibited or restricted exports in the Prohibited Import and Export Goods List and Restricted Import and Export Goods List promulgated on 1 March, 1993 by the General Administration of Customs (superceding earlier lists in which cultural relics similarly appeared).

The rationale for this sort of embargo legislation in developing, source states is said to be the need to "protect" the objects of art and the cultural heritage they represent. However, there are in reality many elements involved: the cultural, historic or ethnological value of the relic; archaeological considerations, such as preventing the unscholarly destruction of the only records of a civilization; preservation of the integrity of the work and its physical safety, such as from vandalism; the economical, national economy from regular artistic interest; and national pride.

The retentive embargo measures, as in most source states. A senior bureaucrat in Beijing felt that opening up to open auction methods “is tampering with terrible results”. The Administration for Cultural Administration of the Ministry of Culture, practical to raise funds for conservation and anti-theft work, “the opening of a free antiquities market is not an unqualified benefit, but on the contrary will increase incitement to steal”. In 1994, statistics that the State Administration of Cultural Heritage had 10 million source objects, of which about 1% are in the “most protected” category.

There is, however, a subtext in the economics and realities of the market, the source states, by attempting to stop the market, doing nothing more than exacerbating the flow of cultural property.

The developing states typically are those whose source states, by attempting to stop the market, doing nothing more than exacerbating, not regulating, their museums have limited funds and are often held privately.29 The absence of meaningful international law which recognizes the existence of an illicit market is a critical factor.

A situation that encourages corruption, theft, nationalification and corruption.30 Paramilitary Customs, often used to enforce strict retention laws and operate in the name of protecting illicit income.

The museologists argue that a market leads to illicit traffic which they claim will not flourish as it results in amateur rather than professional traffic, in damaging of sites and works.

Embargo or retention legislation can only be said to enforce the laws, and may help preserve, catalogue and disseminate information which will help to protect and inform the public.31 Having regard to the contraband market, it can be said that embargo legislation is a useful tool to combat the theft of cultural artifacts.

people's republic of china
from vandalism; the economic interests — the benefits for the national economy from regulated sales or, alternatively, tourism; local artistic interest; and nationalistic hoarding instincts.29

The retentive embargo mentality is firmly entrenched in the PRC as in most source states. A senior official of the Palace Museum in Beijing felt that opening up relics outlet channels such as through open auction methods “is to increase opportunities for relics smuggling with terrible results.”30 Similarly a spokesman for the State Administration for Cultural Relics was of the view that “it is not practical to raise funds for relics protection by selling relics”, and “the opening of a free antique market is not the way to curb smuggling, but on the contrary will result in more leaks”31 — this despite statistics that the State Administration for Cultural Relics now has approximately 10 million separate relics in storage, of which only about 1% are in the “most precious” category.

There is, however, a substantial body of opinion, based on the economics and realities of the international art market, that the source states, by attempting to implement embargo regimes, are doing nothing more than exacerbating the problem of the illicit outflow of cultural property.

The developing states typically have no real domestic market, and their museums have limited resources with which to acquire artifacts held privately.32 The absence of a licit market in effect ensures the existence of an illicit market. Nafziger has noted the irony of the situation:

“This emerging threat [i.e. cultural nationalism] to the shared values of cultural diffusion and the advancement of scientific knowledge has arisen from the restrictions which were provoked by the threat of promiscuous trafficking in artifacts and pillaging of archaeology. The current regime may be creating more problems than it is resolving.”33

A situation that encourages an illicit market brings with it criminalization and corruption.34 Paradoxically the bribe-takers would support strict retention laws and oppose legalisation of export, in order to protect their illicit income.

The museologists argue that retention or “protection” legislation leads to illicit traffic which defeats the purpose of protection insofar as it results in amateur removals, the loss of information, and the damaging of sites and works.35

Embargo or retention legislation is toothless absent the resources to enforce the laws, and meaningless unless there exist the means to preserve, catalogue and display the relics that the state means to protect.36 Having regard to such bureaucratic requirements, it might be said that embargo legislation makes even less sense for developing states than for developed states in that in the former the “protected” resources are very often unowned, found — indeed, ex-
cavated — relics rather than identifiable owned objects as in European countries.

The art world knows that embargo legislation in developing source nations does not prevent export; it only ensures that the traffic goes underground. Arguably, the tighter the export control, the stronger the illicit market, and the process spirals despite rhetoric that retention regimes are necessary to curb the black market. In the end, export controls only add costs — social and otherwise — to the inevitable exports.

4 A Preferred Approach

In large part, the problem of the illicit traffic in cultural property results from economics: demand exceeds supply in market states, and supply exceeds demand in source states. Many observers of the process argue that the solution must also be economically based:

“... the prevailing sentiment in most industrialised, importing nations is still very much in favour of allowing the marketplace to operate without intervention. The rationale for a free market in cultural property can be expressed in economic theory which argues that allocating this property to the buyer who pays the most for it assures that the property will come to rest with the person who has the superior use and thus assuring the maximum benefit to society.”

Of course the market view that the buyer who pays the most must have the greatest interest in protection fails to consider the intangibles involved, such as the importance of the maintenance and transmission of a domestic culture. The pure economic approach fails to take account of the interests of future generations because they have no impact on current markets. Arguably such market choices are unfair for developing nations where cultural property protection considerations must compete with public welfare needs in a struggle for limited resources. Unrestrained market rhetoric cheapens the ethnological, historical and cultural importance of the most significant art objects. Even J. S. Mill argued for inalienability where the laws of property “have made property of things which ought not to be property...”

While the operation of the market probably ensures optimum protection in the limited sense that those willing to pay probably are willing and able to conserve, there are numerous other variables that must be taken into account. Certainly trade restrictions must be re-examined on a cost-benefit approach, but the goals — often competing ones — must be made clear. These would include prevention of pillage of sites, protection of the most significant and essential aspects of national patrimony, maintaining a link between art and its geographical-historical milieu, international display and education, avoidance of over-extending or the prospect of enforcement.

Such an approach inevitably, not just a ranking of values regimes, but also a ranking of their importance, having respect for an international regime that would govern imports according to a universal classification leading to a categorization politically, however, given the financial level, development and all — at the domestic level.

It is argued that the export of cultural property should be guided by the same sort of criteria, having respect for a scheme of values that rank the significance. What is required is an assessment of the degree to which each may result in the export of cultural property items. A country’s competitiveness against, rather than for, strict export controls.

The developing art-rich nation, even an exploitable national resource, would be “mined” as a source of income. A way to keep art is to let a large number of excess relics can be made, most culturally significant pieces of exploration efforts. Once in circulation, the creation of a sizeable licit market might discourage and the concomitant respect for a perfect model, money would go into study rather than to bribes. At least the illicit "archaeological" crimes would be kept to a minimum.

Export legislation in developing nations should be significant exchange or lend support to the notion of “cultural ownership” to ensure the market is presumably better than loss for the state of origin. In addition, a release into trade of less significant objects, would, in the absence of embargo legislation better...
People owned objects as in Euro-
pean legislation in developing
countries must ensure that the traffic
after the export control, the
process spirals despite rhetoric
curb the black market. In the
social and otherwise — to the
geographical-historical milieu, preservation, both domestic and in-
ternational display and education, fostering of reciprocal trade, and
avoidance of over-extending customs regimes beyond any realistic
prospect of enforcement.

Such an approach inevitably necessitates a process of ranking —
not just a ranking of values to guide the creation of new legal re-
gimes, but also a ranking of the art objects themselves according to
their importance, having regard to the values. Some argue for an
international regime that would oblige importing states to regulate
imports according to a universally-recognised scheme of values
leading to a categorization of an object’s “significance.” Realisti-
cally, however, given the failure of standardisation efforts at the in-
ternational level, developments must occur — if they are to occur at
all — at the domestic level in the source states.

It is argued that the export policies of the source states must be
guided by the same sort of cost-benefit approach, taking into account
a scheme of values that ranks art objects according to their cultural
significance. What is required is a process of judicious selection that
may result in the export of all but the most culturally significant
items. A country’s comparative poverty becomes an argument
against, rather than for, stricter national controls.

The developing art-rich nations should treat cultural property as
an exploitable national resource, not to be hoarded absolutely, but to
be “mined” as a source of income. As Bator has observed, “the best
way to keep art is to let a lot of it go.” The income from the sale
of excess relics can be made available to finance preservation of the
most culturally significant pieces, training of curators, and scientific
exploration efforts. Once international demand is satisfied by the
creation of a sizeable licit market, the profit is cut out of illicit traf-
ficking and the concomitant anti-social behaviour is reduced. In a
perfect model, money would be channelled towards preservation and
study rather than to bribes. Scientists would replace thieves, or at
least the illicit “archaeologists” could be “harnessed.” Enforcement
regimes would be kept to a manageable size.

Export legislation in developing source states should allow for
significant exchange or lending programmes, not only as a reflection
of the notion of “cultural comity” but also because preservation in
a market state to ensure the retention of the integrity of the collection
is presumably better than loss of the collection through neglect in
its state of origin. In addition, there should be scope to allow the
release into trade of less significant or excess material as a trade-off
for financial assistance for exploration and preservation.

This sort of approach, which has at its core the substantial relax-
ation of export controls in accordance with the application of a
scheme of values that would dictate the retention of only the most
significant objects, would, it is argued, achieve the stated objectives
of embargo legislation better than embargo legislation itself.
This must be so in the PRC especially — perhaps now the classic source state, suffering from extensive plundering of graves; theft from archaeological sites and museums; attendant corruption; smuggling networks originating with peasants for whom the relics have economic but not cultural significance; insufficient resources to cope with classification, protection, preservation or enforcement; and a surplus of relics at all levels of cultural importance.

There are indications that the PRC is at least attuned to the economic arguments. As early as the 1960 Provisional Regulations on the Protection and Administration of the Cultural Heritage, there appeared a legislative attempt to isolate items of “considerable historical, artistic or scientific value”.

In a 1974 Circular a group of ministries proposed that:

“The cultural relics department shall guard against the one-sided mentality of caring only about collection while neglecting export and shall adopt a more active approach in assessing and selecting cultural relics that are exportable and supply them to foreign trade departments for export.”

Significantly, in a joint pronouncement the Supreme People’s Court and the Supreme People’s Procuratorate decreed in 1987 that:

“...we should use the ranking of relics as the basis for determination. Consideration should also be given to factors such as quantity, measurable price/value etc. of the cultural relics”.47

Chapter IV of the 1982 Cultural Relics Law obliges state museums and other institutions to “classify the cultural relics in their collection by different grades, compile files for the relics kept by them, establish a strict system of control and register the relics with the relevant department for cultural administration”. “Grade One” cultural relics alone are the responsibility of the state department for cultural administration.48 It is generally conceded, however, that at the moment the PRC has insufficient resources to devote to a serious, comprehensive and scientific ranking exercise that would allow an orderly determination of appropriate export outflows.

Nonetheless, there are recent indications that the state is prepared to engage in international sales of excess relics. The leading example was the “Beijing International Auction” held in October 1992, the first such event since the Communist takeover. Significantly, the expressed aim was to stem the flow of smuggled items. The auction attracted about 500 potential buyers including Asian and Western dealers and collectors and “around 20 affluent Beijingers”.49 A wide range of items was on offer, but only about 15% were pre-1795 pieces. The sale was limited to items classified as Grade 2 or 3. Quality and condition were generally low, and estimates (and presumably reserve prices) unrealistically high. The sale prices were low and many reserve prices stone though it was — a current trend in the west between the market value and the general lack of knowledge.

The PRC experience as a resource state. In the PR the symbolic effort to relax the rigidity of the auctioning, should on the other hand, accentuate the result of its official policy. Inevitable economic necessity can facilitate a move away from the PRC government can only enhance the allure of the patrimony, while at the same time desirable for appreciation by the world in general.
low and many reserve prices were not reached. The auction — milestone though it was — pointed up the PRC officials’ ignorance of current trends in the world art trade and of the significant gulf between the market values of the best pieces and the rest, and their general lack of knowledge of what constitute museum quality relics.

The PRC experience is not untypical of that of many developing source states. In the PRC’s case it is perhaps ironic that the recent symbolic effort to relax its retentive policies, represented by the Beijing auction, should only serve to expose its underdeveloped consciousness of the workings of the international art market, itself a result of its official policy of retention. It is to be hoped that the inevitable economic and political changes to come in the PRC will facilitate a move away from an embargo mentality. Such a development can only enhance the PRC’s ability to preserve its own cultural patrimony, while at the same time making its cultural heritage available for appreciation by the rest of the world.

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People’s Republic of China and the Illicit Trade in Cultural Property

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Customs Officers seizing relics and arresting smugglers. From the PRC magazine Customs. Illustration by courtesy of J. David Murphy.
12 Historically, for African and Asian states in particular, the pillaging of cultural relics was equated with colonialism, and the cultural property issue became central to the struggle for independence. Gradually, however, the rhetoric of anti-colonialism has given away to notions of “national patrimony” and even to the relationship of a state’s art treasures to the “common heritage of mankind”, though still predominantly with a view to nationalistic protection. See D. N. Thomason, “Rolling Back History: The United Nations General Assembly and the Right to Cultural Property” (1990) 22 Case W. Res. J. Int'l. L. 47.


14 See generally Prott and O’Keefe, supra.


17 249 UNTS 240

18 In Article 1.

19 The PRC has recognised the need for such facilities: see, for example, Chapter IV of the Law of the People’s Republic of China on the Protection of Cultural Relics adopted at the 25th Meeting of the Standing Committee of the Fifth National People’s Congress, November 19, 1982 (hereinafter, the “1982 Cultural Relics Law”); however it is extremely doubtful whether sufficient resources will be found in the near term even to approximate the ideals and standards set forth therein.


22 See generally L. V. Prott and P. J. O’Keefe, supra, esp. chs. 8 and 9; P. J. O’Keefe, “Export/Import Laws — Problems of Drafting and Implementation” in International Sales of Works of Art ICC Geneva 1990 at 57. Note that measures “imposed for the protection of national treasures of artistic, historic or archaeological value” are expressly excepted from the GATT regime: Art. XX (f), provided “that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrim-
Notes


6. Decision Concerning the Severe Punishment of Criminals Who Seriously Undermine the Economy, adopted 8 March, 1982 by the 22nd Session of the Standing Committee of the Fifth National People's Congress. See also the 16 December, 1974 Circular Concerning the Opinion on Strengthening Cultural Relics Commercial Administration and Implementing the Policy on the Protection of Cultural Relics, promulgated by the State Council approving the Opinion of the Ministry of Foreign Trade, the Ministry of Commerce and the State Administration for Protection of Cultural Relics, referring to the problem of the "frenzy of digging up tombs for buried treasures". See also, J. David Murphy, "An Annotated Chronological Index of People's Republic of China Statutory and Other Materials Relating to Cultural Property" (1994) 1 ICP 159.


8. Window, October 30, 1992. According to a February 5, 1993 account in the South China Morning Post the Macau police recovered and returned 7 rare Chinese antiques worth $120 million that had been stolen from a museum in Kaifeng City, Henan Province in 1992.


10. J. Merryman, "The Retention of Cultural Property" (1988) 21 U. Cal. Davis L. R. 477 at 482. And see M. F. Lindsay, "The Recovery of Our Archaeological Heritage" (1990) 22 Case W. Res. J. Int. L. 165. Interestingly, even the fledgling archaeological movement in the PRC has been affected by the vagaries of politics — for example, used as a tool of anti-American propaganda and, during the "Great Leap Forward", subordinated to the principle of "hau-chen pao-ku" ("paying more attention to the present than to the past").


12. Historically, for African and Asian cultural relics was equated with a certain elevation of the culture. The rhetoric of anti-colonialism has even been used to justify cultural property theft. See D. N. Thomas, General Assembly and the Resolution: "The Right of the People of Western Sahara to Self-Determination," Res. J. Int'l. L. 47.


14. See generally Prott and O'Keeffe, Law and the Cultural Heritage.


nation between countries where the same conditions prevail, or a disguised restriction".


24 For an indication of the legal problems — including those of expropriation and extraterritoriality — see J. S. Moore, “Enforcing Foreign Ownership Claims in the Antiquities Market” [1988] Yale L. J.466; and J. Merryman, supra in (1988) 21 U. C. Davis L. R. 477. Article 4 of the 1982 Cultural Relics Law provides that “all cultural relics remaining underground or in the inland waters or territorial seas within the boundaries of the People’s Republic of China...sites of ancient culture, ancient tombs and cave temples...memorial buildings, ancient architectural structures, stone carvings, etc. designated for protection by the state...and 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”.

25 Article 2. The provisions of this legislation are often mirrored in legislation of provinces, autonomous regions and municipalities within the PRC.

26 ibid., Article 4.

27 ibid., Articles 24, 25.

28 See also the Measures on the Administration of Export Verification for Cultural Relics announced by the Cultural Department February 27, 1989. These supplement Articles 27 and 28 by providing somewhat more detail on verification (i.e. classification) procedures, designated selling units, and the requisition by purchase.


31 ibid., at 5.

32 Contrast the situation of many Asian source states with that of the source (and market) state of Japan, for example, whose domestic collectors have the resources to compete with foreign buyers, which has tax incentives to induce donations to the state, and whose restrictions on exports are sufficiently narrow to make effective enforcement feasible, with the result that the foreign market is satisfied generally through legal means: see C. F. Sayre, “Cultural Property Laws in India and Japan” (1986) 33 UCLA L. R. 851.


34 See, for example, explicit references in the Circular on Cracking Down on Activities Involving Smuggling and Illegal Excavation for Cultural Relics, issued by the State Council 26 May, 1987, which, interestingly, addresses in the same breath the “damage of social values” associated at an official or unofficial level. During the Cultural Revolution, officials discreetly allowed the theft of cultural objects in Peking. There is a report of an official who was involved.

35 In the PRC as in many source states, the classes whose grave-robbing is a sophisticated smuggling network has been attacked by peasants allegedly robbed 50,000 years ago.

36 See the very telling admission by a professor at an academy: “Exports of Cultural Relics were negotiated by the State Council Jean-Francois blondeau, ‘Exporting Relics’ in (1991) 117 The Art Newspaper 10 which was following the by a professor at an academy: “Exports of Cultural Relics were negotiated by the State Council Jean-Francois blondeau, ‘Exporting Relics’ in (1991) 117 The Art Newspaper 10 which was following the earlier announcement of the Cultural Department of the PRC that these were legal exports. The PRC continues to negotiate exports of cultural property. In 1990, a Japanese professor claimed to have sold a stone statue of the Buddha to a private collector in Japan, which was subsequently returned to the PRC. In 1991, a Japanese professor claimed to have sold a stone statue of the Buddha to a private collector in Japan, which was subsequently returned to the PRC. In 1991, a Japanese professor claimed to have sold a stone statue of the Buddha to a private collector in Japan, which was subsequently returned to the PRC. In 1991, a Japanese professor claimed to have sold a stone statue of the Buddha to a private collector in Japan, which was subsequently returned to the PRC. In 1991, a Japanese professor claimed to have sold a stone statue of the Buddha to a private collector in Japan, which was subsequently returned to the PRC. In 1991, a Japanese professor claimed to have sold a stone statue of the Buddha to a private collector in Japan, which was subsequently returned to the PRC. In 1991, a Japanese professor claimed to have sold a stone statue of the Buddha to a private collector in Japan, which was subsequently returned to the PRC. In 1991, a Japanese professor claimed to have sold a stone statue of the Buddha to a private collector in Japan, which was subsequently returned to the PRC.

37 Morris, supra at 41. See also Elen, supra (1982) 12 J. of Int. Law 189.


40 See J. A. R. Nafziger, supra.


42 P. Bator, supra at 322.

43 For an example of this see Metropolitan Museum: A Quest to Share (1973) 1163.

44 The importance of cultural property for mankind” in the UNESCO Res
People’s Republic of China and the Illicit Trade in Cultural Property

35 In the PRC as in many source states, the real “source” of relics is the peasant classes whose grave-robbing, excavations or thefts are often the first step in a sophisticated smuggling network. In 1986 in Henan province, for example, peasants allegedly robbed 500 graves dating from the First to the Fourth Centuries B.C. Of course, the “extreme” internationalist position holds that illicit trafficking may be a thing in that amateur digs may disclose relics otherwise never recovered, and smuggling may save works otherwise neglected, thereby “spreading” culture.

36 See the very telling admissions in Trial Measures on the Administration of Exports of Cultural Relics with Special Permission, approved and promulgated by the State Council July 31, 1979 (“in assessing cultural relics to be exported, any objects whose authenticity is hard to determine at the moment or disputable shall not be exported for the time being so that the outflow of important cultural relics out of carelessness can be avoided”); and see Measures on the Administration of Export Verification for Cultural Relics, announced by the Cultural Department February 27, 1989, article 27, as to the rather small staff numbers deemed necessary for a “verification unit.” Sun Fei, supra, observes that in many cases curators or staff of PRC museums are simply unable even to identify losses after thefts.

37 Morris, supra at 41. See also P. Bator, supra; and J. H. Merryman and A. E. Olsen, supra (1982) 12 J. of Arts Management


40 See J. A. R. Nafziger, supra.

41 See Bator, supra at 330 ff.; W. P. Buranich, “The Art Collecting Countries and Their Export Restrictions on Cultural Property: Who Owns Modern Art?” (1988) 19 Cal. Western Int. L. J. 153 and Bolano, supra. Some would supplement such a regime with a supranational adjudicative institution to determine “cultural significance”: see Prunty, supra; or a UNESCO-supervised register to be used, in a manner similar to a land register: see E. C. Schneider, “Plunder or Excavation? Observations and Suggestions on the Regulation of Ownership and Trade in the Evidence of Cultural Patrimony” (1982) 9 Syr. J. Int. L. & Comm. I. An economic analysis would dictate that it is more effective and efficient for the buyer or the market place to police the traffic than the poor source nations: see J. S. Moore, supra [1988] Yale L. J. 466.

42 P. Bator, supra at 322.


44 The importance of cultural exchanges is actually espoused by UNESCO despite its nationalist leanings: see references to the “common heritage of mankind” in the UNESCO Recommendation at the 19th General Conference

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including those of expropriation and, “Enforcing Foreign Ownership Yale L. J.466; and J. Merryman, 7. Article 4 of the 1982 Cultural is remaining underground or in the boundaries of the People’s Republic’s ancient tombs and cave temples... structures, stone carvings, etc. descultural relics in the collection of used by the whole people and public

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ent feasible, with the result that the high legal means: see C. F. Sayre, in” (1986) 33 UCLA L. R. 851.
managing the International Flow of Int. Law 189 at 194.
Circular on Cracking Down on a Excavation for Cultural Relics, which, interestingly, addresses in

the same breath the “damaging of state cultural heritage” and the “corrupting of social values” associated therewith. Illicit traffic can occur at the official or unofficial level. During the 1980s in a bid for foreign currency, PRC officials discreetly allowed a flow of antique pottery out through Hong Kong. There is a report of an individual museum official in Hunan province stealing over 1800 cultural relics: Sun Fei, “Using the Criminal Law as a Means of Protecting the Historic Relics of our Motherland” (1983) 1 Studies in Law 18, 23.
at Nairobi, 1976; see also the 1979 General Assembly Resolution 34/64 suggesting that states have a right only to a "representative" collection.

45 There have been recent developments of this sort in the PRC; see, for example, exchange programmes such as the June 1, 1992 PRC-Japan Agreement for the Dunhuang Caves Cultural Relics Protection, Research and Exhibition Centre; and the June 10, 1992 PRC – Italy Establishment of the Xian Cultural Relic Protection and Restoration Centre Agreement. PRC treasures such as terracotta warriors and the gold-threaded jade suit have even been loaned to Taiwan: Beijing Review, Vol. 35, No. 46, Nov. 16–22, 1992 at 33. A desirable international effort would be a world fund to assist preservation, exploration, scientific study, inventory compilation and the like in developing source states, of a kind similar to the fund established in the UNESCO Convention for the Protection of the World Cultural and Natural Heritage.

46 Circular Concerning the Opinion on Strengthening Cultural Relics Commercial Administration and Implementing the Policy on the Protection of Cultural Relics, promulgated December 16, 1974 by the State Council approving the Opinion of the Ministry of Foreign Trade, the Ministry of Commerce and the State Administration for Protection of Cultural Relics, para 3. See also Trial Measures on the Administration of Exports of Cultural Relics with Special Permission, approved and promulgated by the State Council July 31, 1979, referring to overstocking, the large number of replicas, and the types of items that ought not to be retained.

47 Explanation of Several Questions Concerning the Applicable Law in Handling Cases of Stealing, Illegally Recovering, Dealing in, and Smuggling Cultural Relics, issued by the Supreme People’s Court and the Supreme People’s Procuratorate, November 27, 1987.

48 See also Chapter VI of the Beijing Municipal Administrative Regulations on the Protection of Cultural Relics, adopted at the 37th Meeting of the Standing Committee of the Eighth Beijing Municipal National People’s Congress, 7 July, 1987.