

# SAFEGUARDING CHINA'S CULTURAL HISTORY: PROPOSED AMENDMENTS TO THE 2002 LAW ON THE PROTECTION OF CULTURAL RELICS

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*Abstract:* The 2002 Law on the Protection of Cultural Relics (“2002 Law”) has done little to safeguard cultural property in China. While the statute provides general procedures for relic collection, protection, and cataloging, and sets punishments for individuals and entities that violate the law, it does not furnish funding for the implementation of these measures. Amendments in 2007 failed to address the major problems of the 2002 Law—notably, the lack of incentives to return stolen or looted property and insufficient funding of the law. Due to these problems, the 2002 Law should again be amended to create a fund for the protection of historical sites and establish a grant process through which individuals and entities seeking to protect cultural relics would be compensated adequately for the costs of their efforts.

## I. INTRODUCTION

In 259 BC, in the state of Qin, the King celebrated the birth of his first son and heir, Zheng.<sup>1</sup> The child would grow up to be the first Emperor of China and one of the most infamous figures in Chinese history.<sup>2</sup> Over Zheng’s lifetime, he killed hundreds of thousands of Chinese and destroyed the historical records of various kings, libraries, and archives.<sup>3</sup> Although well known in Chinese history, the Emperor remained relatively obscure to the rest of the world until 1974, when villagers digging a well in Xian happened upon his tomb.<sup>4</sup>

Those villagers found one of the greatest archeological discoveries of the twentieth century—a monstrous tomb containing the Emperor’s life-sized “buried army” of more than 8,000 terracotta soldiers, preserved since his death in 210 BC.<sup>5</sup> Although it is a popular tourist destination, the tomb mound itself has yet to be excavated by archeologists.<sup>6</sup> One reason for this

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<sup>1</sup> FRANCES WOOD, CHINA’S FIRST EMPEROR AND HIS TERRACOTTA WARRIORS 20 (2008).

<sup>2</sup> *Id.*; J. DAVID MURPHY, PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE’S REPUBLIC OF CHINA 44 (1995).

<sup>3</sup> MURPHY, *supra* note 2.

<sup>4</sup> WOOD, *supra* note 1, at 131.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 129.

is a concern that, once exposed to air, items contained in the tomb will be damaged beyond repair.<sup>7</sup> Archeologists prefer to wait for the development of proper technology before they attempt to exhume the contents of the mound.<sup>8</sup> However, if this tomb mound is pillaged by local grave-robbers in search of valuable cultural relics prior to archeological excavation, the loss of history and culture would be tragic.

To protect against this type of damage, and in recognition of the national value of its cultural property, the People's Republic of China ("P.R.C.") enacted the Law on the Protection of Cultural Relics in 2002.<sup>9</sup> The P.R.C. passed the law to strengthen the protection of cultural relics and the historical and cultural legacy of China, promote research of archeological findings, and educate citizens and visitors on the history and traditions of China.<sup>10</sup> Unfortunately, the law has two major shortcomings: it includes few incentives to return illegally obtained property and it provides only unspecified sources of funding to implement the requirements of the 2002 Law.<sup>11</sup> In 2007, the P.R.C. amended several articles of the law,<sup>12</sup> but even the amended law does little to prevent or discourage the looting of historic sites or the illegal exportation of China's cultural relics. Moreover, the amended law still fails to address the shortage of funding.<sup>13</sup>

This Comment proposes a series of amendments to the 2002 Law that would address these weaknesses by providing, first, a national fund for the protection of cultural relics; second, revenue sources to support the required provisions of the law; and third, a proposed system for distributing these funds.

Part II of this Comment provides a background of cultural property protection in China, including a definition of what constitutes cultural property and a discussion of Chinese and international laws relating to the

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Law on the Protection of Cultural Relics [2002 Law] (promulgated by the Standing Comm. Nat'l People's Cong. Oct. 28, 2002, effective Oct. 28, 2002), *translated in* Chinese Government's Official Web Portal (last visited Aug. 23, 2008) (P.R.C.).

<sup>10</sup> *Id.* art. 1.

<sup>11</sup> 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.* 2, 82-83 (2004). A third weakness identified by Dutra was statutory vagueness; however, that issue is not central to this comment and is not discussed further. *Id.*

<sup>12</sup> Decision of the Standing Comm. Nat'l People's Cong. on Amending the Law on the Protection of Cultural Relics [Amendments] (promulgated by the Standing Comm. Nat'l People's Cong. Dec. 29, 2007, effective Dec. 29, 2007) *LAWINFOCHINA* (last visited Nov. 1, 2008) (P.R.C.).

<sup>13</sup> A special fund is currently available, but it is funded with centrally controlled state revenue proceeds. Zhongguo Wang, *Protection of Cultural Heritage in China*, *WORLD NEWS CONNECTION*, May 28, 2006. In 2005, 534 million Yuan were invested, up from 129 million in 1994. Although significant, this amount is not enough, given the work still needed in this area. *Id.*

protection of such property. Part III investigates the status of the illicit cultural property trade in China both before and after the 2002 Law was passed, describes certain problems with the 2002 Law as originally written (including lack of proper implementation), and analyzes the amendments passed in December 2007. Finally, Part IV will propose further amendment to the 2002 Law and suggest other non-legislative, short-term solutions for relic protection.

## II. DEFINITIONS OF CULTURAL PROPERTY INCLUDING INTERNATIONAL AND DOMESTIC LAWS FOCUSED ON ITS PROTECTION

Cultural property, also referred to as cultural heritage or cultural relics, is a broad term that can encompass many things. The Hague Convention of 1954 defines it as “movable property (artistic works), as well as immovable property (monuments, buildings, sites), works of expression (music, dance, theater), intangible cultural property (folklore, talents, rituals, religious beliefs, intellectual traditions) and so on.”<sup>14</sup> The 1970 United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) Convention to Prohibit the Illicit Import and Export of Cultural Property (“UNESCO Convention”) defines the term as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science[.]”<sup>15</sup> In the 2002 Law, the P.R.C. adopts a definition covering both generic and specific relics, including:

[1] sites of ancient culture, ancient tombs, ancient architectural structures, cave temples, stone carvings and murals that are of historical, artistic or scientific value; [2] important modern and contemporary historic sites, material objects and typical buildings that are related to major historical events, revolutionary movements or famous personalities and that are highly memorable or are of great significance for education or for the preservation of historical data; [3] valuable works of art and handicraft articles dating from various historical periods; [4] important documents dating from various historical periods, and manuscripts, books and materials, etc.[.] that are of

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<sup>14</sup> Jiří TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT*, 40 (1996) (citing Convention for the Protection of Cultural Property in the Event of Armed Conflict, Signed at the Hague on May 14, 1954, ¶ 2) [hereinafter 1954 Hague Convention].

<sup>15</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter 1970 UNESCO Convention].

historical, artistic or scientific value; and [5] typical material objects reflecting the social system, social production or the life of various nationalities in different historical periods.<sup>16</sup>

This definition is significantly more inclusive in terms of the types of objects considered cultural property than either of the two treaties discussed above.

A possible reason for China's expansive definition is its self-perception that it has a greater need than most countries for protection from the illicit trade of its cultural property. Globally, there are two generally recognized categories of nations: source nations and market nations. Source nations are those that are "rich" in cultural art and property, but "poor" in economic resources.<sup>17</sup> Market nations are just the opposite; they are economically "rich," but have very few cultural relics.<sup>18</sup> China is typically considered a source nation,<sup>19</sup> along with other countries including Iraq<sup>20</sup> and India.<sup>21</sup> Market nations include the United States, Switzerland, and the United Kingdom.<sup>22</sup> The harm to source nations, at the hands of collectors within market nations, can be devastating. "Assaults on cultural treasures of developing states have become stunningly systematic, organized, and technical . . . [while s]muggling operations are often structured in vast 'pyramids' with local peasants at the bottom and prominent representatives of the art-collecting world at the top."<sup>23</sup> Therefore, China's status as a source nation creates a demand for its cultural relics which, in turn, may have created a state instinct to foster greater protection over these objects.

Chinese interest in the protection of its cultural property blossomed with the nation's economic development in the 1980s and early 1990s.<sup>24</sup> Building projects first necessitated consideration of cultural relics. During construction, discovered objects had to be preserved.<sup>25</sup> Existing cultural property also required safeguarding.<sup>26</sup> Later, when Chinese citizens began to accumulate wealth and discretionary spending power, many started to collect

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<sup>16</sup> 2002 Law, art. 2.

<sup>17</sup> Barbara T. Hoffman, *Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 1, 3 (2006).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.*

<sup>21</sup> MURPHY, *supra* note 2, at 2.

<sup>22</sup> Hoffman, *supra* note 17, at 3.

<sup>23</sup> MURPHY, *supra* note 2, at 4-5.

<sup>24</sup> JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 96-97 (2008).

<sup>25</sup> *Id.* at 96.

<sup>26</sup> *Id.*

cultural objects.<sup>27</sup> In order to protect its vast cultural property, China became a signatory to several international conventions, and also passed domestic legislation regulating the protection of cultural property.<sup>28</sup> These include the 1970 UNESCO Convention,<sup>29</sup> the 1995 International Institute for the Unification of Private Law (“UNIDROIT”) Convention on Stolen or Illegally Exported Cultural Objects (“1995 UNIDROIT Convention”),<sup>30</sup> the 1982 Cultural Relic Law (P.R.C.),<sup>31</sup> and the 1997 Criminal Law (P.R.C.).<sup>32</sup>

A. *Current International Laws Do Not Effectively Protect Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention*

The 1970 UNESCO Convention, ratified by the P.R.C. in 1989,<sup>33</sup> followed several other international treaties in protecting cultural property from illegal use and exportation.<sup>34</sup> The UNESCO Convention is unique, however, in that it was the first to offer protection during times of peace.<sup>35</sup> The main purpose of the Convention was to protect national cultural heritage by allowing signatory countries to adopt their own rules regulating the exportation of identified cultural property within their borders.<sup>36</sup> Many countries have signed on to the UNESCO Convention.<sup>37</sup> However, several

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<sup>27</sup> *Id.* at 97.

<sup>28</sup> See MURPHY, *supra* note 2, at 67-70 (discussing generally China’s acknowledgement of its shortcomings related to the protection of cultural relics).

<sup>29</sup> 1970 UNESCO Convention, *supra* note 15.

<sup>30</sup> International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (1995), available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm> [hereinafter UNIDROIT Convention].

<sup>31</sup> Law on the Protection of Cultural Relics [1982 Cultural Relics Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 19, 1982, effective Nov. 19, 1982) LAWINFOCHINA (last visited Oct. 11, 2008) (P.R.C.).

<sup>32</sup> Criminal Law (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1979, amended Mar. 14, 1997) LAWINFOCHINA (last visited Oct. 11, 2008) (P.R.C.).

<sup>33</sup> PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 212 (2d ed. 2007).

<sup>34</sup> See 1954 Hague Convention, *supra* note 14. “There have been several attempts at multi-national regulation of cultural patrimony. The first significant conference convened in Brussels in 1879, but did not produce any legislation or noteworthy suggestions. A subsequent attempt in Hague, in 1899, produced a treaty . . . [that] commented on the handling of cultural property during times of conflict.” Janene Marie Podesta, *Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Undermines its Goals by Unduly Targeting Market Nations*, 16 CARDOZO J. INT’L & COMP. L. 457, 465 (2008).

<sup>35</sup> Inbal Baum, Note, *The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?*, 24 CARDOZO ARTS & ENT. L.J. 919, 930 (2006).

<sup>36</sup> Jason M. Taylor, Student Article, *The Rape and Return of China’s Cultural Property: How Can Bilateral Agreements Stem the Bleeding of China’s Cultural Heritage in a Flawed System*, 3 LOY. U. CHI. INT’L L. REV. 233, 240 (2006).

<sup>37</sup> For a complete list, see O’KEEFE, *supra* note 33, at 212-14.

aspects detract from its effectiveness. First, the convention has no power of enforcement; rather, “it merely requires party states to it to prevent illicit export or import when it is consistent with a given state’s domestic law.”<sup>38</sup> Second, its broad grant of power to party states to develop definitions of cultural property and policies acts as a “so-called ‘blank check’ provision[,] allowing member states to define ‘inalienable’ cultural property that is automatically considered ‘illicit’ if exported.”<sup>39</sup> Finally, the Convention’s inherent favoritism toward source nations, to the detriment of collectors in market nations,<sup>40</sup> has resulted in limited ratification by key market nations, thereby limiting the reach of the Convention.<sup>41</sup>

The UNIDROIT Convention, ratified by the P.R.C. in July 1997 and signed into force in January of 1998,<sup>42</sup> focuses mainly on the restitution of cultural property that has been stolen or illegally exported.<sup>43</sup> The UNIDROIT Convention was meant to remedy some of the practical problems with the UNESCO Convention.<sup>44</sup> Specifically, it addresses ownership “disputes between original owners and good-faith purchasers” and “unauthorized cross-border removal of cultural property.”<sup>45</sup> Additionally, it allows nations and individuals wishing to recover stolen or illicitly obtained cultural property the ability to “file a complaint before a foreign court where the object is located[ or] . . . submit their restitution and return claims to another court or arbitration[.]”<sup>46</sup> As with the UNESCO Convention, the lack of market nations as signatories has severely retarded the Convention’s effectiveness.<sup>47</sup>

*B. Similarly, China’s Domestic Laws Fail to Sufficiently Protect the Country’s Cultural Relics*

Cultural relic protection was first codified in China with the passage of the 1982 Cultural Relic Law.<sup>48</sup> It was promulgated to provide an authoritative source of protection for Chinese cultural relics due to “reasons of cultural heritage, science, trade and economic benefit, and domestic

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<sup>38</sup> Dutra, *supra* note 11, at 76.

<sup>39</sup> Taylor, *supra* note 36, at 240.

<sup>40</sup> *Id.* at 240-41.

<sup>41</sup> MURPHY, *supra* note 2, at 144.

<sup>42</sup> UNIDROIT Convention, *supra* note 30.

<sup>43</sup> Taylor, *supra* note 36, at 241.

<sup>44</sup> Dutra, *supra* note 11, at 77.

<sup>45</sup> *Id.*

<sup>46</sup> Taylor, *supra* note 36, at 242 (internal quotations omitted).

<sup>47</sup> *Id.* at 243; Dutra, *supra* note 11, at 78-79.

<sup>48</sup> 1982 Cultural Relics Law. The 1982 Cultural Relic Law was replaced twenty years later by the 2002 Law. Taylor, *supra* note 36, at 244.

order[.]”<sup>49</sup> One of the greatest weaknesses of the 1982 Cultural Relic Law was the “lack of jurisdictional rules and . . . inconsistencies between the national government and regional municipalities.”<sup>50</sup> Because jurisdiction was “based on the rarity and value of the [specific] relic or site,” it was almost impossible to determine “which governmental level—local, county, provincial, or central—ha[d] primary jurisdiction” over such relics.<sup>51</sup> Additionally, the law did not provide for any type of private ownership of cultural relics, including those passed down as family heirlooms or purchased legally from stores and auction houses.<sup>52</sup>

The 1997 Criminal Law (“Criminal Law”) statutorily provides various punishments—ranging from fines to prison sentences—for individuals who vandalize, destroy, steal, or illegally export, sell, or excavate cultural relics.<sup>53</sup> Although the Criminal Law provides for harsh punishments on its face, in reality, statutory vagueness allows the Chinese judiciary to apply penalties without guidelines or consistency.<sup>54</sup> The result is that “smugglers and individuals may be willing to take their chances in court, especially with the large payouts from illicit export of cultural property.”<sup>55</sup> However, even with these problems, some individuals have been criminally prosecuted for cultural property crimes and received harsh sentences under this law.<sup>56</sup> If applied consistently, the Criminal Law could serve as a substantial deterrent.

### III. THE CURRENT CHINESE LAW IS NOT ENOUGH TO PROTECT CULTURAL RELICS FROM MARKET DEMANDS

China is a source nation.<sup>57</sup> It is plagued with problems such as tomb-robbing, looting of known archeological sites, and the existence of vibrant black markets for the sale of illicitly-obtained goods.<sup>58</sup> In order to fully understand the current demands for Chinese cultural property—and the shortcomings of the laws intended to protect it—an overview of both the

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<sup>49</sup> MURPHY, *supra* note 2, at 84.

<sup>50</sup> Taylor, *supra* note 36, at 244.

<sup>51</sup> Dutra, *supra* note 11, at 81.

<sup>52</sup> *Id.* at 83.

<sup>53</sup> Taylor, *supra* note 36, at 248.

<sup>54</sup> *Id.* See Dutra, *supra* note 11, at 92-93.

<sup>55</sup> Taylor, *supra* note 36, at 248.

<sup>56</sup> See Dutra, *supra* note 11, at 92.

<sup>57</sup> Hoffman, *supra* note 17, at 7.

<sup>58</sup> See U.S. STATE DEP'T, BUREAU OF EDUC. AND CULTURAL AFFAIRS, PUBLIC SUMMARY: REQUEST OF THE PEOPLE'S REPUBLIC OF CHINA TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA UNDER ARTICLE 9 OF THE 1970 UNESCO CONVENTION (2004), <http://culturalheritage.state.gov/cn04sum.html> (last visited Jan. 28, 2009) [hereinafter P.R.C. Request Summary].

international illicit trade market and a full description of the 2002 Law is necessary.

A. *Past and Present Demands for Chinese Antiquities Emanate from International and Domestic Markets*

I. *A Historical Perspective: China Has Long Been a Victim of International Looting*

Market-country collectors and their agents have been excavating and removing Chinese antiquities since the late nineteenth century.<sup>59</sup> In ancient times, this was referred to as the “right to booty.”<sup>60</sup> More recently, it was called “the law of finders.”<sup>61</sup> The international community only recently perceived such behavior as stealing.<sup>62</sup> In 1860, British and French troops invaded the Summer Palace, just outside of Beijing.<sup>63</sup> During the invasion, the palace was plundered and burned.<sup>64</sup> Many of the looted objects were brought back to France and England.<sup>65</sup> Queen Victoria herself was given a Pekingese dog that was “retrieved” from the sacking of the palace; in acknowledgement of the dog’s origins, it was named “Looty.”<sup>66</sup>

In 1907, the Mogao Caves were “discovered” by Aurel Stein, a collector and purveyor of Asian antiquities for the British Museum.<sup>67</sup> Stein convinced a Taoist priest to allow him to open a library in the caves containing thousands of manuscripts and paintings that had not seen the light

<sup>59</sup> See MURPHY, *supra* note 2, at 45-47.

<sup>60</sup> 1954 Hague Convention, *supra* note 14, at 3.

<sup>61</sup> Peter T. Wendel, *Protecting Newly Discovered Antiquities: Thinking Outside the “Fee Simple” Box*, 76 FORDHAM L. REV. 1015, 1022 (2007).

<sup>62</sup> See Michael J. Reppas II, *Empty “International” Museums’ Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT’L L. & POL’Y 93, 94 (2007); JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 185 (2d ed. 1996).

<sup>63</sup> Zhou Weiquan, *Summer Palace: Its Garden and Landscape Design*, in *SUMMER PALACE* 116, 117 (1981) (burned down in 1860 by Anglo-French forces); Liu Zuohui, *The Story of the Summer Palace*, in *SUMMER PALACE* 19 (1981) (northwest suburbs of Beijing).

<sup>64</sup> WILHELM TREUE, *ART PLUNDER: THE FATE OF WORKS OF ART IN WAR AND UNREST* 201 (Basil Creighton trans., 1961).

<sup>65</sup> See *id.* at 203-208 (describing the plundering and looting of the palace by British and French troops, as well as Chinese peasants).

<sup>66</sup> GREENFIELD, *supra* note 62, at 300.

<sup>67</sup> The Mogao Caves are a series of grottos carved by Buddhist Monks just off of the Silk Road in Dunhuang County in the province of Gansu. CUNO, *supra* note 24, at 88-89. Construction of the caves began in 366 A.D. and ended around the end of the Yuan dynasty (approximately 1367 A.D.). MURPHY, *supra* note 2, at 45. The grottoes house one of the largest and best preserved collections of Buddhist art in the world. Shuhong Chang, *Dunhuang’s Mogao Grotto Art*, in *ART TREASURES OF DUNHUANG*, 1 (Ho Kai ed., 2d ed. 1981).



of day since the entrance was sealed in 1000 A.D.<sup>68</sup> Describing his find, Stein wrote, “[m]y main care was how many of them I might be able to rescue from their dismal imprisonment and from the risks of their present guardian’s careless handling. To my surprise and relief, [the Taoist priest] attached little value to these fine art relics of T’ang times.”<sup>69</sup> As a result of the priest’s indifference toward the items, Stein collected 260 paintings and more than 8,000 manuscripts for the British Museum.<sup>70</sup> Although China has not officially requested that any of the items be returned, informal requests by the curator of the Mogao caves have made their way to the media in recent times.<sup>71</sup>

## 2. *Current International Markets Exist in both the East and West*

According to Chinese government reports, upwards of one million Chinese artifacts have been scattered throughout more than two hundred museums in forty-seven different countries over the past centuries.<sup>72</sup> As these numbers suggest, the desire to acquire Chinese antiquities has not faded since Westerners got their first glimpse of the treasures carried back to Europe and the United States by characters such as Stein. Eastern markets are no less to blame for the current situation. Hong Kong, for example, fuels a large demand for Chinese cultural property.

### a. *Hong Kong: A Burgeoning Market Close to Home*

Hong Kong has long been a collector’s dream for obtaining illicitly exported Chinese cultural relics. In the 1980s, P.R.C. customs officials intercepted over seventy thousand objects on their way to Hong Kong or Macau.<sup>73</sup> At that time, Hong Kong had no specific law against importing

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<sup>68</sup> GREENFIELD, *supra* note 62, at 138.

<sup>69</sup> *Id.* at 142.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Such examples bring up a debate commonly heard in the art world: should culture be national or transnational? That is, is it more beneficial for the countries of cultural origin to have the exclusive rights to and possession of items of artistic and historical significance to their culture? Or, is it better to allow such objects to be owned by and exhibited in different countries, giving people of all nations exposure to objects considered part of our collective human culture? For further discussion of this interesting topic, see generally CUNO, *supra* note 24 (proposing that ownership of cultural property should be evaluated transnationally); WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW (Kate Fitz Gibbon ed., 2005) (comprising a collection of essays on the pros and cons of both methods); Richard Lacayo, *Who Owns History?*, TIME, Mar. 3, 2008, at 61 (describing the debate generally).

<sup>72</sup> Zhao Huanxin, *Efforts Being Made to Reclaim Treasures*, CHINA DAILY, May 26, 2006, available at [http://www.chinadaily.com.cn/cndy/2006-05/26/content\\_600586.htm](http://www.chinadaily.com.cn/cndy/2006-05/26/content_600586.htm).

<sup>73</sup> MURPHY, *supra* note 2, at 59.

individual, high value artifacts from mainland China.<sup>74</sup> It is not surprising, therefore, that auction houses in Hong Kong, including those as internationally recognized as Sotheby's, have been selling Chinese antiquities for years.<sup>75</sup> Hong Kong's regulations were so lax that "[s]ales of the most valuable antiquities to overseas buyers [were] said to be arranged by local dealers without the item ever appearing in a Hong Kong shop."<sup>76</sup> Part of the reason for this may be that, prior to 1997, Hong Kong was still under the control of the United Kingdom—which was not yet a signatory to the UNESCO Convention.<sup>77</sup>

Today, several circumstances ensure that Hong Kong continues to be a hotspot for the Chinese antiquity trade. First, the success of Hong Kong's auction houses makes it an Asian art hub.<sup>78</sup> Second, the city does not impose any tax on the sale of artwork; in comparison, the P.R.C. charges a tax of thirty-four percent on such sales.<sup>79</sup> Finally, the Hong Kong import laws do not specifically prohibit the importation of cultural property from any country.<sup>80</sup> The close proximity of such a thriving market,<sup>81</sup> without strict import laws protecting Chinese cultural property, demonstrates the critical nature of the problem China faces and shows the need to take immediate protective steps.

*b. Demand for Chinese Artifacts in the United States Is Strong*

The underground illicit art market is one of the most profitable illegal trades in the world, second only to the drug trade.<sup>82</sup> Demand from the

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<sup>74</sup> *Id.* Hong Kong continues to have a booming market in Chinese cultural property, legally sanctioned by China. Comment from William G. Pearlstein, Counsel, Golenbock Eiseman Assor Bell & Peskoe LLP to Cultural Property Advisory Committee (Feb. 17, 2005), [www.golenbock.com/docs/OutlineCPACPresentation--ChinaRequest\\_v2.pdf](http://www.golenbock.com/docs/OutlineCPACPresentation--ChinaRequest_v2.pdf) (last visited Feb. 18, 2009).

<sup>75</sup> See MURPHY, *supra* note 2, at 39.

<sup>76</sup> *Id.* at 59.

<sup>77</sup> The United Kingdom did not become a signatory until 2002. See O'KEEFE, *supra* note 33, at 214; Dutra, *supra* note 11, at 72 (stating that Hong Kong is not the hotspot it was under British control, but is still a primary destination for illicitly exported property).

<sup>78</sup> See *Hong Kong Art Auction Roundup*, ARTOBSERVED, May 27, 2008, <http://artobserved.com/hong-kong-art-auction-roundup/> (describing the current success of the contemporary art market and Hong Kong's bid to be Asia's art hub).

<sup>79</sup> *Id.*

<sup>80</sup> Import and Export Ordinance, (1997) Cap. 60, 6C. (H.K.); Import and Export (General) Regulations, (2008) Cap. 60A, Sched. 1. (H.K.).

<sup>81</sup> See John Stanmeyer, *Spirited Away*, TIME ASIA, Oct. 13, 2003, fig. Moving the Loot, *available at* <http://www.time.com/time/asia/covers/501031020/map.html> (map describing Hong Kong as part of the trade route for stolen Asian art and stating that "[s]ome galleries on Hollywood Road furtively sell items stolen from the mainland").

<sup>82</sup> Taylor, *supra* note 36, at 238.

United States significantly contributes to the success of this trade.<sup>83</sup> Fulfilling that demand comes at a price; scholars suggest that “every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came.”<sup>84</sup>

The UNESCO Convention, in addition to the provisions described above,<sup>85</sup> creates support mechanisms in the form of bilateral agreements between two countries.<sup>86</sup> Article 9 of the Convention allows countries “to make bilateral and multilateral agreements to restrict imports in archaeological and ethnological material.”<sup>87</sup> In 2004, the P.R.C. asked the United States to sign such an agreement to restrict the importation of all ethnological and cultural artifacts dated before 1911, in order to discourage smugglers from transporting such items into the United States.<sup>88</sup> After four years, the United States<sup>89</sup> has yet to either approve or deny the request. The delay in approving or denying the request is unusual. To date, the United States has entered into UNESCO-sanctioned bilateral agreements with many other countries, including El Salvador, Mali, Cambodia, Cyprus, Colombia, Italy, and Canada, to name a few.<sup>90</sup> Some speculate that the request has not been addressed because of the P.R.C.’s failure to control its domestic illicit relic trade, as well as its lack of any real attempt to implement and enforce its current laws,<sup>91</sup> such as the 2002 Law or the Criminal Law. It may be that the United States does not want to bear the burden of addressing a Chinese domestic problem that the P.R.C. itself is unwilling to seriously combat.<sup>92</sup> Regardless, the message from the United States may be that before it acts, it expects the P.R.C. to take substantial steps to ensure that its laws are working more effectively to stop illegal acts within its borders.

### 3. *The Thriving Domestic Market: China Could Do More to Protect Itself*

While international outsiders have always played a hand in raising the demand for Chinese cultural objects, China is not itself completely

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<sup>83</sup> See P.R.C. Request Summary, *supra* note 58.

<sup>84</sup> Taylor, *supra* note 36, at 238.

<sup>85</sup> See *supra* Part II.A.

<sup>86</sup> See 1970 UNESCO Convention, *supra* note 15, art. 9.

<sup>87</sup> O’KEEFE, *supra* note 33, at 110.

<sup>88</sup> Baum, *supra* note 35, at 921.

<sup>89</sup> The President of the United States ultimately makes the decision of whether to enter into a bilateral agreement. His decision is based primarily on the recommendation of the Cultural Property Advisory Committee (CPAC). See *id.* at 933.

<sup>90</sup> O’KEEFE, *supra* note 33, at 111-12.

<sup>91</sup> See Baum, *supra* note 35, at 948-49.

<sup>92</sup> See *id.* at 948-51.

blameless. A thriving domestic market for cultural property contributes to the problems of looting and tomb-robbing that continue to destroy areas and items of great historical and cultural significance.

Historically, one of the largest and most notorious domestic markets is the Jinsong market in Beijing.

An early morning visit to the Jinsong antiques market . . . is a revealing and intriguing experience . . . . [S]everal hundred local vendors of apparently modest means display a broad range of 'antiquities.' . . . Police monitor the activity in a half-hearted way (and occasionally buy cheap items themselves) . . . . Those engaged in the local art trade maintain that the more important antiquities change hands . . . in the dead of night[.]<sup>93</sup>

This local availability and demand has been noticed by established international businesses operating in China as well.<sup>94</sup> In November 2005, Christie's celebrated the inauguration of its newly affiliated Beijing auction house, named Forever.<sup>95</sup>

Aside from individual collectors, Chinese nationalist organizations, such as the Poly Group, are also creating local demand for cultural antiquities.<sup>96</sup> The Poly Group is a Chinese conglomerate whose mission is to buy back looted antiquities held in foreign countries.<sup>97</sup> The group opened the Poly Art Museum in Beijing in 1999 and spared no expense to ensure that it houses some of the best in Chinese historical and cultural artifacts.<sup>98</sup> For example, in 2000, the Group spent four million dollars to purchase three bronze heads (a monkey, ox, and tiger) that were originally looted from the Summer Palace by the British and French.<sup>99</sup> An unintended consequence of the group's actions, however, may be that under the auspices of patriotism, the Poly Group is actually incentivizing domestic looters to excavate and sell antiquities<sup>100</sup> because the group seems willing to "pay whatever [is]

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<sup>93</sup> MURPHY, *supra* note 2, at 39-40.

<sup>94</sup> See Baum, *supra* note 35, at 939. The demand for Chinese antiquities includes both domestic and international consumers. See Charlotte Higgins, *Chinese Buyers Fuel Auction House Boom*, GUARDIAN, Aug. 18, 2005, at 9.

<sup>95</sup> *Forever/Christie's Will Have Inaugural Sale in Beijing*, SGALLERY, Oct. 25, 2005, [http://www.sgalleries.net/news/10\\_2005/25.php](http://www.sgalleries.net/news/10_2005/25.php) (last visited Jan. 22, 2009).

<sup>96</sup> See CUNO, *supra* note 24, at 100-01.

<sup>97</sup> *Id.* at 98.

<sup>98</sup> *See id.*

<sup>99</sup> *Id.* at 98-99.

<sup>100</sup> *See id.* at 100-01.

necessary to recover . . . works” for the benefit of the country,<sup>101</sup> thereby increasing demand for rare and valuable relics.

*B. The 2002 Law on the Protection of Cultural Relics, While an Improvement, Is Far from Perfect*

To combat many of the issues discussed above, the P.R.C. strengthened the terms of the 1982 Cultural Relics Law by enacting the 2002 Law.<sup>102</sup> Unfortunately, the 2002 Law still has two major flaws. First, it provides scant incentive for citizens to return illegally obtained property.<sup>103</sup> Article 5 of the Law states that “[a]ll cultural relics remaining underground or in the inland waters or territorial seas within the boundaries of the People’s Republic of China” at the time of the Law’s passage, “are owned by the State[.]” including any relics subsequently excavated.<sup>104</sup> Therefore, there is no right of private ownership for antiquities obtained illegally (even when purchased legally) because those relics are deemed to be owned by the state. The 2002 Law does not offer ownership of the antiquity as a reward for admitting or disclosing illegal activity. Rather, the 2002 Law provides for “moral encouragement or material rewards” to those who contribute to its enforcement.<sup>105</sup> Vague and relatively unsubstantial rewards,<sup>106</sup> when compared to the choice of keeping the object for oneself or selling it to an antiquities dealer for a handsome profit, do little to encourage citizens to follow the 2002 Law. In fact, this defect likely helps maintain the underground illicit trade in artifacts.

Second, and most importantly, the 2002 Law provides no concrete mechanism for making state funding available for the protection, preservation, or display of cultural relics, even though it mandates that

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<sup>101</sup> *Id.* at 99.

<sup>102</sup> See Dutra, *supra* note 11, at 82. One of the biggest differences between the two laws is that the 2002 Law provides for private ownership and transfer of cultural property, whereas the 1982 Law did not. *Id.* at 83. Now, individuals and organizations can obtain cultural relics, not owned by the state, through “(1) legal inheritance or gift; (2) purchase from cultural relics shops; (3) purchase from cultural relics auction enterprises; (4) exchanges or transfers between individual citizens pursuant to law; and (5) other methods authorized by the central government.” *Id.* The legality of these transactions that were previously prohibited should help to decrease local demand for illegally obtained cultural relics, and ensure that such transactions occur out in the open. *Id.* at 82.

<sup>103</sup> *Id.* at 82-83.

<sup>104</sup> 2002 Law art. 5.

<sup>105</sup> *Id.* art. 12.

<sup>106</sup> In 2003, a farmer who discovered twenty-seven bronze pieces and turned them over to the government was awarded 20,000 Yuan (\$2,410) and invited to Beijing to inaugurate the museum exhibit dedicated to the finds. Zhao Huanxin, *Reward People Who Protect Cultural Relics*, CHINA DAILY, Mar. 9, 2007, available at [http://www.chinadaily.com.cn/china/2007-03/09/content\\_823324.htm](http://www.chinadaily.com.cn/china/2007-03/09/content_823324.htm). A yearly fund of only 500,000 Yuan (\$64,102) is available each year for rewards. *Id.*

persons and entities in possession of such relics follow certain procedures.<sup>107</sup> Article Ten of the 2002 Law requires the following:

People's governments at or above the county level shall incorporate the undertaking of the protection of cultural relics into their own plans for national economic and social development and the expenses entailed shall be listed in their own budgets. Budgetary appropriations made by the State for the protection of cultural relics shall increase along with the increase of revenues. Incomes earned by the undertakings of the State-owned museums, memorial halls, sites protected for their historical and cultural values, etc. shall exclusively be used for the protection of cultural relics, and no units or individuals may take them into their own possession or misappropriate them.<sup>108</sup>

While admirable, this directive is also vague. It does not guarantee any source of funds to be used for the implementation of cultural relic protection initiatives. As written, this lack of clarity effectively renders unenforceable the good intentions of the 2002 Law.

*C. The 2007 Amendments to the 2002 Law Fall Short of Their Potential*

In December 2007, the P.R.C. amended the 2002 Law. Three amendments addressed the reconstruction (and new construction) of immovable cultural relics and the intrastate borrowing procedures of cultural relics.<sup>109</sup> Given the deficiencies of the 2002 Law, the 2007 amendments could have been used to increase the Law's effectiveness. Unfortunately, the P.R.C. did not include operative language to this effect. None of the amendments cure, or even address, the significant ills previously identified in the 2002 Law.<sup>110</sup> The substance of each amendment and its contribution to the overall effectiveness of the 2002 Law is discussed below.

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<sup>107</sup> See 2002 Law art. 15 (install signs and notices, establish records and files for the historical and cultural sites, and establish special organs or assign full-time personnel to be responsible for the administration of the sites), art. 34 (register and keep excavated relics until they can be transferred to the appropriate government-identified location), art. 36 (museums, libraries and other institutions must classify relics by different grades, compile files for the relics kept, establish a strict system of control and report for record with the competent departments of cultural relics administration), art. 40 (hold exhibitions, conduct scientific research, and strengthen the education of the historical culture and traditions of China), and art. 43 (protect relics from loss or damage).

<sup>108</sup> *Id.* art. 10.

<sup>109</sup> See Amendments.

<sup>110</sup> See *supra* Part III.B.

1. *Article Twenty-Two: Rules for Reconstructing and Improving Unmovable Cultural Relics Already Destroyed*

The first amendment targets Article Twenty-two of Chapter Two of the 2002 Law, concerning Unmovable Cultural Relics.<sup>111</sup> Article Twenty-two deals primarily with the procedures required to obtain approval for the reconstruction or improvement of cultural sites that have been completely destroyed.<sup>112</sup> The 2007 wording changes within the article may substantially affect the necessary process for reconstruction approval. For example, before amendment, approval for local reconstruction projects were first submitted to the administrative department for cultural relics, under the purview of the national State Council, and then submitted to the local government.<sup>113</sup> Article Twenty-two no longer requires approval from the administrative department for cultural relics; instead, the decision is made by the local government alone, with the provision that such decisions should be reported to the State Council.<sup>114</sup> The impacts of this change have yet to be seen, but they may limit bureaucratic inefficiencies typical of multiple levels of review. On the other hand, lack of review by the State Council departments may lead to geographically inconsistent application of the 2002 Law in reconstruction projects, as municipal governments alone will make these determinations.

2. *Article Twenty-Three: Rules for Private Building on the Site of an Unmovable Cultural Relic*

Article Twenty-three also addresses Unmovable Cultural Relics. It describes the types of review necessary before using a designated historical or cultural site for something other than building a museum, preservation site, or tourist site.<sup>115</sup> Originally, Article Twenty-three used broad language to describe the review necessary at each level of government.<sup>116</sup> As amended, Article Twenty-three clearly establishes the review procedures required at the municipal or county level, the provincial level, and the national level for all sites designated as protected.<sup>117</sup> The specific designations of review provide clear, mandatory oversight to ensure that

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<sup>111</sup> 2002 Law art. 22.

<sup>112</sup> *Id.*

<sup>113</sup> 2002 Law art. 22.

<sup>114</sup> Amendments amend. 1. Reconstruction of sites that are considered important at the national level is still subject to review by the State Council. *Id.*

<sup>115</sup> 2002 Law art. 23.

<sup>116</sup> *See id.*

<sup>117</sup> Amendments amend. 2.

important cultural sites are not improperly used for purposes other than conservation. Although the amendment is helpful for this narrow issue, it still does not address the more general concerns with the 2002 Law described above.

### 3. *Article Forty: Regulation of Interstate Borrowing of Cultural Relics*

China also amended Article Forty of the 2002 Law, Cultural Relics in the Institution Collection.<sup>118</sup> Article Forty regulates procedures for the intrastate borrowing of cultural relics.<sup>119</sup> The amendment changed slightly the procedure required for one Chinese institution to gain approval to borrow state-owned relics from another Chinese institution; under the original law, the transaction required approval only by the State Council.<sup>120</sup> As amended, additional levels of approval—at the regional and state levels—are required for the transfer of relics between state institutions.<sup>121</sup> It is unclear how this amendment is designed to increase the overall effectiveness of the 2002 Law, or how it will contribute to the protection of cultural relics. Perhaps the additional approval will prevent the misplacement of relics or will increase regional awareness of the use of cultural assets so as to bring notice to the abuse of such relics. However, another level of review for intrastate borrowing procedures increases the costs associated with implementing the 2002 Law. As with the other amendments, this change does not address the most glaring deficiency in the 2002 Law—the lack of funding.

#### D. *The Future of Cultural Relic Protection in China Is Grim Unless Immediate Action Is Taken*

The demand for Chinese art and antiquities is increasing, and will likely continue to do so.<sup>122</sup> Although the 2002 Law strengthened China's approach to the issue, the country has a long way to go to adequately address the situation.<sup>123</sup> As described above, none of the 2007 amendments addressed the primary shortcomings of the 2002 Law. In order to protect China's cultural treasures, the government should once more revisit, reassess, and revamp the current legislation—this time ensuring that strong

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<sup>118</sup> 2002 Law art. 40.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Amendments.

<sup>122</sup> See *China Becomes World's 3rd-largest Art Auction Market*, CHINA DAILY, Mar. 3, 2008, available at [http://www.chinadaily.com.cn/bizchina/2008-03/03/content\\_6503270.htm](http://www.chinadaily.com.cn/bizchina/2008-03/03/content_6503270.htm).

<sup>123</sup> There are conflicting views on whether or not stronger regulations will even halt the illicit property trade. See Taylor, *supra* note 36, at 234; Baum, *supra* note 35, at 948-49.



revisions effectively target the problem and punish offenders. Without such provisions, Chinese treasures will continue to be illicitly obtained, sold, and possibly lost forever to China.

#### IV. TO BE EFFECTIVE, THE 2002 LAW NEEDS SUBSTANTIAL ALTERATIONS, INCLUDING GUARANTEED FUNDING

In order for the 2002 Law to effectively curb the illicit antiquities trade, China should enact several important amendments. Additionally, China should shift the national focus away from a development mindset and toward one inclusive of conservation goals; pursue legal claims against those who hold illegally obtained relics or do not follow the 2002 Law; and actively seek bilateral agreements with market nations.

##### A. *Proposed Amendments to the 2002 Law Will Provide Better Protection for Cultural Relics*

Arguably, the most glaring shortcoming of the 2002 Law is the absence of any mandated funding for use in carrying out the Law's directives for protection of cultural property.<sup>124</sup> To remedy this problem, the People's Congress should establish: 1) a national fund for the protection of cultural relics; 2) revenue-generating activities that would contribute money to the fund; and 3) a grant application process, so that individuals and entities can receive money to carry out the goals of the 2002 Law.

Any amendments to the current law must be within the scope of the Chinese Constitution.<sup>125</sup> Initially, it is important to note that the purpose of the 2002 Law—the protection of cultural relics—falls well within constitutional language.<sup>126</sup> The Constitution says that “[t]he state protects sites of scenic or historical interest, priceless cultural relics, and other important objects of China’s historical and cultural heritage.”<sup>127</sup> As the

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<sup>124</sup> See *Tourism Deal for “Raise the Red Lantern” Site Suspended After Controversy*, XINHUA NEWS AGENCY, Jan. 19, 2008, available at <http://www.china.org.cn/english/travel/240008.htm> (quoting an expert with the Shanxi province cultural development planning and research center: “[t]hough we have a general law on cultural relics protection, there is no specific regulation on the operation and financing of cultural relics operators and the government should improve legislation in this field.”).

<sup>125</sup> XIAN FA art. 5 (1982) (P.R.C.) (stating that “No organization or individual has privilege such that they are above the law or the Constitution”).

<sup>126</sup> The Constitution states that “China is a country with one of the longest histories in the world. The various peoples of China have come together to create a magnificent culture, with a glorious revolutionary tradition.” XIAN FA pmb. (1982) (P.R.C.).

<sup>127</sup> *Id.* art. 22; Taylor, *supra* note 36, at 244 (stating that the Chinese government’s authority to regulate cultural property is granted by the constitution, specifically Article Twenty-two).

amendments would go directly to furthering this goal, they are facially constitutional.

1. *The P.R.C. Should Establish a National Fund for the Protection of Cultural Relics*

The P.R.C. should amend the 2002 Law to establish a National Fund (“the Fund”) with the express purpose of financing activities in furtherance of the implementation and execution of the Law’s provisions.<sup>128</sup> For example, effective language could resemble the following:

A National Cultural Relic Protection Fund shall be established by the State Council, from which cultural relic protection work shall be financed.

Ideally, this amendment would be added to Article Eight’s General Rules.

Although some critics might suggest that such a fund is unnecessary because current funding via local budgets is sufficient, the continuing market in illicit Chinese artifacts suggests otherwise.<sup>129</sup> If government officials face dividing a common pot of money between competing social needs (such as education, development, and healthcare), resources directed to cultural property protection may suffer.<sup>130</sup> A separate fund is necessary to ensure that promotion and enforcement of the 2002 Law will be properly funded.

2. *The 2002 Law Should Specify Revenue Sources that Will Contribute to the Fund*

Once the Fund is created, the P.R.C. should specify where monies for the Fund will come from. Failure to identify a source may reduce the practical impact of the Fund because, without one, there is no guarantee that money will be set aside for the Fund. Fortunately, the 2002 Law already provides many potential funding sources. First, Article Ten identifies

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<sup>128</sup> Zhongguo Wang, *supra* note 13.

<sup>129</sup> “Smuggling and illegal excavations of Chinese relics have peaked since the 1990s, and the situation is worsening as the market for Chinese art booms both at home and abroad.” Wang Shanshan, *Nation’s Relics Threatened as Never Before*, CHINA DAILY, Dec. 21, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-12/21/content\\_401800.htm](http://www.chinadaily.com.cn/english/doc/2004-12/21/content_401800.htm). “Despite repeated crackdowns, the country’s cultural relics, especially those not included on the State protection list, face a growing threat from smugglers, tomb raiders, thieves, and other sources of degradation.” Zhao Huanxin, *supra* note 106.

<sup>130</sup> See Donald Clarke, Peter Murrell & Susan Whiting, *The Role of Law in China’s Economic Development* 27 (The George Washington University Law School, Public Law and Legal Theory Working Paper No. 187, 2006) (local government officials favor projects that foster economic growth and public order, and public goods, including basic infrastructure and primary education). For current levels of funding, see Zhongguo Wang, *supra* note 13.

economic development budgets, general state financial revenue, and revenues from state-owned museums and cultural relic protection entities.<sup>131</sup>

Article Ten should be amended to require that a portion of the profits from state-owned museums, memorials, and cultural relic protection agencies go to the Cultural Relic Protection Fund. The following proposed amendment would accomplish this goal:

A portion of net profit from the operation of state-owned museums, memorials, and cultural relic protection entities shall be directed to the Cultural Relic Protection Fund, and no entity or individual may take into their own possession or misappropriate the fund.

This amendment would effectively generate revenue for the Fund and provide civil protection<sup>132</sup> from possible misappropriation of such revenues.

This amendment could potentially discourage successful or profitable museums from continuing their good work, such as investments in education programs, thoughtful exhibits, and community outreach programs to increase awareness of the museum and increase gross revenue. Under the amended law, however, incentives to perform these tasks would not be completely erased. The curator would be eligible to apply for grants from the Fund to implement such projects, as each example above contributes to the preservation of cultural relics and the promotion of Chinese culture and history.<sup>133</sup> The success of previous projects should increase the likelihood of being awarded a grant for future projects.

Next, Article Fifty-three of the 2002 Law allows for the establishment of privately owned cultural relics shops.<sup>134</sup> In order to subsidize the Cultural Relic Protection Fund, the P.R.C. should assess a special tax on profits from such businesses. Therefore, the following language should be added to Article Fifty-three:

A percentage of the annual profit, to be determined by the State Council, resulting from cultural relics shops is payable annually into the Cultural Relic Protection Fund.

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<sup>131</sup> 2002 Law art. 10.

<sup>132</sup> Criminal protection for fraud and embezzlement are available under the 1997 Criminal Law at Chapter III, Section 5 and Chapter VIII, respectively. Criminal Law.

<sup>133</sup> 2002 Law art. 1.

<sup>134</sup> “[C]ultural relics stores shall be subject to approval by the administrative department for cultural relics under the State Council or by the administrative department for cultural relics under the people’s government of the relevant province, autonomous region or municipality directly under the Central Government, and the stores shall be administered according to law.” *Id.* art. 53.

The tax would be a simple source of revenue for the Fund. Although it could be argued that such an amendment might discourage cultural relic shops from entering or continuing business, and may encourage fraudulent reporting of legal earnings in order to avoid paying the tax, the benefits of this amendment could outweigh the risks—even for the shop owners. If the amendments successfully curb illegal exportation and destruction of relics, demand for legally-obtained relics could rise due to the unavailability of illegally-obtained relics. As a result, shop owners might be able to charge higher prices for their legally-obtained relics and overall store profits might increase despite the tax. Because these businesses would likely benefit from increased demand for Chinese relics—and the attendant higher prices—imposing a modest tax on profits should not be objectionable to the businesses.

Finally, Chapter Seven of the 2002 Law establishes the legal responsibilities of various parties.<sup>135</sup> Within this chapter, several articles establish fines that are to be paid by individuals and entities that violate provisions of the 2002 Law.<sup>136</sup> The proceeds from all of these fines should go into the Cultural Relic Protection Fund. This could be accomplished by including language requiring that:

Any and all fines collected under this Chapter shall be payable to the Cultural Relic Protection Fund.

This amendment would best be included in Chapter Seven, Article Sixty-five, which sets out the general provisions for the chapter.<sup>137</sup> The revenues collected from such fines could be minimal, especially if prosecution of violations continues to be sparse. However, prosecution of the crimes could increase if prosecutors realize that all fines would go toward additional protection measures, directly benefiting the operation of the law.

### 3. *The 2002 Law Should Create a Grant Application Process to Give Funds to Individuals and Entities Furthering its Goals*

Finally, once the Fund is established and monies set aside, the 2002 Law, as amended, should specify how such money shall be paid out. The 2002 Law sets forth numerous requirements that owners and custodians of cultural relics catalog the relics, care for the relics, and so forth,<sup>138</sup> each of which requires money to accomplish. Insufficient state funding exists to

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<sup>135</sup> See *id.* ch. 7.

<sup>136</sup> See *id.* arts. 66, 68, 70-74.

<sup>137</sup> *Id.* art. 65.

<sup>138</sup> See *id.* arts. 15, 20, 32, 34, 36, 40 and 59.

subsidize these required activities.<sup>139</sup> The 2002 Law's unfunded mandate is one of its greatest weaknesses. To remedy this situation, the P.R.C. must establish a process for allocating money to individuals and entities to fund the activities required under the 2002 Law. The Constitution specifically supports the development of "libraries, museums, cultural centers, and other cultural undertakings that serve the people . . . by sponsoring such collective cultural activities."<sup>140</sup> The monies spent through grants from the Fund should regularly go to organizations that fall within the above description, therefore contributing to "cultural activities" as a whole.

The United States encountered a similar problem when Congress passed the Native American Graves Protection and Repatriation Act ("NAGPRA").<sup>141</sup> Under this Act, an agency that received federal funding was required to return any Native American cultural items and human remains in its possession to the originating tribe. Congress devised a national grant process to help tribes, corporations, museums, and others gain "financial assistance in carrying out projects associated with NAGPRA compliance."<sup>142</sup>

China could benefit from a similar program. Monies from the Cultural Relic Protection Fund could be distributed to applicants through a grant process. The following amendment should accompany each article that mandates work to protect cultural relics:<sup>143</sup>

The peoples' local governments, autonomous regions, municipalities, and private entities may apply for a grant from the Cultural Relic Protection Fund to cover expenses related to activities under this article.

Additionally, monetary awards specified under Article Twelve<sup>144</sup> should be financed through the Fund.

To ensure the constitutionality of the Fund, the State Council should build transparency and public accountability into administration of the Fund and its grant system. Article Twenty-seven of the Constitution requires that state institutions keep in contact with the people, listen to their opinions and

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<sup>139</sup> Additionally, funds could be used to pay rewards described under the 2002 Law for reporting discovered or stolen relics. The current failure to set aside funds for this purpose "makes a mockery of the law and is detrimental to the protection of cultural treasure." Zhao Huanxin, *supra* note 106.

<sup>140</sup> XIAN FA art. 22 (1982) (P.R.C.).

<sup>141</sup> Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2006).

<sup>142</sup> NAGPRA Grants, <http://www.nps.gov/history/nagpra/GRANTS/INDEX.HTM> (last visited Feb. 17, 2009).

<sup>143</sup> See 2002 Law arts. 15, 20, 34, 36, 40, and 59, for articles that require work to be performed related to the possession and protection of cultural relics.

<sup>144</sup> *Id.* art. 12 (specifying performance conditions for the award of monetary rewards to individuals).

suggestions, accept public supervision, and do their best to serve the public.<sup>145</sup> However, direct provisions to this effect need not be specified in the plain language of the amendment; these concerns can be addressed during the implementation of the Fund and the organization that will administer the grants and oversee the application process.

Admittedly, this amendment creates another layer of bureaucratic red tape that individuals and entities would be required to navigate in order to further the goals of the 2002 Law. However, the potential benefits of funding—mainly that organizations will have the means to implement the protective measures the 2002 Law seeks to promote—would likely outweigh the downside of bureaucracy. Furthermore, the proposed process would be less burdensome than the alternative: lobbying local governments to divert funds from other social programs to fund protection efforts.<sup>146</sup>

Critics might point out that establishment of an agency to disburse the funds will be costly in itself, especially given the size of China, the amount of grants likely to be requested, and the need to monitor use of funds once distributed. In response, it is important to remember that restricted action in this situation is better than no action. In choosing between higher administration costs paid out of a discrete fund in order to further *some* protection, versus the current virtual unavailability of monies for *any* protection, those in favor of strengthening the 2002 Law should be persuaded to choose the former.

*B. In the Absence of New Amendments, the P.R.C. Should Adopt Other Measures to Protect Cultural Relics and Enhance the 2002 Law*

The first set of amendments to the 2002 Law took five years to sign into law. If another five years pass before the proposed amendments are adopted, irreparable damage could be done to countless Chinese cultural relics. In order to minimize such damage, China can enforce a few stopgap measures short of legislative action. These include: 1) prioritizing the national interest in protection of cultural relics over economic development; 2) encouraging citizens to file legal claims under the Administrative Procedure Law (“APL”);<sup>147</sup> 3) pursuing legal action against known holders

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<sup>145</sup> XIAN FA art. 27 (1982) (P.R.C.).

<sup>146</sup> The success of lobbying efforts is not likely given the local government bias in favor of economic development and basic infrastructure needs over other projects. Clarke, Murrell & Whiting, *supra* note 130, at 27.

<sup>147</sup> Xingzheng susong fa [Administrative Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) LAWINFOCHINA (last visited Dec. 17, 2008) (P.R.C.).

of illicitly obtained cultural property; and 4) pursuing bilateral agreements under the UNESCO Convention with market nations.

1. *China Should Encourage Protection of Cultural Relics over Economic Development*

Though the Chinese Constitution values and protects the history and culture of the people,<sup>148</sup> the P.R.C.'s emphasis on the economic development and expansion of the country often hinders that goal; in many instances, the government has allowed the destruction of cultural assets in favor of economic expansion. For example, in October 2007, construction of the Beijing-Shanghai high-speed railway was halted because ancient pottery was discovered in the path of the proposed construction.<sup>149</sup> The Cultural Heritage Bureau negotiated with the railroad company for the repositioning of the line so that it would not pass over the site where the ruins were found.<sup>150</sup> The railway company refused, saying "the project was of national importance."<sup>151</sup> The company did not respond to the Bureau's fine of five million Yuan (approximately \$602,500) to pay for excavation of the relics before major construction began. The railway continued construction on its own terms, without paying a fine or excavating any relics.<sup>152</sup> Construction was finally halted by the municipal government in late August 2008, but only after 2,000 square meters (approximately 3.3 square miles) of the site was severely damaged.<sup>153</sup>

Additionally, as part of the construction for the 2008 Beijing Olympics, a seventeen-block area in the historic Qianmen neighborhood was leveled and reconstructed.<sup>154</sup> The renovation preserved only eleven buildings, which comprised three percent of the eighty-nine acre development area.<sup>155</sup> The Qianmen demolition happened despite protests by local citizens who were evicted from their family homes and cultural groups demanding that the area be preserved.<sup>156</sup> The demolition also involved compliance with the 2002 Conservation Plan for the Twenty-five Historic

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<sup>148</sup> XIAN FA pmbl. (1982) (P.R.C.).

<sup>149</sup> *Rail Project Halted to Save Relics*, CHINA DAILY, Sept. 2, 2008, available at [http://china.org.cn/china/local/2008-09/02/content\\_16371449.htm](http://china.org.cn/china/local/2008-09/02/content_16371449.htm).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Henry Sanderson, *Despite Promises, Old Beijing Neighborhoods Fall*, USA TODAY, June 16, 2008, available at [http://www.usatoday.com/news/world/2008-06-16-2383481538\\_x.htm](http://www.usatoday.com/news/world/2008-06-16-2383481538_x.htm).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

Areas in Beijing Old City, a plan announced by the government, without public comment, that provides for the conservation of historic neighborhoods in Beijing by controlling the approval necessary for construction and renovation projects.<sup>157</sup> According to He Shuzhong, the founder of the Beijing Cultural Heritage Protection Center, in demolishing the Qianmen neighborhood, “[t]he district government made the narrowest interpretation of the 2002 preservation agreement, cherry-picking a few places for preservation and developing the rest[.]”<sup>158</sup> Such disregard for the cultural property protection laws should not be tolerated, especially when the wrongs are committed by state officials sworn to protect the best interests of the Chinese people and uphold the laws and constitution. The Chinese government must shift its priorities so that protection of cultural property is valued at least equally to economic development, and so additional destruction of important assets does not occur.

## 2. *Chinese Citizen Groups Should File Lawsuits Under the APL to Force Compliance with the 2002 Law*

In 1990, China passed the APL, a law that allows private citizens and entities to sue the government.<sup>159</sup> Under the APL, “citizens, legal persons or other organizations refusing to accept a disposition imposed by an administrative organ or administrative official have the right to institute proceedings to a people’s court.”<sup>160</sup> Citizen groups, such as the Beijing Cultural Heritage Protection Center or the Cultural Heritage Bureau, mentioned above, could use this law to sue municipalities or government officials that rubberstamp construction projects in violation of the 2002 Law. Litigants can bring claims under the APL if “the specific administrative act has been found to have inadequacy of essential evidence, erroneously applied the law or regulations, violated legal procedure, exceeded authorization or abused power.”<sup>161</sup>

However, groups could run into problems when trying to state a claim against an administrative decision. In the Chinese communist state, “[p]olitical considerations . . . play a major role in case-by-case judicial or administrative interpretation and enforcement” prompting the meaning of a

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<sup>157</sup> Rowan Callick, *Olympic Vandalism*, THE AUSTRALIAN, Jan. 15, 2008, available at <http://www.theaustralian.news.com.au/story/0,25197,23052059-5014197,00.html>.

<sup>158</sup> Sanderson, *supra* note 154.

<sup>159</sup> Administrative Procedure Law.

<sup>160</sup> State Council Information Office, *China's Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. INT'L L. 513, 531 (Jul. 2008).

<sup>161</sup> *Id.*



law that is unexpressed or unclear to be interpreted in court as proper if it is not “against [the] interest of the People, the legislator, the government, [or] the party.”<sup>162</sup> The reasons for, say, granting a specific building permit or authorizing a specific construction project could be interpreted as a proper application of the 2002 Law or another competing government interest. Also, the APL’s helpfulness is strained by its short statute of limitations. Litigants must file suit within fifteen days of the administrative reconsideration decision or action in question.<sup>163</sup> Citizens groups will have to closely follow and anticipate administrative actions that infringe upon the 2002 Law in order to challenge them in the court system.

### 3. *China Should Pursue Legal Claims Against Known Holders of Illicitly-Obtained Cultural Relics*

Over the past two years, Italy has vigorously petitioned several international museums for the return of property looted from Italian archeological sites and later smuggled into other countries.<sup>164</sup> In 2006, Marion True, former curator for the Getty Museum in Los Angeles, was criminally prosecuted for knowingly purchasing looted antiquities for the Getty’s collection.<sup>165</sup> In response to the legal action taken, the Getty has voluntarily repatriated thirty-nine objects to Italy.<sup>166</sup> Greece has similarly pursued the return of its cultural property from the Getty and other major museums, including the Metropolitan Museum of Art in New York City and the Museum of Fine Arts in Boston.<sup>167</sup>

China could attempt to curb the illicit antiquities trade by pursuing similar legal action against individuals selling looted goods and individuals who own such goods, whether they live in China or abroad. The United States has a criminal law, the National Stolen Property Act,<sup>168</sup> directed at

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<sup>162</sup> Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT’L & COMP. L. 35, 46 (2007).

<sup>163</sup> Administrative Procedure Law art. 38. All administrative law decisions can be petitioned for reconsideration and a decision upon such petition will be issued within two months. *Id.* Claims under this law should be brought fifteen days after the reconsideration is final. *Id.* “Also significant is that the ‘burden of proving the legality’ of a disputed administrative action falls on the defendant, not the citizen who brought the case.” Traci Daffer, “*I Am Fighting for the Right to Eat, and I Will Keep Fighting. The Truth is on Our Side*”: *Class Action Litigation as a Means of Enacting Social Change in China*, 75 UMKC L. REV. 227, 235 (2006).

<sup>164</sup> Lacayo, *supra* note 71, at 62.

<sup>165</sup> Sylvia Poggioli, *Ex-Getty Curator Stands Trial for Looted Antiquities* (National Public Radio Broadcast Jan. 20, 2006), <http://www.npr.org/templates/story/story.php?storyId=5165575> (last visited Feb. 17, 2009).

<sup>166</sup> Lacayo, *supra* note 71, at 62.

<sup>167</sup> *Id.*

<sup>168</sup> National Stolen Property Act, 18 U.S.C. § 2314 (2006).

discouraging the illegal importation of cultural relics protected under the UNESCO Convention.<sup>169</sup> Although prosecution under the law can only be brought by the United States government, China should make public demands that the United States pursue charges against individuals and entities known to have illegally obtained Chinese cultural relics. Legal prosecutions, whether in China or abroad, may be a more effective method of prevention than elaborate purchases of looted antiquities on the auction circuit, such as those executed by the Poly Group<sup>170</sup>—particularly because those purchases might actually undermine the goals of the 2002 Law and encourage looting. In addition, China should make public requests for the return of known looted items contained in other market nations such as Japan and the United Kingdom.

4. *China Should Continue to Pursue Bilateral Agreements with the United States and Other Major Market Nations*

One of the theories explaining why the United States has not yet approved China's pending request for a bilateral agreement is that China is not doing enough within its own borders to deter the illicit market trade.<sup>171</sup> Accordingly, China should more stringently enforce its current domestic laws, including the 2002 Law and the Criminal Law, to encourage the United States to enter into an agreement (and provide fewer excuses to refrain from so doing). Additionally, China could pursue bilateral agreements with other major market nations. China should approach the United Kingdom and Japan, both known collectors of Chinese antiquities and both signatories to the UNESCO Convention,<sup>172</sup> for bilateral agreements. Such agreements can be requested between any signatories to the UNESCO Convention. To date, no such agreements exist between China and any other signatory.

V. CONCLUSION

Chinese art and antiquities have long been valued by both collectors and historians around the world. China should protect these relics from illegal exportation for the benefit of present and future generations. The 2002 Law was enacted to that end. Although it established a foundation of regulations to protect and care for cultural relics, its lack of practical funding

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<sup>169</sup> Baum, *supra* note 35, at 933-34.

<sup>170</sup> See *supra* Part III.A.3.

<sup>171</sup> Baum, *supra* note 35, at 948-49.

<sup>172</sup> See O'KEEFE, *supra* note 33, at 212-14.

sources has kept it from achieving its full potential. Amendments passed in 2007 solved minor problems, but nevertheless failed to tackle the larger problem—the lack of financial resources to guarantee that individuals, state organizations, or private entities comply with the 2002 Law.

In light of its shortfalls, the P.R.C. should amend the 2002 Law again. This time, the amendments should accomplish three specific tasks: first, a National Fund should be established to provide a pool of monies dedicated to the execution of the 2002 Law; second, the amendments should provide specific revenue sources that would continually contribute money into the Fund; and third, a grant application process should be created so that individuals and entities can receive money to achieve the purposes of the 2002 Law. If the P.R.C. does not take action quickly, countless cultural relics will be lost to looting, destruction, and illicit export. The Chinese people—and future generations of every nation—would benefit from increased protections for priceless remnants of one of the earth's ancient cultures.