

**PEOPLE'S REPUBLIC OF CHINA**  
**Request for Import Restrictions on Certain Cultural Materials**

**Comments of William G. Pearlstein<sup>1</sup>**  
**to**  
**Cultural Property Advisory Committee**

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*Three Significant Problems with the PRC Request*

1. The Request Includes Numerous Categories of Objects That Are Not “Archeological Materials.” Only Archeological materials may be designated for restriction.

(a) “Archeological materials” are limited to the following (Section 302(2) of Convention on Cultural Property Implementation Act):

(i) any object of “archeological interest” that was first discovered in China and is “subject to export control” by China.

(A) Is every object covered by the Request “subject to export control” by China?

- The scope of China’s export controls is unclear. The Summary suggests that Chinese law only restricts the export of those “cultural relics with important historical, artistic and scientific value”. Chinese law appears to require a qualitative or subjective analysis of objects before export is restricted. By contrast, the categories of objects subject to the Request are all inclusive.
- The categories of objects restricted for import into the US cannot be broader than the categories of objects restricted for export from China.
- The existence of a booming free market in Hong Kong for the same materials, legal sanctioned by the PRC, negates the purpose of any “export controls” that may formally be on the PRC’s books.

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Section 302(i)(II). (ii) Objects of “archeological interest” must be at least 250 years old.

- US restrictions cannot apply to objects that were created after 1754, i.e., midway through the Qing Dynasty.

(iii) Objects of “archeological interest” are limited to those “normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water.” Section 302(i)(III).

(A) Experts in the field firmly believe that many of the categories subject to the Request are not archeological because they are not “normally” found in the ground:

- Ming, Qing and certain Song/Liao/W.Xia/Jin/Yuan are entirely non-archeological. Import of these objects may not be restricted under the Act.
- Certain categories of Song/Liao/W.Xia/Jin/Yuan; Sui/Tang/5 Dyn/10 Kingdom; and 3 Kingdoms/W&E Jin/S&N Dyn are possibly but not necessarily archeological. They are generally not funerary and are found more often out of the ground than in. Under the Act, these categories may not be restricted because they are not “normally discovered” as a result of excavation, digging or exploration.
- Only certain categories of 3 Kingdoms/W&E Jin/S&N Dyn and the earlier periods are “normally discovered” as a result of excavation, digging or exploration.

(iv) Objects of “archeological interest” must be also of “cultural significance.” Section 302(i)(I).

- The archeological view is that all objects discovered in context have potentially equal value to the archeological record. Thus any object that is part of the archeological record is “significant” and the significance of all objects in context is assumed. This view makes the term “culturally significant” irrelevant to the analysis under the Act.
- The Act requires a qualitative analysis of which archeological objects may be restricted. (This is especially clear with “ethnological materials” which must have “characteristics which distinguish them from other objects

in the same category;” they exclude “trinkets and other objects that are common or repetitive or essentially alike.)

- The Request covers every category of cultural property from Prehistory to 1911 and encompass every conceivable object falling within these broadly described categories of cultural property. Compare this scope with statements in the Senate Report that accompanies the Act and by the key U.S. personnel involved in drafting the Act:

“The Committee intends these limitations to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other nations.” U.S. Senate Report, 97-564.

“We were not prepared to give the rest of the the world a *blank check* [emphasis added] in that we would not automatically enforce, through import controls, whatever export controls were established by another country.” (Mark Feldman; Chief State Dept. Negotiator)

“The power to place import controls on art was seen as an extreme and dangerous step to be used only in cases of great necessity. The power is *not* to be resorted to as a generalized way of dealing with the fact that a large amount of illegal art goes out of a lot of countries. ... the mere fact that a large amount of illegal export goes on should not trigger this legislation. *There really has to be some specific showing that illegal export is destructive to some important category of art.*” (Paul Bator; Head of US Delegation to UNESCO).

- What is the meaning of “culturally significant”?

(v) Suggested factors relevant to this determination may include: comparative rarity, the quality and state of the existing archaeological record relating to the category of artifact to which the object belongs, the quality and state of the art-historical record, the representation of comparable objects in Chinese, U.S. and foreign museums, and the availability of like objects on the internal Chinese market and on the international market.

2. No Multi-National Response by Other Important Market Nations. *Categories of objects that pass the threshold analysis of whether they are “archeological materials” can be restricted only if the Committee makes all of the required determinations.*

(a) The requirement for a “*concerted international response*” is only satisfied if US restrictions “will be applied in concert with similar restrictions implemented or to be implemented by those nations individually having a significant import trade in such materials.” Section 303(a)(1)(c)(i).

(b) It is *not* satisfied if the other significant market nations are simply parties to the UNESCO Convention. Congress considered and rejected this argument before passing the Act.

(i) The UNESCO Convention itself provides that a State Party’s signature to UNESCO is not enough. UNESCO is not “self-executing” with respect to import controls. Instead Article 9 of the UNESCO Convention requires State Parties

to undertake to participate in a concerted international effort to determine and to carry out the *necessary concrete measures*, including the control of exports and imports and international commerce *in the specific materials concerned*. [emphasis added.]

(ii) Taiwan, Japan and Singapore in Asia, and France, Belgium, Germany and England in Europe are all major markets for Chinese objects. US market experts believe that the combined size of these other markets is greater than that of the US market by a multiple. Yet no other party to UNESCO has signed an agreement with China restricting the import of cultural materials.

(c) The existence of general, non-specific customs regulations, passively enforced, is not a substitute for the imposition of “similar import restrictions,” selectively targeted at specific categories of archeological materials and backed by active Customs enforcement. (e.g., the Member States of the European Community have failed to enforce applicable customs regulations in any meaningful fashion).

(d) US restrictions imposed in the absence of a “multi-national response” will have the predictable effect of driving the market offshore to unregulated markets without deterring looting.

3. The PRC has failed to meet its burden of satisfying the “self help” requirements.

(a) The PRC must take measures consistent with the UNESCO Convention to protect its cultural patrimony, and remedies less drastic than U.S. import restrictions must not be available. Section 303(a)(1)(B) and (C)(ii).

(i) PRC “*should not only have established export controls but also be making a serious effort to solve the problem itself.*” Lax enforcement by PRC of its cultural property laws against its own citizens and the encouragement of private ownership and a

booming domestic market in archeological materials should weigh heavily against import restrictions.

(b) The booming internal market in the PRC for cultural objects is dominated by a large and growing number of Chinese auction houses and dealers. Today, approximately 48 Chinese auction houses and over a hundred private dealers handle these materials. US market experts believe that from 2000 to 2004 the total auction market in the PRC and Hong Kong increased approximately 700% for the same materials that the US is being asked to restrict, and that the size of the domestic Chinese market in both dollar volume and number of sales is greater than the US market by a multiple.

4. Conclusion.

(a) The US is being asked to bar the importation of objects that are openly sold in the booming Chinese internal market and Hong Kong, and are freely exported to major markets in Asia and Europe.

(b) In light of the circumstances,

(i) China's request should be suspended until China

(A) controls its domestic market in archeological materials; and

(B) orchestrates a concerted international response among the important offshore market nations.

(ii) If and when the Committee can make these determinations in good faith, the categories of restricted objects should be limited to the relatively few categories of archeological materials.