

Statement of the Association of Art Museum Directors concerning the Proposed Extension of the Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China Concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period through the Tang Dynasty and Monumental Sculpture and Wall Art that is at Least 250 Years Old

Meeting of the Cultural Property Advisory Committee

May 2, 2018

I. Introduction

The Association of Art Museum Directors (the "AAMD") respectfully submits this statement for consideration to the Cultural Property Advisory Committee (the "Committee") in connection with the proposed renewal of the *Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China Concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period through the Tang Dynasty and Monumental Sculpture and Wall Art at Least 250 Years Old* (the "MOU"). Pursuant to the Cultural Property Implementation Act (the "CPIA"), the governments of the United States of America and the People's Republic of China ("China") entered into the MOU in 2009 ostensibly to protect archaeological material ranging in date from approximately 75,000 B.C.E. through 907 C.E. and Monumental Sculpture and Wall Art that is at least 250 years old, for a period of five years. The MOU was amended and extended for an additional five years on January 14, 2009, subject to interim review, and the Designated List issued in connection with the MOU was revised to clarify that the MOU applies to monumental sculpture and wall art that is at least 250 years old as of January 14, 2009.

II. Preliminary Statement

In 2014, the AAMD submitted written comments to the Committee identifying a number of areas for improvement in the MOU and concerns with the accuracy of the accompanying Designated List. For example, the AAMD noted that by imposing import restrictions on monumental sculpture and wall art at least 250 years old without clarifying that the age would be measured from the date of the MOU, a restriction inconsistent with the CPIA was created. The amended MOU and Designated List reflected the Committee's adoption of this recommendation and specified that the protected objects had to be 250 years old as of the date of the MOU.

The AAMD also made a number of recommendations with respect to Article II, Section 7, addressing cultural exchange; many of which were implemented in the 2014 Amendment. Specifically, Article II was amended to require China to use its best efforts to approve loans for exhibitions for up to two years, increase the number of Grade 1 objects allowed in those exhibitions, consider long-term loans of up to five years, and allow the permanent export of cultural objects that meet certain criteria.

III. Positive Cultural Exchange

While the AAMD has concerns with respect to China's compliance with the MOU, as discussed below, those concerns should not overshadow the excellent cooperation that exists on numerous levels between American museums and their Chinese peers. Loans for exhibitions are being made – in both directions – and exhibitions are being organized between American and Chinese museums – again in both directions. Without suggesting this is an exhaustive list, a few notable examples demonstrate the diversity of these projects:

- *Dreams of Kings: A Jade Suit for Eternity, Afterlife Treasures of the Han Dynasty from Xuzhou*, currently at the Nelson-Atkins Museum;
- *Age of Empires: Chinese Art of the Qin and Han Dynasties* at the Metropolitan Museum of Art from April 3, 2017 - July 16, 2017;
- *Mirroring China's Past: Emperors, Scholars and their Bronzes*, currently at the Art Institute of Chicago;
- *Forbidden City: Imperial Treasures from the Palace Museum, Beijing* at the Virginia Museum of Fine Arts from October 18, 2014 - January 19, 2015;
- beginning April 20th, *Terracotta Army: Legacy of the First Emperor of China* at the Cincinnati Art Museum (previously at the Virginia Museum of Fine Arts); and
- *Forces of Nature: Ancient Maya Art from the Los Angeles County Museum of Art* at the Shenzhen Museum August 24 - November 25, 2018, the Jinsha Museum December 18, 2018 - March 19, 2019 and the Hubei Provincial Museum April 27 - July 29, 2019.

American museums host fellowships of Chinese students as well as visiting museum professionals through programs like the China International Cultural Association (CICA). Chinese curators have come to a number of AAMD museums for study and collaboration.

AAMD museums have hosted symposiums with invited Chinese scholars. American curators have collaborated on research and publications with Chinese museums, and even serve as research fellows in Chinese museums.

Papers authored by curators from American museums are published in China and curators are invited speakers at international conferences in China.

Chinese museums have been generous in allowing American curators access to museum inventories and sites for study and research. These visits, however, have not always been without issues. In at least one example, a museum professional was not permitted to request to study specific objects in advance, rather the objects for study were chosen and revealed only on arrival and no photography was permitted.

Chinese conservators through generous grants are able to come to the United States to help in the conservation of Chinese objects in American museums.

These and many other examples highlight the tremendous interest in fostering and strengthening cultural ties with China and the MOU is a critical component in that effort.

IV. The Determinants and Article II

The Committee needs to review China's compliance with the MOU itself and, in particular, Article II. Not only is compliance with the MOU a requirement for renewal, but Article II, Section 7 falls directly within the fourth CPIA determinant, interchange of cultural property.¹ Accordingly, "[w]hat is very important to the USA is how well the programmatic elements embedded in Article II of an agreement are being implemented."² Perhaps cognizant of this, the Committee recommended renewal of the MOU in 2014 with provisions requiring China to use its best efforts to accomplish several defined goals all within its control. The Committee must now evaluate, and respond appropriately to, China's progress in this regard.

A. Allowing Objects in an Exhibition to Remain Outside China for up to Two Years.

The MOU requires China to use best efforts to allow objects in an exhibition to remain outside China for up to two years.³ Nevertheless, the AAMD has not discovered any Chinese loan to AAMD members (or anyone else) made in the last five years with durations longer than one year, much less two. The reason this extended time frame is so critical is coupled with another area of concern with loans from Chinese museums: loan fees and costs, *e.g.*, couriers, visiting professionals, *etc.*

While there have been isolated examples of China reducing or waiving loan fees, these examples are the exception and fees and costs involved in borrowing from Chinese museums make organizing an exhibition in the United States challenging. Because of the cost, these exhibitions often need to be organized with multiple venues in the United States – thus spreading the cost amongst multiple borrowing institutions. Trying to accomplish a multiple venue exhibition with the loan term of one year, especially a term *measured from the moment the work leaves the Chinese museum until it returns*, makes organizing a financially viable exhibition extremely difficult. With the down time for packing and shipping between venues added, the time a work can be shown at multiple venues is extraordinarily limited. One of the benefits of the requirement that China increase the permitted loan period was to have the ability to include more venues; thereby, reducing the per museum cost.

B. Increasing the Number of Grade 1 Objects.

Though the MOU requires an increase in the percentage of Grade 1 items⁴ permitted in an exhibition (currently 20%),⁵ the AAMD observed little change.⁶ This problem highlights the

¹ 19 U.S.C. § 2602(a)(1)(D).

² Maria P. Kouroupas, Kouroupas, Maria P. 2015. "Combating Cultural Property Looting and Trafficking: the US Experience." *Uniform Law Review - Revue De Droit Uniforme*20 (4): 533. doi:10.1093/ulr/unv042.

³ 2014 MOU, Art. II, § 7(3).

⁴ MOU, Art. II, § 7(3).

interrelationship of conditions for loans imposed by China. If China will not increase the *percentage* of Grade 1 objects – the centerpiece of most exhibitions – the *overall number* of borrowed objects must increase in order to obtain more Grade 1 objects, which in turn means increased loan fees and costs. With a restricted loan term, however, the ability to amortize the increased cost is significantly curtailed. In other words, the provisions of Article II, Section 7 of the MOU are interrelated and interdependent.

C. Encouraging and Facilitating the Approval of Loan Exhibitions to the United States of America.

Despite being required to encourage museum loans of archaeological material, including recently excavated objects, for research and public display purposes,⁷ as well as to facilitate loan exhibitions to the United States,⁸ significant barriers remain. Among the most significant are high loan fees, which are to some extent mandated by a system in China requiring museums to generate substantial revenue through object loan fees. Such fees adversely impact all American institutions, but disproportionately impact small museums with limited resources, severely curbing—if not altogether eliminating—their ability to present great Chinese works of art to their public. As previously stated, there have been isolated incidents of reduced or waived loan fees, but it must be emphasized that these are the exceptions and a general, comprehensive approach needs implemented. Further, as indicated above, there is a direct and negative interrelationship among the hardships created by abbreviated loan terms, too few Grade 1 objects, and too high loan fees.

IV. The Chinese Art Market

By reducing the volume of cultural property entering United States by way of import restrictions, the United States is voluntarily restricting its market and, in turn, its market competitiveness. There are undoubtedly good reasons for doing so, as the United States should not be a market for

⁵ State Council of the PRC. 2018. “Regulations for the Implementation of the Law of the People’s Republic of China on the Protection of Cultural Relics,” May 13, 2003 Promulgated by Decree No. 377 of the State Council of the People’s Republic of China on May 18, 2003, and Effective July 1, 2003.” UNESCO. Accessed April 12. http://www.unesco.org/culture/natlaws/media/pdf/china/china_regimplawprotclt_entof. “Law of the People’s Republic of China on Protection of Cultural Relics.” 2018. Accessed April 12. http://www.unesco.org/culture/natlaws/media/pdf/china/china_lawprotectionclt_entof; [Adopted at the 31st meeting of the Standing Committee of the Tenth National People’s Congress on December 29, 2007].

⁶ One exception that demonstrates China’s ability to make significant exceptions unfortunately occurred not in the U.S., but in Japan where the Tokyo National Museum was granted more than 60% Grade 1 objects for an exhibition called *China: Grandeur of the Dynasties*. It received “169 sets of art treasures from 29 institutions distributed in 11 Chinese provinces[,]” see Da Kong. 2015. “Imaging China: China’s Cultural Diplomacy through Loan Exhibitions to British Museums.” Dissertation. University of Leicester, 134; citing Li Wei 李微, “‘zhonghua dawenming zhan’ jiagou zhongri wenhua jiaoliu xin qiaoliang’ ‘中华大文明’展架构中日文化交流新桥梁 [‘China: Grandeur of the Dynasties’ builds up a new bridge for China-Japan cultural exchanges].

⁷ 2014 MOU, Art. II, § 7(1).

⁸ 2014 MOU, Art. II, § 7(3).

looted antiquities, but the United States market should not be restricted in order to advantage other markets.

China has the second-largest economy and either the first or second largest art market *worldwide*.⁹ Furthermore, that market has grown since the MOU was first implemented in 2009, which may not be coincidental.¹⁰ In 2016, more Chinese art and antiquities by value were sold in China than any other country in the world.¹¹ At the same time, the United States market contracted by 26%.¹²

The original MOU enacted in 2009 prohibited Chinese museums, like United States museums, from acquiring restricted archaeological objects.¹³ This prohibition was designed to help level the playing field for *both* the United States and Chinese museums; the latter of which have been historically allowed, and in fact encouraged, to buy Chinese antiquities abroad.¹⁴ China was relieved of this restriction, however, in 2014 when the MOU was renewed and Article II(10) was deleted and replaced. Now, it seems, the MOU serves double duty: prohibiting the import of restricted objects into the United States, but allowing Chinese museums free access to global markets.

Other amendments to the MOU are also problematic. Article II, Section 9 of the 2009 MOU provided that China would use its best efforts “to continue to license the sale and export of certain antiquities as provided by law and [to] explore ways to make more of these objects available licitly.” Yet this provision was deleted in the 2014 Amendment and replaced with a

⁹ China Radio International. 2017. “China Regains Title as World's Largest Art Market.” *Great Britain Times*. March 1. <https://gbtimes.com/china-regains-title-worlds-largest-art-market>; *World Economic Forum*. 2018. “China Has Overtaken the UK as the World's Second Market for Art.” March 19. <https://www.weforum.org/agenda/2018/03/china-is-second-largest-art-market-in-world/>.

¹⁰ “[A]fter the enactment of the original MOU with the United States in 2009, the auction market for art and antiques in mainland China experienced a 500% growth between 2009 and 2011, and by 2011, the Chinese auction market surpassed all other countries in the world with \$9.3 billion in total sales value CCP Staff. 2017. “US Gives China License to Loot.” *Cultural Property News*. November 11. <https://culturalpropertynews.org/us-gives-china-license-to-loot/>, citing Ning Lu and Yu Jinsheng. 2016. “Global Chinese Art Auction Market Report.” *ArtNet*, 12; http://www.cn.artnet.com/en/assets/pdfs/global_chinese_art_auction_market_report_2016_en.pdf. and further noting that between 2009 and 2011 auction sales of arts and antiquities overseas had also expanded by 278%.

¹¹ “According to a comprehensive study published [in 2017] by Artnet and the China Association of Auctioneers, while overseas auction sales in Chinese art and antiques experienced a 5% decline between 2015 and 2016, the auction market in Mainland China saw a 7% increase in total sales value of art and antiquities, reaching \$4.8 billion in 2016.” CCP Staff. 2017 “US Gives China License to Loot” citing Ning Lu and Yu Jinsheng. 2016. “Global Chinese Art Auction Market Report,” 9, 13.

¹² Kinsella, Eileen. 2017. “The Once-Hot Chinese Art Market Is Struggling to Reignite.” *ArtNet*. August 21. <https://news.artnet.com/market/2016-chinese-art-market-report-1050767>; “Mainland China sold more Chinese art and antiques in 2016 by value than any other country in the world. Total sales in mainland China grew by seven percent, reaching \$4.8 billion (¥33.4 billion), while the Western art market experienced a contraction. In the US alone, the market declined by 26 percent, while the United Kingdom saw a 14 percent decline year-on-year.”

¹³ 2009 MOU, Art. II, § 10.

¹⁴ James Cuno. 2011. *Who Owns Antiquity?: Museums and the Battle over Our Ancient Heritage*. Princeton, NJ: Princeton University Press, xvii-xviii.

section allowing the *re-export* of cultural objects.¹⁵ This provision has nothing to do with permitting objects initially acquired legally on the Chinese market to be exported and subsequently sold in other marketplaces, namely in the United States. On careful read, the new section is designed to encourage Chinese residents to bring home Chinese antiquities with the promise that the objects can later be re-exported. *None of this* speaks to protecting objects of cultural significance from being looted or destroyed, but rather to protecting the value of China's expanding art and antiquities market. The Committee should recommend revisions to the MOU designed to avoid this obvious outcome.

V. Immunity from Seizure

China benefits from the immunity from judicial seizure statute in the United States¹⁶ when loans are made to American museums applying to the State Department for the determinations under that statute. While many of the major marketplace countries of the world have adopted immunity from seizure laws, *e.g.*, Australia, Austria, Canada, France, Germany, Japan, Switzerland and the United Kingdom, China has no such protections for works of art entering its borders on loan. The AAMD, in its statement in 2014, recommended that immunity from seizure be considered by China, but nothing was added to the MOU. In contrast, recently, the United States, in its MOU with Italy, added a provision requiring Italy to continue to explore the feasibility of promoting a legislative initiative on the application of immunity from seizure. The absence of immunity legislation has a chilling effect on potential exhibition loans and cultural exchange between the United States and China and should be addressed in any renewal of the MOU with China.

VI. The Designated List

The Designated List continues to be a matter of concern. The list is overly broad, the categories sometimes incorrect, its descriptions provide little guidance for customs officials, and in many respects, it fails to put importers on fair notice of what can and cannot be imported. The broad sweep of covered objects genuinely oversteps the authority given under the CPIA.

The framers of the CPIA worked to balance competing interests, while still assisting countries experiencing significant destruction and looting of their cultural heritage. Congress worked to equalize “the structure of the statute and its effectuating mechanisms”¹⁷ in a way that would balance “the competing interests of U.S. museums, the art market, the U.S. public, archaeologists, as well as source nations.”¹⁸ This is “because Congress considered such import

¹⁵ 2014 MOU, Art. II, §(8), which states: “with respect to Chinese cultural objects that meet the following four conditions: a) legally exported as part of a private collection of Chinese heirlooms, b) legally transferred among owners, c) purchased and imported by residents of China, and d) declared upon import to China and registered with the relevant authorities, the Government of the People's Republic of China shall seek legislative action that permits their re-export.”

¹⁶ 22 U.S.C. § 2459.

¹⁷ Andrew L. Adler and Stephen K. Urice. 2011. “Resolving the Disjunction between Cultural Property Policy and Law: A Call for Reform.” *Rutgers Law Review* 64: 139. doi:10.2139/ssrn.1658519.

¹⁸ Stephen K. Urice and Andrew L. Adler. 2010. “Unveiling the Executive Branch’s Extralegal Cultural Property Policy.” *Miami Law Research Paper Series*. 18. doi:10.2139/ssrn.1658519.

restrictions to be ‘drastic’ measures,¹⁹ especially for a country so committed to open borders and free trade,²⁰ Congress ensured that [import restrictions] could be imposed only if *exacting criteria were satisfied*.²¹ What currently exists is an overbroad, untargeted, prohibition on importing vast segments of China’s cultural heritage. The restrictions should be *tailored, reactive* measures implemented to stop *known* looting of specific cultural heritage *proven* to be under threat by the source country.

Just by way of example, Article VIII of the Designated List restricts the importation of “glass” for which the explanatory language simply states “types include mostly tablewares, such as cups, plates, and saucers.” This incredibly broad and indistinct description apparently applies to any glass object created between 1100 B.C.E. and 907 C.E.; in other words, 2,000 years. How is a customs official supposed to identify and restrict objects covered by this description? How is an importer going to know what can be brought into the United States? Is the category limited to tablewares or are all glass objects covered?

Another example is amber, which is described as follows:

“Small ornaments from the Neolithic through Tang Dynasties”.²²

In other words, any small object made of amber (or maybe made in part of amber?), created between 10,000 B.C.E. and 907 C.E., a span of almost 11,000 years, which left China after January 14, 2009, cannot be brought into the United States. First, the description cannot meet the definition of the CPIA, which requires that the object be of “cultural significance,”²³ but more importantly no importer could be on reasonable notice as to what can and cannot be imported into the United States. Consequently, every object containing amber created over a period of 11,000 years, regardless of the significance of the object itself, is permanently restricted from import into the United States unless it left China before January 14, 2009 (or had an export license after that date – which is unlikely).

These broad “descriptions” leave customs officials with little guidance. The end result of a vague, overly-broad Designated List, coupled with customs officials (undoubtedly trying their best to do a difficult job) with limited training as to what is a restricted “antiquity,” is that virtually everything is now restricted. That is blatantly inconsistent with the CPIA, which contemplates narrow, understandable import restrictions applicable to “culturally significant” objects.

¹⁹ Referring to the definition of import restrictions as a *drastic remedy* in 19 U.S.C. §2602(a)(1)(C)(ii).

²⁰ See, e.g., Paul M. Bator. 1982. “An Essay on the International Trade in Art.” *Stanford Law Review* 34 (2): 343. doi:10.2307/1228349; explaining that the United States has historically allowed for the “[u]nrestricted and free trade in the arts.”

²¹ Andrew L. Adler and Stephen K. Urice. 2011. “Resolving the Disjunction between Cultural Property Policy and Law: A Call for Reform.” 140; *emphasis added*.

²² 2014 Designated List, 1(B): Ornaments and Jewelry. *Federal Register* 79:8. January 13, 2014. 2091.

²³ 19 U.S.C. § 2602(a)(1)(D).

VII. Recommendations

The AAMD recommends that if the MOU is to be renewed, the following should occur:

Article II should be amended to *require real, demonstrated, and objectively measured*, progress by China with respect to:

1. allowing and encouraging exhibition loans to be made for at least two years;
2. allowing and encouraging long-term loans to be made for at least five years;
3. reducing loan fees;
4. increasing the percentage of Grade 1 antiquities that can be included in any exhibition;
5. considering legislation to provide immunity from seizure; and
6. allowing the permanent export of at least some cultural objects legally acquired in China.

Finally, the Designated List must be revised in order to put importers on fair notice and to not unduly burden customs officials. The list should be revised in order to describe objects that are truly of cultural significance in a way that importers and customs officials can *readily discern* what is and is not permitted to be imported into the United States.

VIII. Conclusion

The AAMD does support the renewal of the MOU with China and applauds the progress made, but more progress needs to be made in the areas described above if the AAMD is to continue to support renewals in the future.

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The Association of Art Museum Directors (AAMD), established in 1916, is a professional organization of approximately 240 directors of major art museums throughout the United States, Canada, and Mexico. The purpose of the AAMD is to support its members in increasing the contribution of art museums to society. The AAMD accomplishes this mission by establishing and maintaining the highest standards of professional practice, serving as a forum for the exchange of information and ideas, acting as an advocate for its member art museums, and being a leader in shaping public discourse about the arts community and the role of art in society.