



**Statement of the Association of Art Museum Directors
Presented by Stephen J. Knerly, Jr.¹**

**Meeting of the Cultural Property Advisory Committee to Review Proposal to Extend 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,
May 14, 2013.**

I. Introduction

This statement is made on behalf of the Association of Art Museum Directors ("AAMD"). The AAMD is a professional organization consisting of directors of art museums in 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.

The AAMD deplores the illicit and unscientific excavation of archeological materials and ancient art from archeological sites and the destruction or defacing of ancient monuments. The AAMD is also committed to the responsible acquisition of archeological materials and ancient art and believes that the artistic achievements of all civilizations should be represented in art museums, which uniquely offer the public the opportunity to encounter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The AAMD recognizes and applauds the United States when it has taken a balanced approach to the protection of the world's cultural heritage, an approach that encourages a unified and international solution to the problem while allowing American museums to continue to collect responsibly on behalf of the American public.

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On January 14, 2009, the Government of the United States and the Government of the People's Republic of China entered into a Memorandum of Understanding (the "MOU"). China has now applied for a five-year extension of the MOU.

This statement sets forth AAMD's position relating to the requested extension. In developing this statement, the AAMD surveyed its membership and received responses from 21 of its members with a deep interest in and often times significant experience with China, the Chinese government and Chinese museums. This statement is based in large measure on those surveys, as well as in-depth interviews with knowledgeable curators and other professionals with whom the AAMD staff and the preparer of this statement spoke.

II. Framework for Reviewing the Request to Extend the MOU

Under the Convention on Cultural Property Implementation Act ("CCPIA"), the Cultural Property Advisory Committee ("CPAC" or the "Committee") is to consider whether China continues to meet all four factors required by the CCPIA before renewing the MOU². In addition, under Article IV, paragraph 3 of the MOU, CPAC must review the effectiveness of the MOU. The Committee should also evaluate China's compliance with the MOU and in particular Article II.

As discussed in the remainder of this statement, review of the four factors in the CCPIA, China's compliance with the MOU, and the MOU itself indicates that the following issues should be addressed if the MOU is to be renewed:

- CPAC should evaluate China's efforts to protect archeological sites, preserve artifacts, and meet specific commitments under Article II of the MOU and the CCPIA in the context of China's economic resources, rapid economic development and capital projects;
- The maximum period for long-term loans should be extended;
- Loan terms should be brought in line with international standards;
- China should adopt an immunity law to encourage more open cultural exchange;

² 19 U.S.C. § 2602(e) provides that before an MOU may be renewed, the President must determine that (1) the cultural patrimony of the requesting country is in jeopardy of pillage, (2) the requesting country has taken steps to protect such patrimony, (3) import restrictions, if applied with similar restrictions implemented or to be implemented by other countries with a significant import trade, would be of substantial benefit in deterring pillage (and less drastic remedies are not available) and (4) import restrictions in the particular circumstances are consistent with the general interest of the international community in the interchange of cultural property.

- The U.S. and Chinese governments should design an exchange program that will effect change among Chinese thought leaders in China’s cultural agencies;
- CPAC should determine if export licenses for objects on the designated list, other than for exhibition, have been granted;
- The designated list should be brought into compliance with the CCPIA; and
- There should be a fixed date for wall art.

III. China’s Efforts to Protect Sites, Preserve Artifacts, and Engage in Cultural Exchange

Efforts by China with respect to protection of sites and objects³ and cultural exchange⁴ should be analyzed in light of the current economic conditions in China. China has one of the largest economies in the world and its art market is either the first or second largest in the world. AAMD recognizes that China has so many sites of archaeological importance, such a large population and such a complicated history of cultural property that fulfilling its obligations under the CCPIA and Article II of the MOU is not easy. On the other hand, China’s ability to protect sites, invest in security, regulate its markets, educate its population about the importance of cultural property protection, and enter into meaningful cultural exchange with the United States should be measured in the context of its significant economic resources and evolved infrastructure. Furthermore, rapid economic development, capital projects and population growth must be evaluated as potential causes of site destruction, dispersal of objects and loss of context, in addition to systematic looting.⁵ The Committee should consider whether these causes are within the control of China and if they are, whether China has met its obligations under the CCPIA and the MOU to take steps to protect its cultural patrimony.⁶ For example, Article II(4) of the MOU required China to “use its best efforts to increase funding and professional resources for the protection of cultural heritage throughout the country,” and Article II(5) required measures to improve the effectiveness of customs officers.

³ Article II(4) of the MOU and 19 USC § 2601(a)(1)(A).

⁴ Article II(7) of the MOU and 19 USC § 2602 (a)(1)(D).

⁵ See, generally, Mia Logan, *Limiting Access to Art in Hopes of Decreased Cultural Property Destruction: An Assessment of the United States and China’s Memorandum of Understanding for 2014*, unpublished ms on file with author, citing, *inter alia*, Report on the application of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (China) (2010-11), available at <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/restitution-of-cultural-property> and *Official reveals China’s success in UN heritage sites*, THE INSTITUTE OF ARCHAEOLOGY, CHINESE ACADEMY OF SOCIAL SCIENCES, Dec. 12, 2012, <http://www.kaogu.cn/en/detail.asp?ProductID=3775>.

⁶ 19 U.S.C. § 2602(e) requires that before an MOU may be extended, the President determines that China “has taken measures consistent with the Convention to protect its cultural patrimony.”

IV. Loans - Challenges

Article II(7) of the MOU requires China to promote long-term loans and to promote increased institution-to-institution collaboration. The challenges facing U.S. museums as they negotiate for Chinese loans – either long-term or exhibition loans – are numerous and stem from two basic causes: Chinese legal and government imposed restrictions and inconsistencies between Chinese loan practices and international standards.

A. Legal Restrictions

The AAMD survey indicates a significant interest in long-term loans of objects covered by the MOU, but there are major challenges to such loans. The primary, but not the only one, is Chinese law. Article 50 of the Regulations for the Implementation of the Law of the People’s Republic of China on Protection of Cultural Relics⁷ prohibits the exhibition of cultural relics outside China for longer than one year. China takes this prohibition seriously; for example, apparently relying on Article 50, China required that the University of Pennsylvania cease displaying certain objects after they had been out of China for more than a year.⁸ While China ultimately agreed to an extension of the loan, the legal restriction remains in place and is a significant deterrent to American museums even seeking long-term loans. Without a secure agreement for a loan term of sufficient duration at the outset, U.S. museums are unlikely to expend the time and resources to obtain such loans. As the AAMD has previously indicated to the Committee, the allowable loan term should be closer to ten years.

A second major obstacle to long-term loans is China’s requirement that no more than 20% of any exhibition be classified as Class 1 objects. Unlike exhibition loans, long-term loans that place objects in the permanent collection galleries tend to comprise one or a small number of objects. Accordingly, U.S. museums are effectively precluded from borrowing Class 1 objects for long-term loans; a long-term loan of a single Class 1 object, for example, would constitute 100% of the exhibition and would thus be prohibited under Chinese law. While perhaps the provision could be waived, its existence is a significant disincentive to any discussion of a long-term loan, especially for smaller museums that cannot exhibit large numbers of objects.

⁷ Adopted May 13, 2003. <http://www.unesco.org/culture/natlaws/index.php?title=&title-and=0&text=&text-mode=0®ions=&countries%5B%5D=34&categories%5B%5D=0&themes%5B%5D=0&instruments%5B%5D=0&keywords%5B%5D=0&languages%5B%5D=0&years%5B%5D=0&years%5B%5D=0&doctype=0&documents%5B%5D=original&documents%5B%5D=translated&transtype=0&search=Search&change=&action=search&db=LAWs&show=&page=&start=&newsizе=null&sort=&criteria=YTo5OntzOjc6InJlZ2lvdnMiO2E6MTp7aTowO3M6MToiMCI7fXNm6OToiY291bnRyaWVzIjthOjE6e2k6MDtzOjE6IjAiO31zOjEwOiJYXRIZ29yaWVzIjthOjE6e2k6MDtzOjE6IjAiO31zOjY6InRoZW1lcyI7YTowOntpOjA7czo4OiwjthOjE6e2k6MDtzOjE6IjAiO31zOjU6InllYXJzIjthOjE6e2k6MDtzOjE6IjAiO31zOjJkImRvY3VzZW50cyI7YTowOntpOjA7czo4OiwjvcmlnaW5hbCI7aTowO3M6MTA6InRyYW5zbGF0ZWQiO319&lng=en>

⁸ [Philip Kennicott, *Following controversy, mummies at Penn Museum remain objects of mystery* http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030206371.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030206371.html)

Chinese law also impedes loans from U.S. museums to China, thereby further undermining cultural exchange, in that China does not have an immunity law. Laws that protect a foreign lender from seizure of its objects or even litigation involving its objects have become more and more important and prevalent. At least seventeen countries have such laws and the trend is only increasing given the adoption of immunity laws in recent years by countries such as the United Kingdom, Japan, Liechtenstein, the Czech Republic and Finland. A number of U.S. museums commented that the absence of such a law influenced their decision as to which objects would be lent to Chinese exhibitions. The adoption of such a law in China would significantly reduce concerns by American lenders and encourage more open lending of objects.

B. Loan Practices

In addition to legal restrictions that are not conducive to cultural exchange, China's loan practices raise concerns. Members of the AAMD have significant experience in exhibition loans with China. While wonderful exhibitions have been organized and successfully shown for the benefit of museum visitors in the United States, a number of practical obstacles discourage or impede cultural exchange. Furthermore, the loan process varies widely, depending upon the lender and the type of exhibition. In borrowing from a single museum in China, U.S. borrowers have enjoyed a relatively easy process with good results. Exhibition loans from multiple museums, however, require coordination with central government authorities, which significantly complicates the negotiations.

Loan agreements for loans from Chinese museums, particularly when the government is involved, contain terms that are inconsistent with international norms. For example, because of the restrictive nature of the contracts and the lengthy and extensive negotiations involved, contracts often are not signed before objects are shipped. In addition, the objects on the loan lists often change up until the very last minute. Loan fees are significant; risk shifting is inconsistent with international standards; and restrictions imposed on the type and percentage of objects that can make up an exhibition all impede an orderly process for obtaining loans. Some Chinese museums refuse to allow condition reports of the works before the objects are lent, which means that there is no baseline with respect to any damage to objects. At the same time, contractual requirements are imposed that require the American borrowing museum to cover for loss of value and repair of an object in the event of damage, thereby not only increasing the cost but in effect providing for a double recovery. As noted above, the requirement that loans contain no more than 20% of Class 1 objects creates a qualitative burden on exhibition planning. An additional impediment is the number and qualifications of the people who are expected to travel to or with the exhibition, and the type of accommodations and travel arrangements mandated for

them. This adds complication and expense to the process. Finally, especially for smaller museums in the United States with less direct contact with China, the absence of databases, images and inventories of objects that are available for loan significantly complicates the process.

A more comprehensive review of some of these issues can be found in the statement of Dan L. Monroe, Director and Chief Executive Officer of the Peabody Essex Museum, provided to CPAC.

One possible solution to the problem is for Chinese museums and applicable government authorities to adopt the standards for international loans established by the International Exhibition Organizers, commonly known as the Bizot Group⁹.

V. Other Collaborations

Several significant collaborations are occurring or have recently occurred between museums in the United States and museums in China. One of the most impressive was a program administered by the Metropolitan Museum of Art and funded by the Mellon Foundation, which brought directors and deputy directors of Chinese museums to be “embedded” in U.S. museums in order to observe and learn how United States museums operate development, conservation and exhibition departments. Article II(7)(3) of the MOU requires China to encourage these types of collaboration, but numerous impediments keep these efforts from expanding and from having a significant impact.

First and foremost, there must be a critical mass of people from China enrolled in these programs in order to effectuate change in China. Sending one or two people a year to gain international experience will not provide a large enough group of professionals to make a meaningful impact in a country as large and with as many museums, archaeological sites and repositories of cultural material as China. Also, the people chosen for the experience must have the qualifications necessary to undertake the project and bring back to China a knowledge base that can inform thought leaders in China. Visas must be expedited, in the first instance by China, but then by U.S. officials so that the participants can in fact attend symposia and internships and take advantage of study grants, etc. We heard any number of times that delays in the visa process in both countries caused real problems for Chinese scholars and museums officials. To create the kind of critical mass necessary to bring the experience with international standards to Chinese museums and government cultural agencies would take a dedicated program on behalf of the United States and Chinese governments.

⁹ A copy of the Guidelines can be found at http://www.lending-for-europe.eu/fileadmin/CM/public/documents/references/APPROVED_18_December_2009_Revised_Bizot_Group_LOANS_GUIDELINES-w_Exec_Summary.pdf

VI. Export of Objects

The Chinese art market is, depending upon who is doing the analysis, the first or second largest market in the world. Article II, Section 9 of the MOU requires China to “continue to license the sale and export of certain antiquities.” Despite numerous inquiries, the AAMD is unable to find any significant examples of the export, except for exhibition purposes, of material covered by the MOU. In this context, unless there is different information provided to the Committee, this section in Article II assumes something that does not appear to exist, which is the current licensing of objects for legal sale and export. As part of its review, CPAC should request information from China concerning its efforts to “explore ways to make more of these objects available licitly” because as far as the AAMD can determine, those objects are not coming into the U.S. market.

VII. Designated List

A. The List Generally

The CCPIA requires that the designated list relate to property that is of “cultural significance.” A review of the China designated list calls into question compliance with this requirement. For example, under the list every ceramic in China made between 7500 B.C. and 907 A.D. is covered. If every piece is covered, then the concept of “significance” is a nullity. This cannot be what Congress intended. Admittedly, China’s many cultures and very long history present real challenges for CPAC in identifying property that should be covered by an MOU, but the solution is not to include everything; rather, the list should include only objects of cultural significance as required by the CCPIA. Any number of other, similar, examples can be found in the designated list, a list that covers almost 76,000 years.

B. Wall Art

Included in the designated list are “monumental sculptures and wall art at least 250 years old.” To the extent this means “at least 250 years old as of the date of the MOU,” this term is acceptable. If it means “at least 250 years old as of the date of the intended importation,” however, the term is inappropriate and inconsistent with the CCPIA. A designated list cannot possibly prohibit the importation of objects not eligible for protection at the time of the execution of the MOU; the definition of archaeological property found in the CCPIA says that such property is at least 250 years old, not that it “will be” 250 years old.¹⁰ Furthermore, the CCPIA requires “fair notice”¹¹ to importers. Providing a moving target that one day allows an object to be imported, but the next day does not and extends that concept on literally a daily basis

¹⁰ 19 U.S.C. § 2601(2)(e)(i)

¹¹ 19 U.S.C. § 2604(2)

for five years (the period of the MOU) is not “fair notice.” This definition of wall art undermines the credibility of CPAC and creates potential confusion in the marketplace. For example, someone could negotiate to buy an object, but then because of delays in finalizing the negotiation would be prohibited from importing it simply because of the passage of time. A date certain should be inserted in the designated list with respect to such property or the words “as of the date hereof” added to the section, if wall art is to be included at all.

VIII. A Technical Change and Concluding Statement

In addition to the recommendations provided above, the AAMD suggests a technical change in Article II(7)(1) to add exhibition loans and antiquities so that the clause would read as follows:

Promote long-term and exhibition loans of archaeological objects and antiquities of significant interest to a broad cross-section of American museums for public exhibition, education, and research purposes.

Finally, while the notice of China’s request does not indicate any proposed additions to the objects to be covered by or the time periods applicable to the MOU or the designated list, the AAMD would oppose any additions to the objects covered or the time periods involved.

AAMD members have enjoyed excellent collaboration with their Chinese colleagues in the past and look forward to enhancing that collaboration in the future for the benefit of the people of the United States who AAMD members serve. The AAMD thanks CPAC for this opportunity to bring the views of its members to the attention of Committee. The AAMD appreciates the Committee’s consideration of the issues raised above with respect to this very important MOU.