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CULTURAL HERITAGE PROTECTION IN THE PEOPLE'S REPUBLIC OF CHINA:

THE IMPORT AND EXPORT OF CULTURAL RELICS

Supervisor
Prof. Renzo Riccardo Cavalieri

Assistant supervisor
Prof.ssa Sabrina Rastelli

Graduand
Alice Desto
Matricolation number
881296

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前言

如今，在日益受到全球化影响的不同方面中，还有文化领域：例如，每天来自许多国家的文化遗产在国际市场上持续自由买卖。但是，因为文物跟每一个国家的历史有关系，因为对创造他们的身份有关键作用，并且对社会和政治至关重要，严格来讲，文物所体现的价值不仅是艺术的或者文化的。因此，大多数的国家，尤其是那些拥有丰富文化遗产但没有经济资源来保障有效文物保护的国家，一直把本地国家文物保护确定为优先事项。

其中，中国就是全世界最积极地捍卫目前的文物保护制度的国家之一，并且，近年来，中国也是世界的第三大文物进口国：这些因素一定会导致一系列相反的问题需要解决，例如文物的具体保护，还有拍卖行的设立和当地艺术文物市场的自由化。

把上述的这些因素考虑进出之后，由于中国同时正在努力防止其文物离开国界并正在支持其本土文物和艺术市场的扩张，我认为看看中国当局如何决定起草自己的文化遗产保护制度是相当有趣的，尤其是因为这种制度就应该满足强烈反对需求。具体地说，我决定分析进出口法规这个话题，因为对我来说，这种规定显然是任何国家遗产保护制度的必要要素，但是它们的结构方式不仅会影响到当地的实践，而且甚至可能产生国际影响。事实上，一方面，有效的出口管制制度对于跟踪进出入该国的遗产流量至关重要，从而使中央和地方当局能够打击和防止国家文物的走私。

另一方面，考虑到文物在世界范围内不断交换和流通，通过有效的进口检查管制，一个国家更加有可能识别从其他国家窃取的货物，拦截并归还，这样支持非法遗产贩运的全球斗争，甚至改善其国际地位和与合作伙伴的关系。

此外，还应该指出，进出口程序的管理严重地影响到艺术品贸易领域：准确地说，出口限制、关税、获得一张许可证的平均时间都确定如何当地和全球艺术市场将发展，决定支持还是阻碍其增长。

为了进行我的研究，分析的资源是由有关的法律、公约、条例、协议和其他法律文件组成的，主要来自两个不同来源：首先，鉴于手头问题的国际层面，因为国际公约会对每个国家决定建立自己的文化遗产保护制度产生深刻的影响，一定必须分析

联合国教科文组织、国际统一私法协会和世界海关组织等世界组织通过的公约，以全面概述现有全球制度的规定。

此外，为了进行本研究显然，我也分析了一些中国法律文件的内容，特别是分析了文物保护法及其实施条例。必须指出的就是，由于所考虑的绝大多数文件都没有官方的英文翻译，目前还只有中文版本，为了分析他们的内容，我不得不依赖原始中文法律文本。

最后，为了获得满意的见解更好地了解我处理的问题，还必须查阅一些学术出版物：在这个情况下，所选择的来源是该领域非常尊敬的权威，其结果是在公认的期刊上发表的。材料的主要语料库是由英语或意大利语的出版物组成的，但是由于某些具体的方面只有被中国学者才研究的，我也必须分析他们的研究；并且，因为没有其他官方翻译，我还不得不参考原始语言的内容。

本工作分为三个章节。

由于把文化遗产的这个概念从一种语言和法制完美地翻译成另一种语言和法制极其复杂，几乎不可能，第一章必须根据国际标准对于 “Cultural Heritage” 及文物的概念提出一个暂定而详细的定义。提供了这些必要的初步定义之后，我立即注意在中国的当代情况：首先，我简要分析了最近中国文物保护方式的历史演变，以强调其关键要素。随后，我重点介绍构成实际文物保护制度基础的法律文件的内容，为的是确定最主要的义务要适用，涉及的有关权威和他们的基本责任，并介绍一些在系统中仍然存在的模糊性和问题。

由于该主题还有一个比较重要的国际层面，因此在第二章中，我更多地关注联合国教科文组织和国际统一私法协会这两个世界组织起草的公约和法律文书；最近几年这些文件都是被中国通过或访问的。事实上，因为这些文件对每个国家的文物保护制度的制定产生了很大的影响并与之相辅相成，如果把这些不考虑进出，对中国制度的分析也可能是不完整的。

最后，第三章专门介绍文物进出口的现有规定。尤其是，我来解决三个问题：第一，我想确定中国权威如何构建当代的系统，并验证进出口活动都需要相同的程序，还是，因为中国同时是文物来源国和市场国，所以进口和出口面对的问题不一样而需要根本不同的解决方案。第二，我想对当前的中国制度与在第二章中介绍的国际制度进行比较，区分中国至少正式纳入其国家立法的国际标准，并强调可能产生对比的问

题。第三，我愿意确定所分析的进出口规定和趋势对当地文化遗产和艺术市场可能会产生那种影响，还有愿意试图评估未来的后果。

Introduction

Nowadays, amongst the different sectors that are increasingly being affected by globalization there is also the cultural field, while for example, cultural heritage originating from different countries is more or less freely bought and sold on the international market daily; the values embodied by cultural heritage, however, aren't only artistic or strictly cultural, as they play a key role in the definition of a country's identity and have socio-political relevance: therefore national cultural heritage protection has always been identified as a priority by several States.

Given these premises, I opted for the central topic of my work to be the current cultural heritage protection framework adopted by China, a country that has proven to be crucial in the heritage field since, as of today, not only it has the second highest number of heritage sites inscribed in the World Heritage List, but at the same time is also the third largest importing country in the world; consequently I believe it will prove rather interesting to see how Chinese authorities have decided to draft their own heritage protection regime to best fit their local situation.

I decided to focus, in particular, on the aspect of import and export regulations since, in my opinion, they are obviously a necessary element of any country's heritage protection system, but the way they are structured doesn't simply affect local practices, but may even have far-reaching international consequences: in facts, for example, an efficient export control system may be crucial to keep track of the flow of heritage entering, and even more so leaving, the country, while import controls may favor the identification of stolen goods, thus allowing local authorities to prevent the smuggling of national cultural heritage and at the same time also contribute to the global fight against illicit heritage trafficking.

Additionally, the way import and export procedures are conducted also affects the art trade sector, considering that export restrictions, tariffs and the length to obtain specific permits all determine how the local, and consequently the global, art market will develop by sustaining or on the contrary hindering its growth.

To conduct the present research, one of the main resources considered were relevant laws, conventions, regulations, agreements and other legal documents originating mainly from two different sources: on one hand, given the international dimension of the matter at

hand, the contents of world conventions adopted by organizations like UNESCO, UNIDROIT and WCO had to be taken into consideration to provide an exhaustive overview of the existing global framework, as it deeply influences individual countries when they have to set up their own cultural heritage protection system.

On the other hand, the research obviously takes into consideration the contents of several Chinese legal documents, in *primis* the Cultural Relics Protection Law and its implementing regulations. Regarding this point, it must be noted that, since the vast majority of the documents analyzed lacked an official English translation, to conduct my research I had to heavily rely on the original legal texts, currently available only in Chinese.

Furthermore, to obtain a satisfactory insight on the issues I was dealing with, several academic publications also had to be consulted: in these cases as well, the sources chosen were respected authorities in the field, whose results were published on recognized journals. The main *corpus* of materials is composed of English or Italian publications, however, since some specific aspects had been covered only by Chinese scholars, their researches also had to be taken into consideration and consulted in their original language, as no other official translation was available.

The present work is articulated through three chapters.

Given the complexity and the impossibility of perfectly translating the concept of cultural heritage from one language and legal system to a different one, Chapter One necessarily starts with a tentative definition, as exhaustive as possible according to international standards, of the expressions *cultural heritage* and its Chinese recognized equivalent *cultural relics* or *wenwu* 文物. After having provided these needed preliminary definitions, all the attention is immediately focused on the Chinese situation: first of all, I briefly analyze the historical evolution of the general approach to heritage protection in Communist China to highlight the key elements that have characterized it throughout its recent history. Subsequently, I focus on the contents of the legal documents that constitutes the basis of the actual heritage protection framework, identifying the main obligations deriving from their application, the relevant authorities involved with their essential duties and introducing some of the ambiguities and problems that still persist in the system.

Since this topic also presents a relevant international dimension, in Chapter Two I focus more on the existing conventions and legal instruments that have been drafted by world organizations of the caliber of UNESCO and UNIDROIT and that have been either adopted or accessed by China in recent year. In facts, considering that these texts heavily influenced the

creation of the national heritage protection framework and are complementary to it, no analysis of the Chinese regime would be complete without taking them into consideration.

Lastly, Chapter Three is dedicated to the description of the heritage import and export regulations. Three issues in particular will be addressed: firstly, I want to define how the current system is constructed and verify whether the same procedures are applied for export and import activities alike or instead different solutions have been crafted in a country that, as will be explained, is at the same time a source country and a market one. Secondly, by comparing the current Chinese regime to the international one presented in Chapter Two, I want to differentiate the international standards that China has at least formally incorporated into its national legislation and highlight the issues that instead may generate contrasts. Thirdly, I want to identify the possible effects that the described import and export procedures had on the local cultural heritage and art market and its growth, while also trying to gauge possible future consequences.

Cultural Heritage Protection in China:
Evolution and Overview of the Existing Legal Framework

1. Preliminary Definitions

1.1 "*Cultural property"* or "*cultural heritage*"?

Finding a term able to embrace the majority of a country's objects and manifestations of artistic, archaeological, ethnological, scientific, historical or social interest is extremely difficult. In each country, national legislators have come up with several definitions to try and identify such objects and define the degree of protection they are entitled to, but as States have different legal traditions these linguistically "equivalent" versions often fail to convey the same legal concept and thus cannot be easily overlapped[1]. Despite this, at international level there are two terms that have gained popularity and have been mainly used over the last eighty years in different legal documents and conventions: "*cultural property*" and "*cultural heritage*". These two concepts are often considered interchangeable, but actually some important differences between them must be pointed out[2].

The phrase cultural property has been used for the first time in a legal context in the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* of May 1954. Actually, even before that several important international treaties and codes, starting from the Lieber Code of 1863 till the Convention on Laws and Customs of War on Land (Hague IV) of 1907 contained provisions regarding the protection of cultural property, but only in the 1954 Hague Convention, and later on in the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 1970, we can find the first comprehensive definition of cultural property[3].

To be specific, Article 1 of Hague 1954 convention adopts the following definition:

> "the term `cultural property' shall cover, irrespective of origin or ownership:

[1] FRIGO M. Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?, in International Review of the Red Cross, vol. 86, n. 854, June 2004, pp. 370-372

[2] NOVARETTI S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, pp. 59-63

[3] MERRYMAN J.H. *Two Ways of Thinking About Cultural Property*, in *American Journal of International Law*, Vol. 80, No. 4, October 1986, pp. 831-835

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as `centers containing monuments'."[4]

15 years later, Article 1 of UNESCO 1970 re-elaborates the content of Hague 1954 systematically organizing the cultural objects listed above into specific categories; furthermore, the concept of cultural property also starts expanding thanks to the addition of some new categories, like "*rare collections and specimens of fauna, flora, minerals and anatomy*"[5] or "*sound, photographic and cinematographic archives*"[6]. Ultimately, despite some minor changes, we can see that no substantial differences appear in the two expressions used and that the definition of cultural property in both cases encompasses similar elements[7].

Scholars, however, noted that using the term "property" to identify cultural objects may bring forth three different problems.

[4] UNESCO, *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, Art.1
[5] UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, Art. 1
[6] *Ibidem*
[7] Actually, even though Hague 1954 and UNESCO 1970 use similar definitions to identify cultural property, the underlying philosophies that inspired these conventions and their meanings are significantly different: Hague 1954 was mainly promoted by market countries – wealthy countries where the demand of cultural property far exceeds the supply – and spread the idea that cultural property was part of the "cultural heritage of mankind", something that needed special international protection regardless of its place of origin, location or national jurisdiction. UNESCO 1970, instead, stresses the importance of cultural property as part of a nation's cultural heritage since, as seen in Article 1, States have the authority to designate what should be considered cultural property and what shouldn't; this implies that the country of origin can exercise some specific rights towards its national cultural property, like controlling its circulation or asking for its "repatriation". Starting from the Seventies, cultural nationalism became increasingly widespread worldwide, with such an interpretation clearly being in favor of source countries; however, it also favored practices such as "destructive retention" or "cultural objects hoarding". The differences between these conventions and their consequences have only been roughly summarized here, but since the focus of the present section is the definition of cultural property – and, as already stated, no substantial difference exist in the list of cultural objects of Hague 1954 and UNESCO 1970 – such implications won't be further analyzed in the present work. MERRYMAN J.H. *Two Ways of Thinking About Cultural Property*, in *The American Journal of International Law*, Vol. 80, No. 4, October, 1986, pp. 831-853

First of all, property is an ideologically charged legal concept and, in Western countries in particular, it's closely related to ownership: property laws are meant to recognize and protect the rights of the owner, among which we can find the right to exploit, alienate and exclude others from one's own possessions[8]. Clearly, this notion creates problems when applied to cultural property, since it does not take into consideration one of cultural heritage's most peculiar characteristics: its publicity. In fact, as stated in Hague 1954, cultural objects are part of the so called "*cultural heritage of mankind*"[9], they should receive adequate protection for the sake and enjoyment of present and future generations and it should also be possible for people other than their lawful owners to get access to them[10]. This implies that, even if almost all legislations allow individuals to privately own, buy and sell cultural objects, owners cannot always freely dispose of them as they see fit; on the contrary, in order to guarantee the protection and, to some extent, the accessibility of cultural objects, it is acceptable for the property rights of the owner to be severely curtailed[11].

Secondly, scholars noted that using the phrase cultural property tended to favor the commodization of cultural goods. Apart from an artistic and historical value, culture also has social and political importance, since cultural products are first and foremost a representation of the groups and societies that created them; thinking about culture in terms of property, however, encourages the practice of increasingly assigning cultural artifacts a commercial value and seeing them as commodities that can be freely bought and sold in the market: to avoid such consequences, some researchers stated that, instead of cultural property, other expressions like cultural heritage should actually be preferred, since they are much more neutral and, while not actively countering the cultural commodization process, at least they lessen the impact of thinking about cultural goods only in terms of market value[12].

One last problem that should be taken into consideration is the fact that the expression cultural property is not broad enough to encompass all possible manifestations of culture. The

[8] O'KEEFE, P.J. and PROTT, L.V., *"Cultural Heritage" or "Cultural Property"?*, in *International Journal of Cultural Property*, vol.1, 1992, pp. 309-312; BLAKE, J., *On Defining the Cultural Heritage*, in *International and Comparative Law Quarterly*, vol. 49, n. 1, January 2001, pp. 65-67

[9] UNESCO, *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*

[10] AINIS, M. and FIORILLO, M., L'ordinamento della cultura. Manuale di legislazione dei beni culturali, Milano 2015, pp. 74-76

[11] The existence of *ad hoc* regulations that deal solely with cultural property, derogating to normal property laws, is not a phenomenon found only in national legislations. Even international treaties, like the General Agreement on Tariffs and Trade, admit that the same rules for the circulation of goods at international level cannot be fully applied when dealing with cultural objects, but specific *ad hoc* provisions should be applied instead (GATT, Art XX, f).

[12] O'KEEFE, P.J. and PROTT, L.V., *"Cultural Heritage" or "Cultural Property"?*, in *International Journal of Cultural Property*, vol.1, 1992, p. 311; BLAKE, J., *On Defining the Cultural Heritage*, in *International and Comparative Law Quarterly*, vol. 49, n. 1, January 2001, pp. 65-67

concept of property, in fact, can be easily applied to tangible goods, both movable and immovable, like artworks, monuments, archeological sites etc.; at the same time, however, the same concept tends to exclude almost all elements of intangible culture, such as dances, songs but also rituals or a specific knowhow, in other words, all those manifestations that lack almost any physical dimension[13]. Furthermore, in some legislations natural heritage elements, like peculiar landscapes or topographical features, are compared to cultural objects and entitled to the same protection: in such cases, again, the concept of property is perceived as insufficient and cannot be applied[14].

In order to try and partially solve the problems outlined above, different phrases have been coined as substitutes of cultural property; among them the expression that has gained popularity over the last few decades and has imposed itself also in the legal community is "cultural heritage". This expression was commonly used by archeologists, researchers and anthropologists to identify different cultural manifestations, and, whilst the word property is connected to ownership, the concept of heritage conveys the idea of something valuable that should be especially protected and passed on from a generation to another, regardless of its market value[15]. In the legal context it can be found for the first time in the *Convention on Laws and Customs of War on Land* (Hague IV) of 1907, where it appears only as part of the phrase "*cultural heritage of mankind*", with no further explanation added[16]. Instead, to find this expression used as an alternative to cultural property we have to wait till the *Convention concerning the Protection of the World Cultural and Natural Heritage* of November 1972, where three main heritage categories are identified as follows:

> Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

[13] BLAKE, J., *On Defining the Cultural Heritage*, in *International and Comparative Law Quarterly*, vol. 49, n.1, January 2001, pp. 65-67

[14] This is for example the case of Italy, where the code dedicated to the protection of cultural heritage is divided into two different parts, one specific for cultural property and another one for natural heritage. AINIS, M. and FIORILLO, M., *L'ordinamento della cultura. Manuale di legislazione dei beni culturali*, Milano 2015, p. 168

[15] BLAKE, J., *On Defining the Cultural Heritage*, in *International and Comparative Law Quarterly*, vol. 49, n.1, January 2001, pp. 67-75; AINIS, M. and FIORILLO, M., *L'ordinamento della cultura. Manuale di legislazione dei beni culturali*, Milano 2015, pp. 235-236

[16] O'KEEFE, P.J. and PROTT, L.V., *"Cultural Heritage" or "Cultural Property"?*, in *International Journal of Cultural Property*, vol.1, 1992, pp. 318-319; BLAKE, J., *On Defining the Cultural Heritage*, in *International and Comparative Law Quarterly*, vol. 49, n. 1, January 2001, pp. 67-72

> Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view[17]

A we can see, this definition of cultural heritage still has some of the same shortcomings of cultural property, focusing on tangible goods only, but starting from the *Convention for the Safeguarding of the Intangible Cultural Heritage* of October 2003, the definition of cultural heritage is further expanded, as follows:

> The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity[18]

By combining together the definitions offered by these two conventions, we obtain the general meaning of the phrase cultural heritage, which is clearly much broader than cultural property encompassing all forms of tangible and intangible goods, their common characteristics being their exceeding historical, artistic, scientific or anthropologic value and being recognized by groups as a crucial element of their social identity.

The main problem of using such a general definition is that it becomes extremely difficult to identify the single elements to which the concept of cultural heritage should be applied to – or, in other words, it's difficult to define what should be deemed worthy of actual protection and what shouldn't. Since cultural manifestations are acknowledged as a representation of the society that produced them, UNESCO recognized the sovereignty of territorial States over their cultural heritage and gave them the authority over its identification, classification and protection[19]; this lead each State to devise its own independent criteria for

[17] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, Art. 1
[18] UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, Art. 2
[19] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage,* Art. 4-5. One of the downside aspects of this authority being given to States is that, considering their social implications, choices made when defining national cultural heritage elements are never free from political considerations; for example, choosing to protect some cultural manifestations, expression of the majority of society, while at the

this purpose, but many opted to conform as much as possible to the international interpretation: in Italy for example are now deemed worthy of protection those manifestations important for historical, archeological, anthropological or aesthetic reasons[20]. China instead chose to identify different levels of "preciousness" into which cultural heritage is divided.

These two expressions presented above have been alternatively used in different legal documents, but in recent years the prevalent tendency is for cultural heritage to completely substitute cultural property[21]. This ideological change can be observed at national level as well, as several countries have been modifying the way they address cultural objects; this shift can be seen in both common and civil law countries, however, it must be noted that in most civil law countries the "equivalents" of "cultural property" already included intangibles. A good example is again offered by Italy, where the Article 148, comma 1 of d.lgs n.112/1998 not only listed all the categories of elements, both tangible and intangible, embodied by the concept of "beni culturali", but it also stated that this very definition should also be applied to all those manifestations that "*costituiscono testimonianza avente valore di civiltà*"[22], thus opening up to the possibility of further expanding the concept in the future[23].

China decided to follow the international guidelines as well but with some interesting differences: only the official English name of some institutions have been changed, with cultural property/cultural relics being substituted by cultural heritage; in other cases, especially in the translation of legal documents, the expression cultural relics is still amply

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same time ignoring all those manifestations valuable only to minorities or other smaller communities, not fully integrated into the national one, could indeed be a way to discriminate said minorities and force their integration into mainstream culture. BLUMENFIELD, T. and SILVERMAN, H., *Cultural Heritage Politics in China*, New York 2013, pp. 7-8

[20] Before the work of the Franceschini Comminssion in the 1960s, the main criteria used to identify cultural heritage in Italy were its exceptionality and its aesthetic value. Unfortunately a similar approach was far too limiting, as aesthetic canons are bound to change with time. One of the greatest merits of the Commissions was indeed the design of objective criteria that could work regardless. AINIS, M. and FIORILLO, M., *L'ordinamento della cultura. Manuale di legislazione dei beni culturali*, Milano 2015, pp. 165-170

[21] For example, the latest UNESCO conventions, like the *Convention for the Safeguarding of the Intangible Cultural Heritage* of 2003 and the *Convention on the Protection of the Underwater Cultural Heritage* of 2001, both use the term cultural heritage, while at the same time UNESCO 1979 still used the phrase cultural property. O'KEEFE, P.J. and PROTT, L.V., *"Cultural Heritage" or "Cultural Property"?*, in *International Journal of Cultural Property*, vol. 1, 1992, pp. 310-311. Interestingly enough, these concepts never appear simultaneously in the same legal text as alternatives; instead, each document defines the concept for the text purposes and applies it exclusively. FRIGO, M., *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, in *International Review of the Red Cross*, vol. 86, n. 854, June 2004, pp. 369-370

[22] Article 148, comma 1 of d.lgs n.112/1998, adopted to implement the law n.59/1997, also known as Legge Bassanini.

[23] FRIGO, M., *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, in *International Review of the Red Cross*, vol. 86, n. 854, June 2004, pp. 369-370; AINIS, M. and FIORILLO, M., *L'ordinamento della cultura. Manuale di legislazione dei beni culturali*, Milano 2015, p. 187

being used. In Chinese, instead, the same term has always been used with no changes nor alterations whatsoever, 文物 (*wenwu*)[24].

1.2 Cultural Heritage in China

1.2.1 Definition of 文物(wenwu)

As stated above cultural heritage plays an important role for the definition of a nation's identity and as such its protection has deep social and political implications for every country and government, therefore it's not surprising that the Communist Party of China (CPC) has always given particular attention to this topic long before the foundation of the PRC in 1949. Especially during the republican age, while trying to promote a new socialist society based on completely different values compared to traditional ones, CPC elites also started to realize that cultural relics protection could be used as an effective propaganda tool and that by presenting itself as the sole protector of China's millennial heritage, the Party could more easily unify under a common cause the majority of the population and all those individuals and groups unsatisfied with the Nationalists rule.

Considering this, starting from 1930s, the government of the freed areas under communist rule adopted a series of regulations relevant to cultural heritage protection and, instead of the commonly used 古物 (*guwu*, lit. antiquities), the term 文物 (*wenwu*, lit. cultural relics) was chosen to identify China's cultural property. *Wenwu* had been used throughout Chinese history since the III sec b. C. to identify sacrificial vases and ritual utensils used by the emperor himself during ceremonies and, later on during Tang dynasty (618-907), in general all relics belonging to previous dynasties. Starting from the Song dynasty, however, *guwu* slowly gained popularity as a synonym for all kinds of cultural manifestations[25] and it was the term commonly used by Qing authorities as well; *guwu* had also been the term adopted by the Nationalist Party for the *Law on the Preservation of Ancient Objects* (古物保存法，*Guwu baocunfa*), the first law of contemporary China on the matter promulgated in 1930: said law, however, was harshly criticized by communist intellectuals for being too

[24] NOVARETTI S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, p. 66

[25] Even though the scope of *guwu* slowly broadened, getting closer to the contemporary definition of cultural property/heritage, however, before the republican age, some categories of cultural objects weren't included in the definition, like calligraphies or scrolls, since Chinese people at that time wouldn't consider such objects as culturally relevant. NOVARETTI S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, p. 73

lenient towards foreigners' greed and expropriations, while the Guomindang was accused of being unable to protect China's heritage[26].

So, for political reasons, more than linguistic or philological ones, in order to clearly mark the different approach between the Communist and Nationalist Parties, a new term other than *guwu* had to be identified. The choice in the 1930s fell on *wenwu* and the term acquired a completely new meaning compared to its historical one: in facts, at the start, only revolutionary relics (革命文物 *geming wenwu*) were deemed worthy of collection and protection, such as, for example, documents, journals, diaries, but also photos, weapons or personal effects of fallen soldiers and leaders of both the Red Army and the "counterrevolutionary" forces[27]; only in a second phase the notion started to be applied to other categories of cultural objects, substantially overlapping with *guwu* and getting closer to the concept of cultural property discussed in those very years by the international community. However, since no formal legal text on the matter had been promulgated, it's difficult to obtain a clear definition of what "relics" truly encompassed in those years.

This terminological and legal uncertainty came to an end in 1982, when the national legislator opted to maintain *wenwu* as the equivalent of cultural property/cultural heritage[28] and the *Cultural Relics Protection Law* (文物保护法 *wenwu baohu fa*)[29] was approved: today according to Art. 2 of the latest revised version of said law, five categories are identified[30] and, in general, the concept of *wenwu* can be applied – and, consequently, protection should be granted – to all cultural manifestations, movable and immovable, that, regardless of their age, fulfill the following conditions:

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[26] ZHANG SONG, *Zhongguo wenhua yichan baohu fazhi jianshe shi huimou (Review on the Building of China Cultural Heritage Protection Legal System)*, in *Zhongguo Mingcheng*, n. 3, 2003, p. 28; LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, pp. 1-3

[27] XIAN QIAOYING, *Genju diji jiefangqu wenwu baohu zhi jian (Comments on Cultural Heritage Protection in Liberated Areas)*, in *Renmin luntan xueshu qianyan*, vol. 90, June 17, 2010, p. 224

[28] The Nationalist Party in Taiwan, instead, chose *guwu* as an equivalent of cultural property till 1982, when it was substituted with 文化资产 (*wenhua zichan* lit. cultural property), linguistically closer to the expression used in UNESCO Conventions. NOVARETTI S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, p. 66, note 126

[29] The *Cultural Relics Protection Law of the People's Republic of China* was first adopted in 1982. In 2002, the law was heavily amended for the first time and its content further revised in 2007, 2013 and 2017. Another revision has recently been solicited, but as of today, no decision has been taken on the matter. https://npcobserver.com/legislation/cultural-relics-protection-law/

[30] The five categories identified in Art. 2 are: ancient cultural sites; modern and contemporary sites related to major historical events and revolutionary movements; works of art of any period; documents and manuscripts of any era; all objects representative of Chinese society; additionally, Art. 2 also states that even though vertebrate and human fossil aren't considered cultural relics, they should have the same status and protection as cultural heritage. *Cultural Relics Protection Law of the People's Republic of China*, Art. 2

1. have historical, artistic or scientific value (具有历史、艺术、科学价值 *juyou lishi, tishu, kexue jiazhi*)[31];

2. are representative (代表性 *daibiaoxing*) of Chinese "*social systems, social production and social life*"[32] in various eras;

3. are "*non-renewable resources*" (不可再生的文化资源 *buke zai sheng de wenhua ziyuan*)[33], meaning that they cannot be recreated (不可再生性 *bukezaishengxing*)[34] nor substituted (不可替代性 *buketidaixing*)[35] once destroyed, as they are deeply connected to the specific context they were created in.

Two important considerations should be made at this point. First of all, it must be noted that the age of the relics is not a basic criteria for the identification of cultural heritage and that the term "relics" can be easily applied to ancient, modern and contemporary sites or objects with no distinction whatsoever among them.

Secondly, even if the choice of words is slightly different, the present definition is perfectly in line with the one provided in the UNESCO Convention of 1972, as analyzed in paragraph 1.1, thus demonstrating that, despite the turbulent political events that were taking place at that time, especially during the Cultural Revolution (1966-76), China had also been closely paying attention to the international debate about cultural heritage.

In most recent years, the expression 文化遗产 (*wenhua yichan*, lit. cultural heritage) has also been used but only as part of the expression 非物质文化遗产 (*feiwuzhi wenhua yichan*, lit. intangible cultural heritage), while *wenwu* is still the preferred option for identifying tangible heritage.

For research purposes, since the focus of my work are the regulations relevant to the import and export of cultural heritage, unless otherwise stated, in the present work I'll mainly use the terms "cultural heritage" and "cultural relics" referring to tangible movable objects.

1.2.2 Chinese Cultural Relics Classification System

Considering the enormous amount of cultural objects Chinese authorities have to protect and preserve with limited resources available, defining a grading system to identify

[31] *Cultural Relics Protection Law of the People's Republic of China*, 2017, Art. 2
[32] *Ibidem*. It has been noted that by using this expression China can extend the concept of *wenwu* also to those sites that are present within its territory, but are not of Chinese origin, like for examples the buildings of the Shanghai Bund and all the other structures realized by foreigners within their concessions. NEWELL, P., *The PRC's Law for the Protection of Cultural Relics*, in *Art Antiquity and Law*, Vol. 13, n. 1, April 2008, p. 8
[33] *Cultural Relics Protection Law of the People's Republic of China*, 2017, Art. 11
[34] LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, pp. 16-18
[35] *Ibidem*

those cultural objects more worthy of protection was a necessity; therefore in 1987 the Ministry of Culture issued the *Rating Standards for Collections of Cultural Relics* (文物藏品定级标准, *wenwu cangpin dingji biaozhun*). Such standards weren't just an administrative tool, but affected other areas as well, determining, for example, how museums and private collectors should organize and conserve cultural heritage, what kind of goods could be exported and what couldn't and the legal consequences of crimes against different grades of cultural heritage[36].

The 1987 Rating Standards, however, soon proved to be outdated and in 1992 the *Details for the Implementation of the Law on the Protection of Cultural Relics* were issued, addressing some of the vacancies and problems arisen after the first Rating Standards were approved. The innovations introduced with the 1992 Details have been codified in both the new Rating Standards of 2001 and in the revised *Cultural Relics Protection Law* of 2002[37].

According to the preface of the 2001 Standards, Chinese cultural relics are divided into Common (一般文物 *yiban wenwu*) and Precious (珍贵文物 *chengui wenwu*) cultural relics. Moreover, Precious cultural relics are further divided into First, Second are Third Grade Relics (一、二、三级 *yi, er, san ji*), where First Grade is a category composed by "*especially important*" [38] cultural heritage (特别重要 *tebie zhongyao*), Second Grade identifies those which are "*important*"[39] (重要 *zhongyao*), and Third Grade those which are "*relatively important*"[40] (比较重要 *bijiao zhongyao*); lastly, common relics are those deemed to have only "*a certain value*"[41] (一定重要价值, *yiding zhongyao jiazhi*).

Compared to the previous Standards, that were extremely vague, the 2001 Standards identified 26 categories of cultural heritage and provided some criteria to assess cultural relics, the most important being the historical, artistic or scientific value embodied by a specific relic, its quantity and geographic distribution; age should also be considered a grading criteria since usually the oldest the relic, the highest its grade and export regulations rely heavily on age as a criteria as well[42].

[36] LAU, T., *The Grading of Cultural Relics in Chinese Law*, in *International Journal of Cultural Property*, n. 18, 2011, pp. 3-5
[37] *Cultural Relics Protection Law*, 2017, Art. 3
[38] *Rating Standards for Collections of Cultural Relics*, 2001, Section 1, Art. 1
[39] *Rating Standards for Collections of Cultural Relics*, 2001, Section 2, Art. 1
[40] *Rating Standards for Collections of Cultural Relics*, 2001, Section 3, Art. 1
[41] *Rating Standards for Collections of Cultural Relics*, 2001, Section 4, Art. 1
[42] LAU, T., *The Grading of Cultural Relics in Chinese Law*, in *International Journal of Cultural Property*, n.18, 2011 pp. 15-18

Lastly, the greatest merit of the 2001 Standards was probably the addition of an Attachment, in which exhaustive examples of First Grade cultural relics can be found. By looking at the examples provided, we can see that First Grade Cultural Relics are those of which only a single or a small group of exemplaries exist, those that offer insights on a specific historical event or era or that can be used as a rating tool, due to its conservation status and uniqueness[43]. Said Attachment, however, offers no insight on how to distinguish among Second and Third Grade relics, so using the First Grade relics list as a model, it can be inferred that Second Grade cultural relics are those with the same characteristics as First Grade ones, but their distribution is more widespread or their conservation status is compromised; Third Grade relics, in turn, are even more common that Second Grade and Common relics can easily be found[44].

Actually, one of the main problems of the Rating Standards identified by scholars is indeed its inherent vagueness: in facts, given the implications that these regulations have on other administrative sectors the impossibility of univocally identifying the correct grade of relics may for example hinder the definition of administrative sanctions or criminal penalties for offenders and complicates the attribution of responsibilities among different-level authorities[45].

Neither version of the Rating Standards specifies who, in theory, is responsible for actually grading cultural relics, however, in practice, museums, libraries, memorial halls, etc… are in charge of such a task at local level. Additionally, there exist provincial-level appraisal organizations, whose objective is to support those museums – in particular local ones – that lack the level of expertise needed to conduct a full appraisal and grading of cultural relics[46].

In 1992 the *Details on the Implementation of the Law on the Protection of Cultural Relics* also shed light on another important issue: Rating Standards should only be applied to movable cultural relics, while immovable cultural relics should operate on a different system, due to their peculiarities[47]. Precisely, the legal basis for the classification of immovable

[43] *Rating Standards for Collections of Cultural Relics*, 2001, Attachment, Art. 1-26
[44] LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, pp. 131-136
[45] For example, the same violation may be punished with criminal charges or administrative sanctions, depending whether the relics involved are precious or common ones, so making a clear distinction between them will indeed have deep consequences. HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016, p. 5
[46] LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, pp. 138
[47] LAU, T., *The Grading of Cultural Relics in Chinese Law, in International Journal of Cultural Property*, n.18, 2011, p. 25

cultural relics can be found in Art. 3 of the *Cultural Relics Protection Law*, where it is stated that, according to their historical, artistic and scientific value, immovable cultural heritage should be divided into national key cultural heritage protection sites (全国重点文物保护单位 *quanguo zhongdian wenwu baohu danwei*), provincial-level (省级文物保护单位 *shengji wenwu baohu danwei*), city and county-level protection sites (市、县级文物保护单位 *shi*、*xianji wenwu baohu danwei*)[48].

Furthermore, Art. 13 states that authority over the classification and protection of immovable cultural heritage, should befall on the same-level correspondent organ, in other words, national key cultural heritage protection sites are selected and nominated by the National Cultural Heritage Administration (NCHA)[49]; provincial-level sites are designated by the people's governments of provinces, autonomous regions, and municipalities; city and county-level sites are respectively approved by the people's governments at the district, city, autonomous prefecture and county levels. Lastly those cultural relics that are yet to be classified into protection sites are still entitled to some degree of protection, to be given by county-level governments[50].

2. Cultural Heritage Legislation and Policies in Pre-Reforms China (1931 – 1978)

2.1 First Regulations and Policies Approved in "Soviet" Basis and Liberated Areas (1931 – 1949)

As for other study areas, the basis of the Chinese legal system relevant to cultural heritage protection can be found in the various regulations, directives and communications approved in the "soviet" basis and other liberated areas before the actual foundation of the RPC: these were mainly short texts, more political than legal, but the concepts expressed in them will have a great impact on the subject in Maoist and even contemporary China.

The first references of the need to collect and protect cultural relics can be found in Art. 16 of the *Resolution concerning the Preferential Treatment of the Red Army of Chinese Workers and Peasants* (关于中国工农红军优待条例决议 *Guanyu Zhongguo gongnong Hongjun youdai tiaoli jueding*), promulgated on January 13 1932 by the Central Government

[48] *Cultural Relics Protection Law of the People's Republic of China*, 2017, Art. 3
[49] The National Cultural Heritage Administration is the highest authority in matters concerning cultural heritage. For the relationship between NCHA, the State Council and the Ministry of Culture, see *infra* Paragraph 4
[50] *Cultural Relics Protection Law of the People's Republic of China*, 2017, Art. 13

of the Soviet Republic of China[51], and in the document *Inspire the Collection of Exhibits for the Central Museum* (中央博物馆征集陈列品启示 *Zhongyang bowuguan zhengji chenliepin qishi*), published by Education Minister Xu Teli in May 1933. In both cases, Red Army soldiers, government offices, mass organizations and even individual civilians[52] were strongly invited to participate in the retrieval and protection of revolutionary cultural relics, to be displayed in *ad hoc* museums dedicated to the history of the Revolution[53].

Said regulations exclusively deal with the protection of revolutionary cultural relics, but the preservation of ancient sites, objects, books and other relics was an increasingly urgent priority for the CPC elites, further prompted by the start of the Japanese Invasion in 1939. Amongst the most relevant dispositions on the matter approved in that period, we have the *Communication concerning the Protection of Historical Documents, Ancient Sites and Relics* (关于保存历史文献及古迹古物的通告 *Guanyu baocun lishi wenxian ji guji guwu de tonggao*) approved by the Propaganda Department of the CPC Central Committee in March 1938 and the *Instructions from the Government of the Shaanxi-Gansu-Ningxia Border Region to the administrative commissioners of the districts and the heads of the counties for the surveillance of antiquities, documents and ancient monuments* (陕甘宁边区政府给各分区行政专员各县县长的训令——为调查古物、文献及古迹事 *Shanganning bianqu zhengfu gei ge fenqu xingzheng zhuanyuan gexian xianzhang de xunling – wei diaocha guwu, wenxian ji guji shi*), published by the border area president Lin Boqu in November 1939, expanding to all cultural heritage the measures already adopted for revolutionary relics.

By analyzing the four documents listed above, three principles – important pillars for future doctrine evolutions – can be found for the first time in communist legislation: first of all, cultural relics are explicitly recognized here as the cultural inheritance of the Chinese Nation, the starting point for the study and comprehension of present-day China and the

[51] The Soviet Republic of China, also known as the Jiangxi Soviet, was founded in November 1931 in Ruijin, in the Jiangxi Province. It was the center of the CPC organization till 1934, when the Nationalist campaigns forced the Communist forces to flee, starting what will be later recorded as the Long March. SAMARANI, G., *La Cina del Novecento. Dalla fine dell'Impero a oggi*, Torino, 2008, pp. 136-141

[52] XIAN QIAOYING, *Genju diji jiefangqu wenwu baohu zhi jian (Comments on Cultural Heritage Protection in Liberated Areas)*, in *Renmin luntan xueshu qianyan*, vol. 90, June 17, 2010, p. 224

[53] LIU WEIPING, *Shanganning bianqu wenwu fagui shuyao (Cultural Heritage Policies in the Border Areas of Shaanxi-Gansu-Ningxia)*, in *Zhongguo wenwubao*, n. 3, June 7, 2016, p. 1. In May a Preparatory Office of the Central Revolution Museum was indeed created, but the general situation, characterized by war uncertainty and financial instability, made the actual realization of such a project impossible. The construction of the National Museum of Chinese Revolution started in 1950 and was finally completed in 1959; nowadays, after the merge with the National Museum of Chinese History in 2003, its collections are displayed in the northern wing of the National Museum of China (中国国家博物馆 *Zhongguo guojia bowuguan*) in Beijing. http://en.chnmuseum.cn/about_the_nmc_593/history/201911/t20191123_173503.html (Last visited: 19/05/21).

cornerstone upon which to build a new Chinese society[54]. From this moment onward, this particular view on cultural heritage and its importance for Chinese society will constitute the basis for all heritage protection regulations in the following years[55].

Second, considering its social importance, it is always stated that all relics – both cultural and revolutionary – should be devolved to museums or similar protection units under the direct control of state organs for better protection. Even more significant, however, is the fact that, when the preservation of cultural relics is in the hands of private citizens, this is deemed as a danger to their actual protection, thus implying that private ownership of said relics is effectively prohibited[56].

Lastly, the cited texts show that active involvement of the masses in heritage protection was encouraged or even required: actually, not only this approach was in line with the ideology of the CPC, that viewed masses as an important asset for the construction of the new society, but this practice was probably perceived as a necessity, since involving the largest number possible of people was the fastest and most practical way for the Party to actually achieve its objectives in terms of relics collection[57]. Mass participation could take various forms[58], but in that period such contributions had to be adequately compensated by the authorities.

The experiences in the soviet basis also allowed the CPC to confront some of the challenges cultural heritage protection policies will have to face even in contemporary China.

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[54] *Communication concerning the Protection of Historical Documents, Ancient Sites and Relics* (关于保存历史文献及古迹古物的通告 *Guanyu baocun lishi wenxian ji guji guwu de tonggao*), as cited by XIAN QIAOYING, *Genju diji jiefangqu wenwu baohu zhi jian (Comments on Cultural Heritage Protection in Liberated Areas)*, in *Renmin luntan xueshu qianyan*, vol. 90, June 17, 2010, p. 224

[55] Mao Zedong himself reaffirmed a similar concept in 1939, when talking about cultural heritage in *Position of the Chinese Communist Party in the National War* (中国共产党在民族战争中的地位 *Zhongguo gongchandang zai minzu zhanzheng zhong de diwei*), as cited in LI XIAODONG, *Minguo wenwu fagui shiping (Comments on Cultural Heritage Policies in Republican China)*, Beijing 2013, p. 216

[56] *Instructions from the Government of the Shaanxi-Gansu-Ningxia Border Region to the administrative commissioners of the districts and the heads of the counties for the surveillance of antiquities, documents and ancient monuments* (陕甘宁边区政府给各分区行政专员各县县长的训令——为调查古物、文献及古迹事 *Shanganning bianqu zhengfu gei ge fenqu xingzheng zhuanyuan gexian xianzhang de xunling – wei diaocha guwu, wenxian ji guji shi*). The full text can be found in LIU WEIPING, *Shanganning bianqu wenwu fagui shuyao (Cultural Heritage Policies in the Border Areas of Shaanxi-Gansu-Ningxia)*, in *Zhongguo wenwubao*, n. 3, June 7, 2016, p. 1 and in LI XIAODONG, *Minguo wenwu fagui shiping (Comments on Cultural Heritage Policies in Republican China)*, Beijing 2013, pp. 204-205

[57] NOVARETTI S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, p. 114

[58] People could mainly voluntary donate the cultural relics they owned or had found, but where also encouraged, especially old people, to participate in the surveys that started to be conducted in liberated areas in those years for the first time. XIAN QIAOYING, *Genju diji jiefangqu wenwu baohu zhi jian (Comments on Cultural Heritage Protection in Liberated Areas)*, in *Renmin luntan xueshu qianyan*, vol. 90, June 17, 2010, p. 224

In particular, with the "liberation" of new areas and the progression of the Land Reform, one problem that had to be addresses was how to protect cultural relics from the destructive fury of the masses: in facts, cases of soldiers and civilians destroying ancient sites, temples[59] or the objects retrieved from purged landlords' houses were becoming so common that Communist authorities had to intervene, promulgating some *ad hoc* regulations to remind people their duty towards cultural relics protection and prompting cadres to swiftly restore what could be salvaged. The most noteworthy documents published by the CPC Central Committee were the *Instructions on Paying Attention, Treasuring and Protecting Ancient Sites* (关于注意爱护古迹的指示 *Guanyu zhuyi aihu gujide zhishi*), approved in February 1946, and the *Instructions on Prohibiting the Destruction of Ancient Books and Monuments* (关于禁止毁坏古书、古迹的指示 *Guanyu jinzhi huihuai gushu, gujide zhishi*), adopted in July 1947, focusing on the protection of immovable heritage and movable relics respectively. Even the Central Military Commission issued *8 Rules concerning the Entrance in Liberated Cities* (8 条入城纪律 *ba tiao rucheng jilü*), defining how soldiers should behave in that specific situation and stressing the importance of protecting, among others, "*scientific and cultural institutions, urban public equipment and historical sites*"[60].

An additional danger, closely related to the progression of the Land Reform, was that, even when retrieved relics weren't damaged or destroyed, most of the times they were stolen and sold in the black market, usually at extremely low prices as people lacked any knowledge about the actual value of the objects they dealt with[61]. This particular problem was addressed in September 1947 in Art. 9 of the *Guidelines of the Land Law* (中国土地法大纲 *Zhongguo tudifa dagang*), where people were explicitly required, and not simply encouraged as it was ten years prior, to comply with their duty to report to competent local authorities all the ancient relics, especially those with particular historical or scientific value, discovered amongst landlords' possessions[62].

After the publication of the *Guidelines*, the various governments in liberated areas all started to adopt regulations and laws which contained similar dispositions on the subject.

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[59] As examples, Chinese researchers often highlight the heavy damaging of the Confucius Temple and Imperial Palace of Rehe (Chengde, Hebei) or the temples of Mount Wutai (Shanxi) LIU WEIPING, *Shanganning bianqu wenwu fagui shuyao (Cultural Heritage Policies in the Border Areas of Shaanxi-Gansu-Ningxia)*, in *Zhongguo wenwubao*, n.3, June 7, 2016, p. 1

[60] XIAN QIAOYING, *Genju diji jiefangqu wenwu baohu zhi jian (Comments on Cultural Heritage Protection in Liberated Areas)*, in *Renmin luntan xueshu qianyan*, vol. 90, June 17, 2010, p. 225

[61] *Ibidem*

[62] *Guidelines of the Land Law* (中国土地法大纲 *Zhongguo tudifa dagang*), 1947, Art. 9, paragraph 3. The text can be found in XIAN QIAOYING, *Genju diji jiefangqu wenwu baohu zhi jian (Comments on Cultural Heritage Protection in Liberated Areas)*, in *Renmin luntan xueshu qianyan*, vol. 90, June 17, 2010, p. 224

A good example of provisions aimed at summarizing and standardizing the contents of all previous regulations are the *Rules Concerning Problems on the Collection and Management of Cultural Relics and Ancient Sites* (关于文物古迹征集管理问题的规定 *Guanyu wenwu guji zhengji guanli wenti de guiding*)[63], issued on July 13 1948 by the central government of Northern China[64]. In the 10 articles that compose the document the same principles already identified in early communist regulations are reaffirmed, but its content is now much more refined and well-organized, becoming slightly closer to that of a formal legal text; moreover, compared to previous regulations, it is also evident the legislator's attempt to produce a comprehensive law, touching in a single text all different aspects related to heritage preservation: this means that we not only find dispositions defining the contents of the expression *wenwu* (stressing once again the importance of cultural relics as part of China's cultural inheritance in the Preface and in Art. 3 and 5), regulating the creation of special committees operating under the authority of the Ministry of Culture and tasked with cultural heritage management (Art. 2), and defining the relationship between the central and the territorial organs (Art. 5), but matters such as rewards for people that donate their relics (Art. 6), punishments for those who fail to do so (Art. 7), the creation of a standardized cataloguing method (Art. 8) and rules regarding archeological excavation (Art. 9) and export prohibitions (Art. 1) are also provided.

An interesting aspect in my opinion is that, as in previous texts, private property of cultural relics isn't explicitly prohibited nor allowed, but we can here easily see that it is strongly discouraged: Art. 6 and 7, in particular, admit that during the Land Reform some movable cultural relics have been distributed among farmers, who thus rightfully own them; however, since we are dealing with especially precious objects, their individual owners have the duty to return them to the people, collectively entrusted with their protection. From this it can be inferred that *de facto* private ownership isn't actually possible. Instead, given that local governments are responsible for all immovable heritage, the same problem does not arise with this kind of relics (Art. 5).

Lastly, two other innovations are added for the first time in communist legislation: Art. 1 introduces a ban on the export of any form of cultural heritage, while Art. 9 sets standards for archeological excavations. This two aspects had been the central focus of early Nationalist laws, but had gradually lost importance, given that in the uncertainty of the Japanese Invasion

[63] The full text can be found in LI XIAODONG, *Minguo wenwu fagui shiping (Comments on Cultural Heritage Policies in Republican China)*, Beijing 2013, pp. 220-221

[64] A macro-entity created by the fusion of the border areas bases of Shanxi-Hebei-Shandong-Henan and Shanxi-Chahar-Hebei. SAMARANI, G., *La Cina del Novecento. Dalla fine dell'Impero a oggi*, Torino, 2008, p. 163

and the following Civil War the priority was collecting relics and ensuring actual protection, while all other matters had to wait. With the final phases of the war and the impending communist victory, however, finally there was the possibility of addressing these two questions, that would soon become the center of the new-born PRC cultural heritage legislation.

2.2 Cultural Heritage Protection Policies in Maoist China (1949 – 1976)

The first years after the foundation of the RPC saw Communist cadres addressing all sorts of issues in order to normalize the general situation and create the legal, administrative and economic basis for new China, after decades characterized by continuous warfare. While authorities were working on the contents of the first Constitution, to be approved in 1954, issues related to heritage protection were also being addressed, thus reinforcing the image of the CPC as the only protector of China's past; however, as in other Communist countries in those same years, the legislator chose an informal approach and instead of drafting a new comprehensive law, the most important regulations approved in the liberated areas were adjourned and applied to the whole Chinese territory, while other varying documents, such as orders, regulations, instructions, were implemented by different departments and local institutions, covering aspects till that moment left unattended[65].

In particular, as anticipated in the previous paragraph, regulations concerning relics protection in that period mainly focused on three areas of interest: first of all, in 1950 the central government once again completely prohibited the export of any kind of cultural heritage from the national territory[66].

Secondly, the issue of archeological excavations started to be amply debated. The interest on this particular matter shouldn't be surprising considering that in that same period China had also started its process of national reconstruction: as important infrastructural projects were being conducted, an increasing number of cultural relics was either retrieved or discovered for the first time, so, in order to ensure the correct handling of said relics without hindering nor slowing down the general reconstruction, cooperation with archeological teams became imperative. This situation prompted the government to adopt in 1950 the *Provisional Measures for the Investigation and Excavation of Ancient Cultural Sites and Ancient Tombs*

[65] NOVARETTI, S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, pp. 121-125

[66] *Provisional Measures for Prohibiting the Export of Precious Cultural Relics and Books* (禁止珍贵文物图书出口暂行办法 *Jinzhi chengui wenwu tushu chukou zanshi banfa*), 1950

(古文化遗址及古墓葬之调查发掘暂行办法 *Guwenhua yizhi ji qumuzang zhi diaocha fajue zanxing banfa*) detailing how excavations should be conducted and later integrated in 1953 by the *Instructions on the Protection of Historical and Revolutionary Cultural Relics in Basic Construction Projects* (关于在基本建设工程中保护历史及革命文物的指示 *Guanyu zai jiben janshe gongcheng zhong baohu lishi ji geming wenwu de zhishi*), specifically addressing the relationship between heritage protection authorities and construction units[67]. Furthermore, since after years of unrest the number of archaeologists and experts had greatly decreased, the Ministry of Culture and the Academy of Social Sciences also organized several courses and seminaries to quickly form a new group of field professionals[68].

Lastly, a third area of interest concerned the need to educate the masses and actively involve them in heritage protection: similarly to what had happened in previous years, the enormous amount of Chinese cultural heritage, the limited resources available and the general lack of specific knowledge from those that should have been tasked with its preservation made it necessary for the government to heavily rely on mass participation to achieve its fixated goals; moreover, such issues became even more pressing with the progression of the Land Reform and the launch of the Great Leap Forward.

However, in order to involve masses while also avoiding past excesses, the government stressed since the start the importance of educating people about the content of existing relevant policies and the true value of the relics they were about to handle, for example by organizing expositions[69] or by encouraging people to create special mass organizations operating at local level in accordance with the Ministry of Culture to ensure adequate protection to endangered relics[70].

Unfortunately the policies adopted in these years struggled to find an actual application, considering that heritage protection and preservation often had to be sacrificed in the name of economic progress and that the excesses of the masses once again led to the destruction or loss of several relics.

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[67] XIE CHENSHENG, *Xin Zhongguo wenwu baohu gongzuo 50 nian (50 Years of Cultural Heritage Protection in New China)*, in *Dangdai Zhongguo shi yanjiu*, vol. 9, n. 3, May 2002, pp. 61-62

[68] *Ibidem*

[69] *Directive on the Protection of Historical and Revolutionary Cultural Relics during the Basic Construction Process* (关于在基本建设工程中保护历史及革命文物的指示 *Guanyu zai jiben jianshe gongcheng zhong baohu lishi ji geming wenwu de zhishi*), 1953

[70] *Notice on the Protection of Cultural Relics in Agricultural Production and Construction* (关于在农业生产建设中保护文物的通知 *Guanyu zai nongye shengchan janshe zhong baohu wenwu de tongzhi*), 1956. XIE CHENSHENG, *Xin Zhongguo wenwu baohu gongzuo 50 nian (50 Years of Cultural Heritage Protection in New China)*, in *Dangdai Zhongguo shi yanjiu*, vol. 9, n. 3, May 2002, p. 63

2.2.1 Provisional Regulations of 1961

In the years following the failure of the Great Leap Forward, a national economic readjustment process was carried out, leading to an attempt to formalize and rationalize the existing system. Considering our research field, the most important result achieved was the adoption of the *Provisional Regulations on the Protection and Management of Cultural Relics* (文物保护管理暂行条例 *Wenwu baohu guanli zanxing tiaoli*), issued by the State Council in 1961.

This document – which will be the only existing legal basis on the matter till 1982 – in a total of 18 articles summarizes in a single systematic text all the key points regarding cultural heritage protection adopted in previous years: for example, concepts such as State ownership of all cultural relics, unearthed relics included (Art. 1), the export prohibition with the exception of relics sent for exhibitions (Art. 14) and the need to reward people for their positive contributions (Art. 15) are all reaffirmed.

Additionally, some clarifications and brand new concepts are also added: in particular, it should be noted that 6 articles – a third of the whole text – describe quite in detail the institutional structure that had been created to protect and manage national cultural relics: the highest authority responsible for heritage protection and management is the Ministry of Culture (Art. 4), whose tasks encompass issuing relevant policies and implementing regulations (Art. 16), drafting standards for renovation works (Art. 11), identifying and directly managing national heritage sites (Art. 4) and managing in accordance with the Chinese Academy of Social Sciences all matters related to archeological excavations (Art. 10). At local level, instead, cultural heritage management is, within their jurisdiction, the duty of people's committees (人民委员会 *Renmin weiyuanhui*, Art. 1), usually tasked with identifying, researching, collecting and listing all the cultural relics and sites present within their territory (Art. 3 and 5); committees can also issue their own policies and regulations (Art. 17) and can be helped in their day-to-day work by organizations, schools and museums (Art. 5). Moreover, people's committees should always seek the collaboration of other departments (Industry, Agriculture, Defense, Constructions, Transportation), in order to ensure the effective preservation of cultural heritage (Art. 7 and 8).

An interesting new concept, relevant to immovable cultural heritage, introduced for the first time is the institution of a protected range (保护范围 *baohu fanwei*), within which construction is prohibited[71] (Art. 11).

One last peculiarity is that Art. 11, after prohibiting almost any form of alteration to cultural sites, admits however the possibility of said sites to be legally demolished. No additional context is given in the Provisional Regulations, but this provision should probably be seen as a tentative justification of what had already been happening in practice: in facts, despite all the importance attributed to cultural relics, their protection had often been sacrificed for the completion of other ideologically charged projects, like the Land Reform, the Great Leap Forward or the Cultural Revolution.

The latter in particular has been a dark period for heritage protection in China, since, starting from 1966, only revolutionary relics were deemed worthy of protection and those same masses that a few years prior had been encouraged to actively contribute to cultural heritage management work were now asked to destroy all the relics expression of the old imperial society and not in line with the new socialist society that had to be created[72].

3. Current Cultural Heritage Legislation and Policies in China (1982 – today)

After the ten year parenthesis of the Cultural Revolution and the official launch of Deng Xiaoping's *Reform and Opening Up* program (改革开放 *Gaige kaifang*), in the throughout reform process that would engulf all relevant sectors in China, the legal basis of the current cultural heritage protection regime were also laid.

First of all, the national legislator chose to strongly reaffirm the intrinsic importance of cultural heritage – equally including both cultural and revolutionary relics – as a crucial part of the Chinese history and identity by including this principle in the Preface of the 1982

[71] Something similar had been created in 1948 by the central government of Northern China, but in that specific case it was only applied to Confucian temples, while no such limitation is mentioned in the Provisional Regulations. XIAN QIAOYING, *Genju diji jiefangqu wenwu baohu zhi jian (Comments on Cultural Heritage Protection in Liberated Areas)*, in *Renmin luntan xueshu qianyan*, vol. 90, June 17, 2010, p. 2

[72] It is recorded that a great number of cultural relics and sites had either been lost, demolished or seriously damaged during the ten years of the Cultural Revolution. Important monuments, like the Imperial Palace in Beijing, the Confucius Temple in Qufu and the Lingyin temple in Hangzhou were saved thanks to the intervention of moderate cadres like Zhou Enlai. XIE CHENSHENG, *Xin Zhongguo wenwu baohu gongzuo 50 nian (50 Years of Cultural Heritage Protection in New China)*, in *Dangdai Zhongguo shi yanjiu*, vol. 9, n. 3, May 2002, pp. 64-65

Constitution[73]. Moreover, Art. 22 clearly defines the State's duty to protect "*places of scenic beauty and historical interest, valuable cultural relics and other forms of important historical and cultural heritage*"[74]. At the same time a national inventory of all existing immovable cultural heritage within Chinese territory was called for.

On November 19 1982, as a result of the work of the Conference organized by the Cultural Session of the CPC Central Committee, China's first formal *Cultural Relics Protection Law* (CRPL) was approved: its 33 articles were still closely based on the Provisional Regulations of 1961, but some interesting innovations were added, like the possibility for individual citizens to privately own cultural relics.

Two decades later, however, the rapid economic development, the process of urban redevelopment, a thriving tourism sector and the increasing internationalization of China all made an adjournment of the CRPL much needed; consequently the law was heavily amended in 2002 – legalizing private transactions and creating an internal cultural relics market – and integrated the following year with the *Regulations for the Implementation of the Cultural Relics Protection Law* (中华人民共和国文物保护法实施条例 *Zhonghua renmin gongheguo wenwu baohufa shishi tiaoli;* from this moment on "Implementing Regulations")[75]. The CRPL was further amended in 2007, 2013, 2015 and 2017, but only minor changes were made[76].

The general legal framework is completed by the *Intangible Cultural Heritage Law*[77] (中华人民共和国非物质文化遗产法 *Zhonghua renmin gongheguo feiwuzhi wenhua yichan fa*) and the *Regulations Concerning the Protection and Management of Underwater Cultural Relics*[78] (中华人民共和国水下文物保护管理条例 *Zhonghua renmin gongheguo shuixia wenwu baohu guanli tiaoli*).

[73] The 1982 Constitution is the fourth constitution of China, approved by the National People's Congress on December 4 1982. The Constitution has been amended five times, the latter being in 2018, however no noteworthy changes were made in terms of cultural heritage provisions. NOVARETTI, S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, p. 133, note 56

[74] *Constitution of the People's Republic of China*, 2018, Art. 22. According to Art. 119 ethnic minorities in autonomous regions are free to adopt their own policies to protect, restore and manage the cultural heritage belonging to their ethnic group; however, it is highly debatable whether this freedom is truly guaranteed or not by central authorities. BLUMENFIELD, T. and SILVERMAN, H., *Cultural Heritage Politics in China*, New York 2013, pp. 7-9

[75] Approved by the State Council on May 13 2003, amended in 2013 and 2016.

[76] It should be noted that the Special Administrative Regions of Hong Kong and Macao have their own independent regime concerning heritage protection and do not apply the CRPL. A brief overview of the effects of the Chinese import/export regulations in these regions will be provided in Chapter 3.

[77] Approved by the Standing Committee of the National People's Congress on February 25 2011.

[78] Adopted by the State Council on October 20 1989, amended in 2011.

The following analysis on the current cultural heritage legislation will focus on the latest amended version of the laws introduced.

3.1 Cultural Relics Protection Law

The CRPL is composed of 8 chapters, whose titles give us an idea of all the issues relevant to cultural heritage protection addressed in the law, as follows: General Provisions (Chapter One, articles 1–12); Immovable Cultural Heritage (Chapter Two, articles 13–26); Archaeological Excavations (Chapter Three, articles 27–35); Cultural Relics in Institutional Collections (Chapter Four, articles 36–49); Cultural Relics in Private Collections (Chapter Five, articles 50–59); Import and Export of Cultural Relics[79] (Chapter Six, articles 60–63); Legal Liabilities (Chapter Seven, articles 64–79); and Final Provisions (Chapter Eight, article 80).

Art.1 introduces the main objectives of the law itself, taking a marked nationalist stance on the matter: in facts, the law in question shouldn't only be the basis for the protection of China's excellent (优秀 *youxiu*) cultural heritage, but it should also be the instrument necessary to promote patriotism and the creation of a socialist spiritual and material civilization. In this way in a single provision the historical, artistic, ideological and political importance held by cultural heritage are reaffirmed together and presented on the same level[80]. Coherently with the formalization and standardization process that interested the Chinese law system in general, no other reference to the ideological and political value of cultural heritage appears throughout the text, but the fact that it is explicitly acknowledged in Art. 1 shows that Chinese authorities are conscious of the importance heritage holds as an instrument to promote unity internally and as a basis for international cultural policies.

Amongst other principles, Chapter 1 also attempts to define the roles, duties and jurisdictions of the different State organs entrusted with heritage protection: all cultural relics identified in Art. 2 are entitled to some degree of State protection according to their level of "preciousness" (Art. 3)[81], but the actors materially responsible for ensuring such a protection are local governments, that operate at all levels within their jurisdictions through their cultural relics administrative departments (Art. 8).

[79] The provisions governing the import and export of cultural objects will be analyzed in Chapter 3.
[80] NEWELL, P., *The PRC's Law for the Protection of Cultural Relics*, in *Art Antiquity and Law*, Vol. 13, n.1, April 2008, pp. 6-7
[81] The definition of *wenwu* according to the CRPL and the description of the Chinese grading system have already been discussed *supra* in Paragraph 1.2

Art. 10 further specifies that, to fulfill their duties, local governments must include heritage protection into their economic and social development plans and set aside part of their budget to cover for the necessary expenses required by these tasks, however no indication is given, neither in the CRPL nor in the Implementing Regulations, on the effective amount of funds to be allocated; the only provision that may give some additional details on the issue states that the budget destined for heritage protection should "increase as financial revenues increase"[82]: based on this wording, it could be inferred that at least a minimum fixed percentage of said revenues should be allocated for heritage protection, but no concrete conclusion can be reached, given the vagueness of the provision. On the other hand, instead, many scholars argued that such a provision will be difficult to enforce and, as no effective limits are set, the funds allocated by local governments are almost always lacking[83] and the vast majority or revenues is redirected to projects perceived by local authorities as more pressing in terms of economic, infrastructural or touristic development.

Additional funds can be obtained through the regular revenues earned by State museums and other public institutions or through private donations to institutional funds especially created for this purpose (Art. 10). To avoid the possibility of such funds being misused, the income thus obtained can only be reinvested in a definite set of activities such as recollection and renovation of cultural relics, organization of expositions or other educational activities, research projects and improvement of the preservation equipment and security systems of museums (*Implementing Regulations*, Art. 2-3).

3.1.1 Ownership and Circulation of Cultural Relics within China

Under the current CRPL State ownership (Art. 5) and private ownership (Art. 6) of cultural relics are both allowed, but not all types of relics can be privately owned.

In particular, all ancient cultural sites, tombs and temples, all the relics found underground – found either during archeological excavations (Art. 34), the realization of construction, infrastructural or agricultural projects (Art. 29) or accidentally in other circumstance (Art. 32) – or in internal and territorial waters are exclusively owned by the

[82] *Cultural Relics Protection Law*, 2017, Art. 10

[83] NEWELL, P., *The PRC's Law for the Protection of Cultural Relics*, in *Art Antiquity and Law*, Vol. 13, n.1, April 2008, p. 14; HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016 p. 15; DUTRA, M.L., *Sir, How Much is that Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China*, in *Asian-Pacific Law and Policy Journal*, vol. 5, 2004, pp. 86-87

State (Art. 5)[84]; additionally are also property of the State all movable cultural relics collected and kept in public organizations (museums, but also, for example, military units) and those legally acquired by or voluntary donated to the State by citizens and private organizations (Art. 5 and 37). Lastly, other categories of immovable cultural relics, like ancient and modern buildings, stone carvings etc. may be owned by the State, but this doesn't seem to be automatic, thus implying that private property of such relics is also possible (Art. 5).

Compared to the provisions of the 1982 law, nowadays legal protection of State ownership is strengthened, as State property rights on the matter have absolute inviolability (不容侵犯 *burong qinfan*)[85]: this means that even if the rights of use of the land on which State heritage sites insist are held by a private party or even if the organization entrusted with the collection and protection of movable relics is private, the ownership of the cultural relics itself will suffer no changes (Art. 5). Similarly, State-owned relics are inalienable and cannot be sold, transferred or mortgaged (Art. 24 and 44).

Interestingly, Art. 45 admits the possibility for State institutions to legally dispose (处置 *chuzhi*)[86] of the relics they hold, however no further explanation is added: actually, this process should be regulated by a different set of rules issued by the State Council, but, as of today, such regulations are yet to be promulgated, exposing relics to potential dangers. Additionally, since this provision is contained in Chapter 4 dedicated to cultural relics in institutional collections and no equivalent is found in Chapter 5 regulating private collections, it should be assumed that privately owned relics cannot, under any circumstance, be legally disposed of.

The CRPL also allows and regulates the internal circulation of State relics: according to Art. 40, even though they cannot buy nor sell them, cultural institutions – both public and private – can mutually lend to one another for a limited period of time (not superior to three years) State relics of any grade for exposition or research purposes. The only apparent conditions to be respected are that the exchange must be approved by the competent administrative department, according to the relics grade (Art. 40), that all information regarding the holdings exchanged must be duly documented and catalogued (Art. 41) and that the institution that lends its relics should be compensated accordingly (Art. 43), while the one

[84] The only exception to these provisions is represented by relics unearthed during archeological excavations, since with the authorization of the competent administrative department, the team in charge of the excavation can collect some relics for research purposes, instead of handing them over. *Cultural Relics Protection Law*, 2017, Art. 34

[85] *Cultural Relics Protection Law*, 2017, Art. 5

[86] *Cultural Relics Protection Law*, 2017, Art. 45

that borrowed them it's responsible for any damage that may be sustained (*Implementing Regulations*, Art. 30).

Although these provisions are limited to State owned goods and clearly favor richer regions and institutions[87], as they have more resources to invest, allowing an internal exchange of cultural relics is indeed a huge development that will make it easier for the greater public to get access to and appreciate its own cultural heritage.

With regards to private property, individuals and organizations can legally own ancient buildings and all kinds of movable cultural heritage (Art. 6).

Owners – or users, when the two are distinct – not only have to ensure the protection of their immovable and movable cultural relics, but they are also responsible for all necessary restoration works (Art. 21 and 46). Such interventions should try to maintain the original state of the relics without altering it and can be conducted only by highly qualified teams, certified by the local government (*Implementing Regulations*, Art. 15, 16 and 17) after several conditions have been met[88].

Since the approval of the 2002 amendment, private transactions concerning cultural relics are allowed within China and an internal licit cultural heritage market has been developed; however, nowadays said transactions still aren't fully liberalized and the State exercises strict control over them: for example, under the current legislation, individuals can legally acquire cultural relics only through inheritance, purchase (购买 *goumai*)[89] from authorized shops or auction houses and exchanges (交换 *jiaohuan*)[90] or transfers (转让 *zhuanrang*)[91] with other privates (Art. 50). The fact that private parties are allowed to *purchase* relics, but aren't explicitly allowed to *sell* them and are even unambiguously prohibited from engaging in heritage-related commercial activities (Art. 55) is perceived as one of the greatest limits of the current Chinese cultural relics protection regime[92].

[87] NEWELL, P., *The PRC's Law for the Protection of Cultural Relics*, in *Art Antiquity and Law*, Vol. 13, n.1, April 2008, pp. 33-34

[88] In particular, to be certified, renovation teams must have adequate equipment to engage in heritage protection projects and prove that their staff have previous professional experience in working in museums. *Regulations for the Implementation of the Cultural Relics Protection Law,* 2016, Art. 16

[89] *Cultural Relics Protection Law*, 2017, Art. 50

[90] *Ibidem*

[91] *Ibidem*

[92] HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016, p. 5

Currently, only authorized shops (文物商店 *wenwu shangdian*)[93] and State sanctioned auction houses (拍卖企业 *paimai qiye*)[94] can undertake commercial operations concerning cultural heritage. Interestingly, cultural relics shops cannot operate as auction houses (Art. 53), nor auction houses can open shops and directly sell relics (Art. 54), and, probably to avoid any possible case of corruption or embezzlement, administrative cultural departments and their staff are prohibited from directly operating any of the two (Art. 55).

Auction houses, in addition, have the duty to preventively submit all cultural relics soon to be auctioned for inspection in order to confirm their eligibility for sale (Art. 56) and subsequently have to record all information regarding said relics and the private parties involved in the transaction (Art. 57; *Implementing Regulations* Art. 43), meaning that no anonymity is effectively offered to buyers; when the ones to be auctioned are recognized as "precious" relics, State authorities can intervene and generally can buy them at a reduced price, negotiating directly with the auction house (Art. 58).

An additional obstacle to the complete legalization of private trade in cultural relics is the fact that individuals cannot engage in the buying nor selling of State-owned relics and, in general, of all "precious" relics, even when part of private collections (Art. 51 and 56) – thus meaning that apparently only "ordinary" relics can be legally traded. Moreover, private immovable relics and movable relics prohibited from export cannot, under any conditions, be sold, transferred or mortgaged to foreigners (Art. 25 and 52). Lastly foreigners are also prohibited from investing in cultural relics shops and auction houses, not even in the form of a joint-venture (Art. 55).

3.1.2 Immovable Cultural Heritage and Archeological Excavations

In terms of immovable cultural heritage protection and archeological excavation legislation, almost all of the measures implemented in the 1961 Provisional Regulations are reaffirmed in the CRPL, however, some interesting innovations are also present: first of all, neighborhoods, blocks and even entire cities with a striking historical, artistic or scientific value could be listed as cultural heritage sites (Art. 16), but specific regulations regarding their protection should be approved directly by the State Council and local governments (*Implementing Regulations*, Art. 7), not by cultural relics administrative departments.

Secondly, the concept of protected area, already established in 1961, is further developed. As of today two different types of protected areas exist: if a protected range (保护

[93] *Cultural Relics Protection Law*, 2017, Art. 53
[94] *Cultural Relics Protection Law*, 2017, Art. 54

范围 *baohu fanwei*) is instituted, no construction, demolition, digging nor excavation may happen within its perimeter, unless under special circumstances (Art. 17); on the other hand, within a construction control belt (建设控制地带 *jianshe kongzhi didai*), with the authorization of the local administrative department, construction projects can be conducted to a certain degree, according to the effective conditions of the heritage sites involved and without damaging them (Art. 18). In both cases, no facilities that may endanger the sites and pollute the surrounding environment can be built; when already present, the State has the authority to remove them completely within a given time limit (Art. 19).

Lastly, the main innovation related to archeological excavations is that, even if private parties are prohibited from independently conduct excavations (Art. 27), foreigners can engage in them if granted a special authorization from the National Cultural Heritage Administration (Art. 33).

3.1.3 Heritage Protection and Economic, Infrastructure and Tourism Development

In the last 40 years one of the biggest challenges China had to face was finding the right balance between heritage protection and economic development: despite the government's continuous reminders of the importance that cultural relics held for China, in the struggle against economic development plans, urban redevelopment and infrastructural projects, it was heritage protection that most of the time had to be sacrificed to achieve other more pressing goals. This strategy, indeed, made it possible for China to grow at an incredibly fast pace, but at the same time, lead to the destruction, loss or irreparable damaging of a long list of heritage sites and cultural relics.

An additional threat that has emerged in recent years is tourism: Chinese authorities soon realized that enormous revenues could be obtain thanks to the touristic exploitation of cultural relics. Unfortunately, mass tourism and debatable renovation practices, implemented to remodel heritage sites to better accommodate tourists, often had the opposite effect, further endangering cultural relics instead of protecting them[95].

The CRPL attempts to set some rules to minimize the potential risks deriving from this existing practices, stating that local governments must take into account heritage protection when defining and pursuing their other economic and social goals and also guarantee that the

[95] DUTRA, M.L., *Sir, How Much is that Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China*, in *Asian-Pacific Law and Policy Journal*, vol. 5, 2004, p. 9; GRUBER, S., *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, in *Asia Pacific Law Journal of Environmental Law*, vol. 10, n. 3, 2007, pp. 284-285

realization of construction, infrastructure and tourism projects within their jurisdictions can be conducted without damaging cultural relics. (Art. 9).

While local cultural relics departments are the primary actors charged with heritage protection, administrative departments other than them (like public security organs, departments for industry and commerce, customs units, urban and rural construction planning departments) are also required to "*earnestly*"[96] (认真 *renzhen*) cooperate with local authorities to ensure that cultural relics are effectively protected (Art. 9) and these goals are to be included into their own plans and budgets (Art. 16). In particular, before the start of any large-scale infrastructural or construction project, preliminary archeological surveys must be carried out by State recognized teams (Art. 29-30) to guarantee that any damage to existing immovable cultural heritage will be reduced as much as possible and to assess the eventual presence of cultural remains in the area; if relics are indeed found at the site, a more systematic excavation should be conducted and all movable cultural relics found should be swiftly collected and salvaged; moreover, construction units are charged with all related expenses (Art. 31) and are prohibited from hindering the excavation in any way (*Implementing Regulations*, Art. 23).

Looking at the general legal framework presented, it can be seen that the Chinese national legislator set up a strict regime to ensure heritage protection. However, whilst these rules have proven effective and have been followed in various instances[97], cases where cultural relics are sacrificed for economic purposes are still frequent, one of the most famous examples being the construction of the Three Gorges Dam in Hubei: respecting the CRPL provisions, preliminary archeological surveys were indeed conducted and the area declared rich in terms of cultural heritage, leading to the temporary stop of the project and the launch of a massive campaign to salvage as many relics as possible; unfortunately the construction of the dam was only postponed, and soon resumed before all relics located in the area could be

[96] *Cultural Relics Protection Law*, 2017, Art. 9

[97] An interesting example is provided by the Yangliuhu hydropower project, in Sichuan: the aim of the project was to bring electricity and favor the economic development of the region, but its realization would have meant the destruction of 2,000-year-old Dujiangyan Irrigation Project. In this case, considering the results of a preliminary investigation, the project was cancelled by the Sichuan provincial government before it even started to avoid the loss of a part of Chinese heritage. MERTHA, A., *"Fragmented Authoritarianism 2.0": Political Pluralization in the Chinese Policy Process*, in *The China Quarterly*, n. 200, December 2009, p. 1005
Another example is offered by the creation of the Horse and Chariot Museum in Luoyang: in this case, after the results of the preliminary archeological survey highlighted the existence of important relics, the digging was stopped and the site itself transformed in a museum. This "victory" for cultural heritage however was possible since Luoyang is extremely rich in terms of cultural heritage and cultural relics departments are usually highly supported by the local government. ZAN, L. and BONINI BARLDI, S., *The Heritage Chain Management. General Issues and a Case Study, China*, in *Journal of Cultural Heritage*, Vol. 14, n. 3, May–June 2013, p. 213

successfully retrieved, as the economic benefits coming from the realization of the dam were deemed superior compared to heritage losses[98].

It should be noted that violations of this provisions are usually punished through administrative sanctions, not with criminal penalties. This contributes to further hinder the heritage protection regime, since the payment of a fine is usually not a great feat for construction units; this means that those units may actually be willing to damage cultural heritage and pay the corresponding fine, instead of actually trying to design a plan to ensure effective relics protection[99].

Lastly, in some cases heritage destruction incidental to economic activities may even be allowed: for example, when a construction project takes place, if it is deemed impossible to guarantee protection of immovable cultural sites *in situ*, under no better specified "special circumstances"[100] (特殊情况 *teshu qingkuang*), it is possible for provincial-level and county-level sites to be either relocated or completely demolished, with the approval of local authorities (Art.20). However, since construction units are the ones to bear all relocation or demolition related expenses, they almost always push for demolition since it's less expensive and more easily manageable compared to relocation.

3.1.4 Legal Responsibilities

In case of violation of the discussed provisions, the remedies provided by the CRPL encompass both criminal penalty and civil liability, depending on the type of infringements.

Art. 64 explicitly identifies as "*crimes*"[101] (犯罪 *fanzui*) a long list of offences, such as intentionally or negligently destroying precious cultural heritage, selling State-owned relics, selling or privately transferring to foreigners cultural relics prohibited from export, illegally excavating, robbing and smuggling cultural heritage sites and objects. The punishments for this crimes, however, are not further discussed in the CRPL, but are entirely covered in Chapter 6, Section 4 (dedicated to "Crimes of Obstructing Cultural and Historic Objects Control") of the *Criminal Law of the People's Republic of China* (中华人民共和国刑法 *Zhonghua renmin gongheguo xingfa*). According to its provisions, criminal penalties for the offences listed above include fines, confiscation of properties and fixed-term imprisonment up

[98] GRUBER, S., *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, in *Asia Pacific Law Journal of Environmental Law*, vol. 10, n. 3, 2007, p. 278
[99] HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016, p. 7
[100] *Cultural Relics Protection Law*, 2017, Art. 20
[101] *Cultural Relics Protection Law*, 2017, Art. 64

to life imprisonment, depending on the "*seriousness*"[102] (严重 *yanzhong*) of the violation (*Criminal Law*, Art. 324-328).

Unfortunately, as with the "preciousness" of cultural relics, the Chinese legislation fails to define the specific limits of "serious", making actual enforcement of these provisions quite complex and unpredictable. Another limit that has been noticed is that, while some articles state that penalties should be applied to both individuals and legal persons (*Criminal Law*, Art. 325-327), others do not explicitly affirm this, thus effectively failing to punish legal persons (*Criminal Law*, Art. 324 and 328)[103].

Concerning civil liabilities, when violations of CRPL provisions do not constitute a crime, the remedies are fully regulated by the CRPL itself (Art. 65-75) and almost always take the form of administrative pecuniary sanctions.

Interestingly, the current legal regime obliges the different governmental agencies to assist cultural relics authorities and allows them to directly sanction violations that fall within their jurisdictions: for example, violations of CRPL that are also violations of public security rules, customs policies and environmental protection should be directly sanctioned by public security (Art. 65), customs (Art. 65) and environmental authorities (Art. 67). All other types of violations fall directly within the jurisdiction of cultural relics departments.

Lastly, in line with the anti-corruption campaigns promoted by the national government, *ad hoc* provisions are included against members of cultural relics departments, institutional museums, cultural relics shops and auction houses that abuse their authority, negligently damage cultural relics or illegally sell them to obtain private profits and embezzle funds (Art. 76). If circumstances are deemed particulars serious, violators are not only fined but also expelled from public offices and their qualifications revoked for ten years.

Similar measures are adopted when members of other government agencies commit illegal acts for personal gains that result in the damaging of cultural heritage (Art. 78).

3.2 Regulations Concerning the Protection and Management of Underwater Cultural Relics

Underwater cultural relics (水下文物 *shuixia wenwu*) are a particular category within cultural heritage, which, due to its peculiar nature and retrieval position, are often illegally

[102] *Criminal Law*, 2020, Art. 324
[103] HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016, pp. 8-9

looted and exported to foreign markets where they can be sold[104]. Provisions of the CRPL can be applied to underwater cultural relics as well, however, to further enhance the protection of this category a specific set of Regulations, exclusively dedicated to this subject, has been adopted.

According to said regulations, underwater cultural relics encompass all relics submerged before 1911 found in Chinese internal and territorial waters, regardless of their origin (Art. 2): since underwater relics are a State property (CRPL, Art. 2), this means that the State not only claims ownership of all Chinese underwater heritage, but also of foreign relics or relics whose State-of-origin is unknown, as long as they are located in Chinese waters (Art. 3). Moreover, relics of Chinese origin located in foreign territorial waters should also be considered part of the Chinese cultural heritage (Art. 2); in this case, however, private ownership of said relics is allowed (Art. 3), probably because, as they are located outside of Chinese jurisdiction, it would be extremely difficult or even impossible for China to enforce its national provisions concerning State-owned relics.

The competent authorities tasked with underwater heritage protection are the National Cultural Heritage Administration at central level and cultural relics administrative departments at local level (Art. 4): their responsibilities include identifying, listing and appraising all the retrieved relics (Art. 4) and organizing, together with the Underwater Archaeology Centre at the National Museum of China, research excavations and expeditions[105] (Art. 7).

Similar to the concept of the protected range in the CRPL, when underwater cultural relics are designated as cultural heritage sites, it is also possible for the competent department to create a protection area (保护区 *baohuqu*), within which fishing, demolition and other potentially damaging activities are severely prohibited (Art. 5).

Lastly, it should be noted that illicitly exporting and trafficking underwater cultural relics constitute violations that could be persecuted under the Criminal Law or punished with administrative sanctions (Art. 10), but no specific measures are described in the Regulations concerning this matter and the general provisions of the CRPL are usually applied.

[104] GRUBER, S., *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, in *Asia Pacific Law Journal of Environmental Law*, vol. 10, n. 3, 2007, p. 289

[105] Research expeditions are usually conducted by State organizations; privates, instead, must be authorized by the competent department to engage in their own expeditions and are obliged to report any findings to the corresponding government department (Art. 8). Foreigners can also conduct private expeditions in collaboration with Chinese authorities (Art. 7).

4. Relevant State Organs dedicated to Cultural Heritage Protection

4.1 Central Organization

4.1.1 National Cultural Heritage Administration (NCHA)

According to the CRPL, currently the highest administrative authority responsible for cultural heritage protection and management within the Chinese territory is the National Cultural Heritage Administration (国家文物局 *Guojia wenwuju*)[106] (CRPL, Art. 8).

Originally, in 1982, the agency officially entrusted with such a duty was a department created for this specific purpose within the Ministry of Culture and of Tourism (MCT), however, since the rapid evolution of Chinese economy had also multiplied the problems and issues that had to be faced in terms of heritage management, greater independency from the MCT was deemed necessary[107]. As of today, the NCHA holds the status of vice ministry operating directly under the State Council, but at the same time it's still, at least formally, under the supervision of the MCT[108].

The NCHA has four main functions: first of all, it's in charge of coordinating and guiding heritage protection throughout the country, by defining uniform standards, methods, policies and regulations that must be coherently applied to areas such as archeological excavation, cultural relics identification, collection, protection, research and organization of exhibitions[109].

Secondly, in terms of actual management, it should be noted that immovable national key cultural heritage protection sites, first grade precious cultural relics and those listed as UNESCO's World Cultural Heritage sites are the only ones directly managed by the NCHA, thus leaving all remaining heritage within the jurisdiction of local cultural relics administrative departments. Additionally, central cultural institutions (like museums, research institutions, archeological teams…) all answer directly to the NCHA with no intermediaries.

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[106] The current Chinese denomination has been adopted in 1998 and has always remained unchanged. The English denomination, instead, has been frequently modified: originally, the official translation was State Administration for Cultural Relics, modified in 2003 into State Administration for Cultural Heritage, commonly known as SACH. The current English name has been recently adopted in 2018.

[107] HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016, p.13

[108] A list of the responsibilities of the Ministry of Culture and Tourism of the People's Republic of China is available on the official website of the MCT: management of the NCHA can be found listed at point 12. https://www.mct.gov.cn/gywhb/zyzz/201705/t20170502_493564.htm (last visited: 07/06/21)

[109] A similar list with the responsibilities of the National Cultural Heritage Administration can be found on its official website, at: http://www.ncha.gov.cn/col/col1020/index.html (last visited: 07/06/21)

Third, the NCHA plays an important supervisory role: in particular, a series of local activities, like the establishment of cultural relics shops and auction houses, museum exchanges or the execution of construction projects when important relics are involved can be conducted only if previously authorized at central level.

Lastly, NCHA is also responsible for cooperating with foreign and international agencies to promote a constant dialogue and licit exchange of cultural relics between museums and research institutions worldwide[110].

4.1.2 Ministry of Culture and Tourism (MCT)

Despite the NCHA being the highest authority tasked with heritage protection, the MCT also plays an important role: actually, while NCHA dispositions usually only apply to *tangible* cultural heritage, the protection, revitalization and promotion of *intangible* cultural heritage is, instead, one of the prerogatives of the MCT[111].

The allocation of authorities so defined should ensure that there is no overlapping between the tasks of NCHA and the ones of the MCT. Although this principle is somehow respected for the most part, some overlapping and incongruences are unavoidable for two reasons. On one hand, it may happen that some of the NCHA exclusive tasks are in practice execute by the MCT: for example the Ministry directly manages some central museums like the Palace Museum or the National Museum of China, even if such a task should befall under NCHA authority.

On the other hand, it should be noted that the MCT is responsible for tourism as well as culture and, since cultural heritage plays an increasingly pivotal role in promoting tourism both at local and international level, any tourism project to succeed requires a strict collaboration between the ministry and the vice-ministry.

Furthermore, considering the peculiarity of the objects we are considering, MCT isn't the only central agency the NCHA has to closely cooperate with to fully achieve its goals: for example, the management of some temples and other religious sites – even those recognized as heritage sites – is in the hands of religion departments; customs have authority in monitoring the application of import and export policies; the regulation and supervision of the

[110] *Ibidem*

[111] Responsibilities of the Ministry of Culture and Tourism of the People's Republic of China, point 7 https://www.mct.gov.cn/gywhb/zyzz/201705/t20170502_493564.htm (last visited: 06/07/21); HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016, p. 13

cultural relics market is entrusted to the agency in charge of economic and industrial activities and so on[112].

Unfortunately, this situation strengthens the existing institutional fragmentation and, considering that these entities all have their own independent goals to achieve, it is extremely difficult for the NCHA to impose its provisions and obtain that cultural heritage is actually protected.

4.2 Territorial Organization

At local level, county and provincial level cultural relics departments (文物管理局 *wenwu guanliju*) are tasked with managing and protecting cultural heritage within their jurisdictions and acting as an intermediary between local governments and cultural institutions, like museums, archeological teams, etc. They are responsible for all activities, from identification, to collection and research. In practice, since, as stated above, the NCHA is directly responsible only for national level immovable heritage sites and first grades relics, local departments must shoulder the actual duty and financial burden of protecting the greatest majority of Chinese heritage with their limited resources.

Coherently with the Chinese State organization, local departments are organized in a hierarchical pyramidal structure that culminates in the NCHA: specifically, from a professional point of view, county-level cultural relics departments are vertically subjected to the supervision of provincial-level departments, which are in turn supervised by the NCHA. Moreover, at the same time, each department is horizontally and financially subordinated to the corresponding-level government. In this way the principle of double dependency is replicated in the cultural heritage sector as well, however, given the particular status of NCHA and the way responsibility are allocated according to the current legal framework, the resulting system is extremely decentralized and fragmented[113].

A particularly concerning problem emerges in financial terms: in facts, due to the existing organizational structure, most of the expenses for heritage protection are made at local level and are usually funded not by central entities (that tend to reinvest their financial resources in specific projects or initiatives) but by using the funds allocated by local governments. Consequently, this financial dependency of local cultural relics departments

[112] HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016, p. 13
[113] ZAN, L., and BONINI BARALDI S., *Managing Cultural Heritage in China: A View from the Outside*, in *The China Quarterly* , No. 210, June 2012, p. 462

towards their corresponding-level governments creates a situation where governments are the entities with actual decision making powers while the NCHA, despite being the agency formally in charge, actually lacks any strength to effectively impose its decisions and directives to lower level organs, having no authority whatsoever over governments[114].

This peculiarity of the Chinese system also helps explain why it is possible for local cultural relics departments to adopt policies or make decisions that oppose the NCHA, but favor the interests of local governments, despite central efforts to try and adopt a uniform approach throughout the country.

[114] ZAN, L., *Cultural Heritage in China. Cultural Policies, Professional Discourse and the Issue of Managing*, in *Public Archeology*, n.13, 2014, p. 106

The International Cultural Heritage Protection Framework: Relevant Agreements Adopted by China

As seen in Chapter 1, ever since the 1978, cultural heritage protection once again became a central issue for the Chinese leadership, leading to the decision of simultaneously operating on two parallel levels: on one hand, a detailed national legal framework has been devised and constantly adjourned to efficiently and effectively ensure adequate heritage protection within Chinese territory; on the other hand, in the last forty years China had also increasingly sought international cooperation on these matters, since it had quickly become clear that internal legislation alone was insufficient to protect national heritage from other external threats. In particular, heritage could also be seriously endangered by wars, thefts and cross border smuggling, all of these events that couldn't and still cannot be prevented nor eradicated by individual States, but, on the contrary, require the cooperation and coordination of all interested parties worldwide.

Furthermore, another reason that could explain the current growing Chinese activism in heritage related issues is that, by engaging in international activities, China can promote a specific narrative and image of itself as a crucial country for global heritage, thus increasing its influence worldwide.

To reach its goals China gradually expanded its international presence over the years, for example by occupying key positions within international organizations tasked with heritage protection[115], or by actively promoting relevant activities[116] and, in general, by adopting a series of fundamental multilateral and bilateral agreements.

Considering both the global ramifications of the subject and the growing attention China itself has given to this topic, an overlook of the national cultural heritage protection

[115] For example, as of today, the UNESCO Deputy Director General, Qu Xing, one of ICOM's two Vice Presidents, An Laishun, and one of the members of the UNIDROIT Governing Council, Shi Jingxia, are all Chinese, fact that confirms the magnitude of international presence reached by China. Detailed information on the internal structures of said organizations can be found in their respective websites at the following pages: UNESCO, https://en.unesco.org/about-us/whoswho; ICOM, https://icom.museum/en/about-us/executive-board/; UNIDROIT, https://www.unidroit.org/about-unidroit/governing-council (last visited: 15/07/21).

[116] For example, nowadays China is one of the main players involved in any discussion dedicated to heritage protection in Central Asia and Sub-Saharan Africa, due to the prominent Chinese interests and presence in these regions. At the same time, China is also at the forefront of innovative projects like the creation of a network of sustainable cities across the world, with the objective of promoting creative thinking, sustainability and cultural integration. Additional information on these topics regarding the most recent activities can be found in the UNESCO website at the following links: https://whc.unesco.org/en/events/1531 (Central Asia initiatives); https://whc.unesco.org/en/events/1472 (Sub-Saharan Africa initiatives) and https://en.unesco.org/unesco-for-sustainable-cities (Creative cities) (last visited: 15/07/21).

regime would be utterly incomplete without a brief explanation at least of the main obligations undertaken by China at international level; for this very reason an analysis of all the most important agreements ratified or acceded in the last forty years will now be proposed.

1. Fundamental UNESCO Conventions relevant to Cultural Heritage Protection

UNESCO (United Nations Educational, Scientific and Cultural Organization), as of today, has a total of 193 members and, among other things, is undoubtedly also the most important international organization devoted to cultural heritage protection: to be specific, the organization not only is in charge of creating standards regarding various aspects of heritage protection, but it also promotes international cooperation over these same issues; its preferred instrument to achieve its goals are International Conventions, multilateral agreements among States whose provisions are legally binding once ratified[117].

It should be noted that all UNESCO Conventions are usually open for accession, which means that even if a State didn't ratify an agreement or wasn't present altogether when it was adopted – like China before 1979 for example – there is still the possibility of accessing said agreement at a later date.

As of today, China has signed and officially ratified five International Conventions: the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* of 1954[118], the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 1970[119], the *Convention Concerning the Protection of the World Cultural and Natural Heritage* of 1972[120], the *Convention for the Safeguarding of the Intangible Cultural Heritage* of 2003[121] and the

[117] Another instrument frequently used by UNESCO are Recommendations: compared to Conventions, however, they do not need to be ratified by States and consequently their norms aren't usually legally binding, but States are still strongly encouraged to apply them. A brief definition of Conventions, Recommendations, other standard-setting instruments and their adoption procedures can be found on the UNESCO website at: http://portal.unesco.org/en/ev.phpURL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#name1 (last visited: 15/07/21)

[118] The Convention was adopted in The Hague on May 14 1954. China ratified it on January 5 2000. The full text of this and of all the following Conventions are all available on the UNESCO Legal Instruments Portal, at: http://portal.unesco.org/en/ev.php-URL_ID=13649&URL_DO=DO_TOPIC&URL_SECTION=-471.html (last visited: 15/07/21)

[119] The Convention was adopted in Paris on November 14 1970. China ratified it on November 28 1989.

[120] The Convention was adopted in Paris on November 21 1972. China ratified it on December 12 1985.

[121] The Convention was adopted in Paris on October 17 2003. China ratified it on December 2 2004.

Convention on the Protection and Promotion of the Diversity of Cultural Expression of 2005[122].

Amongst heritage-related treaties, only the ratification of the *Convention on the Protection of the Underwater Cultural Heritage* of 2001[123], instead, is still pending.

Since the focus of the present work are the export and import regulations concerning tangible movable cultural heritage, only the contents of the first three conventions will be analyzed, while the topic of intangible cultural heritage won't be further elaborated here.

1.1 The *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* of 1954

Before the adoption of this Convention, other national codes and international agreements already included special provisions covering the issue of granting protection to cultural heritage during conflicts; however, after the continuous looting and the enormous damages sustained indistinctly by all kinds of national cultural properties during the Second World War, several States convened that a new international standard exclusively dedicated to heritage protection was indeed much needed[124], thus prompting the drafting of the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* in 1954 (from this moment UNESCO 1954).

The 40 articles of the Convention are divided into 7 chapters, as follows: General Provisions Regarding Protection (Chapter I – Art. 1-7); Special Protection (Chapter II – Art. 8-11); Transport of Cultural Property (Chapter III – Art. 12-14); Personnel (Chapter IV – Art. 15); Distinctive Emblem (Chapter V – Art. 16-17); Scope of Application of the Convention (Chapter VI – Art. 18-19); Execution of the Convention (Chapter VII – Art. 20-28); Final Provisions (Chapter VIII – Art. 29-40).

At the same time, a set of *Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict* (from this moment Implementing Regulations) and a first Protocol were also adopted in 1954, while a second, more detailed, Protocol was added later on in 1999.

[122] The Convention was adopted in Paris on October 20 3005. China ratified it on January 30 2007.
[123] The Convention was adopted in Paris on November 2 2001.
[124] *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,* 1954, Preamble.

Compared to similar treaties, a first interesting innovation introduced in UNESCO 1954 is its scope of application: to be specific, if previously measures to ensure protection of cultural heritage were to be implemented only during full-scale declared wars[125], the present Convention's provisions could instead be applied in any kind of international armed conflict between two contracting Parties (Art. 18.1), which means, for example, that cultural heritage should be granted an adequate level of protection even in cases when one of the Parties hasn't explicitly recognized the conflict (Art. 18.1) or when the territory of one of the Parties have been militarily occupied, but no armed resistance to the event could actually be observed (Art.18.2).

Additionally, it is worth noting that many of the provisions included in the Convention are actually principles already affirmed in previous international agreements, like the Hague Conventions of 1899[126] and of 1907[127], and by the time UNESCO 1954 was adopted such principles had already been recognized as international customary laws[128]; as a consequence, even if an armed conflict were to take place between a contracting Party of the Convention and a non-contracting Party, the former would still be bound by the Convention's obligations (Art. 18.3).

Another consequence is that, even if UNESCO 1954 is an international convention, whose provisions have been devised mainly for international conflicts between two or more different States, as a customary law, its obligations should also be applied to grant at least a minimum of protection during internal conflicts, since, while the latter isn't of international character, it may nevertheless severely endanger cultural heritage (Art. 19).

1.1.1 Main Obligations of State Parties

By signing the Convention, the most important obligation States agree to undertake is to protect cultural heritage at the best of their abilities by "*respecting*" and "*safeguarding*" it (Art. 2).

Specifically, for the purposes of UNESCO 1954, to "respect" cultural heritage in the event of an armed conflict means that States are first and foremost obliged to ensure the protection of both the cultural property present within their own territories and within the

[125] GRUBER, S., *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, in *Asia Pacific Law Journal of Environmental Law*, vol. 10, n. 3, 2007, p. 258
[126] The *Hague Convention of 1899* was adopted in The Hague on July 29 1899.
[127] The *Hague Convention of 1907* (also known as *Hague Convention IV on The Laws and Customs of War on Land*) was adopted in the Hague on October 8 1907.
[128] NOVARETTI, S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, p. 172

territory of other contracting Parties, for example, by refraining from any type of hostile action that may directly expose to destruction or damage said heritage[129] (Art. 4.1) and by actively discouraging any sort of reprisal of one's troops against local cultural property (Art. 4.4); moreover, any form of theft, pillage, misappropriation and requisition of immovable and movable cultural property must be prohibited, or actively stopped if said actions were already happening (Art. 4.3).

Cultural heritage isn't exposed to potential dangers only during the actual conflict, but also when territories are occupied by foreign Powers. In such cases, to lessen the impact of the occupation or other military operations on local heritage, the Convention states that the Occupying Power should closely cooperate with local competent national authorities for the preservation of their heritage (Art. 5.1). If, for whatever reason, such a solution weren't possible, the Occupying Party should still be held responsible for the draft of, at least, all strictly necessary measures of heritage preservation (Art. 5.2).

Furthermore, both during conflicts and the eventual subsequent occupations, personnel dedicated to the protection of cultural heritage should always be respected and allowed to continue to carry on their tasks, even if they were to fall in the hand of the opposing Party as hostages (Art. 15).

Apart from respect of cultural property, the other main obligation undertaken by contracting Parties is safeguarding: in other words, States shouldn't only protect cultural heritage during armed conflicts, but during peacetime they are also required to adopt all appropriate measures to anticipate and prevent any potential detrimental effect brought by future military actions (Art. 3).

Even though States are free to choose the preventive measures more appropriate for their specific situation, some general duties should nevertheless be followed: first of all, in order to guarantee the best protection possible to cultural heritage, States should, on one hand, educate their armed forces on the contents of the present Convention and favor the diffusion of heritage protection values (Art. 7.1); on the other hand, they should also establish special units within their armed forces solely tasked with respect-related activities in times of war (Art. 7.2).

[129] Some examples of said hostile actions include directly attacking or bombarding cultural sites, but also reconverting existing sites to serve other military purposes, like movements of personnel and materials, since in such cases cultural heritage integrity cannot usually be guaranteed (Art. 4).

Another interesting measure that contracting Parties should take into consideration is the possibility of creating a limited number of shelters[130] for movable cultural property and centers for immovable cultural sites, protected by *ad hoc* armed custodians (Art. 8.4) and the possibility for all of them to be placed under special protection [131] if some general requirements imposed by the Convention are fulfilled: in particular, said shelters cannot be placed near sensible military objectives (like industrial centers, ports, railways, important communication lines, etc.), nor can be used for military purposes (Art. 8.1). Additionally, to obtain special protection, States should report about the existence of these shelters and cultural sites to the Director-General of the UNESCO and ask for them to be inscribed in the *International Register of Cultural Property under Special Protection* (Art. 8.6 and *Implementing Regulations*, Art. 13.1).

Unfortunately, the Convention is extremely vague and nor the document itself nor the Implementing Regulations explain in details what said special protection should encompass; the only certainty is that, once added to the International Register, listed cultural relics are granted total immunity and contracting Parties must exert their maximum efforts to avoid, under any circumstances, any action that may endanger or cause damages (Art. 9) and prohibit any seizure, confiscation or misappropriation of said relics (Art. 14).

Lastly, if deemed necessary for their safeguarding, cultural property under special protection can be extraordinarily transferred under international supervision to a different place, which could be within the territory of the contracting Party or abroad[132] (Art. 12.1 and *Implementing Regulations*, Art. 18.1). In both cases immunity should also be extended, other than to the relics themselves, to the transportation means and the personnel, thus prohibiting other States from harming them in any way (Art. 12.3).

[130] These shelters should be created as preventive measures during peacetime to avoid the potential dangers caused by wars, however, if deemed necessary, improvised refugees can also be created during armed conflicts by local authorities or by the Occupying Party and put under special protection (*Implementing Regulations*, Art. 11.1).

[131] To better ensure that cultural heritage under special protection can be quickly and univocally identified, a distinctive emblem for the Convention has been designed (Art. 16 and 17.1); at the same time, it is also allowed for a slightly modified emblem to be used for "normal" cultural heritage and for personnel tasked with heritage protection (Art. 17.2), since, even if not all cultural properties are granted special protection, all heritage should still be preserved and respected during armed conflicts, according to the spirit of UNESCO 1954 itself.

[132] When cultural property is temporarily transferred abroad, the depository State must ensure its protection and can start procedures for its return only when the conflict at hand has effectively ended (*Implementing Regulations*, Art. 18).

1.1.2 The First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954

In May 1954, together with UNESCO 1954 a separate Protocol (from this moment I Protocol) was also implemented, with some additional duties to be followed by those States that accepted to ratify it.

One of the main reasons the drafting committee opted for this peculiar course of action is the fact that the contents of the Protocol itself were actually quite controversial and it would have been extremely difficult to reach an agreement amongst all parties had its provisions be included in the original Convention; through the creation of a separate Protocol, instead, it was possible to a ensure a large consensus on the main contents of UNESCO 1954, while also allowing interested Parties to undertake the obligations brought forth in the Protocol.

The Protocol focuses on issues such as the circulation of cultural heritage from occupied territories and its use as war reparations: in particular, according to its provisions, the export of cultural property from occupied territories should be prohibited (*I Protocol*, Art. 1); nevertheless, if such actions were indeed to take place, the importing – or occupying – country has to take into custody the imported relics (*I Protocol*, Art. 2), has to ensure its protection for all the duration of the occupation, or at least of the conflict, and once hostilities have been officially declared concluded it has to return them to their original territory (*I Protocol*, 5). Moreover, the importing country is prohibited from retaining the imported cultural property as war reparations (*I Protocol*, Art. 3), a particularly important provision especially for source nations like China, that have often seen their heritage be claimed by other countries.

1.1.3 The Convention's Main Problems and the Adoption of the Second Protocol in 1999

The Convention has been one of the first international agreements adopted by the UNESCO and is considered a milestone in terms of heritage protection, however two faults in particular should be highlighted, as they greatly hinder its effective application.

The first problem that should be taken into consideration is the general vagueness of the language used for most provisions: as stated above, for example, special protection could be granted to some cultural property, but no indication is added to explain what special protection should encompass.

An even better example is the fact that, according to UNESCO 1954, the ban on destroying or damaging cultural heritage during military actions – one of the focal points of the whole Convention – can be completely ignored when "*imperative military necessity*" so

requires (Art. 4.2). The main problem with this provision is that, by failing at defining the boundaries of military necessities, UNESCO 1954 actually allows States to constantly adduce this reason as an excuse for damaging cultural heritage without them technically violating the obligations they had previously undertaken, thus greatly decreasing the value and effectiveness of the Convention as a whole.

Similarly, UNESCO 1954 declares that penal or disciplinary sanctions will be imposed on any person who would breach the Convention (Art. 28), however, on one hand, since these sanctions should be adopted within the national criminal jurisdiction, no uniformity is guaranteed and no guidelines are offered either. On the other hand, Art. 28 explicitly states that such measures can only be imposed on private people, not on independent countries, whose actions, instead, aren't subjected to any control nor can be sanctioned.

The second unavoidable problem of the UNESCO 1954 is that there is no authority with enforcement power able to impose the respect of the Convention's provisions to contracting Parties: UNESCO itself only provides technical assistance to better ensure heritage protection, but such interventions are only allowed when a formal request for help is forwarded by a contracting Party (Art. 23). This unfortunately led to the substantial impossibility of implementing the Convention, while war crimes against cultural heritage couldn't actually be prevented nor effectively sanctioned[133].

To try and partially solve the problems briefly outlined above, a second, more refined Protocol was adopted in 1999 (from this moment II Protocol), providing additional details to better define all the concepts perceived as too vague in UNESCO 1954.

For example, while States are still free to choose the preservation mechanism that they deem appropriate, at the same time a detailed list of preventive measures to adopt to ensure heritage protection in times of peace is also provided, thus making the concept of safeguarding less discretional (*II Protocol,* Art. 3 and 6-8).

Furthermore, the issue of when it should be allowed to forsake the Convention's provisions due to imperative military necessity is also handled: regarding this point, it is stated that exceptions to the general obligation of respecting cultural heritage are legit only if the intentionally destroyed or damaged cultural property had been made a military objective and no feasible alternative to reach a prefixed goal was actually available (*II Protocol*, Art. 6a).

[133] POSNER E. A., *The International Protection of Cultural Property: Some Skeptical Observations*, in *Chicago Journal of International Law*, vol. 213, 2007, p. 216

Lastly, international crimes against heritage destruction were instituted (*II Protocol*, Art. 15) and it was made clear that the Convention's provisions should be extended to internal armed conflicts as well (*II Protocol*, Art.22).

Ultimately, the II Protocol does reach its objective of setting up a stricter framework for heritage protection during armed conflicts; however, this regime failed to obtain large consensus among countries, as many of them – China as well – didn't want to undertake such strong obligations that would force them to invest considerable amounts of resources towards the institution of protection mechanisms[134]: as of today, only 44 States have ratified or accessed the II Protocol[135], thus making its application extremely limited.

1.2 The *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 1970

While other previous conventions had all been dedicated to cultural heritage protection during wartime, since at the time this was perceived as the most impending danger possible, heritage could also be subject to damages and destruction even in times of peace, especially due to theft, illicit trade and trafficking, nowadays considered as some of the most lucrative illegal activities worldwide after drug smuggling[136]. With the aim of fighting these specific crimes UNESCO on November 14 1970 officially adopted the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (from this moment UNESCO 1970), which is the first multilateral agreement ever to deal with international heritage protection in times of peace only.

The Convention's main objective is to increase international cooperation among States in order to efficiently regulate cultural heritage circulation worldwide. This does not mean that UNESCO 1970 aims to prohibit all kinds of cultural exchange among countries: to be specific, exchanges "*for scientific, cultural and educational purposes*" [137] are highly encouraged as part of UNESCO's mission, since they are considered one of the most effective

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[134] POSNER E. A., *The International Protection of Cultural Property: Some Skeptical Observations*, in *Chicago Journal of International Law*, vol. 213, 2007, pp. 218-221

[135] An adjourned list of Contracting Parties and the full text of the Protocol can be found at: http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited: 15/07/21)

[136] *Protecting Cultural Heritage by Disrupting the Illicit Trade* https://www.interpol.int/News-and-Events/News/2018/Protecting-cultural-heritage-by-disrupting-the-illicit-trade (last visited: 15/07/21)

[137] *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 1970, Preamble.

ways to actually "*increase the knowledge of the civilization of Man, enrich the cultural life of all peoples and inspire mutual respect and appreciation among nations*"[138].

On the contrary, UNESCO 1970 true target is undermining the import, export and transfer of ownership of cultural property illicitly conducted among States, as these deeds are seen as dangerous threats toward heritage protection in general and, in particular, often make it impossible for people to admire, enjoy and learn from each other's heritage, thus hindering nations from creating a positive climate of dialogue and mutual understanding with one another[139].

It should be noted that the term "illicit" implies all those activities conducted violating the laws of the country of origin: UNESCO 1970 can thus be rightfully applied not only to stolen goods, but also to cases when relics – banned from export under national legislation – are directly exported or sold by their lawful owners[140]. This has important implications especially for countries like China: in fact, considering the Chinese legislation, according to which, for example, first grade cultural relics, whether publicly or privately owned, are always banned from export, the sale or export of said relics is automatically considered illicit even when the transaction is conducted by its legal owner, thus befalling under the scope of UNESCO 1970 and making it possible for China to apply the Convention's provisions to ask for cultural property restitution.

In line with the principles already expressed in the first Protocol of UNESCO 1954, cultural property export and ownership transfer are also automatically considered illicit when they take place in occupied territories and/or are the result of interventions of foreign powers (Art.11).

1.2.1 UNESCO 1970 Scope of Application

The Convention has a total of 26 articles; Art. 1 identifies eleven categories of sites, relics and objects that once "*specifically designated by each State*"[141] constitute their national cultural heritage and as such are granted protection according to the Convention. As it is evident from this article, States are the ones with the authority to decide what should be

[138] *Ibidem*
[139] TAYLOR, J. M., *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?*, in *Loyola University Chicago International Law Review*, vol. 3, Issue 2, Spring/Summer 2006, p. 240; ZHONG HUI, *The Return of Chinese Cultural Treasures Taken From the Second Opium War (1856-1860)*, University of Queensland, 2014, p. 31
[140] FRIGO, M. *La Circolazione Internazionale dei Beni Culturali. Diritto Internazionale, Diritto Comunitario e Diritto Interno*, Milano 2001, p. 4
[141] *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 1970, Art. 1

considered cultural heritage within their territory: this implies that once a State recognizes something as part of its heritage, other countries also have to automatically accept this decision and do their utmost to favor heritage restitution if all the other conditions imposed by the Convention are met; on the contrary, whenever a State fails to recognize something as part of its heritage, Convention provisions cannot be applied.

This specific wording actually constitutes one of the main limits of UNESCO 1970, since it does not take into consideration the problem of undiscovered or unexcavated archeological sites: such sites are usually the preferred target of looters, whose actions not only often directly damage or even destroy relics, as a consequence of improper extraction procedures, but also determine the loss of scientific and scholarly data[142]. Unfortunately, since most of these sites are often still unexcavated by competent authorities when the looting takes place, stolen cultural relics aren't officially identified as part of national heritage and as a result aren't entitled to international protection nor their restitution befalls within UNESCO 1970 jurisdiction[143].

To limit the potential damages outlined above, Art. 4 was added, according to which all cultural property found within national borders, created by citizens of a State or by foreigners residing within the territory of that State, legally purchased or received as a gift (Art. 4 a-e) should be considered as part of a nation's cultural heritage, thus giving States the possibility of recognizing such sites and rightfully demanding the restitution of stolen property according to UNESCO 1970 provisions.

1.2.2 Main Obligations of State Parties

The duties undertaken by State parties can be divided into three categories: prevention of illicit international art trade, control of import/export movements and cultural heritage restitution.

The first measure to actually prevent cultural property trafficking is for States to set up an adequate heritage legislation to guarantee that, at least within national borders, relics are effectively preserved (Art. 14); to do this, it is also crucial to explicitly prohibit and sanction illicit import, export and transfer of ownership of relevant cultural property (Art. 5a).

[142] TAYLOR, J. M., *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?*, in *Loyola University Chicago International Law Review*, vol. 3, Issue 2, Spring/Summer 2006, p. 238; POSNER E. A., *The International Protection of Cultural Property: Some Skeptical Observations*, in *Chicago Journal of International Law*, vol. 213, 2007, p. 217; BATOR, P. M., *An Essay on the International Trade in Art*, in *Stanford Law Review*, Vol. 34, n. 2, January 1982, pp. 295-302

[143] PROTT, L. V., *Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 Years After its Adoption*, Report for the Second Meeting of States Parties to the 1970 Convention, June 20-21, 2012, pp. 4-5

Moreover, since only recognized heritage is officially covered by the Convention, creating and continuously updating a national inventory of protected heritage is highly encouraged (Art. 5b) since it would also reduce the possibility of restitution claims being refuted, as it often happens when, due to lack of information, it cannot be proven that a specific relic is actually part of a nation's heritage.

Additional activities that should be undertaken by State parties encompass the creation of research organizations and the promotion of archeological excavations (Art. 5c-d) or other educational activities to inform public opinion of the possible damages deriving from illicit trafficking (Art. 5f and Art. 10b).

Secondly, State parties should also adopt stricter export regulations and methodically supervise export procedures to prevent cultural relics from being smuggled; however, since most countries already have detailed rules, no specific details are brought up concerning what type of controls countries should apply: the Convention, instead, recognizes the "*indefeasible right*"[144] of States to design the regulations that best suit their situation as they can even completely ban some relics from being exported under any circumstance, thus making such relics inalienable (Art. 13d). The only innovative obligation introduced for State parties is the duty to create appropriate export certificates that testify that the export of specific cultural properties is authorized by the country of origin (Art. 6a), while, on the contrary, without said certificate, export should be prohibited (Art. 6b).

It should be noted that under UNESCO 1970 export restrictions, as vague as they may seem[145], are actually stricter compared to import ones: in facts, according to previous drafts of the Convention, States also had to take appropriate measures to prohibit any import of cultural heritage that lacked a valid export certificate emitted by the country of origin, however, this disposition was deemed difficult to implement and was later excluded from the final version of the document[146]. As of today, the only import restrictions effectively imposed in the official text are the prohibition for national museums to acquire cultural property illegally exported from another State party (Art. 7a) and, in general, the prohibition to import inventoried cultural property *stolen* from museums and other public institutions, whether

[144] *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 1970, Art. 13d

[145] As previously stated, the provisions contained in the first UNESCO Conventions tend to be quite vague, as a consequence of the need to find an acceptable balance between the interest of source nations and market nations. See *supra*, paragraph 1.1.

[146] FRIGO, M. *La Circolazione Internazionale dei Beni Culturali. Diritto Internazionale, Diritto Comunitario e Diritto Interno*, Milano 2001, pp. 7-9

religious or civil (Art. 7b.i). These two provisions, however, have been criticized for being too lax, since, for example, the import of cultural relics illicitly traded by their legal owners shouldn't in theory be restricted, especially when the transaction only involves privates (since such relics aren't considered stolen nor they are about to be acquired by national institutions).

Lastly, concerning the third category of duties undertaken by parties – cultural heritage restitution – Art. 7b.ii states that each country should "*take all appropriate steps to recover and return*"[147] any cultural property stolen and illicitly imported from another signing State party. For restitutions requests to be accepted, however, the requesting party should provide all necessary evidences to back its claim – or, in other words, prove that the property to be returned is indeed an inventoried part of its national cultural heritage – and offer a just compensation to the eventual "*innocent"*[148] purchaser.

Since the final approved version of Art. 7 only covers examples of heritage stolen from public institutions, it may seem that no legal basis exists to demand the return of other illegally exported relics. However, to avoid such problems, additional provisions were added in Art. 13 where it is stated that, if the restitution requests advanced by rightful owners are deemed valid, each State also has the duty of recovering any kind of illegally exported cultural property and facilitating to the best of their abilities its prompt restitution (Art. 13b-c).

As seen till this point, only States Parties of the Convention can, usually on behalf of their public institutions, demand heritage restitution, while no such possibility is offered to private individuals and institutions, whose requests are not covered by the Convention[149].

UNESCO itself also isn't directly involved in the Convention application, as its main duties are usually limited to offering technical assistance in the form of consultation services, coordination, research and other educational activities (Art.17).

1.2.3 Some Unresolved Problems of UNESCO 1970

Even though UNESCO 1970 provided, for the first time at international level, a legal basis for countries' cultural heritage restitution requests and some important successes have

[147] *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 1970, Art. 7b.ii

[148] *Ibidem*. The expression "innocent purchaser" is used here with the same meaning of "*bona fide* purchaser". The fact, however, that the phrase "*bona fide* purchaser" doesn't explicitly appear in the Convention text, created some interpretation problems concerning the treatment reserved for *bona fide* purchasers; these concerns would later be addressed in the UNIDROIT Convention of 1995. See *infra*, paragraph 2.1.

[149] OLIVIER, M., *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, in *Golden Gate University Law Review*, vol. 26, Issue 3, January 1996, p. 645

been obtained[150], four main limits that substantially weaken the effectiveness of the Convention have been identified.

First of all, UNESCO 1970 provisions can be applied only amongst contracting parties (Art. 7): as of today a total of 140 States have already ratified the Convention[151], however, several countries, especially relevant market nations like Germany or Switzerland, still refuse to adopt it. This isn't surprising if we consider that, by ratifying this Convention, contracting parties actually accept to recognize the export laws and restrictions imposed by a foreign country – namely the country of origin of a specific cultural relic – without preventively verifying whether such provisions are consistent or not with one's own substantive policies and many countries aren't willing to do so[152].

A second problem that should be taken into consideration is that the Convention obligations can be applied only if "*consistent with national legislation*"[153], which not only hinders the creation of a global shared legal frameworks, but also means that, if a State fails to adapt its national legislation, all the provisions described above cannot be applied. A particular problem that has occurred is that most States usually tend to favor property rights of local *bona fide* purchasers, instead of respecting UNESCO 1970 duties, but since no real superseding enforcement mechanism has been created, no State nor organization can sanction[154] other countries behaviors. UNESCO itself lacks both the power and the authority to enforce the Convention provisions and can intervene and mediate between two State parties only when required to do so by the same countries engaged in a dispute (Art. 17).

Moreover, cultural heritage restitution takes place exclusively through international cooperation and diplomatic channels (Art. 2 and 7), but no other external international organization exists to mediate between States. Considering this, to increase the chances of

[150] China and Italy, in particular, have both been successful in obtaining the restitution of looted and smuggled cultural properties under the terms of UNESCO 1970: China in 2003 (before the adoption of any bilateral agreement) obtained the collaboration of U.S. authorities to interrupt an auction at Sotheby's and return six ceramic statues previously looted from Han Dynasty Empress Dou's tomb. BEECH, H., *Spirited Away*, in *Time*, October 13, 2003.
Instead, in 2006 Italy's Minister of Culture, Francesco Rutelli, requested and obtained that some U.S. museums returned several illegally trafficked archeological relics. LACAYO, R., *Who Owns History?*, in *Time*, March 3, 2008.

[151] The full list can be found at https://en.unesco.org/fighttrafficking/1970 (last visited: 15/07/21)

[152] OLIVIER, M., *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, in *Golden Gate University Law Review*, vol. 26, Issue 3, January 1996, p. 643, note 104; POSNER E. A., *The International Protection of Cultural Property: Some Skeptical Observations*, in *Chicago Journal of International Law*, vol. 213, 2007, pp. 228-229

[153] *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 1970, Art. 7b.ii. Other equivalent expressions used are "*as appropriate for each country*" (Art. 5 and 10) and "*consistent with the laws of each State*" (Art. 13).

[154] UNESCO 1970 admits the possibility for a State of sanctioning actions that violate the provisions of the Convention, but only when committed by individuals, not States (Art. 8).

obtaining positive results, the Convention itself actually strongly encourages the adoption of additional bilateral agreements among State parties (Art. 15).

Lastly, UNESCO 1970 isn't retroactive, which means that protection is guaranteed only to relics illicitly exported after the treaty's entry into force. China, for example, cannot rely on said Convention to demand the return of relics stolen during the Opium Wars[155] and, in general, before its official entry into force. To try and partially solve this issue in 1978 the *UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* (ICPRCP)[156] was created, a permanent intergovernmental body in charge of facilitating bilateral negotiations concerning all those cultural properties that do not befall under UNESCO 1970, mainly because they had been smuggled before the Convention's entry into force.

1.3 The *Convention Concerning the Protection of the World Cultural and Natural Heritage* of 1972

The first two conventions analyzed in the previous paragraphs weren't deemed sufficient to efficiently ensure heritage protection worldwide, since, even though armed conflicts and heritage trafficking had indeed been perceived as the most incumbent dangers to cultural heritage at the time, other threats had also slowly started to emerge: countries,

[155] This specific issue is simply one aspect of a much broader debate, concerning the restitution or repatriation of cultural heritage to their rightful country of origin. The origins of this phenomenon trace back to the start of colonial domination when colonial powers would systematically loot and forcibly transfer abroad cultural heritage of occupied territories, as it also happened in China during the Opium Wars; the reasons for these actions varied, ranging from the earnest belief that this was the only way to ensure effective protection of local relics, to the desire to acquire popular objects to resell on the growing art market; regardless of the reasons, this favored the birth of public and private collectionism, but also undoubtedly impoverished colonized territories. With the end of imperialism, former colonies, in the midst of constructing and strengthening their new national identity, started to strongly request the restitution of these relics, however, currently the international debate is still ongoing and no agreement has been reached on the topic, since former colonial powers and market countries in general oppose such an idea, affirming that, when the so-called thefts took place, no existing legal instrument was explicitly prohibiting it and, therefore, such actions shouldn't technically be considered illegal. Unfortunately, as of today, no legal tools are available to countries that want to re-enter in possession of their smuggled heritage, since all relevant conventions and agreements aren't retroactive and, as a consequence, cannot be applied: this means that cases of repatriations effectively took place only when museums or other institutions voluntarily decided to return the relics in their collections to their rightful owners or when private citizen independently acquired said relics on the international art market and subsequently donated them to their local authorities. For more information on this topic, see KOWALSKI, W., *Types of Claims for Recovery of Lost Cultural Property*, in *Museum International*, vol. 57, n. 4, 2005; ROEHRENBECK, C., *Repatriation of Cultural Property – Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*, in *International Journal of Legal Information*, vol. 38, Issue 2, July 2010; SIMPSON, M., *Museums and Restorative Justice: Heritage, Repatriation and Cultural Education*, in *Museum International*, vol. 61, n. 1-2, 2009.

[156] PROTT, L. V., *Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 Years After its Adoption*, Report for the Second Meeting of States Parties to the 1970 Convention, June 20-21, 2012, p. 5. Information on the Committee can be found at https://en.unesco.org/fighttrafficking/icprcp (last visited: 15/07/21).

especially developing countries, were evolving swiftly, while changes in social patterns and rapid economic development were further exacerbating an already precarious situation, affecting both natural and cultural heritage[157]. Considering that the one endangered was the cultural heritage of mankind, whose destruction would prove an impoverishment for "*all the nations of the world*"[158], the solution proposed was the implementation of a new international treaty, the *Convention Concerning the Protection of the World Cultural and Natural Heritage* of 1972 (from this moment UNESCO 1972), that laid the basis for the creation of a system focused on international cooperation and collective assistance to ensure protection of, at least, the most relevant examples of cultural and natural heritage worldwide.

UNESCO 1972 has a total of 38 articles, integrated by the *Operational Guidelines for the Implementation of the World Heritage Convention*; as of today it has been ratified or accessed by 194 countries[159], thus being the UNESCO Convention with the highest number of contracting Parties.

Interestingly, compared to previous agreements, UNESCO 1972 recognizes that heritage isn't only related to culture, but nature as well should be considered as part of a nation's heritage. As such, the Convention's provisions should be applied to both natural and cultural heritage (Art. 1 and 2) with the aim of finding a balance between the two of them.

Concerning the duties of contracting Parties, it should be noted that, under the regime created by UNESCO 1972, States have absolute sovereignty over their national heritage, as they are the only ones with the authority to and responsibility of identifying them (Art. 3)[160]. Moreover, other them identifying them, each State also has the obligation to ensure "*to the utmost of its own resources*"[161] that the highest level possible of protection is granted to its recognized national heritage (Art. 4). To reach this objective and further enhance heritage protection wherever possible, contracting Parties within their own territories have the responsibility of sponsoring research studies (Art. 5.3), creating preservation centers and train

[157] https://whc.unesco.org/en/convention/ (last visited: 15/07/21)
[158] UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1972, Preamble
[159] The updated list of State Parties to the Convention can be found at https://whc.unesco.org/en/statesparties/ (last visited: 15/07/21)
[160] While this may seem an important result of the Convention that would allow countries – in particular source countries – to retain actual control over their own heritage as no foreign intermission is accepted, at the same time, this concept also implies that the international community has no say on what is deemed worthy of protection: this in particular may be counterproductive for heritage in general, as it prevents foreign Parties from helping preserve heritage that for whatever reason (cultural, economic or even a political one) failed to be recognized as such at national level. BLUMENFIELD, T. and SILVERMAN, H., *Cultural Heritage Politics in China*, New York 2013, p. 11
[161] UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1972, Art. 4

the personnel that will operate them in the future (Art. 5.2 and 5.5) and setting up all the additional legal, scientific, technical, administrative and financial measures and facilities required by each specific situation (Art. 5.4). It can be easily seen that all the aforementioned obligations are actually mechanisms that each individual State should have already implemented at national level or should be at least planning to, depending on the resources that can be invested on such projects[162]; instead, the new concept that is introduced for the first time by the Convention with these provisions is that, when States design their heritage policies and all other related measures, it is important for heritage protection to be as much as possible an aspect integrated with the daily life of local communities (Art. 5.1) and for State to promote *ad hoc* educational initiatives (Art. 27), since, by doing this, countries can more easily support the circulation of information about said heritage and the threats it could be exposed to if not preserved correctly, they can involve more and more people in heritage protection at local level and even obtain other countries' attention and recognition worldwide.

One last important obligation includes the need for contracting Parties to produce frequent reports concerning the legislative and administrative measures adopted and the current preservation state of recognized cultural and natural heritage within their territory (Art. 19.1), since such reports are deemed an essential instrument to constantly monitor and assess the effective implementation of the Convention's provisions[163].

Even though, as stated above, a State's sovereignty over its own cultural and natural heritage is undeniable, given the importance that heritage generally has for the entire world, the international community as a whole should cooperate in order to ensure its protection (Art. 6.1): this implies that contracting Parties, on one hand, are strictly forbidden from intentionally damaging or endangering another Country's heritage (Art. 6.3); on the other hand, they are also strongly encouraged to support, when requested, other Parties in carrying out duties such as the identification, protection and presentation of their cultural and natural heritage (Art. 6.2 and 7).

1.3.1 The World Heritage List and the World Heritage Fund

Amongst the greatest achievements of UNESCO 1972 it should indeed be remembered the creation of both the *World Heritage List* and the *World Heritage Fund*.

[162] GRUBER, S., *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, in *Asia Pacific Law Journal of Environmental Law*, vol. 10, n. 3, 2007, pp. 262-263
[163] UNESCO *Operational Guidelines for the Implementation of the World Heritage Convention*, 1972, Chapter V, Par. 201-202

The World Heritage List[164] is an inventory, to be adjourned at least once every two years, comprising all the cultural and natural properties characterized by an "*outstanding universal value*"[165] identified within the territories of the Convention's contracting Parties (Art. 11.2). Interestingly, only the State where said heritage is located can forward a formal request for inscription on the List, otherwise, without the country's consent, the nomination will be deemed invalid (Art. 11.3).

Once inscribed on the World Heritage List, heritage sites should receive permanent protection (Operational Guidelines, Art. 49), however this doesn't mean that States can forsake the preservation of any of their other cultural properties: on the contrary, contracting Parties must strive to protect all their national heritage to the utmost of their capabilities (Art. 12), even if they are not inscribed on the List or their nomination has been rejected. The only relevant difference is that, with normal cultural heritage, countries can only rely on their own resources, while World Heritage List entrees, due to their exceptionality, are eligible to receive international assistance (Art. 19 and 20) and can gain access to the World Heritage Fund[166].

Whenever their preservation is particularly "*threatened by serious and specific dangers*"[167] – both natural and human – there is the possibility for some of the sites inscribed on the List to also be included in the "List of World Heritage in Danger"[168] (Art. 11.4): in this case, the consent of the concerned State isn't required and the World Heritage Committee can freely design the corrective measures needed and ask for international cooperation on the matter[169].

All international activities concerning properties on the World Heritage List are primarily financed from the World Heritage Fund (Operational Guidelines Art. 233).

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[164] Currently, after the 44th session of the World Heritage Committee held in July 2021, there are 1154 properties inscribed on the World Heritage List; among them Italy alone has 58 properties and China has 56, thus being the two countries with the highest number of heritage sites inscribed at the moment. The adjourned List is available on the UNESCO website, at: https://whc.unesco.org/en/list/&order=country#alphaI (last visited: 15/07/21)

[165] UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1972, Art. 11.2

[166] The same treatment is also reserved for heritage inscribed on the Tentative List for the World Heritage List, since the fact itself that they are included in the tentative list means that the State has already recognized their potential outstanding universal value (Operational Guidelines Art. 233).

[167] UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1972, Art. 11.4

[168] As of today there are 52 properties included on the List of World Heritage in Danger, none of which is Chinese. The complete List is available on the UNESCO website, at: https://whc.unesco.org/pg.cfm?cid=86 (last visited: 15/07/21)

[169] GRUBER, S., *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, in *Asia Pacific Law Journal of Environmental Law*, vol. 10, n. 3, 200, p. 264

Said Fund is a trust fund, whose resources consist mainly of the compulsory donations that contracting Parties agreed to pay once every two years (Art. 15.3a and 16.1); other sources include donations and contributions from the UNESCO or other international organizations (Art. 15.3b), funds raised during special events organized for this very purpose (Art. 15.3d and 18) and even individual donations from private parties (Art.17).

States can request access to the Fund for different kinds of projects, however utmost priority should be given to emergency interventions aimed at salvaging properties on the List of the World Heritage in Danger (Art. 13.4). Unfortunately, considering the great number of heritage sites currently endangered or, in any case, in need of conservation and management assistance, the resources available in the World Heritage Fund are amply insufficient, but they can nonetheless be used to mobilize additional funds from other sources (Operational Guidelines, Art. 225).

1.3.2 The World Heritage Committee

UNESCO 1972 also established an intergovernmental committee purposely created to manage all work relevant to the protection of cultural and natural heritage of outstanding universal value (Art. 8.1).

The Committee is composed by 21 members[170], elected among the contracting Parties of the Convention and it can be supported in the execution of its functions by some external advisors, usually nominated in representations of the most important heritage international organizations, like ICOMOS (International Council of Monuments and Sites) and IUCN (International Union for Conservation of Nature and Natural Resources) (Art. 8.3); to ensure an equal representation to all the regions and cultures of the world (Art. 8.2) members of the Committee are usually elected for a period of six years, but each State can voluntary choose to limit its mandate to only four years, thus allowing other contracting Parties to be elected and guaranteeing a continuous interchange within the Committee[171].

The World Heritage Committee performs different functions: first of all, it defines the requirements for heritage to be included in the World Heritage List and the List of World Heritage in Danger (Art. 11.5) and, at the same time, it also evaluates contracting States'

[170] China has been elected for the first time as a member of the World Heritage Committee in 1999. Since then three other mandates followed, the last of which ending in July 2021. https://whc.unesco.org/en/statesparties/cn (last visited: 15/07/21)

[171] During its first two mandates China decided to serve for all the required six years, while in the last two mandates, instead, decided to step down from the position after the first four years. https://whc.unesco.org/pg.cfm?cid=166 (last visited: 15/07/21)

nominations, constantly updating and publishing the latest version of both lists (Art. 11.2 and 11.4).

Furthermore, the Committee has complete control over how the resources of the World Heritage Fund are distributed (Art. 13.6); similarly, it can assess the requests for international assistance forwarded by contracting Party and decide where, how and to what extent intervene (Art. 13.1)[172]

Lastly, it is also in charge of favoring cooperation with other international organizations and realize projects that may be advantageous for all the Parties involved (Art. 13.7).

1.3.3 Advantages and Disadvantages of Signing the Convention

Despite substantially reaching its goal of creating an international cooperation system centered on heritage protection, UNESCO 1972 still fails to solve some problems common to almost all UNESCO conventions.

A first unresolved issue is the fact that the Convention mostly provides States with guidelines to follow, without explicitly obliging them to adopt specific sets of obligations: this implies that contracting Parties are free to apply the Convention's provisions in completely different ways, each opting for the policies and measures that best fit them according to their own national legislations[173].

Secondly, even though the World Heritage Committee has absolute decision-making power in some limited areas like control over the World Heritage List and the World Heritage Fund, generally speaking it has no enforcement power nor exists another organization with the authority to impose to other countries the implementation of UNESCO 1972 provisions[174].

Moreover, while contracting Parties can gain access to the World Heritage Fund, it is indeed difficult to obtain such resources and, even when a project is approved for financing, the requesting State is still expected to shoulder the greatest part of the incurred expenses unless it is able to amply prove that its resources are indeed insufficient (Art. 25).

[172] Usually assistance is granted in the form of technical support from experts for studies and researches (Art. 22.2) or help in training specialists (Art. 22.3), however, in particular instances, the Committee may also purchase materials and equipment on behalf of contracting Parties that are unable to acquire them directly (Art. 22.4) or offer long-term interest-free loans (Art. 22.5).

[173] GRUBER, S., *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, in *Asia Pacific Law Journal of Environmental Law*, vol. 10, n. 3, 200, p. 263

[174] *Ibidem*

Nonetheless, ratifying the Convention will still prove beneficial for several reasons. Obviously, thanks to the dialogue and exchanges made possible by UNESCO 1972, national cultural heritage legislation can be greatly and positively influenced[175].

However, from China's point of view, the most important advantage that can be achieved is probably the prestige deriving from having its own cultural or natural heritage inscribed in the World Heritage List: to be specific, being part of UNESCO 1972 is actually an efficient leverage to enter into the international community and to exploit a pacific organization to spread a positive image of China as one of the most active countries in the protection of the so-called cultural heritage of mankind, while also increasing its own global presence. Other than that, actively participating in the projects organized by the World Heritage Committee or sending financial and technical support to other countries in need may prove advantageous when defining new strategic alliances worldwide[176].

Lastly, sites inscribed on the World Heritage List are usually subject to an increase in public awareness: if a country is able to correctly manage and shape this phenomenon, it can surely be converted in tourist movement, thus generating revenues at least at local level[177].

2. Other Multilateral Agreements

Whilst it is undeniable that UNESCO is currently the most important international organization devoted to cultural heritage protection, other institutions also are actively setting new standards and practices, promoting educational activities to enhance social awareness and international cooperation towards the creation of a global legal framework that will ensure heritage protection, favor intergovernmental dialogue between countries and help countering illicit cultural heritage trafficking[178].

Amongst them, ICOM (International Council of Museums), WCO (World Customs Organization) and INTERPOL deserve a particular mention.

As of today, ICOM is the main partner of UNESCO and the highest standard-setting authority worldwide for all matters concerning museums' organization, management and preservation policies; additionally, it also has a crucial role in encouraging transnational

[175] https://whc.unesco.org/en/convention/ (last visited: 15/07/21)
[176] RIVA, N., *Dal Soft Power al Wenhua Ruan Shili: la Cultura al Centro*, in LUPANO, E., *La Cina dei Media. Analisi, Riflessioni, Prospettive*, Milano 2016, pp. 46-47
[177] *Ibidem*
[178] FIORENTINI, F., *The Trade of Cultural Property: Legal Pluralism in an Age of Global Institutions*, in *SSRN Electronic Journal*, January 2013, pp. 125-126

exchanges and research among different institutions and promoting all sorts of museum related initiatives[179].

As the organizations in charge respectively of coordinating the work of national customs administrations and of facilitating police cooperation and crime prevention worldwide, WCO and INTERPOL, instead, focus part of their efforts and resources in fighting illicit trafficking of cultural property, thanks to the creation of an online information exchange platform and a regularly updated database for stolen cultural heritage[180].

Another fundamental inter-governmental institution whose contributions towards heritage protection cannot be overlooked is UNIDROIT (International Institute for the Unification of Private Law). This organization's main purpose actually is to harmonize private law and formulate uniform law instruments, principles and rules to be applied worldwide; its scope of activity is extremely broad and touches all sorts of different research areas, among which heritage protection can be found as well. It usually prefers "soft law" instruments, like model laws, general principles or legal guides, that may be used as references by States when drafting domestic regulations or may be freely addressed by judges and arbitrators; despite this, however, UNIDROIT has also been responsible for the draft of "hard law" alternatives, namely legally binding international conventions[181], an excellent example being the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* of 1995[182] (from this moment UNIDROIT 1995). Said Convention was actually commissioned by UNESCO in 1984 as a revision and integration of the preexisting UNESCO 1970 Convention, the final result being an instrument compatible and complementary to UNESCO 1970 that, however, adopts a private law approach to try and solve some of the problems present in the previous documents concerning actions against illegal trade of stolen or illegally exported cultural heritage and their the restitution.

Currently China is a member of all the organizations presented above and has adopted numerous of the agreements, recommendations and practices they proposed; however, since the most sophisticated international legal instrument that China has ratified is indeed the UNIDROIT 1995 Convention, the following paragraph will focus exclusively on said document.

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[179] A general list of ICOM functions, standards and recommendations can be found on its official website, at: https://icom.museum/en/our-actions/ (last visited: 15/07/21)

[180] More information on WCO and INTERPOL activities and their databases can be found on their respective websites: WCO, http://www.wcoomd.org/en.aspx; INTERPOL, https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database (last visited: 15/07/21)

[181] Information on the type of instruments adopted by UNIDROIT and its working method are available on the UNIDROIT website, at: https://www.unidroit.org/about-unidroit/overview (last visited: 15/07/21)

[182] The Convention was adopted in Rome on June 24 1995. China ratified it on May 7 1997.

2.1 The *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* of 1995

Currently, UNIDROIT 1995 has been officially ratified or accessed by 50 countries and, as all other international conventions, its provisions are legally binding for contracting parties.

Considering that since UNESCO 1970 countries should have already extensively set up their own national regulations relevant to import and export control mechanisms[183], UNIDROIT 1995 focuses solely on the restitution and return of stolen or illegally exported cultural property, with the objective of obliging State parties to recognize the limits to cultural heritage circulation and commercialization imposed by other countries' national legislation[184]; the main instrument used to reach this result however isn't diplomatic cooperation, as it was in previous conventions, but private law provisions.

The Convention has a total of 21 articles, divided into 5 Chapters, as follows: Scope of Application and Definition (Chapter I – Art. 1-2); Restitution of Stolen Cultural Objects (Chapter II – Art. 3-4); Return of Illegally Exported Cultural Objects (Chapter III – Art. 5-7); General Provisions (Chapter IV – Art. 8-10); Final Provisions (Chapter V – Art. 11-21).

As Art. 1 states, UNIDROIT 1995 can be applied to all international claims relevant to the restitution of stolen cultural objects or the return of illegally exported cultural objects.

Compared to previous legal documents, the present Convention actually defines the two concepts of "restitution" and "return", establishing that "restitution" claims can be forwarded when dealing with stolen heritage (Art.1a), regardless of the place where the theft may have taken place or the object was recovered, be it the country of origin or abroad[185]. "Return" requests, instead, can only be applied to heritage illicitly exported from the territory

[183] UNIDROIT 1995 drafters chose not to address these specific aspects within the convention; instead, model guidelines – a soft law tool – were designed to facilitate the application of the UNESCO 1970 and UNIDROIT 1995 conventions and the strengthening of national cultural heritage protection legislation: the *UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects*. Interestingly enough, it seems that China has already adopted most of these model provisions, like the institution of State ownership for undiscovered cultural heritage. https://www.unidroit.org/instruments/cultural-property/model-provisions.

[184] FRIGO, M., *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, in *International Review of the Red Cross*, vol. 86, n. 854, June 2004, p. 29

[185] As commented in the Explanatory Report published by UNIDROIT together with the Convention, many different proposals were forwarded concerning the definition of stolen cultural heritage and its restitution, but in the end it was decided not to define "theft" nor to add details concerning where the theft had to happen for the Convention to be applied. The main problem that was being addressed was that the theft of cultural heritage may not necessarily always have an international character, which is instead intrinsic with the definition of illicit export; the intent of the drafter was for Art. 1a to encompass not only the cases where cultural relics are stolen and subsequently found abroad (cases whose international character is obvious), but also all the cases in which stolen relics are recovered within their country of origin after they have crossed borders and have been traded abroad. UNIDROIT Secretariat, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, in Unif. L. Rev., December 31, 2001, pp. 9-10

of a contracting State in violation of its laws "*regulating the export of cultural objects*" (Art. 1b): this specific wording implies that the Convention should only cover cases where national laws specifically adopted to regulate cultural heritage export have been breached, thus avoiding the possibility of States or private owners being obliged to return objects whose export only violates general national customs regulations[186].

For the purposes of the Convention, cultural relics that have been legally temporarily exported (for exhibition, research or restoration purposes) but haven't been accordingly returned, should be deemed equivalent to illicitly exported cultural property (Art. 5.2).

Concerning, instead, the definition of "*cultural objects*"[187] to which the Convention's provisions can be applied to, we can see that according to UNIDROIT 1995 protection should be extended to all the cultural objects, both private and public, that fulfill the following two conditions: to be specific, they must be "*of importance for archaeology, prehistory, history, literature, art or science*"[188] and at the same time belong to one of the categories listed in the Annex to the Convention (which is substantially the same list contained in UNESCO 1970, Art. 1). The interesting innovation brought forth by Art. 2 is that, for the first time since UNESCO 1970 and 1972, States do not have exclusive authority over what is to be defined as cultural heritage and protected as such. Despite this seeming a disadvantage for contracting States, that would thus be unable to enforce protection on the totality of their national cultural heritage, two interesting advantages can actually be derived from this article: on one hand, as a result of the attempt to find a more objective definition for cultural heritage, contracting parties do not have to automatically recognize – and are not in turn obliged to return – all the relics that the requesting State unilaterally identifies as part of its cultural heritage according to its national internal regulations[189].

On the other hand, the second important consequence is that, since criteria for defining cultural heritage are objective, there is no need for States to explicitly claim something as a cultural object for the Convention to be applied: this, in theory, means that relics unlawfully excavated from archeological sites or legally excavated but unlawfully retained and smuggled

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[186] FRIGO, M., *La Circolazione Internazionale dei Beni Culturali. Diritto Internazionale, Diritto Comunitario e Diritto Interno*, Milano 2001, p. 19, note 22

[187] *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 1995, Art. 2. In Art. 2 UNIDROIT 1995 specifically uses the term "cultural objects", but throughout the same text the alternatives "cultural property" and "cultural heritage" are also used interchangeably, so cultural objects should be considered as a perfectly equivalent term on par with the others.

[188] *Ibidem*

[189] Despite this obvious limit, it should be noted that the scope of application of UNIDROIT 1995 is quite broad, to the point that some market nations have refused to ratify the Convention, not wanting to be bound by its obligations. FRIGO, M., *La Circolazione Internazionale dei Beni Culturali. Diritto Internazionale, Diritto Comunitario e Diritto Interno*, Milano 2001, p. 21

can also be rightfully protected (Art. 3.2), thus finally solving the problem of undiscovered and unexcavated sites[190], left open since UNESCO 1970.

2.1.1 Procedures for Submitting Restitution Claims and Return Requests

Under UNIDROIT 1995 jurisdiction, cultural heritage restitution claims can be brought by the legal owner before the court of the State where the stolen relic was retrieved (Art. 3); however, since UNIDROIT 1995 nor its Explanatory Report specify what kind of actor can make such claims, it has been generally accepted that both States and private parties can directly ask for the restitution of their stolen cultural property[191]. Interestingly enough, only in the case of restitution, as long as the claimant is able to prove that a theft has indeed occurred, no other legal information is needed to back such claims[192].

The procedures for requesting the return of illegally exported cultural heritage, instead, are slightly different, mainly due to the fact that while all States admit that theft is a crime and this in itself constitutes a sufficient legal basis for claiming the restitution of stolen objects, no such agreement has been reached concerning illicit export: the circumstances according to which an export procedure should be considered unlawful are strictly linked to national export restrictions, whose enforcement at international level implies recognizing the public law obligations of another country, something States are always wary of; as a consequence, illicit export in itself is not sufficient to automatically obtain the return of smuggled cultural property, but a specific set of additional requirements should be met. First of all, return requests can only be presented by a contracting State party, not by a private, to the administrative body or court of the country where the cultural object was retrieved (Art. 5.1).

Secondly, said court will in turn enforce the return request if the requesting State is able to provide complete information, either factual or legal (Art. 5.4), to prove that the exported object is an "*important*"[193] constituent of a nation's cultural heritage or that its

[190] TAYLOR, J. M., *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?*, in *Loyola University Chicago International Law Review*, vol. 3, Issue 2, Spring/Summer 2006, p. 242

[191] OLIVIER, M., The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property, in Golden Gate University Law Review, vol. 26, Issue 3, January 1996, p. 656

[192] UNIDROIT Secretariat, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, in Unif. L. Rev., December 31, 2001, p. 504

[193] No additional detail is provided to specify under which circumstances cultural heritage should be considered "important". However, this specific provision could be seen as an encouragement for States to record and catalogue all information pertaining to their national cultural heritage, in order to prove their importance and increase their possibilities for an eventual return request to be accepted. FRIGO, M., *La Circolazione*

export constitutes a threat toward its physical preservation (Art. 5.3a) and integrity (Art. 5.3b) or toward the preservation of related scientific and historical information (Art. 5.3c) or of some specific traditional knowhow (Art. 5.3d).

Moreover, return requests are automatically considered void and rejected if, when the said request is forwarded, the export is no longer considered unlawful according to the country of origin legislation (Art. 7.1a), usually due to a change in relevant regulations. Similarly, the return procedure described in Art. 5 cannot be applied when the objects in question are exported during the lifetime of their creator or within fifty years after their death (Art. 7.1b), which means that the Convention's provisions do not pertain to the circulation of modern and contemporary art[194].

A significant innovation introduced in UNIDROIT 1995 is the concept of prescription terms applied to cultural heritage: both restitution claims and return requests can be accepted only if presented within three years from the moment the location of the cultural object and the identity of its possessor were known to the claimant (Art. 3.3 and 5.5). In any case, any claim must brought within fifty years from the moment the theft (Art. 3.3) or the illegal export (Art. 5.5) took place, otherwise such actions will be prescribed and the claimant will lose its right to ask for its restitution or return according to UNIDROIT 1995.

Only in cases of theft, however, the fifty year time limit should not apply if the stolen cultural objects belong to a public collection, an identified archeological site, a religious institution or an indigenous community (Art. 3.4, 3.7 and 3.8); in such instances States have two possible choices: they can chose not to set a specific time limit for these specific categories of cultural property or they can impose a prescription limit of seventy-five years (or higher) within which restitution claims can be made (Art 3.5), however it should be noted that, if contracting parties chose to impose a time limitations on restitution claims within its jurisdiction, the principle of reciprocity applies and its own cultural heritage will be subject to the same prescription limits within other countries territories[195]; China itself, for example, has decided to accept a seventy-five years limit for restitution claims[196].

Internazionale dei Beni Culturali. Diritto Internazionale, Diritto Comunitario e Diritto Interno, Milano 2001, p. 32

[194] The only admitted exception to Art. 7.1b are cultural objects created by indigenous communities, whose return should always be granted (Art. 7.2).

[195] UNIDROIT Secretariat, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, in Unif. L. Rev., December 31, 2001, p. 510

[196] NOVARETTI, S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, p. 183, note 109

2.1.2 The Issue of Bona Fide Purchasers

One of the main topics addressed in UNIDROIT 1995 is how to solve eventual ownership disputes between legal owners and *bona fide* purchasers of stolen or illegally exported cultural objects.

The Convention introduces some important innovations, starting with the principle that all stolen cultural heritage should be returned (Art. 3.1), regardless of whether it has been purchased in good faith or not. This seemingly trivial provision is actually one of the biggest successes of the Convention, since for the first time in an international agreement it is implied that contracting parties are now obliged to protect the lawful rights of original owners, instead of protecting the property rights of local purchasers, subjects that States had always been more inclined to protect.

Dispossessed purchasers are entitled to a "*fair and reasonable compensation*" (Art. 4.1), to be paid directly by the person responsible for the transaction or by the material actor of the illicit action when they are two different individuals (Art. 4.2). Such a compensation however is not automatically awarded to all dispossessed purchasers, but, on the contrary, it's only extended to *bona fide* purchasers: in other words, to be able to obtain the promised compensation, the purchaser must successfully prove that he didn't know that the object acquired had been previously stolen and that he had exercised all necessary due diligence during the transaction (Art. 4.1), for example, by checking the register of stolen cultural heritage and the validity of the export certificate (Art. 4.4).

Coherently with the intentions of the authors of UNIDROIT 1995, the promise of a compensation for *bona fide* possessors should actually be seen as an incentive for purchasers to pay greater attention to the circumstances in which any transaction takes place and for dealers to provide all documents concerning the transaction or they as well won't be entitled to receive any compensation whatsoever[197].

Once again, provisions are slightly different when dealing with illegally exported cultural property: in such cases, *bona fide* purchasers are always entitled to the payment of a compensation (Art. 6.1) as long as they are able to prove that the required due diligence has been exercised (Art. 6.2); however said compensation should be paid by the requesting State (Art. 6.1), who should also bear the cost of all the other expenses concerning the return of cultural heritage (Art. 6.4).

[197] OLIVIER, M., *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, in *Golden Gate University Law Review*, vol. 26, Issue 3, January 1996, pp. 33-34

Furthermore, a *bona fide* purchaser and the requesting party can also reach a completely different agreement, deciding for example that the purchaser will retain ownership of the object (Art. 6.3a) if he guarantees not to resell it to the original trader or deciding that the purchaser will transfer ownership of the object to a third person residing in the territory of the requesting party (Art. 6.3b).

2.1.3 General Provisions

One last aspect that should be analyzed is the choice of jurisdiction.

In order to increase the application possibilities and the general effectiveness of the Convention, UNIDROIT 1995 tries to set a "*uniform rule on jurisdiction*"[198], according to which claims for the restitution of stolen cultural objects or for the return of unlawfully exported ones can be brought both before the courts or competent administrative bodies of the requesting State and before the courts of the State where cultural heritage has been retrieved or where its purchaser is located (Art. 8.1). The main results of this provision are the fact that it provides to contracting parties a new basis of jurisdiction other that national laws and it ensures that the retrieval process will be quickly completed since now restitution or return sentences can be implemented directly by the court of the State where stolen and illegally exported cultural relics are located, while, on the other hand, there is no more need for additional enforcement procedures to recognize and execute sentences emitted by the courts of the requesting State[199].

Moreover, to better guarantee the physical integrity of cultural heritage and the protection of a claimant's rights, all precautionary measures emitted by another contracting party should be executed in the State where such heritage is located (Art. 8.3).

Additionally, interested parties (both States and private parties) can also choose to submit their disputes to the court of a third party or even opt for arbitrage (Art. 3.2), the latter being a solution often encouraged, given the confidentiality and neutrality that arbitrage procedures usually ensure and the technical expertise offered by arbitrators.

Lastly, it is worth noticing that, if national laws or other provisions of international treaties a State has adhered to are proven to be stricter or more sophisticated compared to the ones contained in the Convention, the most favorable rule should always prevail over the others (Art. 9.1).

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[198] UNIDROIT Secretariat, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, in Unif. L. Rev., December 31, 2001, p. 542

[199] FRIGO, M., *La Circolazione Internazionale dei Beni Culturali. Diritto Internazionale, Diritto Comunitario e Diritto Interno*, Milano 2001, pp. 34-40

As of today, UNIDROIT 1995 is still one of the most sophisticated international instruments concerning heritage protection and would prove extremely effective in fighting art trafficking, however, two main defects should still be pointed out: first of all, similarly to what happened with UNESCO 1970, the Convention isn't retroactive (Art. 10.1 and 10.2), so it cannot be used to request the restitution of cultural property stolen or illicitly exported before the ratification of the Convention itself.

The second problem is that the Convention's provisions can only be applied if both parties – the claimant and the State where the relics where retrieved – have adopted the Convention; however, since UNIDROIT 1995 tends to favor source nations while, at the same time, putting several market nations at a disadvantage, some of the most important market nations have refused to ratify said Convention, thus greatly reducing its potential impact[200].

3. Bilateral Agreements

Given the general problems of international conventions briefly outlined above, namely the vagueness of their provisions, the impossibility of effectively enforcing them and the lack of adoption especially amongst market nations, many States have decided to look for alternative legal instruments like bilateral treaties, that would allow them to negotiate directly with said market nations and reach the most favorable agreement possible.

Even though these kinds of treaties only contain general provisions whose enforcement solely depends on national regulations, several objectives can still be reached by signing them. On one hand, States through bilateral cooperation usually hope to actively realize some heritage preservation initiatives: this implies, depending on the country the agreement is negotiated with, for example, favoring institution-to-institution dialogue, in order to promote educational short-term museum exchanges or cross-border research projects. Similarly this enhanced cooperation may also result in adhering Parties asking their counterpart for support by implementing shared training programs for specialized heritage protection personnel and joint archeological excavations or renovation initiatives, thus

[200] OLIVIER, M., *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, in *Golden Gate University Law Review*, vol. 26, Issue 3, January 1996, p. 664

allowing a continuous upgrade in heritage standards in all related areas, from research to on site heritage management[201].

On the other hand, the other main objective contracting Parties usually focus on is also to increase the cooperation between relevant administrative and government authorities, first of all, by promoting a regular information exchange concerning their respective national cultural heritage. Additionally, in order to try and adopt stricter and more effective control mechanism on heritage circulation than those included in the international conventions described in this chapter, contracting Parties can agree to mutually impose import restriction on a specific list of cultural properties; this is not an easy objective to achieve since any effective control system would require a close collaboration between both Parties customs authorities and police forces – as they are the ones most closely involved with cases of heritage trafficking – especially when one of the contracting Parties is a market nation[202].

China in particular have been extremely active in this area and in the span of forty years have signed more than thirty bilateral treaties with both market and source nations[203]. Amongst them one of the most interesting[204], as it involves the two countries with the highest

[201] MARTON, A. L., *On Rabbits, Rats and Low-Hanging Fruit: Rethinking the Impact of International Agreements on China's Domestic Cultural Property Protection*, in *Columbia Journal of Asian Law*, vol. 23, 2009, pp. 234-237

[202] NOVARETTI, S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, p. 186

[203] HUO ZHENGXIN, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, in *International Journal of Cultural Policy*, vol. 22, n. 4, 2016, p. 10

[204] Among the bilateral agreements adopted by China the most important is the Memorandum of Understanding signed with the US on January 14 2009. The adoption of this treaty proved highly controversial, since the terms originally proposed by China in 2004 were extremely restrictive and unbalanced and US scholars argued that accepting them would excessively depress the US art market, which was indeed one of the preferred markets for Chinese cultural property; additionally, many scholars also objected that the measures previously implemented by China to protect its own national cultural heritage till that point weren't enough and that cultural heritage wasn't really endangered by art trafficking as much as the economic development plans adopted by the Chinese government itself. After lengthy discussions a compromise was reached and a first Memorandum was ratified in 2009 for an initial period of five years, later on renewed for another five years both on 2014 and 2019. The main obligation imposed by the Memorandum is for the US to restrict the import into national territory of Chinese cultural heritage dating from "*the Paleolithic Period through the end of the Tang Dynasty (A.D. 907), and of monumental sculpture and wall art at least 250 years old*" (Art. 1.1). China instead has to "*use its best efforts*" (Art. 2.3-4) to improve the effectiveness of its internal heritage protection mechanisms and export restrictions, especially towards Honk Kong and Macau (Art. 2.5-6), to support long-term academic exchanges with US institutions (Art. 2.7) and to invest in a "*national preservation strategy*" (Art. 2.8) with the technical support of the US.
For a summary of the US debate concerning the adoption of the Memorandum of Understanding, see BAUM, I., *The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?*, in *Cardozo Arts & Entertainment*, n.24, 2006; for an analysis of the contents of the Memorandum, see MARTON, A. L., *On Rabbits, Rats and Low-Hanging Fruit: Rethinking the Impact of International Agreements on China's Domestic Cultural Property Protection*, in *Columbia Journal of Asian Law*, vol. 23, 2009 and MURPHY, N. M., *The Art of Importing Chinese Objects*, in *China Business Review*, March 2010.
The text of the Memorandum is available online at: https://eca.state.gov/files/bureau/china_tias.pdf (last visited: 15/07/21)

number of heritage sites recognized in the UNESCO World Heritage List, is the Agreement signed with Italy in 2006 to counter illicit excavations and circulation of cultural heritage.

3.1 *Accordo fra il Governo della Repubblica Italiana e il Governo della Repubblica Popolare Cinese per la Lotta Contro i Furti, gli Scavi Illeciti, l'Importazione e l'Esportazione Illegali di Beni Culturali*

The Agreement between Italy and China was officially adopted on January 20 2006 and, in the spirit of UNESCO 1970 and UNIDROIT 1995, its main goal is to set some effective measures to prevent the illicit export, import and circulation of cultural heritage (Art. 1); as other international agreements, however, the treaty only creates a general framework while contracting Parties are free to choose how to implement its provision according to their own national legislation (Art. 1.2).

In this specific case, to reach this objective Italy and China choose to focus their resources and energies on three main cooperation areas: first of all, to have a better understanding of the heritage protection regime applied within the other Party's territory, both countries should establish an "*hotline*" (Art. 2) through which rapidly exchange information concerning their respective laws, regulations or specific policies (Art. 3.1), the structure of the relevant administrative bodies involved (Art. 3.4), the procedures for legally exporting cultural property and the export certificates used (Art. 3.6 and Art. 6) and, lastly, information concerning the latest trends in the local illicit art market (Art. 3.7). Moreover, of particular importance is the creation, according to common standards, of a shared database, where an accurate list of all the cultural properties whose import and export is banned under national legislation will be constantly updated (Art. 3.2); if one of the Parties were to identify or retrieve one such objects, illegally exported, it will be obliged to notify the counterpart and return the object whenever possible (Art. 7.3).

A second area of cooperation encompasses technological and know-how exchanges: to be specific, Italy and China should both activate shared research projects in order to improve the general level of technology used in heritage related works, while, at the same time, they should also offer their support for initiatives like joint renovation campaigns[205] of key national heritage sites (Art. 5).

[205] For example, in 2018 a group of Italian experts was sent to China to offer their insights and technological instruments and actively cooperate with local authorities for the restoration of the UNESCO site of the Dazu Grottoes in Chongqing. More information about the collaboration can be found on the following website, at: https://www.venetiancluster.eu/en/agreement-china-vhc/ (last visited: 15/07/21)

Lastly, exchange training programs should also take place, aimed especially at the personnel employed in the security and management sectors (Art. 4): for example, immediately after the adoption of the Agreement, several task forces and work groups were established, the most important being a task force composed of Chinese special agents who would receive *ad hoc* training from the Italian military police regarding new methods of identifying and tracking cultural artifacts[206] and a work group where it would be possible to exchange ideas and receive help in drafting management plans for the preservation of World Heritage Sites[207].

[206] MARTON, A. L., *On Rabbits, Rats and Low-Hanging Fruit: Rethinking the Impact of International Agreements on China's Domestic Cultural Property Protection*, in *Columbia Journal of Asian Law*, vol. 23, 2009, p. 235

[207] Ministero della Cultura, *Cooperazione Difesa Patrimonio Culturale Italia – Cina*, March 16 2006 https://www.beniculturali.it/comunicato/cooperazione-difesa-patrimonio-culturale-italia-cina (last visited: 15/07/21)

China's Cultural Heritage Import and Export Regulations: Analysis and Main Consequences of the Current System

As previously anticipated in Chapter 1, the creation of laws, regulations and rules specifically governing the issues related to the import and export of cultural relics has always been one of the core elements of any cultural heritage policy officially promulgated in contemporary China.

This particular approach to heritage protection can actually be easily explained if we consider that export and import policies usually play a cardinal role in ensuring the effective preservation of cultural relics and of the values embodied by them, a function even more important for China as a country – and for its political leadership in particular – both from an historical and political point of view: on one hand, in facts, starting from the Opium Wars and continuing throughout the Ninetieth and Twentieth centuries, China's cultural relics have continuously and consistently been looted, smuggled and stolen either by foreign powers or by Chinese nationals themselves fleeing abroad from wars and other internal conflicts, thus determining the loss for China of a significant part of its heritage, that to this day still hasn't been returned but is, instead, being frequently traded in the international art market[208]. Considering this background, given that cultural heritage is generally considered a crucial part of any nation's history, it isn't too surprising that after the foundation of the PRC Chinese authorities have immediately tried to block such an hemorrhage by setting up a strict framework limiting almost all kinds of heritage exporting activities[209].

On the other hand, however, another underlying fact that undeniably influenced local authorities when defining import regulations, in particular, is that cultural relics are often deemed tangible remains of the society that created them and as such they embody not only artistic or historical values but also social and political ones that concur to the definition of a

[208] This phenomenon is part of a much broader international issue, briefly described in Chapter 2, note 155. The depredations of foreign countries specifically towards China have been the main focus of several studies conducted by both Chinese and foreign scholars, for additional information of this specific topic see, for example, TAYLOR, J. M., *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?*, in *Loyola University Chicago International Law Review*, vol. 3, Issue 2, Spring/Summer 2006; for a Chinese uptake on the matter, see ZHONG HUI, *The Return of Chinese Cultural Treasures Taken From the Second Opium War (1856-1860)*, University of Queensland, 2014.

[209] XU, T. and ZHOU, B., *Conditions And Requirements For The Export Of Art From China*, in *Eiger Law*, March 2014, p. 2; LAU, T., *The Grading of Cultural Relics in Chinese Law*, in *International Journal of Cultural Property*, n. 18, 2011, p. 21

nation's identity[210]. This becomes an especially pressing matter in the case of China, whose leaders have always struggled to present a single unified narrative of their role, their policies and their country's history by maintaining as strict a control as possible over the image of China presented both inside and outside national borders. In this situation, to reach their goal, it is imperative for them to control as well the flow of information exiting, and even more so also entering China, amongst which cultural relics represent an important component, given their social, historical and political relevance[211].

Therefore, it isn't surprising that these two reasons discussed above immediately prompted the drafting of conservative cultural heritage export and import bans and other similar highly restrictive regulations in the first years of communist rule.

To provide some context on the matter, it should be noted that the first legal document to contain provisions related to this very topic, approved even before the official foundation of the People's Republic of China, were the *Rules Concerning Problems on the Collection and Management of Cultural Relics and Ancient Sites* (关于文物古迹征集管理问题的规定 *Guanyu wenwu guji zhengji guanli wenti de guiding*) adopted in 1948 by the central government of Northern China[212]: the provision in question was its Article 1, where, for the first time in communist China, it was explicitly prohibited to export any kind of cultural heritage from the Country to better ensure its protection.

These specific policies defined in the early years of the PRC would also be included in all the regulations that would follow, namely the *Provisional Measures for Prohibiting the Export of Precious Cultural Relics and Books* (禁止珍贵文物图书出口暂行办法 *Jinzhi chengui wenwu tushu chukou zanshi banfa*) approved in 1950 and the *Provisional Regulations on the Protection and Management of Cultural Relics* (文物保护管理暂行条例 *Wenwu baohu guanli zanxing tiaoli*)[213] of 1961, where the export ban was strongly reaffirmed[214]. Additionally, the Ministry of Culture tried to standardize the procedures through which to determine the eligibility for export of different categories of cultural relics, by issuing and

[210] See *supra*, Chapter 1 Paragraph 1.1
[211] POTTER, P., *People's Republic of China Provisional Regulations on Art Import and Export Administration*, in *International Journal of Cultural Property*, vol. 18, February 2011, p. 134
[212] See *supra*, Chapter 1 Paragraph 2.1
[213] See *supra*, Chapter 1 Paragraph 2.2
[214] LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, pp. 357-358

constantly adjourning a set of *Opinions on the Appraisal Standards for the Export of Cultural Relics* (文物出口鉴定标准的几点意见 *Wenwu chukou jianding baozhun jidian yijian*)[215].

Lastly, all previous provisions have eventually been organized and summarized in Chapter 6 of the current *Cultural Relics Protection Law*[216] (文物保护法 *Wenwu baohu fa*; from this moment on "CRPL"). Given such premises, at least at a superficial glance, it may seem surprising that only a total of 4 articles of the CRPL, all of procedural nature, are dedicated to such a complex topic. On the contrary, however, after a more in-depth analysis, it's quite obvious that the contents of the CRPL alone should in no way be deemed sufficient to obtain an exhaustive outlook on the current cultural relics import and export regime, as several other legal texts must be analyzed as well, starting off with the *Regulations for the Implementation of the Cultural Relics Protection Law* (中华人民共和国文物保护法实施条例 *Zhonghua renmin gongheguo wenwu baohufa shishi tiaoli;* from this moment on "Implementing Regulations"), the *Audit Standards for the Exit of Cultural Relics*[217] (文物出境审核标准 *Wenwu chujing shenhe biaozhun*; from this moment on "Audit Standards") and the *Administrative Measures for the Audit of the Entry and Exit of Cultural Relics*[218] (文物进出境审核管理办法 *Wenwu jinchujing shenhe guanli banfa*; from this moment on "Administrative Measures").

Furthermore, since import and export related issues necessarily need the involvement of Customs organizations and other external institutions, other documents must also be taken into consideration to obtain a general picture, like the *Customs Law of the People's Republic of China*[219] (中华人民共和国海关法 *Zhonghua renmin gongheguo haiguan fa*), the *Customs Inspection Regulations of the People's Republic of China*[220] (中华人民共和国海关稽查条例 *Zhonghua renmin gongheguo haiguan jicha tiaoli*) and the *Provisional Measures on the Management of the Import and Export of Fine Art*[221] (美术品进出口管理暂行规定 *Meishupin jinchukou guanli zanxing guiding*; from this moment on "Fine Art Management Measures").

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[215] CHENG DAFENG, *Jinchujing yishupin haiguan guizhi celue yanjiu (Research on Customs Regulation Strategies for the Entry and Exit of Artworks)*, in *Shandong yishu xueyuan xuebao*, n. 178, 2021, p. 100
[216] For an analysis of the contents of the CRPL, see *supra*, Chapter 1 Paragraph 3.1
[217] Adopted by the NCHA on April 3 2007.
[218] Adopted by the NCHA on June 1 2007.
[219] Adopted by the Standing Committee National People's Congress on January 22 1987; amended in 2000, 2013, 2016 and 2017.
[220] Adopted by the State Council on January 3 1997; amended in 2011 and 2016.
[221] Adopted by the Ministry of Culture on August 1 2009.

1. Concerned Relevant Authorities

As for all other matters concerning cultural heritage protection and management, in this case as well the highest institution with decision-making authority over import and export related activities is the National Cultural Heritage Administration[222]: to be specific the NCHA is in charge of defining the audit standards and inspection procedures (*Administrative Measures*, Art. 2) and issuing the formats for the application forms, permits and official countersigns (*Administrative Measures*, Art. 18) that will be applied by local cultural relics departments throughout the country; moreover, the NCHA is also the only organization that can legally issue or revoke import and export permits for cultural heritage. However, given the enormous amount of tasks its functionaries are usually entrusted with on a daily basis, the actual work of collecting import/export requests, examining cultural relics and verifying their eligibility effectively befalls under the jurisdiction of specialized organs, such as the Cultural Relics Entry and Exit Audit Agencies.

Lastly, since import and export are complex activities that require the cooperation of different ministries and institutions, the NCHA and the Ministry of Culture have to coordinate their efforts with several other organs, *in primis*, national Customs, but also the Ministry of Trade and so on.

1.1 Cultural Relics Entry and Exit Audit Agencies

Cultural Relics Entry and Exit Audit Agencies (文物进出境审核机构 *wenwu jinchujing shenhe jigou;* from this moment on "audit agencies") are specialized organs, instituted directly by the NCHA within provincial level cultural relics department[223].

As of today, 21[224] such agencies have been founded throughout the country and each of them is directly subordinated to the NCHA, to which they have to report their activities, forward exit permits requests after having conducted in-depth inspections and signal possible frauds discovered (*Administrative Measures*, Art. 2 and 7); despite this, similarly to what happens with cultural relics departments at local level, audit agencies are also horizontally and financially subjected to their correspondent provincial level government, who has the

[222] For a synthetic overview of the NCHA general duties, see *supra*, Chapter 1 Paragraph 4.1.1

[223] NEWELL, P., *The PRC's Law for the Protection of Cultural Relics*, in *Art Antiquity and Law*, Vol. 13, n. 1, April 2008, p. 48

[224] According to the NCHA website, audit agencies can be found in the Municipalities of Beijing, Shanghai, Tianjin, Chongqing, in the Provinces of Hebei, Jiangsu, Zhejiang, Anhui, Fujian, Shandong, Henan, Hubei, Guangdong, Hunan, Shaanxi, Liaoning, Sichuan, Shanxi, Hainan and in the Autonomous Regions of Tibet and Inner Mongolia. The updated list is available at: http://gl.ncha.gov.cn/Industry/Entry-exit (last visited: 27/08/21).

duty of allocating the required funds and provide physical offices and other equipment for them to properly manage their daily activities (*Administrative Measures*, Art. 3).

Audit agencies main duties can be divided into four main areas of interest: first of all, whenever an entry or exit request is submitted, agencies are tasked with inspecting all relevant cultural relics to ensure that the ones submitted aren't actually counterfeit goods, nor have they been stolen or are about to be illegally smuggled (*Administrative Measures*, Art. 16), thus effectively acting as first line actors in the fight against the illicit trafficking of cultural heritage[225].

Secondly, once it has been clarified that the ones they are dealing with are authentic, lawfully owned cultural relics, audit agencies must proceed with their verification: in other words, they have to decide whether, according to the CRPL and other related regulations, submitted goods meet or not all the requirements for being exported (*Implementing Regulations*, Art. 46; *Administrative Measures*, Art. 9). This, in many cases, means that functionaries have to verify that cultural relics do not belong to any of the categories banned from export and that their grade, conservation status, geographical diffusion, etc. are all compatible with the export requirements and are coherent with the specifications that have been declared to relevant authorities.

Thirdly, audit agencies are responsible for registering all the information obtained concerning the goods that have been submitted (*Administrative Measures*, Art. 11); in this way an adjourned database can be created to keep track of the movements of cultural relics inside and outside national territory. This practice has proven particularly useful, especially when relics are only temporarily imported or exported and will have to undergo a second inspection in the future, since, by relying on said database, it is indeed much easier for the authorities carrying out re-exit and re-entry procedures to understand whether illegal substitutions, damages or thefts have taken place, thus allowing them to promptly react and take all the countermeasures needed depending on the situation.

The last duty audit agencies are in charge of encompasses the emission, after all inspection procedures have been carried out, of a certificate that testifies a relic's eligibility for export or import (*Administrative Measures*, Art. 9).

[225] LI JIANGHONG, HUANG JUAN, HUANG JIANPING, LÜ WENJI, *Lun wenwu jinchujing guanli biaozhun tixi jianshe (Study on the Establishment of a Standard System for the Entry and Exit of Cultural Relics)*, in *Biaozhun kexue*, n. 1, 2014, p. 39

Since cultural relics may vary a lot among themselves in terms of form, value, distribution, material and grade, in order to properly carry out their duties, audit agencies functionaries require in-depth heritage-related knowledge and have to master a vast array of competencies[226]: to reach this goal, it is required for every agency to be composed by at least 7 cultural heritage experts and 5 import/export experts (*Administrative Measures*, Art. 4 and 5), all of which must have previously gained experiences working in State museums or other similar national organizations and must have obtained the official qualification issued directly by the NCHA (*Implementing Regulations*, Art. 44). Furthermore, to avoid any possibility of corruption or embezzlement, audit agencies staff is prohibited from directly operating auction houses and authorized shops (*Administrative Measures,* Art. 6), as all cultural relics departments staff usually is[227].

1.2 The Role of National Customs

Other than cultural relics entry and exit audit agencies, the other organizations deeply concerned with cultural heritage import and export management are Customs (海关 *haiguan*); whilst audit agencies are usually tasked with identification and registration of cultural relics exit and entry permits, Customs instead are recognized as State organs in charge of surveillance and control over all commodities, personnel and goods – cultural relics included – that depart from or arrive into the national territory (*Customs Law*, Art. 2).

Individual Customs throughout the country work independently from one another, but each and every one of them has to report at central level to the General Customs Organization, set up directly by the State Council (*Customs Law*, Art. 3).

Nowadays, Customs engage in a wide array of different tasks, their most important one undoubtedly being – at least when heritage management is concerned – conducting a final inspection over all the items to be imported or exported, in order to ensure the legality of the operations even when other agencies have previously identified and verified all relevant relics and the NCHA has already given its approval[228]; whenever discrepancies with the attached documentation or other irregularities are detected, Customs have the power to immediately retain the illegally exported and imported goods and to impose the payment of additional

[226] *Ibidem*
[227] *Cultural Relics Protection Law*, 2017. Art. 53-55
[228] CHENG DAFENG, *Jinchujing yishupin haiguan guizhi celue yanjiu (Research on Customs Regulation Strategies for the Entry and Exit of Artworks)*, in *Shandong yishu xueyuan xuebao*, n. 178, 2021, p. 101

tariffs and fines for their clearance or proceed with their restitution to their rightful owner depending on the situation at hand (*Customs Law*, Art. 6.1 and 24).

These specific functions performed by Customs also explain their role as crucial anti-smuggling institution: in particular, Customs are called to constantly monitor the flow of relics and to closely cooperate and coordinate with police organizations in order to prevent possible criminal activities (*Customs Law*, Art. 4-5).

Lastly, amongst the prerogatives of Customs there is the possibility for them to perform follow-up inspections, other than traditional on-site inspections: in the first case, within three years from the release of an imported or exported item, Customs have the right of checking once again all the documents and relics related materials to assess whether or not the import or export had been legally conducted[229].

2. Cultural Relics Export Regulations

2.1 Cultural Relics Banned from Export

Before starting analyzing the current procedures for the export of cultural relics, a general consideration should be made: when in 2002 the national legislator heavily amended the CRPL, despite the numerous innovations introduced, the main objective was – and still is – to implement measures that would guarantee the highest level of protection possible to their national heritage and avoid their dispersion abroad, thus leading to the draft of generally restrictive provisions[230].

The result was that even though the sale, acquisition and export of cultural relics has indeed been legally allowed ever since 2002, however, only a limited amount of cultural goods can in practice be sold or bought, and an even smaller amount can permanently leave the country, since once exported it would be extremely difficult for relics to be imported back and Chinese authorities are extremely keen on avoiding this possibility. To be specific, as of today, only private "common" cultural relics can be lawfully exported, while, at least in theory, the export of all State-owned relics and privately-owned "precious" relics is banned under any circumstance[231] (CRPL, Art. 60). The main problem that emerges with this wording

[229] *Ibidem*
[230] LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, p. 367
[231] This provision does not apply to cases of temporary exports of cultural heritage for exhibitions or other particular purposes, which will be later discussed *infra* in the present Chapter, Paragraph 2.2.1.

is that, given the vagueness of definitions such as "common" and "precious" cultural relics, it is quite difficult for people to clearly determine whether they are or not allowed to export some specific items and it may prove complex even for audit agencies to unambiguously issue export certificates.

To minimize these problems, it was soon decided in 2007 to adopt a new set of standards that rely on age as the main criteria used to determine relics eligibility for export; in particular three different dates have been identified as limits:

1. The export of all cultural relics created before 1911 (included) is always prohibited[232]; in some cases, however, for some categories or when a particular artistic, historical or scientific importance is recognized, export may be prohibited or at least extremely limited even for cultural relics produced before 1949 (included);
2. When dealing with relics created by members of recognized national minorities, the export ban is applied with no exceptions to all relics realized before 1966 (included);
3. Foreign cultural relics that have been permanently imported in China, must be classified according to Chinese standards[233], which means that if these relics were to be exported again the same export restrictions normally implemented for Chinese relics would have to be applied, making it almost impossible for those identified as precious to actually leave the Country.

As stated above, the choice between 1911 and 1949 as an operative date is strictly linked to the typology of cultural heritage involved: for example, for relics such as inscriptions (*Audit Standards*, Restrictions, Art. 6), statues (Art. 5), books (Art. 7.3-7.4), ancient coins (Art. 8.1-8.2), furniture (Art. 10.9), traditional clothes and other accessories (Art.

[232] Originally, the operative date before which cultural relics exports were banned was 1795 (corresponding to the end of Qing Emperor Qianlong's reign); however, the MCT and the NCHA realized that maintaining this limit would endanger all cultural heritage realized during the late Qing dynasty, as demand on the international market of these relics was still quite high. Coherently with its internal regulations, in recent years China also tried to implement this same concept in bilateral agreements, asking the other Parties to restrict import of Chinese relics dating before 1911: as of today, this request has been generally accepted by source countries, while market countries like the US, instead, were strongly opposed and a compromise had to be reached, keeping 1795 as the limit for import restrictions from China to the US. MURPHY, N. M., *The Art of Importing Chinese Objects*, in *China Business Review*, March 2010, p. 2; MARTON, A. L., *On Rabbits, Rats and Low-Hanging Fruit: Rethinking the Impact of International Agreements on China's Domestic Cultural Property Protection*, in *Columbia Journal of Asian Law*, vol. 23, 2009, p. 229

[233] *Regulations for the Implementation of the Cultural Relics Protection Law*, 2016, Instructions, Art. 3-5 and 16

9.3-9.4) competent authorities opted for 1911 as the date before which export should be prohibited.

In other instances 1949 has, instead, been preferred, as it happened with goods that are mainly related to the Republican Era, the Anti-Japanese War or the Civil War periods, since they have for obvious reasons been produced after 1911 but are still deemed as representative of an essential part of China's recent history and as such should be conserved within national borders on par with all other recognized relics. Examples of these relics include original manuscripts and documents (Art. 7.4), maps (Art. 7.5), letters (Art. 7.2), medals (Art. 6.5)[234], but also weapons and industrial products in general (Art. 10.2).

Moreover, additional restrictions are imposed on objects – like seals (Art. 6.2), weapons (Art. 10.2) or instruments (Art. 10.3) – that have been used by celebrities and their export, regardless of the age of the relics and the original category they belong to, is always banned.

An interesting exception is the one portrayed by the works of famous contemporary calligraphers: even though, in theory, these works should be considered contemporary art, not cultural properties, since the ones used are traditional techniques and their loss would constitute a damage for all national cultural heritage, the MCT and the NCHA have decided to equate them to precious cultural relics (*Administrative Measures*, Art. 8.6). As a result, works of selected contemporary calligraphers cannot legally exit China, even if they have only been recently created in the Twenty-first Century[235].

Lastly, it should be noted that if there are goods that are not included in the 16 categories identified in the Audit Standards, but, at the same time, are deemed worthy of protection due to their value, they should be preventively prohibited from leaving the Country regardless of their age or, as an alternative, the limit applied to the closest category found should be imposed on them as well (*Audit Standards*, Instructions, Art. 7-8).

[234] These provisions do not apply to cultural relics whose private character has been recognized, like the correspondence between family members with no reference to vulnerable information (Art. 7.2), medals (Art. 6.5) or portraits (Art. 14.8) that are still privately owned by relatives and have not been donated to public institutions.

[235] *Appraisal Standards for the Restriction of the Export of Works by Late Famous Calligraphers and Painters after 1949* (1949年后已故著名书画家作品限制出境的鉴定标准 *1949 nian hou yi guzhuming huajia zuopin xianzhi chujing de jianding biaozhun*). The Standards were issued by the NCHA for the first time in 1990 and were last adjourned in 2013. Furthermore, once one of the listed works enters China, it cannot be legally re-exported under any circumstance. TEFAF (The European Fine Art Fair), *Chinese Art Market Report 2019*, June 2020, available online on the TEFAF website, at: https://2019.amr.tefaf.com/chapters-print/?printMode=true (last visited: 27/08/21).

2.2 Procedures for the Export of Cultural Relics

For cultural heritage to be legally exported outside China[236], a correspondent exit permit (出境许可证 *chujing xukezheng*) must be issued by the NCHA (CRPL, Art. 61).

The first step to obtain an export permit is to advance a request to the nearest audit agency (*Implementing Regulations*, Art. 45): usually the responsibility of forwarding said requests is shouldered by the relics' legal owner, however, since foreign buyers aren't usually accustomed to Chinese regulations, a local shipping company or a similar enterprise may be tasked with the clearance of all procedures[237].

Once a request has been submitted, the concerned audit agency must appoint a board of at least three members, two of which must be cultural heritage experts, for the inspection of each individual object presented according to the standards issued by the NCHA (*Implementing Regulations*, Art. 45 and *Administrative Measures*, Art. 10). After having carried out the required throughout examination of the relics, the board has up to 15 working days to express an opinion concerning the possibility for the submitted cultural relics to be exported and to make a detailed report to the NCHA (*Implementing Regulations*, Art. 45).

Unfortunately, obtaining a positive opinion from the audit agency does not automatically translate into receiving an export permit, since only the NCHA has the authority to confirm or, on the contrary, overrule the decisions of local agencies (CRPL, Art. 61). Furthermore, depending on the type of cultural relics considered, the NCHA may not be the only central organization whose approval is required: manuscripts, letters, maps and other publications, for example, are jointly protected by the NCHA and the National Archives (国

[236] The same procedures described in this Paragraph are applied even if cultural relics are exported towards Hong Kong, Macao or Taiwan, since all these territories have their own independent cultural heritage protection regulations; the only concession is that preferential tariffs and taxes are usually applied when relics are exported towards these territories. NEWELL, P., *The PRC's Law for the Protection of Cultural Relics*, in *Art Antiquity and Law*, Vol. 13, n. 1, April 2008, pp. 47-48

[237] Originally, since there were cases where cultural properties were exported after being sold by auction houses or authorized cultural relics shops to international clients, to simplify the procedures and attract international customers, it was actually common for auction houses to request an export permit even before the actual relic had been sold; this practice offered insurance to potential customers that the goods they were about to purchase would indeed be able to legally leave China, thus contributing to the growth of the local art market. LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, p. 367. Nowadays, however, this possibility is no longer available and clients have to individually request an export permit or appoint a Chinese shipping company to do so in their stead. Auction houses still have to submit the relics they intend to sell for a pre-auction inspection (see *supra* Chapter 1 Paragraph 3.1.1), but they cannot forward an export request themselves anymore and, since the departments responsible for determining heritage eligibility for sale and eligibility for export are different, this implies that ultimately there is no guarantee that a cultural relic whose sale has been approved will also be able to exit China. MURPHY, N. M., *The Art of Importing Chinese Objects*, in *China Business Review*, March 2010, available online, at: https://www.chinabusinessreview.com/the-art-of-importing-chinese-objects/ (last visited: 27/08/21).

家档案局 *Guojia dang'anju*)[238], which means that for them to exit the country the approval of both authorities is required. This may cause two main problems: on one hand, involving more organizations could make it even less likely for cultural relics to obtain the export permit, as different departments may not share the same objectives and may respond differently; on the other hand, having to wait for the approval from more than one agency means an increase in the total time needed to complete the exit procedures[239]; additionally, since no existing regulation, as of today, sets a time limit within which the NCHA or the other central authorities have to decide whether to approve or refuse the export, there is no certain way to know how long it will actually take to obtain an answer.

If a positive response is given by central authorities, then the NCHA identifies the port through which the cultural relics will leave the country (CRPL, Art. 61) and issues the export permit in triplicate, as one copy is conserved by the audit agency that originally received and analyzed the export request, one by Customs authority and the last one is for the cultural relic's owner – or more frequently the shipping company when foreign buyers are involved – to keep (*Administrative Measures*, Art. 11). The same audit agency is also in charge of applying directly on the cultural property at hand the correct exit countersign[240] (出境标识 *Chujing biaozhi*), that will later be examined by Customs (*Implementing Regulations*, Art. 47).

At this point, to successfully conclude the export procedures the owner still has to declare the articles he wants to export, clear all Customs formalities and pay the corresponding export tariffs[241] (*Implementing Regulations*, Art. 47); despite the previous approval of the NCHA, the exit permit, the countersigns and all relevant documents have to

[238] ZENG YOUHE, *Kangzhan wenxian jin chujing jiaoliu falü wenti yanjiu (Research on the Legal Issues of the Entry and Exit of Anti-Japanese War Documents),* in Changjiang shifan xueyuan xuebao, vol. 29, n. 4, August 2013, p. 102

[239] *Ibidem*

[240] Nowadays, there exists three different types of official standardized countersigns: one for cultural relics exiting China, one for cultural relics entering China and one for those articles recognized as authorized imitations of existing cultural relics (*Administrative Measures*, Art. 11). Originally the countersigns used were lacquer seals, since they were durable and hard to remove or counterfeit; however, with the increase of import and export activities, traditional seals have been substituted in recent years with electronic tags. Each year the NCHA produces and distributes throughout the Country a new, adjourned set of uniform tags to be used by local audit agencies (*Administrative Measures*, Art. 18). YUAN WENHUI, *Dianzi biaoqian zai wenwu hangye de yingyong: yi wenwu jinchujing yewu weili (Application of Electronic Tags in the Cultural Relics Industry: Examples from the Import and Export Business),* in *Guanli zongheng*, vol. 5, 2019, pp. 35-39

[241] According to the *Measures of the Customs of the People's Republic of China on the Examination and Approval of the Duty-paid Value of Imported and Exported Goods* (中华人民共和国海关审定进出口货物完税价格办法 *Zhonghua renmin gongheguo haiguan shending jinchukou huowu wanshui jiage banfa*; from this moment on "Measures on Duty-paid Value"), the value of the export tariffs to be paid is determined by Customs authorities taking into account different factors, like the transaction price paid (or payable) of the submitted goods if exported for trade purposes, the transportation expenses and the insurance premiums calculated before the goods leave the Chinese territory (Art. 21).

be examined one last time and if anomalies, errors or discrepancies between the objects examined are detected in this phase, the exit can still be prohibited.

As a general guarantee that the property rights of legal owners will be respected throughout the process, it is also stated that, if, for whatever reason, during any of these steps the submitted cultural relics do not meet the export requirements, in any case they cannot be retained by State institutions, but, on the contrary, they must be swiftly returned to their original owners and the reasons that prevented them from leaving China must be duly explained (*Implementing Regulations*, Art. 47).

2.2.1 Procedures for the Temporary Export of Cultural Relics

As stated in the previous Paragraphs, currently only "common" cultural relics can be legally exported, but in some instances a temporary exit permit can be issued instead, allowing otherwise export-restricted heritage to leave the Country.

Normally the main reason a temporary export request is submitted is when cultural heritage has to exit China to be presented as part of an exhibition (展览 *zhanlan*) abroad; however, under *special circumstances* (特殊需要 *teshu xuyao*) other causes can justify precious relics leaving the State (CRPL, Art. 60; *Administrative Measures*, Art. 14): for example, it may be necessary for relics to be brought to a foreign Country to proceed with renovation works or to take part in a joint research project. Additionally, temporary exports are also approved if there is the possibility of local national heritage being damaged, usually as consequence of armed conflicts, and it is deemed more effective for their protection to move them abroad. It should be noted that, in all these instances, one of the important requirements that must be met is that there cannot be any ownership transfer concerning exported relics[242].

The practice of temporary export is indeed an efficient way to increase the possibilities of cultural properties to legally exit China, however, some remaining restrictions are still in place: in particular, while precious cultural relics can be exported, this only applies to relics that have already been part of an official exhibition previously held within the Country (*Implementing Regulations*, Art. 49).

Moreover, no more than 120 first class relics can be simultaneously exported by the same organization and, in any case, first grade relics cannot constitute more than the 20% of the total amount of properties exported at the same time (*Implementing Regulations*, Art. 48).

[242] LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, p. 366

Concerning first grade relics, it is also important to remember that if there is only one existing exemplar or if their preservation mechanism is complex or they are deemed extremely vulnerable, their exit may be prohibited either way (CRPL, Art. 62; *Implementing Regulations*, Art. 49).

Lastly, temporarily exported relics can remain abroad only for one year, a period that can extraordinarily be prolonged for up to an additional year (*Implementing Regulations*, Art. 50); if at the end of the granted exhibition period the cultural properties are not returned accordingly, their export will be considered illicit and China will have the right to activate international instruments like UNESCO 1970 and UNIDROIT 1995 to try and lawfully retrieve the stolen goods.

In terms of regulations, the procedures for granting a temporary export permit are quite similar to the ones applied for permanent export, the first step always being an official exit request made by the cultural relics' legal owner – a State museum in most cases, as they are the ones normally involved in international exhibitions temporary export permits are usually requested for – to a local audit agency (CRPL, Art. 62; *Administrative Regulations*, Art. 14): said request can be advanced to any certified audit agency, which will in turn forward it to the NCHA after a mandated inspection of each and any relic.

The main difference, compared with the procedures previously analyzed, is that for temporary exports definite time limits for the whole process to be concluded are actually set: in particular, the exit request must be made at least six months prior the date the expected exit should take place. Furthermore, only in these cases, the NCHA also has a total of 30 working days to cross-examine the goods, form its own opinion and decide whether the export should be approved or not (*Implementing Regulations*, Art. 48).

Additionally, given the exceptional importance of the relics involved, the final approval of the State Council, as well as the NCHA, may also be required, especially when the ones that are to be exhibited abroad are first grade, unique or extremely vulnerable relics (*Implementing Regulations*, 48)[243]. At this point, if the NCHA decision is not overruled by the State Council, the export procedure can continue normally, the temporary triplicate permit and the corresponding countersign are quickly issued, while the goods can leave the Country as long as no irregularities are detected during the final inspection carried out by Customs (CRPL, Art. 62).

[243] The State Council's involvement is obligatorily required, for example, when an amount of first grade cultural relics higher than the normally allowed one has to be exported (*Implementing Regulations*, Art. 48).

Once the agreed exhibition period is over and it is time for cultural relics to be imported back, their lawful owners must, first of all, clear Customs formalities and make their possessions re-enter China through the same port through which they had exited; afterwards, sealed relics are retrieved by Customs, but not inspected by them; on the contrary they have to be presented with their seals intact to the audit agency that had originally examined them and had expressed a positive opinion on their export: in this particular instance, audit agencies are usually asked to once again inspect all returned goods, in order to find out if there have been any substitutions or they have suffered damages when abroad (*Administrative Measures*, Art. 14).

If, during the exhibition period, for any reason, cultural authorities consider the general situation too dangerous to ensure an effective protection for the borrowed relics in question, the NCHA or the State Council have the authority to directly suspend or even annul their participation to initiatives abroad and demand for the immediate restitution of their own national heritage (*Implementing Regulations*, Art. 51).

Interestingly, it should be noted that, according to the CRPL, the loot, sale or private transfer to foreigners of cultural relics prohibited from export constitutes a crime in the form of smuggling (CRPL, Art. 64) and it is punished with criminal penalties, such as the payment of fines and a fixed-term imprisonment, up to five years at a maximum, for all the perpetrators involved (*Criminal Law*, Art. 325).

All other violations of the export policies discussed above are not usually identified as crimes and are punished through administrative pecuniary sanctions, but complete authority over the matter is given directly to the Customs (CRPL, Art. 65): for example, activities like providing a false declaration (*Customs Law*, Art. 86.3), refusing Customs inspections (Art. 86.4), forging export permits (Art. 84) or bribing Customs staff (Art. 90) are usually fined and all involved goods and their resulting gains are confiscated.

All these remedies, however, generally apply to any illicit act that takes place during Customs activities, while no specific corrective measure targeting exclusively breaches of permanent and temporary export provisions for cultural heritage is present in either the CRPL, the Customs Law or the Criminal Law.

3. Cultural Relics Import Regulations

The export provisions described till this point are quite strict, but are actually perfectly in line with the export regulations applied in other countries – especially source countries – sharing the central goal of avoiding as much as possible the exit and potential loss of their national heritage. On the other hand, however, one of the most notable characteristic of the current Chinese system is that, as in opposition to the restrictive export regulations, no specific import regulation is actually present, an instance more fitting for market countries[244]: in facts, by merely looking at its general legal framework, it is indeed quite evident that neither in the CRPL, nor in the Implementing Regulations there is any provision regarding the permanent import of cultural relics, a rather peculiar situation considering that, even though import policies are usually less detailed than export ones, source countries usually insert some sort of entry examination[245] to at least diminish the possibilities of relics stolen from elsewhere to enter unaccounted.

Due to the apparent lack of an *ad hoc* legal instrument, it is implied that the regular Customs Law must be applied when permanently importing cultural properties. In these cases, the inspection and approval of Customs authorities is considered sufficient and there is no need for an examination to be carried out by audit agencies or for a report to be made to the NCHA.

In facts, the only obligation to be respected is for the legal owner of the submitted cultural relics to make a declaration to the Customs and to pay the corresponding import tariffs[246] (*Customs Law*, Art. 47); if no irregularities are detected, the permanent import procedures can be concluded without any other additional passage.

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[244] For example, in the US, historically and currently the greatest market country in the world, there are no policies specifically regulating the import of cultural heritage from other countries and no controls other than the Customs ones at the time of entry are required. There are only three instances in which cultural heritage import can be legally restricted according to the *Cultural Property Implementation Act* (from this moment on "CPIA"): when a bilateral agreement has been ratified to prohibit the import of relics that lack a regular export certificate issued by the counterpart or alternative "*satisfactory evidences*" (CPIA, Art. 16 and Art. 23); when the cultural properties to be imported have been stolen from another Country's public institutions or museums (CPIA, Art. 24), as prescribed also by Art. 7b of UNESCO 1970; when cultural heritage is the object of frequent pillaging and fragmentations that endanger its conservation and by prohibiting its import it would be possible to avoid any additional damage (CPIA, Art. 11a). Unfortunately, with the exception of the first situation case, since no *ad hoc* entry control is actually required it may prove difficult to identify stolen or illicitly exported relics.

[245] In Italy, for example, according to the *Codice dei Beni Culturali e Naturali*, cultural heritage cannot be treated as regular commodities, but all cultural properties about to be imported, after the clearance of Customs formalities, must also be declared to the relevant administrative office in charge of imports and exports (Art. 72.1); to obtain an import certificate the importer has to provide valid documents that describe the good in question and testify where it has been legally exported from (Art. 72.2). Since these provisions apply to all cases, in this way, it is in theory easier to identify possible cases of illicit circulation of cultural heritage and promptly counter them.

[246] The value of the import tariffs to be paid is determined by Customs authorities taking into account different factors, like the transaction price paid (or payable) of the submitted goods if imported for trade purposes, the

3.1 Cultural Relics Banned from Import

This situation, however, does not translate into an overall total lack of import restrictions nor in the possibility for all relics to freely enter the Country according to the current import regime: on the contrary, as stated at the start of the present Chapter, considering the importance that controlling the inward flow of information in every area has for the Chinese leadership in order to maintain their monopoly over the representation of China both locally and internationally, it isn't surprising that cultural relics as well are not generally exempt from some forms of preventive censorship, most notably the absolute prohibition for some categories of cultural goods to be imported[247].

According to Art. 6 of the Audit Standards, cultural heritage that "*damages the interests of the State and of the Nation or that may negatively affect society*" (损国家、民族利益，或者有可能引起不良社会影响的文物 *sun guojia, minzu liyi, huozhe youkeneng yinqi buliang shenhui yingxiang de wenwu*)[248] cannot be imported under any circumstances.

This definition, unfortunately, is so vague that its application has often resulted quite arbitrary, therefore a more detailed list of banned goods is provided by Art. 5 of the *Provisional Measures on the Management of the Import and Export of Fine Art*[249], according to which it is prohibited the import of relics that:

> (1) Violate the basic principles established by the Constitution;
>
> (2) Endanger national unity, sovereignty and territorial integrity;
>
> (3) Leak State secrets, endanger national security […]
>
> (4) Spread ethnic hatred and ethnic discrimination, undermine ethnic unity or violate ethnic customs and habits;
>
> (5) Spread cults or superstitions;

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transportation expenses and the insurance premiums calculated before the entry into Chinese territory (*Measures on Duty-paid Value*, Art. 3). Moreover, according to the *Import and Export Tariff Regulations of the People's Republic of China* (中华人民共和国进出口关税条例 *Zhonghua renmin gongheguo jinchukou guanshui tiaoli*; from this moment on "Tariff Regulations") the total amount of tariffs to be paid may also vary if the most-favored-nation clause is applied (Art. 9): to be specific, imported goods originating from within the territory of China (or, in other words originating from Hong Kong and Macao) and from countries that have signed with China bilateral trade agreement containing mutual most-favored-nations clauses can take advantage of lower tariffs (Art. 10).

[247] POTTER, P., *People's Republic of China Provisional Regulations on Art Import and Export Administration*, in *International Journal of Cultural Property*, vol. 18, February 2011, pp. 132-133

[248] *Audit Standards for the Exit of Cultural Relics, Instructions,* 2007, Art. 6

[249] In theory the two concepts of 文物 (*wenwu* "cultural heritage/cultural relics") and 美术 (*meishu* "fine art") are different and do not usually overlap; moreover, the provisions of the Fine Art Management Measures cannot be applied to cultural relics. Despite this, given the lack of detailed restrictions in the legal documents strictly related to the management of cultural heritage (CRPL, Implementing Regulations, Administrative Measures, etc…), it is common practice for Art. 5 of the Fine Art Management Measures to be used as a guideline in the cultural heritage field as well.

(6) Disrupt the social order and undermine social stability;

(7) Spread obscenities like pornography, gambling, violence, terror, or crime;

(8) Insult or slander others, infringe the lawful rights and interests of others;

(9) Deliberately tamper with history or seriously distort history;

(10) Endanger social morality or harm the nation's excellent cultural traditions;

(11) Other content prohibited by laws, administrative regulations and state regulations[250]

By looking at this list what emerges is that two macro-categories of goods can be identified. On one hand there are cultural relics whose import is usually explicitly prohibited in several different countries throughout the world, not only in China, due to their immoral or socially dangerous content: they include, for examples, goods that engage with pornography (Art. 5.7), encourage ethnic discrimination (Art. 5.4), directly violate the lawful right of other citizens (Art. 5.8) or foment criminal behaviors (Art. 5.7) in general.

On the other hand, instead, relics whose import is restricted for more specifically "political" reasons can also be found: in these cases, the main reason for not allowing their import is generally based on the allegation that their existence may outright violate the basic principles expressed in the Constitution (Art. 5.1) and may endanger national unity (Art. 5.2) or social stability (Art. 5.6). The choice of including in the "blacklist" of banned goods also those relics that deliberately distort history by promoting a different interpretation compared to the endorsed one (Art. 5.9) or sustain the diffusion of local cults (Art. 5.5) may seem quite peculiar, however, it simply further demonstrates the desire of Chinese authorities to prevent the spread of any form of structured content that may prevent the creation of a single, unified narrative.

3.2 Procedures for the Temporary Import of Cultural Relics

All cultural relics that are not included in the list presented in the previous Paragraph can be permanently imported without further complications. The same procedure, however, cannot be applied when the entry of cultural properties into China is only for short-term periods of time.

To understand this oddity, it is important to understand that the practice of temporary imports usually takes place when foreign cultural relics are to be presented in local institutions as part of an exhibition, when they are the subject of joint research projects and

[250] *Provisional Measures on the Management of the Import and Export of Fine Art,* 2009, Art. 5

restoration activities or when they have to be sold on the Chinese art market, possibly to foreign collectors, and therefore will probably have to be exported once again as a result (*Administrative Measures*, Art. 12). All these instances, however, have been heavily codified at the international level and more than one multilateral agreement has focused on the global circulation of cultural heritage, like the UNESCO 1970 Convention[251] and the UNIDROIT 1995 Convention[252], both of which have already been accessed to or adopted by China. Additionally, it must also be remembered that China has signed several bilateral agreements, with the objective of better ensuring heritage protection, but also of promoting cultural exchanges among the different Parties.

In this situation, the lack of an *ad hoc* import regulation may greatly hinder China's reputation at international level and generate frictions with other States, since, according to the current legal regime, it may prove extremely difficult for cultural relics that have been imported through standard channels to be re-exported following the procedures designed for local relics and described in Paragraph 2.2, a situation other foreign Countries are not bound to accept when it involves their own national heritage. Therefore, to avoid any potential problem that may disrupt international or bilateral cooperation initiatives and to guarantee to foreign parties and institutions that their cultural heritage will be timely returned and will not, instead, be illicitly retained within the Chinese territory, specific regulations to be applied only to cases of temporary imports have been developed and even included in the current CRPL; it should be however noted that, compared to the corresponding export policies, import procedures are seemingly less complex, probably to assist foreign parties as they are ultimately the ones to deal with them and usually lack in-depth knowledge of the Chinese system.

To be specific, when a private or an organization has cultural goods that he wants to bring into China, first of all he has to declare them to the relevant Customs authorities, clear formalities and pay the corresponding import tariffs (CRPL, Art. 63). Once all these procedures have been successfully concluded and the imported goods have been identified as cultural relics, Customs have to seal said relics and redirect them to the closest audit agency available (*Implementing Regulations*, Art. 52 and *Administrative Measures*, Art. 12).

Upon receipt, audit agencies can proceed with their regular inspection duties: *in primis*, it is imperative to verify that the Customs seals are still intact and have not been tampered

[251] See *supra*, Chapter 2 Paragraph 1.2
[252] See *supra*, Chapter 2 Paragraph 2.1

with; the following step, instead, consists of examining the imported relics and ensure that they correspond to the ones that have been previously declared, thus confirming their authenticity (*Administrative Measures*, Art. 12). One last duty to be carried out by audit agencies encompasses inspecting each and all related relics individually and produce a detailed report, also with the support of photographical documentation, on their conservation status starting from the moment when they entered China and were entrusted to local authorities (*Implementing Regulations*, Art. 52).

Unfortunately, once again there are no official fixed time limits within which the inspection activities of audit agencies must be carried out, however, in practice, the same guidelines adopted for temporary exports are often applied in these instances as well and 15 working days are usually sufficient for an import permit to be obtained[253]: in facts, contrary to what happens with export procedures, in cases of temporary imports the formal approval of the NCHA is usually not explicitly required and, if no particular problem is detected, local audit agencies can independently issue the triplicate import permits and apply the corresponding countersigns.

Once permits have been issued, imported cultural relics may remain in China for a maximum of 6 months, but extensions can also be granted if timely requested and approved by both Customs authorities and the audit agency in charge (*Administrative Measures*, Art. 13).

To be re-exported, cultural heritage must be submitted to the audit agency that carried out the original examination for an additional inspection (CRPL, Art. 63): in particular, not only the import permits and countersigns previously issued need to be verified, but, since China has the responsibility to protect all cultural heritage that is present within its national borders, it is also crucial to accurately analyze once again the submitted cultural relics and compare them with the records previously drafted at the moment of entry (*Administrative Measures*, Art. 12), to ensure that no damages have been sustained nor any illicit exchange has taken place while they were within Chinese territory.

If no irregularities are detected in this phase, then export procedures can quite easily be cleared, as audit agencies can directly issue exit permits without having to mandatorily report it to the NCHA and even Customs have only to verify the permit's authenticity for relics to be allowed to legally leave China (*Implementing Regulations*, Art. 13). Otherwise, the NCHA and, depending on the situation, the State Council must be notified.

[253] LI XIAODONG, *Wenwu baohufa (Cultural Heritage Protection Law)*, Beijing 2002, pp. 369-370

The only issue that may pose a serious threat to importers emerges when the 6 months period for temporary import is exceeded without permission, when the import permit is lost or the import procedures haven't been carried out accordingly: in these instances, cultural heritage cannot leave China through the preferential channel for temporarily imported goods; instead, their lawful owners must apply for a normal export permit, following the steps described in Paragraph 2.2 (*Administrative Measures*, Art. 13; *Customs Law*, Art. 24). This means that, in order for their export to be authorized, cultural relics must be evaluated by local audit agencies using the Chinese grading system; however, since under the current legal framework it is prohibited to export "precious" relics, if the blocked relics were to be identified as such, it would even more difficult for them to be allowed to leave China legally[254]. A similar problem may arise with cultural goods that have been imported following the normal entry procedures and not the ones for a temporary entry, since, once again, the only way for these relics to exit China is to go through the several steps needed to obtain a permanent export permit (*Implementing Regulations*, Art. 52).

Lastly, similarly to what happens during exports, the CRPL and the Criminal Law fail to provide *ad hoc* remedies – both criminal penalties and civil liabilities – for specific violation of cultural heritage-related import policies; in facts, all infringements are instead punished according to the general provisions contained in Chapter 8 (Art. 82-99) of the Customs Law, mainly through pecuniary sanctions and confiscations.

4. Some Consequences of the Current Import and Export System

From what has been presented till this point, it is clear that, even though at a first glance not many provisions of the CRPL appear to be dedicated to the topic, China actually has been able to develop its own peculiar cultural heritage import and export regime, following the standards set by other source countries and characterized by an active role of State institutions, whose involvement is unavoidable for the approval of any exit request.

Regarding this, one aspect in particular should be highlighted: regardless of appearances, it must be noted that imports are also strictly regulated, but only when they are temporary; instead, as a result of the total lack of import policies specifically targeting cultural heritage, with the exception of some goods that are completely banned from entry, it

[254] MURPHY, N. M., *The Art of Importing Chinese Objects*, in *China Business Review*, March 2010

is relatively simple for cultural relics to be permanently imported from abroad, with no preventive controls nor additional documentation required[255], a situation generally more common in market countries.

Given these premises, it may prove particularly interesting to try and summarize the possible effects generated by such a "mixed" system: for example, considering that China has always been one of most vocal countries in defending the rights of source countries at international level, attention should be focused on whether the seemingly contradictive Chinese relics import-export system and the obligations contained in international agreements underwritten by China are actually coherent with one another or instead some discrepancies can be found between them.

Moreover, another potential area of further analysis focuses on seeing how the provisions presented in the previous Paragraphs affect the incessantly growing Chinese cultural heritage and art market.

4.1 Potential Discrepancies between National Regulations and International Agreements Underwritten by China

Since its entrance into the UNESCO, China has always dedicated oneself to reach a prominent position amongst source countries[256], a result that wouldn't have been possible if deep incongruences were to be spotted between the national cultural heritage protection framework and the obligations China as a State has agreed to undertake by signing some multilateral and bilateral conventions, *in primis* the UNESCO 1970 Convention and the UNIDROIT 1995 Convention. This, in practice, forced China to modify its national regulations adopted in 1982, in order for them to be more compatible with worldwide recognized standards, a process that was mainly achieved in 2002, when the CRPL was drastically amended, since by that time China had already ratified – or accessed – several international agreements and their provisions had amply been studied and used as guidelines for the draft of what today represents the current import and export regime.

[255] For clarity purposes, it is important to highlight that the lack of specific heritage-related controls doesn't necessarily mean that there is no control whatsoever or that it is easy to import cultural relics into China, since there are still several Customs requirements that must be met; it means however that cultural properties are treated like normal commodities when imported, contrary to what happens for example in countries like Italy.

[256] For a brief synthesis of China's path towards international recognition in matters related to cultural heritage see *supra*, Chapter 2, Notes 115-116

In facts, it can be clearly seen that most of the model provisions included in UNESCO 1970 and UNIDROIT 1995 have already been applied by China[257], especially when it comes to local export policies, in some cases even stricter than the ones included in international agreements.

Despite this, however, it may still be possible to highlight some minor discrepancies that could determine relevant legal controversies in the future, especially in terms of import policies: first of all, under the current Chinese legal framework Customs have no obligations to carry out additional inspections exclusively targeting imported cultural heritage, thus making it virtually impossible to determine whether submitted goods are being legally imported or are, instead, previously stolen relics about to illicitly enter the Country; the main problem that may emerge as a result is that there is no effective way for local authorities to avoid that local institutions acquire illegally exported or stolen relics, occurrences that otherwise represent a breach of Art. 7a and 7b of UNESCO 1970.

Moreover, China has also failed to fully uphold the contents of Art. 5a, according to which the illicit import and export of cultural relics must be adequately sanctioned: to be specific, as of today the smuggling of precious relics is indeed considered a crime punished with a fixed-term imprisonment, but no similar penalties exist in relation to the illicit export of common relics and to import in general. In theory, some administrative pecuniary sanctions can still be imposed in this cases according to the Customs Law, but it's important to notice that what is being punished in instances such as these are usually violations of Customs procedures, not the possibly illegal actions carried out specifically against cultural heritage[258].

In both cases, however, even if Chinese deficiencies were to be recognized as a violation of international obligations, the lack of a supranational entity with the authority to punish State parties and the similar approach adopted by the almost totality of market countries indicate that no possible sanction can be actually issued against China.

Another potential incongruence that should be addressed is the problem of temporary imported goods that remain in China longer than originally allowed or that lack the

[257] China, for example, has already declared State ownership over undiscovered cultural heritage, it has instituted organization exclusively dedicated to cultural heritage protection, it has created its own export permits that have been recognized as equivalent to the model ones provided directly by the UNESCO. Templars of both are available on the UNESCO website at: https://en.unesco.org/cultnatlaws/list (last visited: 27/08/21).

[258] XING ZHIYUAN and LI CHEN, *UNESCO gongyue kuanjiaxia wenwu jinjing guanzhi fagui de jianli yu wanshan (The Establishment and Improvement of the Regulations on the Entry of Cultural Relics under the Framework of the UNESCO Convention)*, in *"Guoji Bowuguan" chuanqiu zhongwenban*, 2014, p. 129

documentation required to be successfully re-exported: in cases such as these, according to the current Chinese regulations, said relics have to go through regular export procedures, however their exit may be prohibited if they are recognized as "precious" relics following local standards. As of today, this specific situation is one of the few instances of an otherwise perfectly legal act under the Chinese legislation to actually be an outright violation of the UNIDROIT 1995 provisions, where it is deemed equivalent to an *illicit export*[259] of cultural property. To be solved, problems such as these usually require a Chinese court decision to enforce a return request advanced by the origin State.

However, since in most of the documented times the retained goods are ones that have been imported for exhibition purposes and have been taken into custody without ownership changes and no involvement of eventual *bona fide* purchasers[260], it should be easy for requesting States to prove their claims and obtain their restitution following the procedures already provided by UNIDROIT 1995[261]. Additionally, given that currently only a limited number of Countries have ratified the Convention and effectively recognized the lack of return of temporarily imported relics as an illicit, once again the infraction can be seen as minimal and the possibilities of China's actions to suffer any repercussion are close to zero.

4.2 The Impact of the Current System on the Development of a Cultural Heritage and Art Market in China

One last aspect that should be taken into consideration is that the way import and export policies are structured may deeply affect the creation and development of both the local and the international cultural heritage and art market.

In the case of China, the local art market was originally created at the start of the 1990s and it remained quite small till ten years later, when, after the approval of the 2002 amendment of the CRPL, it knew a huge growth. From that moment on, China has steadily developed, turning today into one of the largest art consuming countries in the world, third only to the US and the UK, and importing in 2019 alone "*art, collectors pieces and antiquities*"[262] for a total value of roughly $840.5 million[263], more or less 18% of the total art

[259] *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 1995, Art. 5.2
[260] XING ZHIYUAN and LI CHEN, *UNESCO gongyue kuanjiaxia wenwu jinjing guanzhi fagui de jianli yu wanshan (The Establishment and Improvement of the Regulations on the Entry of Cultural Relics under the Framework of the UNESCO Convention)*, in *"Guoji Bowuguan" chuanqiu zhongwenban*, 2014, p. 130
[261] See *supra*, Chapter 2 Paragraph 2.1.1
[262] This is the official denomination used by the COMTRADE. It should be noted, however, that since according to the Chinese cultural heritage classification system many modern, and sometimes even contemporary, artworks

imports of that year[264], while at the same time its auction houses are amongst the largest at international level.

This may seem rather surprising, since China is unmistakably a source country with a legal framework designed especially to avoid that cultural relics may leave the Country: as stated in the first Chapter, for example, currently there are lots of categories of cultural properties that cannot under any circumstance be traded nor exported, while the sale, acquisition or export of others is allowed but only to Chinese nationals, completely cutting foreigners out from the local market[265]. Furthermore, the impossibility of knowing with certainty whether the acquired relic will be able to be legally exported is an additional deterrent for foreign buyers.

Nevertheless, a framework like the current one has been proven to support the art market, since, despite the lengthy bureaucratic procedures that always plague countries like China, due to the almost total lack of import restrictions, it is relatively easy for cultural goods to enter by simply following the standard provisions already applied to other commodities and without the need to go through the additional controls that may instead be necessary in other countries, especially source ones. Moreover, cultural relics as a product category can take advantage of relatively low import tariffs and taxes, even lower when the imported goods originate from nations that have signed bilateral agreements with China[266].

Interestingly, this situation, however, does not necessarily contradict the spirit of the Chinese cultural heritage protection system nor implies a lesser role of the State: in facts, if we look at the general situation, we can easily see that once relics have been imported, the entry into force of the export provisions makes it almost impossible for those same relics to exit once again, unless they are of lower grade or the export is only temporary (and even in that situation it may not be simple to obtain an export permit). Considering that for economic, cultural or patriotic reasons[267], Chinese collectors have till recent times always been more

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would fall under the Chinese definition of cultural relics, the provisions of the CRPL apply to the almost totality of goods imported into China belonging to this category. WILDE, C., *The Art of China*, in *CKGSB Knowledge*, March 15 2021, p. 4

[263] This and the following data have been obtained from the United Nations' COMTRADE Database, available at: https://comtrade.un.org/ (last visited: 27/08/21). Data from 2020 is also currently available, however, due to the different impacts of the COVID-19 outbreak on prominent art markets, it may prove difficult to produce a reliable comparison, therefore using 2019 data is preferred.

[264] *Ibidem*

[265] See *supra*, Chapter 1 Paragraph 3.1.1

[266] CHENG DAFENG, *Jinchujing yishupin haiguan guizhi celue yanjiu (Research on Customs Regulation Strategies for the Entry and Exit of Artworks)*, in *Shandong yishu xueyuan xuebao*, n. 178, 2021, p. 7

[267] A part of the Chinese acquisitions on the international art market are actually justified by the buyers' patriotic desire to re-import the cultural relics that have been smuggled and stolen during the period of Western Imperialism before the foundation of the PRC. Nowadays, since there is no retroactive international convention

inclined to invest in cultural heritage of Chinese provenience[268], this leads to the current situation, where the Chinese relics sold on the international market have slowly re-entered China and subsequently become the object of protection of the current CRPL, even if as part of private collections. While it is a stretch to affirm that the current import policies have been drafted in this way in the hope of reaching this exact result, considering that in 2002 it was impossible to foresee the future art market expansion nor the presence of several interested Chinese billionaires, it also undeniable that the present situation is actually extremely favorable for the Chinese government since it allows China to fulfill its long lasting desire of re-acquiring lost relics spread throughout the world and protect them accordingly with limited monetary investments required from State finances. Moreover, central authorities also have the possibility of somehow monitoring the art market, since auction houses all need a certain degree of governmental participation.

Obviously, such movements of cultural relics locally also affect the international market as a whole and while foreign-based auction houses are pressing to enter the local market and sell directly to potential buyers without having to partner with the Chinese government, this one-way movement of Chinese relics towards China means that the prices of the remaining relics are destined to increase worldwide.

The main drawback of such a system, however, is that as Chinese buyers tastes are increasingly changing towards relics originating from other foreign countries[269] a growing number of said relics is currently entering China, but without strict import regulations it is impossible to verify whether the ones sold in auction houses are actually illegally imported relics or not and while this is not necessarily a problem for the integrity of the Chinese

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that may be used as legal basis to request the return of said relics and most countries do not have the funds to directly buy them on the market, the role of individual collectors has often proved crucial. For more information on the topic and some recent example of famous repatriation cases in China, see TAYLOR, J. M., *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?*, in *Loyola University Chicago International Law Review*, vol. 3, Issue 2, Spring/Summer 2006; NOVARETTI, S. *«Che il passato serva il presente»: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli 2017, Section III; WANG XING, *Zhongguoshi wenwu huogui (The Chinese-Style Return of Cultural Relics)*, in *Shenghuo zhoukan*, n. 46, December 21, 2009

While a sensible amount of acquisitions can still be explained in this way, it is however ultimately incorrect to believe that Chinese collectors are only animated by patriotic purposes: on the contrary, many conceive buying artworks as a way to diversify their investments *portfolio*, for others it's a way to signal their ascension in the social ladder, others, finally, are increasingly refined connoisseurs who look for new pieces for their private collections. Additionally, tastes are gradually changing with contemporary art and cultural heritage originating from countries other than China undoubtedly gaining space. WILDE, C., *The Art of China*, in *CKGSB Knowledge*, March 15, 2021; TEFAF (The European Fine Art Fair), *Chinese Art Market Report 2019*, June 2020.

[268] WILDE, C., *The Art of China*, in *CKGSB Knowledge*, March 15 2021; MENDEZ, V., *How China Became the World's Second-Largest Art Market*, in *Highbrow Magazine*, July 28, 2014.

[269] *Ibidem*

national cultural heritage, it represents exactly the kind of conduct that China itself had been strongly advocating against in institutions like the UNESCO.

In conclusion, from what we have seen, we can say that China has been able to create a cultural heritage protection system that, despite some inherent shortcomings like the vagueness of some definitions – especially in the grading of cultural heritage – the lack of adequate funds or an unclear division of responsibilities among the different institutions and agencies, is in line with international standards and, at least in theory, should ensure a good level of protection to local heritage.

One of its characteristics is its apparently contradicting cultural heritage import and export framework, that however perfectly answers the need of a Country that at the moment is both one of the largest source countries and one of the largest market countries in the world. Taking this into consideration, on one hand, it is undeniable that the current export policies have been drafted especially with the objective of preventing as much as possible precious cultural relics from leaving the Country and have so far proven quite effective, since as of today, due to lengthy administrative procedures and demanding conditions to fulfill, it is indeed difficult or even impossible, for Chinese nationals and foreigners alike to export cultural relics following the described procedures, unless previously approved by relevant authorities.

On the other hand, favorable import policies, tariffs and taxes actively support the acquisition of cultural heritage from abroad, thus contributing to their protection once they are within the national territory, while also allowing a constant growth of the local cultural heritage and art market.

If right now the current import and export framework is a perfect fit for China, it may still prove rather interesting to monitor its evolution in the next few years to see how it will change. In facts, right now it is indeed almost impossible to foresee a future where China completely deregulates heritage exports, due to the historical, social and political importance that cultural relics have for the Country and the centrality the topic had in the Chinese system; furthermore, depending on how it wants to present itself globally, there may be the possibility of China actively trying to set an example as one the most representative source countries by strengthening its import regulations in order to effectively identify illicit imports and counter them, as prescribed by several international agreements.

At the same time, however, it may not be completely absurd to expect some reforms in the other direction: at the moment the art market is still growing while undergoing important changes, buyers tastes are moving towards relics other than the Chinese ones and the numerous organizations, groups, auction houses that operate in the market and have been able to profit a lot in the past years are now constantly pressing the authorities for additional import tariffs reductions and a greater liberalization of the market as a whole. If the advantages to be gained from an opening of the local market were to be deemed greater than the ones currently obtained, it may not be completely impossible for a Country already accustomed in its past to some rather radical reforms to undergo a different one again in the future.

Conclusion

In the present work it has been highlighted how China has been able to realize a cultural heritage protection framework suited to its needs, but this topic has been analyzed only from a legal viewpoint, focusing on how the current system has been created, what are its characteristic and, especially, how its import and export regulations are structured.

Such elements, however, aren't important only for a comparative approach and from a more strictly political perspective China is probably destined to influence the way heritage policies will be implemented globally, determining relevant repercussions within the cultural heritage world in the next few years. To better understand this point, two last underlying issues should also be taken into consideration: the position of China as a growing political and economic power and the effects of globalization on the art market.

Concerning the former, it is important to notice that, while it is true that the resources currently invested in this area are nowhere enough to effectively protect the local cultural heritage, as of today China isn't merely a cultural power, like other source countries may be, but it is also one of the world's main political and economic powers and this means that there is the real possibility of its requests, suggestions or proposals to be held in high regard within international organizations or implemented through *ad hoc* bilateral agreements, due to the influence the Country has as well in other areas external to heritage protection, thus deeply affecting the existing balance: in facts the current international protection framework is the result of a compromise between the opposing interests of source and market countries and the lack of support from the latters is one of the main causes that determined the impossibility of adopting shared legal instruments to prevent heritage trafficking while also ensuring better control of heritage circulation worldwide. The ever-growing economic and political power of China, however, its marked position as a source country and its increasing activism are slowly changing this equilibrium, since a source country finally has the resources and prestige to impose its vision and even force in some cases market countries to reconsider their general positions and sign slightly less favorable treaties or even consider accession towards those international conventions that they had previously refused.

Therefore, as international power relations change, we can probably expect a new era for heritage protection where, if China's concerns were to be seriously taken into

consideration as inputs when drafting and amending legal instruments, we may assist to the implementation of stricter policies to prevent heritage smuggling and maybe even to a potential resolution of the issue regarding the restitution of previously historically stolen goods, two of the more pressing issues in the Chinese agenda.

The second element that may increasingly contribute to shape future developments is globalization: in this case said phenomenon is currently impacting the international circulation of cultural goods and China is obviously also being affected, however, given its role as one of the largest existing art markets, the changes taking place within China are bound to generate repercussions worldwide.

To be specific, cultural heritage isn't unaffected by globalization, as art pieces originating from a specific country are constantly being sold, like all other normal commodities, in a completely different one through the intervention of auction houses, galleries or even privates, while buyers tastes are also continuing to change in different directions. This situation has no direct impact on China as a country itself, since the authorities' prevalent narrative still sees the protection of the Chinese past, identity and traditions as one of the central elements of its cultural policy; however, Chinese buyers aren't foreign to such changes and, given their irrefutable prominent position in art markets, their recent actions are contributing to shape the current market: in facts, if in the past the interest of local buyers towards Chinese relics – backed by national regulations that prevented those same relics from leaving the country once they had entered it – generated a one-way flow of goods towards China and sensibly altered the medium prices such goods were normally sold for, nowadays instead, amongst the other consequences of globalization, their tastes are changing towards foreign art pieces. This situation, in particular, shouldn't be overlooked, since changes in tastes occurring in one of the world's largest markets imply important repercussions in all the other art markets as well, making the prices of some categories of goods fluctuate and others fall.

With these premises it may not seem far-fetched to imagine China trying to exploit its advantages and obtain better conditions for its own local buyers.

Given the general situation presented above, it is clear we are entering a new phase for heritage protection characterized by the central position assumed by China. This especially means that the same hypothesis advanced regarding the future evolution of the Chinese protection system will probably influence the evolution of the international regime as well.

In synthesis, on one hand, despite the obvious flaws of the system, Chinese declared interests towards a better protection of cultural relics may still be beneficial for heritage protection globally, since it may favor, be it through bilateral agreements or support to international projects, the implementation of stricter rules and a greater involvement of other market countries in the fight against illicit trafficking, decay and damages due to negligence.

On the other hand, however, as a consequence of globalization and changes in local tastes, the cultural heritage and art market is also bound to undergo profound alterations and it is unlikely that a powerhouse like China will simply stand by watching but, on the contrary, it will probably take action in the direction that is most likely to be beneficial to its buyers and to itself.

While it is still impossible to clearly foresee today how China will move in the future, what is certain is that it is already one of the protagonists in the heritage area and its individual decisions and strategic alliances will, directly or indirectly, have a profound impact on the international system regardless, therefore keeping an eye on the Chinese situation will probably prove important to understand the changes that will take place in the next few years.

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https://www.unidroit.org/

UNITED STATES DEPARTMENT OF STATE – BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS – China
https://eca.state.gov/country/china

WCO – World Customs Organization
http://www.wcoomd.org/en.aspx