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THE CONFUCIUSORNIS SANCTUS: AN EXAMINATION OF CHINESE CULTURAL PROPERTY LAW AND POLICY IN ACTION

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Abstract: This Article highlights the issues surrounding the international movement of cultural property by examining them in the context of fossil smuggling from China. The story of the Confuciusornis sanctus and a Chinese case concerning stolen fossilized dinosaur eggs serve as case studies for examination of the issues raised by the movement of cultural property between source states and market states. These cases also make vivid the deficiencies in the Chinese legal regime which is designed to protect and retain fossils in China. The Article concludes that the laws now in place are not adequate and that increased emphasis on non-legal measures to protect fossils would be more effective.

INTRODUCTION

In the foyer of the New Mexico Museum of Natural History in Albuquerque lies the skeleton of a slight chicken-sized bird from northeastern China.1 The 130-million-year-old bird, known to paleontologists as Confuciusornis sanctus, has been on display since July 2, 1998.2 Its fossilized remains are among the most important recent paleontological discoveries made. For paleontologists, the Confuciusornis sanctus is one of the newest pieces of information about the early history of modern birds.3 For Chinese legislators and cultural relics professionals, this fossil and others like it are “cultural relics.”4


2 See id.


4 See People’s Republic of China Cultural Relics Protection Law, Adopted at the 25th Meeting of the Standing Committee of the Fifth National People’s Congress and promulgated by Order No. 11 of the Standing Committee of the National People’s Congress on and effective as of November 19, 1982 [hereinafter CRPL], reprinted in XIN ZHONGGUO
Such relics are the object of a bewildering array of regulations designed to protect not only the objects themselves, but also China’s various interests in them. In light of the large number of fossils discovered recently in China, and probably the loss of a great many of them (including specimens of Confuciusornis sanctus) to the international fossil market, China is presently undertaking to amend the current Cultural Relics Protection Law (CRPL) to provide more specific protection for fossils.

The purpose of this Article is two-fold. First, it examines issues involved in the international cultural property movement using the story of the Confuciusornis sanctus and the smuggling of fossils in general as case studies. Second, this Article highlights the deficiencies of the Chinese fossil protection regime in order to suggest possible areas of reform and argue for increased focus on non-legal protection methods. Part I presents the story of the Confuciusornis sanctus, a valuable and scientifically significant fossil, as an example of the immense challenge faced by those who set out to protect fossils. Part II places this story in international context. Through China’s experiences with fossil smuggling, this Part examines the issues surrounding the movement of cultural property in general. It outlines both the forces that cause the movement of fossils out of China and other source nations and the various interests that call for their retention in their country of origin. Part III examines critically the group of laws


5 See J. David Murphy, An Annotated Chronological Index of People’s Republic of China Statutory and other Materials Relating to Cultural Property, 3 INT’L J. CULTURAL PROP. 159 (1994). Murphy provides a comprehensive list beginning in 1930 that includes regulations, rules, circulars, measures, laws, guides, announcements, and administrative measures among others. See id. The measures are promulgated by municipal, county, and provincial governments as well as by state authorities. See id.


7 Philip Currie, a dinosaur curator for the Royal Tyrrell Museum of Paleontology in Alberta, Canada, has said that the most popular source for “nicer, showier, more expensive specimens” is China. Jeff Hecht, Psst . . . Wanna Triceratops?, NEW SCIENTIST, Dec. 14, 1996, at 12; see infra note 32 (one estimate holds that 75% of the discovered Confuciusornis specimens have been smuggled out of China).

8 CRPL, supra note 4.

and regulations that exist to protect China’s fossils and other cultural property. A close analysis of these provisions as they apply to fossils reveals flaws in China’s cultural property protection system. This Part concludes that as they are now, the various laws and regulations do not adequately protect fossils. In Part IV, a reported case on the theft of dinosaur egg fossils in Henan Province practically illustrates the patchwork of laws, guidelines, and announcements a court could use to analyze a case concerning fossil protection. The case, translated in the Appendix of this Article, dramatically demonstrates the flaws in China’s present legal framework. It points out some problems discussed in Part III and highlights possible regulatory and enforcement conflicts between local and national legal provisions. Finally, Part V turns from discussion of the laws that failed the dinosaur eggs in Henan and have so far not been able to prevent the loss of Confuciusornis sanctus specimens to argue that non-legal solutions with a focus on prevention and preservation are perhaps the answer.

I. THE STORY OF THE CONFUCIUSORNIS SANCTUS, OR, HOW AN IMPORTANT FOSSIL IS LOST TO CHINA

The provenance of the Albuquerque fossil is largely a mystery. A former member of the museum’s board of trustees, Charlie McCarthy, saw the fossil for sale at the Mineral and Fossil Gallery, a shop in Santa Fe. He bought it for $18,000 and then donated it to the museum. Although museum scientists have verified the authenticity of the very well-preserved specimen, the museum has not been able to determine how or when the fossil came to the United States. The museum has been trying to trace its origins through fossil dealers but has gotten no further than the shop where it was purchased. The owner of the shop, Jack Burch, believes the dealer is out of the country, and Burch has been unable to contact him to obtain copies of Chinese government export papers. The fossil is on temporary display while the museum tries to work out its provenance. Rick Smartt, the museum’s director, says that if it is determined the fossil was smuggled out of

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10 See Fleck, supra note 1.
11 See id.
12 See id.
13 See id.
14 See id.
15 See Fleck, supra note 1.
China, the museum will either give it back to China or seek permission from the Chinese government to display it.\(^{16}\)

Six museums in Japan have Confuciusornis remains, as does the Senckenburg Museum of Natural History in Frankfurt, Germany, which acquired its specimens in 1996.\(^{17}\) The Japanese museums paid between $5,000 and $15,000 for their birds.\(^{18}\) The first Japanese museum to acquire one, the Ibaragi Nature Museum, obtained it in 1993, although this specimen was not identified as a Confuciusornis until 1997 by a visiting British paleontologist.\(^{19}\) The traders who sold to the museums were Japanese.\(^{20}\) Japanese museum officials were assured the fossils were legal, but they did not receive any documents verifying their legality or authorizing export from China.\(^{21}\)

None of the Japanese museums now displays the bird while they try to decide how to deal with the situation. The Education Ministry of the Japanese government has asked the museums to return the fossils.\(^{22}\) The Senckenburg was assured by its dealers that the fossils were legal.\(^{23}\) On the Chinese side, the State Administration for Cultural Relics (SACR) says the fossils are smuggled cultural relics.\(^{24}\) According to the magazine *Science*, "a press spokesperson says that SACR has never approved the export of Confuciusornis fossils, nor has it re-

\(^{16}\) See *id.*


\(^{18}\) See *id.*

\(^{19}\) This was two years before the Confuciusornis sanctus was identified and published. A Confuciusornis also appeared in New York in 1993 in the hands of a Chinese businessman who tried to sell it to Phillips Fine Art Auctioneers. The businessman had bought the bird fossil, along with others he had with him, from Chinese farmers. Phillips’ experts had never seen anything like it before, but the firm did not purchase the bird because its policy is not to sell fossils which are “undescribed or new to science.” However, after it was identified, Phillips put one up for auction in December of 1996. See Hecht, *supra* note 7.


\(^{21}\) See *id.*

\(^{22}\) The Ministry asked the museums to abide by a “moral regulation set by a conference of museums worldwide” which advises museums not to gather objects whose export is banned by the source country. *Museums asked to follow laws of items’ origin country*, *Japan Econ. Newswire*, *Kyodo News Serv.*, July 28, 1998, available in LEXIS, News Group File.


\(^{24}\) See *id.*
ceived any requests." An official of the SACR described the situation as "robbery" to the magazine.

The importance of the Confuciusornis sanctus is clear and underlines the tragedy of the loss of such a great number of specimens. The bird was identified and named in 1995 by avian paleontologist Hou Lianhai of the Institute of Vertebrate Paleontology and Paleoanthropology in Beijing. Hou identified it from a specimen brought in by a local farmer. The creature is thought to have lived more than 130 million years ago and is surpassed in age only by Archaeopteryx. Hundreds of the birds have been excavated from beds outside Sihetun in Liaoning Province. The beds are described as "the most important site discovered this century."

One estimate maintains that 75% of the discovered Confuciusornis skeletons have been smuggled out of China where there is now a minority of fossils for research and exhibition. Another holds that as of 1996 there were only seven in institutions in China while there are several hundred on the open market. According to Xinhua, the

25 Id.
26 Id.
27 See id.
29 See id. Archaeopteryx is a 150-million-year-old-bird discovered in Bavaria in 1861. It has been considered a possible link between birds and dinosaurs. However, because the bones of modern birds look so different from the bones of Archaeopteryx, some ornithologists doubt that modern birds descended from dinosaurs. The Confuciusornis is an intermediate species. It and another Liaoning discovery, the Liaoningornis, which looks more like modern birds, could show that Archaeopteryx and Confuciusornis are on a side evolutionary branch and that modern birds derived from Liaoningornis-type species and not Archaeopteryx. This could imply an even earlier origin for all birds, perhaps even before that of their putative ancestors, the dinosaurs. However, this issue is a hotly disputed topic among ornithologists and paleontologists. See Ann Gibbons, Early Birds Rise from China Fossil Beds, SCIENCE, Nov. 15, 1996, at 1083, available in 1996 WL 14644471.
30 The site is located 400 kilometers northeast of Beijing. It is part of the Yixian formation which is rich in fossils. See Justin Wang, Scientists flock to explore China's "Site of the Century," SCIENCE, Mar. 13, 1998, at 270.
31 Philip Currie (vertebrate paleontologist), quoted in id.; see also Large Number of Ancient Bird Fossils Discovered in Northeast China, XINHUA ENG. NEWSWIRE, Nov. 24, 1997, available in 1997 WL 15756353 (paraphrasing John Ostrom, Professor Emeritus of Yale University who is an expert on ancient birds: "no other place on earth has such a large fossil collection from such a crucial period of change on earth that is preserved so well . . .").
33 This is according to Larry Martin, a paleontologist at the University of Kansas who worked with Chinese scientists on the first description of the fossil. See Hecht, supra note 7.
official Chinese news service, almost 1,000 ancient bird fossils unearthed in the area have been sold secretly.34

II. CHINA'S INTERESTS IN FOSSILS

The story of the Confuciusornis is not a singular tragedy. It is a small part of a narrative that chronicles a steady flow of cultural property out of China. The backdrop of the story is China's interests in fossils—interests that explain why the retention of fossils is a sensitive issue. In general, China's interests are defined by its position as a source of cultural property in the international cultural property market.

A. China's Position in the International Cultural Property Market

The international cultural property market divides into source nations and market nations.35 "Source nations" are art and artifact rich, but generally financially poor.36 "Market nations" are art and artifact poor, but financially rich.37 China is the classic source state: a

34 See Large Number of Ancient Bird Fossils Discovered in Northeast China, supra note 31. Many of the Confuciusornis specimens which have appeared on the black market have gone to private collectors. See id.

35 In thinking about a market with two strongly identifiable sides, I chose to organize these issues in terms of the interests of each side. J. David Murphy similarly presents some of the same ideas in the context of a demand side and a supply side. See J. DAVID MURPHY, PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA 4–5 (1995) [hereinafter PLUNDER]. John Henry Merryman organizes the two sides in a more general, theoretical characterization of cultural property in terms of "nation-oriented policy" or "cultural nationalism" and "object-oriented policy." See John Henry Merryman, The Nation and the Object, 3 INT'L J. CULTURAL PROP. 64 (1994); see also John Henry Merryman, Two Ways of Thinking about Cultural Property, 80 AM. J. INT'L L. 831 (1986). Because discussions of the phenomenon as it relates to China are always so intertwined with the economic status of a developing country and market forces, I think a discussion of the issue which stays closer to economic terms is appropriate. I did not, however, want to use words like supply and demand which are strongly identified with economics because cultural and nationalistic factors are also important. J. David Murphy clearly identifies each side and the terms used to describe them. See PLUNDER, supra.

36 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 46 (1987). This group includes nations like China, Mexico, Guatemala, Russia, Peru, and many others. See id.

37 Id. This group traditionally includes the United States, France, Germany, Japan, Britain, and Switzerland. See PAUL M. BATOR, THE INTERNATIONAL TRADE IN ART 16 (1988). Most cultural property headed out of China goes to Taiwan, Japan, Hong Kong, South Korea, Britain, the United States, and France. See China Customs Seize 200 Smuggled Relics, CHINA DAILY, June 11, 1998, available in LEXIS, News Group File. However, this is not to imply that these nations have no export controls of their own. Except for the United States and Switzerland, most nations have some kind of legal provision which acts to keep
developing country awakening at private and governmental levels to the economic potential of the antiquities trade. On the market side are the museums, dealers, collectors, tourists, and academics of market nations. Both sides have interests in protecting and preserving the objects. Where they differ is how to achieve the goal. The intersection of their attitudes toward cultural property gives rise to the laws that regulate its movement.

Following the laws of supply and demand, artifacts flow from source nations to market nations in a trade, mostly illicit, that has increased spectacularly since the 1970s and 1980s. Cultural property is generally not included in what developing countries like China want to trade, and despite the volume and potential value of a licit market, restrictions are common. These restrictions are "nearly universally" recognized as acceptable exceptions to free trade. However, despite the restrictions and against the best efforts of source nations and the prevailing attitudes of international law, the flow of cultural relics from source nations to market nations continues.

cultural property at home. See MERRYMAN & ELSEN, supra note 36, at 53. To further categorize nations in the international trade in cultural property, Italy and Switzerland are generally known as "transit states" where title can be laundered because of the ability of bona fide purchasers to take good title. PLUNDER, supra note 35, at 2. Hong Kong (at least before unification) and Macau stand in this position for the China trade. See id.

38 See PLUNDER, supra note 35, at 7.
39 See id. at 4.
40 See id. at 1. The early 1970s is considered the high point of concern over the illicit art trade. It culminated in the UNESCO [United Nations Education, Science, and Cultural Organization] Convention on the Illicit Movement of Art Treasures, Nov. 14, 1970, 10 I.L.M. 289 (1971) [hereinafter 1970 UNESCO Convention]. See MERRYMAN & ELSEN, supra note 36, at 71. The 1990s saw considerable publicity directed toward the legal issues surrounding cultural property, most notably in cases which argue for the return of cultural property lost or stolen during World War II. Also in the 1990s, the Unidroit Convention on Stolen or Illegally Exported Cultural Objects was promulgated, signed by 22 countries, ratified by two, and acceded to by one, China. See Marilyn Phelan, Cultural Property, 32 INT'L LAW 447 (1998).

41 See PLUNDER, supra note 35, at 3.
42 See id.
43 The 1970 UNESCO Convention, Article 2 exhorts "to oppose ... [the] illicit import, export and transfer of ownership of cultural property ...." 1970 UNESCO Convention, supra note 40, art. 2, 10 I.L.M. at 290; see also Merryman, The Nation and the Object, supra note 35 (asserting that the basic assumption of the Convention is that objects belong within the boundaries of the nations where they are found). According to Merryman, this assumption informs much of the international legislation on cultural property and the international policy discussions on the issue. See id. at 64.
B. The Cultural Property Interests of China as a Source Nation

While China fits generally into the international scene as a source nation, her particular interests can be divided into four categories: nationalistic, prestigious, cultural, and economic.

1. Nationalistic Interests

Cultural nationalism is a key value underlying retentive cultural property regimes like China's.\(^{44}\) The nationalistic interest is the basic assumption informing such regimes, and it is a factor in almost every kind of cultural property movement.\(^{45}\) The nationalistic attitudes of source nations spring largely from the origin of the cultural property trade in the colonial era, a humiliating period of history for most source nations.\(^{46}\) The export of artifacts became a symbol of colonialism in general.\(^{47}\) In some specific cases, nationalism is stoked by the move of one very precious, symbolic object or collection of objects such as the Elgin Marbles,\(^{48}\) the Afo-A-Kom,\(^{49}\) or in the case of China,

\(^{44}\) In addition to its identification with colonialism, throughout Chinese history conquest has generally involved the destruction of the "cultural collections of the vanquished." Id. at 44. Therefore, in China destruction of cultural property historically is linked with the destruction of the nation.

\(^{45}\) I have chosen to use the word "movement" as much as possible because it does not have the connotations that other words such as transfer, theft, plunder, loss, or gain do.

\(^{46}\) In the Colonial Era there was abundant international trade in cultural property from Africa and Asia. See PLUNDER, supra note 35, at 3.

\(^{47}\) See id.

\(^{48}\) Probably the most famous movement of cultural property that is always presented in terms of preservation of cultural patrimony is the movement of the Elgin Marbles to the British Museum.

\(^{49}\) The story of the Afo-A-Kom is retold in many sources. It is a religious icon of the Kom tribe that lives in Cameroon. It was stolen and sold to a French dealer who sold it to an American dealer. Ultimately it was returned to the Kom by the United States government. It is interesting for purposes of a discussion of cultural nationalism in that it is the symbol of a tribal group within a nation-state. The Cameroon ambassador to the United States, who was not a Kom, was "unenthusiastic" about its return. A cultural attaché at the embassy at the time, a Kom, on the other hand, described the statue as "the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together." Merryman, The Nation and the Object, supra note 35, at 68. Aside from a demonstration of the strong emotion which can be stirred by issues of cultural property, the important point for purposes of this discussion is that it is the interest of the government of the nation state which is expressed in its cultural property laws. In a multi-ethnic state like China, which has an interest in encouraging recognition and consciousness of a single culture and an interest in not fanning the flames of nationalistic fervor among its population groups, this should be kept in mind. In the CRPL, the objects of historical, artistic, or scientific value which reflect the "social structure of each nationality" are protected. CRPL, supra note 4, art. 2(5).
art objects now in the Victoria and Albert Museum in London and an extensive collection of Chinese art in the National Gallery of Scotland.\(^{50}\)

2. Prestige

A national interest exists in retention of cultural property because a rich body of cultural property enhances the prestige of a nation.\(^{51}\) In the case of the Sihetun site, Chinese researchers, "hope to parlay . . . global interest in the site into a more important role in future international collaborations" as well as global recognition.\(^{52}\) China is eager to protect paleontological digs that it feels are rightly excavated by its own scientists. According to a paleontologist from China's Institute of Vertebrate Paleontology, "important achievements on Chinese fossils should be made by Chinese researchers."\(^{53}\) A researcher from the Nanjing Institute of Geology and Paleontology emphasized that "China should have the proprietary rights of academic achievement."\(^{54}\)

\(^{50}\) Some of the objects once belonged to General Charles Gordon and are thought to have been looted by him during the burning of the Summer Palace by British and French troops in 1860. See PLUNDER, supra note 35, at 45. Scottish curators have "acknowledge[d] that the volume and strength of East Asian Art in the National Museum of Scotland owe in part to the efforts of the French and British troops that sacked the Summer Palace in Beijing in 1860, and the consequent flooding of auction houses in Paris and London with imperial treasures." Pillered Gifts from Asia, DAILY YOMIURI, Jan. 19, 1997 (reviewing Jane Wilkerson & Nick Pearce, HARMONY AND CONTRAST (1996)).

\(^{51}\) Guo Zhan, division chief for protection management with the State Bureau of Cultural Relics expressed this attitude in speaking about the designation of UNESCO World Heritage Sites in China: "[t]he honour of being placed on the list raises the status of the places . . . ." China: Protection or tourism, a cultural conundrum, CHINA DAILY, July 31, 1998.

\(^{52}\) Wang, supra note 30. The same dynamic is apparent in the following: Chinese scientists were "elated" when an international panel endorsed a site in Zhejiang province as a "reference point" for the middle Ordovician period. "The designation represented an international seal of approval for the nation's scientific prowess and its ability to be the steward for a site that would draw researchers from around the world." However, the International Commission of Stratigraphy vetoed the designation in the end, turning elation to indignation and anger. The article notes that "[f]or many Chinese scientists, the most important element [to collaboration] is mutual respect." Geoscientists Seek Common Ground on Collaborations: Working in China, SCIENCE, May 2, 1997. However, China will be in the global spotlight on this issue during the Fifth International Conference on Birds and Evolution which will be held in China in the year 2000. The birds found in Liaoning are "high on the list of discussion topics." Large Number of Ancient Bird Fossils discovered in Northeast China, supra note 31.

\(^{53}\) Wang, supra note 30.

\(^{54}\) Id.
3. Historical, Cultural, and Educational Interests

Cultural property preserved within its country of origin has ethnological, historical, cultural, and educational worth. These values are enhanced for the source nation by the presence of the property within its borders. Presence in the source nation maintains a link between the artifact and its geographical and historical milieu.

The Confuciusornis illustrates the critical importance of resident cultural property. A fossil without a provenance is of limited historical and scientific significance. A great deal of a fossil’s value for research purposes lies in its stratigraphic location. Clumsy amateur and illegal digging destroys the evidence of a fossil’s placement. In the Liaoning dig, some birds were found in groups, suggesting some sort of communal lifestyle. Birds taken completely out of context are stripped of this valuable information.

The presence of an object in the source nation also develops and promotes domestic scholarship, education, and display. Confuciusornis fossils remaining in China have been featured in numerous exhibits in China that present their homeland’s ancient history to the Chinese. Discovery of the Confuciusornis has also created opportunities for Chinese paleontologists in research and publication.

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56 See id. at 234–35.
57 See generally, BATOR, supra note 37, at 25.
58 See Hou, supra note 3, at 1164.
59 However, it is notable that once the bird is out of the ground and its placement information is recorded, it loses this value and presumably, if it is no longer needed in China for research, education, or as an example of a type, it could leave without loss of crucial information. This fact was recognized in a set of regulations promulgated in 1979 by the State Council. The main goal of these regulations is how to best manage cultural relics to realize the most profit in foreign exchange. The most efficient use of a fossil would be to learn as much as possible from it and then sell it. See Trial Measures for Control of the Export of Cultural Relics with Special Permission (promulgated and approved by the State Council of the People’s Republic of China on July 31, 1979), CEILaw: CEI Chinese Law and Regulation database <http://www.ceilaw.com.cn>.
60 The CRPL calls for educational campaigns. See CRPL, supra note 4, art. 5. The birds from Liaoning were exhibited in Beijing in an exhibit entitled, “Exhibition of Primitive Bird Fossilized Treasures from Western Liaoning.” Sinosauropteryx Fossils on Display in Beijing, XINHUA ENG. NEWSWIRE, Mar. 23, 1997, available in 1997 WL 3751967.
61 Three Chinese institutions, the National Geological Museum of China, the Institute of Vertebrate Paleontology and Paleoanthropology, and the Nanjing Institute of Geology and Paleontology have mounted expeditions at the Sihetun site. See Wang, supra note 30. The identification of the Confuciusornis was published in Science by Hou Lianhai and three other scientists. See Hou et al., supra note 3. Chen Peiji of the Nanjing Institute of
4. Economic Interests

China also has economic interests in the retention of cultural property. Cultural property can be seen as a national resource to be exploited. For example, in the late 1970s, when the international trade in cultural property was at a high, China's State Council saw control of cultural relics export as a way to raise needed foreign exchange. In general, resident, well-preserved cultural property lures tourists. The Forbidden City in Beijing and the terracotta warrior excavation site in Xian are perhaps the most well-known sites which have drawn tourists for years. In late 1998, a US$800,000 museum is expected to open in Beipiao, near the Sihetun site. The plans are to expose the strata where the birds were found as a tourist attraction.

Cultural property also has economic value on an individual level. Individuals form the base layer of the illicit trade in cultural property. A Chinese farmer who turns up the skeleton of an ancient bird can easily make twice his yearly salary if he sells it on the black market. According to one official, the peasants dig the fossils to make a living but added that they would not do so if there were no commercial demand.

Geology and Paleontology looks forward to international collaboration to help publish articles in English. See id.

62 See PLUNDER, supra note 35, at 5. Murphy distinguishes between "hoarding" relics and mining them as a source of income. See id. at 157.

63 In 1979 the State Council emphasized that "specially permitted export" of cultural relics is allowed "in order that the export of a small quantity of cultural relics will bring in a relatively great amount of foreign exchange so as to support the development of the socialist four modernizations." Trial Measures for Control of the Export of Cultural Relics with Special Permission, supra note 59.

64 See BATOR, supra note 37, at 27. This fact is reflected in a state attitude that the objective of cultural property management in China is the "accumulation of revenue through tourism and sales." PLUNDER, supra note 35, at 107.

65 See Wang, supra note 30. Zhao Yibing, the head of bird fossil security, said, "Beipiao produces nothing that deserves attention but those fossils. They are our tickets to the outside world." Id. There was an International Dinosaur Festival in Nanyang City, Henan Province where a rich dinosaur egg bed was discovered. The discovery site was opened to tourists. See Henan to offer ten new tourism programs, XINHUA NEWS AGENCY, Nov. 7, 1995, available in 1995 WL 7715862.

66 Commentators describe the illicit cultural property trade as a pyramid with a large number of peasants on the bottom, numerous dealers in the middle, and relatively few collectors and museums in market nations at the top. See PLUNDER, supra note 35, at 5.

67 See Wang, supra note 30.

68 See Fleck, supra note 1.
C. The Interests of Market Nations

On the other side of the cultural property stage stand the market nations. Their interests are defined in terms of economics and a kind of international idealism that demands protection of and access to cultural property.

1. Internationalism

Instead of a national patrimony, market nations claim interest in protection of an international patrimony.69 Internationalists contend that the flow from source states to market states puts the artifacts in the hands of those who are eager and able, both technologically and curatorially, to preserve them, thereby aiding preservation of a world heritage.70 This position is often raised in discussions of Chinese cultural property because of the lack of funds and curatorial training among Chinese researchers for cataloguing, displaying, and preservation.71

The market side argues that the trade in cultural property makes artifacts and the cultures that produce them more visible, known, and accessible to researchers, academics, and the public.72 To many proponents of this view it is better that the artifact be in a public collection than in storage or a private collection.73 The argument is persuasive when applied to China. First, China possesses a large number of cultural artifacts, many of which exist in duplicate,74 and many of

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69 See Bator, supra note 37, at 21. This is John Henry Merryman’s first way of thinking about cultural property, “cultural internationalism.” See Merryman, Two Ways of Thinking about Cultural Property, supra note 35, at 831.

70 See Bator, supra note 37, at 21.

71 Murphy notes that cultural property must compete with public welfare needs in a struggle for limited resources. See Plunder, supra note 35, at 156. Such lack of funds has generally been blamed for the ineffective protection of cultural relics. See id. at 65.

72 See Bator, supra note 37, at 22.

73 This attitude is reflected by the former assistant director of the Senckenberg Museum (which has a Confuciusornis sanctus) in Germany, Stefan Peters: “it would bother me a little if they really were illegally imported, [but] . . . it is better that museums acquire these specimens rather than some private collection.” Stone & Couzin, supra note 17. This point raises a question considered in relation to the art market: whether there ought to be a presumption toward public rather than private ownership. See Bator, supra note 37, at 22.

74 In Chinese art history copying was considered an expression of respect and there were and are many forgeries. The practice of copying works, which began in the Song and Yuan dynasties, was not stigmatized but rather was seen as a form of appreciation. See Plunder, supra note 35, at 31. The number of forgeries also increased in the commercialized art market of the Ming Dynasty. See id. The fact of many forgeries makes the issue of
which are in storage.\(^75\) On a basic level, such a situation would seem to call for sharing and dispersal rather than retention.

2. Economic Interests

The market for cultural property in general is vast. It is "thought to be third only to drug and arms smuggling" and may even be in second place.\(^76\) In China, cultural relics are thought to be the "largest single class of item smuggled."\(^77\) China's potential as a future market is also immense.\(^78\) As mentioned, there is a huge supply of antiquities in storage and unexcavated. Thus, auction houses, dealers, and museum officials see China as "the final frontier for the art and cultural property trade."\(^79\)

Part of the international cultural property market is a healthy trade in fossils.\(^80\) As discussed above, Xinhua reports that 1,000 ancient birds from the Liaoning area have been secretly sold.\(^81\) Many of the Confuciusornis specimens that have appeared on the black market have gone to private collectors.\(^82\) Driven by the market, collectors focus on the rarity and aesthetics of a specimen.\(^83\) They do not want to

\(^{75}\) According to Murphy, there are so many relics uncatalogued in storehouses that museum staff cannot determine when something is missing. Relics suffer damage from inferior storage conditions. Numbers of uncatalogued items add to enforcement problems and preservation problems. See id. at 63–65.

\(^{76}\) Murphy, supra note 55, at 227.

\(^{77}\) Id. at 228.


\(^{79}\) Id. A thriving market in contemporary art adds to China's image as an important part of the cultural property trade. See id.

\(^{80}\) See Fleck, supra note 1.

\(^{81}\) See Large Number of Ancient Bird Fossils Discovered in Northeast China, supra note 31.

\(^{82}\) See Fleck, supra note 1 (citing Luis Chiappe, an expert in the species at the American Museum of Natural History in New York). According to Chris Beard, a paleontologist at the University of Pittsburgh, it is well known that fossil smuggling is a widespread problem in China. See id.

\(^{83}\) Henry Galiano, owner of Maxilla and Mandible, a fossil shop in New York City that has bought and sold Confuciusornis specimens, says his customers are interested in fossils that are "beautiful" or "that they can relate to." Hecht, supra note 7. Rarity is also in the interest of the fossil dealer. According to Larry D. Martin, who studies the Confuciusornis, the commercial value of the specimens is waning because there are so many of them. See Wendy Marston, Jurassic Mart: The Conflict between Paleontologists and Commercial Fossil Traders, SCIENCES, July 17, 1997, available in 1997 WL 13512885. Fossils in commercial markets are identified only by their name, state of origin, and location of find. See id. According to
see a drop in supply resulting from effective enforcement of protection measures.\textsuperscript{84}

\section*{III. Protection of Fossils Under the Chinese Cultural Property Protection Regime}

With strong interests in retaining its cultural property and faced with a massive outward flow of artifacts, the Chinese government has constructed a retentive regime that, despite its severity, has failed to protect fossils. The provisions are often vague and ill-suited to the protection of fossils and prehistoric archaeological sites. The main applicable laws, the CRPL and the 1997 Criminal Law, mandate strict control of relics wherever they are found. Though there are provisions designed as protective and preventive, the focus is on punishment, which necessarily occurs after the fossils have lost much of their value.

\subsection*{A. Introduction—Cultural Property in Chinese Legislation}

China's broadest aspirations, as reflected in the legislation regarding cultural property protection, are found in the 1982 Constitution. Article 22 of Chapter One, General Principles, states that the state protects "important items of China's historical and cultural heritage."\textsuperscript{85} A confusing and overlapping group of laws and regulations promulgated by different legislative and administrative bodies implements this policy.\textsuperscript{86} The alleged illegal removal of the fossil now at the

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David Krause, a former president of the Society of Vertebrate Paleontology, science is the loser in the commercial market where the specimen loses its value and "potentially becomes an art object." \textit{Id.}

\textsuperscript{84} In the U.S., the American Association of Paleontological Suppliers seeks to protect the interests of commercial fossil collectors. It sponsored the Fossil Preservation Act of 1996 which sought to gain access to public land for commercial collectors, but the bill did not pass. \textit{See} Marsten, \textit{supra} note 82. Academic paleontologists also do not necessarily want to see a drop in the supply from commercial collectors. "A lot of this material would never be dug up if it were not for the commercial incentive," according to Storrs Olsen of the Smithsonian Institution in Washington, D.C. Hecht, \textit{supra} note 7. One "eminent paleontologist" in China has expressed the same sentiment: "we should thank the explorers—we just can't afford to fund the same exploration ourselves." Justin Wang, \textit{China's New Spirit of Capitalism Unearths Clue to Prehistoric Past}, \textit{World Paper}, Sept. 9, 1997, available in 1997 WL 9862942.

\textsuperscript{85} \textit{People's Republic of China Constitution}, ch. 1, art. 22 (1982). Article 119 specifies that the governments of the autonomous regions are to "independently administer" their own cultural affairs.

\textsuperscript{86} \textit{See} Murphy, \textit{supra} note 5. For an exhaustive collection of measures in Chinese, beginning in 1950, see \textit{Selected New Cultural Property Laws}, \textit{supra} note 4. In addition,
Albuquerque museum implicates a number of statutes and illustrates their flaws.

The most significant applicable laws are the 1982 CRPL and the 1997 Criminal Law. The CRPL, which was amended in 1991, outlines the policies, and the Criminal Law provides criminal enforcement. The CRPL plays a dual role: it provides the basis for administration of cultural relics and mandates their protection by criminal sanction. Other norms are promulgated by the State Council, and regulations can be issued by the Ministry of Culture (a ministry under the State Council) and the State Bureau of Cultural Relics. Customs regulations also aid in enforcement. Provinces, autonomous regions, and local governments also promulgate cultural property legislation that

China has acceded to the 1970 UNESCO Convention on the Illicit Movement of Art Treasures, but has seemingly not enacted domestic implementing legislation. International law is automatically implemented as part of PRC law and where there is a conflicting provision between the two, international law prevails. See PLUNDER, supra note 35, at 80-81. However, according to Murphy, the omission "probably" does not affect the applicability of the convention to China. This issue is beyond the scope of this Article which is not concerned with the Confuciusornis once it leaves China.


88 See Murphy, supra note 78, at 243 (for example, the Explanation and the Guidelines, supra note 87).

89 Customs regulations are important in an administrative sense though serious cases are dealt with under the Criminal Law. See PLUNDER, supra note 35, at 118. In response to the problem of dinosaur egg smuggling, fossils have been the object of specific regulations: "New Provisions Made By the Customs Concerning the Export of the Fossils of Ancient Vertebrates and Ancient People." PLUNDER, supra note 35, at 119, referencing 7 CHINA CUSTOMS 13 (1990).
very often "mirrors" national legislation.\textsuperscript{90} Jin Zi-tong, a Chinese legal commentator who writes on cultural property, has criticized the myriad provisions, despairing of "the large number of relevant laws and regulations, the ill-organized legal system and the lack of coordination between the relevant legal provisions."\textsuperscript{91}

\textbf{B. The Definition of Cultural Property}

"Cultural property" is the legal term used to describe objects like the Confuciusornis sanctus. Cultural property is generally described as a collection of objects of historical, artistic, or scientific value that a nation designates as reflective of or important to its civilization.\textsuperscript{92} It is movable or immovable\textsuperscript{93} and need not be concrete.\textsuperscript{94} Although cul-

\textsuperscript{90} See id. at 78. For example, in the "dinosaur eggs case" discussed in this paper (see Appendix for translation and infra notes 185–203 and accompanying text for discussion), the Announcement Concerning the Illegal Excavation, Buying and Selling, and Smuggling of Fossilized Dinosaur Eggs was promulgated by the Xixia County People’s Government, Henan Province, on June 13, 1993. See Zhang Biliang and Others Failing to Sell and Speculate for Profit on Fossilized Dinosaur Eggs, Xixia County People’s Court 1996, reprinted in 3 \textit{Remin Fayuan Anli Xuan [Selected Cases of the People’s Court]} 43–46 (China Practicing Law Institute ed., People’s Court Publishing House 1996) [hereinafter Zhang Biliang Case].


\textsuperscript{93} See \textit{PLUNDER}, supra note 35, at 19; \textit{CRPL}, supra note 4, art. 2(1). In China (and similarly in other countries) immovables include sites of historic, revolutionary, or national importance such as the Forbidden City or the former house of Mao Zedong’s first wife, \textit{see Floods Damaged World Heritage Sites in China}, \textit{Japan Econ. Newswire}, Sept. 20, 1998, and Tiananmen Square.

\textsuperscript{94} In the controversy between the Shanghai Cultural Ministry and the Lincoln Center Festival which resulted in cancellation of an American staging of Tang Xianzu’s "The Peony Pavilion" in New York City, the opera was described by the Shanghai Cultural Minister, Ma Bomin, as "a precious piece of Chinese culture." Concern that the American interpretation of the Ming-dynasty opera distorted the work and presented an improper view of China led to the production’s demise. The desire to control the work’s dissemination and even meaning seems to push it within the realm of what China considers its cultural property. \textit{See Edward Rothstein, Cultural Modernity and its Gifts of Grace and Struggle}, \textit{N.Y. Times}, July 20, 1998, at E2. In the end, Chen Shi-Zheng’s staging of "The Peony Pavilion" was presented by the Lincoln Center Festival in New York City in July of 1999. \textit{See Classical Music Listing}, \textit{New Yorker}, July 12, 1999, at 13. In a caption to a photograph of a singer, the magazine quoted Chinese officials as having labeled it, "feudal, superstitious, and pornographic." \textit{Peonies, Uncut}, \textit{New Yorker}, July 12, 1999, at 56.
tural property is generally thought of in terms of art objects, it also includes "rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest." China uses the term "cultural relic" rather than "cultural property." This narrower term may reflect the status of cultural property in China as "property of limited circulation." The definition found in Article 1 of the CRPL is inclusive and covers the elements discussed in the first paragraph of this section as they pertain to objects within the boundaries of the People's Republic. The 1982 law includes relics with historical, artistic, and scientific value ranging from tombs and grottos to buildings and manuscripts. China also grants "the fossils of ancient vertebrate animals and paleoanthropoids which have scientific value" the same protection as cultural relics. The Confuciusornis sanctus, being a fossil of an ancient vertebrate animal found inside China and possessing scientific value, falls within the scope of the statute.

C. Fossils and the 1982 Cultural Relics Protection Law


The CRPL effectively brings all valuable fossils under state control. Chapter I of the CRPL outlines the scope of cultural property in China. The Confuciusornis sanctus, as mentioned, falls within its purview. The CRPL was promulgated by the Standing Committee of

96 Id. art. 1(a).
97 The word "wenwu" is translated "cultural relic." A CHINESE ENGLISH DICTIONARY (Beijing Foreign Languages Institute ed., 1993).
98 BASIC PRINCIPLES OF CIVIL LAW 90 (William C. Jones ed., 1989). According to the Civil Law, this property is not freely traded: it cannot be exported privately, it cannot be sold privately to foreigners, and it cannot be sold at a profit; therefore, it does not have the same characteristics generally attributed to the English term "property." Professor Jones uses the term "cultural object." Id. If the Confuciusornis sanctus had been in a private collection, its movement would have been sharply curtailed: cultural relics in private collections can only be purchased by units designated by the cultural administration. See CRPL, supra note 4, art. 24. A private person could not have sold it for profit, and furthermore is forbidden to sell it to a foreigner. See id. art. 25.
99 See CRPL, supra note 4, art. 2.
100 See id.
101 Id.
102 See id.
the National People's Congress (NPC). It authorizes municipal, county, and provincial regulations for the management and protection of cultural relics and mandates that "governmental organs, public organizations and individuals" are obliged to protect relics. According to this chapter, "all cultural relics remaining underground" are owned by the state. By this provision, the results of unauthorized digging (the Confuciusornis sanctus potentially falls into this category) are stolen property. This designation can aid in the return of smuggled fossils from some market states. Finally, relics owned privately by individuals or collectives are protected by the state. Relics owners "must abide" by state regulations concerning protection and control of relics.

2. Administration of Archaeological Excavations

Chapter III of the CRPL, Archaeological Excavations, consists of general administrative provisions for the management of archaeological sites. In general, these administrative controls reflect a concern with centralized control and the possibility of exploitation. According to this chapter, "[n]o unit or individual may conduct excavations without permission," and any relics that are unearthed and not handed over to research institutions must be taken care of by local

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104 See CRPL, supra note 4, arts. 1–6.
105 Id. art. 3. In 1987, the State Council issued an announcement in response to increased smuggling and excavation robbing. It directed local governments to implement the 1982 CRPL. See Guanyu daji qiejue he zousi huodong de tonggao [Announcement on Striking Hard Against Smuggling Cultural Relics Activities], ¶ 4, reprinted in NEW CULTURAL PROPERTY LAW, supra note 4, at 326, and discussed in PLUNDER, supra note 35, at 98. According to Murphy, the implementation was accomplished simply by re-enacting a version of the CRPL locally. See id.
106 CRPL, supra note 4, art. 4. State ownership of unexcavated relics is not new to Chinese law. The 1930 Law on the Preservation of Ancient Objects provided for it and for excavation by Chinese academic institutions rather than foreign scientists. See NEW CULTURAL PROPERTY LAW, supra note 4, at 33.
107 This is a common provision in the protection regimes of source nations. See Merriman, The Nation and the Object, supra note 35, at 62. It serves to change "illegal export" cases into "theft" cases and facilitates return of objects from countries which are protective of owners rather than bona fide purchasers (common law states). According to J. David Murphy, as of 1994, there has not been an instance of China asserting title in the court of another state. He attributes this to the Chinese preference for negotiation rather than confrontation. See PLUNDER, supra note 35, at 87.
108 See CRPL, supra note 4, art. 5.
109 See id.
110 See PLUNDER, supra note 35, at 91.
cultural administration units.\textsuperscript{111} "[N]o unit or individual may take them into its or his own possession."\textsuperscript{112} According to this chapter, it seems that no archaeological excavation can proceed on the local level without state permission. Archaeologists must submit an excavation program to the state department for cultural administration and the Chinese Academy of Social Sciences for examination and approval.\textsuperscript{113} If the site is a major one protected at the national level, final approval of the State Council is required.\textsuperscript{114} Any find made during construction or "agricultural production" must be immediately reported to the local department for cultural administration.\textsuperscript{115} Finally, no foreigner or foreign organization can engage in archaeological work without special permission of the State Council, a national body.\textsuperscript{116}

As mentioned, vertebrate fossils are within the scope of the definition of cultural relics in the General Provisions. However, prehistoric scientific sites are not specifically mentioned in Chapter II (Sites to be Protected for Their Historical and Cultural Value)\textsuperscript{117} or Chapter III (Archaeological Excavations).\textsuperscript{118} This omission is a potential problem for sites like the one where the Confuciusornis was found, particularly if the site does not otherwise merit state protection. Articles 10–13 of Chapter II and Articles 18–19 of Chapter III deal with site protection as it relates to construction projects.\textsuperscript{119} In these situations, the motives to ignore protection provisions that could slow down building are potentially strong. Arguably, such motives are more threatening to site types that are not specifically covered.

To protect qualifying sites, provinces, autonomous regions, and municipalities are given power to define the scope of protection, es-

\textsuperscript{111} CRPL, supra note 4, art. 16.
\textsuperscript{112} Id.
\textsuperscript{113} See id. art. 17.
\textsuperscript{114} See id.
\textsuperscript{115} Id. art. 18.
\textsuperscript{116} See CRPL, supra note 4, art. 21. Although these provisions seem to reflect a concern for exploitation and the nationalistic bent of the law, the policy of prohibiting foreign participation has changed. "China increasingly encourages foreign technological assistance and funding." PLUNDER, supra note 35, at 91.
\textsuperscript{117} See CRPL, supra note 4, arts. 7–15. Sites listed are: "sites related to revolutionary history, memorial buildings, sites of ancient culture, ancient tombs, ancient architectural structures, cave temples, stone carvings, etc." Id. art. 7.
\textsuperscript{118} See id. arts. 16–21. This Article does refer to sites of "historical and cultural value" (art. 17) and "ancient culture and ancient tombs" (art. 19).
\textsuperscript{119} See id. arts. 10–13, 18–19.
establish files and records, and establish special organs and personnel at each site “in light of different circumstances.” However, it is not clear which parts of which governments are in charge. Is it a cultural bureau made up of curators and scientists or made up of bureaucrats? Or are commercial departments in charge of sites that could be valuable for the tourist industry? The fact that fossils are barely mentioned may indicate that paleontologists are not involved in the decisions administering sites and relics most important to this field.

One of the rationales behind the strict administrative control of archaeological work was that relics ought to stay buried until China has the technology and expertise to carry out excavations without risking the relics. This rationale may be less applicable now than it was in the early 1980s. Chinese archaeologists now employ the most up-to-date techniques and have even succeeded in extracting DNA from a dinosaur egg. Potentially China could afford, if not now, then in the future, to be less stringent about centralized state administration of archaeological digs. The CRPL does not seem to provide the flexibility for this change.

Relics are divided into grades. In 1987 the Ministry of Culture published a circular, “The Ranking and Standard of Cultural Relics,” to provide guidance in determining grade for purposes of the CRPL. This system largely repeats the definitional language of the CRPL. Grade One relics are symbolic of Chinese culture and rare; Grade Two have “important” historic or scientific value, but are “widely found;” Grade Three are of lesser importance and include “important relics ‘with certain defects’.” In 1992 the State Bureau of Cultural Relics promulgated the Detailed Rules for the Implementation of the Law of the People’s Republic of China on the Protection of Cultural Relics.

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120 Id. art. 9.

121 This confusion is evident in the case translated in the Appendix. See infra Part IV.


123 See PLUNDER, supra note 35, at 127.

124 Id. at 60.

125 See id.

126 Id. (discussing The Ranking and Standard of Cultural Relics, a 1987 Ministry of Culture circular). According to Murphy, curators and those in the art trade have not been able to determine how relics are graded: “It is Grade One because the State Bureau of Cultural Relics says it is,” says one Hong Kong Museum curator. Id. at 86.
These rules divide relics into "precious" (which includes Grades One, Two, and Three) and "ordinary." It is important to note that this essentially administrative process of grading can have repercussions for criminal penalties. In the case of stolen relics, grading occurs when the relics are seized.

The governmental levels at which objects and sites are to be protected are also unclear. Chapter II, Article 7 reads "Cultural relics . . . shall be designated as sites to be protected for their historical and cultural value at different levels according to their historical, artistic, or scientific value." The most valuable relics are to be protected by the state, while provinces, autonomous regions, and municipalities have charge of the less valuable relics. There is no guidance, however, on how to determine this. The statute calls for the approval of various government levels based on the relic's value. The state department for cultural administration "shall select" from among the sites protected at different levels those significant enough for direct state protection.

The efficacy of this arrangement is difficult to judge because of the number of potentially competitive values that attach to cultural property. One result of subjective centralized decisions could be careful protection of a site of questionable academic or historical value, but high political or economic value. In the case of fossils,
sites with high commercial and prestigious potential, like the one in Liaoning, could be better protected than less spectacular or publicly "useful" finds.

3. Awards and Penalties Under the 1982 Cultural Relics Protection Law and Its 1991 Amendments

The CRPL allows for awards and penalties. Individuals will be given "appropriate moral encouragement or material awards" for implementing the policies, protecting and saving cultural relics, fighting crime, donating privately owned relics, turning in found relics, and long-time service in the field of cultural relics. Despite the list of enticements, there is actually very little economic incentive to turn in a fossil: what a donor might be paid by the state for the relic would in most cases be a fraction of the specimen's black market value.

Possible penalties are divided into administrative penalties (Article 30) and criminal punishments (Article 31). These articles were amended in 1991. The theft of the Confuciusornis violates Article 31, section 2 which forbids "hiding cultural relics discovered underground" and failing to report and deliver them to the state. Administrative penalties include warnings, fines, restitution (in cases of damage to the relic), and seizure of the relic. Individuals or organizations that buy and sell without approval will have their illegal earnings confiscated along with the relic. The relic will be confiscated by centralized authority of cultural relics in ways a national minority might object to. The opening of the Potala Palace to tourists is perhaps an example of this (although, of course, it is impossible to know whether it would be open now even if the present Dalai Lama was living there). See also Robert L. Thorp, "Let the Past Serve the Present": The Ideological Claims of Cultural Relics Work, CHINA EXCHANGE NEWS: A REVIEW OF EDUCATION, SCIENCE, AND ACADEMIC RELATIONS WITH THE PEOPLE'S REPUBLIC OF CHINA (Summer 1992). The quote in the title is attributed to Mao Zedong.

136 CRPL, supra note 4, art. 29.
137 See above narration on the market value of the Confuciusornis sanctus. In addition, one article reported that farmers sold fossilized birds from Liaoning to the China Geological Museum for 120,000 yuan, or $14,000. This was one-fifth of the museum's total annual grants. See Justin Wang, China's new spirit of capitalism unearths clue to prehistoric past, WORLD-PAPER, Sept. 9, 1997, available in 1997 WL 9862942.
139 See 1991 Amendments, supra note 138, at 265.
140 Id. art. 31(2).
141 See id. art. 30(2).
142 See id. art. 30(5).
the industry and commerce departments by their own initiative or as suggested by the cultural administration departments. These articles reflect a new emphasis on cooperation between commerce and industry, on one hand, and cultural administration, on the other, not seen in the original law. However, the means of communication is not made clear, nor is it clear which department keeps the fines. Presumably the seized relics are returned to the museum, site, or department from which they came.

The Detailed Rules provide for administrative fines for the offenses listed in sections 1 through 8 of Article 30. The penalties are apparently to be distinguished by degree of seriousness of the circumstances, but there is no definition of "seriousness" given.

Criminal penalties are authorized in Article 31 for those who allegedly caused the exit of the fossil from China. The article stipulates that a person stealing, smuggling, harming, and destroying sites of cultural relics will be "investigated for criminal responsibility according to law." Presumably, this phrase refers to the Criminal Law.

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143 See id. art. 30(5–6). The statute reads, "by the administrative departments for industry and commerce," but does not indicate exactly which departments these are. 1991 Amendments, supra note 138, art. 30(5).

144 In the prior law, cooperation between the two sides of commerce and industry and cultural administration was not explicit. The Ministry of Culture was concerned about a perceived confusion as to departmental responsibilities for enforcement. The amendments were meant to be a strengthening measure and, having been introduced to the Standing Committee by no less a person than Premier Li Peng, they were a response to the rising number of crimes having to do with cultural relics and smuggling. See PLUNDER, supra note 35, at 96.

145 According to Murphy, the income from the various "business enterprise units," "presumably the state sales outlets," is to be used for protection work. PLUNDER, supra note 35, at 102 (discussing the Detailed Rules).

146 Detailed Rules, supra note 127, arts. 44–45.

147 Id. art. 45.

148 1991 Amendments, supra note 138, art. 31. This phrase also appears in the 1982 version of Article 31. See CRPL, supra note 4, art. 31.

149 See Explanation, supra note 87. The Explanation contains guidelines for how to deal with cultural property cases. It provides that penalties are to be awarded on the basis of the Criminal Law and the Decision. See also 1997 Criminal Law, supra note 87, arts. 324–29.
D. Fossils and the Criminal Law

1. "Crimes of Obstructing Cultural and Historical Relics Control"

Articles 324–29 of the 1997 Criminal Law are concerned with "Crimes of Obstructing Cultural and Historical Relics Control." Under this set of articles the crimes are the same as those in the CRPL, ranging from damage and destruction of cultural relics to privately selling, selling for profit, selling or giving by a museum, and digging up ancient tombs and remains. It is not entirely clear when the CRPL Article 30 provisions apply and when the Criminal Law applies. One commentator opined that when the offense is in both laws, the more specific provision should apply. Read together with the provision of the CRPL that extends the protection given to cultural relics to fossils of vertebrate animals, these provisions apply to a relic like the Confuciusornis sanctus.

Articles 324–27 speak of cultural relics in general. Only Article 328 refers specifically to fossils. It stipulates that the illegal excavation of "ancient human beings or fossils of vertebrate animals which are protected by the state and have scientific values" is punished under the article concerning ancient tombs and remains. Although the specific inclusion of fossils is a step forward, as with the CRPL, the provision is vague. "Illegal excavation" is not defined; presumably it refers to excavation without the permission required under the CRPL. There is also no guidance on what "scientific values" an object must possess to be considered a relic. Does it mean duplicates of fossils are not protected because their value is diminished by the fact that predecessor discoveries have already provided the scientific in-

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151 See 1997 Criminal Law, supra note 87, art. 324.

152 See id. art. 325.

153 See id. art. 326.

154 See id. art. 327.

155 See id. art. 328.

156 See PLUNDER, supra note 35, at 136, n.89, citing Han Meixiu, Two Questions that should be Noted in Implementing the Law on the Protection of Cultural Relics, 8 JURISPRUDENCE 24-26 (1983). Han’s observations apply to the pre-1997 version of the Criminal Law. See id.

157 See 1997 Criminal Law, supra note 87, art. 328 (last sentence).

158 Id.

159 CRPL, supra note 4, art. 16.
formation needed and desired by China? Does it mean a very badly preserved or broken fossil could be taken out of the country? What if a fossil has been “improved” or “repaired” by its finder so that its scientific value is destroyed? As in the CRPL, it is also unclear who has the power to decide which relics have “scientific value.”

The punishments meted out are more explicit in the Criminal Law than in the penalties provisions of the CRPL and include minimum and maximum prison sentences, fines, criminal detention, confiscation of property, or death. The punishments are dependent upon the “seriousness” of the situation and the grade of the relic as precious. Article 328 is the only article that specifies what kinds of situations are serious. The list of what constitutes a serious circumstance in Article 328 includes illegally digging ancient remains or tombs protected by the state, being the ringleader of an organization that engages in illegal digging, engaging in repeated illegal digging and robbing, or illegally digging and robbing precious relics and causing serious damage to the relics.

Thus, under these provisions, perpetrators can receive the death penalty for illegally digging and robbing a fossil site if the circumstances are serious. Prior to the 1997 Criminal Law, the death penalty was awarded under the Decision only for the economic aspects of cultural property crimes. This may signal a shift from concentrating primarily on halting the flow of relics once they have entered the

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160 “Improvement” of found objects was long a feature of Chinese collecting and museology so the possibility is not so far fetched. See PLUNDER, supra note 35, at 31. See also Hecht, supra note 7. Hecht reports that broken fossils from China sometimes look like they have been repaired under a microscope, “as if they came through an institution.” Id. (quoting Charlie Magorem, who runs The Stone Company, a fossil store in Boulder, Colorado).

161 See 1997 Criminal Law, supra note 87, arts. 324–28. Criminal detention is a period of not less than one month and not more than six months during which a prisoner may go home one or two days a month. Id. arts. 43–44.

162 Articles 324, 326, and 328 of the 1997 Criminal Law have harsher penalties in “serious” situations. Id. arts. 324, 326, 328. Article 326 situations are divided into “serious” and “exceptionally serious.” Id. art. 326. In the dinosaur egg case, see discussion below, the fact that the defendants engaged in speculation and profiteering made the situation serious.

163 See Articles 324, 325, and 328 specify that they apply to “precious” relics. Id. arts. 324, 325, 328. Precious relics are relics of grade one, two, or three as defined by the Detailed Rules, supra note 126, art. 2. Which relics these are exactly, however, is unclear. See supra note 128 on the definition of ordinary relics. The 1987 Explanation lists the grade of the relic as a factor as well. See Explanation, supra note 87, introductory paragraph.

164 See 1997 Criminal Law, supra note 87, art. 328(1–4).

165 See id.

166 See Decision, supra note 87. The death penalty provided in the Decision is preserved in Article 264 of the 1997 Criminal Law.
market to halting them at their source. This is effective for fossil protection because much of their non-economic value is lost when they leave the ground.167

The theft of the Confuciusornis sanctus illustrates the potential practical application of the provisions. Of the situations listed in Article 328, two are most likely applicable to the Confuciusornis: (1) "illegally digging" fossils that are protected by the state or "are under the protections of the national or provincial governments' institutions of culture and history," and (2) "illegally digging" and "robbing" any fossils "thereby causing serious damage to the cultural and historical relics."168 The first provision seems to apply to fossils in state-recognized digs or in museums, while the second applies to those an individual might dig on his own. Provisions 328(2) and 328(3) mandate the higher penalties for recidivists and those involved in organized illegal excavation.169

However, the penalties may be dramatically greater. Assuming the bird was illegally excavated and possesses scientific value, at the very least the perpetrators could go to prison or suffer public surveillance or criminal detention for three years.170 They may have to pay a fine or be subject to confiscation of property.171 At most, they would be executed.172

2. "The Crime of Encroaching Upon Property"

"The Crime of Encroaching Upon Property," another article in the Criminal Law, also applies to crimes involving cultural relics.173 Article 264 provides that "those committing serious thefts of precious cultural relics . . . are to be given life sentences or sentenced to death, in addition to confiscation of property."174 This provision preserves

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167 Most important is the loss of information on the fossil's stratigraphic location that is vital for dating and understanding fossils in the context of their ancient environments. Hecht, supra note 7, at 12. See also supra notes 57-59 (discussing the discovery of Confuciusornis fossils in groups).
168 1997 Criminal Law, supra note 87, art. 328(1) and (4).
169 See id. art. 328(2) and (3).
170 See id. art. 328. There are also consequences for anyone who allowed the loss to occur. State personnel who cause damage or loss of "precious cultural relics through serious irresponsibility" can receive not more than three years in prison or criminal detention if the circumstances are serious. Id. ch. IX, Dereliction of Duty, art. 419.
171 See id. art. 328.
172 See 1997 Criminal Law, supra note 87, art. 328.
173 Id. art. 264.
174 Id.
the death penalty for theft of cultural relics as provided in the Decision. Article 264 suffers from the same difficulties as other provisions. "Serious" is a subjective term, as is "precious." Furthermore, how "theft" fits in with Articles 324–29 is not clear. None of the Chapter IV provisions, with the exception of Article 328 in the context of robbing excavations, mention theft. Is Article 264 meant as a kind of supplement to the sale-oriented Articles 325–27, or vice-versa?

In order for the crime to receive the heightened punishment of Article 264, the relic must be "precious." "Ordinary" relics are those dated after 1795 and without historical, artistic, or scientific value. According to the Detailed Rules, relics are divided into "ordinary" and "precious." Fossils pre-date 1795. Does this make them all precious? The distinction is important here because of the significant sentencing differences. Theft of "ordinary" relics falls under Article 263, the general provision on theft, where punishment is three to ten years in prison and a fine. Fossils might be made to fit these provisions more effectively with some separate clarification of the grading of fossils as opposed to other relics.

3. "Crimes of Undermining the Order of Socialist Market Economy"


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175 See Decision, supra note 87. However, Article 264 does not require exporting as well as theft. 1997 Criminal Law, supra note 87, art. 264. The Decision awarded the death penalty in "serious" circumstances of "stealing and exporting precious cultural relics." Decision, supra note 87. This may be indicative of a rise of an illicit domestic market for relics if exporting is not the most important element.

176 1997 Criminal Law, supra note 87, art. 264(2).

177 PLUNDER, supra note 35, at 114. 1795 was the last year of the reign of the Emperor Qianlong.

178 Detailed Rules, supra note 127, art. 2.

179 See supra note 128. The court in the dinosaur egg case did find that eight of the fossilized dinosaur eggs were ordinary cultural relics indicating that there is such a thing as an "ordinary" fossil. Zhang Biliang Case, supra note 90.

180 According to Murphy, thefts of ordinary relics fell under the general theft provision of the 1980 Criminal Law. PLUNDER, supra note 35, at 111. It is possible to receive a harsher sentence under Article 263, including death, but only for certain listed offenses. There is another potential problem, not specific to fossils, for use of Article 263 to punish "not serious" theft of "ordinary" relics. Article 263 applies only to "public or private property," while cultural property seems to fall somewhere in between. 1997 Criminal Law, supra note 87, art. 263. See also supra note 98 (discussing the definition of cultural relics).

181 1997 Criminal Law, supra note 87, art. 151.
“prohibited cultural relics.” 182 The punishment is imprisonment of over five years with a fine; “less serious offenses” attract punishment of less than five years with a fine. 183 “Extraordinarily serious” offenses are punished with “life imprisonment or death, with forfeiture of property.”184 Regarding fossils, the same criticisms of vagueness apply to these provisions as to those previously discussed. The specific inclusion of cultural relics in the smuggling provisions, however, is crucial to the protection of and retention of relics within China. Most relics are destined to be smuggled out of the country. The question of effective enforcement of the smuggling provisions relating to cultural relics is discussed below in Part V.A.

IV. Dinosaur Eggs in Henan

It is not clear precisely how the Chinese legislation discussed here would apply to a stolen Confuciusornis. However, a recent case may provide guidance. A case awarding punishment for the illegal digging of fossilized dinosaur eggs was decided in 1996 185 and selected by the Chinese Practicing Law Institute to be included in the Selective Compilation of the People’s Court’s Cases, which reprints cases tried by various levels of courts. Strictly speaking, the case is not precedent because China does not formally follow precedent,186 but because of its inclusion in a selective compilation it can be used as a rubric for how laws might be applied.187 A translation of the case is included in the Appendix.

The case is significant because it demonstrates the flaws in China’s present legal framework. It vividly makes clear the patchwork of laws, guidelines, and announcements a court could use to analyze a case about fossils. The dinosaur eggs case highlights possible regula-

182 Id.
183 Id.
184 Id.
185 See Zhang Biliang Case, supra note 90.
186 There is no formal system of precedent, but some records are kept, primarily so judges can refer to them for guidance. See Thomas Chiu et al., Legal Systems of the P.R.C. 35 (1991).
187 The introduction to Selected Cases of the People’s Court, where the Zhang Biliang case is reprinted, states that the goal of the collection is to reflect the basic state of the trial work of the People’s Court and to sum up the lessons of experience, guide trial work, promote theoretical study, propagate the socialist legal system, and to widen the social effects of the handling of cases by the People’s Court. See Renmin Fayuan Anli Xuan 1992-1996 [Selected Cases of the People’s Court 1992-1996] 1 (China Practicing Law Institute ed., People’s Court Publishing House 1997).
tory and enforcement clashes between local and national legal provisions and points out the difficulties inherent in the lack of a protection law that is specific to fossils. The facts of this case also show the deficiencies of legal methods of protecting fossils—most basically, the legal system did not intervene until after the eggs were dug up (probably by amateurs though the facts of the digging of the eggs are not covered by the case) and carried away in the back of a truck. Had the crime been thwarted on site, more of the various values of the fossilized eggs would have been preserved intact.

In the Xixia County People’s Court, three defendants were accused and convicted of “speculation and profiteering” on the purchase of 156 fossilized dinosaur eggs. The defense’s main argument was that the defendants had not stolen cultural relics. First, they contended that “three times successively the state announcement of the scope of cultural relics did not list fossilized dinosaur eggs as cultural relics.” Second, the defendants maintained that despite the fact that their actions occurred after the county promulgated an Announcement Concerning the Illegal Excavation, Buying and Selling, and Smuggling of Fossilized Dinosaur Eggs (Announcement), the theft of the dinosaur eggs was not a crime because the province and the state had not determined the status of fossilized dinosaur eggs as cultural relics. The crime allegedly occurred on November 11, 1993, although the State Cultural Bureau did not reply to the Henan Province Cultural Relics Bureau on the status of dinosaur eggs until December 16, 1993. Further, the defense maintained that the county’s Announcement was not law and could not be used as a “basis for declaration of guilt or measurement of penalty.”

The court identified the main issue of the case as whether or not fossilized dinosaur eggs are cultural relics. Significantly, in finding that the eggs were cultural relics, the court did not rely on the county circular to establish the status of the eggs, but argued they were in-

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188 “Speculation and profiteering” is a crime prohibited in the 1980 Criminal Law. Supra note 86. At the time of the case the provisions were 117 and 118. Neither provision mentioned cultural property. If the case happened today the relevant article would be 326 concerning reselling cultural relics for profit. See 1997 Criminal Law, supra note 86, art. 326(4).

189 See Zhang Biliang Case, supra note 90, at 45.

190 Id.

191 Id.

192 See id.

193 Id.

194 See Zhang Biliang Case, supra note 90, at 45.
cluded under the CRPL.\textsuperscript{195} The CRPL definition includes only the fossils of humans and vertebrate animals, a category that does not include fossilized eggs.\textsuperscript{196} Because of this, the court had to wedge the eggs into the definition by arguing that because dinosaurs are a “huge branch of ancient vertebrate animals,” their fossilized eggs are also protected by the law.\textsuperscript{197} By this reasoning, the court asserted the centralized control of the CRPL despite its vagueness and a definition ill-suited to include fossilized eggs. At the same time, the court seemed to discourage, by ignoring it, the effectiveness of more specific measures tailored to local conditions. This raises the question of the efficacy and enforceability of local regulations. After determining that the fossilized eggs did fall within the statute, the court applied Article 31 of the CRPL which calls for criminal responsibility for “serious” cases of speculation in cultural relics.\textsuperscript{198}

Having used the CRPL to define the relics and establish their sale as a crime, the court turned for guidance to the Explanation, which mandates punishment according to the CRPL, the Criminal Law, and the Decision.\textsuperscript{199} It then followed the guidelines in the Explanation, citing specific provisions, and applied punishment based on the number and grading of the relics.\textsuperscript{200} Two other factors influenced the sentences: the two defendants were named ringleaders, and the crime was a “joint” crime.\textsuperscript{201} The two ringleaders received higher sentences.\textsuperscript{202} The fact that it was a “joint” crime is mentioned in the last sentence as a correct basis for punishment.\textsuperscript{203}

This case shows that even a new, clearly drafted fossil protection law may not be sufficient to solve the problem. The problem of conflicting and overlapping local and state regulations is likely to remain. More significantly, however, is the backward-looking character

\textsuperscript{195} See id; see also CRPL, supra note 4, art. 2, sentence 3 (“Fossils of paleovertebrates and paleoanthropoids of scientific value shall be protected by the state in the same way as cultural relics.”).

\textsuperscript{196} See Zhang Biliang Case, supra note 90, at 45.

\textsuperscript{197} Id. at 46.

\textsuperscript{198} Id.

\textsuperscript{199} See id; see also Explanation, supra note 87, introduction. As noted, the Decision has been repealed by the 1997 Criminal Law. See supra note 87.

\textsuperscript{200} See Zhang Biliang Case, supra note 90, at 46.

\textsuperscript{201} See id.

\textsuperscript{202} See id. This factor is included in the 1997 Criminal Law as a factor making a situation involving illegal digging and robbing of tombs serious and mandating a possible death penalty. See 1997 Criminal Law, supra note 87, art. 328(2).

\textsuperscript{203} See Zhang Biliang Case, supra note 90. Organized crime is also included in Article 328(2). See 1997 Criminal Law, supra note 87, art. 328(2).
of such laws to date; for the most part, the laws protecting cultural relics focus on the relics once they have been stolen, damaged, or have entered the black market. Fossils clearly illustrate the importance of this point. As opposed to an after-the-fact, punishment-based system, the significant value of fossils in situ demand a preventative scheme and the administrative organization to enforce it. Prevention is perhaps best accomplished by non-legal responses to the fossil loss problem.

V. NON-LEGAL RESPONSES TO THE FAILURES OF LEGAL CONTROLS

A. Problems of Enforcement and the Anti-Smuggling Campaign

"Theft, smuggling and illicit traffic have bedeviled cultural relic protection in China since the early 1980s."204 Despite improvements in the laws and harsh penalties, cultural relics smuggling still thrives in China.205 Numbers for an illicit market are impossible to know; however, according to the China Daily, Chinese customs seized at least 11,200 items by inspecting passengers’ luggage last year.206 In addition, the Chinese police solved 580 cultural property related criminal cases and seized 2,962 relics.207 One official with the Ministry of Public Security noted an increase in tomb robbing since May of 1997.208 "Antiquities are thought to be the largest single class of item smuggled out of the P.R.C., at least in terms of monetary value."209

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204 See China Customs Seize 200 Smuggled Relics, supra note 37.

205 Cultural relics smuggling is so big that Chubb Insurance Corporation wants to provide insurance for China’s cultural property. The corporation is cooperating with the State Bureau of Cultural Relics in an effort to teach the country’s museum curators and staff about cultural property insurance. The program is known as “Friends of Chinese Treasures.” Chubb Corp Looking to Insure Cultural Property in China, ASIA PULSE, Apr. 7, 1997, available in LEXIS, News Group File.

206 See China Customs Seize 200 Smuggled Relics, supra note 37.

207 See China: Stolen Bust Seized in US, CHINA DAILY, June 15, 1998, available in 1998 WL 7596211. If the rule of thumb that only 10% of illegal trade is uncovered applies to cultural relics, the volume getting out of the country is potentially very large. See Lu Ning, China Mounts Big Drive to Combat Surge in Smuggling, Bus. TIMES (Singapore), June 12, 1998, available in 1998 WL 13932463.

208 See China: Stolen Bust Seized in US, supra note 207.

209 Murphy, supra note 78, at 242. This is at least as of 1992. In the month of September 1993, Hong Kong officers seized 107 artifacts worth more than HK$10 million. Id. The Economist reported in 1992 that the art market in China is said to be worth hundreds of millions of dollars a year. That year the State Bureau of Cultural Relics held its first public auction of antiques in “an attempt to get a grip” on the market. Let Another Hundred Flowers Bloom, Even if Some are Weeds, ECONOMIST, Oct. 17, 1992, available in 1992 WL 11278856.
The route through Guangdong and neighboring Hong Kong and Macau is historically the most common; relics arrive on small cargo boats, fishing boats, trucks, by individual courier, planes, and in shipping containers.\textsuperscript{210} An official with the Ministry of Public Security admitted that the Chinese police's present approach is passive and that smuggling organizations have become better organized and have greatly reduced the time between looting and smuggling.\textsuperscript{211} Better organized smuggling operations have made it more difficult for Chinese police to recapture the relics before they leave the country and have increased China's dependence on foreign enforcement for return of the items.\textsuperscript{212}

The Confuciusornis' presence outside China confirms enforcement problems. The Chinese State Administration for Cultural Relics says the fossils are smuggled cultural relics, and "a press spokesperson says that SACR has never approved the export of Confuciusornis fossils, nor has it received any requests."\textsuperscript{213} The dealer who sold the fossils to four Japanese museums said the fossils were mailed to him from China without documents.\textsuperscript{214} Another dealer said that over the course of more than a dozen trips to take fossils out of China, he has never been asked for any documents authorizing his transport of them.\textsuperscript{215} The Albuquerque bird came from an international fossils dealer whose name the retail fossil shop owner would not reveal.\textsuperscript{216} The shop owner says he has no reason to believe the fossil left China illegally or entered the United States illegally, but he has been unable to contact the dealer to get copies of the Chinese export papers because the


\textsuperscript{211} See China: Stolen Bust Seized in US, supra note 207. According to Pan Fengxiang, an official with the Ministry of Public Security, Guangdong is the major exit point because of its closeness to Hong Kong, "where the trade in relics is legal." Id.

\textsuperscript{212} See id. Lack of enforcement technology is a further problem. Most relics pass through customs in containers, but only two customs centers in Shenzhen have advanced container scanners which can be used to detect hidden relics. See Officials fighting exports of relics, CHINA DAILY, Aug. 5, 1995, available in LEXIS, FT Asia Intelligence Wire.

\textsuperscript{213} Stone & Couzin, supra note 17.

\textsuperscript{214} See id.

\textsuperscript{215} See id.

\textsuperscript{216} See Fleck, supra note 1.
dealer has left the country.\textsuperscript{217} The Japanese museums similarly have not been able to obtain authorizing documents.\textsuperscript{218}

In the face of the continuing illegal outflow of relics, characterized by one article as a "surging trend,"\textsuperscript{219} China has looked to non-legal solutions. Cultural relics smuggling is part of the anti-smuggling campaign that began in 1998.\textsuperscript{220} In June 1998, a seminar was organized by the State Bureau of Cultural Relics and sponsored by UNESCO to focus on fighting illicit traffic.\textsuperscript{221} At least one province, Shanxi, has launched its own campaign focussing on the most common smuggled goods, one of which is cultural relics.\textsuperscript{222}

In conjunction with the anti-smuggling campaign, Premier Zhu Rongji gave a speech in July 1998. Some of the root causes of smuggling he pointed out also apply to cultural relic protection: corruption and weak law enforcement.\textsuperscript{223} These causes potentially can affect a relic like the Confuciusornis at many levels. Many relics initially enter the market through corrupt museum officials or guards.\textsuperscript{224} Corrupt customs officials and other dishonest law enforcement workers

\textsuperscript{217} See id.

\textsuperscript{218} See Stone & Couzin, supra note 17.

\textsuperscript{219} China Customs seize 200 smuggled relics, supra note 37.

\textsuperscript{220} The campaign has been intensified recently by a September national conference on anti-smuggling measures and speeches by both Jiang Zemin and Zhu Rongji on the subject. See Zhu Rongji, Unify Thinking, Strengthen Leadership, and Swiftly and Sternly Crack Down on the Criminal Activities of Smuggling, speech delivered at the National Conference on the Work of Cracking Down on Smuggling, 15 July 1998, <http://wnc.fedworld.gov>, doc. no. FBIS-CHI-98-245 [hereinafter Zhu Rongji speech]. Zhu's speech discussed creation of a reform of the current anti-smuggling system in the form of a new state anti-smuggling police (SASP) unit which will concentrate specifically on smuggling. The hope is to develop a more efficient law-enforcement system which can move quickly enough to take advantage of clues and evidence which, in the case of international smuggling, can "vanish instantly." See id. Applied to cultural relics smuggling, speed and expertise is important to combat more well-organized smuggling rings mentioned above.

\textsuperscript{221} See China: Stolen Bust retrieved in US, supra note 37.


\textsuperscript{223} See Zhu Rongji speech, supra note 200.

\textsuperscript{224} Theft from museums is a problem: an official of the General Administration of Customs noted that a number of items recently seized had been stolen from museums. See China Customs seize 200 Smuggled Relics, supra note 37. Murphy reports an instance of a museum shop manager who stole 1,814 cultural relics, seven of which were "priceless treasures." Also significant could be the relatively low salaries of museum officials. He notes that it is sometimes hard to know whether losses are due to inside theft or simply a lack of documentation and institutional safeguards. There is no national register or system to report lost relics. See PLUNDER, supra note 35, at 3. See supra note 160 on evidence of "improvement" of fossils that might indicate they came through institutions.
can facilitate a relics movement through the illicit market.\textsuperscript{225} Weak law enforcement could result in the levying of fines and use of administrative penalties rather than the criminal prosecution mandated by the statutes. If the exhortations of the anti-smuggling campaign are taken to heart, the possibility of corrupt officials receiving the maximum punishments for the smuggling of such a specimen as the Conficiusornis increases.\textsuperscript{226}

\textbf{B. Source Controls: Physical Efforts to Protect Fossils}

Because of the apparent efficiency of the illicit fossil trade, source controls that aim to prevent the fossil from ever entering the market will perhaps be the most effective measures. If the emphasis on illegal digging and robbing in Article 328 of the new Criminal Law is indicative, China may be looking to this kind of preventative measure rather than merely market controls to protect excavation sites.

In an effort to protect dinosaur egg beds in Hubei, provincial officials have set up a fifteen square kilometer sealed off protection zone around the eggs.\textsuperscript{227} A similar area exists to protect fossilized eggs in Guangdong province where all construction projects in the area require the approval of the Cultural Relics Protection Project.\textsuperscript{228} Similar measures have been taken in Liaoning where the fossil beds have been designated as a Fossil Birds Preservation Zone (Zone), a forty-six square kilometer region south of the town of Beipiao,\textsuperscript{229} Zhao Yibing, a town official, has been named administrator of the Zone and is in charge of managing the area.\textsuperscript{230} He employs five full-time guards who provide around-the-clock protection against thieves.\textsuperscript{231} However, this scheme depends on the honesty of the guards, their ability to police a large area, and the necessary continued funding.

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{225} See China Customs Seize 200 Smuggled Relics, supra note 37.
    \item \textsuperscript{227} See China seals off dinosaur eggs, IRISH TIMES, Sept. 24, 1997, \textit{available in} 1997 WL 12026463.
    \item \textsuperscript{228} See Dinosaur eggs discovered in South China, XINHUA ENG. NEWSWIRE, Sept. 10, 1997, \textit{available in} 1997 WL 11198419.
    \item \textsuperscript{229} See Wang, supra note 30.
    \item \textsuperscript{230} See id.
    \item \textsuperscript{231} See id.
\end{itemize}
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C. Education

China also uses education in its attempt to defeat the illicit market in cultural property. These efforts take two forms: education on the law and on the objects smuggled. General legal education is part of China's larger attempt to disseminate knowledge of law in general,232 but education about the objects smuggled is particular to the illicit cultural relics trade.233 Most objects in the illicit market only have economic value to those who place them there. The aim of education about the relics is to increase awareness and appreciation of the other values of cultural property. It is in part for their non-economic values that China wants to retain the relics.

Museum exhibitions indirectly help in this kind of education. The birds from Liaoning were exhibited in Beijing in an exhibition entitled "Exhibition of Primitive Bird Fossilized Treasures from Western Liaoning."234 Fossilized dinosaur eggs have been described by Guangdong officials as "rounded stones" to help people identify relics.235 Exhibitions also serve to educate citizens about the success of cultural relic protection. An exhibition of antiques (recently recovered from a British smuggler), entitled "Achievements Against the Smuggling of Cultural Relics," were exhibited in Beijing.236 The exhibition had a patriotic undertone in addition to being about art and

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232 See Donald C. Clarke et al., Introduction to The Law of the People's Republic of China 22 (1998) (unpublished manuscript provided by Professor William C. Jones and used in the Fall 1998 Chinese Law course at Washington University School of Law). Popular legal education has been under way since the 1980s and basic materials for a wide audience have been developed introducing the constitution and major laws. Id.

233 In the case of those charged with enforcing the laws, this education is especially critical. Recently the State Bureau of Cultural Relics has cooperated with customs and public security bureaus to teach customs officers to recognize cultural relics. China Customs Seize 200 Smuggled Relics, supra note 37.

234 See Sinosauropteryx Fossils on Display in Beijing, Xinhua Eng. Newswire, Mar. 23, 1997, available in 1997 WL 3751967. Exhibits like this also fulfill the education value identified in the first part of this paper. Chinese citizens had the opportunity to learn about the past and about the achievements of their scientists.


236 The items were smuggled to Britain in 1994 and returned to China in May of 1998. See Officials Fighting Exports of Relics, China Daily, Aug. 5, 1998, available in LEXIS, FT Intelligence Asia Wire; see also Smuggled Relics Return to China, China Daily, Sept. 2, 1998, available in LEXIS, News Group File. The exhibit is scheduled to be sent throughout the country. Id.
history. It operated as a demonstration of China's legal success locally and internationally.\textsuperscript{237}

Educational efforts also extend to publicity of the laws and possible punishments. For instance, Hubei province authorities announced that violators will be prosecuted. They also encourage locals to turn in finds: many of the eggs found near Heyuan city in Guangdong province have been turned over to the government.\textsuperscript{238} At the Liaoning site, Zhao Yibing has participated in efforts to educate local farmers to protect and identify fossils they find in the ground and to make sure farmers know that those who trade already excavated fossils “will be convicted according to the law.”\textsuperscript{239}

CONCLUSION

The illegal presence of so valuable a specimen as the Confuciusornis sanctus in Albuquerque demonstrates the deficiency of China’s fossil protection scheme. China has been unable to stem the flow of such specimens to market states. The present system does not effectively protect fossilized objects or China’s economic, nationalistic, cultural, or prestige interests.

Despite the broad policy aspirations of the 1982 CRPL,\textsuperscript{240} the confusing and overlapping group of laws and regulations that implements it has not served fossils well. The section on administration of archaeological excavations does not specifically mention pre-historic sites, and it is difficult to determine whether fossil experts are involved in making decisions about site protection and management.\textsuperscript{241} Further, the statute does not seem to have the flexibility to accommodate China’s rapidly improving field of archaeology.\textsuperscript{242}

\textsuperscript{237} An exhibition of objects returned from U.S. customs was put on in the Chinese embassy in Washington; the countries held a ceremony marking their return. The demonstration exhibited not only the relics, but also China’s enforcement success and the comity of the U.S. See U.S. Customs Return Seized Antiquities to China, CHINA BUS. INFO. NETWORK, May 7, 1998, available in LEXIS, News Group File.

\textsuperscript{238} See Dinosaur Eggs Discovered in South China, supra note 228.

\textsuperscript{239} Wang, supra note 30.

\textsuperscript{240} Article 1 reads: “This law is formulated with a view to strengthening state protection of cultural relics, contributing to the development of scientific research, inheriting the splendid historical and cultural legacy of our nation, conducting education in patriotism and in the revolutionary tradition, and building a socialist society with an advanced culture and ideology.” CRPL, supra note 4, art. 1.

\textsuperscript{241} See supra discussion in Part III.C.2 and notes 117 and 121.

\textsuperscript{242} See supra discussion in Part III.C.2 and notes 122 and 123.
The 1997 Criminal Law improved the situation by consolidating most existing offenses in a more extensive section devoted to cultural relics. However, these provisions and others elsewhere in this statute suffer from problems of definition as to relic value and seriousness of criminal situations. This difficulty is significant because potentially harsh punishments are awarded on the basis of the definitions.

Both the CRPL and the 1997 Criminal Law use such imprecise terms as “precious,” “ordinary,” “serious,” and “extraordinarily serious” that do not satisfactorily define the crimes involving fossils or the grading of fossils. The Henan dinosaur eggs case provides some guidance on the application of the laws but demonstrates difficulties even in defining the fossilized eggs as relics and reveals a conflict in the application of local and national laws.

In light of the large number of significant fossils discovered in recent years and China’s failure to protect them, the National People’s Congress is in the process of amending the CRPL to better protect fossils. The Henan dinosaur eggs case and the problems of protecting the Liaoning birds (which include Confuciusornis sanctus) prompted Chinese scholars from the Chinese Academy of Sciences to appeal to the government for greater legal protection to prevent improper excavations. Their recommendations include designation of certain departments and research institutes to handle digging permits and designating a committee of the Ministry of Science and Technology to coordinate fossil searches and excavations. The participation of paleontologists and other scientists in this effort, as well as the focus of their proposals on fossils, is heartening.

A law with a more object focused approach—that is, one that emphasizes preservation of the object itself instead of exclusively the values that attach to it—will perhaps lead to the successful protection of fossils on site, before they enter the illicit market. Such an ap-

243 See supra discussion in Part III.D.1.
244 See id.
245 See supra discussion in Part III and note 161.
246 See discussion of Zhang Biliang Case in Part IV.
247 See supra note 9.
248 See China Academics Say Laws are Needed to Protect Rare Fossils, XINHUA ENG. NEWSWIRE, May 13, 1998, available in 1998 WL 12155714.
249 See id.
250 See also the inclusion by the 1997 Criminal Law on crimes involving excavation, supra note 155.
251 This emphasis would probably be the choice of archaeologists and scientists. In his discussion contrasting the nationalistic approach to protection as opposed to the object-oriented approach, Merryman points out that archaeologists’ emphasis on site preserva-
proach would have to enhance current on-site control and protection arrangements and public education efforts. Successful on-site protection will best preserve the fossils and their values for both China and the world.

Merryman, Two Ways of Thinking about Cultural Property, supra note 35, at 832.
APPENDIX

The Case of Zhang Biliang and Others Selling for Profit and Speculating on Fossilized Dinosaur Eggs

[Case Details]

Defendant: Zhang Biliang, male, age 30, from Hunan Province, Shaoyang City, is a worker at Shaoyang City Shazipo car repair workshop, arrested August 12, 1994.

Defendant: Liu Dezhi, male, age 32, from Hunan Province, Shaoyang City, is a worker at Shaoyang City Baishouting Rubber Factory, arrested August 12, 1994.


On November 25, 1993, defendants Zhang Biliang, Liu Dezhi, and Zhang Chunling’s husband Ren Wenji (who is still at large), met in the Great Wall Hotel in Nanyang City, Henan Province. They illegally planned that Ren Wenji would return to the countryside around Yangcheng, Xixia County to organize the purchase of an unspecified number of fossilized dinosaur eggs, each egg at a price of 200–300 yuan, once back in Nanyang they would then according to the quality [of the eggs] negotiate specific prices. Zhang Biliang and Liu Dezhi at that time paid Ren Wenji the agreed price of 2,000 yuan. After Ren Wenji returned to Yangcheng, with the help of his wife Zhang Chunling and his younger brother Ren Wenzhuo (who is still at large), he organized the purchase of 156 fossilized dinosaur eggs. On the evening of November 27, Ren Wenji went from Nanyang to Nancheng in a rented “131” cargo truck, the same night, Ren Wenji, Zhang Chunling and Ren Wenzhuo escorted the fossilized dinosaur eggs by truck to Nanyang. By way of a county toll station in the countryside, the public security organs intercepted and captured them, and ferreted out and seized 156 fossilized dinosaur eggs. Afterward, the defendants Zhang Biliang and Liu Dezhi fell into the net in Nanyang.

Through the Henan Province Cultural Relic Appraisal Organization the following were appraised: of 156 seized dinosaur eggs, 148 were state grade three cultural relics, and eight were ordinary cultural relics. These 156 fossilized dinosaur eggs have been moved to the Xixia County Cultural Relic Protection Administration Collection.

[Trial]

The Xixia County People’s Procuratorate, because the defendants Zhang Biliang, Liu Dezhi, and Zhang Chunling engaged in
speculation and profiteering, has raised a prosecution in the Xixia County People's Court. The defendants Zhang Biliang and Liu Dezhi, as to the facts of the crimes with which they have been accused, have no objection. The defendant Zhang Chunling defends herself: “It is true that I was caught in the truck that was hauling the fossilized dinosaur eggs, but I did not participate in buying the dinosaur egg fossils, that night I was just along to go to Nanyang for fun.” Counsel of the three defendants all noted that the actions of the three defendants occurred before a Henan Province government announcement and a State Cultural Bureau affirmation of the grade of fossilized dinosaur egg relics, hence their behaviour did not constitute a crime.

The Xixia County People’s Court, through public hearing of the case, concluded that the defendants Zhang Biliang, Liu Dezhi, and Zhang Chunling, with reaping profits as their goal, illegally trafficked in state grade three fossilized dinosaur egg relics, and that their behaviour constituted the crime of speculation. The number of the grade three state cultural relics the three defendants illegally trafficked in reached 148. This case is related to the cases of the illegal traffic in many same grade cultural relics, and according to the Highest People’s Court and the Highest People’s Procuratorate regulations Explanation of Several Questions Concerning the Applicable Law in Handling Cases of Stealing, Illegally Recovering, Dealing in, and Smuggling Cultural Relics (hereinafter, Explanation), ought to be punished as if it were illegal trafficking in grade two cultural relics. This is a joint crime. Defendants Zhang Biliang and Liu Dezhi who brought a large number of fossilized dinosaur eggs from Hunan to Nanyang are ringleaders, and ought to be heavily punished; the defendant Zhang Chunling who assisted the purchase and transport of the fossilized dinosaur eggs, is an accessory, and can be punished more lightly than the ringleaders. The argument of Zhang Chunling who defended herself saying she had not participated in the sale or transport of the fossilized dinosaur eggs does not tally with the facts; the arguments of counsel who believed that the behavior of the three defendants does not constitute a crime cannot be established, and this court cannot adopt it. Following the The Criminal Law of the People’s Republic of China, Article 118, Article 22 clause 1, Article 23, and Article 24, on July 27, 1995 the court handed down a criminal punishment. Because of the crime of speculation and profiteering the sentences were divided: defendants Zhang Biliang and Liu Dezhi each received a six year sentence, and defendant Zhang Chunling received a four year sentence.
After pronouncement of the verdict, the three defendants did not raise an appeal, and the People's Procuratorate also did not appeal the case.

[Analysis]

Since 1990, "Xixia County Fossilized Dinosaur Eggs" have attracted the extensive interest of the scientific world. Dinosaur eggs are seen as the scarce fossils of ancient animals, and are important objects which bring to light the mystery of the existence of dinosaurs. They are a way for men to understand geological history and environmental information; they are also important scientific and cultural artifacts for the world. In order to protect scientific and cultural artifacts belonging to all mankind, Xixia County People's Government, on June 13, 1993, promulgated Announcement Concerning the Illegal Excavation, Buying and Selling, and Smuggling of Fossilized Dinosaur Eggs (hereinafter Announcement) forbidding any unit or individual to privately dig, buy and sell, or smuggle fossilized dinosaur eggs. On December 16, 1993, the State Cultural Bureau in Cultural Relic Document Number 1122 officially replied to the Henan Province Cultural Relic Bureau unequivocally pointing out that "fossilized dinosaur eggs ought to fall within the scope of the state cultural protection," "relatively intact fossilized dinosaur eggs may be tentatively categorized as grade three or higher cultural relics," and "as to private excavation, selling, and smuggling fossilized dinosaur eggs should be given severe punishment." On December 28 of the same year, the Henan Province People's Government promulgated the Announcement Concerning Striking Hard Against Criminal Activities of Illegal Excavation, Selling, and Smuggling of Fossilized Dinosaur Eggs, which indicates that "any participation in activities inciting, inducing illegal excavation, or selling fossilized dinosaur eggs are included in the scope of criminal behaviour. . . ." As to the criminals, we must move to adjudication, and, according to The People's Republic of China Cultural Relics Protection Law and the Highest People's Court and the Supreme People's Procuratorate Explanation, bestowed severe sanction.

In the course of hearing this case, counsel did not raise an objection to the facts of the case. However, they raised [the point that] because the actions of the three defendants in buying the fossilized dinosaur eggs occurred before November 28, 1993, and at that time the fossilized dinosaur eggs were not considered cultural relics, therefore, their behaviour did not constitute a crime. Their reasons are: (1) three times successively the state announcement of the scope of cultural relics did not list fossilized dinosaur eggs as cultural relics; (2) not until December 16, 1993, did the State Cultural Bureau in Cul-
tural Relic Document Number 1122 of 1993, officially reply to the Henan Province Cultural Relics Bureau that fossilized dinosaur eggs are listed as cultural relics, and the behaviour of the three defendants happened before this official reply; (3) the Xixia County People’s Government and the Henan Province People’s Government promulgated Announcement is not law, and cannot be used as a basis for declaration of guilt or measurement of penalty. We believe that these kinds of defense theories cannot be sustained. The focal point of this controversial case is whether or not fossilized dinosaur eggs constitute legal cultural relics. Through examination of the November 19, 1982 People’s Republic of China Cultural Relics Protection Law, article two, section three stipulates: “Fossils of ancient vertebrate animals and ancient anthropoids having scientific value receive the same state protection as cultural relics.” Dinosaurs are a huge branch of ancient vertebrate animals, thus it can be inferred that fossilized dinosaur eggs ought to be categorized as cultural relics which are protected by the law. Article 31 expressly provides that speculation and profiteering in cultural relics is a serious circumstance; (we) ought to investigate criminal responsibility according to law. On November 27, 1987 the Supreme People’s Court and the Supreme People’s Procuratorate in the fourth section of the Explanation: “Illegally managing (including purchase, transport, reselling, and profiteering) cultural relics in a serious situation which constitutes a crime, is punished according to the crime of speculation and profiteering, along with articles 117 and 118 of the criminal law, and the first section, article one of the State Council’s regulation, Decision. Illegal management of grade three relics is punished by no more than three years prison sentence or supervision and also may be punished by a fine or confiscation of property; illegal management of grade two cultural relics is punished by no less than three and no more than ten years imprisonment, and can be punished with confiscation of property; . . . In a case of illegal management where every relic is higher than grade three or there are many instances of illegal management of the same grade of relic, for the measure of punishment consult the Explanation, section one, article three.” Section one, article three of the Explanation reads: “If in one case the number of stolen relics of the same grade is relatively large, and the situation is serious, it can be punished according to the measure of punishment for relics one grade higher.” In this case, of the 156 fossilized dinosaur eggs the three defendants resold at a profit, 148 were grade three relics, (we) ought to firmly believe that many instances of reselling grade three cultural relics at a profit, according to the regulation, Explanation (promulgated by the Supreme
People’s Court and the Supreme People’s Procuratorate), will be punished as if they were grade two relics. Xixia County People’s Court, according to the criminal facts and situation of each defendant, along with their roles and functions in the joint crime, was right in convicting them of the crime of speculating and profiteering and setting their punishments.

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