

Comments on MOU Request from Government of Ecuador**May 2, 2018**

The Global Heritage Alliance (“GHA”) and its sister organization, the Committee for Cultural Policy (“CCP”)¹ are pleased to comment on a proposed Memorandum of Understanding (“MOU”) with Ecuador.

If that MOU is recommended, any such a MOU should be conditioned on limiting the designated list and holding Ecuador accountable to reasonable benchmarks that address Congressionally mandated self-help measures. Under no circumstances should restrictions be applied to items that are neither archaeological nor ethnological in character such as “Colonial and republican period coins; medallions more than 50 years old ...manuscripts more than 50 years old; and certain works by modern artists.”

A. The Law

The Cultural Property Implementation Act (“CPIA”), 19 U.S.C. §§ 2601 *et seq.* contains significant procedural and substantive constraints on the executive authority to impose import restrictions on archaeological and ethnological objects. The Cultural Property Advisory Committee (“CPAC”) is to provide the executive with useful advice about this process.

Import restrictions may only be applied to archaeological and ethnological artifacts of “cultural significance” “first discovered within” and “subject to the export control” of a specific UNESCO State Party. *Id.* § 2601 (2). They must be part of a “concerted international response” of other market nations, and can only be applied after less onerous “self-help” measures are tried. *Id.* § 2602 (a) (1). They must also be consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes. *Id.*

The definitions of archaeological and ethnological objects limit the scope of any restrictions. Section 2601 defines them as follows:

(2) The term —archaeological or ethnological material of the State Party means —

(A) any object of archaeological interest;

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(B) any object of ethnological interest; or

(C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph—

(i) no object may be considered to be an object of archaeological interest unless such object –

(I) is of cultural significance;

(II) is at least two hundred and fifty years old;

and (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or underwater; and

(ii) no object may be considered to be an object of ethnological interest unless such object is –

(I) the product of a tribal or nonindustrial society, and

(II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.

The legislative history underscores the fact that “ethnological material” is to be defined narrowly. According to the Senate Report,

“Ethnological material” includes any object that is the product of a tribal or similar society, and is important to the cultural heritage of a people because of its distinctive characteristics, its comparative rarity, or its contribution to the knowledge of their origins, development or history. *While these materials do not lend themselves to arbitrary age thresholds, the committee intends this definition, to encompass only what is sometimes termed "primitive" or "tribal" art, such as masks, idols, or totem poles, produced by tribal societies in Africa and South America.* Such objects must be important to a cultural heritage by possessing characteristics which distinguish them from other objects in the same category providing particular insights into the origins and history of a people. The committee does not intend the definition of ethnological materials under this title to apply to trinkets and other objects that are common or repetitive or essentially alike in material design, color, or other outstanding characteristics with other objects of the same type, or which have relatively little value for understanding the origins or history of a particular people or society.

U.S. SENATE REPORT, 97-564 at 5 (emphasis added).

B. GHA and CCP Concerns about the Ecuadorian Request

1. Overbroad Designated List

The Public Summary that appeared on the Cultural Heritage Center’s website is extremely broad and encompasses not only pre-Columbian era archaeological objects but “ethnological material including paintings and sculptures that are at least 100 years old; Colonial period metalwork; Colonial and Republican period textiles; Colonial and republican period coins; medallions more than 50 years old; tools and utensils with ethnological value more than 50 years old; manuscripts more than 50 years old; and certain works by modern artists.” Public summary at 1. *See*

https://eca.state.gov/files/bureau/ecuadorrequest2018_publicsummary_04.05.2018.pdf (last visited April 9, 2018.)

It is doubtful that many of these materials may be lawfully restricted at all, but that is certainly the case for coins, medallions and modern art.

Colonial and Republican era coins are not archaeological in nature; they either do not meet the 250 year threshold and/or are not “normally discovered” within the ground. *See* 19 U.S.C. § 2601 (2) (A). Nor do coins meet the definition of ethnological objects. *Id.* Colonial era coins were not struck in Ecuador, but at other Spanish mints in South America and Spain itself. The first coining activity in Ecuador was the placement of countermarks on coins starting in about 1831. Then, in 1833, a mint opened in Quito that struck coins based on Columbian prototypes. These coins, like their colonial counterparts, were struck in large numbers using European industrial processes. They circulated in international commerce as demonstrated in Herman Melville’s novel *Moby Dick*, where Captain Ahab nailed an Ecuadorian gold “doubloon” to the mast of the “Pequod” as a reward for sighting the White Whale. Indeed, both Spanish Colonial and Ecuadorian Republican era coins were legal tender in the United States until 1857. After 1872, Ecuadorian coins were struck abroad, mostly in the United States, the United Kingdom, and Peru. Today, Ecuador’s “dollarized” economy uses U.S. coins and paper money, with the Sacagawea dollar, depicting a Native American woman, being particularly popular with Ecuador’s own indigenous population.

It is unclear what “medallions” the Ecuadorian government hopes to restrict, but again such objects would not fit the definition of either “archeological” nor “ethnological objects.” So too with modern art which most certainly would fall outside these criteria.

2. Any MOU Should Be Conditioned on Benchmarks for Self-Help Measures.

Before any MOU with Ecuador may be agreed to, CPAC must advise whether “Ecuador has taken measures consistent with the Convention to protect its cultural patrimony.” *Id.* § 2602 (A) (1) (B). The CPIA further requires a finding that “remedies less drastic than the application of the restrictions . . . are not available.” *Id.* § 2602 (A) (1) (C) (ii).

Congress recently reemphasized the need for CPAC to assess self-help measures as part of the MOU renewal process as follows:

Cultural Property.--The Cultural Properties Implementation Act (CPIA) requires countries participating in MOUs restricting cultural property take significant self-help measures. The Committee² urges the Cultural Property Advisory Committee to consider the annual national expenditures on securing and inventorying cultural sites and museums in its annual reviews of the effectiveness of MOUs, as well as during the reviews required by the CPIA for extension of an MOU. The Committee also requests the Secretary of State review the feasibility of collecting and reporting on the cost of measures taken by partner countries in support of their cultural property MOU with the United States and be prepared to report on such review during the hearing process on the fiscal year 2019 budget request.

House Report 115-253 at 11. Here, there is reason to believe that the Ecuadorian government has not done all it can do to protect its own cultural patrimony, and indeed encourages private collecting amongst its wealthiest citizens. See Ernesto Salazar, *The Looting of Archaeological Patrimony in Ecuador in Proceedings of the 20th (1) Congress Suyanggae and her Neighbors in Haifa, Israel, June 21-28, 2015.*

Rather than “banning” collecting as Salazar advocates, however, CPAC instead should recommend that Ecuador investigate the creation of a portable antiquity reporting scheme for objects found on private land. Once objects reported under that scheme are registered, land owners and/or finders acting with the permission of the landowner should be allowed to retain or sell common objects not necessary for state museums. Such a program, which has been quite successful in the United Kingdom,³ could be a model for countries such as Ecuador, at least as far as common, redundant objects found on private land are concerned.

C. Conclusion

If CPAC recommends an agreement with Ecuador, any such a MOU should be conditioned on limiting the designated list and holding Ecuador accountable to reasonable benchmarks that address Congressionally mandated self-help measures. Under no circumstances should restrictions be applied to items that are neither archaeological nor ethnological in character such as Colonial period paintings, Colonial and Republican period coins; medallions more than 50 years old, manuscripts more than 50 years old, and modern art.

² The House Committee on Appropriations.

³ For more about the United Kingdom’s voluntary Portable Antiquity Scheme and mandatory Treasure Act, see <https://finds.org.uk/> (last visited April 10, 2018).