

Comments on MOU Renewal Request from Government of Bolivia**September 28, 2020**

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

Here, if a renewal is recommended, it should be conditioned on limiting the designated list and holding Bolivia accountable to reasonable benchmarks that address self-help measures. Moreover, any restrictions must be prospective, limiting detention, seizure and forfeiture to items illicitly exported from Bolivia after the effective date of any governing regulations. Under no circumstances should restrictions be applied to items that are neither archaeological nor ethnological in character.

A. U.S. 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. *Id.* § 2605. “Regular” restrictions may only be applied to archaeological artifacts of “cultural significance” “first discovered within” and “subject to the export control” of a specific UNESCO State Party. 19 U.S.C § 2601. There must be some finding that the cultural patrimony of the UNESCO State Party is in jeopardy. *Id.* § 2602. They must be part of a “concerted international response” “of similar restrictions” of other market nations, and can only be applied after less onerous “self-help” measures are tried. *Id.* 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;

¹The Global Heritage Alliance, 5335 Wisconsin Ave., N.W., suite 440, Washington, D.C. 20015. <http://global-heritage.org/>. The Committee for Cultural Policy, POB 4881, Santa Fe, NM 87502. www.culturalpropertynews.org, info@culturalpropertynews.org.

(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).

Once restrictions are imposed, they are prospective and only apply to designated archaeological or ethnological material “that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material . . .” 19 U.S.C. § 2606 (a).

B. GHA and CCP Concerns about the Bolivian Request

1. No Showing of Current Looting

CPIA import restrictions are meant to address current looting not looting that took place decades ago when mores and laws were different. Here, to date the State Department has not produced evidence of present looting showing that Bolivia’s cultural patrimony is currently in danger. Under the circumstances, CPAC should question Bolivian authorities closely before CPAC can make the required finding that Bolivia’s cultural patrimony is in danger.

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

Before any MOU with Bolivia may be agreed to, CPAC must advise whether “Bolivia 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).

The current MOU with Bolivia already contemplates that Bolivia will undertake site preservation and conservation measures as well as law enforcement measures as conditions for any renewal. MOU Art. II, B-H. Here, it is unclear what steps Bolivia has taken with regard to these commitments, and CPAC will need to assess whether Bolivia has complied with its promises during this renewal process.

In addition, GHA and CCP also suggest that CPAC recommend that Bolivia 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,² could be a model for countries such as Bolivia, at least as far as common, redundant objects found on private land are concerned.

There are two other areas where self-help measures may address looting at archaeological sites. First, CPAC should recommend that U.S. archaeologists working in Bolivia ensure there is year round site security at their digs. At its last meeting, CPAC member Ricardo St. Hilaire raised the issue of site security in Italy and Colombia, but did not get a detailed response about the measures taken. Site security can now be accomplished in a cost effective manner with the

² For more about the United Kingdom’s voluntary Portable Antiquity Scheme and mandatory Treasure Act, see <https://finds.org.uk/> (last visited September 15, 2020).

use of cameras and other low cost electronic security devices which should make any burden on archaeological missions manageable. Second, CPAC should recommend that U.S. archaeologists pay their archaeological workers a fair living wage. This will help provide a disincentive for the “subsistence digging,” and, therefore, directly combat looting.

3. CPAC Should Limit the Scope of Any Designated List and Work to Ensure that all Restrictions are Strictly Prospective.

The current designated list includes Colonial era ethnographic material dating as recently as 1900 in addition to pre-Columbian archaeological material. It is unclear at this juncture whether there will be any effort to expand this list further; however, if so, care should be taken not to include coins in any expanded designated list.

Colonial era coins were not only struck in Bolivia, but at other mints located throughout the Spanish Empire as well. It is our understanding that Republican era Bolivian coins were struck not only within Bolivia, but within the U.K. and France as well. Spanish 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) (C) (i) (II) (III). Nor do coins meet the definition of ethnological objects. *Id.* § 2601 (2) (C) (ii). They are not made individually, but by sophisticated industrial processes. Finally, due to their circulation in international commerce, one cannot assume such coins were “first discovered within” and hence were “subject to export control by” Bolivian authorities. *Id.* § 2601 (2) (C). Indeed, early coins that circulated within Bolivia were also legal tender in the United States until 1857.

Moreover, CPAC should take care that any import restrictions are only applied prospectively to items on the designated list illicitly exported from Bolivia after the effective date of governing regulations. 19 U.S.C. § 2606. Unfortunately, CBP instead applies import restrictions far more broadly to any cultural goods *imported* into the United States after the effective date of import restrictions, i.e., an embargo, not targeted, prospective import restrictions.

C. Conclusion

If CPAC recommends an extension of the agreement with Bolivia, any such MOU should be conditioned on limiting the designated list and holding Bolivia 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. Nor should restrictions be applied as embargoes.