

Comments on MOU Renewal Request from Government of Guatemala**January 18, 2022**

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

If that renewal is recommended, any such renewed MOU should be conditioned on limiting the designated list and holding Guatemala accountable to reasonable benchmarks that address congressionally mandated self-help measures. Moreover, any restrictions must be prospective, limiting detention, seizure and forfeiture to items illicitly exported from Guatemala 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. Background

Despite U.S. import restrictions dating back to 1997, proponents of the renewal will claim that it is still necessary for the U.S. to extend import restrictions for yet another five (5) years to combat looting. However, keeping Guatemalan archaeological and ethnological material out of the hands of US collectors for additional time will not address the root cause of looting, which is rural poverty. An embargo for another five (5) years will simply not change the underlying dynamic. Only targeted efforts in Guatemala itself can hope to change that picture.

Anthropologist David Matsuda has written extensively about subsistence looting in Central America by poor farmers. He has harshly criticized stereotypes of looters in the popular press as ignorant peasants. David Matsuda, *Subsistence Diggers* in *Who Owns the Past?* 255, 263 (Kate Fitz Gibbon ed. Rutgers 2005). Instead, he notes that the diggers themselves regard the debate over who owns loot as an aspect of class warfare. He paraphrases the words of one such digger as follows,

Every year the archaeologists dig up the artifacts and take them away. The next year they come back with more money, people and equipment. They talk of our ancestors with reverence, but treat us like ignorant peasants. The excavations are often run like plantations where we are exploited. The archaeologists want strong backs and weak

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.

minds. When we work for them, they pay us little and do not treat us with respect. We are never asked what we think, and there is no chance for advancement. The artifacts represent money and power to archaeologists. That is how they make their upper class living. To us, these gifts from our ancestors mean seed corn, food, clothes and security. This is how we live our lower-class lives.

(*Id.* at 264.)

B. 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. *Id.* § 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.*

Leaving aside limitations on entering into agreements, there are also strict limitations on what types of artifacts may be restricted. In particular, 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;

(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).

C. GHA and CCP Concerns about the Guatemalan 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, the State Department has not produced

any evidence to prove there is a significant current looting problem. Under the circumstances, CPAC should question Guatemalan authorities closely before CPAC can make the required finding that Guatemala’s cultural patrimony is in danger.

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

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

Here, the 2017 Amendment with Guatemala focuses on law enforcement efforts that do not address the root of the problem. Instead of more punitive measures, CPAC instead should recommend that Guatemala investigate the creation of a portable antiquity reporting scheme for objects found on private land. Once objects reported under that scheme are registered, landowners 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 Guatemala, 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 Guatemala ensure there is year-round site security at their sites. This can now be accomplished in a cost-effective manner with the use of cameras and other low-cost electronic security devices. 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” described in Dr. Matsuda’s work.

3. CPAC Should Limit the Scope of Any Designated List.

The renewal of the MOU with Guatemala should not be an excuse to expand current import restrictions, particularly to coins.

Colonial era coins used in Guatemala were struck elsewhere until a mint was opened in the 1730’s. Subsequently, Guatemala City became the major mint for the Central American Republic until some years after that union broke up and coins were struck in the name of Guatemala itself. 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” Guatemalan authorities. *Id.* § 2601 (2) (C). Indeed, early coins that circulated within Guatemala were also legal tender in the United States until 1857.

² For more about the United Kingdom’s voluntary Portable Antiquity Scheme and mandatory Treasure Act, see <https://finds.org.uk/> (last visited January 18, 2022).

C. Conclusion

If CPAC recommends another agreement with Guatemala, any such a MOU should be conditioned on limiting the designated list and holding Guatemala 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, particularly coins.