

Written Testimony of the Association of Art Museum Directors at the Meeting of the Cultural Property Advisory Committee to Review Proposals to Extend the Memorandums of Understanding Between the Government of the United States and the Governments of the Republic of Guatemala and the Republic of Mali, March 15, 2007.

I. Introduction

The Association of Art Museum Directors (“AAMD”) is a professional organization consisting of directors of art museums in the United States, Canada, and Mexico. The purpose of the AAMD is to support its members in increasing the contribution of art museums to society. The AAMD accomplishes this mission by establishing and maintaining the highest standards of professional practice, serving as a forum for the exchange of information and ideas, acting as an advocate for its member art museums, and being a leader in shaping public discourse about the arts community and the role of art in society.

The AAMD deplores the illicit and unscientific excavation of archeological materials and ancient art from archeological sites and the destruction or defacing of ancient monuments. The AAMD is also committed to the responsible acquisition of archeological materials and ancient art and believes that the artistic achievements of all civilizations should be represented in art museums, that, uniquely, offer the public the opportunity to encounter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The AAMD recognizes and applauds the balanced approach that the United States has taken to the protection of the world’s cultural heritage, an approach that encourages a unified and international solution to the problem while not creating barriers to the continued, responsible, acquisition by American museums of antiquities and works of ancient art unless those barriers are common to other collecting countries.

In 1983, Congress passed the Convention on Cultural Property Implementation Act¹ (the “Act”), which was the enabling legislation in the United States for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the “Convention”).² The Act permits the President of the United States to enter into bilateral or multilateral agreements with other convention signatories restricting the import of designated archaeological or ethnological material.³ The Act also allows the President to impose import restrictions in response to “emergency conditions” with respect to archaeological and ethnological material from signatory countries.⁴

Guatemala was the fourth country to take advantage of the Act, requesting emergency protection in April 1991.⁵ Guatemala’s request was granted and emergency import restrictions

¹ 19 U.S.C. §§ 2601-13.

² Nov. 17, 1970, 823 U.N.T.S. 231.

³ § 2602(a)(2).

⁴ § 2603.

⁵ 56 Fed. Reg. 15,181 (Apr. 15, 1991).

were applied to archaeological material from the Peten Archaeological Region.⁶ In 1997, pursuant to a non-emergency, bilateral agreement, those restrictions were continued as well as broadened to include “pre-Columbian material from the Highlands and the Southern Coast of Guatemala.”⁷ The 1997 restrictions were extended for a five year term in 2002,⁸ and are now under consideration today for further extension.⁹

In September 1993, Mali was granted emergency restrictions covering cultural significant archaeological artifacts from the Niger River Valley and Bandiagara Escarpment regions.¹⁰ Those same restrictions were renewed in a non-emergency, bilateral agreement in September 1997.¹¹ The restrictions were then extended for five years in 2002¹² and are now under consideration for further extension.¹³

The AAMD is sympathetic to the desires of the governments of Guatemala and Mali to limit the looting of archaeological materials from those respective countries. The conditions of looting were substantial enough in the early 1990’s to warrant the imposition of emergency import restrictions for certain archeological material from those countries, and those restrictions have been continued and extended through non-emergency bilateral agreements in an attempt to curtail the looting that continues to this day. Notwithstanding this regrettable situation, United States policy, as codified in the Act, is designed to work a delicate balance between the desires of countries that are the source of this archeological material and the desire of the United States to maintain open channels of cultural interchange as well as to ensure that the United States is not placed in the (impossible) position of combating the problem of international looting on its own. It is the responsibility of this Committee to protect this delicate balance through strict adherence to the mandates of the Act.

Before the President can enter into or renew a bilateral agreement with another Convention signatory, the Act explicitly requires the President to make four determinations:

- (1) The cultural property of the country applying for protection is “in jeopardy from the pillage of archaeological or ethnological materials” from that country.

⁶ *Id.*

⁷ 62 Fed. Reg. 51,772 (Oct. 3, 1997).

⁸ 67 Fed. Reg. 61,259 (Sept. 30, 2002).

⁹ 72 Fed. Reg. 8,833 (Feb. 27, 2007).

¹⁰ 58 Fed. Reg. 49,428 (Sept. 23, 1993).

¹¹ 62 Fed. Reg. 49,595 (Sept. 23, 1997).

¹² 67 Fed. Reg. 59,159 (Sept. 20, 2002).

¹³ 72 Fed. Reg. 8,833 (Feb. 27, 2007).

(2) The country applying for protection has “taken measures consistent with the Convention to protect its cultural patrimony.”

(3) The restrictions would be of “substantial benefit in deterring a serious situation of pillage” “if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations . . . individually having a significant import trade in such material”; and “less drastic” remedies than the import restrictions are not available.

(4) The application of restrictions is “consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.”¹⁴

An examination of these required determinations with respect to the import restrictions for Guatemala and Mali suggests that the statutory requirements necessary for renewal of the restrictions cannot be satisfied.

II. The CPIA Prohibits the Extension of the Guatemala and Mali Import Restrictions Where Such Restrictions Are Not Accompanied By Similar Restrictions From Other Countries with Significant Trade in Guatemalan and Malian Archeological Material.

Perhaps the most difficult decision facing the Committee is not a determination of whether areas of the rich cultural history of Guatemala and Mali are subject to illegal excavation and exploitation, but rather whether the proposed renewal of the bilateral agreements meets the statutory elements required before a renewal can take place.

Setting aside for the moment the analysis that this Committee must undertake with respect to whether Guatemala in particular, but Mali as well, have taken measures consistent with the Convention to protect their cultural patrimony, we believe the most difficult question before the Committee is whether the renewal of these agreements would meet the standards set forth in 19 U.S.C. § 2602(a)(1)(C)(i), which provides that –

the application of the import restrictions set forth in section 2606 of this title with respect to archeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage.

¹⁴ 19 U.S.C. § 2602(a)(1).

The United States undertook emergency action with respect to Guatemala in 1991 and with respect to Mali in 1993. The bilateral agreements with both countries essentially continued the protection provided under the emergency actions. As a result, with respect to Guatemala there has been over fifteen years of continuous protection by the United States and with respect to Mali over thirteen years.

We do not have the benefit of the request from Guatemala and Mali, but we assume that both of the governments will strenuously argue that continued protection is essential because of the ongoing threats to the cultural property within their borders. Let us assume that their position on this issue is correct, what does that mean in terms of the statutory requirements?

Sixteen years (Guatemala) and thirteen years (Mali) should be sufficient time for this Committee to make a determination as to whether or not the restrictions as implemented have resulted in a substantial benefit in deterring a serious situation of pillage. Again, without the benefit of seeing the application for extension by either of these countries, we believe that both Guatemala and Mali will be unable to point to any direct correlation between the implementation of import restrictions by the United States and a substantial benefit in deterring a serious situation of pillage in Guatemala or Mali. By proving their case for renewal, in effect they prove the inadequacy of the protection requested. The reason for the failure lies not in the United States, but rather in the protections accorded the subject properties in other market countries.

The drafters of the Act were wise in the framework that they created for import restrictions by the United States. They knew that simply adopting the Convention was not enough, whether or not one takes the position that the Convention can be “self-executing.” Congress determined that protection for the world’s cultural heritage only follows specific regulatory authority applied at the border, education of those who protect the borders and strict enforcement against those who violate our nation’s customs laws. As a result, Congress and the various administrative entities involved have developed a framework whereby, after the determination has been made to enter into a bilateral agreement:

- specific descriptions of protected objects are created;
- regulations are issued which become part of our customs law;
- photographs of the types of objects are created and placed on a website for all to see; and
- instructions are issued to customs officers helping them to understand what objects should be identified, evaluated and restricted.

Section 2602 requires the Committee to determine that the proposed import restrictions under Section 2606 (NOT the bilateral agreement itself):

- if applied in concert with similar restrictions implemented or to be implemented within a reasonable period of time by those nations . . . having a significant import trade in such material
- would be of substantial benefit in deterring a serious situation of pillage.

There must be a clear understanding of the process that exists under the Act to protect against illegal importation in order to understand how the word “similar” needs to be applied in addressing the statutory definition. What are the restrictions set forth in Section 2606? First and foremost Section 2606 presupposes “designated archeological or ethnological material.” As a result, the first test of the similarity of import restrictions is whether or not the country being evaluated has something similar to the designated archeological or ethnological material found in our customs regulations. Does it have to be the same designated archeological or ethnological material? No, but it must be similar. If the Committee undertakes a review of market countries, for example, in Europe, we believe that the effort to find a list of designated Guatemalan or Malian objects will be in vain. In fact the customs laws of countries like the United Kingdom, France, Italy or Spain do not appear to have any provisions specifically prohibiting the importation of such property.

Would simply adopting the Convention satisfy this requirement? No. First and foremost, if Congress intended this to be the case Congress would have simply said if a market country has adopted the Convention, the test is satisfied. Congress did not do so, instead, Congress was looking for real action by market countries that could have a demonstrated effect on the illicit trade. The Convention covers a multitude of objects from fauna and flora, from minerals and anatomy to revenue stamps and old books. Simply adopting the Convention, even if the adopting country declares it to be law of the land does not constitute the designation of specific archeological or ethnological material required by Congress, in particular the kind of designation which can guide and inform a customs officer. In fact, a review of the Convention leaves the reader wondering how the mere adoption of the Convention without implementing a regime of customs regulation and enforcement could possibly meet the test of similarity set forth in the Act. There is nothing “self-executing” with respect to the Convention and it does not provide a system for prohibiting the importation of designated cultural property from its country of origin into a signatory country. That is left to the discretion of the regulatory country. Congress has mandated that before import restrictions will be implemented by the United States, other market signatory countries in their implementation of the Convention must adopt similar restrictions to the ones proposed for the United States. The absence of specific import restrictions gives the markets for Guatemalan and Malian art and cultural property the opportunity to flourish around the world. Those countries that have a significant trade in such objects should certainly be encouraged to adopt restrictions similar to those that have been in effect in the United States for years, but the continued renewal of bilateral agreements with Guatemala or Mali by the United States of America will not accomplish that encouragement. On the contrary, the renewal of such agreements puts no pressure on those countries to act in a way that is similar to the actions of the United States and does little to help protect the property of Guatemala or Mali.

In addition to meeting the statutory definition of “similar,” the Committee must address the question of whether restrictions imposed by other countries have actually been implemented. Section 2602 allows the President to enter into a bilateral agreement as long as the similar restrictions are “to be implemented within a reasonable period of time.” How is the Committee to interpret this section? Could the Committee determine in 1997 when the first bilateral agreements were executed that there was a belief that similar restrictions would be implemented within a reasonable period of time? Presumably this was the case as similar restrictions do not appear to have existed at all in 1997. Did they make that determination in 2002? Perhaps. Can

they make that determination in 2007? We believe not. Ten years is more than sufficient time to determine whether or not similar restrictions have in fact been implemented or have a reasonable possibility of being implemented. Absent compelling evidence of similar restrictions which will be implemented in the very near future, how can the Committee take the position that the renewal of the bilateral agreements meets this statutory definition?

Again, the situation of looting in Guatemala and Mali is a regrettable facet of the growing internationalization of cultural heritage: A culture that may have once only been appreciated on a national scale is now appreciated and desired around the world. If the United States is to be excluded from this internationalization and the marketplace for objects restricted by these agreements, then, as contemplated by the Act, the rest of the world's principal markets should also be excluded. More importantly, the cultural property of Guatemala and Mali should be protected from illicit removal and sale in those market places. The absence of similar restrictions adopted by other market countries has resulted in a continuing market for objects illegally exported from Guatemala and Mali as we believe the applications for renewal by Guatemala and Mali will argue. This Committee is empowered and, in fact required, to assure that the United States does not "go it alone" in connection with these issues. We submit that this Committee must find that restrictions similar to those adopted by the United States must have been implemented in other market countries before the renewal can be recommended – restrictions that are real and that designate, regulate and educate.