

Statement of the Association of Art Museum Directors Presented by Stephen J. Knerly, Jr.* Meeting of the Cultural Property Advisory Committee

Review Proposals to Extend the Memorandums of Understanding Between the Government of the United States and the Governments of the Republic of Peru and the Republic of Cyprus

January 25, 2007

I. Introduction

This statement is made on behalf of the Association of Art Museum Directors (“AAMD”). The 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

* Counsel to the AAMD and Partner, Hahn, Loeser & Parks, LLP, Cleveland, Ohio; (216) 621-0150; sjknerly@hahnlaw.com.

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

Peru was the third country to take advantage of the Act, requesting emergency protection in June 1989.⁵ Peru’s request was granted on May 7, 1990, and emergency import restrictions were applied to archeological material from the Sipan Archaeological Region.⁶ In 1997, import restrictions on materials from Peru were substantially broadened with a non-emergency bilateral agreement between the United States and Peru covering:

¹ 19 U.S.C. §§ 2601-13.

² Nov. 17, 1970, 823 U.N.T.S. 231.

³ § 2602(a)(2).

⁴ § 2603.

⁵ 54 Fed. Reg. 26,462-63 (June 23, 1989). Peru’s request followed grants of emergency action with respect to Cara Sucia pre-Columbian archeological material in El Salvador, 52 Fed. Reg. 34,614-16 (Sept. 11, 1987), and antique ceremonial textiles from the community of Coroma, Bolivia, 54 Fed. Reg. 10,618-20 (Mar. 14, 1989).

⁶ 55 Fed. Reg. 19,029 (May 7, 1990).

[P]re-Columbian archaeological material . . . ranging in date from approximately 12,000 B.C. to A.D. 1532, and including, but not limited to, objects comprised of textiles, metals, ceramics, lithics, perishable remains, and human remains that represent cultures that include, but are not limited to, the Chavin, Paracas, Vincus, Moche (including objects derived from the archaeological zone of Sipan), Viru, Lima, Nazca, Recuay, Tiahuanaco, Huari, Chimu, Chancay, Cuzco, and Inca.⁷

The restrictions also limited the import of Colonial ethnological material, ranging in date from A.D. 1532 to 1821, including:

(1) objects directly related to the pre-Columbian past, whose pre-Columbian design and function are maintained with some Colonial characteristics and may include textiles, metal objects, and ceremonial wood, ceramic and stone vessels; and (2) objects used for religious evangelism among indigenous peoples and including Colonial paintings and sculpture with distinct indigenous iconography.⁸

The 1997 restrictions were renewed in 2002 for five years⁹ and are now subject to review to determine whether continued import restrictions are necessary and appropriate.

Like Peru, Cyprus's request for protection under the Act began as a notification of an "emergency condition" as defined in 19 U.S.C. § 2603. On April 12, 1999, the United States imposed emergency import restrictions on "ecclesiastical and ritual ethnological material from Cyprus representing the Byzantine period, ranging in date from approximately the 4th century A.D. through approximately the 15th century A.D."¹⁰ The ethnological restrictions were renewed for three years on August 29, 2003.¹¹ Additional restrictions were imposed on July 16,

⁷ 62 Fed. Reg. 31,713 (June 11, 1997).

⁸ *Id.* at 31,713-14.

⁹ 67 Fed. Reg. 38,877 (June 6, 2002).

¹⁰ 64 Fed. Reg. 17,530 (Apr. 12, 1999).

¹¹ 68 Fed. Reg. 51,903 (Aug. 29, 2003).

2002, pursuant to a separate bilateral agreement on “archeological material from Cyprus representing pre-classical and classical periods ranging in date from approximately the 8th millennium B.C. to approximately 330 A.D.”¹² Because the emergency restrictions on Byzantine material were due to expire on September 4, 2006, on August 11, 2006, the bilateral agreement was amended to include the Byzantine material so that its restrictions would be co-extensive with those set forth in the expiring emergency action.¹³ Both the archeological and ethnological import restrictions are being presently considered for renewal by the Cultural Property Advisory Committee.¹⁴

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.
- (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.”¹⁵

¹² 67 Fed. Reg. 47,447-48 (July 19, 2002).

¹³ 71 Fed. Reg. 51,724 (Aug. 31, 2006).

¹⁴ 71 Fed. Reg. 71,022 (Dec. 7, 2006).

¹⁵ 19 U.S.C. § 2602(a)(1).

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

II. The Peru and Cyprus Restrictions Exceed the Legislative Authority Allowed for Archaeological or Ethnological Material in Jeopardy

The current import restrictions of Peruvian archaeological and ethnological material are written too broadly to fit within the given legislative authority. While the original emergency restrictions in 1990 were applied only to archaeological material from the Sipan region, the subsequent restrictions currently under review ambitiously cover a wide array of archeological material from no less than thirteen separate cultures spanning a period of over 13,000 years (12,000 B.C. to A.D. 1532). The ethnological restrictions for Peru are also broad, covering any Colonial object from 1532 to 1821 that relates to the pre-Columbian past as well as any object during that period that was used for purposes of religious evangelism among indigenous cultures. With respect to the latter category, the U.S. Department of State has designated objects such as colonial paintings of the Virgin Mary and statues of Jesus and various saints as part of the colonial ethnological objects restricted by the bilateral agreement.¹⁶

The Cyprus bilateral agreement mirrors the Peru agreement in terms of the broad scope of archaeological and ethnological material restricted from import. The Cyprus ethnological restrictions protect Byzantine material created within a window covering 1,100 years (4th to 15th century A.D.). The archaeological restrictions for Cyprus cover any material representing the “pre-classical or classical period” over a similarly extensive period of time of 1,100 plus years (8th century B.C. to 330 A.D.).

¹⁶ U.S. State Department, Bureau of Educational and Cultural Affairs, Peru Image Collection – Colonial Ethnological Objects (2000), <http://exchanges.state.gov/culprop/peru/colonial/sect.htm>.

In contrast to the broadly worded import restrictions for Peru and Cyprus, the legislative history shows that the bilateral agreements permitted under the Act were intended only to apply to a “narrow range of objects possessing certain characteristics.”¹⁷ The Peru and Cyprus agreements include objects created, in some instances, over more than ten thousand years without any limitation as to archaeological sites, geographical location or cultural identity.

In addition to the temporal expanse of the current import restrictions, certain definitional aspects of the restrictions also stretch beyond the legislative limitations by virtue of the categories of material they protect. Specifically, with respect to “ethnological material,” the legislative history states the term is intended only to apply to the “product of a tribal or similar society.”¹⁸ The definition was intended “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.”¹⁹ This intention contrasts with the State Department’s designation of religious paintings and statues as “colonial ethnological objects.” The inclusion of these items, as shown in the State Department’s own image collection of restricted material from Peru, appears to go beyond the limited protection of “masks, idols, or totem poles” and other “primitive or tribal art” allowed by the Act. Furthermore, these ecclesiastical objects are not “found-in-the-ground” antiquities. They are generally objects found in churches, museums or private collections. Those objects found in churches or museums are already protected by 19 U.S.C. § 2607, the section of the Act restricting the import of cultural property stolen from “the

¹⁷ S. REP. NO. 97-564, at 25 (1982) (emphasis added) (“Only the term ‘archaeological or ethnological material of the state party’ requires fuller explication here. The Convention does not define the term. The definition is intended by the committee to reflect the understanding of U.S. negotiators that the application of import restrictions under agreements entered into under Section 203 or emergency actions taken under Section 204 is limited to a narrow range of characteristics.”)

¹⁸ *Id.*

¹⁹ *Id.*

inventory of a museum or religious or secular public monument or similar institution.”²⁰ Objects in private collections have never been the impetus for import restrictions, but may be protected under state conversion and replevin laws as well as the federal National Stolen Property Act.²¹

Finally, the Peru and Cyprus bilateral agreements make no exception for common or repetitive objects. Again, the agreements may have gone beyond the intentions of the framers of the Act by not addressing the issues surrounding this particular subset of objects:

The Committee does not intend the definition of ethnological material 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.²²

The intention stated in the legislative history is also borne out in the statute: “No object may be considered to be an object of ethnological interest” unless the object is “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.”²³ While arguments could be advanced that any product of an ancient civilization contributes to the history of a people, to accept such arguments renders the limitation language of the statute a nullity.

The limitations expressed in the legislative history as well as in the language of the Act were meant to preserve the delicate balance between the United States’s interest in supporting the international market for art against situations where protection is needed due to jeopardy from the pillage of archaeological or ethnological material. As Mark Feldman, who was Deputy

²⁰ 19 U.S.C. § 2607.

²¹ 18 U.S.C. §§ 2314 and 2315.

²² *Id.*

²³ 19 U.S.C. § 2601(2)(C)(ii).

Legal Advisor for the U.S. Department of State and represented the United States during the negotiations of the 1970 UNESCO Convention, stated:

This legislation cannot be construed as opening the way to blanket restrictions, because it is ad hoc, country by country and it contemplates designated objects or classes of objects. . . . But we *do* hope to use the authority responsibly and to limit it to specifically designated classes of objects where it can be demonstrated that jeopardy does exist, and where American interests—art and other diplomatic interests—justify such measures.²⁴

Unfortunately, the current import restrictions for Peru and Cyprus resemble the “blanket restrictions” that were to be avoided under the Act. That these restrictions are imposed on a country-by-country basis does nothing to change the fact that these restrictions cover a far wider array of cultural material within each of these countries than the Act intended. The limitations imposed by the Act that the restrictions only apply to a “narrow range” of material, that “ethnological material” only apply to “primitive” or “tribal” art, and that the restrictions do not apply to common or repetitive objects were intended to prevent bilateral agreements from turning into blanket-type restrictions.

III. Cyprus and Peru Have Not Taken Sufficient Measures to Protect Their Respective Cultural Property

Another determination the President must make before a bilateral agreement can be concluded or extended is whether or not the country seeking the imposition of import restrictions “has taken measures consistent with the Convention to protect its cultural patrimony.”²⁵ The country “should not only have established export controls but also be making a serious effort to

²⁴ Mark B. Feldman, *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYR. J. INT’L L. & COM. 97, 125 (1976).

²⁵ 19 U.S.C. § 2602(a)(1)(B).

solve the problem itself.”²⁶ This determination is intended to protect the United States from putting itself at a disadvantage in the international market for art where domestic factors in the source country—rather than the U.S.’s participation in the market—pose significant risks to cultural material. As Mark Feldman noted, “We recognize that if American efforts are not going to have a meaningful impact on the problem, it probably would be unwarranted for us to stop the flow of art to [the U.S.] through international cooperation.”²⁷

A. *Cyprus*

The situation in Cyprus shows uneven protection against the pillage of archaeological sites. As described by the Republic of Cyprus’s Department of Antiquities, “In the free area of Cyprus where the Antiquities Law is implemented, looting is sporadic and there are only three cases where the same cemeteries are in constant danger.”²⁸ This statement alone raises the question of why blanket restrictions are needed at all. In the northern areas of Cyprus, however, looting is considerable: “It is estimated by the Cyprus Police that since the Turkish invasion of 1974 more than 60,000 ancient artefacts have been illegally transferred to different countries of the world. To this number one should add approximately 16,000 icons and mosaics stolen from at least 500 churches in the occupied area.”²⁹

Many of the objects being looted are Byzantine material that was covered by the 1999 emergency restrictions and the 2002 extension of those restrictions. Under the Act’s provisions allowing for emergency restrictions, the President only needed to make a finding that jeopardy

²⁶ Feldman, *supra* note 24, at 116.

²⁷ Feldman, *supra* note 24, at 116.

²⁸ Republic of Cyprus, Department of Antiquities, “Destruction of cultural heritage in occupied Cyprus,” (available at <http://www.cyprus.gov.cy/moi/pio/pio.nsf/All/BA4D044F6081C750C2256DC90032C3EC>).

²⁹ *Id.*

existed from the “pillage, dismantling, dispersal or fragmentation” of archaeological or ethnological material.³⁰ By amending the bilateral agreement to include Byzantine material, the (formerly emergency) restrictions protecting the material must meet the higher burden of the four determinations required by § 2602 of the Act, including the determination that Cyprus is making a serious effort to solve their problem. This is a determination Cyprus cannot possibly satisfy given the lack of protection afforded Byzantine material in the northern area.

In addition to the problem of looting, the antiquities laws of Cyprus have proven ill-suited to protect the country’s cultural patrimony. Archaeological excavations in Cyprus have been criticized as lacking in scientific methodology and without the necessary consultation of civil engineers and architects.³¹ The president of the Association of Cypriot Archaeologists, Andreas Demetriou, has pointed out that “there was far too [sic] much digging going on, between foreign missions and local ones, which resulted in damage to archaeological sites and possible valuable material [being] thrown away due to lack of space and facilities.”³² Demetriou added, “We dash everywhere in Cyprus to dig and then we dump things. . . . There is no government policy on archaeology. There is no strategy on antiquities at all.”³³

The mixture of uneven domestic protection of cultural material and haphazard archaeological policy suggests that the biggest threats to Cyprus’s cultural heritage exist within the country’s borders. These wholly domestic threats are unlikely to be addressed by U.S. import restrictions on archaeological and ethnological material from Cyprus and, as such, may not

³⁰ 19 U.S.C. § 2603(a) and (b)

³¹ Jean Christou, *Too Much Digging Is Damaging Our Heritage*, CYPRUS MAIL, Nov. 29, 2005 (available at <http://www.cyprus-mail.com/news/main.php?id=23075>).

³² *Id.*

³³ *Id.*

warrant the United States placing itself at a self-imposed competitive disadvantage in the international market for art.

B. Peru

In Peru, cultural nationalism and the practice of hoarding cultural objects has, ironically, threatened the preservation of Peru’s cultural heritage. Peru has often retained works that, ultimately, are not adequately conserved or displayed.³⁴ If, instead, the “endangered works were moved to some other nation, they might be better preserved, studied and displayed and more widely viewed and enjoyed.”³⁵ This practice has been termed by commentators as “destructive retention” or “covetous neglect.”³⁶

In addition, the fact that Peruvian national museums are overflowing with repetitive cultural artifacts also indicates that extending the current import restrictions may not be warranted. As previously discussed, the Act was never intended to restrict the import of these repetitive artifacts. Furthermore, one of the United States’s stated goals in implementing the 1970 UNESCO Convention is to “place a high value on the international movement of cultural property through legitimate channels.”³⁷ “The idea is to have the legislation reflect our general support for the international movement of art. Thus, the President would have to determine that in this instance limited cooperation would be consistent with that overall policy.”³⁸ Peru’s export law appears to be a virtual ban on the export of cultural objects (except for exhibition or State gift purposes). The country’s practice of hoarding cultural artifacts—especially artifacts

³⁴ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 Am. J. Int’l L. 831, 846 (1986).

³⁵ *Id.*

³⁶ *Id.* at 846-47.

³⁷ Mark B. Feldman, *supra* note 24, at 113.

³⁸ Mark B. Feldman, *supra* note 24, at 116.

that are duplicative or repetitive of other material—does nothing to further the United States’s overarching interest.

IV. The Overarching Goal of the Act is to Support the Interchange of Cultural Property among Nations

The final required determination provided in the statute that must be made before import restrictions can be imposed or extended is whether or not such restrictions are “consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.”³⁹ This determination is set out in the explicit language of the statute to highlight the interplay between honoring an applicant country’s request for import restrictions and protecting the United States’s own interest in participating in the market for art and promoting the spread of culture worldwide. “[T]he essence of the U.S. position is that we should cooperate with foreign countries to put some limitation on the illicit traffic in cultural property, [but] that we should seek actively to encourage these countries to liberalize their legislation where it unduly restricts the international circulation of cultural property.”⁴⁰ Where, as already outlined with respect to the situation of “destructive retention” in Peru, a country persists in a policy or practice that is not consistent with a liberalization of international trade, it follows that the United States should not further feed the country’s cultural nationalism by erecting import barriers with respect to that country’s archaeological and ethnological material. An example of the context in which the Committee should evaluate whether continued assistance through import restrictions of Peru’s nationalist approach are the recent threats by Peru against Yale University.

³⁹ 19 U.S.C. § 2602(a)(1)(D).

⁴⁰ Mark B. Feldman, *supra* note 24, at 113.

This analysis highlights an important point as the government makes its determination on whether to extend the Peru and Cyprus bilateral agreements: The foregoing determinations are intended “to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other countries”⁴¹ The United States has its own interests to consider and, by design, the Act “permits us to be flexible in extending cooperation [to applicant countries], weighing the propriety of controls by whether it is in our interest to do so, whether there is a proper attitude towards art values, and whether reciprocity will be given. We have an element of choice in the matter.”⁴²

Precisely because of this element of choice and the guarding of United States interests, the Act requires the Committee to engage in a thorough analysis of the four determinations laid out in the statute before a bilateral agreement can be concluded or extended. These determinations serve as the final check to assure that agreements between foreign countries and the United States, in accordance with the Act as well as the 1970 UNESCO Convention, remain in balance with the interests of the American art community and the United States as a whole. Recent history shows, however, that the U.S. Department of State may have overlooked this requirement in amending the 2002 Cyprus archaeological restrictions to also include the Byzantine ethnological material protected in the 1999 emergency action and subsequently extended in 2003 for an additional three years. This method of amending is not provided for by statute and results in the avoidance of the carefully crafted analysis required in § 2602(a). 19

⁴¹ S. REP. NO. 97-564, at 27 (1982).

⁴² Mark B. Feldman, *supra* note 24, at 114.

U.S.C. § 2602 only authorizes the President to take two actions: (1) enter into bilateral and multilateral agreements with a Convention signatory to apply import restrictions⁴³ and (2) extend such bilateral or multilateral agreements as long as the four determinations “which justified entering into the agreement still pertain.”⁴⁴ Nothing in the statute permits an amendment of a currently existing bilateral agreement and, *a fortiori*, nothing in the statute permits an expiring emergency action—a type of action that can only be (and, in this case, was) extended once for a period of three years⁴⁵—to be effectively extended by way of amending an existing bilateral agreement.⁴⁶

The reasoning behind this restriction in the Act’s power is simple: Any material that is to be restricted from import into the United States on a non-emergency basis must be justified as per the four required determinations in § 2602(a)(1). Emergency actions, on the other hand, are only subject to the less stringent finding that “jeopardy from pillage, dismantling, dispersal, or fragmentation” exists.⁴⁷ Where restrictions from an expiring emergency action are simply “piggy-backed” onto an existing bilateral agreement by way of amendment, those restrictions are, against the design of the Act, never scrutinized under the rubric of the four required determinations.

⁴³ 19 U.S.C. § 2602(a)(2).

⁴⁴ 19 U.S.C. § 2602(e).

⁴⁵ 19 U.S.C. § 2603(c)(3).

⁴⁶ It should be noted that § 2603(c)(4) does nothing to refute this argument. § 2603(c)(4) allows for an effective extension of an emergency action “in whole or in part, if before their expiration, . . . there has entered into force with respect to the archaeological or ethnological materials an agreement under [§ 2602].” In other words, this paragraph does not prohibit the subject matter of an emergency action from being included in a new bilateral agreement. Such a bilateral agreement, along with the consideration of material protected by the prior emergency action, would be subject to findings with respect to each of the four determinations required by § 2602(a)(1).

⁴⁷ 19 U.S.C. § 2603(a)(1) - (3).

V. Concluding Remarks

The AAMD's position is that the Cultural Property Advisory Committee must proceed with deliberate caution before considering an extension of the current bilateral agreements with Cyprus and Peru formed under the Convention on Cultural Property Implementation Act. The Act was designed to delicately balance the interests of the United States art community with the deplorable situation of pillage that occurs in specific areas around the world. Because of this delicate balance, the AAMD recommends that the Committee adhere strictly to the inherent limitations designed into the Act. First, the broad scope of the import restrictions provided for in the Cyprus and Peru agreements ignores the intention of the Act to serve only as an extreme remedy applied to a narrow range of objects and in a limited number of situations. Second, the Committee must account for the diminished efficacy of the Cyprus and Peru restrictions and the possibility that any perceived benefits derived from the continuation of the restrictions will be lost amid wholly domestic matters in the source country. Finally, the Act reminds the Committee that its analysis must always be focused towards the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes. The AAMD shares this interest with the Committee and with the United States as a whole. The AAMD believes working towards this shared goal necessarily implies only the most judicious use of the restrictions allowed by the Act.

