

**Statement of the Association of Art Museum Directors Concerning the Proposed
Extension of the Bilateral Agreement between the United States of America and the
Republic of Nicaragua**

**Meeting of the Cultural Property Advisory Committee to Review the Proposal to
Extend the Memorandum of Understanding between the Government of the United
States and the Government of the Republic of Nicaragua Concerning the Imposition
of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures of
the Republic of Nicaragua**

I. Introduction

This statement is made on behalf of the Association of Art Museum Directors (the “AAMD”). The AAMD is a professional organization consisting of approximately 220 directors of major art museums throughout 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 archaeological materials and ancient art from archaeological sites and the destruction or defacing of ancient monuments. The AAMD also is committed to the responsible acquisition of archaeological materials and ancient art. It 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, where these works may educate, inspire and be enjoyed by all.

II. Executive Summary

The AAMD respectfully recommends that the Cultural Property Advisory Committee (the “Committee”) decline Nicaragua’s request to extend the *Memorandum of Understanding Between the Government of the United States and the Government of the Republic of Nicaragua Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures of the Republic of Nicaragua*, last amended and extended on October 4, 2010 (the “MOU”). This recommendation is based on the AAMD’s conclusion that at least two of the four determinants for extending an MOU cannot be made. If the Committee nevertheless recommends extension, Article II of the MOU should be revised in order to ensure that the letter and

spirit of the Cultural Property Implementation Act (the “CPIA”) are honored and that the MOU is of maximum benefit to all parties.

Nicaragua does not appear to be a major source for acquisitions or exhibition loans. As a result, import restrictions under the MOU do not significantly affect the ability of AAMD members to acquire or borrow works. The AAMD does, however, deeply care about the integrity of the processes required under the CPIA and the work of the Committee required under the CPIA. Any time that a country requests and is granted import restrictions without strict compliance with the requirements of the CPIA, the entire program contemplated by the CPIA is placed in jeopardy. Furthermore, a country continuing to request renewal of those restrictions without showing significant improvement in the protection of cultural property jeopardizes the very purpose of the CPIA. Obtaining import restrictions from the United States can have political, diplomatic and social benefits for a requesting country, but none of those are grounds for an MOU. The AAMD is concerned that if countries like Nicaragua are permitted to obtain this extraordinary type of protection without compliance with the requirements of the CPIA, the entire rationale for the work of the Committee is undermined.

III. All Four Required CPIA Determinations Cannot be Made for Nicaragua

In order to recommend an extension of the MOU to the president, the Committee must find that four determinants are satisfied.¹ Nicaragua fails to satisfy at least two of the four determinants. First, Nicaragua cannot demonstrate that it is taking measures to protect its cultural property consistent with the 1970 UNESCO Convention.² Second, the MOU has not been of substantial benefit in deterring pillage.³

A. Nicaragua is Not Taking Measures to Protect Its Cultural Property

Section 2602(a)(1)(B) of the CPIA requires a finding that the requesting country “has taken measures consistent with the [1970 UNESCO] Convention to protect its cultural patrimony.” The evidence indicates that Nicaragua has not taken such measures. A report issued in 2013 stated that “looting and destruction of archaeological sites, [and] the illegal trade in cultural property and illicit trafficking in them[,] are

¹ 19 U.S.C. §§ 2602(a)(1) and 2605(f)(2).

² 19 U.S.C. §2602(a)(1)(B).

³ 19 U.S.C. §2602(a)(1)(C)(i).

significantly undermining the cultural heritage of Nicaragua[.]”⁴ The result is a state of patrimonial impoverishment.⁵ For example, according to a 2010 report, Tepestate, “one of the most important sites in Nicaragua, has been nearly destroyed in recent years”⁶ through “modern development and intensive looting[.]”⁷ Nicaragua’s two pyramids, at Canto Gallo on the Indio River and Garrobo Grande near La Gateada, which are suspected to be the oldest pyramids in the hemisphere, also suffer from looting,⁸ as do museums themselves.⁹ Looting and destruction are attributed to a lack of governmental protection¹⁰ and to a general failure to maintain sites¹¹ and provide basic security.¹²

Destruction of Nicaragua’s cultural patrimony will only accelerate with construction of the new Nicaragua Canal. On December 22, 2014, construction commenced on the 172-mile canal, which, at up to 1,700 feet wide and 90 feet deep, will be able to serve ships too large to use the expanded Panama Canal. When completed, it will bisect the country beginning at the Pacific port town of Brito, passing through Lake

⁴ Organización de Estados Iberoamericanos, *Informes sobre los Sistemas Nacionales de Cultura: Nicaragua* (2013), translated, <http://www.oei.es/cultura2/Nicaragua/06a.htm> (last accessed December 15, 2014).

⁵ *Ibid.*

⁶ Geoffrey G. McCafferty, *Ten Years of Nicaraguan Archaeology* (2010), Paper Prepared for 2010 Meeting of the Society for American Archaeology, http://arky.ucalgary.ca/mccafferty/sites/arky.ucalgary.ca.mccafferty/files/Ten_Years_of_Nicaraguan_Archaeology.pdf (last accessed January 5, 2015).

⁷ Geoffrey G. McCafferty and Carrie L. Dennett, “Ethnogenesis and Hybridity in Proto-Historic Period Nicaragua,” *Archaeological Review from Cambridge: Archaeology and Cultural Mixture* 28, no. 1, (April 2013), 197.

⁸ See Nicaragua News Bulletin, “Prehistoric Ruins Need Better Maintenance,” *NicaNet*, (July 8, 2014), www.nicanet.org/?page=blog&id=27235 (last accessed December 12, 2014), “these [pyramids] should be protected by the government to prevent the looting of artifacts and the disturbing of archaeological evidence at the site.”

⁹ Organización de Estados Iberoamericanos, “Museums, mostly local, are [the] constant object of theft or looting.”

¹⁰ See, e.g., Nicaragua News Bulletin, stating that pyramids at Canto Gallo and Garrobo Grande “should be protected by the government to prevent the looting of artifacts and the disturbing of archaeological evidence at the site[s].” See also Rafael Lara, “La Nicaragua Prehistórica está Descuidada,” *El Nuevo Diario*, (July 1, 2014), <http://www.elnuevodiario.com.ni/nacionales/323631-nicaragua-prehistorica-descuidada> (last accessed December 12, 2014), discussing the need to preserve cultural and archaeological property with state protection in order to prevent looting.

¹¹ See Nicaragua News Bulletin, discussing failure to maintain Footprints of Acahualinca, “[a] site belong[ing]to the municipality of Managua[.]”

¹² Organización de Estados Iberoamericanos, discussing museums’ needs for “basic elements of security (locks, proper windows, guards, etc.).”

Nicaragua (a.k.a. Lake Cocibolca), and ending at Venado Island in the Caribbean Sea.¹³ The project will also include “multiple deep-sea ports, a free trade zone, an international airport, cement and explosive factories, an electricity plant and elite hotels.”¹⁴

The canal project will unquestionably put important cultural property sites at risk, involving as it does wide-scale digging and destruction. As just one example, the canal will pass directly through Lake Nicaragua, the shores of which have been the subject of substantial, recent archaeological excavations.¹⁵ In fact, experts believe “that the canal could destroy up to 400,000 hectares [(nearly one million acres)] of rain forest and wetlands.”¹⁶ Despite the obvious potential for destruction of important sites, as of this submission, the AAMD has found nothing to suggest that the project’s anticipated impact on cultural property was even considered and the enabling legislation for the Nicaraguan Canal Authority (Law No. 800)¹⁷ never once mentions protection of cultural property and archaeological sites.¹⁸ Perhaps most problematic, however, is that Nicaragua ceded all facets of construction to the project’s backer, Hong Kong-based HK Nicaragua Canal Development Investment Company (“HKND”) in a deal that “was approved in a record seven days with no public consultation, no feasibility or environmental studies presented and no parliamentary debate.”¹⁹ Just as in the case with the enabling legislation for the canal authority, the AAMD has been unable to determine that any part of the contract requires HKND to protect sites or to undertake remedial action in the course of its work to preserve the archaeological record. In the face of a massive project that by its very nature involves extensive digging and the use

¹³ William Rurode, “Nicaragua Prepares for New Canal through Isthmus, Critics Line up to Fight New Facility - Analysis,” *EurasiaReview*, (December 13, 2014), <http://www.eurasiareview.com/13122014-nicaragua-prepares-new-canal-isthmus-critics-line-fight-new-facility-analysis> (last accessed December 15, 2014).

¹⁴ *Ibid.*

¹⁵ See McCafferty, discussing multi-year investigations of late prehispanic cultures living along the shores of Lake Nicaragua, commenced by the University of Calgary in 2000.

¹⁶ Rurode. See also Brian Clark Howard, “Nicaraguan Canal Could Wreck Environment, Scientists Say,” *National Geographic* (February 20, 2014), <http://news.nationalgeographic.com/news/2014/02/h140220-nicaraguan-canal-environment-conservation/> (last accessed January 5, 2015)

¹⁷ Ley No. 800, Ley del Régimen Jurídico de El Gran Canal Interoceánico de Nicaragua y de Creación de La Autoridad de El Gran Canal Interoceánico de Nicaragua, *La Gaceta - Diario Oficial No. 128* (July 9, 2012), 5046.

¹⁸ By contrast, the legislation does mention the Canal Authority’s responsibility for environmental issues, though protection of unique and endangered resources appears to be a low priority; indeed, the project will “lead to the forcible removal of almost 300 communities in protected indigenous zones[]” including “two UNESCO biosphere reserves that are home to jaguars, sea turtles, great green macaws and other endangered species.” Rurode. See also Brian Clark Howard.

¹⁹ Rurode.

of dynamite, there is no discernible record of any effort by lawmakers to protect – or even discuss protecting – cultural property.

The Committee is faced with a difficult if not impossible task to find that Nicaragua is taking the necessary steps to protect its cultural property. The above noted reports from archaeologists reflect on-going looting and destruction of sites, and the canal project will only exacerbate the situation. Indeed, the Committee itself appears to have been concerned about Nicaragua’s lack of efforts to protect its cultural property in that it required Nicaragua under the existing MOU to report annually on its progress (certainly not a provision found in every MOU).²⁰ Although the AAMD does not have access to these reports, the AAMD urges the Committee to study them carefully and evaluate them in the context of the information provided herein.²¹

B. *The MOU is Not Substantially Beneficial*

The second required determinant that cannot be made is that the import restrictions “would be of substantial benefit in deterring a serious situation of pillage.”²² Given that unabated looting persists in Nicaragua, as detailed above, and that the MOU has been in effect for 15 years, the AAMD does not see how the Committee can reasonably determine that the MOU is of any benefit, let alone a “substantial” benefit in deterring pillage.”²³ Nor can the Committee, after 15 years, reasonably rely on the “would be” language of the statute without appreciating the reality of the situation, which is that there has been little or no demonstrable benefit. The past is in fact prologue for the future and Nicaragua’s past gives little hope that simply continuing import restrictions, especially in the context of the lack of real efforts by Nicaragua, will have any different result in the future. Accordingly, the MOU should not be extended.²⁴

²⁰ MOU, Art II, B.

²¹ While the AAMD appreciates that there may be information and material not suitable for general publication, appropriate portions of these annual reports should be made available to the public in order that the Committee has the ongoing benefit of the expertise of interested members of the public, including the AAMD.

²² 19 U.S.C. §2602(a)(1)(C)(i).

²³ 19 U.S.C. §2602(a)(1)(C)(i).

²⁴ This determinant also includes a requirement that other market countries have or will adopt similar restrictions (19 U.S.C. §2602(a)(1)(C)(i)). The AAMD is unaware of any market country that has adopted, as to Nicaragua, similar restrictions. As has been discussed with the Committee in the past, merely adopting the Convention is not a similar restriction.

IV. Revisions and Amendments to the Memorandum of Understanding

If the Committee decides to recommend extending the MOU notwithstanding the numerous concerns raised herein, the AAMD respectfully asks that the Committee consider three refinements to the MOU in order to conform it more fully to the spirit and intent of the CPIA.

First, Article II of the MOU should be amended to include an affirmative requirement that Nicaragua protect its cultural patrimony through measures such as improved security at archaeological sites and museums, enforcement of applicable criminal laws, and widespread education on the value of preserving cultural property. This duty to protect cultural property is a key term of the CPIA and should be clearly articulated in the MOU. As the CPIA appears to recognize, if the United States is to impose import restrictions on itself with respect to Nicaraguan cultural material, then Nicaragua must also do its part by protecting archaeological material at the source.²⁵

Second, the AAMD recommends revisions to Article II, paragraph C. The exchange of archaeological material must be a bedrock principle for imposing import restrictions. The Committee has a statutory obligation to advise the president if the application of import restrictions is inconsistent with the general interest of the international community. As currently written, Paragraph C is so hedged with qualifications as to be essentially meaningless. For example, it provides that Nicaragua must use “best efforts” to permit the exchange of archaeological materials, rather than simply *requiring* such exchanges. In addition, it states that exchanges will be undertaken “according to the procedures established by [Nicaragua’s] national legislation[.]” allowing Nicaragua wide discretion to adopt procedures that make it unlikely that any exchanges will actually take place. The Nicaraguan government has the direct capacity to permit the exchange of material in its national museums and paragraph C should be modified to require such exchanges.

Finally, Article II should be amended to enhance the free exchange of cultural property between the United States and Nicaragua. Article II should require Nicaragua to identify a single government contact for purposes of seeking approval for loans from, or other cultural undertakings with, Nicaragua. The contact should be required to process all inquiries and requests within a reasonable amount of time and to prioritize the review and, if appropriate, approval of all loans and collaborative projects benefitting both the United States and Nicaragua.

²⁵ 19 U.S.C. §2602(a)(1)(B).

V. Conclusion

AAMD respectfully requests that the MOU not be extended in view of the obvious and substantial concerns raised herein. Nicaragua simply fails to protect its own cultural property in the manner required by the CPIA. This is no more evident than in the case of Nicaragua's decision to construct an interoceanic canal without any apparent consideration of its impact on cultural property. Refusing to extend the MOU could be the very wake-up call Nicaragua needs to undertake real and substantial efforts at a critical time in its history. Importantly, nothing prohibits the Committee from recommending a new MOU in the future, if Nicaragua later demonstrates such efforts. If the Committee nevertheless recommends extension, it should do so only with the amendments to Article II set forth herein.