

Committee for Cultural Policy and Global Heritage Alliance¹
Written Testimony submitted to Cultural Property Advisory Committee, Bureau of
Educational and Cultural Affairs, U.S. Department of State, on the Request for Renewal of
the Memorandum of Understanding Between the United States of America and Honduras
Submitted July 15, 2018

The Committee for Cultural Policy (CCP) is an educational and policy research organization that supports the preservation and public appreciation of art of ancient and indigenous cultures. CCP supports policies that enable the lawful collection, exhibition, and global circulation of artworks and artifacts. We deplore the destruction of archaeological sites and monuments and encourage policies enabling funding for site protection and safe harbor in international museums for at-risk objects from countries in crisis. We defend uncensored academic research and urge funding for museum development around the world. We believe that communication through artistic exchange is beneficial for international understanding and that the protection and preservation of art from all cultures is the responsibility and duty of all humankind.

Global Heritage Alliance (GHA) advocates for policies that will restore balance in U.S. government policy in order to foster appreciation of ancient and indigenous cultures and the preservation of archaeological and ethnographic artifacts for the education and enjoyment of the American public. GHA supports policies that facilitate lawful trade in cultural artifacts, and promotes responsible collecting and stewardship of archaeological and ethnological objects.

The Committee for Cultural Policy and Global Heritage Alliance jointly submit this testimony on the renewal of the Memorandum of Understanding with Honduras.

I. The Proposed Renewal of the 2004, 2009, and 2014 Memoranda of Understanding Between the US and Honduras

On March 12, 2004, the U.S. and Honduras signed the first Memorandum of Understanding Between the Government of the United States and the Government of the Republic of Honduras Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures of Honduras. This bilateral agreement imposed import restrictions on archaeological materials representing the Pre-Columbian cultures of Honduras from approximately 1200 B.C. to 1500 A.D. The same restrictions were extended in 2009 to March 12, 2014 by Customs and Border Protection Dec.09-05 (74 FR 10482).

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On February 11, 2014, in a Notice in the Federal Register (19 CFR part 12, CPB Dec. 14-03, the Department of State determined once again that the Archaeological materials listed in the 2004 and 2009 MOUs continued to be in jeopardy and added to the categories of cultural property restricted from US entry “ecclesiastical ethnological materials dating from the Colonial Period, c. A.D. 1502-1821.”

This last extension and expansion of the 2004 agreement will expire on March 11, 2019.

No Meaningful Basis for Review

The Government of Honduras and Department of State have provided no information to the public supporting the request for renewal or providing evidence of Honduras’ compliance with its undertakings under Article II of the 2014 extension. In fact, no report of any kind from either the Government of Honduras or the State Department seeking renewal of the Honduran MOU in 2019 has been made public. This compounds the State Department’s and Honduras’s failure to provide information in 2014 for review. In Federal Register notice dated September 24, 2013 [FR Doc No: 2013-23191], the State Department stated that Honduras had “informed the Government of the United States of America of its interest in an extension.” A letter sent by the Government of Honduras on March 7, 2014 “accepted the proposal made by the United States of America.”

Fifteen years after import restrictions were enacted, the failure of the Government of Honduras or the State Department to present the facts supporting the Honduran MOU to the public, in 2009, 2013, or today, in 2018, must be regarded as a fatal flaw. The State Department has not even provided a cursory public summary of a request for renewal, much less an analysis showing actions by Honduras to comply with the requirements of the law. Yet there are statutory requirements that must be met for any request or renewal, and the provisions of the CPIA require both an interim and 5-year review by the Cultural Property Advisory Committee (CPAC) to determine whether there is a cause for suspension of the agreement under Section 2602(d) of the CPIA, and whether the obligations established for each party to the agreement have been met. This proposed renewal continues the pattern of complete secrecy that effectively denies the public the ability to respond fully to the proposed renewal.

As Jay Kislak, CPAC Chairman from 2003 to 2008, stated in an affidavit supporting a claim that State Department staff had altered the committee’s recommendations and failed to notify Congress:

“During my tenure as Chairman of CPAC, I became concerned about the secretive operations of the Cultural Heritage Center and its lack of transparency in processing requests for import restrictions made on behalf of foreign states. I believe this lack of

transparency has hampered the ability of museums, private parties and others to make useful presentations to CPAC. I also believe that this lack of transparency has also hampered the ability of CPAC to provide recommendations to the executive branch about the best way to balance efforts to control looting at archeological sites against the legitimate international exchange of cultural artifacts.

Declaration of Jay I. Kislak, dated April 20, 2009; Ancient Coin Collectors Guild v. U.S. Department of State, Civ. Act 07-72074 (RSL) U.S. District Court for the District of Columbia (“Kislak Declaration”).

Actions Taken Under the MOU – Has Honduras Met Its Commitments in Article II of Past MOUs?

Honduras is just one of multiple nations that have signed MOUs under the CPIA with the US, but have avoided fulfilling their commitments under these agreements, including by failing to inventory art and artifacts, or to devote the necessary resources to protect archaeological sites from looting.

Article II of the 2014 extension included requirements that Honduras:

1. Continue to register all known archaeological and ethnological material
2. Continue to register all known archaeological sites
3. Use best efforts to digitize the above, including photo documentation of ecclesiastical material
4. Make temporary and long term loans for exhibition purposes and scientific examination, streamlining approval process and standardizing fees
5. Enforce and prosecute crimes against cultural patrimony
6. Use best efforts to report thefts of archaeological and ethnological cultural property to international authorities
7. Strengthen cooperation on cultural property within Central America and seek cooperation of countries with significant import trade
8. Support research interchange of knowledge among academics
9. Develop and implement professional training programs for archaeologists and museum personnel and promote vitality of local museums, and finally
10. Shall inform the US of the steps it has taken in meeting the terms of the MOU.

Nowhere has Honduras reported on its compliance with these conditions. This is particularly concerning with respect to the commitment of signatory nations to establish legally sanctioned permitting regimes to enable a lawful trade under the UNESCO Convention. The CPIA also

envision a legal marketplace for cultural objects and promotes the circulation of art among nations through exhibitions, loans and market exchanges. Like other public interest, collector, and museum organizations in the U.S., the CCP and the GHA support a licit market which can only properly be achieved through government support of the underlying principles of the UNESCO Convention.

The State Department has provided no meaningful basis for review by the Committee – or by Congress, or in order for the public to comment - of whether Honduras has complied with provisions of Article II.

Publicly Available Information on Art, Artifacts, Sites, the Lack of Looting, and the Real Reason Sites Are Threatened – the Hamburger

Honduran law requires registration of cultural goods.

“[The] Honduran Institute of Anthropology and History will maintain a national registry in which any Cultural Property will be registered that is held by individuals as depositories or owners, who are required to register them within a period of thirty (30) days from the date on which this Law enters into effect. (Decree No. 220-97, Art.12)”

and

“Cultural Property must be duly registered with the Honduran Institute of Anthropology and History; otherwise, it will be deemed an illegal possession and must be recovered. (Decree No. 220-97, Art. 13)”

What is deemed ‘cultural property’ is very broad.

“National Cultural Property’—[is] classified as follows:

(1) Public—

(a) all pre-Columbian property;

(b) submerged cultural property;

(c) documental and library resources for public use;

(2) Ecclesiastical;

3) Individual (part of family or personal property, or was legally obtained at some point).

(Decree No. 220-97, Art. 3)”

“The works of a living artist may be declared protected cultural property if there is express authorization to do so by its owner, or if it is acquired by the State with or without valuable consideration. (Decree No. 220-97, Art. 7)

Honduras' Instituto Hondureño de Antropología e Historia (IHAH) appears to have very well documented online records of hundreds of items of ecclesiastical materials stolen from churches. (See ex. <http://www.ihah.hn/Patrimonio/Bulto/Escultura%20Bulto>) This is a very positive step that will enable return of any of these stolen objects from the U.S. under Section 19 U.S.C. § 2607 of the CPIA. These stolen objects would be returned to Honduras under the terms of the CPIA without the need for any kind of MOU. (19 U.S.C. §2607)

However, there does not appear to be an actual registry as described in the Honduran statutes and decrees, at least nothing that is publicly available. There also is no online listing of archaeological materials or effort to document the inventories of museums, educational institutions etc. or to document any thefts that have taken place, or to register archaeological sites.

Such work as has been done to document archaeological sites has taken place largely outside of Honduras through projects such as the international, interdisciplinary project MayaArch3D, and the work of notable U.S. archaeologists working in Honduras, such as Dr. Christopher Begley and CPAC's own Rosemary Joyce. The incredible difficulty of traversing the jungle to search for sites in Honduras has been very aptly summed up by Dr. Begley as, "There are jumping vipers, coral snakes, fer-de-lance, stinging plants, and biting insects. And then there are the illnesses—malaria, dengue fever, leishmaniasis, Chagas'."

National Geographic and other entertainment-oriented 'specials' about the search for Lost Cities were criticized by academics as not really archaeology, but they were supported by the Honduran government, and they were subject to the same perils. (Half of the National Geographic expedition was struck down by the parasitic illness, which destroys the flesh.) (<https://www.theguardian.com/world/2015/mar/11/honduras-lost-cities-open-letter-national-geographic-report>)

It is noteworthy that there are very few finds of artifacts from the types of excavation now possible in Honduras. In fact, even the 'treasure hunting' specials, which routinely make both treasure and looting the focus of their coverage, found neither. (Douglas Preston, Lure of the Lost City, National Geographic, October 2015.

<https://www.nationalgeographic.com/magazine/2015/10/lost-city-mosquitia-honduras-monkey-god/>)

The chief threat to archaeological sites in Honduras today is the illegal expansion of beef farms into the forest, which the Honduran government is not seriously attempting to control, for whatever reasons. It is not the looter that threatens the preservation of Honduran archaeological sites – he, at any rate, is more likely to be deterred by the threat of leishmaniasis than prison. The

greatest threat is commercial land exploitation for the fast food ground beef market. As Chris Fisher, the lead U.S. archaeologist for the National Geographic expedition stated, “To lose all this over a burger, it’s a really hard pill to swallow.”

What Criteria Must Be Met Under the Law for an Agreement Under the CPIA?

The CPAC must determine whether the request satisfies all four requirements set forth in the statute. The requirements are:

1. The cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party.
2. The State Party has taken measures to protect its cultural patrimony.
3. The application of the requested import restriction if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by nations with a significant import trade in the designated objects, would be of substantial benefit in deterring a serious situation of pillage, and other remedies are not available.
4. The application of the import restrictions is consistent with the general interest of the international community in the interchange of cultural property.

Restrictions under an ordinary bilateral agreement 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. They must be part of a “concerted international response” of other market nations, and the Cultural Property Implementation Act (CPIA) requires countries participating in MOUs restricting cultural property to take significant self-help measures. As noted above, any import restrictions 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.

Emergency restrictions focus on a narrow range of material of particular importance, which must be a “newly discovered type” or from a site of “high cultural significance” that is in danger of “crisis proportions.” Alternatively, the object must be of a civilization, the record of which is in jeopardy of “crisis proportions,” and restrictions will reduce the danger of pillage. No “concerted international response” is necessary for an emergency restriction.

The Requirements for Renewal Are Not Met

In order to renew and extend an agreement under the Convention on Cultural Property Implementation Act, the Cultural Property Advisory Committee is required to determine whether the four determinations under the Act have been met. Each of these is an issue to be reviewed by the Committee in evaluating a proposed extension of a memorandum of understanding.

The current MOU is not only over-broad, it is virtually all-inclusive. There Is no Showing That All the Objects on the Designated List Are Threatened by Pillage

The Honduras Designated List is extremely over-broad, including the entire cultural production of Honduras from approximately 1200 B.C. to 1500 A.D. ‘Ecclesiastical ethnological’ materials were covered from the Colonia Period of Honduras from 1502 A.D. to 1821 A.D. Such all-encompassing restrictions were never contemplated under the CPIA, and were explicitly rejected in Senate Committee discussions during its enactment. Congress intended that import restrictions apply to only “a narrow range of objects...”² This request would cover virtually everything. Over the last fifteen year, of MOUs. Honduras has never at any time shown that this vast range of objects are threatened by pillage and merit import restrictions. (Senate Report No. 564, 97th Cong., 2nd Sess. (1982), p. 5)

Members of the Senate Committee stated that restrictions were not applicable to all objects, saying that it did not intend import controls to extend to trinkets or to 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....” (*Id.*)

The Objects Classified as Ethnological Are Not “Ethnological Materials” as Defined by the CPIA.

Not only has the State Department ignored the requirement that “archaeological or ethnological material” be *of cultural significance*, it has stretched the statutory criteria far beyond the bounds of reason to prohibit importation of Colonial and Republican period, Catholic, religious paintings. “Ethnological” materials must fit Congress’ statutory description of “products of a tribal or non-industrial society.”

“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.”

(Senate Report No. 564, 97th Cong., 2nd Sess. (1982), p. 5)

CPAC should adhere to the statute, and halt the unjustified classification of “ecclesiastical artworks” as the products of a “tribal or non-industrial society.”

The current Designated List is all encompassing, setting no threshold whatsoever for distinguishing what is of “cultural significance. This is not permitted under the statute.

Honduras has Failed to Take Self-Help Measures

Congress recently reemphasized the need for CPAC to assess self-help measures as part of the MOU renewal process as follows:

“Cultural Property.--The Cultural Properties Implementation Act (CPIA) requires countries participating in MOUs restricting cultural property take significant self-help measures. The [House] Committee [on Appropriations] urges the Cultural Property Advisory Committee to consider the annual national expenditures on securing and inventorying cultural sites and museums in its annual reviews of the effectiveness of MOUs, as well as during the reviews required by the CPIA for extension of an MOU. The Committee also requests the Secretary of State review the feasibility of collecting and reporting on the cost of measures taken by partner countries in support of their cultural property MOU with the United States and be prepared to report on such review during the hearing process on the fiscal year 2019 budget request.”

House Report 115-253 at 11.

The Government of Honduras has not done all it can to protect its own cultural patrimony. While Honduras promotes tourism to the long-ago excavated site of Copan, it is far less interested in funding archaeological excavation, documentation, and registration. Decades ago, in 1960, it created the two-thousand square mile Ciudad Blanca Archaeological Reserve. Although as estimated 200 archaeological sites are located within it, they have yet to be explored, and encroaching beef-farms are illegally cutting swathes in it. The Río Plátano Biosphere Reserve was named a World Heritage site in the 1980s. The Cultural Property Advisory Committee should insist on updated information on the effectiveness of measures for protection at these and other sites to determine if Honduras has made significant progress. Are site guards paid? Are police turning a blind eye to local looters? Honduras needs to prove that it is taking serious steps to help itself, especially since fifteen years have passed since the first MOU was signed.

The Requirement for Similar Restriction By Major Market Nations is Not Met.

Honduras is signatory to a variety of international instruments, from the 1954 UNESCO Convention (Hague Convention) (signed in 2003) to the 1970 UNESCO Convention (in June 1979), 1995 UNIDROIT Convention (in February 2014), and 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (in October 2010).

None of these constitute similar restrictions with market nations under the CPIA.

Section 2602(2)(c) of the CPIA explicitly denies the President the authority to enter into an import limitation without a showing that other major market nations have enacted similar

restrictions. A concerted international response to pillage is required; otherwise implementing U.S. agreements simply pushes art and artifacts around the world.

The CPIA provides that under Section 2602(d), the President shall suspend an MOU if, after a reasonable period of time, other art importing countries have not implemented “import restrictions” that are similar to our import restrictions.”

As Mark B. Feldman, the chief negotiator for the Department of State in the enactment by Congress of the CPIA had stated:

“The Executive is not authorized to establish import controls without international cooperation unless an emergency condition exists as defined by law, and Congress did not intend to authorize comprehensive import controls on all archeological objects exported from a country of origin without its permission. The purpose of the program is not to keep art at home, but to help protect archeological resources from pillage; the findings required by the CCPIA were established for that purpose.”

Mark B. Feldman, Symposium: Reform of U.S. Cultural Property Policy: Accountability, Transparency, and Legal Certainty, Benjamin N. Cardozo School of Law, New York, N.Y. April 10, 2014.)

MOUs Must be of Substantial Benefit in Deterring Pillage

Restricted imports must be subject to pillage and US import restrictions must be of “substantial benefit” in deterring such pillage. This raises multiple issues. (1) Past MOUs have had overly broad or ambiguous categorizations of materials and but shown no demonstrated need for such broad protections. (2) If there have been 15 years of import restrictions and the same broad categories continue to require the “protection” of import restrictions, the past MOUs have clearly NOT been effective and should be abandoned.

(3) In order to grant an MOU because it is of “substantial benefit” in deterring a market in the US, then there must be a showing that there is a significant market in Honduran materials in the US in the first place. A search under Pre-Columbian materials from Honduras on eBay turned up only two items over \$500, and the dozen or so remaining averaged under \$200. They included a number of obvious fakes. A search for sales of Honduran art on Live Auctioneers generated results of one pottery figurine which sold for \$1300.00 in 2007, and one ceramic pot for \$400 sold in 2007. There were no Christie’s sales of Pre-Columbian items from Honduras recorded in the U.S., and sales of seven Pre-Columbian items from Honduras in 200 and 2001 at Sotheby’s. All Sotheby’s auction house sale of Pre-Columbian items from Honduras subsequent to 2001 were in

Paris. (In 2014, a survey of AAMD museum members also generated the response that they had seen no significant market in the U.S. for Honduran artifacts.)

Import Restrictions Are Not in the General Interest of the International Community in the Interchange of Cultural Property

One of the four determinants is that the imposition of import restrictions must be consistent with the general interest of the international community in the interchange of cultural property. (19 USC § 2602(a)(1)(D))

When the 2014 renewal was pending, the AAMD submitted testimony stating that while up to 40 of its museum members had indicated an interest in exhibitions or long-term term loans, none had experience with long-term loans because, “Honduras has refused to make loans for more than one year.” (Statement of Association of Art Museum Directors, October 30, 2013) CCP was unable to locate any recent traveling exhibitions of Honduran art and artifacts covered by the MOU in the U.S.

Unless Honduras can demonstrate that its loans to U.S. museums are an adequate substitute for the freedom of U.S. museums to acquire objects, it has not met this statutory requirement.

The Committee must also make a determination that a memorandum of understanding is achieving its purposes, especially in light of its fifteen years of comprehensive export restrictions. (19 USC §2605 (g)(1)).

It is not enough to speculate that in the absence of an MOU, looting would be worse. Unless there is any real evidence that looting has been significantly reduced in the last 15 years as a result of the MOU, and that awareness inside of Honduras of the existence of the US-Honduras MOU has impacted the local situation, there is no logical justification for continuing it.

Recommendations

Based upon the facts as outlined above, the Committee for Cultural Policy and the Global Heritage Alliance find that the current MOU fails to meet the criteria set forth in the implementing statute. We do not believe that can be legally renewed under its current terms.

If renewed, any MOU should be limited in scope to materials legally allowed to be included under the CPIA. Honduras should be held accountable to reasonable benchmarks set by Congress when it mandated self-help measures. Under no circumstances should restrictions be applied to items that are neither archaeological nor ethnological in character according to the standards set in the statute and elucidated by the Senate in its deliberations.

Self-help measures by source countries, especially source countries with a history of lax domestic enforcement and corruption such as Honduras, can only be effective through rigorous police enforcement at archaeological sites, by education of the Honduran public, and by ensuring that residents in site areas have adequate alternative sources of income. Halting looting starts with site protection, and the United States, which has blocked its borders to the import of Honduran cultural archaeological materials for fifteen years, cannot be counted among the market nations for recently looted materials. Nor should it serve as sole international policeman for the protection of Honduran cultural property.

Finally, the CCP and GHA recommend that if the MOU is renewed, Article II should be amended to require the Government of Honduras to provide fair compensation for chance finds, through instituting a program of rewards for reporting the location of archaeological finds and the payment of archaeological workers by the government to properly excavate them.

The Cultural Property Advisory Committee is undoubtedly aware that import restrictions for any specific country under the Act were never intended to be a permanent fixture of the United States' customs laws. The Cultural Property Implementation Act instead recognizes the benefits of temporary import restrictions to ameliorate a serious problem of pillage in particular types and periods of objects.

The only justification for limiting the US market for Honduran, or any other archaeological materials is to give source countries the opportunity to build their own enforcement capacity, pass legislation, build museums and institutions of historical learning, and educate its people to appreciate the social benefits of honoring its past.

Unless CPAC can legitimately find that Honduras has made very significant strides in all of these areas as a result of the MOU – and we believe that it cannot – then the fifteen-year experiment has run its course. Other means of assisting Honduran cultural development that do not damage the US interest in the circulation of art, such as rewards to finders like those implemented in Britain's Portable Antiquities Scheme should be tried instead.