

Statement of the Association of Art Museum Directors
(Presented by Stephen J. Knerly, Jr.¹)

**Meeting of the Cultural Property Advisory Committee to Review the Proposal to Extend
the Memorandum of Understanding Between The Government of the United States of
America and The Government of the Republic of Guatemala**

April 3, 2012

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 200 directors of major 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 deplors the illicit and unscientific excavation of archaeological materials and ancient art from archaeological sites and the destruction or defacing of ancient monuments. The AAMD is also committed to the responsible acquisition of archaeological 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, where these works may educate, inspire and be enjoyed by all. The AAMD recognizes and applauds the United States for taking an approach to protect the world’s cultural heritage by balancing a unified, international solution to the problem while allowing American museums to continue to collect responsibly on behalf of the American public.

II. Consideration of Extension of and Amendment to 2007 Bilateral Agreement with Guatemala

Subject to the concerns raised below, the AAMD supports the renewal of the 2007 Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Guatemala (the “2007 MOU”).

A. Cultural Exchange.

The Cultural Property Advisory Committee (the “Committee”) is required to make recommendations with respect to whether or not a Memorandum of Understanding should be extended.² In that context, the Committee is required to determine whether the four determinants

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² 19 U.S.C.A. §2604(f)(2)

have been met. One of the four determinants is that the imposition of import restrictions by the United States must be consistent with the general interest of the international community in the interchange of cultural property.³ That interchange includes the exchange of cultural property and that exchange is an issue to be reviewed by the Committee in connection with the extension of a Memorandum of Understanding.⁴ The Committee is also required to determine whether or not a Memorandum of Understanding is achieving the purposes for which it was entered into or implemented.⁵ As a result of the foregoing, a review by the Committee of Article II of the 2007 MOU is certainly appropriate and, the AAMD believes, in fact required, both to determine if exchange will be fostered and to assess whether in fact exchange has been fostered. Recommendations by the Committee to improve Article II are certainly appropriate in that context and, as discussed below, in the case of Guatemala, necessary.

B. Article II of the 2007 MOU and Loans.

Article II of the 2007 MOU contains only one provision with respect to the exchange of cultural property, which is found in Section D:

The Government of the Republic of Guatemala shall use its best efforts to facilitate the exchange of its archeological objects and materials under circumstances that do not jeopardize its cultural patrimony, such as temporary loans for exhibition purposes and scientific examination.

Unfortunately, this provision is not only deficient because it only speaks to temporary and not long-term loans, but also because it provides hardly any basis for a meaningful review by the Committee of Guatemala's actions over the last five years. By the time the language has been parsed to identify "best efforts" . . . "under circumstances that do not jeopardize its cultural patrimony", the language is so vague as to allow almost any activity, or no activity, to satisfy the section. Nevertheless, the AAMD does have information to provide to the Committee which not only shows areas of concern, but also hopefully provides a factual basis for a renegotiation of Article II.

A number of AAMD member museums have expressed a great deal of interest in both long-term loans and exhibition loans, but to accommodate these interests, current barriers to borrowing need to be reduced or eliminated. Loans from Guatemalan institutions to the United States, whether they are for exhibition purposes or on a long-term basis (and there are long-term loans of Guatemalan materials to American museums), suffer from a number of different handicaps. For example, negotiations with the government of Guatemala and the government approval process are extremely burdensome. Completing the paperwork involved in a loan is a lengthy process and unnecessarily complex. The loan paperwork must be reviewed by multiple ministries, lawyers and governmental officials, including going before the Senate and the Office of the President. Should any of the foregoing raise a question or issue related to the proposed

³ 19 U.S.C.A. §2602(a)(1)(D)

⁴ 19 U.S.C.A. §2602(1)(e)

⁵ 19 U.S.C.A. §2605(g)

loan, the process must begin again. The approval process includes submitting notarized copies of all documents, all of which must be translated, including translations of the borrowing museum's insurance policies. Changes in government have required that negotiations already in process be recommenced with the new government. Even if all goes well, this process can take two to three years. In addition, AAMD members have noted that determining insurance values of items to be loaned has complicated and even stalled the loan process. In at least one instance, the Guatemalan government insisted that the insurance value of the item being considered for loan was its "irreplaceable value." No commercial insurer, or, for that matter, any governmental indemnity program, would be able to insure for an "irreplaceable value." Needless to say, this insurance requirement was one of the reasons that loan did not take place.

Guatemalan constitutional restraints further frustrate the loan process. The length of time for long-term loans (not more than three years) literally embedded in the Guatemalan constitution is too short for a meaningful long term loan (although three years may be an acceptable amount of time for an exhibition loan). The short loan period without knowledge as to whether a loan may be extended means that the cost of a long term loan to a U.S. museum may be too high for many interested U.S. museums to entertain. This timeframe, coupled with the requirement that the loan meet certain undefined standards for preservation and dissemination of knowledge about Guatemala's cultural patrimony, make the loan approval process highly subjective and problematic. In addition, there is a constitutional ban on having artifacts outside of Guatemala during Presidential elections scheduled every six years; therefore, trying to time even a three-year loan, plus two to three years application process, so as not to overlap with presidential elections causes any long term loan to be nearly impossible, despite the interest of American museums.

There have been exhibition loans and even long term loans (very rare) from Guatemala to museums in the United States and there is a genuine interest on the part of members of the AAMD to have both exhibition and long-term loans with Guatemala, but the problems described above are chilling what should otherwise be a wonderfully collaborative arrangement with Guatemala.

C. Concerted International Response.

The Cultural Property Implementation Act (the "Act") also requires that other market countries must have similar import restrictions to those contemplated by the United States. "Similar" means something similar to the import restrictions that the United States imposes under the Act. The AAMD understands that unreported archeological materials are finding their way into other market countries, such as Japan and France. The Committee must at least question whether there are any effective controls within other market countries that meet the requirement of "similar" as required under the 19 U.S.C.A. § 2602(a)(1)(C).

Some have argued to the Committee in the past that the adoption of the EU Directive⁶ (this is the EU regulation that governs the exportation of cultural objects from the

⁶ Council Directive 1993/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State which regulates the export of cultural objects from the European Communities.

European Communities and the granting of licenses) meets the requirement of similar import restrictions. The AAMD questions whether the EU Directive's *export* restriction could somehow become an *import* restriction that would cause the EU Directive to be considered "similar" to the U.S. import restrictions. Furthermore, late last year, the European Commission launched a public consultation inviting interested parties (including museums and cultural or customs authorities) to submit comments on revisions to the EU Directive.⁷ In the notice the European Commission noted that the purpose of the EU Directive was to "enable EU member countries to reclaim cultural goods classed as 'national treasures' that had been unlawfully removed."⁸ This is not the same as the U.S. import restrictions. In addition, and even if the EU Directive were to be considered similar, the European Commission expressed the view that, based on feedback provided by EU Members in evaluation reports, the provisions of this EU Directive were not functioning successfully, and it acknowledged the need for a future review.⁹

D. Consideration of "Ethnological" Materials

The Committee has been asked by Guatemala to consider amending the 2007 MOU to include "ethnological ecclesiastical material representing the Colonial Period of Guatemala's cultural heritage." The AAMD recognizes and thanks the staff of the Committee for making this request public in advance of the meeting.

While the AAMD supports protecting ethnological ecclesiastical materials of the nonindustrial or tribal people of Guatemala, the AAMD urges the Committee to avoid overly broad categorization and definition of these materials – a process that not only makes compliance with the MOU difficult from a practical standpoint for all involved, but also runs the risk of violating the Act.

Ethnological material by statute is defined as any object of ethnological interest; however, "no object may be considered to be an object of ethnological interest unless such object is ... the product of a tribal or nonindustrial society, and ... 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."¹⁰

While these should not be considered "ecclesiastical" in the first place, AAMD members have expressed concern that the definition of ethnological materials may be interpreted to include ethnographic textiles, such as blouses, skirts, belts, head cloths, trousers and the like, that

⁷ Theresa Papademetriou, "European Union: Revision of Directive on Return of Unlawfully Removed Cultural Objects." December 06, 2011 (http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402904_text visited March 28, 2012).

⁸Public consultation on possible revision of Directive 93/7/EEC on the return of cultural objects unlawfully removed from EU member countries; http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?displayType=consultation&tpa_id=0&item_id=5526&tk (visited March 28, 2012).

⁹ Theresa Papademetriou, "European Union: Revision of Directive on Return of Unlawfully Removed Cultural Objects." December 06, 2011 (http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402904_text visited March 28, 2012).

¹⁰ 19 U.S.C. 2601(2)(C)(ii)(I)-(II) (emphasis added)

were individually made, owned and sold. These articles of everyday clothing should not be included in the definition of ethnological materials for the reasons explained in the Senate report below. Furthermore, that report should inform the Committee's review of the Guatemalan request and guide the Committee to create a short list of important objects with clear and exact descriptions. U.S. Senate Report No. 97-564 provides in part that:

“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.¹¹

A number of AAMD member museums have also noted that Guatemalan ecclesiastical materials may fall into one of several categories, only one of which should be considered Guatemalan ethnological materials, distinctive of Guatemalan people or that are rare. First, a significant amount of ecclesiastical works found in the former Spanish colonies were made in Europe and shipped to the Captaincy General of Guatemala (which was headquartered in what became Guatemala) during the colonial period. These works cannot meet the criteria of ethnological materials, but imprecise descriptions can sweep these objects into the MOU and present a challenge for United States customs officials. Second, in the Spanish colonies there were workshops of both Guatemalan artisans and European artisans, creating ecclesiastical materials, including copying works from Europe. Those made by European artists clearly fall outside the definition in the Act. For example, four of the great Guatemalan artists of the sixteenth and seventeenth century, Echave, Juarez, de Herrera and Ibia were all born outside of Guatemala, three of them in Spain.¹² The AAMD submits that many of the other works created in workshops by local artists are simply copies of European paintings, drawings and prints as well. Finally, and what should be the limited scope of ecclesiastical ethnological material representing the Colonial Period of Guatemala, are those ecclesiastical materials that are original, not mere copies, the product of Guatemalan artisans, distinctive in its characteristics or importance to the Guatemalan people.

III. Recommended Changes to Article II

In light of the foregoing, the AAMD recommends that changes be made to Article II in order to expand the obligations that Guatemala undertakes to make available significant objects

¹¹ S. Rep. No. 97-564, 4-5 (1982) at <http://exchanges.state.gov/heritage/culprop/laws/pdfs/97-564.pdf>.

¹² For an interesting discussion on this topic, see Jennifer Anglim Kreder and Xavier Beteta, *Understanding Guatemala's Cultural Heritage: Extending Protection to Colonial Art in the Memorandum of Understanding between the United States and Guatemala*, Duke Journal of Comparative & International Law, Vol. 21, 2011, at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1024&context=djcil> (last viewed March 28, 2012).

for cultural exchange, whether through exhibition loans or long-term loans. Specifically, the AAMD recommends that Article II be revised to read as follows:

- D. The Government of the Republic of Guatemala will seek to expand the exchange of its archaeological objects [and its ethnological materials] through:*
- 1. Using its best efforts to increase the number of exhibition loans of objects of archaeological or artistic interest to American museums and universities, to encourage the standardization of fees for such loans and to streamline the approval process for such loans;*
 - 2. Using its best efforts to increase the number and overall length of long-term loans of objects of archaeological or artistic interest for research and educational purposes, agreed upon, on a case by case basis, by American and Guatemalan museums or similar institutions, recognizing the spirit of goodwill that exists between cultural institutions in both countries;*
 - 3. Encouraging American museums and universities to propose and participate in joint excavation projects authorized by the Ministry of Culture, with the understanding that certain of the scientifically excavated objects from such projects could be given as a loan to the American participants through specific agreements with the Ministry of Culture;*
 - 4. Promoting agreements for academic exchanges and specific study programs agreed upon by museums and universities of Guatemala and America; and*
 - 5. Creating a single point of contact within the Ministry of Culture for obtaining loan approvals and assisting in the authorization and export process.*

J. A review by the two Governments of the efforts will take place not later than

The above language in sections 3 and 4 is virtually verbatim the language of the relevant sections of Article II of the Memorandum of Understanding between the United States and Italy. Since the renewal of the MOU with Italy with stronger language, definite progress has been made. The AAMD hopes that stronger language with Guatemala will have an equally mutually beneficial effect. In addition, paragraph J is suggested in order to provide a forum for evaluation of the efforts suggested in paragraph D. The AAMD would welcome the opportunity to assist the Department of State in preparing for that review.

IV. Conclusion.

Subject to the concerns set forth above, the AAMD supports the request of Guatemala for an extension of the 2007 MOU.