

**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 El Salvador**

**October 7, 2014, Meeting of the Cultural Property Advisory Committee to Review
Proposal to Extend the Memorandum of Understanding Between the Government of
the United States of America and the Government of the Republic of El Salvador
Concerning the Imposition of Import Restrictions on Certain Categories of
Archaeological Material from the Prehispanic Cultures of the Republic of El Salvador**

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 is also 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. 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. Executive Summary

The AAMD encourages the Cultural Property Advisory Committee (the “Committee”) to carefully review El Salvador’s compliance with Article II of the *Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material from the Prehispanic Cultures of the Republic of El Salvador*, last extended on March 8, 2010 (the “MOU”).¹ In addition, the AAMD questions whether renewal

¹ One important positive example, under the heading of cultural exchange, is the current excellent exhibition *Cerámica de los Ancestros: Central America’s Past Revealed* at the National Museum of the American Indian and the accompanying catalogue *Revealing Ancestral Central America*, edited by Rosemary A. Joyce.

of the MOU would meet the test of 19 U.S.C. § 2602(a)(1)(C)(i). Looting does not appear to have been significantly curtailed even after more than 27 years of United States import restrictions.

III. Is El Salvador Meeting the Convention on Cultural Property Implementation Act (“CPIA”) Required Determinations?

The Committee is required to make recommendations with respect to whether the United States should extend the MOU.² In order to recommend an extension, the Committee must find that four determinants are satisfied.³ While there are questions on a number of those determinants, the AAMD will focus first on whether or not import restrictions by the United States and other market countries “would be of substantial benefit in deterring a serious situation of pillage.” 19 U.S.C. § 2602(a)(1)(C)(i).

A. Legitimate Concerns Exist as to Whether United States Import Restrictions Have Curtailed Looting in El Salvador

El Salvador has benefited from more than 27 years of import restrictions by the United States and in that period, at least based upon presentations made to this Committee and other sources, there does not appear to be a significant reduction in looting that can be linked to those restrictions. The AAMD does not have access to the reports by El Salvador to this Committee, but comments at and submissions for the public sessions of this Committee and other published sources appear to support ongoing and, in some instances, unabated looting. In June, 1998, the Interim Report of the Committee (the “1998 Report”) noted that El Salvador reported “that looting continues in parts of El Salvador. . .”. In 2004, representatives of the Society for American Archaeology presented a paper to this Committee in which they argued that:

The threat to El Salvador’s cultural resources – especially pre-Hispanic archaeological material – remains a significant problem, one that threatens to grow worse in the coming years.⁴

That prediction was accurate. In 2009, when representatives from the El Salvadorian government appeared before this Committee, they argued strenuously that looting remained a significant issue.

Absent any real evidence that looting has been significantly reduced in the last 27 years as a result of the MOU, the argument will no doubt be advanced that without the MOU, looting would be worse. Such statements are not verifiable fact, but simply assumptions, leaving this Committee in the realm of speculation that if the MOU were not in place looting would be worse

² 19 U.S.C. § 2605(f)(2).

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

⁴ *Testimony of Dr. Karen Bruhns and Paul Amaroli on Behalf of the Society of American Archaeology Before the Cultural Property Advisory Committee on the Renewal of the Memorandum of Understanding Between the United States and El Salvador*, November 18, 2004 at 2, http://www.fundar.org.sv/e_referencias.html (last accessed September 29, 2014).

than at present. Mandatory statutory determinations should be met based on evidence and facts, not based on speculation and hope.⁵

B. Some of the Reasons Looting Continues

El Salvador's tumultuous history has many examples of the inability or failure to protect cultural property.⁶ In fact, its government's efforts - whose current and immediate-past president are from the Farabundo Martí National Liberation Front ("FMLN")⁷, falls well short of effective protection. As long ago as 1998, this was used as a reason not to analyze critically ongoing compliance with the MOU. As the 1998 Report noted:

The Committee took into consideration that El Salvador, like other of its neighbors in the region, has only recently come out of a protracted civil war. In this crucial time of rebuilding and democratization, resources and expertise are simply not in sufficient supply to enable full and immediate implementation of all provisions of the agreement. The provisions subject to review are found in Article II of the agreement, each repeated below.⁸

(1) Destruction at Cihuatán and Sitio de Jesús

Unfortunately, while in the past, the lack of an effective government could be blamed for looting, today a centralized and economically motivated government is also a problem.⁹ Historically, Fundación Nacional de Arqueología de El Salvador (National Foundation of Archaeology of El Salvador) ("FUNDAR"), a *non-governmental* organization acting cooperatively with El Salvador, assumed significant responsibility for conserving, protecting, and investigating Salvadoran archaeology by maintaining the Cihuatán, Joya de Cerén, San Andrés, Tazumal, and Casa Blanca Archaeological Parks.¹⁰ This relationship ended on

⁵ In this context, Fundación Nacional de Arqueología de El Salvador made an interesting comment about the Cara Sucia site that was the subject of the 1987 emergency restrictions, noting that "Although the massive looting at Cara Sucia was stopped in 1982 when the site was fenced and equipped with guards, depredation continued at many neighboring sites." *Our Fight Against Looting and Illicit Traffic of Artifacts*, available at http://www.fundar.org.sv/e_saqueo.html#convenios (last accessed September 29, 2014).

⁶ Thus failing to satisfy the determinant required by 19 U.S.C. § 2602(a)(1)(B).

⁷ *A Comparative Criminology Tour of the World*, Dr. Robert Winslow, San Diego State University, available at www.rohan.sdsu.edu/faculty/rwinslow/namerica/el_salvador.html (last accessed September 25, 2014).

⁸ The AAMD notes with interest that the Federal Register notice for this meeting limits comment to the four determinants, but the Committee obviously considers, or at least has considered, review of Article II of an MOU as critical to the fulfillment of its mandate. The AAMD submits that public comment on Article II compliance should also be part of the process, especially as the Committee is required to consider such compliance under 19 U.S.C. § 2605(g)(2)(B).

⁹ Fabricio Valdivieso, *The Use of Archaeological Resources for the Benefit of Rural Communities in El Salvador*, thesis for partial fulfillment of the requirements for the degree of Master of Arts, the University of British Columbia (Okanagan) (March 2014), 109 ("History has given us a lesson on the way in which the management of archaeological resources in El Salvador has failed by following a model of development that leaves out local interest. Most archeological sites are neglected, and a few archaeological parks are exploited for profit by the central government.").

¹⁰ *About FUNDAR*, available at www.fundar.org.sv/e_somos.html (last accessed September 25, 2014).

December 31, 2009, shortly after FMLN assumed control of the presidency.¹¹ Although FUNDAR and El Salvador signed a new agreement on July 12, 2010, the agreement is limited to co-administration of the Cihuatán Archaeological Park.¹²

Not unsurprisingly, during the abbreviated period in which the government administered Cihuatán, a housing project destroyed approximately 3.5 acres of the site in a designated protected area.¹³ This spurred corresponding looting during the construction of 38 homes (with 300 more planned).¹⁴ Government involvement in the housing project was evident by insignia on the heavy machinery deployed to the site¹⁵, as well as signs on the complex identifying a consortium among the Ministry of National Defense, Engineer Command of the Armed Forces, the Mayor of Aguilares, and the Department of Housing.¹⁶ Concurrently or shortly after the undertaking at Cihuatán, similar destruction occurred at Sitio de Jesús.¹⁷ Despite repeated and disturbingly detailed reports of both situations by FUNDAR to the Secretary of Culture, the destruction continued even beyond March 8, 2010, the effective date of the last MOU renewal.¹⁸

(2) Destruction and Looting Beyond Cihuatán and Sitio de Jesús

Looting and destruction do not end with the more publicized events at Cihuatán and Sitio de Jesús. Other examples include: **(i)** Chalchuapa (“a region with more than seven sites all from Pre-Hispanic periods[,] [m]ost of [which] . . . have been brutally plundered and destroyed by urban development”); **(ii)** San Andrés (a site “dating to the Classical period, [which] is subject to on-going looting around the perimeter of the current archaeological park grounds”); **(iii)** the region of Guazapa (containing “sites . . . from the Postclassic period, [that] have been partially destroyed for the acquisition of stone that is used for building materials”)¹⁹; **(iv)** Guija (a site “with rock art and the Classical period site named Igualtepeque, [which] is constantly being vandalized”); **(v)** Asanyamba, a complex Classical period site with shell mounts [that] has been

¹¹ *The Archaeological Parks of El Salvador—Administration of the Archaeological Parks*, December 31, 2009, letter from FUNDAR President Rodrigo Brito, available at http://www.fundar.org.sv/e_parques.html (last accessed September 25, 2014).

¹² *FUNDAR and the Secretaría de Cultura Sign Agreement for the Co-administration of Cihuatán*, July 12, 2010, available at: http://www.fundar.org.sv/Noticias/e_firma_convenio.htm (last accessed September 25, 2014).

¹³ *Id.*

¹⁴ March 2, 2010, correspondence from FUNDAR to the Secretary of Culture and enclosed Urgent Report Concerning the Destruction of Part of the Ancient City of Cihuatán, available at: <http://online.sfsu.edu/kbruhns/cihuatán/2March.pdf> (last accessed September 25, 2014).

¹⁵ *Destrucción y saqueo en Cihuatán*, March 17, 2010, available at: http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6482&idArt=4617359 (last accessed September 25, 2014) (discussing damage at Cihuatán by heavy machinery of the Engineers Command of the Armed Forces).

¹⁶ *Visita guiada a un sitio arqueológico mutilado por el Estado*, April 4, 2010, available at: www.elfaro.net/es/201004/noticias/1451 (last accessed September 24, 2014).

¹⁷ March 4, 2010, correspondence from FUNDAR to the Secretary of Culture regarding Information Concerning Imminent Destruction in the Archaeological Site “Sitio de Jesús,” available at: <http://online.sfsu.edu/kbruhns/cihuatán/4marzo.pdf> (last accessed September 25, 2014).

¹⁸ March 12, 2010, correspondence from FUNDAR to the Secretary of Culture, further alerting the government to continuing destruction at Cihuatán and Sitio de Jesús and requesting action and information, available at: <http://online.sfsu.edu/kbruhns/cihuatán/12marzo.pdf> (last accessed September 25, 2014).

¹⁹ Sitio de Jesús is located in this region. Valdivieso, *supra* fn. 9 at 81.

partially destroyed by looters since the late 1970s”); (vi) Cara Sucia (a Postclassic site contain[ing] more than 5000 looting holes created since the early 1980s”)²⁰; (vii) Madre Selva (“a Postclassic site considered by many to be the dominion of Cuscatlán . . . destroyed in 1993”); (viii) Carcagua (“a Preclassic site (with structures) [that] was fully destroyed in 1998. . . . to make way for the construction of the western bus terminal, which was never completed”); (ix) Rosita (“a Preclassic site, [which] was partially destroyed to make way for the construction of a residential area on the outskirts of the city of Santa Ana in 1999”); (x) Santa Lucia (“located in Ciudad Arce, [it] was from the Classical period, and destroyed in 2001 to make way for the construction of a settlement for families affected by earthquakes that same year”); (xi) El Cambio, (“a Preclassic site partially destroyed by paving a street into a residential zone in 2008[,] [for which] [t]he central government and the private sector were responsible”); (xii) El Nispero (“a classical period style, [which] was partially destroyed by the installment of transmission lines conducted by the central government in 2009”); (xiii) Las Marías (“a Postclassic site and probably the largest Prehispanic site in El Salvador . . . damaged by looters and crop activity since 2000”); (xiv) Cajete (“located in an island in Ahuachapán, [it has been] under constant looting since the 1980s”); and (xv) Casa Quemada and El Chaparral, “as well as 10 more sites threatened by the construction of the El Chaparral dam in the near future.”²¹

C. *Market Countries and Similar Restrictions*

No doubt, as has been the case in the past, there will be submissions to this Committee that other countries with a market in the archaeological materials subject to the MOU have adopted “similar” restrictions. Let us assume for a moment that those statements (discussed below) are accurate. As far as the AAMD can determine, there is no significant legitimate market for El Salvadorian archaeological material in the United States. There may be an illegitimate market, although even that is questionable.²² After 27 years, if the United States and the other countries that will no doubt be mentioned by others as having implemented significant import restrictions have not in any meaningful way reduced the looting in El Salvador, then it is time for the Committee to rethink the MOU with El Salvador.

When the other market countries are mentioned, the AAMD suggests that the Committee examine critically where the market exists. While there remains a market for objects in Europe (note the Barbier-Mueller sale in 2013 which while very controversial nevertheless occurred)²³, the market for Prehispanic objects appears to have expanded to the Middle East and China. Presumably, although difficult to prove, El Salvadorian Prehispanic objects are included in that trade because they can be difficult to distinguish in large measure from objects from neighboring countries like Guatemala, Nicaragua, and the Yucatan Peninsula of Mexico.

On the other hand, a review of actions by other countries calls into question the ability to meet the requirements of the CPIA. Much will probably be made of the bilateral agreement between Mexico and El Salvador. A careful reading of that agreement however demonstrates a significant discrepancy. The CPIA *affirmatively requires* the Federal government to hold, seize, and offer designated property for turnover to the subject state party.²⁴ The Mexican agreement

²⁰ See, *supra* fn. 5.

²¹ Valdivieso, *supra* fn. 9, at 80-81.

merely provides a vehicle for El Salvador to request the return of designated material.²⁵ Action upon request differs vastly from action by mandate.

Some may also argue that the adoption by a market country, like France, of the 1970 UNESCO Convention satisfies the requirement set forth in 19 U.S.C. § 2602(a)(1)(C). This argument ignores the purpose of that section. The CPIA provides specific, governmental, customs, and enforcement measures to stop designated objects at the border or seize them after illegal entry. The Convention does not.

Others may argue that the EU Directive (Council Directive 93/7/EEC) is a “similar” restriction. The EU Directive is an export regime. Furthermore, as admitted by the European Commission itself in a proposal for changes to the Directive, “it appears that Directive 93/7/EEC is barely used and is of limited effect.”²⁶

Based on the foregoing, the Committee is left with the inescapable conclusion that either:

- other market countries have adopted similar restrictions and there has been no concomitant reduction in looting; or
- after 27 years, market countries have not adopted similar restrictions and, after that amount of time, the “reasonable period of time” for such adoption under 19 U.S.C. § 2602(a)(1)(C)(i) is long past.

In either case, one must question how the determination required can be made.

D. Other Determination Issues

While the continued looting in El Salvador and the efficacy of United States import restrictions are the most important of the issues the AAMD wishes to bring to the attention of the Committee, they are not the only points of concern that should be considered in reviewing the four required determinations. Given the significant involvement of the government in development activities that threaten sites (see Section III(B)(1) above), one must ask whether El

²² In 27 years, there appear to only be two seizures of objects illegally imported from El Salvador and covered by the Designated List, one in 2001 and one reported in 2010. *Seized Pre-Columbian Objects Repatriated*, U.S. Dept. of State Media Note, June 21, 2001, available at: <http://2001-2009.state.gov/r/pa/prs/ps/2001/3727.htm> (last accessed September 29, 2014); and *ICE, CBP and El Salvador Celebrate Recovery of Pre-Columbian Artifacts in Joint Investigation Into Smuggling Ring Selling on E-Bay*, Immigration and Customs Enforcement News Release, May 12, 2010, available at: <http://www.ice.gov/news/releases/1005/100512washingtondc.htm> (last accessed September 29, 2014).

²³ March 25, 2013, Tom Mashberg, *Sale of Pre-Columbian Art Falls Short of Expectations*, available at: <http://artsbeat.blogs.nytimes.com/2013/03/25/sale-of-pre-columbian-art-falls-short-of-expectations/?ref=arts> (last accessed September 27, 2014).

²⁴ 19 U.S.C. § 2609(b).

²⁵ October 20, 1992, *Convenio de Protección y Restitución de Monumentos Arqueológicos, Artísticos e Históricos Entre El Gobierno de Los Estados Unidos Mexicanos y Gobierno de la Republica de El Salvador*, Art. II.

²⁶ European Commission. *Press Release: European Parliament Approves New Provisions for the Return of National Treasures*, April 16, 2014, available at: http://europa.eu/rapid/press-release_IP-14-430_en.htm?locale=en (last accessed September 27, 2014). The new provision will not change this analysis.

Salvador is meeting its burden to take measures to protect its cultural property.²⁷ Rapid expansion and capital improvements sponsored or tolerated by the government should be of real concern to the Committee.

Between the questionable efficacy of import restrictions in deterring looting and the concerns about the government of El Salvador's measures to protect its cultural property, one has to at least question how an MOU can be extended when El Salvador appears to meet only half of the four required determinations.

IV. A New Paradigm

El Salvador is one of the best examples of why the current system of simply renewing MOUs is ineffective and inconsistent with the CPIA. The absence of a significant legitimate market in the United States for El Salvadorian Prehispanic objects has apparently had little or no effect on looting in El Salvador. If the past, and presumably current, submissions to this Committee are to be believed, United States import restrictions alone have not been effective in significantly curtailing looting in El Salvador. The time has come for the Committee to explore new ways, within the confines of the CPIA, to render real assistance to countries like El Salvador.

The AAMD does not suggest that it has all of the answers to this issue, but one can begin to identify those answers by admitting that simply repeating what has been done in the past is not likely to have any different result than what has occurred over the last 27 years. In 2010, the AAMD recommended to this Committee that El Salvador be encouraged to begin a legal system of exchange of cultural property. This can be suggested under 19 U.S.C. § 2602(a)(4). Any such exchange should be taxed and the proceeds of that tax should be used to protect cultural sites and to encourage related employment by the local populations and the scientific exploration, storage and conservation of objects from those sites. There may well be other approaches that reasonable people on all sides of these issues can recommend, but the first step needs to be taken by this Committee in acknowledging that new and different approaches must be taken if the archaeological record of a country like El Salvador is to be preserved and protected.

V. Amendment of the MOU

Any MOU must be consistent with the general interest of the international community in the interchange of cultural property.²⁸ In addition to the issues discussed above, if the MOU is extended, it should be amended to incorporate the following provision:

The Government of the Republic of El Salvador will seek to expand the exchange of its archaeological objects and its ethnological materials by:

Encouraging and facilitating qualified foreign archaeologists and other scholars to undertake field research in El Salvador and encouraging publication of the results of such research.

²⁷ 19 U.S.C. § 2602(a)(1)(B).

²⁸ 19 U.S.C. § 2602(a)(1)(D).

A similar (albeit more mandatory) provision was incorporated into the 2005 MOU amendment and extension²⁹, but inexplicably deleted in the 2010 MOU amendment and extension. Given current conditions in El Salvador, encouraging qualified archaeologists to assist in scientifically excavating, studying and preserving artifacts and bringing their research to the attention of the broadest public possible seem reasonable and prudent. While an excellent example exists in the recent publication of the catalogue *Revealing Ancestral Central America*³⁰, much more could be done.

VI. Conclusion

Evaluating whether to extend the MOU should not be undertaken lightly. The MOU as currently structured does not appear to have had any material impact on looting or destruction of archaeological material. The Committee now must question seriously whether simply repeating the past is likely to have a different result or whether a new and different approach to an MOU is necessary.

²⁹ Compare March 7, 2005, MOU, Art. II(J) with March 8, 2010, MOU, Art. II.

³⁰ *Supra*, fn. 1, at 23-31.