January 3, 2007

Cultural Property Advisory Committee
U.S. Department of State
301 4th Street, S.W.
Washington, D.C. 20547

Dear Committee Members,

I am submitting this letter on behalf the Lawyers' Committee for Cultural Heritage Preservation[1] in support of the proposed extension of the United States-Peru Memorandum of Understanding. I will focus my comments on the third determination and seek to inform the Committee concerning the current status of the various international conventions as these may be relevant to the Committee's findings under this determination with respect to Peru.

Where the primary import market for the artifacts from a particular country is the United States, as with Peru, the exception to the third determination found in section 303(c)(2) comes into play. The Senate Report that accompanied enactment of the CPIA noted that determining which countries have a significant import trade may be a function of "type and historic trading patterns" as well as of monetary value (Senate Report No. 97-564, 27). It further urged that "the formula measuring the presence and worth of a 'concerted international effort' not be so mechanical as to preclude the conclusion of agreements under Section [3]03(a) where the purposes of the legislation nevertheless would be served by doing so" (Senate Report, 28). The Senate intended this requirement to be interpreted with a significant degree of flexibility on a case-by-case basis.

The CPIA does not require that all the countries with an import trade in the designated materials be part of an international response. Instead, it only requires that the net effect of U.S. restrictions be of "substantial benefit" to deterring the illicit trade. The exception allows "the President, once he has identified the significant importing nations the participation of which ordinarily would be expected to comprise a concerted international effort, to enter into agreements without the participation of all such nations" (*id*.). If the United States has a sufficiently large market for artifacts from a particular country, then the lack of participation of other nations will not diminish the benefit that will derive from U.S.-imposed restrictions. This is supported by the statement in the Senate Report that "the president is allowed to move forward without the full participation of nations the contributions of which are not essential to amelioration of the problem" (*id*.). In light of the underlying goal of the CPIA and the legislative history, the meaning of this exception is that the United States can act whenever

[1] The Lawyers' Committee for Cultural Heritage Preservation is an association of lawyers who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy.

its import restrictions would be of "substantial benefit in deterring a serious situation of pillage" regardless of how many other nations are or are not taking action.

Under the third determination outlined in section 303(a), the use of the word "similar" (rather than the word "same") in the statutory language to describe the actions of other nations to be considered under the third determination indicates that the CPIA only requires that other nations need to take similar actions that serve the underlying purpose of restricting the trade in looted artifacts. The CPIA's explicit inclusion of the actions of nations that are not party to the 1970 UNESCO Convention further indicates that the precise form of restriction used by other countries is not relevant. Thus, if a nation restricts the import of such artifacts without the use of bilateral agreements or even if the nation restricts the trade in such artifacts through a means not including import restrictions, these actions should still be considered as part of the third determination analysis.

There are now 110 States Parties to the UNESCO Convention; seventeen joined since the extension of Peru's original bilateral agreement was considered by CPAC in 2002. Probably the most significant development with respect to Peru is the recent announcement of its agreement with Switzerland that will restrict the import of undocumented artifacts into Switzerland.[2] Several other market nations are seriously considering ratifying the Convention (such as Germany and Belgium) and Germany is preparing draft implementing legislation.

Unlike the situation in the United States, ratification of the Convention is self-executing in many countries. In those countries, there is no need to enact implementing legislation. In addition, other nations, such as Australia and Canada, have enacted domestic implementing legislation that automatically prevents the import of illegally exported cultural materials from other States Parties. These nations have therefore *already* implemented restrictions that are *similar* to, albeit much broader than, US import restrictions under the CPIA.[3]

The United Kingdom has implemented its ratification of the UNESCO Convention through creation of a new criminal offense. This legislation criminalizes the knowing dealing in "tainted cultural objects," which are defined as an object whose "removal or excavation constitutes an offence."[4] However, application of the criminal offense statute goes an additional step toward restraining the trade in looted archaeological artifacts. The offense of dealing in tainted cultural objects includes the import or export of such objects, in which case Her Majesty's Customs and Excise (HMCE) investigates the potential offense and is

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[2] The Swiss bilateral agreements differ from those of the United States because they continue indefinitely without need for renewal. Federal Act on the International Transfer of Cultural Property, Article 7. The Swiss statute, unlike the CPIA, provides criminal penalties for illicitly importing cultural property. Article 24(c). See http://www.kultur-schweiz.admin.ch/arkgt/kgt/e/e_kgt.htm.

[3] These restrictions are much broader because they apply to *all* illegally exported cultural materials and are not restricted to archaeological materials that are older than 250 years or to specifically designated categories of archaeological and ethnological materials. *See*, *e.g.*, Canada Cultural Property Export and Import Act, R.S.C. 1985, c. C-51, § 37; Australia Protection of Movable Cultural Heritage Act 1986.

[4] Dealing in Cultural Objects (Offences) Act 2003, 2003 Ch. 27, Sections 1 and 2(2), *available at* http://www.uk-legislation.hmso.gov.uk/acts/acts2003/20030027.htm. The statute refers to objects removed from "a building or structure of historical, architectural or archaeological interest" or from an excavation either in the United Kingdom or in a foreign country. Section 2(4).

empowered to seize such objects as part of the investigation.[5] If HMCE determines that there is not sufficient evidence to prosecute a crime, the antiquities whose ownership is vested in the nation will be returned to the country of origin. As an HMCE agent wrote, "Customs' main objective in relation to tainted objects/antiquities is to seize and return the objects to the country of origin where claims for return are made by those countries."[6] Thus, although the United Kingdom has chosen a different method of implementing the UNESCO Convention, by criminalizing the dealing in "tainted" artifacts, this legislation and the CPIA serve the same function and purpose of deterring trade in illegally excavated artifacts.

Peru was an early member of the 1995 Unidroit Convention to which there are now twenty-eight States Parties. Unlike the UNESCO Convention, the Unidroit Convention focuses on requiring nations to create private rights of action for recovery of stolen and illegally exported cultural objects. Of greatest significance is Article 3(2), which recognizes all illegally excavated archaeological objects as stolen property, when this is consistent with local law where the illegal excavation took place. This offers a potentially powerful disincentive to trading in archaeological materials in other States Parties.

The changes in international law concerning the trade in cultural objects have been remarkable since the previous extension of the US-Peru MoU in 2002, and more nations will continue to ratify or accede to the UNESCO and Unidroit Conventions in the next few years. All of this indicates that the evidence of an international response to the problem of the looting of archaeological sites has strengthened and will continue to do so. Whether considered under section 303a(1)(c) or 303c(2), this criterion for extension of the bilateral agreement with Peru seems easily satisfied.

I hope that the Committee will find these comments useful and I thank you for the opportunity to offer them.

Sincerely,

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President, Lawyers' Committee for
Cultural Heritage Preservation

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[5] The explanatory notes and guidance issued in conjunction with the Act state that section 4 of the Act gives HMCE the "necessary powers of enforcement where an offence involves the importation or exportation of a tainted cultural object." It further adds: "These [powers] include search and seizure powers under the Police and Criminal Evidence Act 1984." A government report issued in February 2004 in response to queries from the Select Committee stated:

> The new Dealing in Cultural Objects (Offences) Act 2003 has given HM Customs and Excise new powers of seizure under the Police and Criminal Evidence Act (PACE) for cultural objects they suspect to be tainted at the time of import. HM Customs and Excise can also rely on their seizure powers under the Customs and Excise Management Act 1979 where the import of any cultural objects also involves the commission of a Customs offence.

[6] Anne Marie Dryden, "Enforcing the laws - UK Customs" in *Not for Sale, A Swiss-British Conference on the traffic in artifacts from Iraq, Afghanistan and beyond* (February 2004).