



GOVERNING COUNCIL
90th session
Rome, 19- 11 May 2011

UNIDROIT 2011
C.D.(90) 8
Original: French
April 2011

Item n° 9 on the agenda: International Protection of Cultural Property

**(a) UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects –
implementation and promotion**

(b) Model Provisions on State Ownership of Undiscovered Cultural Objects

(memorandum submitted by the Secretariat)

<i>Summary</i>	<i>Information on (a) the status of ratifications of the 1995 Convention, and (b) the state of advancement of the work on the preparation of model provisions on State ownership of undiscovered cultural objects</i>
<i>Action to be taken</i>	<i>See paragraph 22 below</i>
<i>Mandate</i>	<i>Work Programme 2011-2013</i>
<i>Priority level</i>	<i>(a) High priority; (b) Low priority</i>
<i>Related documents</i>	<i>UNIDROIT 2011 – C.D. (90) 2; UNIDROIT 2010 –C.D.(89) 7 Add. 3, UNIDROIT 2010 –C.D.(89) 8 and 17, §§ 102-109</i>

INTRODUCTION

1. This document contains information on the efforts made in the past year both for the **promotion** of the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, adopted in 1995, as well as for the preparation of **model provisions** on State ownership of undiscovered cultural objects and the state of advancement of this work.

I. 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – status and promotion

A. Status of the 1995 Convention

2. On 31 March 2011, there were 31 Contracting States to the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*. Denmark was the latest State to accede to the Convention, on 11 January 2011. The Danish Government deposited its instrument of accession with the Italian Government, Depository of the Convention, on 1 February 2011 and the Convention will enter into force for Denmark on 1 August 2011.

3. On 10 March 2011, the Swedish Government referred to the Parliament (“Riksdagen”), a draft bill for **Sweden** to accede to the Convention. The Committee on Culture of the Parliament is currently examining the draft bill and should deposit its conclusions on 13 May. The Parliament is scheduled to vote on 8 June. The proposed accession will add two new Chapters to the Act (1988:950) on Culture Heritage, adopting *inter alia* procedural rules for claims for restitution of cultural objects.

4. **Algeria** and **Colombia** have completed their internal procedures for accession but the Secretariat is still awaiting the deposit of their instruments with the Italian Government. Ireland had officially announced its decision to accede to the Convention in 2010.

5. Consultations in view of ratification or accession are in progress in other countries. **Turkey**, after years of opposition to the Convention, is seriously considering to adhere, and is organising a meeting for 13 May in Ankara for an in-depth discussion with a view to such an adhesion. It is a country which suffers greatly from plunder, and spends significant amounts in the attempt to recover its objects by means of judicial proceedings before foreign courts. Finally, **Belgium**, in the context of the execution of the *1970 UNESCO Convention*, is examining the 1995 UNIDROIT Convention in depth. The francophone community, after having organised a day of study specifically devoted to the Convention, has already started work on the preliminary official steps necessary to initiate the ratification process by Belgium.

B. Promotion of the Convention

a) Activities

6. Interest in the 1995 UNIDROIT Convention has revived over the past three years or so, not the least owing to the upsurge in trafficking in cultural objects, and the UNIDROIT Secretariat is increasingly called upon in this regard. The Secretariat has, within the limits of its meagre budgetary resources and with the financial assistance of the organisers, pursued its efforts to publicise the instrument by participating – directly or otherwise – in a range of events organised to consider it (see the Annual Report 2010 for examples, document C.D.(90) 2, pp. 16-17).

7. It should be noted that the meetings in which UNIDROIT participated to promote the 1995 Convention since the last session of the Governing Council, were held in different parts of the world, notably Bahrain, which permitted UNIDROIT to approach and heighten the awareness of the States belonging to the Gulf Cooperation Council (GCC) and Yemen. All such occasions provide an opportunity for the Secretariat to establish or restore relations with the representatives of member and non-member States, to introduce them to the Convention, and to assist them in starting ratification or accession procedures. All the above events resulted in recommendations inviting States to accede to the 1995 UNIDROIT Convention.

b) *Financing*

8. Even if the organs of UNIDROIT have always insisted on the importance and necessity to promote the instruments prepared by UNIDROIT, it must *per force* be recognised that the means placed at the disposal of this promotion have always been insufficient and that no real global strategy has at present been put in place (this question is referred to in the reflection in the Strategic Plan).

9. It was decided to set levels of priority to the different subjects in future, in order subsequently to allocate, when possible, the necessary funds in the Budget of the Organisation. The General Assembly gave this activity priority status in the 2011-2013 Work Programme (see Appendix III of document A.G. (67) 9 rev), but the Secretariat, by reason of the present financial difficulties and pending in particular the result of the reclassification of certain States in the UNIDROIT contributions chart, saw itself constrained, with regret, to reduce the allocation of Chapter 10 of the draft Budget (promotion of all UNIDROIT instruments) to € 0 in the first estimates for the draft Budget for the 2012 financial year submitted to the Governing Council (see document CD(90) 17 and the related document FC(69) 4, Appendix III, Chapter 10 and note 17). The Budgets of preceding years allocated the sum of € 5,000. The Secretariat hopes to be in a position to allocate a reasonable sum to this Chapter in the months to come.

C. *Convening of the special Committee*

10. Since 2009 there is a strong movement of discontent on the part of those States that suffer particularly from illicit trafficking in cultural objects, as they do not manage to obtain the restitution of their cultural objects, or do so only rarely, by the judicial means on which they spend a lot of money. These States question the validity of the existing judicial arsenal, and in particular of the 1995 UNIDROIT Convention, if for no other reason because of the few States among the market States that are parties to the Convention. Their attention is in particular directed towards the United Nations Office on Drugs and Crime (UNODC) where, in several meetings of the Commission on Crime Prevention and Criminal Justice held in May and October 2010 and in May 2011, they have requested with force that a new instrument be prepared.

11. In order to answer this discontent, on the occasion of the 40th anniversary of its *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO wished to revisit the history of the Convention and take stock of its accomplishments, its strength and its weaknesses and to examine the principal challenges it faces. In light in particular of the problem of illegal excavations and trade in archaeological objects, UNESCO responded to the desire of member States to increase its visibility, improve its implementation at national level and carefully re-examine its future by organising a media event which was held on 15 and 16 March 2011 at UNESCO Headquarters in Paris. This event included a round table open to the public and the press on the fight against illicit traffic in cultural property, a press conference and a forum of reflections, intended for UNESCO Member States and leading experts (with extra budgetary financing). The Secretary-General of UNIDROIT participated and stressed, in particular, the complementary nature of the two instruments, as well as the big step forward that the 1995 Convention constituted.

12. UNIDROIT should play an active role in the current reflexion on the efficiency of existing instruments and in particular, of course, of its 1995 Convention. The authors of the Convention well understood this and provided for a mechanism to monitor its application, in the shape of a special follow-up committee.¹ Such bodies already exist in the framework of several instruments

¹ See Article 20 of the 1995 Convention: "The President of the International Institute for the Unification of Private Law (UNIDROIT) may at regular intervals, or at any time at the request of five Contracting States, convene a special committee in order to review the practical operation of this Convention."

drawn up by the Hague Conference on International Private Law (the “special commissions” on its legal and administrative assistance conventions) and by the Council of Europe (“permanent committees” or “Convention committees” It should also be recalled that other, more recent, UNIDROIT instruments provide for “evaluation conferences”² entrusted with the examining of, *inter alia*, the practical application of these instruments.

13. Numerous arguments speak in favour of the convocation of this special committee, among which:

- at the international level, the fact of having a follow-up committee is a practice which is both current and healthy. The activity of international organisations does not finish with the mere drafting of the instruments, it is necessary to know with regularity how international practice as well as States are reacting in this matter;

- in this context, the follow-up committee is particularly important as the art market is both powerful and fickle. There are several questions to discuss, in particular: are the mechanisms provided for by the Convention sufficiently solid to solve the present problems of the international trade in art?

- an important argument to encourage other States to ratify the Convention is precisely its effectiveness in the international art market. The Convention must become an increasingly important tool for the restitution of cultural property. Without a broad application of the Convention, the position of the States of origin remains weak as regards the protection of their cultural heritage;

- the defence of the cultural heritage has become a theme of transcendence and UNIDROIT has an important place with its 1995 Convention. By convening the special committee UNIDROIT would send a clear message to the international community as regards its active role in this domain and would in this manner enhance its visibility;

- the meeting of the committee could try to check the current movement of discontent, which risks to delay, if not prevent, the ratification or adhesion procedures currently underway in a number of countries.

14. The special committee is to be convened “regularly” at the initiative of the President of UNIDROIT – the Conference clearly intended to see UNIDROIT take an active part in the follow-up work – or at the request of five Contracting States. Common sense suggested that the special committee would not meet until there was enough practical evidence of the operation of the Convention. The moment appears to have come to convene the committee, at the initiative of the President in order to clearly demonstrate the commitment of the Organisation. Nothing is indicated as to its composition (normally the prerogative of the President of UNIDROIT), but its members will presumably include representatives of the negotiating States as well as of the relevant international organisations.

15. If the Governing Council were to decide that it is opportune to organise such a meeting (the duration of which could be of a day and a half), the Secretariat could envisage requesting, if need be, extra-budgetary contributions to supplement the financing necessary.

² See 2001 Cape Town Convention on International Interests in Mobile Equipment (Article 61), 2001 Aircraft Protocol to the Cape Town Convention (Article XXXVI), 2007 Rail Protocol to the Cape Town Convention (Article XXXIII) and 2009 Convention on Substantive Rules for Intermediated Securities (Article 47). For the latter Convention, a Follow-up and Implementation Committee has even been constituted to work before the entry into force of the Convention.

II. UNESCO/UNIDROIT Model Provisions

A. *Mandate and state of advancement of work*

16. At the 16th session of the UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (Paris, September 2010), the Committee formally adopted a Recommendation in which it "encourages the establishment of a working group of independent experts chosen jointly by UNESCO and UNIDROIT [and] encourages the preparation of model provisions with explanatory guidelines to be made available to States to consider in the drafting or strengthening of national laws". The Governing Council of UNIDROIT at its 88th session (2010) agreed to collaborate with UNESCO in preparing an instrument to facilitate both the application of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention and their ratification by as many States as possible, and the General Assembly decided, at its 67th session (December 2010), to include this item in the Work Programme 2011 – 2013, in close co-operation with UNESCO, with low priority (see. A.G. (67) 9 rev.).

17. The UNESCO and UNIDROIT Secretariats accordingly set up an Expert Committee, using a criterion which would guarantee the most representative geographic participation. The members of the Committee are appointed in their personal capacity as independent experts (see the list in document CD (89)7 Add. 3). The Committee is co-chaired by Mr Jorge Sánchez Cordero, member of the UNIDROIT Governing Council, and Mr Marc-André Renold, Professor of law at Geneva University.

18. The Expert Committee held its first meeting in September 2010 in Paris, on the occasion of the 16th session of the UNESCO Intergovernmental Committee, and examined draft model provisions prepared by Professor Renold on the basis of two working documents and on observations made by the members of the Committee (see document CD(89)7 Add. 3). The Expert Committee met a second time in Paris in March 2011, on the occasion of the celebration of the 40th anniversary of the 1970 Convention, and continued its examination of the draft provisions. The provisions are currently six in number (see the report on the second meeting with the text of the provisions and short explanations annexed to this document) and will be accompanied by explanatory guidelines which will be drafted by the Expert Committee. Subject to confirmation, the Expert Committee will meet again at the end of June 2011, on the occasion of the 17th session of the UNESCO Intergovernmental Committee, to perfect the explanatory guidelines, or at another date to be agreed.

19. The Governing Council is invited to reiterate its support of the project and to take a stand as to the resources that should be placed at its disposal.

B. *Financement du projet*

20. As far as the financing of the project is concerned, the Governing Council and the General Assembly agreed to redefine at a future session, as required, the means to be employed for this purpose. At the last session of the General Assembly, because of the interest shown by several States for this project, the *Secretary-General* indicated that "the low priority assigned to the cultural property model law project simply reflected the pace of work on the UNESCO side and the need to define the scope of the project more precisely but that once the project really got going, UNIDROIT would mobilise the necessary resources and set a level of priority adequate to it". Mr Francesco Bandarin, UNESCO Assistant-Director for Culture, wrote to the Secretary-General of UNIDROIT in February 2011 asking, to the extent that the project is brought forward jointly by the two Secretariats, what financial contribution UNIDROIT would be able to make to the advancement of

this project, in particular to the participation of experts in the coming meetings. Certain experts had in fact asked to be able to benefit from a total or partial coverage of their trip and stay in Paris, so as to enable them to participate in the second meeting.

21. The Secretariat suggests that, in addition to the participation of the Secretariat Officer in charge of the subject, UNIDROIT assume the expenses of one or two members of the Committee – who would be most likely to have taken part in the negotiations that led up to the 1995 Convention – so as to permit their participation in the next meeting, whenever it takes place.

ACTION TO BE TAKEN

22. a) As regards the promotion of the *Convention*, the Governing Council is invited to take note of the efforts of the Secretariat and to take a stand on the opportuneness of convening a follow-up committee in accordance with Article 20 of the 1995 Convention, as well as on the means to finance it.

b) As regards the *draft UNESCO-UNIDROIT model provisions*, The Governing Council is invited to take note of the state of advancement of the work on the preparation of the draft, to reiterate its support and to take a stand on the means to allocate to it.

ANNEX**Expert Committee on States' Ownership of Cultural Heritage****Draft model provisions on State Ownership of
Undiscovered Cultural Objects**

resulting from the second formal meeting of the Committee
(March 14, 2011, Paris)

Explanatory Report

(for the Expert Committee, its Co-chairs, Prof. Marc-André Renold, Geneva and Dr. Jorge Sanchez Cordero, Mexico)

The Expert Committee established by the UNESCO and UNIDROIT Secretariats met formally on two occasions in Paris, on September 20, 2010 and March 14, 2011. Several exchanges among the members of the Committee also took place via e-mail.

1. Mandate of the Expert Committee

At its first meeting the Expert Committee discussed its mandate which was the "working on model provisions with explanatory guidelines (in French: *'dispositions modèles accompagnées de lignes directrices'*) on State Ownership of Undiscovered Cultural Objects" (Minutes of the September 20, 2010 meeting, page 2).

This understanding of its mandate was confirmed by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation which, "acknowledging the obstacles faced by many countries in applying for restitution of cultural property, especially when it comes to materials from cultural sites where there is no inventory or provenance documentation, in particular objects coming from illicit excavations" recommended "the preparation of model provisions with explanatory guidelines to be made available to States to consider in the drafting or strengthening of national laws" (Recommendation N° 3, 16th session of the Intergovernmental Committee, Paris 2010, CLT-2010/CONF.203/COM.16/5).

2. Preliminary Draft Model Provisions

At the first meeting of the Expert Committee (September 20, 2010), a preliminary draft was discussed. This preliminary draft contained several proposals that were deemed by the Committee as being too broad and based more on the language of an international convention than that of model provisions of national law. Hence they were redrafted and presented orally to the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its 16th session. The discussions that followed indicated that a certain number of amendments would be necessary. These were incorporated in the draft model provisions discussed at the second formal meeting of the Expert Committee on March 14, 2011.

3. Draft Model Provisions

The second meeting of the Expert Committee (March 14, 2011) discussed further these draft model provisions. All experts present agreed that much progress had been made with this draft. A certain number of comments and additional proposals were made and discussed and the result of these is the present status of the model provisions with brief comments proposed by the Chairs of the Expert Committee.

The text that follows will be discussed at the third meeting of the Expert Committee, which is scheduled to take place in Paris on June 29, 2011. The result of the Expert Committee's work will then be presented at the 90th session of the UNIDROIT Governing Council in May 2011 and at the 17th session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.

Draft Model Provisions on State Ownership of Undiscovered Cultural Objects

Provision 1 (General Duty)

The State shall take all necessary and appropriate measures to protect Undiscovered Cultural Objects and to preserve them for present and future generations.

Comment: The Expert Committee feels that a model law should start with a general clause stating the general duty of the State regarding cultural objects that have not yet been discovered. This duty relates both to the *protection* and *preservation* of such objects.

Provision 2 (Definition)

Undiscovered cultural objects are objects which, according to national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the subsoil or underwater.

Comment: The model law definition follows the general definition given by the 1970 UNESCO Convention (art.1) and 1995 UNIDROIT Convention (art. 2). As it is a model of a national legislation a reference to the national law is appropriate.

The definition incorporates both types of Undiscovered Cultural Objects, i.e. those found in the *subsoil* and those found *underwater*.

Provision 3 (State Ownership)

Undiscovered Cultural Objects are owned by the State, provided no prior existing ownership is established.

Comment: This is the central rule of the model provisions. The principle adopted – State ownership - follows that of many existing national legislations, but in the most clear and simple terms.

The Committee feels, however, that a restriction should be made in case the prior ownership of a third party can be established (e.g. a person buries a cultural object belonging to him/her in order to protect it during a conflict and that object is “rediscovered later by that same person or its heirs).

Provision 4 (Unlawful Removal)

The unlawful excavation of a cultural object or the unlawful retention of a lawfully excavated cultural object is a criminal offence.

Comment: Among the several possible definitions of what the “unlawful removal” of a cultural object can be, the Expert Committee proposes to follow that of art. 3 paragraph 2 of the 1995 UNIDROIT Convention, since one of the purposes of the model provisions is to facilitate the enforcement by national courts of the UNIDROIT Convention. Model provision 4 (and 6 as well) follow that purpose, although they also have an autonomous existence.

The Expert Committee feels, however, that from the criminal law point of view, the characterization of the offence (theft, handling of stolen property, swindle, etc.) should be left to the national legislator to decide, according to its principles of criminal law.

Provision 5 (Inalienability)

The transfer of ownership of an unlawfully removed cultural object is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.

Comment: Model provision 5 is the private law complement of provision 4. An undiscovered cultural object is a *res extra commercium* and remains such once it has been discovered. It can therefore not be validly acquired by a further acquirer.

The Expert Committee considers that a reservation should be made for the case where the transferor has a valid title (e.g. a State archeological museum that decides, validly according to its national law, to sell an item in its collection or a private person who validly acquired the object prior to the entering into force of the model provision in the State concerned).

Provision 6 (Return or restitution)

For the purposes of ensuring the return or the restitution of unlawfully removed cultural objects, any such unlawful removal of an object from the place where it has been found shall be considered as a theft.

Comment: Model provision 6 aims to facilitate the return or the restitution of a cultural object that has been exported after having been discovered. If the object is considered stolen, international judicial cooperation in criminal matters will generally enable its return to the country where it was discovered.

Also, from a private international law point of view, a foreign court, seeing that the country where the object was discovered considers it as stolen on the basis this provision, will have little difficulty in returning it on the basis of that state’s law. This will even more so be the case if the States involved have ratified the 1995 UNIDROIT Convention (see its art. 3 paragraph 1).