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Item No. 9 on the agenda: International protection of cultural property

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

(b) Publication and promotion of the UNESCO/UNIDROIT Model Provisions defining the State's Ownership of Undiscovered Cultural Objects

(memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Information on the status of ratifications of the 1995 Convention and on 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 21 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 2012 – C.D. (91) 2; UNIDROIT 2011 – C.D.(90)8</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 2012, there were 32 Contracting States to the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*. Sweden was the latest State to accede to the Convention. The Swedish Government deposited its instrument of accession with the Italian Government, Depositary of the Convention, on 28 June 2011 and the Convention entered into force for Sweden on 1 December 2011.

3. On 26 December 2011, the President of the Republic of **Angola** signed the letter of accession to the 1995 Convention. At the time, Angola was in the process of acceding to three UNESCO Conventions and the deposit concerning the 1995 UNIDROIT Convention was made with UNESCO by mistake, on 7 February 2012. The instrument of accession has now been returned to Luanda and should be re-directed to Rome at the earliest opportunity.

4. **Ireland** has officially announced its decision to accede to the Convention, as has **Uzbekistan**.

5. Consultations are underway with several other countries with a view to ratification/ accession, in particular with Southern Africa in the wake of a seminar organised in Namibia in 2011.

B. Promotion of the Convention

a) Activities

6. The UNIDROIT Secretariat has been increasingly called upon in recent years in connection with the 1995 Convention, owing, among other things, to the upsurge in trafficking in cultural objects. The Secretariat has pursued its efforts to publicise the Convention, within the limits of its meagre budgetary resources for this item and with the financial assistance of the organisers, in particular UNESCO, by taking part – directly or otherwise – in a range of events at which the Convention is on the agenda (see the Annual Report for 2011 for examples, document C.D.(91) 2, p. 24).

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, more particularly in Namibia, which gave Unidroit an opportunity to approach the countries of Southern Africa to publicise the Convention (regional conference organised by UNESCO). All such occasions provide an opportunity for the Secretariat to (re-)establish relations with the representatives of member and non-member States, to acquaint them with the Convention and to assist them in starting ratification or accession procedures. Recommendations were adopted at the close of all these meetings inviting States to accede to this UNIDROIT Convention. Since the regional seminar in Namibia, the Government of Zambia, which is already a signatory State, re-opened its ratification procedure, and the competent authorities in Botswana, Lesotho, Namibia and Zimbabwe have approached their Governments to accede to the 1995 Convention at the earliest opportunity. South Africa for its part might accede in 2012.

8. **Partnerships and collaboration with other international organisations** in these matters played an important role in 2011, a year which saw much activity in the field of cultural property. In addition to the close ties it maintains with **UNESCO**, UNIDROIT has also developed its co-operation links with:

- the ***Istituto Italo-Latino Americano (IILA)*** – a training course organised in Rome for magistrates from Ecuador;

- the ***United Nations Office on drugs and crime (UNODC)*** – UNIDROIT had been invited to take part in an expert group to draft “*Guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property*”. These will be discussed at governmental level in June 2012;

- the ***European Union*** - UNIDROIT was an institutional partner closely involved in the preparation of a “Study on prevention and fighting illicit trafficking in cultural goods in the European Union” – October 2011 – carried out by CECOJI-CNRS at the request of the European Commission in response to the need to study ways of developing more effective tools to fight such trafficking in Europe, taking account of international instruments dealing with the subject, with a view, in particular, to revising Directive 93/7/CEE. This study formed one of the bases of the conclusions adopted by the EU Council in December 2011 in respect of “preventing and combating crime against cultural goods”. In particular, the Council stresses the importance of the UNIDROIT Convention which, together with the 1970 UNESCO Convention, “constitute important instruments for strengthening protection of the global cultural heritage”, and recommends that the member States “consider ratification [...] the 1995 UNIDROIT Convention” and that the European Commission “involve relevant stakeholders when setting up the expert group under the Work Plan for Culture 2011-2014 to produce a toolkit on the fight against illicit trafficking and theft of cultural goods.” UNIDROIT was also involved, in the framework of the European Police College (CEPOL), in a training course in Rome for European police officers specialising in the fight against illicit trafficking in cultural objects;

- with other organisations such as ***INTERPOL*** or the International Council of Museums (***ICOM***).

b) *Financing*

9. Funding continues to be a problem since, even though the various UNIDROIT organs have always insisted on the importance of and need to promote the instruments prepared by UNIDROIT and have indeed given high priority to the subject of promotion, the fact is that the actual resources devoted to it remain insufficient.

10. Fortunately, the Institute’s excellent collaboration links with other organisations active in the field of cultural property have in recent years done much to compensate for this lack of funds. The Director General of UNESCO recently decided, at the behest of the Organisations’ member States, to set aside a large amount of money from the Emergency Fund to step up its training activities in this area in the months to come, and she has asked UNIDROIT to join in this effort (proposal to fund five regional training workshops – West and Southern Africa; Central America, the Andean and Caribbean regions; South-East Europe).

C. Convening of the special Committee

11. At its 90th session in 2011, the Governing Council reacted favourably to the arguments put forward by the Secretariat urging the convening of a follow-up committee in accordance with Article 20 of the 1995 Convention, and requested the President of UNIDROIT to convene such a meeting (cf. UNIDROIT 2011 – C.D.(90) 8, paragraph 13).

12. UNESCO having decided to call a Meeting of States Parties to the 1970 Convention to discuss measures to be taken to prohibit and prevent the illicit import, export and transfer of ownership of cultural property, to be held in Paris, France on 20-21 June 2012, as well as the 18th 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*, to be held in Paris on 22 June, and given the complementarity of these two binding instruments and the number of States taking part in the UNESCO meetings, it was felt appropriate that UNIDROIT organise the meeting of the follow-up committee at the UNESCO headquarters in Paris. The meeting is to take place on 19 June.

13. The 1995 Convention is silent as to the composition of this Committee but, in view of the size of the UNESCO meeting room, the Secretariat has decided to invite, in addition to the Signatory States and States Parties to the 1995 Convention, all the member States both of UNIDROIT and UNESCO. Invitations were sent out on 18 January 2012 together with a questionnaire seeking information on the practical experiences of States (see the questionnaire reproduced in Appendix I). The working languages of the meeting will be English, French and Spanish (Spanish had not yet been selected as a working language at the time the invitations were sent out but was later felt to be indispensable, and the additional cost should be covered by outside funding).

14. The meeting will provide an opportunity, first, to explain which international claims mechanisms are available for cultural property outside the international instruments and, second, to highlight the benefits offered by the 1995 convention mechanisms and to assess the Convention's impact beyond the number of ratifications/accessions. It will also, and indeed especially, given States a chance to exchange views on their experiences, to compare practices and to discuss any difficulties encountered in implementing the Convention.

15. The Director-General of UNESCO, Ms Bokova, has indicated that these "four days of debate to assess the effectiveness of the instruments and tools available in the fight against trafficking in cultural property will no doubt enable States to express their points of view on the national and international situation in this area and be of assistance to our respective Secretariats in formulating strategies for the years to come."

II. Completion and publication of the UNESCO/UNIDROIT Model Provisions defining the State's ownership of undiscovered cultural objects

16. At its 90th session in 2011, the Governing Council took note of the state of advancement of work on the preparation of model legislative provisions for the protection of cultural objects and reiterated its support for the project, which was due to be completed in 2011.

17. The group of independent experts set up by the UNESCO and UNIDROIT Secretariats, co-chaired by Mr Jorge Sánchez Cordero, member of the UNIDROIT Governing Council, and Mr Marc-André Renold, Professor of Law at the University of Geneva, in 2010, held three formal meetings in Paris on 20 September 2010, 14 March 2011 and 29 June 2011. Consultations were also held among members by electronic means.

18. At its 17th session (Paris, July 2011), UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation examined the draft Model Provisions together with their explanatory guidelines, and adopted a recommendation in which it "takes note of the finalization of model provisions, [...] invites the Committee to incorporate in its explanatory guidelines the observations made [...] and] requests [that they be] widely disseminated [...]."

19. The UNIDROIT Governing Council also took note of the finalisation of the model provisions and expressed its satisfaction at the Institute's close collaboration with UNESCO. Finally, the Council invited the Secretariat to continue this collaboration and called for the wide dissemination of the Model Provisions.

20. The Model Provisions, together with an Explanatory Report and a set of explanatory guidelines,¹ are now at the disposal of the member States of the two Organisations (see Appendix II) with a view to their being used, where appropriate, as a model in drafting new provisions to govern the State's ownership of undiscovered cultural objects, or to replace and/or adapt national legislation already in force. The Model Provisions aim, in particular, at facilitating the implementation of the 1995 UNIDROIT Convention and the 1970 UNESCO Convention.

ACTION TO BE TAKEN

21. (a) As regards the *promotion of the Convention*, the Governing Council is invited to take note of the efforts deployed by the Secretariat;

(b) as regards the UNESCO/UNIDROIT Model Provisions, the members of the Governing Council are invited to take note of the state of advancement of the work and to assist in promoting and disseminating them among the national legislative bodies in the States in their region.

¹ The Model Provisions, together with the explanatory guidelines, and a preface by Professor Manlio Frigo (Professor of International and European Union Law at the University of Milan) were published in the Uniform Law Review, Vol. XVI / 2011-4, pp. 1024-1055.

APPENDIX I**Questionnaire on the practical operation of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects**

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter: the "UNIDROIT Convention") was adopted in Rome on 24 June 1995 and is currently in force between 32 States (see the Appendix to this document). The Convention was the culmination of a lengthy process initiated at the request of UNESCO in an attempt to fill a gap in the *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (hereinafter: the "1970 UNESCO Convention") relating to the private law aspects of the restitution and return of stolen or illegally exported cultural property.

The two Conventions are, of course, compatible and, above all, complementary, but they are not substitutes for one another. The UNIDROIT Convention strengthens the provisions of the 1970 UNESCO Convention and supplements them by formulating minimum rules in terms of restitution and return of cultural objects. It guarantees the rules of private international law and of international procedure that allow the principles embodied in the 1970 UNESCO Convention to be applied.

Seventeen years after the adoption of the UNIDROIT Convention, the President of UNIDROIT intends, in accordance with Article 20 of the UNIDROIT Convention, to convene the first meeting of the special committee in order to assess the functioning of the Convention in practice. This meeting will provide an opportunity to recapitulate the solutions offered by this instrument and to take stock of the implications of its adoption, on the one hand, and for States to exchange views, to compare practical experiences and to discuss any difficulties they may have encountered in implementing the Convention in practice, on the other hand.

With this in mind, the UNIDROIT Secretariat would welcome information on the States' practical experience (implementing regulations, case law, repercussions on the art market, as well as any other steps taken to apply the Convention). States not Parties to the Convention are also invited to put questions and to make comments, to which the special committee will do its best to reply.

*We wish to thank you in advance for your co-operation and hope that you may be able to return the completed questionnaire to us **before 31 May 2012.****

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For further information on the Convention, in particular the Explanatory Report, see the UNIDROIT Internet website at <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>.

I. Information regarding the application of the UNIDROIT Convention (referring to the provisions of the Convention)

1. Ratification, approval, acceptance or accession

(a) Is your country a Party to the UNIDROIT Convention? **If so:**

- *Were implementing regulations required, and if so, in respect of which points?*
- *Did ratification/accession pose any particular difficulties and if so, what were these difficulties, and how were they resolved?*
- *Did the use of the legal concepts employed in the Convention create any problems?*

(b) **If not** (please indicate, as appropriate):

- *What stage has the ratification/accession procedure in your country reached (close to ratification/ accession), active preparation, not envisaged in the short, medium or long term)?*
- *What are the counter-arguments advanced, and which are the obstacles or difficulties encountered in steering the ratification/accession process (in legal, political or practical terms), as well as the measures taken to overcome them?*
- *How can UNIDROIT assist in bringing this process to a successful conclusion?*

2. Definition

In order to benefit from the system set in place by the UNIDROIT Convention, “cultural objects” need not be designated by the State, as is on the contrary required under the 1970 UNESCO Convention.

- *Which is the definition retained in your country’s legislation?*

3. Theft

(a) **How many cultural objects are stolen** in your country each year, and where do most of these thefts occur (percentage) (museums, places of worship, private homes, archaeological sites, ...)?

(b) **Claims for restitution of stolen cultural property** brought under the Convention

- *Has your country (or have any of its nationals) ever brought such a claim for restitution? What results were obtained (please enclose the relevant decision)?*
- *Has your country (or have any of its nationals) ever been the subject of such a claim for restitution? What results were obtained (please enclose the relevant decision)?*

(c) Did your country’s courts **encounter any difficulties** in applying the concepts enshrined in the Convention when called upon to apply the UNIDROIT Convention? If so, which?

(d) Claims for restitution of stolen cultural property brought in accordance with other procedures

- *Has your country (or have any of its nationals) ever brought such a claim for restitution? What was the procedure chosen? What results were obtained?*
- *Has your country (or have any of its nationals) ever been the subject of such a claim for restitution? What was the procedure chosen? What results were obtained?*

(e) A cultural object that has been unlawfully excavated (or lawfully excavated but unlawfully retained) shall be **considered stolen** when consistent with the law of the State where the excavation took place (Article 3(2)).

- *Does your legislation provide for State ownership of such objects? Please specify*
- *Has your country encountered difficulties in obtaining recognition of such ownership in restitution proceedings brought before foreign courts? Please provide examples.*

(f) Claims for restitution of some objects (Article 3(4)) shall not be subject to **time limitations** other than a period of three years, unless a Contracting State makes a declaration to the contrary (Article 3(5)).

- *Does your legislation provide for such a time limitation? If so, what is that limitation and to what type of property does it apply?*
- *At the time of ratification/accession, did your country make such a declaration or did it envisage doing so?*

(g) The concept of “due diligence” on the part of the possessor of the cultural object and the criteria applied in determining such (Article 4(1) and 4(4)).

- *Can you indicate any decisions handed down in your country as to the “diligence” exercised, or that should have been exercised, by a possessor (in particular in terms of the character of the parties), and as to the proof adduced?*
- *Does your country operate a “reasonably accessible register of stolen cultural objects”? Please specify*

4. Illegal export

(a) The conventional mechanism is based on breach of national legislation prohibiting the export of (certain) cultural objects.

- *Does your country have such legislation and if so, what type of object does it cover (please specify any references, where applicable)?*

(b) Article 17 of the Convention requires Contracting States to provide the Depositary with written information in one of the official languages of the Convention (English and French) **concerning the legislation regulating the export** of its cultural objects, and to update that information from time to time.

- *Did your country provide the Italian Government (the Depositary of the Convention) with the text of your country’s relevant legislation or a summary thereof, within six months of ratification or accession, and has that information been updated since that time?*

(c) Requests for the return of illegally exported cultural objects brought under the Convention

- *Has your country (or have any of its nationals) ever brought such a request for the return of an illegally exported cultural object? What results were obtained (please enclose the relevant decision)?*
- *Has your country (or have any of its nationals) ever been the subject of such a request for the return of an illegally exported cultural object? What was the procedure chosen? What results were obtained?*

(d) Did your country's courts **encounter any difficulties** in applying the concepts enshrined in the Convention (for example, "significantly impairs" an interest, "significant cultural importance") when called upon to apply the UNIDROIT Convention – Article 5(3))?

(e) Requests for the return of illegally exported cultural objects in accordance with other procedures

- *Has your country (or have any of its nationals) ever brought such a request for return? What was the procedure chosen? What results were obtained?*
- *Has your country (or have any of its nationals) ever been the subject of such a request for return? What was the procedure chosen? What results were obtained?*

II. Other legal, judicial and administrative measures taken by States – impact of Convention

1. More favourable rules

(a) The purpose of the Convention is to establish "**common, minimal legal rules** for the restitution and return of cultural objects between Contracting States" (Preamble) and it does not "prevent a Contracting State from applying any rules more favourable" to such restitution or return (Article 9(1)).

- *Does your country apply any other, or more favourable, rules in this field and if so, which?*

2. Bilateral or multilateral agreements

(a) The Convention "initiates a process that will **enhance international cultural cooperation**" (Preamble) and offers the opportunity to States of entering into "**agreements** with one or more Contracting States, **with a view to improving the application of this Convention in their mutual relations**" (Article 13(2)).

- *Has your country entered into such agreements, or is it planning to do so? Please specify.*
- *If you are a State Party to the UNIDROIT Convention and have entered into such an agreement, did you send a copy of that agreement to the Depositary (please enclose a copy if appropriate)?*

(b) States not Parties to the UNIDROIT Convention

- *Has your State become a Party to another international instrument for the protection of the cultural heritage since the UNIDROIT Convention was adopted? Please specify.*

3. Impact of the UNIDROIT Convention

(a) Has the adoption of the UNIDROIT Convention resulted in any **practical changes** in the way your country protects its cultural property (whether you are a Contracting State or not)?

- *For example, has the Convention had a positive impact on the fight against illegal trafficking of cultural objects? Has its adoption affected the extent of trafficking in your country or of the transit of such objects through your territory?*

(b) If your country is not a Party to the UNIDROIT Convention but is a Party to the 1970 UNESCO Convention: does the implementing legislation for the latter instrument contain **rules inspired by the UNIDROIT Convention** and, if so, which?

(c) Since the Convention was first adopted, **non-binding instruments** have been developed relating to **"due diligence"**, such as "codes" for art dealers and auctioneers in the United Kingdom, or UNESCO's International Code of Ethics for Dealers in Cultural Property.

- *Does your country have such an instrument? Please specify*

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The logo of UNIDROIT, featuring a world map with the word "UNIDROIT" in a bold, sans-serif font overlaid on it.

UNIDROIT

International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

To Ministers responsible for relations with
UNESCO and UNIDROIT Member States

Ref. : DG/4/12/2814

LXXA/612

20 APR 2012

**Subject: Model Provisions on State Ownership of Undiscovered Cultural Objects,
drafted under the auspices of the UNESCO and UNIDROIT Secretariats**

Sir/Madam,

We are pleased to submit for your consideration the Model Provisions on State Ownership of Undiscovered Cultural Objects (the "Model Provisions").

These Model Provisions, established by a group of experts convened by the UNESCO and UNIDROIT Secretariats, are intended to assist domestic bodies in establishing a normative framework for heritage protection. The objective is to encourage them to adopt effective legislation for the establishment and recognition of the States' ownership of undiscovered cultural objects with a view, *inter alia*, to facilitating restitution in cases of unlawful removal. They are accompanied by guidelines to help better understand the Model Provisions.

The close cooperation between the Secretariats of UNESCO and UNIDROIT, through the UNIDROIT Governing Council and the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, demonstrates that international and inter-institutional coordination is paramount for developing solutions to the challenges faced by States seeking to protect their cultural heritage, particularly when dealing with archaeological objects.

These Model Provisions are a legal tool, but by no means a legally binding instrument. They are made available to UNESCO and UNIDROIT Member States to assist them in the adoption of specific legal principles. They are aimed also at facilitating the application of the 1970

UNESCO Convention and the 1995 UNIDROIT Convention. In developing or strengthening their national legislations, States are encouraged to incorporate the provisions of these Model Provisions into their own bodies of law, or to adapt them nationally, as appropriate.

Accept, Sir/Madam, the assurance of our highest consideration.



Irina Bokova
Director-General of UNESCO



José Angelo Estrella-Faria
Secretary-General of UNIDROIT

Cc:

- o Permanent Delegations and National Commissions of UNESCO Member States and Associate Members

Materials enclosed:

- o Model Provisions on State Ownership of Undiscovered Cultural Objects
- o Background information and explanatory guidelines
- o Recommendation No. 4 of 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 17th session (Paris, 30 June – 1 July 2011)



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Expert Committee
on State Ownership of Cultural Heritage

Model Provisions on State Ownership of Undiscovered Cultural Objects

Explanatory Report with model provisions and explanatory guidelines

INTRODUCTION

This document contains model legislative provisions (the “Model Provisions”) established by a group of experts convened by the UNESCO and UNIDROIT Secretariats which are intended to assist domestic legislative bodies in the establishment of a legislative framework for heritage protection, to adopt effective legislation for the establishment and recognition of the State’s ownership of undiscovered cultural objects with a view, inter alia, to facilitating restitution in case of unlawful removal. They are followed by guidelines aimed at better understanding the provisions.

The Model Provisions cannot answer all questions raised by the legal status of undiscovered cultural objects. They are designed to be applied, adapted and supplemented where necessary by the issuance of regulations providing further details. They can either supplement or replace the relevant existing provisions to strengthen enforcement or to fill a gap.

In the context of these Model Provisions, “national law” or “domestic law” are to be understood broadly, in the sense that they also include federal, regional or international law that is applicable to the State adopting the Model Provisions (hereafter the enacting State).

BACKGROUND/CONTEXT

During the extraordinary session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation held in Seoul in November 2008 legislation on undiscovered antiquities was one of the major issues discussed. It was in particular noted that such national legislation is often too vague and that this lack of precision in legislation is often penalised by courts. States consequently encounter numerous legal obstacles when requesting restitution of such objects found in another country. A proposal was then put forward concerning the preparation of model provisions for protecting cultural property against illicit traffic to be submitted to States as a model that could be integrated into their own body of law or adapted nationally in accordance with specific legal traditions. The aim was to ensure that all States were equipped with sufficiently explicit legal principles to guarantee their ownership of cultural property.

On that occasion, Mr Patrick O'Keefe, Honorary Professor at the University of Queensland (Australia) presented the legal obstacles which many countries faced during the restitution process, particularly when dealing with archaeological artefacts from sites for which there were no inventories or documentation on provenance. He encouraged States to affirm their right to ownership of cultural heritage as an inalienable and imprescriptible right and to claim the ownership of all yet undiscovered archaeological and cultural property.

In this connection, it is worthwhile recalling that UNESCO looked at this issue as long ago as 1956 in its *Recommendation on the International Principles Applicable to Archaeological Excavations* which, after setting out the general principle that each State should ensure the protection of its archaeological heritage, it goes on to say that "[e]ach Member State should define legal status of the archaeological sub-soil and, where State ownership of the said sub-soil is recognized, specifically mention the fact in its legislation" (see Principle 5(e)).

Professor Jorge Sánchez Cordero, Director of the Mexican Center of Uniform Law and member of the Governing Council of UNIDROIT, presented a project for the effective promotion of ratification of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. Describing these Conventions as "two sides of the same coin", he depicted the UNIDROIT Convention to the Intergovernmental Committee as the natural follow-up of the 1970 Convention. In the same vein of Professor O'Keefe, he defended the possibility of drafting a uniform law to fill the legal void at the international level. He also suggested the creation of a working group that could address the task of standardisation. Indeed those conventions were based partly on national legislation, but some States did not have sufficient legislation and needed assistance.

At the 15th session of the UNESCO Intergovernmental Committee (Paris, May 2009), the twenty-two members of the Committee came out in favour of pursuing this initiative and encouraged UNESCO and UNIDROIT to set up a committee of independent experts to draft model legislative provisions defining State ownership of cultural property, in particular the archaeological heritage. Such legal guidelines could, it was felt, form the basis for drafting national legislation and promote uniformity of the cultural terminology, the ultimate goal being for all States to adopt sufficiently explicit legal principles in this area.

At its 88th session (May 2009), the UNIDROIT Governing Council decided to agree in principle to work with UNESCO in drafting an instrument that would facilitate the application of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention as well as their ratification by

as many States as possible. It was clear that the aim was not to question the principles laid down by those two instruments, but to facilitate their application.

At the 16th session of the UNESCO Intergovernmental Committee (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 General Assembly of UNIDROIT decided in December 2010 to include this item in the Work Programme 2011 – 2013, in close co-operation with UNESCO.

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 were appointed in their personal capacity as independent experts and composed as follows: as Co-chairs, Dr. Jorge Sánchez Cordero (Mexico) and Prof. Marc-André Renold (Switzerland) and, as members, Thomas Adlercreutz (Sweden), James Ding (China), Manlio Frigo (Italy), Vincent Négri (France), Patrick O’Keefe (Australia), Norman Palmer (United Kingdom) and Folarin Shyllon (Nigeria). The UNIDROIT and UNESCO Secretariats were represented by Marina Schneider and Edouard Planche respectively.

At its 90th session in May 2011, the UNIDROIT Governing Council took note of the state of advancement of the work on drafting model legislative provisions and reiterated its support and involvement for the project.

The Expert Committee met formally on three occasions in Paris, on September 20, 2010, March 14, 2011 and June 29, 2011. Several exchanges among the members of the Committee also took place via e-mail.

At its 17th session (Paris, July 2011), the UNESCO Intergovernmental Committee examined the draft Model Provisions accompanied by explanatory guidelines and adopted a recommendation in which it “takes note of the finalization of model provisions, [...] invite the Expert committee to incorporate in its explanatory guidelines the observations made [...] and] request to widely disseminate those model provisions [...]” (see Attachment I).

The UNIDROIT Governing Council then also took note of the finalisation of the model provisions and welcomed the close collaboration with UNESCO. The Council also requested the Secretariat to continue this joint effort by calling for the wide dissemination of the work.

STATUS OF THE MODEL PROVISIONS

As stated in the Recommendations adopted by the UNESCO Intergovernmental Committee at its 16th and 17th sessions, those provisions are made available to States to consider in the drafting or strengthening of their national legislations.

It is by no means a binding legal text or a normative instrument as it has not been submitted to States for formal approval. The provisions constitute a model offered to States which might need it, among other legal tools of which the UNESCO and UNIDROIT Secretariats have the mission to encourage the implementation.

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It is important at this stage to note that the Expert Committee made great efforts to come to a short text – so as to be more incisive -, with only six provisions, which aims, in line with both the 1970 UNESCO and the 1995 UNIDROIT Conventions, both to encourage the protection of archeological objects and to favor their restitution to the State where illicit excavations took place.

The drafting of clear provisions also aims at avoiding the time and efforts that would be needed to develop comprehensive interpretations of the law of the State bringing an action for return of an object that falls within the scope of these provisions.

Simplicity further avoids that ambiguity could be exploited before foreign courts. Moreover, the provisions have to be understandable by foreigners engaged in the trade in cultural heritage as it should be recalled that the Court of Appeal (United States of America) in *United States v. McClain* 593 F2d 658 at 670 held that the Mexican claim of ownership was not expressed “with sufficient clarity to survive translation into terms understandable and binding upon American citizens.”

**Model Provisions on State Ownership of
Undiscovered Cultural Objects
accompanied by explanatory guidelines**

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.

Guidelines:

It is felt that the first provision should be a general clause that recalls the general duty of the State regarding cultural objects that have not yet been discovered.

The duty relates both to the *protection* and *preservation* of such objects. These terms are to be found also in the Preambles of the UNESCO Convention on the Protection of Underwater Cultural Heritage of 2001 and of the UNIDROIT Convention on Stolen or Illegally exported Cultural Objects of 1995.

An earlier version of the text indicated some measures to be taken: for example, a State should encourage, through financial and other means, persons who find archaeological objects to disclose their finding to the competent authorities, or encourage the national and international circulation of such archaeological objects, for example through loans to museums and other cultural institutions. It was finally decided to allow each State to take the measures it deemed necessary and appropriate in accordance with the national and international practice and standards and, among others, the 1976 UNESCO Recommendation concerning the International Exchange of Cultural Property or the Preambles of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention.

The State's duty applies both in the present times (i.e. on the date the model provisions are adopted by a State) and for the future (i.e. after they have been adopted). The obligation of preservation for future generations is indeed now a significant factor for sustainable development of all communities. The model provisions will not affect past situations as they are not intended to be retroactive. It should be recalled that the 1970 and 1995 Conventions

also have no retroactive application, following the general principle stated in Article 28 of the 1969 Vienna Convention on the Law of Treaties.

This provision imposes a general obligation and indicates the intent of the law which may be adopted according to the legislative tradition of the enacting State, such as being the first clause of a national statute, or incorporated in the statute's preamble.

Provision 2 – Definition

Undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the soil or underwater.

Guidelines:

The model provisions definition is based on the general definition given by the 1970 UNESCO Convention (art.1) and the 1995 UNIDROIT Convention (art. 2). This is to stress that these provisions must facilitate the implementation of the two instruments and that the definition is applied among the 120 States bound by the 1970 UNESCO Convention. 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 *soil* and those found *underwater*. The ownership regime under the Convention on the Protection of the Underwater Cultural Heritage of 2001 – which is different from that of these Model Provisions – will apply to States Parties to that Convention.

It should be stressed that the list of categories is not exhaustive and the enacting State is free to add what it wants (for example, also covered are anthropological objects, human remains, etc.). Similarly, the location of the object should be understood broadly (for example, an undiscovered object could be located in a building or in ice). The enacting State can of course choose on the contrary to limit the definition in its internal law.

Provision 3 – State Ownership

Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership.

Guidelines:

This provision 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. As drafted, the text clearly indicates that such objects are owned by the State *before* being discovered, thus avoiding the problem of interpretation of vague legislations.

The terms “*are owned by the State*” were chosen as opposed to “*are the property of the State*”, for the nature of the right of ownership to be absolutely clear. It is also evident that such a right does not aim at the enrichment of the State (institutions or representatives) but allows it to fulfil its role as custodian of the heritage.

A restriction should be made in case prior ownership by a third party can be established. It could be a person who buries a cultural object belonging to him/her in order to protect it

during a conflict, intending to retrieve it later so that he/she has not abandoned ownership. Some existing statutes go in the same direction when they provide for State ownership if the discovered object “belong to no one”.

Given the general and abstract nature of a model law, it does not appear necessary for it to provide in detail what the precise circumstances are in which “prior existing ownership” is to be considered as established. The national legislator might wish to provide an (illustrative or exhaustive) list of such circumstances, based on local understandings or traditions.

The enacting State may wish to consider the effect of national and international human rights laws on the validity of an extended ownership of the State (see for example the 1948 Universal Declaration of Human Rights, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms – and amendments –, the national implementing legislations).

Provision 4 – Illicit excavation or retention

Cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects.

Guidelines:

Once the principle of the State's ownership of undiscovered cultural objects is clearly established, the effects of it once the objects are illicitly discovered must be clearly set forth. Illicitly discovered means either illicit excavation or retention. This provision considers such objects as stolen.

It should be recalled in this connection that art. 3(2) of the 1995 UNIDROIT Convention provides that “[f]or the purpose of this Convention a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen when consistent with the law of the State where the excavation took place”.

Among the several possible definitions of what “illicit excavation or retention” of a cultural object can be, the definition given by art. 3(2) of the 1995 UNIDROIT Convention should be followed, 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.

This is an indirect reference to the 1995 UNIDROIT Convention which will assist States not yet Parties to it to have the legal basis in their own legislation to become Party and benefit in particular from article 3(2) (“when consistent with the law of the State where the excavation took place”), having a perfect harmony between the Convention and the national legislation. If the enacting State is not Party to the 1995 Convention, the normal rules of private law will apply such as, for example, the fact that under certain legal systems title of a stolen object cannot be acquired.

The fact that this provision considers such objects as stolen has certain legal effects in domestic law (see Provision 5). This characterisation of theft triggers for example the application of the *National Stolen Property Act* in the United States of America.

The provision follows the wording of the 1995 Convention “are deemed to be stolen” and not “are stolen” to answer a problem which some States could have because as long as it is not

in a possession of the object, such object cannot be stolen. A retention for the purposes of this provision would not then be a theft. This is why a broader formula has been chosen.

The licit or illicit nature of an excavation ("object excavated contrary to the law") will be determined by additional national legislation which very often already exists. For example, many national legislations require excavations to be authorised with an administrative process being followed.

The other effect concerns criminal law as the provision is dealing with theft. This criminal activity involves the setting into force of the criminal law procedures at national level, but also international co-operation in criminal law matters when international aspects are concerned (see Provision 6).

In case an object is lawfully excavated and lawfully exported on a temporary basis, but not returned after the expiry of the term, and thus illicitly retained, it should be deemed stolen.

Provision 5 – Inalienability

The transfer of ownership of a cultural object deemed to be stolen under Provision 4 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.

Guidelines:

Provision 5 is the private law complement of Provision 4. An undiscovered cultural object is a thing which may not be the object of private rights and remains such once it has been discovered. It can therefore not be validly acquired by a subsequent acquirer (by purchase, donation, succession, etc.).

A reservation should, however, be made if the transferor has a valid title, for example a State archeological museum that decides, validly according to its national law, to sell an item in its collection (for example by *deaccessioning*) or a private person who validly acquired the object prior to the entering into force of the model provision in the State concerned. If this is the case, the museum or the private person are the actual owners of the object and they may as such dispose of it.

The enacting State should be conscious of the limited scope of the provision: if the object is transferred abroad, the nullity of the transfer of ownership will be effective only if the foreign State has adopted Provision 5 or a similar rule.

Provision 6 – International enforcement

For the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to the law or licitly excavated but illicitly retained, such objects shall be deemed stolen objects.

Guidelines:

Model provision 6 aims to facilitate the return or the restitution of a cultural object that has been exported after having been discovered and unlawfully removed. 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 having to deal with a claim for restitution, 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(1)).

It should also be noted that the model provisions cannot and do not intend to answer all questions linked to the legal status of excavations and discoveries of cultural objects. For example, the model provisions do not deal with the issue of "treasure trove", i.e. to what extent the discoverer should be rewarded for his or her discovery. If the national legislator deems it to be relevant, this will have to be dealt with separately in accordance with its legal system. The Provisions also do not purport to solve the vexed issue of the protection of the good faith acquirer and his or her duty of diligence. It should be recalled that UNESCO specifically asked UNIDROIT to deal with this fundamental issue and the 1995 UNIDROIT Convention provides an answer in Articles 3 and 4. In particular Article 4(4) indicates the criteria to determine due diligence at the time of acquisition of an object, which will be of great assistance to the potential buyer who will know in advance how to behave, but also to the judge called to decide in case of dispute. Such criteria have inspired several national legislations adopted since.



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للتربية والعلم والثقافة

联合国教育、
科学及文化组织

ATTACHMENT 1

CLT-2011/CONF.208/COM.17/5

Paris, 1st July 2011

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INTERGOVERNMENTAL COMMITTEE FOR PROMOTING THE RETURN OF CULTURAL PROPERTY TO ITS COUNTRIES OF ORIGIN OR ITS RESTITUTION IN CASE OF ILLICIT APPROPRIATION

Seventeenth session

Paris, UNESCO Headquarters, 30 June – 1 July, 2011

Recommendation No. 4

The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation

Recalling recommendation No. 3, adopted by its 16th session on the preparation of model provisions with explanatory notes by an independent Expert committee under the auspices of UNESCO and UNIDROIT Secretariats,

Welcoming the participation of UNIDROIT in this project given its expertise regarding the harmonisation of legal systems,

1. *Thanks* with appreciation this Expert committee for having elaborated and presented the project to the Committee at its 17th session,
2. *Takes note* of the finalization of model provisions and expresses its satisfaction with the obtained results,
3. *Invites* the Expert committee to incorporate in its explanatory guidelines the observations made by the Member States and Observers of both organizations which will be circulated by UNESCO and UNIDROIT Secretariats to the States,
4. *Requests* the Secretariat to widely disseminate these model provisions with explanatory notes and to make them available to Member States which could consider them for elaborating or reinforcing their national legislations,
5. *Requests* the Secretariat to present an assessment on the use of model provisions during its 19th session.