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

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 it 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.

ATTACHMENT 1

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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.