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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**

Sixteenth session

Paris, UNESCO Headquarters, 21-23 September 2010

**FINAL REPORT OF THE SUBCOMMITTEE OF EXPERTS ON THE DRAFT
RULES OF PROCEDURE ON THE MEDIATION AND CONCILIATION**

OUTLINE

Source: Recommendation No.4 adopted by 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 15th session.

Background: At the 15th 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, held from 11 to 13 May 2009, the first four articles of the draft rules of procedure (Scope, Nature of the Procedures and Roles of the Mediator and of the Conciliator, Main Principles and Parties) were debated at length by Committee members and observers. Nevertheless, no agreement was reached on several key issues and it was therefore decided to establish an ad hoc subcommittee to continue discussions on the draft text between the 15th and 16th sessions and to submit the results of its work to the Committee at its 16th session. It was also decided at that session that the subcommittee would be composed, in accordance with the principle of balanced geographical distribution, of three representatives of States Members of the Committee per regional group and would be open to all observers wishing to attend the discussions.

Purpose: This document contains the final report of the meeting of the Intergovernmental Committee's subcommittee that was held from 18 to 20 November 2009 at UNESCO Headquarters.

I. Opening of the meeting

1. The meeting of the subcommittee of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (hereinafter the “subcommittee”) was held in Paris from 18 to 20 November 2009. The following representatives of groups of UNESCO Member States took part in the proceedings: Argentina, Burkina Faso, China, Greece, Guatemala, India, Iraq, Italy, Japan, Libyan Arab Jamahiriya, Mexico, Nigeria, Republic of Korea, Romania, Senegal and United States of America. Algeria, Belarus, Bolivia, Bulgaria, Cambodia, Canada, Chile, Colombia, Cyprus, Czech Republic, Dominican Republic, Madagascar, Mongolia, Netherlands, Peru, Russian Federation, Saudi Arabia, United Republic of Tanzania and Turkey and one non-governmental organization (the International Council of Museums – ICOM) attended as observers: The list of participants is available from the Secretariat on request.

2. The Assistant Director-General for Culture, Ms Françoise Rivière, opened the meeting. She then stated the reason for which the subcommittee had been established (see box on previous page), its main goal being to continue the discussion on the draft text considered by the Intergovernmental Committee in 2007 and 2009 and to submit a new draft to the Committee at its 16th session in 2010.

II. Election of the Chairman

3. Professor Constantin Economidès (Greece) was elected Chairman by consensus.

III. Examination of the articles of the draft rules of procedure

4. The Chairman proposed that the participants examine the draft rules of procedure on mediation and conciliation article by article. The main points discussed are summed up below.

Revision of Article 4 “Parties”

5. Many proposals were made by several delegations (Greece, Japan and United States of America) on Article 4 of the draft rules of procedure on mediation and conciliation. Italy stressed the importance of that article and the need for the conciliation and mediation provisions to be open not only to States but also to private and public institutions and even to private persons as, for example, in the agreements between some museums in the United States of America and the Italian Government. The participants raised the question of the procedure being restricted or open only to government institutions and even to private persons.

6. Japan, seconded by the United States of America and India, expressed reservations about Italy’s proposal and wished to have the phrase “is open” replaced by “is limited” in order to reduce both the scope of the article’s paragraph 3 and the ambiguities to which it could give rise. On reading Article 4, it would seem that a person might act on his or her own initiative against a State, which would be indeed far removed from the original idea. In that connection, Argentina stressed that the choice between the two terms was to be made as a political, rather than as a legal, decision and as such was a matter for the Intergovernmental Committee and not for the subcommittee.

7. Italy then specified that it was merely a matter of enabling a State to take action, consistent with the desire to facilitate restitutions, against a private person, a passive party to the procedure. That idea had led to the introduction of paragraph 2bis. In that regard, a twofold condition had been inserted for the submission of a request involving a public institution, a private institution or a person. Firstly, they must be holding the cultural object and, secondly, the State of which they are nationals must not exercise diplomatic protection.

One observer pointed to the option already available under the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States for proceedings to be instituted between a State and public institutions, private institutions and even persons.

8. The United States of America expressed concern about the risk of existing legal instruments being neglected and specified that the most satisfactory outcomes in the settlement of disputes have often been achieved through legal methods or bilateral agreements. It would therefore be counterproductive to open the procedure to private institutions and even to persons.

9. Two opposing views therefore emerged on the introduction of a new instrument on the mediation and conciliation procedure: emphasis on dialogue or legal constraint. Considered to be very progressive in relation to the law as it currently stood, paragraph 2bis, agreed to in part by several delegations, was placed in its entirety within square brackets, as it had been decided that its content would be left to the sovereign appraisal of the Intergovernmental Committee. Furthermore, as paragraphs 1, 2 and 2bis were intimately linked, the lack of consensus had rendered the decision more political than legal.

10. Lastly, the subcommittee reworded the text to limit paragraph 3 to only one mediation procedure. It laid emphasis repeatedly on the voluntary and optional aspects of the initiation of the mediation or conciliation procedure and on its non-binding outcome, while stressing, nonetheless, that once the procedure had been agreed, it should be conducted to the very end.

Revision of Article 5 “Nature of the Procedures and Roles of the Mediator and of the Conciliator”

11. During the discussion on that article, the wording “a (the) mediator(s) and conciliator(s)” was adopted for the entire text. The subcommittee preferred the term “principles” to “general principles” and deleted the pre-existing list in order not to limit the rules governing the conduct of mediators and conciliators. Owing to the reference to Article 3, paragraph 2, repetition of the principles that must guide mediation and conciliation procedures was avoided.

12. During the discussion of (b) the issue of conflicts of interest and the problem of finding a suitable wording were raised. The subcommittee opted for wording (“not acting as representatives or advisers”) that made it possible to avoid that pitfall.

13. Lastly, Article 5, paragraph 2, was deleted, as it duplicated Article 7, paragraph 4, as reworded, which covers all cases of appointment and replacement.

Revision of Article 6 “Initiating a Mediation or Conciliation Procedure”

14. The version adopted is the outcome of a proposal by the delegation of Japan incorporating an amendment proposed by the delegation of Mexico. Use of the term “proposal” instead of “request” in paragraph 1 was discussed at length but was not adopted.

15. Although the unilateral initiation of mediation or conciliation was also raised, it was not adopted by the subcommittee which preferred to state clearly, in paragraph 1, that such a procedure might be initiated “only on the basis of the mutual consent of the parties concerned”.

16. Lastly, in view of the concern caused by the powers granted to the Chairman of the Committee in the old version of Article 6, it was pointed out that the request would be

submitted in writing to the Director-General of UNESCO, who would acknowledge receipt and inform the Chairman of the Committee thereof.

17. The Chairman of the subcommittee highlighted the opposition between two schools of thought as to whether or not the procedure to be followed in submitting a request should be set out in detail in Article 6. In short, the version adopted was underpinned by the idea that the Parties had reached prior agreement without, however, indicating by which process.

Revision of Article 7 “Appointment of Mediator(s) or Conciliator(s)”

18. With the intervention of the Legal Adviser of UNESCO, the members of the subcommittee were able to reach a consensus that the deadline for appointing a mediator or conciliator should become effective after submission of the written request, and not after the request, as that would leave too little time.

19. The subcommittee Chairman summarized the discussion concerning Article 7, namely the possibility of replacing a mediator or conciliator in between Committee sessions, the nature of the office of chairman (a private individual or representative of a State), and any possible conflicts of interest that could arise in the course of the procedure. On this point, the likelihood of conflicts of interest was excluded, as the Chairman is elected in his own name and not as a representative of a country, and as the Chairman does not have the right to vote in matters involving his or her country of origin.

20. In the event that the parties do not reach an agreement, it was suggested that the Chairman of the Committee or the Director-General be authorized to appoint a mediator or conciliator. However, because this proposal is related to a policy decision, it was agreed that the Committee would either adopt or not adopt the text in square brackets in paragraph 2 of Article 7.

21. Lastly, paragraph 3 regarding the qualifications of the mediator(s) or conciliator(s) was adopted after numerous modifications. Furthermore, the subcommittee decided to insert into paragraph 4 a reference to paragraph 2 of Article 3, but did not define the procedures to be followed in the event of a breach of obligations. The addition of a provision stipulating the agreement of the parties on the appointment of new mediators or conciliators was rejected to prevent the obstruction of the process.

Revision of Article 8 “Conduct of the Mediation or Conciliation”

22. Article 8 was adopted with little difficulty. The term “confidential” was preferred to “secret”, as the restriction applies only to disclosure to the general public. In paragraph 8, the term “detailed” was replaced by “specific”; the article was then adopted, following the initial proposal of Guatemala. Lastly, to ensure flexibility, the subcommittee noted that the parties could extend the time limit for the conclusion of the procedure rather than set a minimum number of meetings.

Revision of Article 9 “Information”

23. The experts added the clause “at forthcoming and subsequent sessions” at the end of the article to ensure that the Intergovernmental Committee provided accurate information and complete follow-up.

Revision of Article 10 “Conclusion of the Procedures”

24. The subcommittee amended this article only slightly. The experts, however, confirmed the need to ensure that parties to a dispute be made aware of any decisions taken

by the other party. As such, communication between the parties is of utmost importance in finding a solution to the dispute.

25. The wording of paragraph 1(a) was amended at the request of the delegation of Argentina. Concerning subparagraph (c), the experts specified that reference was being made to the parties "to the dispute". The subcommittee Chairman expressed the wish to include a formal requirement in subparagraph (d), namely that a party wishing to withdraw from the procedure must notify their decision in writing.

26. The subcommittee Chairman suggested adding a clause whereby the parties must promptly inform the Chairman of the Committee, who shall inform the Director-General of UNESCO and the members of the Committee at its next session, of the outcome of the mediation or conciliation procedure. The subcommittee also suggested adding that any communication regarding the settlement reached be made on a concerted basis.

Revision of Article 11 "Costs"

27. The decision to allow parties as much flexibility as possible is enshrined in this article, which states that withdrawal from the procedure shall have no impact on the parties, "unless another arrangement has been agreed".

IV. Continuation of work and closure of the meeting

28. At the end of the meeting, the experts carefully reviewed the amended articles again for an overall view of the draft rules of procedure. The subcommittee approved the revised version of the text and expressed the wish that it be submitted 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 next session in April 2010.

29. The Chairman thanked all participants, observers and the Secretariat for participating in the discussions and for their constructive contributions and declared the meeting closed.

ANNEX

TITLE**DRAFT RULES OF PROCEDURE FOR MEDIATION AND CONCILIATION IN ACCORDANCE WITH ARTICLE 4, PARAGRAPH 1, OF THE STATUTES OF THE INTERGOVERNMENTAL COMMITTEE FOR PROMOTING THE RETURN OF CULTURAL PROPERTY TO ITS COUNTRIES OF ORIGIN OR ITS RESTITUTION IN CASE OF ILLICIT APPROPRIATION**

(adopted title in May 2009)

Article 1. Scope of the Rules of Procedures for Mediation and Conciliation (adopted title in May 2009)

1. In accordance with Article 4.1 of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (hereinafter the "Statutes"), any request for the return or restitution of cultural property, as defined under Article 3 of the Statutes, which are submitted to the Intergovernmental Committee (hereinafter "the Committee"), may also be dealt with under a mediation or a conciliation procedure if the parties to the dispute (hereinafter "the parties") so agree. (adopted in May 2009)
2. The rules contained herein apply both to the mediation and conciliation procedures before the Committee unless the Parties agree to amend them before the procedure. (adopted in May 2009)

Article 2. Nature of the Procedures and Roles of the Mediator and of the Conciliator (adopted title in May 2009)

1. For purposes of these Rules, "Mediation" means a process whereby, with the prior consent of the parties concerned, an outside party intervenes to bring them together and to assist them in reaching an amicable solution of their dispute with respect to the restitution or return of cultural property. (adopted in May 2009)
2. A mediation procedure shall require the involvement of one or more individuals who shall act as mediators, chosen by the Parties preferably among independent experts on the return and restitution of cultural property. (adopted in May 2009)
3. For purposes of these Rules, "Conciliation" means a process whereby, subject to their prior consent, the parties concerned submit their dispute with respect to restitution or return of cultural property to a constituted organ for investigation and for efforts to effect an amicable settlement of their dispute. (adopted in May 2009)
4. A conciliation commission shall be composed of conciliators who are preferably independent experts on restitution and return of cultural properties whose number shall be mutually agreed upon by the parties concerned. (adopted in May 2009)

5. Each party to the dispute shall appoint one or two conciliators. An additional conciliator, which shall be of a nationality different from that of the parties involved, shall be chosen jointly by the parties and will be the President of the conciliation commission. If the parties cannot agree on that person within 60 days the procedure provided under Article 7.2 below will be followed. (adopted in May 2009)
6. A list of potential mediators and conciliators shall be drawn up and maintained by the Secretariat for the information of, and possible use by, the Parties in appointing mediators or conciliators. To that end, each Member State of UNESCO shall be invited to nominate two individuals who could fulfil the role of mediator or conciliator in international cultural property disputes. The list shall be reviewed at two-year intervals when Member States may confirm existing nominations or submit new nominations. The Parties to a mediation or conciliation procedure shall remain free to appoint mediators or conciliators not included in this list. (adopted in May 2009)

Article 3. Basic Principles (adopted title in May 2009)

1. Mediation and conciliation procedures require the consent in writing of the Parties before they may be initiated. (adopted in May 2009)
2. Mediation and conciliation procedures shall be conducted in conditions of confidentiality and in accordance with the general principles of fairness, impartiality and good faith. (adopted in May 2009)
3. The Parties shall participate in a responsible manner and cooperate in order to proceed as expeditiously as possible. (adopted in May 2009)
4. The Parties, the Mediator(s) or the Conciliator(s) shall participate with a view to facilitate an amicable and just solution or settlement of the dispute having due regard to international law and recognized principles. (adopted in May 2009)

Proposal of the Subcommittee for Article 4

Article 4. Parties (title adopted in May 2009)

1. The participation to a mediation or conciliation procedure shall be **[open] [limited]** to Member States and Associate Members of UNESCO.
2. States may represent the interests of public or private institutions located in their territory or the interests of their nationals. (adopted in November 2009)
- 2bis. **[A request to initiate a mediation or conciliation procedure may be submitted by a member state or associate member of UNESCO with regard to a public or private institution or an individual if they are in possession of the cultural property concerned and the State where the institution is located or the State of which the individual is a national does not wish to represent them and if paragraphs 1 and 2 of this Article cannot be applied.]**
3. A representative of each Party shall be present at mediation meetings. Subject to Article 10, paragraph 4, each Party's representative shall have the requisite authority to prepare, with the assistance of the Mediator(s), the terms and conditions of a settlement. (adopted in November 2009)

Proposal of the Subcommittee for Article 5

Article 5. Rules of conduct for Mediator(s) and Conciliators (adopted title in November 2009)

The Mediator(s) and Conciliators shall:

- (a) act according to the principles listed in Article 3 paragraph 2. (adopted in November 2009)
- (b) not act as a representative or counsel of either Party in any proceedings concerning the dispute at issue. (adopted in November 2009)

Proposal of the Subcommittee for Article 6

Article 6. Commencement of a Mediation or Conciliation Procedure (adopted title in November 2009)

1. Mediation or conciliation procedure may be commenced only upon mutual consent of the parties concerned to resort to such procedure. Upon such mutual consent, either party shall submit in writing a request to initiate a mediation or conciliation procedure to the Director-General who shall acknowledge receipt and inform the Chairman of the Committee. (adopted in November 2009)
2. The Committee, pursuant to article 4.1 of its Statutes, may also recommend to parties which have a case pending before it to make use of mediation or conciliation procedure. (adopted in November 2009)
3. The request shall contain the names and contact information of the parties, an indication of the subject of the dispute and the relevant supporting documents. (adopted in November 2009)
4. If a mediation or conciliation procedure is initiated, it shall not prejudice the application and the effects of any other procedure or other means of dispute settlement that the parties have undertaken or wish to undertake concurrently or at a later stage. (adopted in November 2009)

Proposal of the Subcommittee for Article 7

Article 7. Appointment and Replacement of the Mediator(s) or Conciliators (adopted title in November 2009)

1. The Parties shall appoint a Mediator(s) or Conciliators within 60 days of the written request to initiate a procedure of mediation or conciliation and shall inform the Chairman of the Committee accordingly. (adopted in November 2009)
2. Failing such appointment, [the Chairman of the Committee or the Director-General of UNESCO] shall, after consultation with the Parties concerned, appoint Mediator(s) or Conciliator(s). Such an appointment shall be made as soon as possible. (adopted in November 2009)

3. Mediator(s) or Conciliators shall be selected taking into consideration their expertise in the field of restitution and/or their knowledge with regard to the nature of the dispute or the specificity of the cultural property at stake. (adopted in November 2009)
4. Any Party, after consultation with the other party, may, in case of breach of any of the obligations set forth under Article 3 (2), request at any stage of the procedure the replacement of the Mediator(s) or Conciliators. The grounds for the requested replacement must be set out clearly. In such a case, the new Mediator(s) or Conciliators must be appointed according to the same procedure originally used. (adopted in November 2009)
5. Any vacancies which may occur during a procedure as a result of death, resignation or any other cause shall be filled as soon as possible according to the procedure originally used for appointing these individuals. (adopted in November 2009)

Proposal of the Subcommittee for Article 8

Article 8. Conduct of the mediation or conciliation (adopted title in November 2009)

1. The Parties shall submit to the Mediator(s) or Conciliators the issue which is the subject of the dispute, their position thereon and all relevant documentation. All documentation will be transmitted to the other Party. (adopted in November 2009)
2. In consultation with the Parties, the Mediator(s) or Conciliators shall then set the times, places and dates of their meetings and specify in which language(s) documentation and evidence shall be submitted. (adopted in November 2009)
3. The Mediator(s) or Conciliators may conduct their own inquiries and research to determine the facts of the dispute. (adopted in November 2009)
4. Following the request of a Party, the Mediator(s) or Conciliators may allow witnesses, experts or third parties to provide documentation or evidence. (adopted in November 2009)
5. Each Party shall have the right to submit new arguments and documents in writing before the procedure is concluded. (adopted in November 2009)
6. Consultations are confidential, no recording shall be made, and information or documents obtained during the procedure shall not be disclosed, unless the Parties agree otherwise. (adopted in November 2009)
7. While complying fully with the principles listed in Article 3, paragraph 2, the Mediator(s) or Conciliators may meet and communicate separately with each Party. The information given in this way shall not be disclosed without the express authorization of the Party providing the information. (adopted in November 2009)
8. Within a conciliation procedure, unless the parties to the dispute otherwise agree, the Conciliators may decide whether to adopt specific rules of procedure, including with respect to the submission of written pleadings by the Parties. (adopted in November 2009)
9. The Mediator(s) or Conciliators shall endeavour to bring the Parties to reach an amicable settlement of the dispute within one year from the date of his/her

appointment unless otherwise agreed by the Parties. At the end of the procedure, the Conciliators submit to the Parties a report which includes their recommendations. (adopted in November 2009)

10. The Parties may set a time limit for the conclusion of the procedure, beyond which, if no settlement has been reached, the procedure shall be deemed to have been concluded. The Parties may extend the time limit. (adopted in November 2009)

Proposal of the Subcommittee for Article 9

Article 9. Information (adopted title in November 2009)

The Parties shall jointly inform the Committee on the state of progress of the procedure at its following session and its subsequent sessions. (adopted in November 2009)

Proposal of the Subcommittee for Article 10

Article 10. Conclusion of the Procedure(s) (adopted title in November 2009)

1. A mediation or conciliation procedure shall be deemed to have been concluded in one of the following cases: (adopted in November 2009)
 - (a) when all Parties deem that an amicable settlement to that dispute has been reached; (adopted in November 2009)
 - (b) when all of the Parties concerned consent in writing to deem the procedure concluded; (adopted in November 2009)
 - (c) when all Parties to the dispute have set a time limit, and the time limit has expired without a settlement having been reached; (adopted in November 2009)
 - (d) when one of the Parties has notified in writing its withdrawal from the procedure. (adopted in November 2009)
2. The Parties shall promptly inform the Chairman of the Committee, who shall inform the Director-General of UNESCO and the Members of the Committee at the next session, of the result of the mediation or conciliation procedure. Any communication of a settlement reached should be done in a coordinated manner. (adopted in November 2009)
3. When a procedure has been concluded without a settlement, the issue which is the subject of the dispute shall remain before the Committee as any other unsolved question which has been submitted to it. (adopted in November 2009)
4. The outcome of the procedure shall be binding on the Parties only when they reach a binding agreement on it. (adopted in November 2009)

Proposal of the Subcommittee for Article 11

Article 11. Costs (adopted title in November 2009)

1. The Parties shall bear in equal share the costs of the mediation or conciliation procedure unless another arrangement has been agreed. In the event of a withdrawal by a Party, this will not have an affect on the obligation of the Party in question to pay the expenses incurred up to the date of notification of withdrawal. (adopted in November 2009)
2. Expenses incurred for witnesses, experts, or legal assistance when requested by only one Party, shall be borne by that Party, unless another arrangement has been agreed. (adopted in November 2009)