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SECTION ON INTERNATIONAL LAW AND PRACTICE
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Protection of Cultural Property

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Preparation of draft legislation and/or guidance on issues that need to be resolved by legislation to implement the 1995 UNIDROIT Convention on the return of stolen and illegally exported cultural property

The purpose is to strengthen the international protection of cultural property, including the reduction of movement of stolen and illegally excavated or exported items, by enhancing rights of return, while at the same time balancing the legitimate collection, exhibition, study and trade in cultural objects. The outline and issues below are drawn from suggestions by commentators. Note: there has been no decision at this time to seek implementation of the Convention; advice is being sought on the issues reflected below and others as may be relevant so that the broader interests of the U.S. and affected groups and countries can be assessed.

Legislative Model: The 1995 UNIDROIT Convention would not be self-executing; implementing legislation will be necessary. The process followed for ratification of the 1970 UNESCO Convention is likely to be relevant. This raises the question of which legislative model(s) to employ: should the 1983 Cultural Property Implementation Act ("CPIA") be followed? Does it fit the Convention's scope and standards? Is the more recent NAGPRA and its regulations a more appropriate model? Should revisions to and compatibility with customs laws and regulations be considered?

UNIDROIT convention standards and some unresolved issues:

Recognizing that outside of the U.S. and Canada, few "art market" states have joined the existing UNESCO Convention thereby substantially limiting its effect, the UNIDROIT Convention (undertaken at UNESCO's request) was intended to provide a basis on which the remaining market states might join

a treaty regime granting rights of return, while seeking between various interests, including:

Acquisition policies of institutions, government agencies, collectors;
Archeological and special community preservation interests;
Art, antiquities, historical and communal objects trade and dealers;
Curatorial, research, exhibition and public access policies;
Differing policy concerns of "source" countries and "market" countries;
Differing country laws on control of cultural property, theft, status of bona fide acquirers, limitations on actions, repose, etc.

Key UNIDROIT Convention provisions:

Non-retroactivity expressly stated
Different return rights for stolen vs. illegally exported objects
Special provisions for archeological sites and native communities
Special provisions for "public collections" (covers American-style non profits)
Statutes of limitation and repose – moveable dividing lines; actions can be extinguished for certain claims and categories of objects.

Part I: Return of stolen objects:

Largely parallels current U.S. state and federal laws
McClain and Peru cases followed on objects with unclear title by reason of alleged theft or illegal excavation
Possibility of compensation for BFP's; keyed to due diligence & shift in burden of proof (compensation not available generally under current US laws)
Fifty-year cut off on claims, but special rights and seventy-five year periods for public collections, archeological objects, or certain objects of indigenous communities
Limitations of rights of donors are transferred to new donees

Part II: Return of illegally exported objects:

Limited to claims by governments
Limited to certain types of export laws (specifically aimed at cultural property protection)
Proof of export violation alone does not qualify for return rights
Significant loss or damage to cultural interests must be established
Possible compensation for BFP's; no shift in burden of proof
International export certificated system was rejected
Unreturned exhibition, research or restoration objects are covered
Covers most objects more than fifty years past the creator's lifetime

Some matters not covered by or uncertain under the Convention's provisions which may need to be dealt with in any proposed legislation:

Restate definitions generally for clarification *and* to set limitations on scope of application

Define and restrict scope of objects to be covered
(e.g. should scientific object exchanges or transfers be excluded or subject to different standards?)

Assuming court jurisdiction for resolution of stolen property cases, should a public or governmental board be considered for illegal export cases (following the model of US implementation of UNESCO?)

Should arbitration or other ADR resolution be authorized as a means of resolving treaty-based rights or claims?

Set rules on application of foreign laws on theft (possibly parallel US cases); set tight rules on application of export control laws

Set rules on standing, jurisdiction, venue, burden shifting

Set possible compensation standard? (e.g. forum State? State of origin?)

Objects acquired in periods of hostilities or occupation?

Prior acquired objects related to Holocaust or other special circumstances regarding mass denial of human rights?

Add conditions on preservation, public access, or limitations on resale?
(Convention does not so qualify any rights of return)

Guidance on unresolved cultural property rights that may affect legislative solutions:

(A) Should the art trade, museums and other acquiring institutions, and government agencies anticipate the rapidly improving software capacity for low-cost, high resolution recordation of objects, and expanded access internationally to such systems, which could be employed to reduce the ease with which illegally acquired objects can overtly be sold or transferred through recognized outlets?

(B) Should specialized dispute resolution panels be promoted for transborder return cases? For export violation cases only? Proposals have been made for

establishment of such systems, which could be composed of panels with expertise both on the art trade and preservation, which could operate under rules negotiated in advance. The Cultural Property Advisory Committee established to implement the UNESCO Convention could serve as one model.

(C) Should legislation seek separate standards for the problems of archaeological site protection, and develop a dual approach to rights of possession and return, differentiating known art objects from those from unearthen protected sites? The preservation in situ of archaeological, ethnological and other items often presents different issues with regard to proof of origin, ownership, value of loss, etc. The feasibility of combining both types of objects under the same rules or standards may need to be reconsidered.

(D) Should international or domestic structured fund systems be considered as methods to resolve compensatory aspects of some transborder return claims, which could lead to negotiated substitutions of items and other mechanisms to facilitate cooperative rather than adversarial proceedings?

(E) Certain public collections and sacred or communally important cultural objects, and objects integral to an archeological site may be exempted from or subject to different time limitations for claims than would otherwise be applicable under UNIDROIT (American-style non-profits can qualify as "public collections"). The Convention provides options; how should these be dealt with by in legislation?

(F) Does the Hague Convention or the current negotiation of the proposed UNESCO convention on underwater cultural resources raise issues that implicate any of the above?

(G) Holocaust seizures, forced sales or comparable means of divestiture: application of the UNESCO Convention to those circumstances is unclear, and the UNIDROIT Convention does not apply retroactively, nor does it contain provisions specific to these issues. Should legislative provisions be considered which would seek extension unilaterally to such circumstances if that is feasible? Should the possibility of seeking a protocol to either Convention to cover such cases be explored?

(H) To what extent do other recent international or domestic developments affect the foregoing, such as trends in Federal and State laws and regulations on protection of cultural property, cases decided or settled since negotiation of the UNIDROIT Convention, U.S. implementation of the 1954 Hague Convention and the first Protocol, current issues in connection with the proposed underwater cultural resources convention, and compensation and return policies since 1995 for forcible divestiture or its equivalent?