

**JUNE 2005 MEETINGS OF ICOM ADVISORY COMMITTEE AND EXECUTIVE COUNCIL:
REPORT FROM THE LEGAL AFFAIRS AND PROPERTIES COMMITTEE**

**INTERNATIONAL MEDIATION PROCESS FOR THE RESOLUTION OF DISPUTES OVER THE
OWNERSHIP OF OBJECTS IN MUSEUM COLLECTIONS**

For many years ICOM has encouraged museums facing claims or disputes over the ownership of objects in their collections to seek a negotiated settlement where possible, rather than face the often enormous expense, and likely bad publicity, of a legal action, (or the imposition of what may well be a political solution by governments).

The ICOM Legal Affairs and Properties Committee has been considering practical ways in which ICOM might encourage and help institutions and those making claims against them to pursue more informal mediation over such disputes as an alternative to court actions. We have been greatly assisted in our work by one of our members, Professor Marilyn Phelan, Paul Whitfield Horn Professor of Law at the Texas Tech University, and a leading international authority on museum and cultural property law. Following initial drafts and discussions earlier in 2004, the Legal Affairs Committee co-sponsored with the ICOM International Committees for Management (INTERCOM) and Ethnography (ICME) a half-day session on the issues during the Seoul General Conference in October 2004.

Following the considerable interest expressed in the Seoul session, both Professor Phelan and the Legal Affairs Committee overall have developed the ideas further and addressed issues raised in the various discussions and comments, including clarifying the potential role of ICOM and ensuring that ICOM does not itself become a party to any dispute or otherwise be committed in any way, financially or otherwise. The Legal Affairs and Properties Committee is now submitting the following recommendations to the Advisory Committee and Executive Council for consideration.

Patrick J. Boylan
Chairperson, ICOM Legal Affairs and Properties Committee
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INTERNATIONAL MEDIATION PROCESS

It is the policy of the International Council of Museums (ICOM) to encourage the peaceable resolution of disputes regarding the ownership of objects in museum collections that allegedly were stolen or illegally exported from the country of origin and the early settlement of such disputes through voluntary settlement procedures rather than through lengthy and expensive litigation or through political decisions.. Discussion at the 1983 ICOM General Conference led to Resolution No. 5: Return of Cultural Property to its Countries of Origin, which "urges ICOM members, both at the individual and institutional levels, to initiate dialogues with an open-minded attitude, on the basis of professional and scientific principles, concerning requests for the return of cultural property to the countries of origin." To provide for the peaceable resolution of such disputes, including requests for restitution from individuals, ICOM has established an International Mediation Panel to consider issues relating to the return/restitution of cultural property in museum collections that was stolen, illegally exported, illegally confiscated, or otherwise wrongfully expropriated. Management of the Mediation Panel is vested in a committee selected by the Executive Council of the International Council

of Museums.

The committee, upon request from a museum, some other entity, or an individual, may refer a dispute to a mediation forum in which an impartial person or persons, the mediator or mediators, facilitate(s) communication between parties to the dispute to promote reconciliation, settlement, or understanding among them.

When the committee refers a dispute for mediation, the committee may appoint, from a list of panel members prepared by the International Council of Museums, an impartial third party to facilitate the procedure. If the parties to the dispute prefer, the committee may appoint such an impartial third party, but may also appoint two other persons as mediators, one each from a list submitted by each party to the dispute.

The mediator (or mediators) shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement. Unless expressly authorized by the disclosing party, the mediator (or mediators) may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. Unless the parties agree otherwise, all matters, including the conduct of the parties during the mediation process, are confidential and, thus, may not be disclosed.

MEDIATION PROCEDURE FOR CULTURAL PROPERTY DISPUTES

This procedure applies to disputes relating to ownership of cultural property held in museum collections in instances wherein parties to the dispute agree to mediate the issues.

In disputes regarding ownership of cultural property in a museum collection that allegedly has been either stolen, illegally confiscated, illegally exported from the country of origin, or otherwise wrongfully expropriated, the International Council of Museums (ICOM) will assist in the process of mediation whereby an impartial person, a mediator, will facilitate communication between the parties to promote reconciliation, settlement, or understanding among the parties in the following instances:

- parties involved in the dispute request mediation, or
- following a request from one party to a dispute, the President of ICOM, in consultation with the Executive Council, suggests mediation in instances wherein ICOM deems it to be in the best interest of parties to the dispute to mediate the issues and the parties involved then agree to mediation.

The Mediation Committee for ICOM, in consultation with the parties to the mediation, will nominate an impartial third party (or mediation panel at the parties' request) from the International Mediation Panel to facilitate the mediation procedure. The Mediation Committee for ICOM, in consultation with the parties to the dispute, will determine the required qualifications of the mediator(s). At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate the dispute.

Before accepting a mediation, an individual who is requested to serve as a mediator shall: (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation. If a mediator learns of any fact as described above after accepting a mediation, the mediator shall disclose it as soon as is practicable. A mediator must be impartial unless, after disclosure of the facts noted above, the parties agree otherwise.

All mediation communications will be confidential unless the parties agree otherwise in writing. Mediation communications also will be privileged and will not be subject to discovery or be admissible in evidence in any proceeding unless (1) all parties agree in a written agreement signed by all parties that the mediation communications are not privileged or (2) the communications are made during a session of a mediation which is open, or is required by law to be open, to the public.

A person (or panel) appointed to facilitate a mediation communication shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement. A person serving as a mediator may not impose his or her own judgment on the issues for that of the parties. Unless expressly authorized by the disclosing party, an impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. (Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may not be disclosed to anyone, including officials within ICOM.)

The mediation process should be conducted in a timely fashion. Parties to a dispute should attempt to conclude the mediation process within 180 days from the date the parties to a dispute agree to mediation.

Unless parties to a mediation agree otherwise, the following procedures shall apply:

- Each party to the mediation shall have a representative present at the mediation hearing who has settlement authority. If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
- An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.
- Discovery must be simple and inexpensive to both parties to the dispute. Discovery shall be limited to requests for the production of documents, interrogatories, and affidavits from the parties involved. In most disputes, affidavits from the parties involved should be sufficient.
- Any findings of fact by the mediator(s) shall be binding on the parties.
- A mediator (or mediation panel) may disclose the following
 - (1) whether the mediation has occurred or has terminated and
 - (2) whether a settlement was reached, and attendance.
- A mediator (or mediation panel) may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to any court, administrative agency, or other authority that may make a ruling on the dispute which is the subject of the mediation unless parties to the mediation agree that mediation communications will not be privileged or they are made during a mediation which is open to the public.
- Until and unless a fund can be established to provide for the payment of costs of the mediation process, the parties to the mediation will share equally the mediator's fee (or fees of members of a mediation panel) and the expenses of the mediation.
- A person appointed to facilitate mediation communications who is a volunteer is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. A volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.
- ICOM is immune from civil liability, including attorneys' fees and court costs, for its role in facilitating the mediation process, both in reference to its nomination of the mediator(s) and in assisting in providing for a forum for the mediation process.