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SUMMARY REPORT

Item 1 of the agenda – Opening of the session and welcome by the Secretary-General

1. *The UNIDROIT Secretary-General*, Professor Ignacio Tirado, welcomed the participants to the second session of the Working Group on Orphan Objects. He recalled that after the first meeting of the Working Group a potential framework of the future UNIDROIT Guidelines had been reviewed, containing principles on the definition of orphan cultural objects, applicable law, provenance, due diligence, burden of proof, and procedure for "clearing" orphan objects. He added that for the second meeting of the Working Group, the Secretariat had developed a more advanced version of the Preliminary Draft Guidelines on Orphan Cultural Objects for the consideration of the participants. Additionally, a Working Note on different types of orphan cultural objects had been prepared, categorising orphan cultural objects based on their financial and/or cultural value.

Item 2 of the agenda – Adoption of the draft agenda and organisation of the session
(Study S70B – W.G.2 – Doc. 1)

2. The Working Group adopted the draft agenda as proposed (see Annexe I). On the second day, the Working Group decided to slightly modify the agenda by inverting the discussion on Guideline E (Evidence and burden of proof) and F (Procedure for "clearing" an orphan cultural object), starting with Guideline F.

Item 3 of the agenda – Presentation of the new members of the Working Group

3. As suggested by the Chairman at the first meeting, the Working Group was expanded with representatives from the United States of America and China: Ms Patty Gerstenblith, Distinguished Research Professor of Law at the DePaul University College of Law and Director of its Center for Art, Museum and Cultural Heritage Law, and Ms Zhang Jianhong, Professor of Archives at the Palace Museum in Beijing, respectively. See the list of participants in Annexe II.

Item 4 of the agenda – Presentation of China's legal response to orphan cultural relics (Study S70B – W.G. 2 – Doc. 4)

4. *Ms Zhang* presented the newly adopted Chinese Cultural Relics Protection Law, which had removed the provision prohibiting state-owned museums from collecting cultural relics of unknown origin and objects with archival lacunae or only partial provenance. She indicated that this was of significant importance for various reasons.

5. First, the removal of this prohibition allowed museums to expand their collections' channels, effectively giving an opportunity to these artefacts with potential value but unknown sources to be properly preserved and put on display. This also encouraged the further enrichment of the types and quantities of museum collections, making the cultural exhibitions of museums more comprehensive and diverse, and providing the public with richer cultural experiences. Secondly, museums could now protect and restore these relics with their professional preservation technology, preserving them for future generations. Experts could also conduct further research to explore their historical, cultural, and artistic significance, contributing to academic development and a deeper understanding of China's heritage. Finally, she stressed that the removal of the prohibition encouraged the holders of private cultural relics to actively donate or transfer them to state-owned museums, enhancing their sense of responsibility in the identification and protection of cultural relics.

Item 5 of the agenda – Discussion of the different types of orphan cultural objects (Study S70B – W.G. 2 – Doc. 3)

6. *Mr Renold* opened the discussion by recalling the need to determine what the members of the Working Group considered as an orphan cultural object. To aid in the participants' consideration of the case study, he referred to the summary report of the first session of the Working Group, in which three examples had been presented (Study S70B – W.G.1 – Doc 3).

7. *Ms Tassignon, Fondation Gandur pour l'Art*, then presented the Working Note prepared for the second session, which demonstrated that orphan cultural objects could be differentiated into the three following categories:

(a) *Low financial value with low cultural value*: objects produced in big numbers, such as antique terracotta lamps, modelled or moulded and made in hundreds of copies, or glass vessels from the Imperial Roman period, not moulded but mass-produced, currently on sale for a maximum of a few hundred euro/US dollars.

(b) *Low financial value with high cultural value*: objects made of material of little value (terracotta) or of small dimensions, but bearing inscriptions that give a historical context, names or scenes. For example, a Mesopotamian or Neo-Assyrian "foundation nail" (3rd-1st century BC) would be on sale for approximately 800 euro/ 850 US dollars; although the inscription thereon was generally repetitive, it might include new names of rulers or deities. Another later example could be Roman bronze seals (*signacula*), estimated at 200-400 euro, which might have an important inscription.

(c) *High financial value with high cultural value*: for the rarity of the object in the historical context in which it was created. Objects in this category were often made from precious or rare materials, with little-documented forms, scenes or inscriptions. An example might be a Roman cameo glass vase, with a value that could reach several million euro/US dollars. Another example could be a votive stele from Asia Minor with a Greek inscription.

8. The discussion started with a focus on the proportion of the cost of conducting the provenance research regarding the level of cultural value. *The UNIDROIT Secretary-General* asked if

any participants wanted to comment on the three-tiered classification, highlighting the fact that *financial* value and *cultural* value were distinct, which was crucial for the Guidelines.

9. *An observer* agreed with the concept of the classification and underlined that carrying out due diligence had to be proportionate to the financial value of the cultural good. He pointed out that it seemed unrealistic to ask for a full provenance report for cultural objects with low financial value, and therefore, proportionate due diligence must be established. He also raised a question regarding who would be entitled to categorise the objects and decide on the financial and/or cultural importance thereof. He mentioned the European Union export regulation and legislation from the United Kingdom that already referred to financial thresholds, which could be at least a basis for discussion.

10. *Ms Tassignon* proposed that a group of experts, art historians and archaeologists should discuss this matter, as they were most familiar with the objects.

11. *A participant* highlighted that financial value was determined by the market, but she wondered who would decide and evaluate the object's cultural significance, and significance for what purpose. She indicated that the impact of orphan cultural objects' context had to be incorporated into the way they were categorised. The market did not always recognise the cultural value and cultural importance of some types of objects. She suggested that the Working Group create more categories, as the examples proposed were archaeological objects for which she doubted that the financial value should be a criterion. She suggested to separate objects that were in the first place made for the market, while distinguishing them from objects that were not, in addition to distinguishing objects having been excavated and objects from Indigenous communities.

12. *Another participant* raised a concern about the objectivity of a cultural value benchmark created by the Guidelines, especially regarding the second category presented (Low financial value with high cultural value). He believed that the third category (High financial value with high cultural value) was the most interesting, recalling the "national treasures" of the European regulations.

13. *Mr Renold* stressed that three preliminary Guidelines were linked to the current discussion, namely those relating to the definition, due diligence and evidence and burden of proof, which would be discussed in detail later.

14. *A participant* suggested that the categories created had to be applicable to the objects coming from different countries and, therefore, contexts. She reminded the participants that the aim of the suggested procedure was that no one would claim the object afterwards because the provenance would have been cleared.

15. *The Secretary-General* recalled that UNIDROIT was not bound by any one legislation as it was a global organisation and explained that UNIDROIT instruments were for use by everyone and in every country. Countries did not need to be a member of the organisation to use UNIDROIT instruments.

16. *Mr Renold* stressed that the present preliminary Guidelines would become a proposal made under the auspices of UNIDROIT. He proposed to refer to the Annexe of the 1995 UNIDROIT Convention, which already listed categories of cultural objects, although financial value was not taken into account in such categorisation. The Annexe could be used for various categories, and there would be a consideration of value for each.

17. *A participant* agreed with how the context of the object might have an impact on the relationship between financial value and cultural significance. For example, for some looted Judaica objects that might not be of a high financial value, current collectors might spend a disproportionately large amount of money on provenance research, legal fees, etc., in order to identify the provenance of an object of a cultural significance which had been dispossessed over the course of history. The context was important and had to be taken into account in the categorisation.

18. *Another participant* pointed out the challenge of establishing which country was in a position to identify an object's cultural value and suggested that countries might determine the cultural value of their own cultural objects.

19. *The Deputy Secretary-General of UNIDROIT* asked whether taking the existing list of categories from the 1995 UNIDROIT Convention as a reference and scrutinising them against the proposed high/low value classification related more to the scope of the Guidelines or to the due diligence activity.

20. *Mr Renold* stressed that the 1970 UNESCO and 1995 UNIDROIT Conventions already established benchmarks for the definition of cultural objects and proposed using those benchmarks and categories as points of reference.

21. *An observer* submitted the idea to take inspiration from the categories of the ICOM Red Lists of particularly vulnerable objects. To more specifically address risks regarding cultural objects' provenance, he underlined the need to add sub-categories, fearing the existing categories would be too general.

22. *A participant* asked if the expected level of due diligence should be adapted to the category, as well as the risk the art market dealer was willing to take regarding the financial impact involved in the acquisition of a cultural object with unclear provenance. She suggested coming back to the purpose of the discussion and deciding whether the Working Group was seeking a universal definition (for which no financial test would be necessary) or only the level of due diligence (where the financial aspect would be relevant). She said that if the goal was a universal definition, then the Working Group could go along with the proposal of Mr Renold.

23. *Ms Tassignon* presented a case study relating to one cultural object of the collection, the Wahballat statuette, which had an incomplete pedigree.

24. Ms Tassignon explained that the Wahballat statuette had a well-known backstory. The first owner had been an Iranian antiques dealer who fled the Mulas regime to settle in the United States in 1979. The dealer's heirs consigned and sold the object at Christie's in 2009. The object then entered a French private collection and was sold to La Reine Margot, a Parisian art gallery. On 28 November 2010, the object was purchased from the gallery by the current owner, the *Fondation Gandur pour l'Art*. Documents, archives and owner identity had been found for every provenance reference, except for the Iranian antiques dealer.

25. The problem with the Wahballat statuette was twofold: (1) the lack of information regarding its provenance and (2) the impossibility of publishing the provenance research findings as a consequence. Ms Tassignon further explained the following:

(a) She had conducted provenance research for the Wahballat statuette, tracing the chain of ownership up to the sale of the statuette by Christie's New York on 3 June 2009, lot n°52, but the auction house had refused to communicate the name of the original Iranian dealer. Ms Tassignon underlined that she had been able to identify all the owners' names after the Christie's sale but could not verify Christie's information and go beyond that owner's provenance reference.

(b) Ms Tassignon explained her intention to publish an article about this statuette which she identified as the only known representation of Wahballat, the son of Zenobia, the last queen of Palmyra. She emphasised the statue's archaeological and historical significance. However, her intention to publish an article on the subject was misinterpreted by the organisers of a conference she had attended, who mistakenly believed that the cultural object was connected to illicit trafficking. As a result, they excluded her work from the conference proceedings. Ms

Tassignon disagreed with the assumption that an object with an uncertain provenance should automatically be linked to illicit trafficking. She argued that such assumptions silenced cultural objects and hindered proper provenance research.

26. During the discussion, *a participant* underlined that, in this case study, she saw three points which might render the provenance problematic: the legal title, the marketability and the ethical policies adopted by archaeological organisations and their publications.

27. *The Secretary-General* raised a question concerning the possibility of an object being marketable without status or a legal title. *A participant* answered by underlining the willingness of dealers and collectors to accept the risk, even knowing they might not obtain a legal title. He referred to the question of legal title against marketability, or *nemo dat quod non habet* versus positive possession and stressed that the market had to grapple with this difference.

28. *An observer* and *Mr Renold* expressed the need to differentiate between the legal status of a cultural object and the financial/marketable status, although such distinction was less relevant nowadays due to the existence of international texts such as the 1995 UNIDROIT Convention.

Item 6 of the agenda – Presentation and discussion of the preliminary draft Guidelines
(Study S70B – W.G. 2 – Doc. 2)

29. After a general presentation of the preliminary draft Guidelines, *the Secretary-General* indicated that each Guideline would be examined in more detail and that the current Guidelines should be considered only as a basis, the discussion being open, with more to be added.

A. Definition of an orphan cultural object

> **For the purposes of the present Guidelines, an orphan cultural object is a movable cultural object, as defined in Article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which totally or partially lacks documented and/or identifiable provenance (for example no available or reliable relevant archives or publications).**

30. *A participant* indicated that she saw two main issues with the proposed definition. The first was the question of how far back someone should go in provenance research, as it was not practical to go back to the date of creation of the object, and therefore, more definite parameters were necessary. The second issue related to the term "reliable" as to the documentation.

31. *Other participants* pointed out that, in most cases, it was nearly impossible to establish perfect provenance and trace back the entire uninterrupted provenance chain of a cultural object from its creation or discovery, and that the project might propose a time limit or a reference to a specific date.

32. *A participant* noted that a single date could not be proposed for every cultural object, as it could not address and frame every orphan cultural object's provenance research.

33. *Another participant* indicated that, for archaeological objects, it was necessary to deal with the date established by the national legislation (ownership laws), which was different in each country, and therefore a single date would be problematic.

34. *An observer* referred to Article 2.3 of the ICOM Code of Ethics for Museums,[1] on Provenance and Due Diligence, indicating that "*due diligence in this regard should establish the full history of the item since discovery or production*." According to him, demanding the full history of the item since discovery or production was an unrealistic demand for art market dealers.

35. *The Secretary-General* reminded the Working Group that it was defining this concept only for the purposes of the instrument at hand and that it was to be inserted in the text for the sake of clarity.

36. *A participant* vouched against setting a new date of reference for provenance research, as it would likely create a new scheme and not use existing reference dates, such as those from the 1970 UNESCO Convention or the 1995 UNIDROIT Convention.

37. *Another participant* suggested to replace *partially* with *substantially*, as the first term was too vague and not legalistic. *Still another participant* noted that a lack could be *total* or *partial*, but the consequence of the lack was *substantial,* and therefore proposed to keep *partially* in the Guideline and to explain this in the commentary.

38. *The Deputy Secretary-General* suggested reflecting in both the Guideline and the commentary that total or partial lack (of documented and/or identifiable provenance) could have substantial consequences that should be considered for due diligence. Still, substantial consequences should not be included as a limit to the scope of the definition.

39. *A participant* asked what a substantial consequence would be and underlined the need to define this notion. *An observer* answered that the consequence was the object's inability to circulate on the market.

40. Another issue raised was the term "reliable" in relation to the quality of the documentation and the need to determine acceptable provenance documentation, given the recent increase in false provenance.

41. *The Secretary-General* asked for clarification about the difference between *documented* and *identified* provenance and questioned whether it was possible to have identified provenance which was not documented. *Mr Renold* explained that *documented* provenance referred to clear archives, and *identifiable* provenance referred to the existence of witnesses but without any documents.

42. *A participant* proposed to replace the notion of *identifiable* with the notion of *reliable*, referring to the quality of the evidence. *Another participant* expressed her opinion regarding the importance of keeping *identifiable* in the definition, as some cultures did not have written evidence.

43. *An observer* emphasised that incomplete provenance was an obstacle to the object's circulation on the market and stressed that it needed to be clearly expressed in the commentary to this Guideline. In view of this, *a participant* questioned whether the Guidelines' purpose was to determine the marketability of an object. *Mr Renold* suggested that the Guidelines should aim to provide for all the possible consequences, including those for the art market and scientific research.

44. *An observer* suggested changing the drafting of "*partially lacks"*, as one could not partially lack anything, and proposed redrafting as "*lacks complete documentation or provenance"*. *Another participant* proposed instead, "*which has incomplete (documented) provenance"*.

[1] ICOM Code of Ethics for Museums, 2017, p.9, https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf, (last accessed 16 January 2025).

45. Addressing the questions suggested for discussion in document Study S70B – W.G.2 – Doc. 2, *a participant* stated that the notion of archives in parentheses should be removed from the definition itself and be better placed in the commentary. She elaborated that an archive was an intentional group of documents and therefore should not be kept in the actual definition as an example of provenance documentation.

46. The need to define what a documented provenance was in the commentary of the Guideline was highlighted, as well as what an incomplete provenance was. *Mr Renold* indicated that the case example presented (Wahballat statuette) could be used as a reference to define what an incomplete provenance was.

47. Upon the second reading of the Guideline, *a participant* suggested to add "movable cultural object *of importance*", and the question of a glossary of terms was raised. The term "incomplete provenance" was inserted, meaning that "incomplete" had effects with consequences for present and future circulation and use.

B. Applicable Law

> **The existence, legal status and acquisition of an orphan object are subject to the relevant conventions. If no convention is applicable, the existence and legal status of an orphan object are subject to the domestic law of its country of origin. The acquisition of an orphan cultural object is subject to the law of the place of its location at the time of the transaction, provided the principles of due diligence (below D) are respected**.

48. *Mr Renold* explained the architecture of the provision, starting with a reference to the existence, legal status, and acquisition being subject to the relevant international conventions in the first place, and then, if no convention was applicable, the Guideline referred to the domestic law with two different rules, one to regulate the existence and legal status (law of its country of origin, which was based on the Belgian Code of private international law[2]) and another for acquisition (law of the place of its location at the time of the transaction).

49. *The Deputy Secretary-General* asked why, at the end of the provision, the reference to the Guidelines was limited to only "the principles of due diligence (below D)" and suggested to indicate "provided these principles are respected", and that in general it would be good to clarify the relationship of those Guidelines, even if they were not binding, with already existing due diligence references. The answer given was that the reference to due diligence came from the Belgian Code, which referred to the good faith purchaser, but it was acknowledged that the proposed text was better suited.

50. *Several participants* discussed the reference to "relevant conventions" and how to determine that a convention was applicable or not. It was indicated that the wording referred to whether or not a State was a Party or not to a convention, or if the situation was outside the scope of a particular convention. It was felt necessary to develop this further in the commentary to the provision.

51. As to the proposed law regulating the existence and the legal status of an orphan object – the domestic law of the country of origin – *several participants and observers* indicated that on many occasions such country was unknown or unclear, and therefore that there was a need to fill the gap. *An observer* proposed to use the *lex rei sitae*, instead of the *lex originis*, and suggested the law of

[2] Belgian Code of Private International Law, 2004, p.25, https://www.dipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf, last accessed on 16 January 2025

the last recorded place of the item, because the country of origin was unknown by definition since the object was orphan.

52. As to the proposed law regulating acquisition – the law of the place of the location at the time of the transaction – *a participant* noted that in her country, the United States of America, the law of the place of acquisition tended not to be very relevant and that primarily the choice of law or conflict of law was resolved through the jurisdiction with "the most significant contacts" and the applicable law, at the state level, would usually be the law of the place where the object was located at the time it was being claimed. *The Secretary-General* also suggested to discuss whether party autonomy could be the preferred choice. *Mr Renold* added that the conflict of law rule here proposed was indeed more common in Continental Europe and suggested a change in drafting to "the most significant contact terms", which would bring it closer to the U.S. solution. He also noted that, in property issues, if there was party autonomy at all (rarely), it was limited to only the two parties who signed the agreement, but not to third parties.

53. *A participant* expressed the opinion that there was no need for another applicable law (other than the Guidelines) because the purpose was to subject these objects to the Guidelines themselves. The Guidelines would be a new venture, the aim of which was to find a way to solve a problematic situation under existing laws and conventions. She reiterated that the problem was that in many cases the country of origin was unknown, and the question of the applicable law would not be solved. She made a comparison with the Washington Principles, which applied regardless of other law.

54. *The Secretary-General* recalled that the work here being elaborated was a soft-law instrument, not binding law, and therefore *some* law had to apply. The question was whether the Group wanted to provide guidance to States as to which law should apply at which part of the transaction, or whether party autonomy should apply, and therefore the parties should freely decide that these Guidelines were applicable to them. He noted that a majority of countries did not recognise non-binding laws as a source of the law. *The Deputy Secretary-General* added that even if the Guidelines would be the first point of reference, there might be gaps which would need to be filled by referring to the applicable law; this was not a complete set of principles with detailed rules even within the Guidelines' scope of application. The question was whether to leave the question open to the State where the issue would arise or whether to link to any of the other domestic laws mentioned in the provision for the different issues.

55. *An observer* noted that sometimes the only element known of an object was its location, maybe the location of the last transfer of the object, and therefore suggested to use the *lex rei sitae* as the most logical applicable law for the acquisition as well.

56. *A participant* emphasised that the result of Washington Principles[3] after 25 years of experience was the impact on the way to solve problems; taking those Principles as an example for this project would bring about a "fair and just solution" for orphan objects as well. *Another member* also indicated the kind of "soft-law jurisprudence" that had emerged from the implementation of the Washington Principles through the Restitution Committees set up by six countries (along with the restatement of the restitution rules that had been decided in German and English). He also suggested to draw inspiration from the Washington Principles, which should be considered as going well beyond their initial declaration, having developed into a substantial body of soft-law jurisprudence with major similarities (while also some differences) among six important jurisdictions in Europe. He also indicated that the new Restitution Committee set up in Switzerland would deal with not only Holocaust-era objects, but also colonial-era objects, and that it could be an opportunity to expand the scope of inquiry into the broader category of orphan objects. Moreover, it was noted that in Germany, all such matters were going to arbitration (basically undoing the Restitution Committee),

[3] Washington Conference Principles on Nazi-Confiscated Art, 1998, https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.

and therefore this could be an institutional opportunity to include orphan objects as part of a broader "package", not governed by hard law, but part of an emerging, "softer" jurisprudence.

57. The discussion then turned to focus on the type of instrument being elaborated and its addressees, legislators or market actors. It was recalled that the UNIDROIT Governing Council expected a soft-law guidance instrument (as opposed to a model law or a treaty). *Some participants* noted that the Guidelines should follow the Washington Principles in involving legislators more, while *others* believed that they should be addressed to the operators of the market involved in transactions relating to orphan objects.

58. As to the question of whether it would be possible to involve States in the adoption process, *the Deputy Secretary-General* answered that it had been done in the past. In such case, States had become involved for an instrument where there was an important regulatory aspect which was not directly treated in the instrument but which in any case complicated the considerations, and therefore State involvement served to assuage potential concerns of the Governing Council.

59. Several interventions were in favour of writing Guidelines more for market operators, but it was noted that the Group could also decide to target legislators, or both legislators and market participants, possibly differentiating in different parts of the instrument, or simply through a very general set of principles that could be used by judges in deciding cases, practitioners for use in contracts, or simply by those who wanted to operate ethically. *A participant* and *an observer* indicated the UNIDROIT Principles on Digital Assets and Private Law as an example to follow, but it was emphasised that such instrument was exclusively aimed at legislators. *A member* indicated that the current Guideline F relating to the "Procedure for 'clearing' an orphan cultural object" was aimed at legislators.

60. *A participant* stressed the point that there was a policy in favour of clearing the objects, but there were also arguments against it, and there were limits to the extent to which private transactions could trump the law – essentially, they could not. She also indicated that the Group was not in a position to say there should be a uniform law here, partly because even if members were not representing countries, most of the participants were from market countries, and there was not much expertise coming from source countries.

61. *A participant* indicated that there should be an alternative for the conflict of laws rule, as mentioned before, and suggested drafting similar to "the law of the place where the object is currently located, as consistent with current choice of law rules in that jurisdiction". Then, a discussion followed on whether this alternative should apply as to the object's (a) existence and legal status and/or (b) acquisition.

62. *An observer* made another proposal to apply the *lex rei sitae* both to determine the status of an object on the basis of the law of the place where the object was located and also to regulate the contract on the basis of the place of the object. She indicated that the starting point was the assumption that the *lex originis* was not known and so it could not be applied.

63. As to the rule regulating the transaction, *Mr Renold* explained that the provision could be rephrased to refer to the concept of "the most significant contacts", or perhaps the "closest connection", and it could be: "the acquisition of an orphan cultur[al] object is subject to the law of the State with which there is the most significant contact". He stressed that under a civil law perspective, the "closest connection" would be, for example in Switzerland, "the law of the location of the object when the transaction occurred". He said that if the "closest connection" would be the rule, the commentary would need to specify that in the United States it would often be the place where the object was at the time of the controversy, but that it could also be different in civil law jurisdictions. *The participant who suggested the alternative rule* specified that in her country the "closest connection" would be the place where the object was located at the time of the decision.

64. *The Secretary-General* wondered whether it would be useful guidance to decide that the solution would be whatever the judge decided. The aim should be to bring clarity and to avoid fragmentation. It would not be as strong as a rule. *A participant* suggested to develop some sort of a cross-border common denominator of what constituted a "close connection". *Another* agreed that it would be interesting to come up with some criteria for determining "significant contacts" in the commentary.

65. *An observer* suggested to use "transfer" instead of "acquisition", which she saw as more neutral because "acquisition" from a source country perspective appeared very market-oriented. The other participants agreed.

66. *Some participants* also noted that the reference to the "State of origin" usually applied to archaeological objects, but the relevant market was not primarily of archaeological objects. *An observer* added that archaeological objects were presumed to be owned by the State, which could use the "*ordre public"* doctrine to claim the objects (inalienability).

67. Later, the Working Group discussed again – as it could not reach an agreement – whether the future Guidelines would be aimed mainly at States and legislators, similar to the Washington Principles, with the idea of an instrument that would be endorsed by UNIDROIT's Governing Council, not rising to the level of a formal treaty for ratification, but instead a guidance tool encouraging States, markets, and provenance researchers to adopt the Principles. *A member* emphasised that the Guidelines did not necessarily need to be aimed at legislators and pointed out that, while Austria had implemented legislation based on the Washington Principles, most other countries (like Germany) had used ministerial decrees or intergovernmental agreements instead. He suggested that this approach would be less intimidating for States, as it did not require parliamentary legislation but could involve softer mechanisms. He advocated for following the same approach as the Washington Principles, focusing on flexibility in implementation. *Other participants* agreed.

68. *A participant* highlighted the practical value of creating norms or guidelines and shared his experience as a prosecutor in Brazil. He explained that such guidelines could provide valuable direction for both market actors during acquisitions and judges when handling controversies, and he emphasised that while these norms might not be legally binding, they were still useful for prosecutors, judges, and other stakeholders. He therefore suggested that the guidelines should be designed to be useful to a broad range of users – States, markets, and other parties – while recognising that their application might vary across different countries and contexts.

69. Still later, the Working Group came back to the issue of applicable law, in particular when the country of origin was unknown, as the issue would remain. *A participant* indicated that, as currently drafted, the provision would only complicate the situation, and the language needed to be consistent (as it spoke of acquisition and then transaction, it split the matters of existence and legal status of the objects, and it gave priority to the law of the country of origin while recognising that this was often unknown).

70. *A member* reminded the Working Group of the "clearing procedure" and the fact that the proposal was to bring the object to a committee until a solution to "clear" the object was found (and therefore there would be no need for a determination of applicable law). *The Secretary-General* replied that the committee would be the forum but would not by itself exclude the need for applicable law.

71. *An observer* raised a concern regarding the possible unwillingness of States to recognise such a committee and pointed out the possibility for States to wish to go to court, thus rendering the determination of the applicable law by the Working Group all the more crucial.

72. *A representative of the art market* pointed out the risk of the uncertainty of the provenance information communicated (or the complete lack thereof). Market collectors as well as museums faced this risk.

73. *The Secretary-General* stated that the current draft was not providing a full legal framework and that in some cases additional elements not foreseen under the framework might be relevant. The Working Group had to decide on the factors determining the applicable law for orphan objects.

74. The discussion did not end with a final decision as to whether the Group wanted to have a rule on applicable law at all, let alone which rule. This is why the provision appears in square brackets. *The Secretary-General* stated that research should be carried out to generate a proposal for the next session, based on comparable situations.

C. Provenance Research

> **Provenance research is the means by which the owner or the acquirer of an orphan cultural object is to find out the place of origin and/or the history of acquisition of the object. No universal definition can be proposed, as provenance research will depend on the specific case at hand and its history. Provenance research should be performed by professionals, and it can involve, among other actions, library research, archives (public or private) consultation, documentation analysis, or exchanges with witnesses.**

75. *A participant* pointed out that the term "*acquisition"* was not appropriate in the drafting of Guideline C and proposed replacing it with the term "*circulation"*. She also suggested to replace "*owner"* with "*possessor"*. Another proposal was to replace "*means*" by "*process*".

76. *Another participant* raised a concern about the term "*orphan cultural object",* as provenance research should be done before buying any cultural object. Additionally, she outlined the complexity of knowing that the object being bought was an orphan cultural object without having conducted any provenance research. She proposed adding a reference to Article 4(4) of the 1995 UNIDROIT Convention in the Annexe.

77. As to the definition of research provenance, *a participant* intervened, saying that it was too early to define it in the text of the Guideline, as this was an emerging academic discipline, and the Working Group could instead give examples of provenance research in the commentary. *Several participants* proposed deleting the sentence "*No universal definition can be proposed*".

78. *Another participant* suggested that if the Guideline was to propose a definition of provenance research, it should not be similar to Holocaust provenance research. The definition should be drawn in consultation with a provenance researcher; some names were proposed to assist the Working Group in this regard.

79. *A participant* added that these Guidelines should address the provenance research field in depth, as it represented the core of the Guidelines. She proposed that this Guideline be developed by multiple provenance researchers, as the methodology differed depending on the location of the cultural object. *Some participants* suggested that provenance research would deserve more than one provision due to its importance (another Guideline or an Annexe).

80. *Another participant* noted that the Guidelines had to address key issues for both the present and the future. The Guidelines should refer to the status of provenance researchers as a "work in progress" or an emerging profession. She reiterated that the Guidelines could be inspired by the Washington Principles urging States to find "a fair and just solution".

81. *An observer* expressed concern about the necessity of involving a provenance researcher every time provenance research had to be carried out. He proposed that the Guidelines should make provision for provenance guidance as a series of steps to follow. He stressed the financial implications of the need to always refer to a third party, when some provenance research could be carried out by one of the two parties. A proposal was made that a checklist of steps to follow to execute provenance research could be added as an Annexe.

82. *A participant* stressed that adding too many elements to the Guideline would only weaken the original text. He suggested staying broad on the elements and following the proportionate principles for conducting due diligence regarding the case at hand.

83. Then, the discussion turned to which professionals were targeted, and *a participant* proposed to define them in this Guideline, stressing that the term "*specific case at hand*" implied a consideration of expense since provenance research would require paying someone.

84. *A participant* suggested, and others agreed, changing the term "*professional"* to the term "*experienced researchers",* as there were no specifications of what a professional was. She expressed her doubt about the efficiency of the proposal of a checklist in an Annexe, as it might not be applicable in some contexts.

85. It was proposed to refer not to a "*provenance researcher"* but to an "*expert"*. As the provenance researcher profession was still without any current official status, it would be too restrictive to only address this Guideline to recognised professionals. *Another participant* agreed to the term *"expert"* but to specify "in provenance research", and she raised the important issues of confidentiality, independence, and deontology, which *another participant* suggested to add to the text ("*provenance research should be performed following the principles of good faith, confidentiality and neutrality"). The former participant* underlined that the provenance researcher profession should be officially organised and referred to as a profession. It was pointed out that the status of the expert might be exercised as a primary job but did not necessarily have to be the only one (referring also to museum curators and auction houses), and standards for provenance researchers' activity needed to be set. A proposal was also made to add the term "*relevant"* (in a particular material or period) to "*expert"*. *Another participant* indicated that it was not always necessary that a professional perform the provenance research – which would also avoid paying a third person when not needed – but what was important was that the Guideline advise on what to do.

86. Therefore, the participants discussed the actions to be performed in research on provenance. *A participant* proposed to add to the end of the last sentence that documentation analysis must include "*visibility on the market"*. The term "archives" was found to be too narrow.

87. *An observer* referred to anti-money laundering requirements as an example where no particular actor was intended to conduct research or file a suspicious claim; any actor in the art market could carry out such research. He proposed thinking about applying a similar flexible approach in this Guideline. A proposal to add "*scientific analysis*" to the text was put forward and agreed to.

88. *A participant* stressed that defining every document listed for carrying out provenance research in the Guideline would weaken its scope and proposed instead to keep it general.

89. Regarding the specific question "s*hould the importance of provenance research, and the time spent on it, be proportional to the price of the object?", an observer* responded in the affirmative. *Another participant* underlined that proportionality was a concept that could not be applied in this Guideline. Indeed, some objects of low financial value could, in fact, have a high cultural value, such the cultural value attributed thereto by source countries.

90. *A participant* proposed to take the level of risk into account for defining the proportionality of the time spent on provenance research. *An institutional observer* reminded the participants that, depending on the professionals aiming to apply these Guidelines, provenance priorities varied; for example, for museum professionals, priority was given to scientific and cultural value.

91. *Mr Renold* asked the participants about the nature of the relationship between a provenance researcher and a client, and an observer stressed the confidentiality aspect of such a relationship, as the holder of the object was very likely to ask the provenance researcher to obtain and share all possible information. He therefore believed that confidentiality and the interest of public domain should be addressed by the present Guideline.

92. Regarding a possible temporal limit or threshold for orphan cultural objects with provenance being researched, participants were not in favour of establishing such a limit.

D. Due diligence in acquiring an orphan cultural object

> **When acquiring an orphan cultural object, attention must be paid to all the relevant circumstances. In this respect the criteria of due diligence provided for in Article 4(4) of the 1995 UNIDROIT Convention are a good starting point.**

93. *A participant* underlined that the reference to Article 4(4) of the 1995 UNIDROIT Convention as a good starting point implicitly meant that it should be developed further, but his opinion was that Article 4(4) of the 1995 UNIDROIT Convention seemed sufficient as a due diligence reference and proposed changing "*a good starting point"* with "*a point of reference"*.

94. *Mr Renold* asked whether this Guideline should list the relevant circumstances or remain general regarding due diligence requirements. He supposed, given the previous discussion on Guideline C, that staying general in the text and providing details in the commentary would be more apt.

95. *A participant* raised a question regarding whether a cultural object determined to be orphan object could be circulated on the market. It was answered by pointing out that this would be a matter of fact based on elements found when conducting provenance research. A proposal was made to add to the title of the guideline "*in researching or acquiring an orphan object*". *An observer* pointed out that it was not possible to know whether it was an orphan object before carrying out due diligence. Therefore, she supported redrafting the title as *researching* or *acquiring* a cultural object. *An observer* proposed to the participants to reframe the beginning of the Guideline as "*when acquiring a potential orphan cultural object"*.

96. It was recalled that research was the means of carrying out due diligence and that due diligence had to be exercised at the time of acquisition; there had to be a lack in provenance information to define a cultural object as an orphan object.

97. *A participant* expressed his concern about linking the concept of provenance research to a binding duty of due diligence (Guidelines C and D), and a proposal was therefore made to have two separate provisions, one relating to the acquisition of an object and another one relating to the research. As provenance research was dealt with in Guideline C, and the acquisition of the object was dealt with in Guideline D, "*research and acquiring" s*hould not be added to the present Guideline.

98. Regarding the link between the two concepts, *a participant* indicated that the exercised due diligence should be higher when acquiring a potential orphan object and therefore proposed to emphasise this idea in the Guideline by creating a new, higher standard for this type of cultural object.

99. *A participant* agreed with this proposition and highlighted Article 44 of the 2016 German Act on the Protection of Cultural Property,[4] stating that there was a higher standard of due diligence imposed on a party if there were reasons to doubt the provenance or the title. He proposed referring to the indicated article as an example in the commentary.

100. *Ms Schneider* noted that this proposal would follow the 1995 UNIDROIT Convention, which stated that the degree of due diligence was not based on one circumstance but on multiple circumstances and in particular as regards the character of the parties. *Mr Renold* also proposed to insert in the text of the Guideline that a "*high degree of attention must be paid",* but it was preferred to add this idea to the commentary.

101. *A participant* proposed to add to the commentary that the scope of the inquiry could change based on the circumstances and agreed that the Working Group could draw inspiration from the different provisions of the German Act on the Protection of Cultural Property that elaborated the general due diligence requirements as well as increased and decreased due diligence requirements, as an example of the way the participants should look into due diligence and the implementation of Article 4(4) of the 1995 UNIDROIT Convention.

102. *A participant* underlined that the nature of reasonable due diligence should be detailed in the commentary, as some collectors did not have the same understanding of what reasonable due diligence was. *An observer* expressed his concern regarding anticipating different levels of the practice of due diligence as Article 4(4) of the 1995 UNIDROIT Convention was already stipulating "*to all circumstances"*.

103. *Mr Renold* proposed replacing "*to all the relevant circumstances"* with "*to all the circumstances relevant to the acquisition",* while *a participant* proposed "*to all the circumstances relevant to the object"*. She also raised a question regarding encouraging current possessors, including museums that might not be contemplating selling or buying, to research their existing collections, broadening this Guideline beyond acquisition. If so, she proposed "*when acquiring or valuating an orphan object to carry out due diligence"*. *Mr Renold* agreed that it might be important to broaden the Guideline and not refer only to *acquisition*.

104. *An observer* stressed that the first preventative measures for every museum against natural disasters or conflicts were to secure its collections, undertake research into its collections, and generate a list of potential orphan objects. Thus the very first step would be to establish inventories of collections. *Mr Renold* asked the participants if "*possession"* should be added to the Guideline.

105. *A representative of the art market* emphasised that a distinction should be made between "*should"* and "*must"* in the recommendation to investigate into museums' collections.

106. To the question whether due diligence for museums in reviewing their collections should be added to the Guideline, *a participant* noted that this Guideline concerned the acquisition of an orphan object, and not inventorying a museum's collection; *another* participant recalled that museums should do this but that such practice was outside this Working Group's scope.

107. Participants emphasised that the Guideline should express the idea that museums should be engaged in researching into their own collections and that due diligence should be used in that research. *Mr Renold* therefore proposed to add a new provision relating to existing collections, whether private or public.

[4] Cultural Property Protection Act of 31 July 2016 (Federal Law Gazette [BGBl.] Part I p. 1914), https://www.gesetze-im-internet.de/englisch_kgsg/englisch_kgsg.html, last accessed on 18 January 2025.

108. *A participant* pointed out that existing collections might not have orphan objects and gave as an example the audit being carried out at Rouen's *Musée des Beaux-Arts* since 2022 to identify the provenance of works of art that might have been looted from Jewish families during the Second World War. Despite fears, it turned out that very few of the artworks had a dubious provenance.[5] Again, *some participants* were inclined to add a new provision for museums to conduct research into the provenance of their collections.

109. *A participant* highlighted that an important aspect that should be considered by the Working Group was how a private collection differed from a museum and what museums should and should not be doing. A major difference was the issue of privacy, as collectors were very unlikely to disclose certain information that museums were comfortable to share.

110. Apart from this issue, *a participant* elaborated on a "traffic light" system that had been created for an ongoing audit of a private collection for red-flag objects, with green, amber and red works. A large amount of work had been identified on the green side or on the red side. Although there was a spectrum, it was hoped that ultimately it could be said with a degree of confidence that a certain object was green or red. There was also an ongoing responsibility for due diligence exercise and provenance research.

111. Regarding the ongoing discussion among participants, *Mr Renold* stated that the due diligence process covered transfer and acquisition, as well as the objects already present in collections.

112. Upon the second reading of the provision, a proposal was made to replace, in the second paragraph, "*museums*" with "*institutions*", which was accepted. The importance of the link between Guideline C on provenance research and Guideline D on due diligence was recalled.

E. Evidence and burden of proof

> **Keeping the proof of all elements surrounding the provenance research and the due diligence performed when acquiring or selling an orphan cultural object is of paramount importance. In case of a transaction, the burden of establishing that due diligence was performed will lie on the acquirer, the seller or the donor.**

113. *An observer* raised the question of the necessity of keeping trace of every element of the provenance research performed and suggested that the *paramount importance* of keeping such records should be explained in the Guideline's commentary.

114. *Mr Renold* proposed to delete "*paramount"* or frame it differently with "*should be retained"*. He also proposed the alternative of "*transferring an orphan object"*, as it was broader than "*acquiring or selling*".

115. *An observer* proposed to substitute "*surrounding"* with "*relating to the provenance research"*. *Mr Renold* suggested replacing "*should be retained"* with "*are to be retained"* and remove "*burden of proof"* in the title. *A participant* instead proposed "*must be retained"*, underlining, however, that this provision was going beyond existing legal standards.

116. *An observer* and *a participant* pointed out that this Guideline was setting a general standard and a reference for the best practice for the future and therefore proposed to delete the second sentence of the Guideline.

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[5] https://www.francebleu.fr/infos/societe/deux-tableaux-exposes-au-musee-des-beaux-arts-de-rouen-auraient-ete-voles-par-les-nazis-9218190

117. *Ms Schneider* and *Mr Renold* reminded the participants that the requirement of exercising due diligence when receiving an object was already present in the 1995 UNIDROIT Convention. This Guideline was not setting a new standard; it was only reiterating and highlighting that standard.

118. *An observer* suggested to only keep the elements of proof regarding the "*provenance"*, and not the "*provenance research"*.

119. *A participant* suggested to go back to the discussion on the categories of cultural objects and pointed out that the new European Union Regulation on the Introduction and the Import of Cultural Goods[6] was coming into force, proposing categories and an obligation to share the information, noting that the Working Group could draw inspiration from this and thereby provide tools to conduct provenance research.

120. *An observer* proposed to keep the title of the Guideline and its first sentence where it is required to keep every provenance element, but to change the second sentence of the Guideline.

121. *An observer* reminded the Working Group that the Guideline had to consider situations where buyers or holders might be misled as to proof of ownership or provenance elements yet not be held responsible.

122. *Ms Tassignon* provided as an example the provenance research conducted and published on the website of the *Fondation Gandur pour l'Art*, which shared references in lieu of the document itself. She underlined the importance of working transparently by sharing information.

123. *An observer* underlined that the demonstration of good faith while conducting provenance research was a way to protect art market actors as well as first-time purchasers.

124. *A participant* wanted to emphasise that there was a need to stay practical and pragmatic regarding the burden of proof, depending on the situation. She raised a concern about not having determined which types of cultural objects the Guidelines were addressed to.

125. *Mr Renold* indicated that conducting provenance research was closely related to proportionality, and proposed to add that provenance research should be conducted "*to the best possible extent"*.

126. *A participant* pointed out that every document regarding the provenance research should be transferred with the object – all the documentation should always accompany the object. Regarding the types of cultural objects concerned by the Guidelines, she recalled that the Group was focusing on those of importance.

127. *A participant* raised the question of the identification method for objects of importance, and who would determine that importance.

128. *A participant* reminded the Working Group of the reference in Guideline A to Article 2 of the 1995 UNIDROIT Convention to provide key elements for the identification of objects of importance.

129. *An observer* indicated that the Guideline should give instructions on whether an object fell into one of the categories of Article 2 of the 1995 UNIDROIT Convention.

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[6] Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32019R0880, last accessed on 19 January 2025.

130. *A participant* recalled that the present Guideline was aiming to protect the cultural object and its possessor, at the beginning of its first sentence.

131. During the second reading of the new version of the Guideline, *a participant* raised concerns about adding too many elements, as it would be preferable to keep general examples. She also suggested that different types of evidence should be included, as this Guideline was supposed to define evidence.

132. *An observer* reflected on the challenges of imposing proof elements and asked the Working Group if this Guideline aimed to change the practice of provenance research elements being kept private.

133. *Mr Renold* confirmed that the current drafting of this Guideline was seeking to change the practice of keeping such information private, encouraging, instead, the safeguarding and sharing of such information as much as possible.

134. *An observer* stressed that this Guideline took no accusatory tack vis-à-vis the owners and holders of misleading provenance documents, but instead would give some direction on what to do in such cases. However, she highlighted the fact that sharing too much information could help forgers fake an object's provenance by using the shared elements as of proof of legal origin. *Some participants* were not satisfied with the addition of the word "shared" without an explanation of whom to share it with.

F. Procedure for "clearing" an orphan cultural object

> **A person or institution possessing an orphan cultural object, regardless of how long ago it was acquired, can subject its possession to a "clearing" procedure. This will involve the physical and/or virtual presentation of the object on a platform specifically designed for this procedure. If, after a period of [XXXX] years, no claim has been made, the object can be subject to publication, research and legal transfer, and a specific official mention ("'Cleared' orphan cultural object") will have to accompany the object at all times.**

135. *A participant* expressed his concern relating to the fact that one could not block future claims (*res in judicata principle*) and the *in personam* effect that the Guideline would potentially have. A more moderate process was proposed as preferable.

136. *Another participant* shared the concern but was not sure that the Guidelines would have an *in personam* effect. She noted that putting an object on a website would not constitute a notification under U.S. law. Less-developed countries could not be obliged to search against a database and bring a claim for a cultural object if necessary. Such an idea was introduced in the United States long ago but was never adopted because the effects would go beyond the market and were considered to be too "pro-market" and fundamentally unfair to certain communities. The Government would never adhere to such a rule. *Still another participant* raised doubts as to the practicability of the proposed Guideline.

137. *Another participant* stressed the paramount importance of this Guideline but recognised that it would have only a relative effect on persons and objects. In fact, the object would not lose its qualification of "orphan" but would be considered "adopted". *A participant* recognised that there was no perfect solution and proposed to publicise the object as widely as possible and give a status to it.

138. *An observer* indicated the "colonialist" approach of the proposal and the fact that, even with a website being created, the object would remain orphan and States with limited resources would

not benefit from it. *A participant* agreed and gave the example of Asian cultural object collections in private hands in the United States that had originated from countries with few resources.

139. Concerning the kinds of objects which might be submitted to this procedure, *some participants* indicated that antiquities were a small percentage of the market and suggested that the Working Group should leave out archaeological and ethnological objects (and maybe another category as well). *An observer* agreed that the problematic objects were not archaeological and indicated that a dealer would not wait for three years (or any other relatively long period of time) for the "clearance" of a chandelier, for example.

140. *A member* noted the issue of the time limit of an object being presented on the platform and what would happen after. *A* participant also asked whether a person or /institution would pay to publish its orphan cultural object on the database.

141. *A participant* indicated that the procedure should cover all objects. Concerning the period of time the object would stay on the platform, she indicated that the market had a cycle of no more than six months, so even two years would be much too long, and the process would be useful only for very few objects. While understanding the problem that countries of origin might face, the difficulties of the market had to be taken into consideration, and it was necessary to give priority to the actions to be taken. *A member* asked whether it would be automatic for an object appearing on the website to be "cleared" and whether a screening process would be put in place.

142. Participants raised a question about the procedure to follow once the cultural object was included in the database, and who was eligible to make a claim. *One participant* proposed submitting the Guidelines to States, in order to exchange on the claiming procedure for cultural objects on published databases. *A participant* referred, as an example, to a project establishing the database for circulating Egyptian and Sudanese artefacts, called CircArt,[7] between 2017 and 2021. *A participant* also recalled the Association of Museum Directors in the United States, which since 2018 had a website with objects of pre-1970 provenance but with no other explanation or effects.

143. *A participant* raised a question regarding the status of the object once it is was posted on the database: would the object be "frozen" for the time it is was on the database, or could it be traded? She also stressed that establishing a time period during which the object had to be presented on the database would have an impact on the object's marketability.

144. *A participant* clarified the difference between a "search notice" (a claim is being made) and a "found notice" (the suspicion of an existing issue). He indicated that the process here suggested would be of a found notice. He also recalled the example of categorisation given previously in the audit of a private collection and the "traffic light system".

145. *A participant* reminded the Working Group of the importance of having some categories and noted what she considered the insufficiency of this procedure and the need to include an expert committee to look at each object, make sure that objects were identifiable as much as possible, and provide the information to the country potentially interested in the object (a kind of screening process). It would be a way to make sure that experts were implicated in this process. Questions were raised about who would manage or take part in this kind of screening, and some suggestions were made (the Art Loss register, for example).

146. As to the database itself, questions were raised about the auspices under which it could be created, and some suggestions were also made. *Ms Tassignon* proposed that it be hosted in

[7] See more: https://www.britishmuseum.org/our-work/departments/egypt-and-sudan/circulating-artefacts

Switzerland due to the diplomatic neutrality. *Another participant* suggested hosting this database in Germany, giving as an example the effectiveness of the Proveana Database.

147. *An observer* wondered what would happen if a State refused to refer to the committee to make a claim. *A participant* answered that "clearing" an object's provenance was up to each State.

148. The Working Group could not agree on the "clearing" procedure but agreed, for the time being, to rephrasing the title of this Guideline to "'Clearing an orphan cultural object"' and creating a new Guideline for the "clearing" procedure, to be further discussed. It was also decided to delete the second sentence of Guideline F.

149. Some comments were made when reading the preliminary proposal of two separate Guidelines. *A member* stressed that the drafting was assuming that there was a dispute and asked which Guideline would apply in case of a conflict. Concerning the "just and fair solution" language, he also indicated that the situation was different between the Holocaust and the orphan objects. In the first case, there was a specific victim, while not so for orphan objects. *Another member* wished to keep the "just and fair solution" approach with an explanation in the commentary because these Guidelines should seek to change mentalities.

150. As no consensus was reached on the principle of a "clearing" procedure, the provision was put into square brackets.

G. Dispute resolution

> **Any dispute relating to the provenance, due diligence or clearing of an orphan cultural object shall be resolved by negotiation, mediation, conciliation or international arbitration.**

151. *A participant* proposed to refer to an expert committee known across the world that was specialised in cultural property and provenance-related issues, that could be consulted in case of dispute, instead of arbitration, mediation or other ADR mechanisms.

152. *Another participant* proposed to refer to international arbitration in case of a claim over the provenance of a cultural object, underscoring that it would be in line with Article 8(2) of the 1995 UNIDROIT Convention. He reminded the Working Group that creating such an international committee would require funds and that the committee should be as inclusive as possible, and with as low cost as possible.

153. *An observer* highlighted the cost of such an arbitration procedure and gave the example of the Court of Arbitration For Art (CAFA) established in the Netherlands, recalling that no cases had yet been presented to it. She indicated her preference for a committee with a number of selected persons. As to the cost, *a participant* indicated that there would be a need to propose a warranty or endorsement that the money would come from the market, collectors, States, museums, etc. *A participant* disagreed, noting that the market was "poor" and was already financing several associations and organisations.

154. *A participant* stressed that a vast amount of restitution claims were dealt with through negotiation and confidential private settlements. In practice, there was a very small percentage of claims. Therefore, he suggested that the Guideline consider negotiation with private settlement first and then resolution by arbitration. *An observer* agreed and suggested that the Working Group offer lists of mediators or conciliators, or that the committee might offer such service.

155. *Mr Renold* reminded the Working Group that Guideline E indicated that the elements relating to provenance were to be shared and asked whether private settlement solutions should be shared or not. *A participant* pointed out that, in the United Kingdom, the export licence reviewing panel issued an annual report stating the reasons why exportation licences were denied, together with a substantial amount of additional information.

156. *An observer* asked whether the first sentence of the Guideline was also referring to disputes relating to title and proposed to refer to it in the first sentence, pointing out that what was being disputed was not the provenance itself but its status. *A participant* stressed that the title was not what was fundamentally being disputed, but rather the inability to use and showcase a collector's collection, for example. It was decided to add "title" to the first sentence.

157. *A participant* pointed out the need to work on concrete cases and that a list of key issues to check as soon as a person wanted to acquire (or already possessed) a cultural object would be very helpful to determine what information was available or known (or not) and what would need further research (the country of origin of the object, the possibility of seeking information from that country, the impact of the context, etc.). More than a dispute, this would be a problem to solve. She stressed that the list of key issues should be addressed first, before discussing the nature of the committee.

158. *A participant* emphasised that the committee should distinguish between a claim aiming to publish scientific research on an orphan cultural object and a claim aiming to sell that object.

159. *Some participants* and *Mr Renold* suggested that the committee's mission should be to give a kind of "clearance" to the object. After determining what a "clear" object was, the Working Group would need to determine the "clearing" procedure.

160. *An observer* emphasised the risk for the market to suffer the "unwillingness" of museums to acquire such objects, referring as an example to the Wahballat statuette case.

161. *A participant* underlined the necessity for the Committee to promote cooperation between collectors and academia, as to encourage provenance research topics on specific collections, for example.

162. *A participant* proposed to create a streamlined process, practical and feasible, to be based on an adversarial procedure. The claiming State would need to submit evidence of ownership, and the burden of proof would lie with the claimant. The committee would then have to consider the reaction of the State and the burden of proof.

163. *A participant* raised a question concerning the purchaser in good faith. In the case of returning an object to its rightful owner, such as a State, the Working Group had to determine whether the good faith purchaser would be financially compensated or not. *A participant* underlined Article 6 of the 1995 UNIDROIT Convention as a reference for the good faith purchaser's compensation in case of restitution.

164. *An observer* wanted to focus on the time limitation regarding the provenance claim. She suggested that a time bar regarding restitution claims made by States should be implemented in the dispute resolution procedure.

165. As no consensus was reached on the principle of dispute resolution, the provision was put into square brackets.

Item 7 of the agenda – Procedure for future work and timetable

169. The Working Group agreed to reflect on some points before its next meeting, such as:

- Highlight in the comments section of Guideline C the choice of the term "*circulation"* for its neutrality;
- Discuss changing the term "*museums"* to "*institutions"* and define *institutions*;
- Specify in Guideline E with whom provenance and diligence elements have to be shared, and by which means; and
- Determine whether or not to keep "a fair and just solution" in Guideline G and explain the reference to the Washington Principles in the commentary.

170. The participants were invited – in groups – to start to draft the commentary sections on each Guideline, but as there was no consensus on important parts of the Guidelines, the members and observers were invited to comment and prepare alternatives proposals to discuss at the next session.

171. It was decided that third meeting of the Working Group would take place at the seat of UNIDROIT and online from 17 to 19 March 2025.

ANNEXE I

AGENDA

1. Opening of the session and welcome by the UNIDROIT Secretary-General
2. Adoption of the draft agenda and organisation of the session (Study S70B- W.G. 2 - Doc. 1)
3. Presentation of the new members of the Working Group
4. Presentation of the China's legal response to orphan cultural relics (Study S70B – W.G. 2– Doc. 4)
5. Discussion of the different types of orphan cultural objects (Study S70B – W.G. 2– Doc. 3)
6. Presentation and discussion of the preliminary draft guidelines
7. Future work and timetable
8. Other business

ANNEXE II

LIST OF PARTICIPANTS / *LISTE DES PARTICIPANTS*

MEMBERS / *MEMBRES*

M. Eric COTTIER *in-person*	Ancien Procureur Général du canton de Vaud Lausanne Suisse
Ms Patty GERSTENBLITH *in-person*	Distinguished Research Professor Director, Center for Art, Museum and Cultural Heritage Law DePaul University College of Law - USA
Ms Corinne HERSHKOVITCH *in-person*	Avocate à la Cour France
Mr LEE Keun-Gwan *remotely*	Professor International Law Seul National University, Korea
Mr Amnon LEHAVI *in-person*	Atara Kaufman Professor of Law Academic Director, G City Real Estate Institute Harry Radzyner Law School Reichman University (IDC Herzliya) Israel
Mr Jorge A. SÁNCHEZ CORDERO *Remotely*	Mexican Center of Uniform Law Mexico City (Mexico) *Chairman / Président*
Mr Marcilio TOSCANO FRANCA FILHO *in-person*	Professor Federal University of Paraiba Brazil
Ms Joanna VAN DER LANDE *in-person*	Chairman Antiquities Dealers' Association United Kingdom
Mr Till VERE-HODGE *Remotely*	Partner Payne Hicks Beach United Kingdom
Ms ZHANG Jianhong *in-person*	Professor of Archives the Palace Museum, Beijing China
Mr Marc-André RENOLD	Professor at the University of Geneva, UNESCO Chair in international law on the protection of cultural property, Director Art-Law Centre of the University of Geneva, Switzerland

Ms Isabelle TASSIGNON	Consultant, Former curator of the archaeological and ethnological collections of the Fondation Gandur pour l'Art Geneva, Switzerland

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ANNEXE III

Draft Guidelines submitted to the second session of the Working Group on Orphan Objects	**Partially reviewed version** **Guidelines B, F, G and H are in square brackets to indicate the lack of consensus on the principles**
A. Definition of an orphan cultural object For the purposes of the present Guidelines, an orphan cultural object is a movable cultural object, as defined in Article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which totally or partially lacks documented and/or identifiable provenance (for example no available or reliable relevant archives or publications).	**A. Definition of an orphan cultural object** For the purposes of the present Guidelines, an orphan cultural object is a movable cultural object of importance, as defined in Article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which has incomplete ~~totally or partially lacks documented and/or identifiable~~ provenance ~~(for example no available or reliable relevant archives or publications)~~.
B. Applicable Law The existence, legal status and acquisition of an orphan object are subject to the relevant conventions. If no convention is applicable, the existence and legal status of an orphan object are subject to the domestic law of its country of origin. The acquisition of an orphan cultural object is subject to the law of the place of its location at the time of the transaction, provided the principles of due diligence (below D) are respected.	**B. [Applicable Law** The existence, legal status and acquisition of an orphan object are subject to the relevant conventions. If no convention is applicable, the existence and legal status of an orphan object are subject to the domestic law of its country of origin. The ~~acquisition~~transfer of an orphan cultural object is subject to the law of the place of its location at the time of the transaction, provided the present Guidelines ~~principles of due diligence (below D)~~ are respected.]

C. Provenance Research Provenance research is the means by which the owner or the acquirer of an orphan cultural object is to find out the place of origin and/or the history of acquisition of the object. No universal definition can be proposed, as provenance research will depend on the specific case at hand and its history. Provenance research should be performed by professionals, and it can involve, among other actions, library research, archives (public or private) consultation, documentation analysis, or exchanges with witnesses.	**C. Provenance Research** Provenance research is the ~~means~~process by which the ~~owner~~possessor or the acquirer of an orphan cultural object is to find out the place of origin and/or the history of ~~acquisition~~circulation of the object. ~~No universal definition can be proposed, as~~ The extent of provenance research ~~will~~depends on the specific case at hand and ~~its~~the history of the object. Provenance research should be performed by ~~professionnals~~[relevant experts in that field] [experienced researchers] [experts], and it can involve, among other actions, library research, consultation of archives (public or private), ~~consultation,~~ document~~ation~~ analysis, scientific analysis ~~or~~and exchanges with witnesses.
D. Due diligence in acquiring an orphan cultural object When acquiring an orphan cultural object, attention must be paid to all the relevant circumstances. In this respect the criteria of due diligence provided for in Article 4.4 of the 1995 UNIDROIT Convention are a good starting point.	**D. Due diligence ~~in acquiring an orphan cultural object~~** When acquiring a~~n~~ potential orphan cultural object, attention must be paid to all the ~~relevant~~ circumstances relevant to the acquisition. In this respect the criteria of due diligence provided for in Article 4.4 of the 1995 UNIDROIT Convention are a point of reference~~good starting point~~. Due diligence also applies to public and private ~~museums~~institutions and collectors when reviewing their collections.
E. Evidence and burden of proof Keeping the proof of all elements surrounding the provenance research and the due diligence performed when acquiring or selling an orphan cultural object is of paramount importance. In case of a transaction, the burden of establishing that due diligence was performed will lie on the acquirer, the seller or the donor.	**E. Evidence ~~and burden of proof~~** ~~Keeping the proof of a~~When transferring an orphan cultural object, all elements relating to~~surrounding~~ the provenance and ~~the~~ due diligence performed ~~when acquiring or selling an orphan cultural object~~are to be retained and shared. They should follow the object in any transfer relating to ~~of~~ it. ~~is of paramount importance. In case of a transaction, the burden of establishing that due diligence was performed will lie on the acquirer, the seller or the donor.~~
F. Procedure for "clearing" an orphan cultural object A person or institution possessing an orphan cultural object, regardless of how long ago it was acquired, can subject its possession to a "clearing" procedure. This will involve the	**F. [~~Procedure for~~"C*learing*" an orphan cultural object** A person or institution possessing an orphan cultural object, regardless of how long ago it was acquired, can subject its possession to a "clearing" procedure. This will involve the

physical and/or virtual presentation of the object on a platform specifically designed for this procedure. If, after a period of [XXXX] years, no claim has been made, the object can be subject to publication, research and legal transfer, and a specific official mention ("'Cleared' orphan cultural object") will have to accompany the object at all times.	physical and/or virtual presentation of the object on a platform specifically designed for this procedure. ~~If, after a period of [XXXX] years, no claim has been made, the object can be subject to publication research and legal transfer, and a specific official mention ("Cleared orphan cultural object") will have to accompany the object at all times.~~
	G. "Clearing" procedure Issues connected with the provenance or due diligence of an orphan cultural object should be put before an international committee. The international committee has to be as inclusive as possible ~~in order to reach a~~ to allow for comprehensive just and fair solutions.
G. Dispute resolution Any dispute relating to the provenance, due diligence or clearing of an orphan cultural object shall be resolved by negotiation, mediation, conciliation or international arbitration.	**H. Dispute Resolution** Any dispute relating to the title, provenance, due diligence or clearing of an orphan cultural object shall be resolved by negotiation, mediation, conciliation or ~~international~~arbitration.]