



UNIDROIT

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

ICC
Institute of World
Business Law



EN

**UNIDROIT Working Group on
International Investment Contracts**

First session (hybrid)
Rome, 23-25 October 2023

UNIDROIT 2023
Study L-IIC – W.G. 1 – Doc. 2
English only
October 2023

ISSUES PAPER

1. The International Institute for the Unification of Private Law (UNIDROIT) and the ICC Institute of World Business Law (ICC-IWBL) have undertaken a joint project to develop a legal instrument on the [UNIDROIT Principles of International Commercial Contracts \(UPICC\)](#) and Investment Contracts, which was approved for inclusion in the Work Programme of UNIDROIT for the 2023-2025 triennium in 2022.
2. This document provides a preliminary illustration of the issues that the Working Group on International Investment Contracts may wish to consider during its first session.
3. The issues considered in this document were identified by the participants of a Workshop on Transnational Law and Investment Contracts co-organised by UNIDROIT and the ICC-IWBL on 7 June 2022, and further elaborated by the UNIDROIT Secretariat in cooperation with the ICC-IWBL and a selected group of experts.¹
4. This document is mostly aimed at clarifying the possible scope of the project, including a first analysis of the potential topics to consider. This document does not intend to provide an exhaustive list of issues nor a full legal analysis of each topic. Rather, its purpose is to provide a starting point for the Working Group's deliberations at its first session.
5. This document is divided into four sections: (i) preliminary matters; (ii) general issues relating to the project and the future instrument; (iii) scope; and (iv) content of the future instrument. It provides a number of questions and recommendations that the Working Group may wish to consider and decide upon, with links to relevant materials in the annexe. As to the contents, the document refers to the UPICC where appropriate. The structure of this document was inspired in part by the structure of the UPICC and the [Principles of Reinsurance Contract Law \(PRICL\)](#), and in part by the [UNIDROIT-IFAD Legal Guide on Agricultural Land and Investment Contracts \(ALIC Guide\)](#).

¹ The Secretariat is grateful to José Antonio Moreno Rodriguez and August Reinisch for their input provided during the preparatory work for this project.

TABLE OF CONTENTS

I. PRELIMINARY MATTERS	3
A. Background of the project	3
B. Format of the future instrument	3
C. Target audience	5
D. Composition of the Working Group	5
E. Methodology and timeline	7
F. Relationship with existing international instruments	7
II. GENERAL ISSUES RELATING TO THE PROJECT AND THE FUTURE INSTRUMENT	8
A. Background: the project as a response to the recent transformations of IIL	9
B. Possible reference to a “transnational body of principles” as a new tool for investment protection	11
1. Role of the UPICC	12
2. Principles and clauses consolidated in the practice of international investment contracts	13
3. Principles addressing IIL treaty standards, including emerging public policy demands in IIAs/BITs	15
III. SCOPE OF THE INSTRUMENT	16
IV. CONTENT OF THE INSTRUMENT	17
A. Structure of the instrument	17
B. Definitions	18
C. Parties, stakeholders and contractual arrangements	19
D. Pre-contractual issues in IICs, issues of formation and validity of the contract	19
1. Pre-contractual issues and relationship with other stakeholders	19
2. Issues concerning formation of contract: freedom of contract, suggested form	19
3. Issues of validity of contract: duress, improper influence, gross disparity and similar	20
E. Rights and obligations of the parties	20
1. Addressing protection standards in IIAs/BITs through contractual tools: “fair and equitable treatment” and “regulatory stability”	20
2. Addressing international investment contracts practice: “stabilisation” and “renegotiation” or “adaptation” clauses	22
3. Addressing public policy standards in IIAs/BITs through contractual tools: sustainable development, SMEs support policies, and further public policy goals	23
F. Non-performance and remedies	24
1. Hardship and force majeure	24
2. Compensation and damages	26
G. Transfer of rights and obligations under the contract and return of rights	27
H. Legal framework and applicable law	27
1. Party autonomy and choice of law: the UPICC (or an adapted version) and other principles of international investment law as the law applicable to IICs	27
2. The legal relationship between IIAs/BITs, including newly emerging standards on public policy goals, and IICs	29
I. Dispute resolution clauses	31
ANNEXE	32

I. PRELIMINARY MATTERS

A. Background of the project

6. In 2022, the Secretariat received a proposal from the ICC-IWBL for a joint project on investment contracts for inclusion in UNIDROIT's 2023-2025 Work Programme ([UNIDROIT 2022 – C.D. \(101\) 4 rev., Annexe 3](#)). The proposal aimed at exploring how international investment contracts (IICs), *i.e.*, contracts between States, or their controlled entities, and private foreign investors, could be modernised, harmonised, and standardised, particularly in light of the UPICC and ICC standards, with a view to address – at the contractual level and therefore mainly from a private law angle – a number of developments in the area of international investment law (IIL) in the last decades, such as the trend to incorporate public policy goals in “international investment agreements” (IIAs), including “bilateral investment treaties” (BITs), and the increasing potential relevance of IICs, also given the need to specify and concretise vague treaty norms and address legal uncertainty deriving from the lack of uniformity in arbitral decisions.

7. On 7 June 2022, the Secretariat, together with the ICC-IWBL, organised a [Workshop on Transnational Law and Investment Contracts](#), during which the then-possible project was discussed with a group of experts in international arbitration and contract law. The Workshop considered developments in IIL and confirmed the need for guidance at the contractual level.

8. At its 101st session (Rome, 8-10 June 2022), the UNIDROIT Governing Council agreed on the importance of the topic and, considering the strong support expressed by Council Members, decided to recommend including the preparation of an instrument on IICs in the 2023-2025 Work Programme as a high-priority project ([UNIDROIT 2022 – C.D. \(101\) 21](#)). The General Assembly, at its 81st session (Rome, 15 December 2022), followed the Governing Council's recommendation and included the project in the new Work Programme of the Institute for the 2023-2025 triennium ([UNIDROIT 2022 – A.G. \(81\) 9](#)).

9. On 17 February and 12 April 2023, the Secretariat and the ICC-IWCL held two preparatory meetings to discuss, *inter alia*, the composition of the Working Group and to exchange views on the scope, form and content of the future instrument. The Secretariat presented the developments in the preparatory phase for this project to the Governing Council at its 102nd session in May 2023 ([UNIDROIT 2023 – C.D. \(102\) 13](#)). On that occasion, the Governing Council reiterated its strong support for the project and authorised the Secretariat to establish a Working Group on International Investment Contracts.

B. Format of the future instrument

10. As a follow up to the ICC-IWBL proposal, the Secretariat submitted to the UNIDROIT Governing Council at its 101st session (June 2022), some of the possible alternative forms that the future instrument could take, such as: (i) a legal guide to the use of the UPICC in IICs, which would provide guidance to parties on how they might adapt or supplement the UPICC to meet the special needs of IICs; (ii) a revision of the UPICC or the preparation of a supplement to the latest version of the UPICC, containing black-letter rules and comments specifically addressing issues of relevance in the context of IICs; and (iii) model clauses reflecting the provisions most commonly used in practice, in accordance with the UPICC. The Governing Council did not decide on this matter, although it expressed a preference for the development of a self-standing instrument - rather than a revision of the UPICC - that could contain guidance on how the UPICC would apply to the investment context and could be usefully combined with model clauses.

11. Against this background, the Working Group is invited to consider two main options, namely the development of (i) a Legal Guide on International Investment Contracts or (ii) a self-standing

set of Principles of International Investment Contracts with commentary. In either case, it is suggested to complement the future guidance instrument with a set of model clauses.

12. A legal guide is generally less prescriptive than a set of principles and could accommodate a more extensive consideration of the context of IICs, including, *e.g.*, more detailed guidance on pre-contractual issues and contract negotiation. On the other hand, a set of principles with commentary might be more practical as they could be immediately applied to investment contracts. Such principles could facilitate a balanced solution in face of the current criticisms of IIL, providing a “special law of contracts” apt to provide transnationally-uniform protection to investment contracts while meeting new public policy demands (see Section II, below). A future set of principles would maintain a close relationship with the UPICC² and place itself among the instruments that complement the UPICC for special categories of contracts, while at the same time restating special principles deriving from the practice of relevant economic transactions. Should certain issues benefit from a more detailed discussion, this could be accommodated in the commentary, in an introductory part, or in a separate, accompanying document.

13. The Institute has already tested in practice the instrument of a legal guide on investment contracts in the context of a project partnership with FAO and IFAD. In 2021, UNIDROIT and IFAD published the [Legal Guide on Agricultural Land Investment Contracts \(ALIC\)](#). The Working Group may wish to consider the ALIC Guide as a possible model, even if it only refers to a specific subset of IICs.

14. Furthermore, the creation of a set of principles for a specific subset of contacts based on the UPICC as a model has also already been tested in practice. In 2019, the Project Group on Principles of Reinsurance Contract Law, in cooperation with UNIDROIT, published the first part of the [Principles of Reinsurance Contract Law \(PRICL\)](#). The Working Group may wish to consider the PRICL as an example for a possible template, although more specificities may need to be introduced for IICs in comparison with reinsurance contracts.

15. With regard to the development of model clauses, the Working Group may benefit from the long-standing tradition of the ICC in drafting model contracts and clauses. Limiting the focus to the last two decades, the ICC has drafted and published various [model contracts](#), such as the ICC Model International Sale Contract, the ICC Model International Franchising Contract, the ICC Model Contract for the Turnkey Supply of an Industrial Plant, and the ICC Model Mergers and Acquisitions Contract I - Shares Purchase Agreement.³ Other model contracts, such as the ICC Model Confidentiality Agreement, are in the process of publication.⁴

16. One of the features of ICC model contracts is that they are not drafted to be unilaterally imposed - they can be adapted and fully amended to meet the needs of the situation at hand. Indeed, they are intended to help parties with equal bargaining power negotiate a fair contract. The ICC model contracts are usually prepared by different task forces formed by members appointed by the national committees, upon a decision of the Commission on Commercial Law and Practice (“CLP Commission”). Nonetheless, the purpose of ICC model contracts is to replace the choice between different national law, which is often not adapted to the needs of international trade, with a detailed

² More precisely, a “general to particular” relationship whereby the UPICC express the main principles of general contract law while the self-standing set of principles would not only include UPICC adaptations (*i.e.*, principles clarifying the manner in which the UPICC apply to the specific context of IICs), but also special principles deriving from IICs’ practice and addressing IIA/BIT standards.

³ Publications in the past 20 years also include the ICC Model Occasional Intermediary Contract, the ICC Short Form Model Contracts, the second edition of the ICC Model Contract on Commercial Agency, the second edition of the ICC Model Distributorship Contract (Sole Importer-Distributor), the ICC Model Mergers and Acquisitions Contract I: Share Purchase Agreement, and the ICC Model Selective Distributorship Contract.

⁴ See also: the ICC Model Mergers and Acquisitions Contract II (Business and Assets Agreement), the ICC Model Turnkey Contract for Major Projects (revised in 2020), ICC Business Guidance on Electronic Contracting, and the ICC Model Clauses on Electronic Contracting.

set of contractual provisions. These contractual provisions are not based on any specific national law but incorporate the prevailing practice in international trade as a whole, as well as the principles generally recognised by domestic law.

Questions for the Working Group

- *The Working Group is invited to reflect on the type and format of the future instrument.*
- *In particular, should the instrument take the form of a legal guide or rather a set of principles with commentary (similar to the UPICC and the PRICL) and a set of model clauses?*

C. Target audience

17. As consistent with all UNIDROIT instruments, the prospective instrument should be relevant for all jurisdictions, irrespective of legal tradition. It should aim at facilitating the modernisation and standardisation of IICs to the benefit of the contracting parties – States and investors – as well as other stakeholders. Indeed, other stakeholders may be affected by foreign investments, such as local populations and communities, contractors and sub-contractors, lawyers and consultants, workers, NGOs, academics, research entities or civil society at large. The future instrument ought to consider all interests involved.

Questions for the Working Group

- *Does the Working Group agree that the primary addressees of the instrument would be private investors and States?*
- *Does the Working Group agree that the instrument should consider the interests of the whole set of stakeholders involved in (or impacted by) IICs?*

D. Composition of the Working Group

18. As consistent with UNIDROIT's established working methods, the Working Group is composed of experts selected by UNIDROIT and the ICC-IWBL for their expertise in international investment law and contract law. Members of the Working Group participate in a personal capacity and represent the world's different legal systems and geographic regions. The Working Group is co-chaired by Ms Maria Chiara Malaguti (President of the UNIDROIT Governing Council) and Mr Eduardo Silva Romero (Chair of the ICC-IWBL Council).

19. In addition to the two Co-Chairs, at present, the Working Group on International Investment Contracts is composed of the following experts:

- Mr José Antonio Moreno Rodriguez (Chair of the Consultative Committee), Founding Partner, Altra Legal (Paraguay);
- Mr Diego Fernandez Arroyo, Professor, Sciences Po (Argentina/France);
- Mr Lauro Gama, Professor, Pontifical Catholic University of Rio de Janeiro (Brazil);
- Ms Jean Ho, Professor, University of Singapore (Singapore);
- Ms Margie-Lys Jaime, Professor, University of Panama (Panama);
- Ms Ndanga Kamau, Founder, Ndanga Kamau Law (Kenya/the Netherlands);
- Mr Malik Laazouzi, Professor, University of Paris II Panthéon-Assas (France);
- Mr Pierrick Le Goff, Partner, De Gaulle Fleurance & Associés (France);
- Ms Céline Lévesque, Professor, University of Ottawa (Canada);

- Mr Chin Leng Lim, Professor, the Chinese University of Hong Kong (Hong Kong SAR, China);
- Ms Loretta Malintoppi, Arbitrator, 39 Essex Chambers (Italy/Singapore);
- Mr Makane Moïse Mbengue, Professor, University of Geneva (Senegal/Switzerland);
- Mr Alexis Mourre, Founding Partner, Mourre Gutiérrez Chessa Arbitration (France);
- Mr Achille Ngwanza, Managing Partner, Jus Africa (Cameroon/France);
- Ms Emilia Onyema, Professor, SOAS University of London (Nigeria/United Kingdom);
- Mr Minn Naing Oo, Managing Director, Allen & Gledhill (Myanmar);
- Mr Aniruddha Rajput, Consultant, Withers LLP (India/United Kingdom);
- Mr August Reinisch, Professor, University of Vienna (Austria);
- Mr Jeremy Sharpe, International Arbitrator (United States);
- Ms Giuditta Cordero-Moss, Professor, University of Oslo (Norway);
- Mr Mohammad Ismail, Judge, Vice-President of the Egyptian Conseil d'Etat (Egypt);
- Mr Michèle Potesta, Partner, Lévy Kaufmann-Kohler (Italy/Switzerland);
- Mr Donald Robertson, Partner, Dentons (Australia); and
- Mr Stephan Schill, Professor, University of Amsterdam (the Netherlands).⁵

20. In addition, UNIDROIT and the ICC-IWBL have invited a number of intergovernmental organisations and transnational bodies to participate as institutional observers in the Working Group. Participation of these organisations and stakeholders will ensure that different regional perspectives are taken into account in the development and adoption of the instrument. It is also anticipated that the observer organisations will assist in the promotion, dissemination and implementation of the instrument once it has been adopted.

21. Other experts and stakeholders (*e.g.*, representatives of States, private sector investors, international NGOs, and specialised academic institutes) may be invited to participate in the project at a later stage.

22. The need to take the intrinsic complexity of IICs into account was mentioned during the Workshop held in June 2022. IICs are inherently interdisciplinary, as they not only involve issues of (public and private) international law, but also commercial law (company law, finance), administrative law (concessions, expropriations, procurement), constitutional law (constitutional guarantees to property, the counter-limits doctrine) and taxation law. Necessary expertise might be added and allocated to the project, if needed, through the establishment of informal thematic sub-groups under the coordination of the official Working Group.

Question for the Working Group

- *Does the Working Group agree that issues should be considered from various perspectives (including other areas of law) and/or that the future instrument should acknowledge the interplay between different areas of law?*

⁵ The last five experts participate in the Working Group as individual expert observers. In addition to the list of experts, representatives of the ICC-IWBL for this project include Ms Mélida Hodgson (Vice-Chair) and Ms Cristina Martinetti (Member of the ICC-IWBL Council).

E. Methodology and timeline

23. The Working Group will undertake its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT's practice, in principle the Working Group will not adopt any formal rules of procedure and will seek to make decisions through consensus.

24. The Working Group will meet at least twice a year (for three days at a time). Working Group sessions will take place at the seat of UNIDROIT in Rome or at the headquarters of the ICC-IWBL in Paris. Meetings will be held in English without translation. Remote participation will be possible, although experts will be expected to attend in person if circumstances permit.

25. In terms of methodology, the project will benefit from a report commissioned by the ICC-IWBL on ICC Arbitral Tribunals' awards that reference principles relating to investment disputes. An internal researcher will review the awards with a view to select principles and rules that touch upon a selected number of clauses.⁶ The researcher's final report will present the information excerpted from the awards in an anonymised form to ensure full respect of the principle of confidentiality. Analogous research will be conducted on an open source basis under the supervision of the UNIDROIT Secretariat. The examination of awards will be useful to gather examples from practice to create a benchmark against which it will be possible to test the validity of the project's assumptions.

26. The preparation of an instrument on IICs is a high-priority project on UNIDROIT's Work Programme for the 2023-2025 triennium and should be completed during this period. The following is a tentative calendar:

- (a) Development of an instrument on IICs over at least five in-person sessions of the Working Group between 2023-2025
 - (i) First session: 23-25 October 2023
 - (ii) Second session: First quarter of 2024
 - (iii) Third session: Before the summer of 2024
 - (iv) Fourth session: Second half of 2024
 - (v) Fifth session: First quarter of 2025
- (b) Consultations and finalisation in 2025
- (c) Adoption by the Governing Council of the complete draft in 2026.

F. Relationship with existing international instruments

27. The project aims to explore how IICs can be harmonised in light of the UPICC and ICC standards, with a view to address, in contract terms, a number of developments in the area of IIL, including by addressing certain public policy goals emerging in IIAs. The final instrument is expected to be coordinated with existing instruments and with the ongoing work of several international organisations (IOs) insofar as they may have an impact on IICs, as well as with other related international legal instruments, including relevant UNIDROIT instruments and, where relevant, those elaborated by private sector associations, especially as regards the consistency of terminology and language across similar initiatives.

28. Several UNIDROIT instruments play a central role in this project. While the UPICC deserve a separate treatment in Section II and extensive consideration in Section IV,⁷ the PRICL and the ALIC

⁶ Namely, stabilisation clauses, hardship clauses, force majeure clauses, dispute resolution clauses, confidentiality clauses, renegotiation clauses, and choice-of-law clauses.

⁷ See Section II, paras 39-42; see also Section IV; paras 86-90 on applicable law.

Guide are proposed elsewhere in this paper as possible models for the final instrument. More generally, the Working Group should take into account the whole set of UNIDROIT instruments where appropriate: for instance, the [Legal Guide on Contract Farming](#) may be relevant for issues such as hardship and force majeure, and the project on the [Collaborative Legal Structure of Agricultural Enterprises](#) may provide useful guidance on multiparty contracts. As to possibly relevant private sector texts, model contracts or model clauses elaborated by associations of certain industries might also be considered.⁸

29. Although other IOs have sometimes addressed IICs,⁹ their work has mostly targeted public international law instruments (BITs and IIAs). UNCTAD has elaborated documents on investment policy options and treaty reform;¹⁰ the OECD has published studies on IIL standards and has established a forum to discuss investment policies;¹¹ the WTO manages a number of agreements that have an impact on investments and has launched initiatives on investment facilitation;¹² UNCITRAL leads the work on Investors-to-States Dispute Settlement (ISDS) reform,¹³ is codifying new standards of conduct for adjudicators in investment disputes in partnership with ICSID,¹⁴ and has also produced model legislative provisions on “Public-Private Partnership” (PPP), which considered some aspects of content and duration of PPP agreements that may be relevant to IICs;¹⁵ HCCH’s expertise on conflicts of law is also essential to this work.¹⁶ To the extent the final instrument will touch upon issues that fall within the scope of activity of other IOs or are covered by existing instruments, it should be coordinated with their work, and consistency of language and legal concepts should be ensured. Observer organisations in the Working Group are invited to contribute to ensuring such consistency, as well as to identify further studies or initiatives that may be of relevance to this project.

Question for the Working Group

- *Are there any further international instruments and initiatives, in addition to those mentioned above, that need to be considered when developing the future instrument on IICs?*

II. GENERAL ISSUES RELATING TO THE PROJECT AND THE FUTURE INSTRUMENT

30. This Section aims at illustrating the main purposes of the project. It is intended to facilitate the Working Group’s agreement on the overall boundaries and structure of the future work. Part A describes recent developments in IIL which provide the contextual background for this Project. Part B explains how the mingling and fragmentation of the various legal sources protecting foreign

⁸ See, e.g., the FIDIC guidance documents on contracts (FIDIC Suite of Contracts or the FIDIC Contracts Guide).

⁹ E.g., UNCTAD has issued a publication on contracts between States (or State Entities) and foreign investors: see *State Contracts*, UNCTAD Series on Issues in International Investment Agreements, Geneva, 2004.

¹⁰ See the 2015 Investment Policy Framework for Sustainable Development, officially launched at the Financing for Development Conference in Addis Ababa, at <https://investmentpolicy.unctad.org/investment-policy-framework>.

¹¹ See OECD, Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers on International Investment, 3, 2004, at <https://www.oecd.org/investment/investment-policy/investment-treaties.htm>.

¹² See the Agreement on Trade-Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS), and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).

¹³ See the work of UNCITRAL Working Group III. The reform is five pronged: the establishment of a Multilateral Permanent Investment Court and an Appellate Mechanism, the reform of Procedural Rules, an Investment Mediation and Dispute Prevention policy, the setting of a Multilateral Advisory Centre, and the drafting of Codes of Conduct. More information is available at https://uncitral.un.org/working_groups/3/investor-state.

¹⁴ See the UNCITRAL/ICSID initiative on the drafting of codes for arbitrators and judges.

¹⁵ See the [UNCITRAL Model Legislative Provisions on Public-Private Partnerships \(2019\)](#).

¹⁶ See, e.g., the HCCH Principles on Choice of Law in International Commercial Contracts at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

investments (including IICs) may create uncertainty, to the extent that a certain degree of unification and standardisation is desirable, and how the elaboration of a body of transnationally-uniform principles to govern IICs may be a solution to address the issue. The remaining Parts elaborate on the possible “layers” of the potential corpus of principles: (i) the UPICC (Part C); (ii) the principles, rules and clauses that apply in current IIC practice (Part D); and (iii) new principles, rules and clauses that may contractually address vague standards in IIAs/BITs and/or accommodate emerging public policy demands in recent IIAs (Part E).

31. The Working Group is invited to examine Parts A through E of this Section together with the issues raised in Section I, paras 10-16 (“Format of the instrument”) and in Section IV, paras 57-58 (“Structure of the instrument and sub-topics (table of contents)”). The Working Group is invited to consider the questions at the end of each Part in order to make some preliminary decisions on methodology.

A. Background: the project as a response to the recent transformations of IIL

32. The protection of investor rights has traditionally been governed by several sources of law, which legal scholars came to label comprehensively as international investment law (IIL). IIL first developed from diplomatic protection based on customary norms regarding the treatment of aliens and foreign property, later complemented by the greater protection offered by international investment agreements (IIAs) and bilateral investment treaties (BITs)¹⁷. Today it provides a system for governing relations between States and private foreign investors and promote foreign investments that includes an opportunity for States and private investors to settle their disputes (treaty arbitration or ISDS).

33. Against the background of these instruments, an important part of private foreign investment operations in a host State have typically been, and continue to be, governed by IICs, *i.e.*, contracts between a State, or a State entity, and foreign investors.

34. The last decade has seen some degree of dissatisfaction with IIL and ISDS on the part of various stakeholders. In an extreme synthesis, on the one hand, some States focus their criticism on IIL potential interferences with States’ power to legislate under the public purpose standard, also due to the so called “regulatory chill” effect,¹⁸ and stress the need for an enhanced commitment by the private sector in favour of a new set of public policy goals, including sustainable development.¹⁹ On the other hand, some States and private investors often converge in pointing out the lack of consistency of arbitral decisions and complain of the legal uncertainty generated as a consequence. Indeed, the legal basis for protection is widely fragmented in a myriad of agreements, which often present generic wording and paves the way for diverging interpretations.²⁰ Finally, part of civil society contends that IIAs and ISDS lack transparency, present conflicts of interest on the side of arbitrators and are intrinsically investor-oriented. According to this view, there is no evidence of investment

¹⁷ At the public international law level, protection was first granted based on principles of diplomatic protection and State responsibility for harm to foreigners in customary international law and later complemented by treaty law, *i.e.* Friendship, Commerce, and Navigation (FCN) treaties, lump sum agreements and, more recently, BITs. Nowadays, while BITs are still popular, there is a trend toward concluding regional or mega-regional agreements, and investment protection is often included in special chapters of Free Trade Agreements (FTAs), but a comprehensive multilateral agreement, such as the Multilateral Agreement on Investment (MAI) has never attained widespread consensus.

¹⁸ Particularly, due to the risk to pay hefty compensation sums under the prohibition of expropriation, which has been stretched in some arbitral decisions to cover so called “regulatory takings”.

¹⁹ Other public policy concerns include social policy, local communities’ involvement, climate change, support policies for SMEs, digitalisation, and the like: see [OECD, The Future of Investment Treaties. Possible Directions \(2021\)](#), p. 11 *et seq.*

²⁰ According to the [UNCTAD Investment Policy Hub](#), at the end of June 2023, BITs amount to 2827 units (2217 in force), while Treaties including Investment Provisions (TIPs) total 437 units (364 in force), for a total of 3264 units (2581 in force).

increases after the conclusion of IIAs/BITs. Furthermore, promised societal benefits would not necessarily manifest for local communities.

35. These considerations have led to structured initiatives by IOs to reshape IIL and provide a forum for discussion of IIL reform.²¹ While most of the BITs currently in force belong to the “older” generation of IIAs,²² over the last decade a significant number of States have been reforming their BITs, creating a new generation of IIAs which feature more cautious language regarding States’ regulatory power and which incorporate wider public policy goals. For instance, certain recent IIAs contain best effort obligations for States to require the counterparties, or call on investors directly, to adhere to international standards on responsible business, as enshrined in relevant soft-law instruments, *e.g.*, on sustainable development, corporate social responsibility (CSR), human rights, social policy, sustainability, and support to SMEs.²³ A number of States are opting out of the IIA/BIT system by terminating or withdrawing from treaties, or not renewing a treaty upon its expiration, and establishing new templates for future agreements, in some cases not including arbitration provisions altogether,²⁴ or providing for alternative mechanisms to settle disputes or promote and attract foreign investment.²⁵

36. As a result, a perception exists that IIL is in a state of transformation and that new solutions might have to be designed. As the current scenario might lead to a decrease in safeguards for private investors, coupled with an increase in complexity of treaty obligations, a shift towards the use of contracts figures among the possible responses to this situation. However, no systematic work has yet been undertaken on how to handle these issues at the contractual level. This Project aims at

²¹ UNCTAD, the European Commission, and more recently UNCITRAL and the OECD have all examined options for IIL and ISDS reform: see, primarily, the [UNCTAD World Investment Report of 2015](#) entitled “Reforming International Investment Governance”, p. 121 *et seq.*, principally 124 and 127-128, and the documents on IIL and IIA reform at <https://investmentpolicy.unctad.org/>; see also the work of UNCITRAL Working Group III dedicated to ISDS Reform. Regarding the EU Commission, see, *e.g.*, the reports on public consultations on ISDS and Trade and Investment Partnerships and the proposal for the establishment of a “Multilateral Investment Court” based in the Hague. For an account of OECD work in this area, see, *e.g.*, the OECD Policy Framework for Investment (2015) and the OECD yearly conferences on investment policies (see the 2023 Conference on “Investment treaties, the Paris Agreement and Net Zero: Towards alignment?” at <https://www.oecd.org/daf/inv/investment-policy/conference-investment-treaties.htm>). The OECD has established a forum for discussion on investment issues with a two-year work programme divided into two tracks (future challenges and desirable changes to IIAs’ current approaches and possible alignment of key provisions of old generation treaties to newer ones based on collective reform efforts: see <https://www.oecd.org/investment/investment-policy/investment-treaties.htm>). The attention of IO efforts is mainly focused on more deliberate drafting of IIAs, especially regarding regulatory power and stabilisation clauses, host State law compliance as a condition for investment protection, codes of ethics and standards of professionalism for arbitrators, addressing conflicts of interest, and options to ensure more consistency in ISDS (through appeal instances and an International Tribunal on Investment), as well as the upholding of international standards on responsible business as possible conditions for the legality of the investment.

²² Over 88% of the IIAs/BITs in force at the end of 2022 were signed before 2012 and thus they were inspired by “old-generation” content: see UNCTAD World Investment Report 2023, p. 73.

²³ *E.g.*, the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, or the United Nations Guiding Principles on Business and Human Rights. New IIAs also call on States to accede to important conventions and commitments in the field of sustainability and environmental protection and reinforce the domestic legal frameworks on anti-corruption, anti-money laundering and fraud, thus addressing traditional normative gaps. More recently, IIA reform has focused on investment policy implications for essential security interests (golden powers); see, *e.g.*, the joint [UNCTAD-OECD Twenty-eighth Report on G20 Investment Measures](#) of 14 November 2022.

²⁴ According to UNCTAD, there were 569 terminations between 1999 and 2022, with 70% of the terminations occurring in the last decade (World Investment Report 2023, p. 73). In 2022, UNCTAD recorded 84 terminations compared with 15 new IIAs, with terminations exceeding new treaties in force for the third consecutive year (*ibid.*, p. 71).

²⁵ Brazil (in its last BIT); the United States, Canada and Mexico in the 2019 USMCA; and recently the EU (the EU-Japan Economic Partnership Agreement (EPA) and the EU-China Comprehensive Agreement on Investment) have all limited ISDS and opted, with different terms and limitations, for State-to-State Dispute Settlement (SSDS). Other trends include attributing a greater role to Governments in deciding on remedies and a greater use of intergovernmental committees to manage investment relationships, as well as a preference for non-pecuniary trade remedies rather than damages. See OECD, *The Future of Investment Treaties: Possible Directions* (2021), p. 15 *et seq.*; see also UNCTAD World Investment Report 2015, p. 108 *et seq.*

exploring how IICs can help to address these issues while taking both investors' concerns and current public policy demands into account.

B. Possible reference to a “transnational body of principles” as a new tool for investment protection

37. In order to address the new developments, this project aims at strengthening and standardising the legal framework for IICs, *i.e.* contracts between States, or State Entities, and private foreign investors. IICs are traditionally accounted to be used primarily in three areas, *i.e.*, exploration of natural resources²⁶, public works contracts for major projects²⁷ and (iii) contracts for industrial and economic cooperation.²⁸ The specialty of IICs lies in that foreign investors usually establish a long-lasting economic presence in the host Country injecting large amount of private capitals in highly regulated sectors with a strong connection with the public interest, which implies a higher exposure to political, legislative and market risks, compared to other types of contracts.²⁹ As a consequence, IICs need, on one hand, a greater amount of adaptation of general contract law to their specificities, including wider grounds for renegotiation to restore financial equilibrium when altered by supervening events, on the other, a more articulated set of legal safeguards, which present legal complexity³⁰ and may stretch until providing for a certain degree of internationalisation or transnationalisation of the contract, so to cope with possible inconsistencies of the law of the host State with international standards on investment protection.³¹

38. Against this background, the Working Group may wish to consider how the final instrument may contribute to encourage legal certainty in IIL and to address contractually, to the extent possible, the further current criticisms of IIL. Particularly, the instrument could provide guidance, or formulate principles with comments, and appropriate model clauses, aimed at unifying and standardising IICs and the applicable law under a “transnational body of principles” that could be based on three “layers” of content: (i) the UPICC as general contract law principles and rules³² and as adapted to the context of IIL; (ii) principles, rules and clauses deriving from the contractual practice of IICs; and (iii) possible innovative principles to address treaty standards and new public policy goals in the latest generation of IIAs and BITs.

²⁶ *E.g.*, “Concession Agreements” (CA), where the foreign investor is enabled to exploit natural resources or manage utilities or other public services in exchange for the payment of royalties, or “Production Sharing Contracts” (PSA), common in the oil and gas sector, where the foreign investor provides capitals and know-how to run exploration, drilling, extraction, refinement, production and commercialisation, and receive in return a share of the resource to cover cost and make a profit (based, traditionally, on the 50% rule).

²⁷ *E.g.*, public infrastructure (ports, dams, highways) under a Build-Operate-Transfer (BOT) contract or a Build-Own-Operate (BOO) contract.

²⁸ *E.g.*, “Joint Ventures Agreements” (JVA) or for the building and management of industrial plants or the provision of public services). Industrial cooperation between a State and a foreign investor may also rely on purchasing shares in an existing company, or may happen under a BOO contract. A share purchase agreement (SPA) is a contract that sets out the terms and conditions relating to the purchase of shares in a company. It is qualified as a protected investment if the number of shares purchased exceeds a certain threshold; it is durable and implies some relevant degree of participation in the company's activities.

²⁹ The State, indeed, is not only party to the IIC, but also legislator and therefore able to influence the legal framework normally applicable to the contract, while economic indicators and market positions may be volatile in the medium and long term.

³⁰ See the Workshop on Transnational Law and Investment Contracts held in June 2022 at <https://www.unidroit.org/transnational-law-and-investment-contracts-presented-to-the-unidroit-governing-council/>.

³¹ See Section IV, paras. 86-90.

³² In the context of the UPICC, the term “principles” does not only refer to provisions with a higher degree of generality which incorporate certain value assumptions capable of being projected onto a wider range of more specific provisions (good faith, reliance, cooperation, party autonomy, and the like); the term also includes more specific rules which essentially cover the most important topics of the general law of contract and obligations (*e.g.*, formation, interpretation, validity, performance, non-performance and remedies, assignment, time limitations, conditions, etc.).

Questions for the Working Group

- Does the Working Group agree to provide guidance on, or elaborate a transnational body of principles derived from the following three "layers": (i) the UPICC as general rules of contract law, as adapted to IICs; (ii) principles and clauses from IICs in practice; and (iii) principles relating to common standards and public policy commitments in new IIAs?
- Would it be of interest to examine the interrelations between the three layers?

1. Role of the UPICC

39. The UPICC, as the first of the three layers which may contribute toward forming a uniform set of principles on IICs, could confer more specific and yet more widely shared substance to a field that is highly differentiated and largely confidential in practice, as well as to sometimes vague legal notions found in contracts, domestic laws, and treaties.

40. The UPICC may be chosen by contracting parties or identified by arbitrators as the applicable law to a contract, alone or in combination with the law of the host State.³³ They may also be incorporated as content of the contract. Moreover, the UPICC may perform other functions, such as interpret or supplement domestic law or international uniform law instruments, help to ascertain their content, and serve as a model for negotiators or legislators.³⁴

41. When discussing the role and function(s) of the UPICC in this project, the Working Group may wish to take into account the fact that the UPICC are, to some extent, already applied to IICs. Publicly-available investment arbitration cases show that the UPICC have been used in different ways in the IIL context, most prominently as a means of interpreting and supplementing the applicable domestic law, often to add weight to the tribunal's interpretation of the relevant domestic law, but also as the *lex contractus*.³⁵ The UPICC have been applied in investment arbitration cases for issues concerning the form of contract, non-performance, good faith and fair dealing, inconsistent behaviour, common intention of the parties, the duty to achieve a specific result *versus* best efforts, quantification of damages, set-off conditions, hardship, liability exemption clauses, and force majeure.³⁶ However, the confidentiality of IICs and arbitration proceedings have thus far hindered the possibility of comprehensively evaluating how and to what extent the UPICC are currently being used by contracting parties and arbitrators. This project therefore provides an invaluable opportunity to assess their potential as a general contractual legal framework for investment disputes.

42. With these elements in mind, the Working Group may wish to consider (i) taking stock of how arbitral tribunals have applied the UPICC to IICs, including if they have been used as applicable law, tools for contract interpretation, or gap-fillers, and detecting commonalities and possible divergences in their application or interpretation; (ii) analysing how the UPICC interact with the most

³³ Whether the parties have agreed that their contract is governed by the UPICC or whether their contract is governed by general principles of law, the *lex mercatoria*, or similar, see the UPICC Preamble (2016 revision), p. 1. The UPICC may also be applied by arbitrators as the appropriate system of rules to govern the contract when the parties have not chosen any law.

³⁴ *Ibid.*

³⁵ Contracting parties may wholly or partially incorporate the UPICC into their investment contract or expressly refer to them as the law governing the contract. While the exclusive use of the UPICC as governing law seems quite infrequent in IICs to date, there are examples of cases in which the applicability of the UPICC was inferred from the agreement. For instance, in *Joseph Lemire v Ukraine*, the tribunal determined that the parties intended their investment contract to be governed by the UPICC since they had incorporated extensive parts of the Principles into their agreement (*i.e.*, a "negative choice" of the UPICC through the exclusion of specific national law). Furthermore, contracting parties may refer in their IIC to "generally accepted principles of international commercial law", "general principles of law", *lex mercatoria*, or the like as the governing law, in which case the UPICC may be seen as a manifestation thereof, as part of the "general principles of law common to nations" (see ICC ICA (First Partial Award) case no. 7110 (June 1995); ICC ICA case no. 7375 (5 June 1996); and *EUREKO v. Republic of Poland*, Ad hoc arbitration, Brussels (19 August 2005)). Finally, in the absence of any choice of law by the contracting parties, arbitral tribunals may decide (under the rules of arbitration chosen by the parties) to apply the UPICC as governing law, either alone or in conjunction with domestic law.

³⁶ For an overview of the relevant case-law principle by principle, see the [UNILEX database](#).

common contractual terms in IICs and ascertaining how they may be adapted to the specific needs of IICs; (iii) verifying the need for and feasibility of developing model clauses for specific Principles that the Working Group finds advisable to adapt to the needs of IICs. There may be merit in, *e.g.*, considering whether the principle of freedom of contract should be reviewed in light of States' constraints (such as formal procurement proceedings or State aid rules), or how the principles on hardship and force majeure work in the context of IICs as long-term contracts when considering the exercise of public power.³⁷ In this regard, the Working Group may wish to assess the relevance of the UPICC 2016 revision to IICs as for application to long-term contracts and discuss what degree of adaptation would be desirable or necessary, while also taking into account the special characteristics and nature of IICs.

Questions for the Working Group

- *Does the Working Group agree to engage in an overall examination of how the UPICC have been applied in IICs and in dispute settlement concerning IICs, based on arbitral awards and other sources, if any?*
- *Does the Working Group agree to identify the most common terms of IICs and examine how the UPICC interact with those?*

2. Principles and clauses consolidated in the practice of international investment contracts

43. The second layer derives from contract practice as it has progressively consolidated between States (or State entities) and foreign investors, and in the interpretation of arbitral tribunals. It would include guidance or a set of principles which are strictly linked to IICs and their distinctive features.

44. In particular, the Working Group may wish to consider identifying and examining the most fundamental clauses used in IICs practice, *i.e.* those centered on "investment protection". These may include (i) "stabilisation" or "standstill" clauses, which provide for the obligation of the host State to not alter the domestic law that applies to the contract, or at least to shield the contract from the legal effects of any normative change and maintain the legal treatment that was applicable or agreed upon at the time of signature; (ii) "adaptation" or "renegotiation" clauses, which lay down the conditions for the parties to the contract to discuss how to adapt the contract to changes of circumstances which may affect the financial equilibrium of the investment in the medium and long term; (iii) "immutability" clauses, which usually provide for the "crystallisation" of what was agreed in the contract and may even foreclose the possibility of terminating the contract, except by agreement of the parties or in very unique situations;³⁸ (iv) specific versions of hardship and force majeure clauses; (v) dispute resolution clauses; and (vi) clauses on confidentiality. Other clauses that may be deemed relevant in this context (and particularly to public policy goals in the host State) are (i) intellectual property and transfer of technology clauses;³⁹ (ii) "economic development" clauses, which provide for social commitments by the investor directly or not directly linked to the investment performance;⁴⁰ and (ii) "environmental protection" clauses, which provide for the reconstruction of the natural environment where the investment took place.⁴¹

³⁷ For more details on examples of possible adaptation of the UPICC to IICs specificities, see Section IV, paras. 65-66 on freedom of contract and 77-80 on hardship and force majeure.

³⁸ Stabilisation, adaptation, and immutability clauses are listed separately for the sake of clarity, but it may occur in practice that they appear in one or more clauses together, as part of the same bargain and of a comprehensive regulation of certain legal effects.

³⁹ These types of clauses provide for the legal protection and conditions of licence and use of the investor's intellectual property rights by the local company, as well as rules of ownership and entitlement on intellectual property that may result from the industrial cooperation with the State or State entities.

⁴⁰ Such as building infrastructure (hospitals, roads, transport systems), providing training and know-how, or hiring local personnel.

⁴¹ *E.g.*, after extended and usually invasive oil land exploration.

45. There could be merit in addressing how such typical clauses in IICs have evolved over time and which form they take in today's practice.⁴² The Working Group may wish to consider (i) taking stock of the most common clauses in investment contract practice in the forms that may result from arbitral awards and other sources, including studies of IOs, and detect commonalities and divergences; and (ii) identifying for which types of clauses there may be merit in formulating guidance, taking recent practice into account, including arbitral interpretations and the regulation of similar concepts in IIAs/BITs (if any).

46. The Working Group may also wish to discuss whether it should limit the analysis to the clauses centered on investment protection, or rather extend the analysis to a wider range of clauses that might still be common to certain types of IICs, such as joint venture or association-related clauses, insurance clauses (including for political and legislative risks), clauses on revenue transfers, payment clauses, option rights, pre-emption rights, currency fluctuation clauses, local procurement clauses, clauses on the minimum amount of investment required over a certain agreed period, clauses containing reporting requirements for the investor *vis-à-vis* domestic authorities and the right of the State to be informed; clauses providing the State with the right to exert control over operations throughout the duration of the investment.⁴³ The Working Group may also wish to consider if the analysis should be extended to (i) "model contracts" as provided in the special legislation of some countries, especially for the exploitation of natural resources; and/or (2) "contract types" and "model clauses" as elaborated by associations of industry or other organisations.⁴⁴

47. In this regard, the Working Group may also wish to consider if it is feasible (and relevant) to consider the principles that have been progressively shaped and stratified by international arbitration tribunals in relation to IICs over the decades,⁴⁵ examine how they relate to the principles under the other two layers (UPICC and treaty standards) and if there is some use in providing their restatement in the final document (including under the relevant UPICC, as adapted).⁴⁶

Questions for the Working Group

- *Should the future instrument provide guidance on typical clauses in investment contracts, based on their development over time and in practice? Should the analysis be limited to the most typical clauses in investment contracts (e.g., stabilisation, renegotiation) or be extended to public policy-related clauses (technology transfer, environmental protection) and other clauses commonly included in certain IICs (e.g., related to joint ventures, revenue transfers, currency fluctuations or payments)?*
- *Should the analysis be extended to model contracts, often contained in specific legislation on the exploitation of natural resources, or guidance documents and contract types or model clauses elaborated by associations of industry?*

⁴² It may also deserve consideration to examine what counter-limits such clauses encounter in domestic law in different geographical areas.

⁴³ *E.g.*, pre-entry screening and right of constant supervision of the operations, including site access and delivery of documents, budget sheets, financial accounts, and the like.

⁴⁴ See, *e.g.*, the FIDIC rules. The ICC has published a Business Guide to Trade and Investment that examines most recurring clauses in IICs.

⁴⁵ An important criticism of applying a "transnational body of principles" to IICs is that there would not be such a comprehensive body of principles, but at most some isolated rules insufficient to give rise to an authentic "system" of law (see M. Sornarajah, *The International Law on Foreign Investment*, Cambridge, 2010, p. 285 *et seq.*, especially 298-299 and 302 *et seq.*). Conversely, the "transnational law of investment" is often referred as one of the most well-articulated areas of transnational law, *i.e.* a system of law "in the making" that is merely not sufficiently well-known because of the confidentiality of contract-based awards (see, P.C. Jessup, *Transnational Law*, New Haven, 1956, p. 391; B. Goldman, *Frontières du Droit et Lex Mercatoria*, Archives de Philosophie du Droit, 9, 1964, p. 177 *et seq.*).

⁴⁶ An essential part of such legal materials would be made up of principles that reflect norms common across legal orders, such as good faith, *pacta sunt servanda*, estoppel, reliance, equity and good conscience, justice, unjust enrichment, *non venire contra factum proprium*, *res judicata*, *rebus sic stantibus*, non-discrimination, prohibition of abuse of law, respect of acquired rights, "competence-competence", due process, and the like (as a modern "natural law"), integrated and supported by professional and commercial usages that derive from repeated practice generally admitted in the relevant economic sector.

- *Would the Working Group agree with the suggested approach, i.e., (i) taking stock of the most common clauses in investment contract practice, and detecting commonalities and divergences; and (ii) identifying for which type of clauses there may be merit in formulating guidance/principles and model clauses?*
- *Would it be of interest to consider principles elaborated by arbitral jurisprudence on IICs?*

3. Principles addressing IIL treaty standards, including emerging public policy demands in IIAs/BITs

48. As a third layer, the Working Group could preliminarily consider including in the future instrument principles that address contractually, and implement to the extent possible, standards of IIL in two possible areas: (i) protection standards reflecting general rights and obligations of the parties under IIAs/BITs; and (ii) standards regarding public policy demands on investors emerging in recent IIAs/BITs.

49. Regarding point (i), IIAs and BITs include an articulated set of standards concerning general rights and obligations of the parties (“fair and equitable treatment”, the prohibition of expropriation without compensation, rules on the right to regulate and regulatory takings, “public purpose”, “full protection and security” and the like). As treaty rules agreed at inter-States level, these standards fall outside the scope of this project. The search and elaboration of principles in this area would rather touch upon the question of if and to what extent a newly formulated set of principles and clauses may “contractualise” and “reproduce” function by function the protection offered by IIAs/BITs standards. The core of this activity would not consist of simply transplanting treaty standards into contracts, but rather of identifying the needs for protection covered by each treaty standard and devise new contractual standards that may meet those needs, taking into account current criticism to the treaty system and the need to consolidate existing jurisprudence, while conferring more specific content to vague IIAs/BITs principles. The work of other IOs in this regard should be taken into account.

50. Regarding point (ii), the Working Group may wish to discuss some of the recent developments described in Part A of this Section, and particularly if and how or to what extent the future instrument could concretely address, at the contractual level (and thus “contractualise” as in para. 49) newly emerging public policy provisions in IIAs/BITs that impose or suggest additional commitments on foreign investors. Treaty language may recall the respect of international human rights or environmental protection standards, or the need to comply with national law standards in the same areas, while committing not to lower public policy standards at the national level as a means to attract foreign investments;⁴⁷ more often, IIAs/BITs invite the parties to require investors to adopt international soft-law documents which prescribe corporate social responsibility standards or other principles on “responsible business” (sustainable development, labour standards, protection of women and children, local communities involvement, human rights due diligence).⁴⁸ It may be worthwhile to examine how this type of commitments have been translated into contract practice and if any arbitral jurisprudence is available. The Working Group may consider formulating guidance,

⁴⁷ Most recent Model IIAs seem to connect the respect of international standards on public policy as enshrined in international conventions and soft-law documents with the compliance with national law: see, e.g., the Dutch Model BIT of 2019 and the Colombia Model BIT of 2017. The Brazil-Mexico Agreement on Cooperation and Facilitation of investment, the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol of 2017, and the Morocco-Nigeria BIT of 2016 provide for a vast range of obligations, such as respecting the host State’s laws, promoting sustainable development, granting workers’ rights, refraining from corruption, respecting the local political system, applying CSR principles and developing self-regulation practices.

⁴⁸ E.g., the [2023 OECD Guidelines for Multinational Enterprises \(2023\)](#) in the Canada-EU Comprehensive and Economic Trade Agreement (2016), the United States-Mexico-Canada Agreement (2018), the Colombia-Spain BIT (2021) and the Colombia-France BIT (2014); [the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy \(2022\)](#), in the EU-Moldova Association Agreement (2014) and the Morocco-Nigeria BIT (2016); [the United Nations Guiding Principles on Business and Human Rights \(2011\)](#) in the Dutch Model BIT (2019); or the Sustainable Development Goals of the United Nations (2015) in the Morocco-Nigeria BIT (2016).

or principles with comments, accompanied by model clauses that could concretely spell out newly emerging investors' commitments with a view to meet States' demands, but also to clarify their scope.⁴⁹

Questions for the Working Group

- *Should the final instrument cover a selection of principles that may address IIAs and BITs standards contractually, with a view to reproduce as well as specify vague protection standards? Should the Working Group take into account their interpretation in arbitral jurisprudence? Should model clauses also be drafted?*
- *Should the instrument address new trends in public policy reflected in new IIAs/BITs, ranging from CSR and the protection of human rights to environmental protection? How should these new trends be covered? Would the Working Group agree to develop model clauses to clarify such obligations of investors in IICs?*

III. SCOPE OF THE INSTRUMENT

50. The mandate for this Project clearly requires it to focus on "international investment contracts". IICs are commonly described in a general manner as contracts (i) negotiated, concluded and executed between a State (or a State-owned entity, agency or subdivision) and a private foreign investor (or a local subsidiary of a foreign investor) that (ii) tend to relate to the establishment and operation of one or more lasting economic activities by the foreign investor in the host State, which are not merely speculative but implying some substantial commitment. The "international character" of IICs depends on their elements of connection with more legal orders: *inter alia* and in addition to the foreign citizenship of the investor, the foreign provenance of the invested capital or know-how, and most often the applicable law and the dispute settlement clause.

51. IIAs usually do not provide a definition of IICs.⁵⁰ Rather, they delimit their scope of application by defining a subjective and an objective element, *i.e.*, an investor and an investment. The ICSID Convention does not define the term "investment", leaving its meaning to States and arbitrators. Thus, several conceptual approaches have emerged: providing a definition (either an intensional definition, referring to the essence of the concept, or an extensional definition, including a list of examples), or rather not providing a legal definition but describing the "economic significance" of such and leaving definitional issues to practice and interpretation. On these terms, arbitral tribunals have often come to qualify the very IICs themselves as "covered investments" and thus assets which deserve protection under IIL.

52. With regard to the subjective element, IIAs often refer to an investment as a network of complex interrelated economic activities which may include contractual relationships between a State or a governmental agent or entity and a foreign private, for-profit company. However, an investment relationship between a State and a foreign government-controlled entity may also be relevant.⁵¹ Treaty definitions refer to the importance of investors' nationality as the element that triggers protection and jurisdiction. IIA reform has recently aimed at narrowing the range of protected

⁴⁹ The Working group is invited to consider point (ii) together with paras. 85-93 of Section IV, covering issues of the legal relationship between IICs and IIAs/BITs, and paras. 74-76 which provide examples of public policy standards in IIAs/BITs that might be "contractualised".

⁵⁰ Arbitral tribunals have occasionally defined the concept of "investment agreement", often in a narrow way: see *Duke Energy v. Ecuador* (18 August 2008) and *Burlington v. Ecuador* (2 June 2010).

⁵¹ See *Rumeli Telekom v. Kazakhstan*, ICSID Case no. ARB/05/16 (29 July 2008).

investors in order to avoid “treaty shopping”⁵² and “round-tripping”⁵³ by including real business activity requirements or denial of benefits clauses.⁵⁴

53. As to the objective element, treaties traditionally include broadly-formulated definitions with a certain prevalence of asset-based definitions referring to direct or indirect control of every kind of asset or economic activity.⁵⁵ More and more exceptions are provided for protected sectors (education, health) and for certain policy areas (taxation). A trend is emerging to limit coverage by expressly excluding short-term, speculative or portfolio investments, sovereign debt obligations and other assets,⁵⁶ or imposing certain conditions (“domestic law compliance”) or defining certain characteristics of the investment, in line with the above-mentioned approach describing “economic significance”, such as the commitment of capital, the expectation of profits and the assumption of risk, or a certain duration or lasting economic relation of the investment.⁵⁷

54. The Working Group may wish to consider whether the future instrument should provide a normative definition of “international investment contracts”, or if it would be preferable to simply describe the scope of the instrument by illustrating some examples of investment contracts. The Working Group should also take the existing instruments and ongoing initiatives of IOs in this field into account, as well as recent IIAs/BITs practice. Should the Working Group deem it desirable to formulate a definition of international investment contracts, it is proposed to postpone the development of such definition to a later stage of the project.

Questions for the Working Group

- *Should the future instrument contain a definition of “international investment contracts”? If not, should it provide examples of investment contracts?*

IV. CONTENT OF THE INSTRUMENT

55. The topics covered in this Section offer an initial attempt to frame the discussion on the possible substantive content of the future instrument.

56. The Working Group is invited to consider proposing additional topics that could be covered by the instrument, beyond the examples provided in this Section. For each topic it decides to cover, already included or newly proposed, the Working Group is invited to consider commonalities or divergences with arbitral and contractual practice, the possible relevance of domestic law (in particular on foreign investments), model contracts and court decisions.

A. Structure of the instrument

57. The structure and content of the future instrument may depend on the format.⁵⁸ If the Working Group prefers to propose for adoption a set of principles with comments, the final instrument could combine a list of principles that adapt the UPICC to IICs with principles deriving from IICs practice and/or addressing IIL standards, together with comments explaining their application. This

⁵² The channelling of the investment through a “mailbox company” in the territory of a State party to enjoy its protection.

⁵³ The expatriation by domestic investors of investment capital to reinvest in the home country to obtain protection.

⁵⁴ See policy developments from 2015 onward in UNCTAD World Investment Reports 2015 and 2016, up through World Investment Report 2022, p. 66 *et seq.*

⁵⁵ Including tangible and intangible property, intellectual property rights, mortgages, liens and pledges, shareholding or participation in a company, claims to money or performance, licences and permits, and the very investment contracts themselves.

⁵⁶ Other examples of exclusion include claims to money arising from commercial contracts and intellectual property rights not recognised or protected under host State’s law.

⁵⁷ See the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Chapter on investments at art. 8.1, or the Nigeria-Turkey BIT (2011) and, from even earlier, the USA-Chile BIT (2003).

⁵⁸ See Section II, paras. 10-16 on the format of the future instrument.

option would make the instrument more closely resemble a “restatement of principles” concerning a specific sector of contract practice, such as – in UNIDROIT’S experience – the PRICL.⁵⁹ Model clauses could be placed right after the comments accompanying such principles. It is worth noting that the PRICL were conceived as a non-binding set of rules that parties can either choose as the law governing their contracts or incorporate into their agreements,⁶⁰ including principles whose formulation has been influenced by the UPICC and principles specific to reinsurance contract law.⁶¹

58. If the option of a legal guide is preferred, the structure might rather be inspired by the [ALIC Guide](#), which does not closely follow the structure of the UPICC, but rather aggregates areas of general contract law and thematic areas specific to investment contracts across seven chapters.⁶² While the ALIC Guide drafters carefully selected relevant areas of interest under general contract law, some of its content and its treatment are specific to ALICs (e.g., land use and tenure rights) and are of less interest for IICs, possibly justifying a different mode of organisation.

Questions for the Working Group

- *How should the content of the instrument be structured? Would it be useful to draft a tentative table of contents? Would the organisation vary depending on the format of the instrument?*
- *If a list of principles with comments is chosen, would it be of use defining the relationship between the final instrument and the UPICC along the same lines of the PRICL?*

B. Definitions

59. The practice of IICs relies on specific language and legal concepts that are usually included in a list of definitions at the beginning of the contract, describing their meaning and coverage.

60. While the UPICC already contain definitions for the relevant concepts used therein,⁶³ a list of definitions in the future instrument specific to IICs may prove useful to establish meanings and provide a clearer context to prospective users, especially in relatively new areas (e.g., “contractualised” BITS/IAs standards, CSR and other public policy concerns). The [ALIC Guide](#) follows a similar approach when listing categories of parties and stakeholders (such as investor, grantor, local community, traditional authority, legal tenure right holder, etc.). As stated in Section I, it is advised that any definitions be consistent, as far as possible, with the terminology used in other international instruments.

Questions for the Working Group

- *Should the future instrument contain a list of definitions relevant to IICs? Which legal concepts should be included in the list?*
- *Should certain definitions be developed with priority, while others would be gradually developed as the project progresses?*

⁵⁹ The PRICL includes five chapters: (i) general part; (ii) duties; (iii) remedies; (iv) aggregation; (v) allocation.

⁶⁰ In this respect, the PRICL draw on the example of the Preamble of the UPICC (see Art. 1.1.1).

⁶¹ The PRICL may be considered partly an adaptation of the UPICC as applied to reinsurance contracts and partly a restatement of principles and rules that are specific to reinsurance contracts and have no connection with the UPICC. The comments to the PRICL clearly define the relationship between the PRICL and the UPICC. In particular, they make express reference to the UPICC provisions that influenced the elaboration of the PRICL, as well as to the rules of general contract law contained in the UPICC that are not replicated in the PRICL, but that will govern the contract if the PRICL are chosen as applicable law (Art. 1.1.2). The instrument also contains a base model choice-of-law clause according to which the contract shall be governed by the PRICL, and two base clauses with an addition for gap-filling (PRICL/UPICC and accepted principles of international commercial law; PRICL/UPICC and the national law chosen by the parties).

⁶² The ALIC Guide includes seven chapters: (1) legal framework; (2) parties, stakeholders, and contractual arrangements; (3) pre-contractual issues; (4) rights and obligations; (5) contractual relationship with reference to non-performance and remedies; (6) transfer of rights and obligations under the contract; and (7) grievance mechanisms and dispute resolution.

⁶³ See, e.g., UPICC Art. 1.11.

C. Parties, stakeholders and contractual arrangements

61. The Working Group may wish to consider addressing the legal matters that concern parties to IICs (States and private foreign investors), as well as the different categories of affected stakeholders (including local communities, contractors and sub-contractors, etc.).

62. An example may be drawn from the ALIC Guide, where Chapter 2 contains a description of the type of subjects that are party to land investment contracts, and references to contractual arrangements that might occur between the State and the investor, on the one hand, and affected stakeholders, on the other.

63. It may also be worth considering other potentially relevant issues such as the nature of the parties, and particularly to define, for the purpose of the instrument, the notion of “public entity” or “public enterprise” (if IICs with State entities will be covered by the instrument). As regards the foreign investor, it might be useful to consider how it may arrange its participation in investment project, *i.e.*, alone or in a group, through joint ventures or different types of enterprise associations. Addressing multiparty contracts or business associations in the instrument may be particularly useful for SMEs as a tool to access the global investment market.

Question for the Working Group

- *Should the future instrument dedicate a separate chapter or section to parties and other relevant stakeholders in the context of investment contracts? If so, what should be covered there?*

D. Pre-contractual issues in IICs, issues of formation and validity of the contract

1. Pre-contractual issues and relationship with other stakeholders

64. The Working Group may want to consider whether guidance should be given in the future instrument on pre-contractual issues. In this regard, questions of law that concern the pre-contractual phase may be examined against the background of the UPICC as principles of general contract law that fully apply to IICs. The Working Group may also wish to take into consideration the chapter of the ALIC Guide which analyses how parties should address pre-contractual issues, having regard to all stakeholders involved, including affected third parties. Similar issues may arise in the context of IICs as regards the use of land in large infrastructure investment contracts and the impact of the investment on local communities or SMEs. The Working Group might want to explore the relevance of standardisation and standardised procedures since the phase of the early negotiations, including due diligence, consultations, or impact assessment obligations as tools to preserve public policy concerns (see this Section, paras. 74-76). Principles developed by arbitral tribunals in this area may also be reflected in the instrument, such as the principle that international merchants/investors are deemed to be competent professionals, and its principal corollary according to which they shall undertake comprehensive due diligence before investing in a foreign country.

2. Issues concerning formation of contract: freedom of contract, suggested form

65. The Working Group may want to address the negotiation process and the formation of an investment contract. Freedom of contract ensures that the parties are free to choose with whom and what to stipulate (Article 1.1 UPICC). Unfair behaviour during the pre-contractual phase might be considered against the backdrop of good faith and fair dealing (Articles 1.7 and 2.1.15 UPICC). The Working Group might also decide whether guidance should be provided on instruments that may be used to ensure fair and good faith negotiations in the pre-contractual stage (letters of intent, step-by-step agreements).

66. The Working Group may wish to consider discussing whether the principle on freedom of contract should be adapted because of States' limitations in negotiating IICs which may derive, for instance, from peremptory rules on public procurement, special laws regulating contracts concluded in strategic sectors of the economy (energy and natural resources) and investment codes, rules on State aid, rules applying to State-owned enterprises (SOEs) or investors financed by third States, and intersections with the expanding concept of "golden powers". The Working Group may also want to provide guidance on the form of investment contracts. For example, even though a written form is generally not mandatory for international contracts (Article 1.2 UPICC), it is usually suggested that investment contracts and all the connected contracts and commitments, due to their complexity, be negotiated and concluded in writing with the highest level of detail.

3. Issues of validity of contract: duress, improper influence, gross disparity and similar

67. As to the validity of the contract, the Working Group may want to explore issues that fall under domestic law concepts of duress, improper influence or corruption, or their equivalent, including application of the rules on "grounds for avoidance" (see UPICC Articles 3.2.5 and 3.2.6 on fraud and threat, respectively) as well as to provide guidance on the issue of *vires* of State officials and the capacity to commit the State party through the signature of a contract. The principle of "gross disparity", provided in Article 3.2.7 of the UPICC, may address the outcomes of asymmetry of power between the parties at the time of conclusion of the contract (including with special regard to SMEs). It permits a party to avoid a contract when it gives the other party an unjustifiably excessive advantage. These principles might be relevant to IICs to the extent that the bargaining power of the parties to an IIC may often be unequal. The Working Group may consider assessing how the UPICC provision on gross disparity applies to IICs and whether it has been applied by arbitrators. A review of the UPICC provision on gross disparity in relation to IICs may include a clearer preference for the remedy for renegotiation rather than avoidance of the contract. Arbitrators' role in the process may also be evaluated.

Questions for the Working Group

- *Should the instrument provide for an autonomous chapter on pre-contractual issues? How should pre-contractual issues, negotiation guidance, pre-signature liability and contract formation be covered?*
- *Should the instrument address issues such freedom of contract, form, duress, gross disparity, improper influence and corruption, as well as limits to freedom of contract stemming from concepts such as treatment of State-owned enterprises (SOE), State aid and golden powers? If so, how?*

E. Rights and obligations of the parties

68. The main rights and obligations of the parties in IICs are the core of this work. Although IIL has long focused more on the obligations of States, most recent IIAs/BITs, especially after the movement for IIA reform, have instead been focusing on States' rights and investors' duties. The Working Group may wish to assess the effects of IIAs reform on IICs and to ascertain whether investment contracts should accordingly reflect a more articulated set of rights and obligations between the parties.

1. Addressing protection standards in IIAs/BITs through contractual tools: "fair and equitable treatment" and "regulatory stability"

69. Under Section II, paras 48-49, the Working Group has been invited to discuss whether, as part of the third layer of content of a possible "transnational body of principles", the final document

could “reproduce contractually” and possibly ameliorate the standard of protection currently provided in treaty law.⁶⁴

71. As an example of this area of content, the Working Group may wish to consider examining the arbitral jurisprudence on investors’ “legitimate expectations” under “fair and equitable treatment” and possibly consolidate a principle and/or a model clause which could define its scope and limits, also taking into account the due diligence obligations that arbitral tribunals have placed on foreign investors.⁶⁵ The Working Group may also consider the evolving arbitral jurisprudence which found in FET a State obligation to ensure “regulatory stability” and has later elaborated the concept of “unreasonable regulatory change” and “acceptable margin of change”: there could be merit in examining how these concepts interrelate with existing practice on “stabilisation clauses” with a view to consolidate a new common standard.⁶⁶ Another topic of interest might be the arbitral jurisprudence on expropriation and regulatory takings: holding into account treaty and contract practice, the Working Group may consider whether it would be feasible to elaborate a principle and/or a model clause that could better define the borders between the investors’ right to obtain compensation and the States’ right to regulate.⁶⁷ The relevance of the principle of good faith and fair dealing, as well as inconsistent behaviour and reliance, could also be examined in this regard (see Articles 1.7 and 1.8 UPICC).⁶⁸ The Working Group should consider the work of other IOs, such as the OECD.⁶⁹ The Working Group may also wish to consider alternative approaches (such as to devise new principles, or consider topic-related principles and rules common to most legal systems).

Questions for the Working Group

- *Which IIA/BIT standards may be addressed contractually by the final instrument? Could the FET standard (in relation to legitimate expectations or implied stabilisation) be addressed? Should the final instrument also address investors’ right to compensation vis-à-vis regulatory takings? Which approach should be taken (consolidating existing case-law, novel standards)?*

⁶⁴ The Working Group could consider this topic in conjunction with Section IV, paras. 85-93 on the legal framework and applicable law to IICs.

⁶⁵ Arbitral tribunals have found that fairness and equity in FET have to do with the respect of basic expectations of consistency, transparency and predictability of State conduct and of the legal framework of the investment, as implied by the legal system in general or by explicit or implicit representations, reassurances and undertakings that the State may provide in contracts, unilateral statements, or otherwise: for an absolute view of the principle as entailing for the host State an absolute duty of transparency and coherence, see *TECMED v. Mexico*, ICSID Case no. ARB(AF)/00/2 (29 May 2003); for a relative view which relies on the standard of predictability of legal changes and the investor duty to carefully examine the local context, see *Parkerings v. Lithuania*, ICSID Case no. ARB/05/8 (11 September 2007).

⁶⁶ For the early treaty arbitral jurisprudence that has found in FET an obligation to maintain regulatory stability (see *Occidental v. Ecuador I*, LCIA Case no. UN3467 (1st July 2004), *Bayindir v. Pakistan*, ICSID Case no. ARB/03/29 (14 November 2005), *LG&E v. Argentina*, ICSID Case no. ARB/02/1, decision on liability (3 October 2006); for later decisions limiting FET guarantees to specific promises, representations or stabilisation clauses concluded by the State, see *Saluka v. Czech Republic*, partial award under UNCITRAL Rules 1976 (17 March 2006), *Continental v. Argentina*, ICSID Case no. ARB/03/9 (5 September 2008), *Total v. Argentina*, ICSID Case no. ARB/04/01; for the notion that regulatory changes should not be unfair, unreasonable or disproportionate, or not to modify the legal framework the foreign investors have relied upon outside of an acceptable margin of change, see *Philip Morris v. Uruguay* ICSID Case no. ARB/10/7 (8 July 2016), *Eli Lilly v. Canada* ICSID Case no. UNCT/14/2 (16 March 2017), *Eiser v. Spain*, ICSID Case No. ARB/13/36 (4 May 2017).

⁶⁷ *E.g.*, a model clause could carefully circumscribe the guarantees that would be offered to the investor, while defining precise counter-limits and establishing - with all possible certainty and by laying down specific indicators - when the State party retains policy space in case of (relevant) change of circumstances.

⁶⁸ Arbitral tribunals have stressed the link between FET and good faith in a long stream of decisions: see, generally, *Tecmed v. Mexico* (2003) and *MTD v. Chile* (2004), and, as to transparency and reliance, *Waste management v. Mexico* (2004).

⁶⁹ The OECD has established a forum where treaty negotiators and experts from OECD and non-OECD countries work together to enhance common understanding of core treaty provisions and emerging legal issues with a view to align key provisions in older generation treaties to newer ones by collective reform: in this context, “fair and equitable treatment” clauses have been subjected to discussion, together with other standards in IIAs/BITs.

2. Addressing international investment contracts practice: “stabilisation” and “renegotiation” or “adaptation” clauses

70. As part of the clauses that belong to IICs practice (see Section II paras. 43-47), a stabilisation (or “standstill”) clause is aimed at providing a stable legal environment for the foreign investor. When planning an investment of long duration, the main concern of the investor is the risk of arbitrary changes to the applicable law and the whole regulatory context relevant to the contract. Stabilisation clauses classically bring States’ public power within the reach of contractual obligations: they “freeze” the laws of the host State at the date of stipulation *vis-à-vis* the agreed investment, preventing States from changing or amending domestic laws in a manner that could negatively affect the investment (absolute intangibility).⁷⁰

71. During the last decade, concerns about regulatory space and public policy have pushed States to limit the scope of stabilisation clauses to specific areas such as tax law, administrative controls, customs checks, etc. (relative intangibility). More recent IIAs/BITs better define the scope of the States’ right to regulate, and therefore may provide new types of counter-limits or regulatory exceptions to stabilisation obligations. Stabilisation clauses may affect the State’s ability to protect public interests: the prospect of having to pay compensation when implementing new laws aimed at protecting a public interest may discourage States from adopting such legislative changes (“regulatory chill”). However, it is generally recognised in arbitral case law that the stipulation of a stabilisation clause does not entail the loss or waiver of the right to expropriate.⁷¹ It is also accepted that stabilisation clauses do not affect the general regulatory power of the State as new law would not apply only as regards the “stabilised” investment.

72. More recently, contractual practice seems to show that the preferred stabilisation clauses in IICs are increasingly “adaptation” or “renegotiation” clauses. In other words, to preserve contract stability, the parties more broadly accept justified regulatory changes, but at the same time, they agree on the obligation to renegotiate the terms of contract in the event of a legislative or policy change. Through wider grounds for renegotiation, the investor may rebalance the economic equilibrium of contract and define a fair share of costs with the State party. Stabilisation and renegotiation clauses are related to the principle of good faith, in connection with the founding principle *pacta sunt servanda*.

73. In principle, a sovereign State may freely bind itself and limit its regulatory power by concluding contracts with foreign investors. However, changes in factual circumstances may entail a duty to regulate on the part of the State. Human rights courts have spelled out the limits of States’ normative action *vis-à-vis* citizens’ property by referring to the principle of proportionality. In a treaty arbitration context, a stream of arbitral decisions has scrutinised legislative activities under the FET standard making reference to the principles of procedural fairness, substantive reasonableness and proportionality.⁷² The Working Group may wish to consider if it would be feasible to provide guidance, or formulate a principle, accompanied by a model stabilisation clause that could strike a balance among competing interests, trying to spell out its scope and limits, and provide suitable grounds for the renegotiation and adaptation of contract in case of regulatory change. In this regard, the work of other IOs should be taken into account and other sources as the Working Group may deem relevant.

⁷⁰ Stabilisation clauses wording may widely vary: a similar version is a clause on applicable law designating the law of the host State at a certain date. The “freezing effect” may immunise the investment from changes in taxation, environmental compliance and other regulatory obligations in the event they amount to a substantial worsening of the agreed economic conditions for the investment.

⁷¹ See, respectively, the arbitral decisions in *Aminoil v. Kuwait* (1982), ILM, 21, 1982, p. 976, and *Amoco v. Iran*, Iran-US CTR, 15, p. 189 *et seq.*

⁷² See *CMS v. Argentina*, ICSID Case no. ARB/01/8 (12 May 2005), *El Paso v. Argentina*, ICSID Case No. ARB/03/15 (31 October 2011), *Eiser v. Spain*, ICSID Case No. ARB/13/36 (4 May 2017).

Questions for the Working Group

- *How should the instrument address stabilisation and renegotiation clauses? Should the Working Group gather elements from contract practice and arbitral awards and provide a model clause for both?*
- *Should stabilisation clauses spell out their limits? How can we define these limits and how should they be interpreted? Would proportionality be one of them? If so, which meaning should be given to this concept (e.g., should the instrument use the definition provided by human rights courts or adopt another approach)?*
- *In this regard, which other principles and clauses from contract practice may be addressed by the final instrument?*

3. Addressing public policy standards in IIAs/BITs through contractual tools: sustainable development, SMEs support policies, and further public policy goals

74. With particular reference to Section II, para. 49, dedicated to the “contractualisation” of new IIAs/BITs public policy trends, the Working Group may wish to discuss how to concretely turn “best efforts” contained in treaty law into contractual obligations and better articulate into contractual clauses the principles contained in soft-law documents with a view to clarify their scope and specify their contents.⁷³

75. A main topic of interest in this area is the principle of sustainable development, or the compliance with SDGs and all further instruments that invite or prescribe States (and/or investors) to put mechanisms in place to ensure investment sustainability.⁷⁴ In this regard, the Working Group may want to discuss if the final document, including through a model clause, should “contractualise” specific devices or commitments such as price adaptation mechanisms,⁷⁵ initial due diligence,⁷⁶ environmental impact assessments and periodic revisions of risk assessments,⁷⁷ or environmental performance bonds.⁷⁸ Other commitments to consider may provide for a list of targets for local recruitment or hiring, training plans and skill or know-how transfer for local personnel, initial and periodic consultation processes involving local communities and other stakeholders affected by the

⁷³ See also this same Section, para. 93, on the legal relationship between new public policy standards in IIAs/BITs and investment contracts.

⁷⁴ Examples from investment treaty law include the preambles of the Brazil-Mexico BIT (2015), the Morocco-Nigeria BIT (2016), and the EU-Singapore Investment Protection Agreement (EUSIPA) (2018). Some treaties, such as the EU-UK TCA, even contain a chapter dedicated to the promotion of sustainable development applicable both to trade and investment: See the EU-UK Trade and Cooperation Agreement, Chapter 8.

⁷⁵ These are mechanisms meant to internalise environmental costs of climate change into the final prices of goods or services, making them transparent to competitors and consumers: the aim is to encourage the internalisation of costs by companies through transparency and market reputation.

⁷⁶ On due diligence obligations in the context of treaty arbitration, see *Parkerings v. Lithuania*, ICSID Case no. ARB/05/8 (11 September 2007)

⁷⁷ The text refers to individual or joint studies carried out by investors and States to analyse the effects that the planned investment will have on environment: a detailed overview of this instrument is contained in the ALIC Guide, p. 63 *et seq.*

⁷⁸ By using environmental performance bonds, governments and other financiers receive a guarantee from the investor for a project that shall abide by a series of environmental standards and repay it only if the proposed environmental benefit is achieved, while obtaining compensation in case the conditions are not met by the final project. These instruments create a relevant incentive to ensure that environmental obligations are met.

investment. The Working Group may find specific inspiration in this regard in the ALIC Guide⁷⁹ and the work of some of the organisations that partnered in its drafting.⁸⁰

76. Other impactful policy trends to consider might be digitalisation policies,⁸¹ including issues such as data protection, cybersecurity, and localisation requirements on IICs,⁸² and policy trends that incentivise SMEs to enter the investment arena.⁸³ IIAs and BITs currently do not differentiate protection standards between large enterprises and SMEs. However, some IIAs contain specific provisions dedicated to SMEs that underline the need for cooperation between parties to further promote SME development.⁸⁴ The Working Group may wish to consider whether to provide specific guidance that would facilitate the access of SMEs to the global market for investments, particularly: (i) joint venture and/or other forms of association-related clauses or contracts as a basis to participate in or be associated with investment operations (“multi-party contracts”);⁸⁵ (ii) multi-tiered dispute settlement clauses including ADR (conciliation, mediation, good offices), on the model of the CETA, as a means to reduce the costs of investment arbitration.⁸⁶ The work of UNICTRAL Working Groups I (Micro- and Medium Size Enterprises) and III (ISDS) should be taken into consideration in this context.

Questions for the Working Group

- *How should the final instrument provide guidance on the contractualisation of newly emerging policy trends in IIAs/BITs? How should contractual clauses concretely address sustainable developments commitments? Should the Working Group gather elements from practice?*
- *What other policy trends should be analysed and addressed in the final instrument (e.g., digitalisation)? Should the final instrument specifically address situations in which one of the contracting parties is a SME? Which type of clauses could encourage SME participation in foreign investment?*

F. Non-performance and remedies

1. Hardship and force majeure

77. As part of a possible set of UPICC (or UPICC adaptations) that may usefully apply to IICs, the hardship provisions in Article 6.2.1 *et seq.* might provide legal solutions that justify adaptation to the IIC context and/or be imported into the logic of IICs. IICs are long-term contracts regulating a complex network of long-lasting activities which may include the establishment and management

⁷⁹ See, e.g. Chapter 4.II, lett. B, of the ALIC Guide, particularly the section on “(E)mployment creation, access to jobs and labour rights”, particularly paras 4.70 to 4.82 providing guidance on contractual provisions relating to job creation, targets on employment creations, labour relations, and the like. The ALIC Guide also provides guidance on how local and indigenous communities may be involved in the negotiation of an IIC since the early phase. International standards provide that the investor and the host State may include in their contracts some methods to protect third-party rights, such as consultations, grievance mechanisms or human rights monitoring mechanisms in accordance with existing international business responsibility practices.

⁸⁰ The International Institute for Environment and Development (IIED) and the International Institute for Sustainable Development (IISD), are working to establish a list of model clauses, on the basis of the ALIC Guide, that would concretely incorporate public policy goals as stated in relevant international documents.

⁸¹ See OECD, 2021, p. 38.

⁸² *Ibid.*

⁸³ SMEs usually constitute a large percentage of the businesses in a country and make a most significant contribution to GDP, but they often do not engage in cross-border investment.

⁸⁴ See, e.g., Article 37 Tunisia-Turkey FTA.

⁸⁵ The UNIDROIT’s LSAE Project is examining the role of “multiparty subjects” as legal tools to improve the aggregation and coordination of agricultural enterprises through the use of contractual networks, the development of corporate governance rules and the delineation of ownership: the Project is considering in particular the option of multiparty contracts as well as legal entities such as cooperatives, corporations, consortia, producers groupings and others (see <https://www.unidroit.org/work-in-progress/legal-structure-of-agri-enterprise/>).

⁸⁶ See the EU-Canada Comprehensive Economic and Trade Agreement (CETA), Art. 8.19, para. 3; Art. 8.23, para. 5; Art. 8.27, para. 9; and Art. 8.39, para. 6.

of sites or the long-term provision of services to the public. As such, compared to short-term contracts such as simple sales, they are exposed to a higher risk of unforeseeable events that may affect contract performance or alter the economic equilibrium of the contract. The issue of time and change of circumstances is of paramount importance to IICs. IIAs increasingly provide language aimed at preserving States' regulatory space in case of change of circumstances; on the other hand, private investors typically require States to stipulate stabilisation and renegotiation or adaptation clauses in IICs. In this context, the Working Group may wish to explore the relevance of hardship and force majeure to IICs, as general principles and rules of contract law enshrined in the UPICC (Articles 6.2.1-6.2.3 and 7.1.7), with a view to determining innovative solutions that might be customised to the needs of IICs.

78. In the context of the UPICC, the hardship provisions in Article 6.2.1 *et seq.* apply where an event, occurring or becoming known to the disadvantaged party after the conclusion of the contract, fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and the event could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract, is beyond the control of the disadvantaged party, and the risk of the events was not assumed by the disadvantaged party. In this case, the disadvantaged party is entitled to request the renegotiation of the contractual terms without undue delay and, upon failure to reach an agreement within a reasonable time, either party is entitled to resort to a court or an arbitrator, which may decide to whether to terminate the contract at a date and on terms to be fixed, or adapt it with a view to restoring its equilibrium. On the other hand, the force majeure principle in UPICC Article 7.1.7 provides that "[n]on-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." If the impediment is only temporary, the excuse shall reasonably have effect for such period, but nothing prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

79. Hardship and force majeure events might be very difficult to discern in concrete terms, the characterisation of the occurrences inevitably being a matter of interpretation. The examination of the relevance of the UPICC hardship and force majeure provisions to IICs may help provide a set of rules to clarify when non-performance is justified in case of change of circumstances (and how to deal with it), bearing in mind the importance of the principle which prescribes the restoration of financial equilibrium in case of (material) alteration in investment contracts. There might be merit in, *e.g.*, discussing to what extent investors may invoke hardship for governmental acts when the public interest is at stake, including when a more onerous measure of performance is due to supervening public policy needs, and particularly which advantages the hardship model may bring compared to "stabilisation clauses", how they would interplay, and whether the logic relating to hardship in the UPICC may be imported into the IIC context. An efficient use of the hardship principle in contract clauses (along with the set of rules, arguments and interpretations that derives from it) might be found to provide, *e.g.*, a broader legal basis for the periodic revision of contracts, possibly coupled with mitigation mechanisms.⁸⁷ This could effectively "cool down" litigation under international arbitration, ensuring the continuation of the investment relationship, while reducing costs. Moreover, in case of contract adaptation based on hardship, it may be worth examining whether parties to IICs may refer to arbitral tribunals as last resort instead of domestic courts.

80. There may also be merit in comparing the UPICC provision on force majeure with the main clauses on force majeure used in IIC practice and ascertaining how the UPICC provision may be adapted, if appropriate, to effectively address the main cases of non-performance in IIC practice. In this regard, in addition to the UPICC, the Working Group may want to consider the guidance on force

⁸⁷ Coping, *e.g.*, with prices, market and currency fluctuations.

majeure – including on the *fait du prince* theory – which is available in Chapter 4 of the [UNIDROIT/FAO/IFAD Legal Guide on Contract Farming](#).⁸⁸

Questions for the Working Group

- *Does the Working Group agree to analyse the relevance of the UPICC provisions on hardship and force majeure to IICs? Do these provisions need to be explicitly adapted to the special needs of IICs?*
- *If so, what is the relationship with States' regulatory power in case of change of circumstances and with stabilisation or adaptation clauses? Should arbitral adaptation be explicitly introduced in case of hardship? Which instruments could be used to ensure the protection of public interests?*
- *Which other provisions of the UPICC deserve consideration and adaptation for the inclusion in the final instrument in relation to supervening events (e.g., mitigation of damages)?*

2. Compensation and damages

81. In case of a contractual breach, the remedy in investment arbitration mainly consists of monetary compensation, while satisfaction, restitution in kind or specific performance all play limited roles because of the specific situations in which disputes arise. Arbitral tribunals have drawn a clear distinction between (i) damages for an illegal act, and (ii) compensation for lawful expropriation.⁸⁹ Arbitral tribunals have defined several principles to determine the exact amount due in case of breach.⁹⁰ Parties may be free to agree on clauses in IICs that require the payment of reliance damages under certain circumstances, or may instead opt for liquidation damages.

82. While requirements for the lawfulness of an act of expropriation are clearly established and include by implication that compensation be provided, criteria may differ as to its calculation. According to most IIAs, compensation is adequate when based on the fair market value (FMV),⁹¹ *i.e.*, the price that a hypothetical buyer would be willing to pay. The most frequent method to calculate FMV is the discounted cash flow method that considers the cash flow that may be expected in the future, along with the discount of the time value of money and risk,⁹² while the “book value” or liquidation value of remaining assets look at the beginning or end of the investment as the relevant moment after which the latter does not produce or is unlikely to produce further income.

83. While there might be doubts (or limits to respect) that damage and compensation issues may be addressed contractually, the Working Group may consider: (i) gathering information as regards the main principles on compensation and damages as they stem from arbitral decisions and in IIC practice; and (ii) providing guidance to prospective users in this respect, including by proposing contract language or a model clause, if feasible. The Working Group might also examine States' and investors' practice as to payments and consider or suggest forms of deferred payment, set-off or other methods that may help to achieve more balanced decisions (*e.g.*, means and criteria for the discount from compensation of those damages that the foreign investor may have caused to the

⁸⁸ *E.g.*, as regards the categorisation of relevant events (natural events, governmental acts, internal or external disturbances such as strikes, war, social unrest and market disruptions), the formulation of relevant clauses in relation to risk allocation and legal consequences (excuse for non-performance, suspension of performance, compensation and indemnity, additional obligations such as notice and mitigation requirements, termination of the contract, right to renegotiate, judicial adaptation).

⁸⁹ See: *Nycomb v. Latvia*, SCC Case no. 118/2001 (16 December 2003); *ADC v. Hungary*, ICSID Case no. ARB/03/16 (2 October 2006); *LG&E v. Argentina* ICSID Case no. ARB/02/1 (25 July 2007).

⁹⁰ *E.g.*, replacement value, actual expenses and lost profits, records of profitability and indicators of future profits, unnecessary risk increase by the investor, including criteria to define the date of calculation.

⁹¹ See *Argentina-US BIT*, or *Energy Charter Treaty (ECT) Art. 13.1*, and *North American Free Trade Agreement (NAFTA) Art. 1110.2*.

⁹² And any other risk factor which may affect the cash flow in the future, such as macroeconomic, political and business-specific risks.

public interest in the host State).⁹³ The Working Group may also wish to examine and possibly develop guidance on liquidated damages and the issue of mitigation of damages.

Questions for the Working Group

- *Should the instrument provide specific guidance on compensation and damages? If so, what should such guidance focus on? Should the instrument extract rules and principles from arbitral decisions and contracts in practice?*
- *Should the Working Group address innovative matters such as possible mechanisms for setoff or discounting damages to the public interest in the host State? Should guidance or principles on liquidated damages and mitigation of damages be envisaged?*

G. Transfer of rights and obligations under the contract and return of rights

84. Investment contracts, such as BOO, BOT or PSA contracts, regulate big infrastructure investments and may entail the use of large portions of land, the management of assets or the provision of services that might need to be returned at the end of the contract to the State or its agencies. Furthermore, investment contracts, often long-term contracts, may involve an assignment of the contract or a transfer of rights and obligations under the contract to third parties. The ALIC Guide notably dedicates a chapter to addressing similar issues, in particular the transfer of an investment project from one investor to another, or the return of the land at the end of such contracts, with a view to ensure continued protection of public policy concerns and the return of land to tenure right holders.

Questions for the Working Group

- *Should the instrument provide for a separate chapter on the transfer of rights and obligations and the return of rights or assets?*
- *Alternatively, should these topics be dealt with in other contexts?*

H. Legal framework and applicable law

85. With regard to the legal framework applicable to IICs, the Working Group may wish to consider examining: (i) issues of choice of law, *i.e.*, which law should apply to IICs, and particularly if and how the parties to an IIC may designate the UPICC (including as adapted to investment contracts) or the final instrument as the applicable law to the contract, or any other source of law or legal solution they would deem proper; (ii) the legal relationship between IICs and IIL, particularly if and to what extent IIAs/BITs provisions, including new public policy standards, may be considered part of the legal framework applicable to investment contracts.

1. Party autonomy and choice of law: the UPICC (or an adapted version) and other principles of international investment law as the law applicable to investment contracts

86. The determination of the law applicable to an investment contract may engender conflicts of interest between the parties: (i) the State will generally seek to protect its national sovereignty and will usually not want to subject economic activities in its territory to foreign laws;⁹⁴ (ii) the foreign investor will generally seek to achieve a predictable and technically suited legal environment for its investment, and particularly to obtain contractual devices (choice of law and dispute settlement) that may prevent the State, both party to the IIC and legislator, from amending the legal system in which

⁹³ *E.g.*, pollution, public health damage, and restoration of the environment or of initial pre-investment conditions in certain areas.

⁹⁴ Some legal systems have come to strictly prescribe the application of national law to contracts which govern investments in the field of natural resources, and prohibit to subject investments in their territory to international arbitration: see, *e.g.*, South Africa.

the contract is situated (and this manner indirectly alter the contract equilibrium), or exerting political influence on the judicial bodies who will decide potential disputes.

87. Investment activities feature a strong connection with the legal system of the host State, which often drives parties to choose domestic law as the applicable law, or the arbitrators to subject the dispute to the law of the State hosting the investment. However, party autonomy, understood as the freedom of the parties to an international contract to designate the law applicable to that contract, is nowadays deemed to be a generally-recognised principle of private international law. While national legal systems may still provide limits to party autonomy, private parties to IICs have elaborated special techniques to designate international or transnational law, *i.e.* non-State law, as the law applicable to their contracts,⁹⁵ so as to obtain guarantees of impartiality and technical adequacy.⁹⁶ When it comes to the negotiation of an IIC, in principle, the parties may want the contract itself to be the sole governing law of their investment relationship. However, as complete and detailed a contract may be, it will never cover all the complex issues that may arise during a long-term investment relationship. The State party will hardly renounce the application of national law, but the investor may obtain as a compromise a reference to “general principles of law”, “international law” or “transnational law” (of which the UPICC are deemed to be an expression) as applicable law, alone or more often in combination with the domestic law of the host State.⁹⁷ The aim is to reduce the “*aléa de souveraineté*” to which IICs are exposed by providing for the application of principles which can complement or correct the national law of the host State in case it contradicts generally accepted principles of justice, or if it would lead to unfair or unreasonable solutions, that do not correspond to international standards.

88. When assessing the relevance of the UPICC and of the future instrument as a means to provide a transnational, uniform solution to regulate investment contracts, the Working Group may wish to consider how the UPICC may come into play: (i) by combination, as they can complement, corroborate and support the application and/or interpretation of domestic law and help ascertain its contents; (ii) by integration, as they can supplement and support the interpretation of international uniform law instruments as they apply to IICs; (iii) by incorporation, as they can be turned into contract language by the negotiators or drafters; and especially (iv) by reference or choice of law, as they can be selected as the *lex contractus*.⁹⁸ In this last role, the UPICC can smoothly serve IICs’

⁹⁵ In particular, these techniques rely on the combination of a “choice-of-law” clause (referring to general principles of law or of public international law, principles common to most legal orders, law of nature, law of justice, commercial usages, accepted principles of international trade, transnational law of merchants, or *lex mercatoria* and like formulations) with an “international arbitration” clause (referring to arbitration rules or regulations that permit the application of non-State law to disputes), and a “stabilisation” clause (obliging the State not to alter its domestic law for the whole duration of contract). It is generally accepted that, while national judges cannot escape the *lex fori* including its conflicts of laws rules (which will usually not allow the application of non-State rules), arbitrators are allowed to apply “rules” not pertaining to any national legal system, that the parties decided to choose as applicable law to the disputes arising out of their contracts. In addition, arbitrators, in the absence of a choice of law by the parties, can usually choose the “rules” (and not exclusively national legislation) of the legal system they judge to be more closely connected to the contract, or more generally the rules of law (including general principles of private international law) they deem most appropriate. These solutions are the standard today in most arbitration rules of procedure and also in the legislation of some progressive countries, in line with the 1985 UNCITRAL Model Law on International Commercial Arbitration and the 2015 HCCH Principles on Choice of Law in International Commercial Contracts.

⁹⁶ These contracts have been labelled in legal practice “internationalised” or “transnationalised” contracts.

⁹⁷ In the absence of an express designation (because no agreement was reached, or as a consequence of a conscious and shared choice of the parties), this same solution may arise out of public international law and from applicable arbitral rules. Indeed, it is well recognised the principle that it is up to the arbitrators to identify the most appropriate rules to the dispute, including by applying general principles of private international law: *e.g.*, where the ICSID Convention applies, according to Article 42 thereof, absent party choice, the domestic law of the host State would apply, in conjunction with international law; also under international arbitration conventions such as the New York Convention and most common arbitration rules, arbitrators may decide to combine the applicable (national) law with appropriate rules or principles of law, including international or transnational law.

⁹⁸ See *Lemire v. Ukraine*, ICSID Case no. ARB/06/18 (28 March 2011), applying the UPICC as applicable law to the contract, together with international law principles.

purposes, since the UPICC can be applied as a neutral applicable law in lieu of, or in combination with, the law of the host State, thereby “transnationalising” the contract.⁹⁹

89. All this considered, the Working Group may wish to discuss how to draft a choice-of-law model clause to provide for a uniform and balanced transnational set of principles to govern investment contracts by (i) drafting a clause pointing to the UPICC (as adapted) or to the final instrument as the law applicable to the contract, alone or in combination with the law of the host State; or (ii) presenting the entire spectrum of possible choices, including an express choice for the UPICC as the applicable law but also referring to the possible other functions of the UPICC and/or the final instrument (rules to be incorporated in the contract; rules used in the interpretation or supplementation of the applicable law or in combination with a dispute settlement clause), without excluding all the other possibilities the Working Group may deem appropriate. The Working Group may find inspiration from the [Model Clauses for the use of the UNIDROIT Principles of International Commercial Contracts](#).

90. In this regard, the Working Group may also wish to examine the possible limits that party autonomy encounters as to the designation of non-national (or even non-State) rules to investment contracts. In particular, it may be considered whether and to what extent investment contracts shall abide by or can abstract from the application of mandatory rules of domestic law and public policy (administrative law, tax law, commercial law, health law, energy law, and the like), and if the international public order may apply. The Working Group may consider providing guidance or formulating an *ad hoc* principle with comments on this topic to prospective users.

Questions for the Working Group

- *How should the future instrument address choice-of-law issues? Should the instrument provide guidance and a model choice-of-law clause? If so, should the clause combine a reference to the UPICC (or the final instrument) with the law of the host State? Should other solutions/model clauses be considered?*
- *Should the Working Group examine the limits of party autonomy in applying a transnational body of principles to investment contracts (e.g., due to mandatory norms of domestic law and public policy)? Could investment contracts abstract from the application of mandatory rules of domestic law? Should the instrument provide guidance on other areas of domestic law of the host State intersecting with IICs? If so, how?*

2. The legal relationship between IIAs/BITs, including newly emerging standards on public policy goals, and investment contracts

91. In this context, the Working Group may also wish to address the relationship between IICs and investment treaties (IIAs/BITs)¹⁰⁰. IIAs and BITs are different in nature from the private law of contracts, being public law standards internationally negotiated between States, that private investors may invoke before arbitral tribunals in treaty arbitration. However, depending on their contents, quality and status in the legal system of the host State, IIAs/BITs might be considered as part of the legal framework applicable to IICs, both as “nationalised” international standards and as mandatory norms which define the normative playing field IICs have to comply with.¹⁰¹

⁹⁹ This outcome might be achieved even absent any explicit reference, as they can still be applied – as mentioned earlier – if the parties refer to the *lex mercatoria* or to general principles of law, since they are deemed to be part of these principles, or if arbitrators deem them appropriate to govern the dispute.

¹⁰⁰ The Working Group may wish to consider if its findings on the legal relationship between IICs and investment treaties (IIAs/BITs) are relevant to the discussion on the “contractualisation” of treaty standards (protection standards and public policy provisions) covered in Section II, paras. 48-49, and in this Section, paras. 69-71 and 74-76.

¹⁰¹ Modern IIAs, be they BITs or FTAs, were developed with a view to offer foreign investors higher standards of protection, which would supplement customary standards and contract practice. Current IIAs may include national treatment (NT), most favoured nation treatment (MFNT), fair and equitable treatment (FET), full

92. In this regard, the Working Group may wish to explore to what extent IIAs/BITs may be deemed to apply to IICs as mandatory or default rules.¹⁰² In general terms, the applicability of a IIA or BIT in force to a specific IIC seems to depend, on one hand, on the language of the BIT (particularly, if it supports its application or disapplication to contracts),¹⁰³ on its specific contents (if it contains prescriptions that may have application in the context of a contractual relationship), and on its status in the legal system of the host State; on the other hand, it depends on the content and language of the contract, and particularly whether the contract may be deemed to keep a relation of “speciality” with the applicable IIA/BIT in the relevant jurisdiction which makes it susceptible to prevail over treaty law,¹⁰⁴ or if it rather builds on (or has to align to) the relevant treaty.

93. The Working Group may also wish to discuss if it is relevant to this project to examine the legal relationship between emerging BIT/IIA provisions on public policy goals (see Section II, para. 50) and IICs, including whether and to what extent those provisions can be deemed part of the legal framework applicable to IICs and with what legal consequences. Depending on treaty language, these provisions may be deemed declaratory of existing obligations or principles of public international law, to imply mere “best efforts”, or more rarely to establish specific obligations with binding effects. There could also be merit in examining whether, once voluntarily incorporated into the contract or otherwise implemented, these standards have full legal effects or the practice reveals different outcomes. In this regard, it might be relevant to examine how States, IICs and arbitral tribunals have applied or interpreted emerging IIA/BIT public policy standards to date. The Working Group may wish to consider to provide guidance on this topic in the final instrument.¹⁰⁵

Questions for the Working Group

- *Should the future instrument cover the legal relationship between IIA/BIT standards and IICs? If so, how should this legal relationship be qualified (e.g., mandatory or default rules)?*
- *Would the Working Group find it relevant to examine the legal relationship between emerging BITs/IIAs provisions on public policy goals and IICs as well as their legal effects (binding or best efforts)?*

protection and security (FPS), the prohibition of direct and indirect expropriation without compensation, guarantees concerning free transfer of payments, and the consent to host investor-State arbitration and the like. Recent IIAs add further standards on market admissibility and access, but also elaborate – in light of recent criticism of ISDS systems and constraints on States’ right to regulate in the public interest - on regulatory takings, including public purpose and public policy (regulatory space) and investors’ legitimate expectations (interferences with investments).

¹⁰² In this regard, different views would have been expressed by arbitral tribunals, with some viewing treaty rules as mandatory, others viewing them as default rules that might be fully derogated by contract, and other as rules endowed with a certain degree of “normative resistance”, *i.e.* that can be displaced only by a clear statement of the parties (“sticky defaults rules”): in favour of considering treaties’ provisions mandatory, see *Enron v. Argentina*, ICSID Case no. ARB/01/3 (22 May 2007), where the tribunal interpreted the US-Argentina BIT as providing a right of legal stabilisation to investors and considered this right applicable to the case, even if the contract did not contain any stabilisation clause; *contra*, see *SGS v. Philippines*, where the arbitrators considered treaty’s provisions as default ones and since the parties had selected courts in the Philippines as the exclusive forum to solve their dispute, the arbitral tribunal considered the treaty’s choice of forum inapplicable, and held the claim inadmissible.

¹⁰³ In treaty arbitration decisions, IIAs/BITs application to IICs may depend on whether the investment definition is found to cover or expressly includes contractual rights, if certain types of contracts are manifestly included in the scope of the IIA or in other protection provisions, how the umbrella clause is worded and interpreted (also in relation to a forum choice in the relevant IIC), if the relevant agreement is found to bind the State in its sovereign capacity, and if the breach is of a purely commercial nature or the magnitude of the interference with the contract is significant and entails the exercise of public power: see *SGS v. Philippines*, ICSID Case no. ARB/02/6 (29 January 2004), *El Paso v. Argentina*, ICSID Case no. ARB/03/15 (27 April 2006), *Salini v. Jordan*, ICSID Case no. ARB/02/13 (31 January 2006), *CMS v. Argentina*, ICSID Case no. ARB/01/8 (12 May 2005), *Sempra v. Argentina*, ICSID Case no. ARB/02/16 (28 September 2007).

¹⁰⁴ *E.g.*, the contract may contain clauses incompatible with the treaty, or it may expressly derogate to it. This may happen when the protection granted by a State to a foreign investor in the investment contract is higher or more specific than by the applicable IIAs/BITs, while it would be less realistic if a contract is deemed to reduce the guarantees provided by the treaty (this possibly violating the inter-States obligations undertaken by the contracting State vis-à-vis the State of citizenship of the contracting foreign investor).

¹⁰⁵ See in this regard also in this Section, paras. 74-76.

I. Dispute resolution clauses

94. Although arbitration procedures are outside the scope of this project, the Working Group may consider examining this topic from a purely contractual perspective, *i.e.*, to the limited extent needed to formulate an appropriate dispute resolution clause. The Working Group will be able to rely on the significant experience of the ICC International Court of Arbitration in the administration of disputes on IICs. The Working Group is also invited to take into consideration the work of other IOs in this regard.

95. In recent years, arbitration and ISDS mechanisms have been the object of criticism due to a number of factors, such as perceived lack of transparency, “double hatting”, and one-sidedness in favour of investors. The Working Group may wish to provide guidance, or formulate principles with comments, and draft model clauses that may restate the most appropriate rules on conflicts of interest as to the appointment of arbitrators or require the adoption of codes of ethics for arbitrators. The Working Group may also consider providing guidance and/or developing a model clause on award transparency, by which contracting parties agree to publish (totally or partially) any arbitral decisions concerning disputes arising out of their IICs. While this may appear an easy task in case of *ad hoc* arbitration clauses, it could be more difficult under institutionalised arbitration schemes (ICSID Rules, UNCITRAL Regulations), but it could always set a standard that might be more widely endorsed in the years to come.

96. The Working Group is invited to consider discussing how to coordinate the solutions adopted under the section on “applicable law” (paras. 86-90) with the formulation of one or more consistent model clauses on dispute settlement, that may consider the designation of applicable law. In this regard, the Working Group may wish to consider gathering information on existing IICs’ practice on how issues of applicable law are dealt with in arbitration clauses, so as to detect commonalities and divergences and extract a consistent rule, if any, or distil a better rule.

97. In line with the principle of preserving the continuity of IICs and of reducing the costs of litigation, the Working Group is also invited to consider discussing which dispute resolution mechanisms, apart from arbitration, could prove effective for parties’ needs, including fast review of decisions, expert determinations, consultations, good offices and mediation. The Working Group may consider comparing contract practice on the use of ADR – with a particular focus on mediation – in the field of IICs or, in the alternative, the relevant practice in the field of commercial contracts as a benchmark, with a view to envisage a model that may be imported and customised for the needs of IICs. In this context, the Working Group may wish to consider the expertise of the ICC in mediation services, as well as the parallel work of other IOs,¹⁰⁶ and assess the feasibility of a model clause on dispute settlement for IICs that would provide the whole spectrum of available ADR mechanisms.

Questions for the Working Group

- *Should the Working Group review existing dispute resolution clauses, taking into account the recent evolution of IIL to address the main criticisms of investment arbitration and ISDS?*
- *How could dispute resolution clauses be improved? Could a model arbitration clause incorporate additional parties’ obligations (such as transparency commitments, agreements on the publication and circulation of awards, professional pre-requisites of arbitrators, and so on)?*
- *Should the model dispute settlement clause address issues of applicable law and provide for an entire set of ADR mechanisms?*

¹⁰⁶ See, *e.g.*, [the UNCITRAL Convention on International Settlement Agreements Resulting from Mediation \(2019\)](#).

ANNEXE**SELECTED RESOURCES****UNIDROIT Instruments**

UNIDROIT / FAO / IFAD, Legal Guide on Contract Farming (2015)

<https://www.unidroit.org/wp-content/uploads/2021/06/Contract-farming-legal-guide.pdf>

UNIDROIT, Principles of International Commercial Contracts (2016)

<https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>

UNIDROIT, Principles of Reinsurance Contract Law (2019)

<https://www.ius.uzh.ch/en/research/pricl.html>

UNIDROIT / IFAD, Legal Guide on Agricultural Land Investment Contracts (2021)

<https://www.unidroit.org/wp-content/uploads/2021/10/ALICGuidehy.pdf>

UNIDROIT / FAO / IFAD project on the Collaborative Legal Structures for Agricultural Enterprises

<https://www.unidroit.org/work-in-progress/legal-structure-of-agri-enterprise/>

UNCTAD publications

UNCTAD, World Investment Report, Reforming International Investment Governance (2015)

https://unctad.org/system/files/official-document/wir2015_en.pdf

UNCTAD, World Investment Report, International Tax Reform and Sustainable Investment (2022)

https://unctad.org/system/files/official-document/wir2022_en.pdf

UNCTAD-OECD Twenty-eighth Report on G20 Investment Measures (2022)

<https://unctad.org/publication/unctad-oecd-report-g20-investment-measures-28th-report>

OECD publications

OECD Policy Framework for Investment (2015)

<https://www.oecd.org/daf/inv/investment-policy/Policy-Framework-for-Investment-2015-CMIN2015-5.pdf>

OECD, The Future of Investment Treaties: Possible Directions (2021)

https://www.oecd-ilibrary.org/finance-and-investment/the-future-of-investment-treaties-possible-directions_946c3970-en

UNCITRAL publications

UNCITRAL Model Legislative Provisions on Public-Private Partnerships (2019)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11011_mlpppp_e.pdf

Model Clauses

Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts (2013)

<https://www.unidroit.org/wp-content/uploads/2021/06/UPICC-model-clauses-English-i.pdf>