



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**

Second session (hybrid)
Paris, 13-15 March 2024

UNIDROIT 2024
Study L-IIC – W.G. 2 – Doc. 2
English only
March 2024

REVISED ISSUES PAPER

1. This document provides a discussion of issues that the Working Group on International Investment Contracts may wish to consider during its second session.
2. The issues considered in this document were identified by the participants in the first Working Group session, participants in the Subgroups, and the UNIDROIT Secretariat in cooperation with the ICC Institute of World Business Law (ICC-IWBL). 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 second session.
3. This document retains a revised version of parts of the Issues Paper from the first session ([Study L-IIC – W.G. 1 – Doc. 2](#)) relating to Preliminary Matters (Part I), General Issues Relating to the Project and the Future Instrument (Part II), and Scope of the Future Instrument (Part III).
4. Part IV of this document relates to the content of the future instrument, based on the intersessional work conducted following the first session. This section is accompanied by four additional documents that represent the detailed outcome of the intersessional work and that will be the main object of the deliberations at the second session:
 - **Report of Subgroup 0** on Definitions and conceptualisation of international investment contracts (IICs); Relationship with domestic law and IIAs; Interaction with the UPICC.
 - **Report of Subgroup 1** on Pre-contractual issues in IICs, formation and validity; Parties, non-signatory parties, and affected stakeholders; Remedies, including compensation and damages; Transfer of rights and obligations; Other UPICC that may need adaptation.
 - **Report of Subgroup 2** on Change of circumstances (stabilisation/renegotiation/adaptation, hardship, force majeure); Other clauses typical of IICs.
 - **Report of Subgroup 3** on Addressing policy goals in IICs; Other treaty standards to be functionally addressed at the contractual level.
5. Annexe I to this paper provides links to relevant documents to assist the Working Group. Annexe II sets out a preliminary structure for the prospective instrument.

TABLE OF CONTENTS

I. PRELIMINARY MATTERS	3
A. Background of the project	3
B. Format of the future instrument	3
C. Target audience	4
D. Composition of the Working Group	5
E. Methodology and timeline	6
F. Intersessional work	7
G. Relationship with existing international instruments	8
II. GENERAL ISSUES RELATING TO THE CONTENTS OF THE FUTURE INSTRUMENT	10
A. Role of the UPICC and their interaction with the other layers of content	10
B. Principles, rules and clauses in IICs transnational practice	11
C. Principles addressing IIL treaty standards, including emerging public policy demands: perplexities raised and option for contractual equivalents	12
III. SCOPE AND STRUCTURE OF THE INSTRUMENT	13
A. Is a definition of “international investment contract” necessary to define the scope of the instrument?	13
B. Structure of the instrument	15
IV. CONTENT OF THE INSTRUMENT	15
A. List of definitions	16
B. Parties, non-signatory parties and affected stakeholders	16
C. Pre-contractual issues and issues concerning formation and validity of contract	17
1. Pre-contractual issues, including liability and due diligence obligations as well as policy commitments and relationship with affected third parties	17
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	19
D. Rights and obligations of the parties: addressing new IIAs/BITs policy goals through contractual tools	19
E. Principles and clauses addressing “change of circumstances”	22
1. “Stabilisation” and “adaptation” (restoration of financial equilibrium) clauses	22
2. Relationship of “stabilisation” with “hardship” and “force majeure” clauses	23
3. Consequences (remedies) of hardship, force majeure and the breach of stabilisation clauses	24
F. Compensation and damages	25
G. Transfer of rights and obligations under the contract and return of rights	26
H. Legal framework and applicable law	26
1. Party autonomy and choice of law: the UPICC (or an adapted version) and other principles of international or transnational law as the law applicable to IICs	26
2. The legal relationship between IIAs/BITs, including newly emerging standards on public policy goals, and investment contracts	28
I. Dispute resolution clauses	28
ANNEXE I	30
ANNEXE II	31

I. PRELIMINARY MATTERS

A. Background of the project

1. 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 to explore 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.

2. 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.

3. 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](#)).

4. 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

5. It is anticipated that the Working Group will prepare legal guidance and a set of model clauses in the area of IICs. A functional approach to legal concepts may be most appropriate in order to produce an instrument that would not be jurisdiction specific, but could be applied and reflected in any legal system or culture. The international guidance could enable practitioners to take a common approach to legal issues arising out of IICs.

6. Concerning the form and type of content, the Working Group may consider (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.

7. 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 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, by total or

partial incorporation into contract clauses, by designation as the applicable law or as a tool for interpretation. A set of Principles would maintain a close relationship with the UPICC¹ and place itself among the instruments that complement the UPICC for special categories of contracts, adapting the Principles (as rules of general contract law) to their specificities, 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, either in an introductory part or in a separate, accompanying document.

8. The two different options have been already tested in practice. The Working Group may wish to consider, among the existing UNIDROIT instruments, the UNIDROIT/IFAD [Legal Guide on Agricultural Land Investment Contracts \(ALIC Guide\)](#) and the [Principles of Reinsurance Contract Law \(PRICL\)](#).

9. 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](#). 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. The purpose of ICC model contracts is to replace the choice between different national laws, which are often not adapted to the needs of international trade, with a detailed 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.

Question for the Working Group:

- *The Working Group is invited to discuss whether the future instrument should take the form of a Legal Guide or a set of Principles with commentary and start considering pros and cons of each format, including their feasibility.*

C. Target audience

10. 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 – which would be expected to be the primary addressees of the future instrument.

11. The future instrument would also consider the interests of other categories that 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. During the first session of the Working Group, it has been repeatedly stated that it is of paramount importance for the future instrument to address the interests of third parties affected by the investment, particularly local and indigenous communities.

Questions for the Working Group:

- *Which categories would the Working Group consider "affected third parties" specifically? How would the Working Group address their interests category by category?*
- *Would the Working Group see fit to consider the interests of these categories, including local and indigenous communities, under the 'policy goals' subgroup (SG3)? Would it consider the instrument of "investor-third parties arrangements"? Are there UPICC that may be deemed relevant in that regard?*

¹ 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.

D. Composition of the Working Group

12. 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).

13. 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).²

² 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).

14. 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. To date, the following organisations participate as institutional observers in the Working Group:

- International Centre for Settlement of Investment Disputes (ICSID);
- International Institute for Sustainable Development (IISD);
- International Law Association (ILA);
- International Law Institute (ILI);
- United Nations Commission on International Trade Law (UNCITRAL);
- United States Council for International Business (USCIB) Trade and Investment Committee.

15. Moreover, in light of the very broad interest generated by this project, a Consultative Committee was established to allow for wider participation of experts, ensuring that national and regional sensitivities and realities are considered, and to increase transparency vis-à-vis Unidroit Member States. The main objective of the Committee is to provide the Working Group with advice, comments and relevant information from a national and/or regional perspective as the work on the future instrument evolves.³

E. Methodology and timeline

16. 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.

17. The Working Group will meet at least twice a year (for three days at a time). The 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 are expected to attend in person if circumstances permit.

18. The Working Group will benefit from research on ICC arbitral awards conducted by a researcher under the oversight of the ICC-IWBL. 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. Furthermore, research is conducted on publicly available contracts and awards by an informal research task force established within the Roma Tre- UNIDROIT "Center for Transnational Commercial Law and Investment Arbitration" under the supervision of the UNIDROIT Secretariat. The examination of contracts and 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.

19. 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

³ The Consultative Committee consists of experts appointed by 27 Member States.

- (i) First session: 23-25 October 2023
 - (ii) Second session: 13-15 March 2024
 - (iii) Third session: 3-5 June 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. Intersessional work

20. At the first Working Group session, in order to facilitate the organisation of the work, the Chairs suggested setting up informal subgroups that would be active during the intersessional period. They would be structured as open-ended, and both experts and observers were to be invited by the Secretariat to express their interest in participating in one or more of them. Five thematic subgroups were set up accordingly.

21. Subgroup 0 is Co-Chaired by Mr Stephan Schill and Mr Diego Fernández Arroyo, and was assigned the following subtopics: (i) Definitions and conceptualisation of international investment contracts (IICs); (ii) Relationship with domestic law and IIAs; (iii) Interaction with the UPICC. Subgroup 0 held one virtual intersessional meeting:

SG 0 – First Meeting – 23 February 13:30 – 15:00 (CET)

22. Subgroup 1 is Co-Chaired by Ms Giuditta Cordero-Moss and Ms Ndanga Kamau, and was assigned the following topics: (i) Pre-contractual issues in IICs, formation and validity; (ii) Parties, non-signatory parties, and affected stakeholders; (iii) Remedies, including compensation and damages; (iv) Transfer of rights and obligations; (v) Other UPICC that may need adaptation. Subgroup 1 held virtual meetings on the following dates:

SG 1 – First Meeting – 26 January 13:00 – 14:00 (CET)

SG 1 – Second Meeting – 21 February 13:00 – 14:00 (CET)

23. Subgroup 2 is Co-Chaired by Ms Margie-Lys Jaime and Mr Pierrick Le Goff, and was assigned the following topics: (i) Change of circumstances (stabilisation/renegotiation/adaptation, hardship, force majeure); (ii) Other clauses typical of IICs. Subgroup 2 held virtual meetings on the following dates:

SG 2 – First Meeting – 7 February 13:00 – 14:00 (CET)

SG 2 – Second Meeting – 29 February 13:00 – 14:00 (CET)

24. Subgroup 3 is Co-Chaired by Ms Catherine Kessedjian and Ms Céline Lévesque, and was assigned the following topics: (i) Addressing policy goals in IICs; (ii) Other treaty standards to be functionally addressed at the contractual level. Subgroup 3 held virtual meetings on the following dates:

SG 3 – First Meeting – 2 February 16:00- 17:00 (CET)

SG 3 – Second Meeting – 20 February 16:00 – 17:00 (CET)

25. Subgroup 4 is Co-Chaired by Mr Michele Potestà and Mr Jeremy Sharpe, and was assigned the following topics: (i) Choice of law clauses; (ii) Dispute settlement clauses. Subgroup 4 will start its work after the second Working Group session.

G. Relationship with existing international instruments

26. The future 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, especially as regards the consistency of terminology and language across similar initiatives.

27. Several UNIDROIT instruments play a central role in this project, in particular the UPICC, the PRICL and the ALIC Guide. More generally, the Working Group should take into account the whole set of UNIDROIT instruments where appropriate: for instance, the UNIDROIT/FAO/IFAD [Legal Guide on Contract Farming](#) may be relevant for issues such as hardship and force majeure, and the project on [Collaborative Legal Structures for Agricultural Enterprises](#) may provide useful guidance on multiparty contracts.

28. Although other IOs have sometimes addressed IICs,⁴ their work has mostly targeted public international law instruments (BITs and IIAs). UNCTAD elaborated documents on investment policy options and treaty reform;⁵ the OECD regularly publishes studies on IIL standards and has established a forum to discuss investment policies;⁶ the WTO manages a number of agreements that have an impact on investments and has launched initiatives on investment facilitation;⁷ UNCITRAL conducts work on Investor-State Dispute Settlement (ISDS) reform,⁸ is codifying new standards of conduct for adjudicators in investment disputes in partnership with ICSID,⁹ and produced model legislative provisions on “Public-Private Partnership” (PPP), which considered some aspects of PPP agreements that may be relevant to IICs;¹⁰ and the HCCH’s expertise on conflicts of law is also essential to this work.¹¹ To the extent the final instrument will touch upon issues that are covered by existing UNIDROIT instruments or fall within the scope of activity of other IOs, 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.

29. Documents elaborated by relevant private sector participants, including model contracts or model clauses elaborated by associations of certain industries, should be considered.¹²

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?*

⁴ 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.

⁵ 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>.

⁶ 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>.

⁷ 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).

⁸ 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.

⁹ See the UNCITRAL/ICSID initiative on the drafting of codes for arbitrators and judges.

¹⁰ See the [UNCITRAL Model Legislative Provisions on Public-Private Partnerships \(2019\)](#).

¹¹ 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>.

¹² See, e.g., the FIDIC guidance documents on contracts (FIDIC Suite of Contracts or the FIDIC Contracts Guide).

- *Would it be useful to create a list of IOs' processes and instruments to be monitored that are relevant to each area of work?*

II. GENERAL ISSUES RELATING TO THE CONTENTS OF THE FUTURE INSTRUMENT

30. At its first session, the Working Group recalled the contextual background of the project (see [Study L-IIC – W.G. 1 – Doc. 2](#), Part II.A) and agreed with the proposed building blocks or “layers of content” of the future instrument: (i) the UPICC as general contract law principles and rules¹³, and as adapted to the context of IICs when appropriate; (ii) principles, rules and clauses deriving from current IICs transnational practice; and (iii) possible innovative principles, rules and clauses that may contractually address vague investors’ protection standards in IIAs/BITs (with some limitations) and policy goals in recent IIAs (see [Study L-IIC – W.G. 1 – Doc. 2](#), Part II.B). It was considered the three layers of content should be examined with a view to considering their interaction.

A. Role of the UPICC and their interaction with the other layers of content

31. Regarding building block (i), it was agreed that the UPICC provide the starting point for this project, while other existing UNIDROIT instruments (especially the ALIC Guide) should also be taken into consideration. The UPICC contain a solid basis of concepts of general contract law that can be imported into IICs practice (e.g., offer and acceptance, consent of the parties). The good faith principle stands out for its potential in the context of IICs as well as many other principles whose possible contribution is still to be explored (the entire agreement principle, mandatory norms, agency, contract in favor of third party). Methodologically, the Working Group should start its analysis by identifying areas for work (pre-contractual and contractual issues, needs for protection and typical breaches, inconsistencies or flaws of the existing protection, emerging policy goals) and look into the UPICC to assess whether any of their principles and rules is suitable for application to that area. If no UPICC is found to be relevant, the Working Group should look into contract practice, transnational standards, or strive for a better rule. At the same time, once some UPICC is found to be relevant for application to IICs, it might apply as it is or it might need adaptation to the specificities of IICs.¹⁴ In the latter case, in order to see how and to what extent it should be adapted, the Working Group should take into account how IICs practice (under the second layer of content) articulates that principle or rule in a manner that departs from general contract law as enshrined in the UPICC.

32. Given the relevance of the UPICC to this Project, the Working Group should consider how and to what extent they are already applied to IICs. In accordance with their Preamble, the UPICC may fulfill different functions.¹⁵ They have already been applied by arbitral practice in different ways, most prominently as a means of interpreting and supplementing the applicable domestic law, often

¹³ 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.).

¹⁴ It was mentioned that traditional distinctions between public and private law are currently blurring and that differences between the UPICC and IICs needs for protection should not be overestimated. The same concept of “good faith and fair dealing” in the UPICC (and the concept of “moralisation of contract law”) implies that many obligations and standards may be built into IICs that take environmental concerns and social issues into consideration

¹⁵ See the UPICC Preamble (2016 revision), p. 1. The UPICC may apply to a contract if they have been chosen by the contracting parties as the governing law, alone or in combination with the law of the host State, or if the arbitrators consider they are the appropriate rules to govern the contract when the parties have not chosen any law. In addition, they may perform other functions: they may provide a model for negotiators (or legislators) and be incorporated wholly or partly into contract clauses, or be used as criteria and tools for interpretation when they are used to interpret or supplement domestic law or international uniform law instruments, or to help to ascertain their contents. 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). Contracting parties to an IIC may designate as governing law “generally accepted principles of international commercial law”, “general principles of law”, *lex mercatoria*, of which the UPICC may be seen as a manifestation (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)).

to add weight to the tribunal's interpretation of the relevant domestic law, but also as the *lex contractus*.¹⁶ The Subgroups should examine in their reports for each area of work - or each UPICC that is found to be relevant - the existing case-law, and particularly how awards (if available) have applied the UPICC to IICs. It falls within the areas of work of Subgroup 1 to examine whether further UPICC may apply to IICs, other from those already identified by the Working Group.

B. Principles, rules and clauses in IICs transnational practice

33. Regarding block (ii), the Working Group agreed in its first session that it is necessary to consider contract practice to the greatest extent possible, either as a benchmark to adapt the relevant UPICC or to extract the relevant transnational principle or special rule in areas where the UPICC are found not to contain any solution (e.g., stabilisation). Any future instrument, indeed, could not expect itself to meet the needs of the operators without taking into account contract practice.

34. In order to conduct a correct appraisal of transnational practice, the Working Group should include in the analysis standardised "contract types" and "model clauses" elaborated from governments and associations of the industries, as well as the principles shaped by arbitral jurisprudence in this area.¹⁷ The Working Group warned about the existing constraints in accessing contracts and arbitral awards due to confidentiality safeguards and discussed some possible options to gain useful insights on current transnational practice.

35. The Working Group has generally agreed on the importance of developing specific guidance under this block by including model clauses in the future instrument. The Working Group has indicated as areas for work clauses on "pre-contractual responsibility", "change of circumstances",¹⁸ "revenue transfer", "compensation and damages", "choice of law", "dispute resolution", along with "clauses addressing policy goals". "Confidentiality" and issues of interests and currency were also mentioned. The Working Group has still not decided if it will limit its work to key provisions ("golden rules") or rather extend it to a wider range of clauses (joint venture or association, insurance, payment, option rights, pre-emption rights, currency fluctuation, local procurement, clauses on the minimum amount of investment required over a certain agreed period, and so forth¹⁹).

36. The Working Group has generally agreed under this block to develop generic guidance on clauses that would be applicable across sectors, combined with industry specific guidance clauses. It has been remarked during the discussion that model clauses such as those included in the FIDIC standard forms of contract usually provide for a general and a special part. The general clauses might be easier to elaborate, but special clauses can really really vary from procurement to construction or energy.

Questions for the Working Group

¹⁶ In particular, 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: for an overview of the relevant case-law principle by principle, see the [UNILEX database](#).

¹⁷ Arbitral tribunals have identified in their awards a number of general principles of law (or principles common to most legal systems) that have progressively accumulated and that have been found to apply to IICs (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).

¹⁸ Including "stabilisation" and "adaptation (restoration of the financial equilibrium)", "hardship" and "force majeure".

¹⁹ Other clauses specific to IICs practice of IICs would be 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, 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.

- *Should the analysis be limited to the IICs clauses already under examination by the Subgroups (e.g., stabilisation, hardship and force majeure), or rather extend to other clauses (e.g., joint ventures, currency fluctuations, payments)?*
- *How would the Working Group concretely combine providing guidance on clauses “applicable across sectors” with “industry-specific” guidance?*
- *How would the Working Group gain useful insights into IICs practice (including model clauses and contract types)? Workshops with in-house lawyers, State negotiators, industry stakeholders, as it was mentioned at the first session?*

C. Principles addressing IIL treaty standards, including emerging public policy demands: perplexities raised and option for contractual equivalents

37. Regarding building block (iii), the Working Group strongly agreed at its first session that the future instrument should provide guidance on how to address contractually new IIAs/BITs provisions on policy goals in IICs, with a broad scope (e.g., from sustainability to human rights and corporate social responsibility, climate change and the protection of affected populations, such as indigenous peoples). At the same time, concerns were generally expressed about the possibility of replicating IIAs/BITs standards of protection, such as FET or the provisions on expropriation, in a contractual setting. It was held that, in theory, all aspects covered by a IIA or BIT could be contractualised. However, regardless of purely conceptual questions,²⁰ IIAs standards are a “moving target” and their interpretation has proved to be inherently dynamic, resisting any attempt to be systematically categorised.²¹ Therefore, pure replication is difficult to achieve and it would run the risk of reproducing the flaws of the existing system.²² Extracting principles from recent treaties should be treated with caution as long as contractual substitutes exist that may be confidently relied and ensure efficiency (e.g., clauses addressing “change of circumstances”). However, certain specific standards in IIAs/BITS may be more easily addressed contractually: provisions on transfers of profits and criteria for compensation and calculation of damages were mentioned as examples.

38. It can be inferred from the Working Group reasoning that regulatory stability concerns (including with regard to legitimate expectations, expropriation and regulatory takings) would be covered under functional contractual equivalents, and particularly under the work of Subgroup 2 on clauses addressing “changes of circumstances”.²³ Legitimate expectations concerns might also be covered under arrangements in the pre-contractual phase (Subgroup 1) and/or any further interaction between the parties that may fall under on-going mechanisms for renegotiation and adaptation of the contract established to govern and preserve the investment contractual relationship (Subgroup 1 and 2). As a rule, when a contractual functional equivalent to IIAs/BITS standard exists, the Working Group should seek whether a transnational principle is present in that area that is pacifically accepted and, if it does not find any, it should strive for the best contractual rule that is found by the Working Group itself to meet similar needs for protection. Accordingly, the relevance of the principles of good faith and fair dealing (Art. 1.7 UPICC), as well as inconsistent behaviour and

²⁰ Relating, e.g., to “international public law reasoning” as opposed to “contract-based reasoning.”

²¹ In some cases, States are even pulling out of the FET standard: see the AfCFTA Protocol on investment, signed in 2023.

²² In particular, the intimate variability and/or vagueness of the standards, with particular regard to FET and the treatment of indirect expropriation and regulatory takings.

²³ Namely “stabilisation” and “adaptation/renegotiation” (restoration of financial equilibrium) clauses, which have then been provisionally associated in this Revised Issues Paper to the work on “hardship” and “force majeure” clauses under Section E on “Clauses addressing change of circumstances”.

reliance (Art. 1.8 UPICC),²⁴ and the work of other IOs, such as the OECD,²⁵ should be considered under the new sections of this Revised Issues Paper dedicated to contractual substitutes.

39. Some opinions were expressed during the first session, although in the minority, that certain IIAs/BITs protection standards may be covered by the future instrument, e.g. rules on “indirect expropriation” or “regulatory takings”, especially when a IIA/BIT is not in force, or it is in force and a kind of legal relationship might be envisaged between the contract and the IIA that could bring the contract to specify the treaty standard. The Working Group may wish to further discuss possible work in this area. Other IIAs/BITs standards that the Working Group may decide to address would fall under the work of Subgroup 3, also based on the work of Subgroup 0 (on the legal relationship between investment treaty law and IICs).

Questions for the Working Group

- *The Working Group may wish to further discuss aspects of IIAs/BITs standards contractualisation to confirm its findings at the first session or identify other areas for work*
- *What further IIAs/BITs standards, beyond those already identified, would the Working Group ask Subgroup 3 to consider? Should the Working Group consider the elaboration of a definitive list of standards in this regard?*

III. SCOPE AND STRUCTURE OF THE INSTRUMENT

A. Is a definition of “international investment contract” necessary to define the scope of the instrument?

40. The Working Group was invited at its first session to reflect on the notion of “international investment contracts”, which the Project mandate clearly indicates as the focus of the activities. 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 territorial subdivision) and a private foreign investor (or its local subsidiary) that (ii) 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 imply some substantial commitment to its development.²⁶

41. IIAs usually do not provide a definition of IICs.²⁷ Rather, they delimit their scope of application by defining a subjective and an objective element (investor/investment). The ICSID Convention does not define the term “investment”. Thus, several conceptual approaches have emerged: providing a definition (referring to the essence of the concept, or providing a list of examples) or rather describing the “economic significance” of such economic activities and leaving definitional issues to practice and interpretation. On these terms, arbitral tribunals, in absence of explicit exclusions, have often come to qualify the very IICs themselves as “covered investments” and thus assets which deserve protection under IIL.

²⁴ 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).

²⁵ 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.

²⁶ The “international character” of IICs depends on their evident connection with more legal orders: *inter alia* and in addition to the foreign nationality of the investor, it might be the foreign provenance of the invested capital or know-how, or the choice of law, when it points at international principles and/or at a foreign law, and the deferral of controversies to international arbitration into the dispute settlement clause.

²⁷ 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).

42. With regard to the subjective element, IIAs often refer to an investment as a network of complex interrelated economic activities which may also include contractual relationships between a State - or a governmental agency or entity - and a private, for-profit foreign company.²⁸ 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 investors in order to avoid "treaty shopping"²⁹ and "round-tripping"³⁰ by including real business activity requirements or denial of benefits clauses.³¹

43. 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 several kinds of assets or economic activity.³² More and more exceptions and carve-outs 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,³³ or imposing certain conditions ("domestic law compliance") or defining certain characteristics of the investment 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.³⁴

44. In its first session, the Working Group did not discuss the question whether the future instrument should provide a normative definition of "international investment contracts" (IICs), or if it would prefer a list of examples. It was clarified that the scope of the project should include the "background" (or "framework") contract between the State (or a State entity) and the foreign investor, rather than the bundle of connected contracts that regulate the investment. Doubts were raised during the intersessional work on whether contracts concerning portfolio investments or concluded with (new) companies incorporated in the host State as part of the implementation of the background contract would fall within the scope of this project. Should the Working Group deem it desirable to formulate a definition of international investment contracts, it is still proposed to leave the matter for a later stage of the project.

45. Subgroup 0 proposes under Topic 1 of its Report to conduct work on the three lemmas – (1) "international" (2) "investment" (3) "contracts" – and on issues of qualification of IICs as a subset of international commercial contracts, or as public law contracts concluded and executed in States' public law capacity (see also, in this document, Part IV.B in relation to the "nature of the parties"). Certain considerations under Topic 3 concerning IICs' "interaction with the UPICC" may also have relevance to this discussion. The Report of Subgroup 0 contains issues that Subgroup 0 suggests considering and discussing in this area.

Questions for the Working Group:

- *The Working Group is invited to discuss the subtopics proposed in this area by Subgroup 0. Does the Working Group agree to ask Subgroup 0 to develop preliminary guidance in this area along the lines proposed in the Report? Should other topics be considered?*

²⁸ An investment relationship between a State and a foreign government-controlled entity may also be relevant: see *Rumeli Telekom v. Kazakhstan*, ICSID Case no. ARB/05/16 (29 July 2008).

²⁹ The channelling of the investment through a "mailbox company" in the territory of a State party to enjoy its protection.

³⁰ The expatriation by domestic investors of investment capital to reinvest in the home country to obtain protection.

³¹ See policy developments from 2015 onward in UNCTAD World Investment Reports 2015 and 2016, up through World Investment Report 2022, p. 66 *et seq.*

³² 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.

³³ 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.

³⁴ 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).

B. Structure of the instrument

46. The structure and content of the future instrument significantly depend on the format. In case of 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 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](#).³⁵ 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,³⁶ including principles whose formulation has been influenced by the UPICC and principles specific to reinsurance contract law.³⁷

47. If the option of a Legal Guide is preferred, the structure might instead be similar to that of 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 land investment contracts across seven chapters.³⁸ 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.

48. Based on the discussion during the first session and intersessional deliberations, a preliminary structure for the instrument was prepared by the Secretariat and included in Annexe II to this document.

Questions for the Working Group:

- *How should the content of the instrument be structured? Would the organisation vary depending on the format of the instrument? The Working Group is invited to consider the preliminary draft structure for the future instrument (Annexe II) and propose any additional content that should be included as well as any rearrangement of content as appropriate.*
- *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?*

IV. CONTENT OF THE INSTRUMENT

49. The topics covered in this Section offer an initial attempt to frame the discussion on the possible content of the future instrument, based on the current preliminary structure of the instrument. For each topic it decides to cover, the Working Group is invited to consider commonalities

³⁵ The PRICL includes five chapters: (i) general part; (ii) duties; (iii) remedies; (iv) aggregation; (v) allocation

³⁶ In this respect, the PRICL draw on the example of the Preamble of the UPICC (see Art. 1.1.1).

³⁷ 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).

³⁸ 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.

or divergences within arbitral and contractual practice, the possible relevance of domestic law (in particular on foreign investments), model contracts and court decisions.

A. List of definitions

50. 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.

51. While the UPICC already contain definitions for the relevant concepts used therein,³⁹ 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” BIT/IIA 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.).

52. As stated in Part I, it is advised that any definitions be consistent, as far as possible, with the terminology used in other international instruments. Furthermore, at its first session, the Working Group agreed on the importance of a list of definitions to reflect practice and discussed that definitions should be formulated in a manner that allows them to be used in different jurisdictions and industry sectors.

53. Subgroup 0 will consider this area of work later in the process.

Questions for the Working Group:

- *Should the future instrument contain a list of definitions relevant to IICs? Which legal concepts should be included? Would the Group agree to draft a provisional list of concepts that need to be defined in an IIC?*
- *Should certain definitions be developed with priority, while others would be gradually developed as the project progresses?*

B. Parties, non-signatory parties and affected stakeholders

54. At its first session, the Working Group strongly supported the inclusion of work addressing the legal nature of the parties to IICs (States and private foreign investors), as well as the different categories of affected stakeholders.

55. The work may look at 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 one hand, and affected stakeholders, on the other.

56. It was considered relevant to define, for the purposes of the instrument, the notion of “State party”, including its central bodies (“Government”, “Ministries”) and local subdivisions or territorial entities (“regions”, “municipalities”), and “State entities” (State agencies or specialised authorities, “State-owned enterprises”); however, the notion of “investor party” may include foreign companies or locally registered companies but also could be impacted by the relationship between the parent company and a subsidiary in the host country, or by the economic association or affiliation of more enterprises, such as joint ventures or consortia (“multiparty contracts”).

57. Possible issues arising from the complex nature of the parties in IICs were considered as areas for work. For example, there would be merit in considering issues of legal representation and

³⁹ See, e.g., UPICC Art. 1.11.

special rules that may apply when a State/State agency/State-owned enterprise/territorial entity (e.g., a municipality) signs an IIC. On the investor side, the added complexity was considered that the foreign investor may establish a new company in the host State to execute an IIC, while such company is not a party to the contract. In connection with this topic, the Working Group discussed whether the State concludes an IIC in its sovereign (public) or commercial capacity. It is traditionally held that States can conclude agreements with private subjects in their public law capacity (concessions) or in their private law capacity (“*jus commune*”): in the former case, they do not relinquish their public powers, including the power to revise or terminate the contract;⁴⁰ in the latter case, they stand with the private contractor on an equal footing, the exercise of public law capacity on their part (e.g., the issuance of a concession) becoming part of the content of the contractual obligation they have assumed *vis-à-vis* the private contractant. In this case, they still retain their public law attributes, but the exercise of those attributes is to be judged against the obligations they undertook on a plan of equality *vis-à-vis* the private investors, so that that exercise might result in a breach of contract.

58. Different views were expressed in this regard by the Working Group at its first session. Public and private law profiles are tightly interwoven. An IIC might be construed as a “private contract” to which any domestic (or transnational) law might apply depending on party choice, or an “administrative contract” that should be controlled against national public policy and domestic mandatory norms (in particular, special laws on public law contracts), depending on the applicable law and on the type of law which is consequently applied. However, over time, new types of IICs have taken the stage, such as “private-public partnerships” (PPP) that place the parties on an equal footing, with a clear trend to limit clauses providing exorbitant State powers, including as to termination of contract. A line could be drawn between cases where the State and the foreign investors directly negotiate, as opposed to cases where few margins for negotiations are left (“public tenders”⁴¹). In the former case, the State could be deemed to act in its contractual capacity, freely negotiating the contents of the contract with the private party, with some specificities depending on the public law nature of its acts; in the latter case, it would act in its public law capacity, concluding an agreement with content mandatorily imposed by the law. The legal qualification of IICs as a subset of private commercial contracts or public law contracts, and relating issues of States’ legal capacity and interaction with the UPICC, are part of the work plan of Subgroup 0.

59. Subgroup 1 proposes in its Report (Subtopic 1) to conduct work on five areas: (1) the State as a multi-faceted actor; (2) identity of parties, rights and obligations; (3) binding non-signatories to an IIC; (4) extending the arbitration agreement; and (5) affected stakeholders. The Report of Subgroup 1 contains questions and issues that Subgroup 1 suggests considering and discussing for each of these areas.

Questions for the Working Group:

- *The Working Group is invited to discuss the five areas proposed by Subgroup 1. Does the Working Group agree to ask Subgroup 1 to develop preliminary guidance on these areas? Should other topics be considered?*

C. Pre-contractual issues and issues concerning formation and validity of contract

1. Pre-contractual issues, including liability and due diligence obligations as well as policy commitments and relationship with affected third parties

60. The Working Group agreed at its first session on the importance of providing guidance in the future instrument on pre-contractual issues. Guidance should include classical areas of pre-

⁴⁰ More precisely “withhold the concession.”

⁴¹ In the area of “public procurement” the State issues a call for tender and provides for strict regulations clearly requiring the bidders to not depart from the provisions included in the call.

contractual liability (in particular, the parties' duty to inform), but also issues arising from emerging national and international standards concerning the level of due diligence required of investors in areas of public interest, including ESG substantive and procedural obligations and the protection of affected third parties ("policy goals"). During the intersessional work, it was clarified that the first version of the Issues Paper covered both areas as interrelated themes for work.⁴² In this regard, it was raised that precontractual issues fall, in principle, under the work programme of Subgroup 2, but policy goals fall within the work programme of Subgroup 3. Considering possible interactions and to avoid conflicting views on this topic, there is a need for coordination and clarification about the division of work between Subgroups 2 and 3 in this area.

61. The Working Group agreed that, in principle, there are significant divergences between legal cultures as regards the pre-contractual phase. From a common law perspective, pre-contractual issues (and liability) are not part of the contract, i.e., the process that leads the parties to sign the contract is not relevant to define the obligations that each party undertakes; under other legal cultures, the information provided prior to the formalisation of contract is determinative of the object of contract and therefore a stronger duty to inform can be construed. The manner in which pre-contractual issues are covered would then intertwine with issues of applicable law, as the outcome of any dispute would depend on the forum (a national court or international arbitrators) and on which type of law applies (administrative or private law).

62. At the same time, there was enough consensus that transnational law principles are emerging in IIC practice that depart from domestic laws, especially those which ignore the legal relevance of pre-contractual conducts.⁴³ In treaty arbitration, international responsibility based on pre-contractual behaviour has been often adjudicated because of the standards existing in that area. In contract-based arbitration, the parallel issue, strictly connected to applicable law, is whether a transnational principle exists that overrides or interacts with domestic law in this area (e.g., the OECD Guidelines for Multinational Corporations or rather specific industry standards) and that can be relied upon across sectors binding both States and investors. Gaps may indeed exist at the level of domestic law, which may be complemented by reference to a transnational or international standard (such as the obligation to conduct an environmental or social impact assessment concerning the investment). The issue of the *erga omnes* binding character of these standards, often incorporated in international (soft law) documents, or mere intra-corporation relevance, should also be considered.

63. All these issues might be properly approached by a set of recommendations that raise awareness about the most relevant risks in the pre-contractual phase having an impact on the contract, including the consequences of the law governing the contract, and suggest proper pre-contractual arrangements in all the relevant areas. Indeed, transnational contract practice shows a significant trend that most pre-contractual issues are being contractualised by way of pre-contractual documents such as letters of intent or warranties and representation clauses, especially on the side of States. By way of example, a clause might require the investor to accept a statement that it reviewed all the papers of the bidding process and all the relevant laws and regulations of the State in relation to the specific sector. This might be an area for work.

64. It was also raised that, especially in long-term contracts, negotiations might occur during the entire lifespan of the contract, and the same principles that would be applicable in the face of pre-contract liability might also be relevant for negotiations that would take place at a later stage. This might well be the object of a contractual provision concerning principles and procedures that would apply to how to conduct negotiations (e.g., in cases of a failure to inform or to give execution to

⁴² See Study L-IIC – W.G. 1 – Doc. 2, Part IV. D, 1 to 3.

⁴³ E.g., 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.

previous expected commitments), so departing from any domestic law or transnational principle that would apply.

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

65. At its first session, the Working Group agreed that the future instrument should address the process of formation of an investment contract, in particular against the backdrop of the relevant UPICC: Freedom of contract (Art. 1.1), Good faith (Art. 1.7) and Conclusion of contract dependent on agreement on specific matters or in a particular form (Art. 2.1.13). The Working Group agreed in principle but without taking any specific stance, that the principle of freedom of contract may need adaptation because of States' mandatory norms that may limit the negotiation of IICs on the part of the State (public procurement rules, energy laws, state aid, SOEs, golden powers). Taking inspiration from the existing limitations in French law and jurisprudence, it was mentioned during intersessional work in Subgroup 0 that international or transnational law may consider national legislation irrelevant in this regard, as a mere fact from the viewpoint of the international legal order or, in alternative, that a transnational principle is progressively emerging that gives relevance to national limitations to the capacity to contract in certain areas.

66. The Working Group also agreed to elaborate guidance on the form of investment contracts and provide the necessary adaptation of the 'no formal requirement' rule provided in article 1.2 UPICC as investment contracts are usually negotiated and concluded in writing with the highest level of detail. This may be done through a final model clause providing for the written form.

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

67. As to issues of validity of contract, the UPICC concerning duress, improper influence or gross disparity (and other invalidity grounds) might certainly apply to IICs, but in principle there is no evidence of a particular arbitral practice or specific situation to address. Therefore it would suffice to refer to the UPICC as they are.

68. Work on corruption may prove to be a much more difficult task as international practice has struggled for decades to elaborate some solution without meaningful results. The risk is that the corruption-invalidity of contract connection leaves untouched both the corruptor and the corrupted, while being harmful to the State, the company, and the final beneficiaries. An hypothesis for work would be to address corruption by contractual means between, i.e. taking inspiration from anti-corruption clauses where a State, if the contract turns out to have been obtained through corruption, has a choice between cancellation or damages.

69. Subgroup 1 proposes in its Report (Subtopic 2) to conduct work on three areas: (1) Principles applicable to the pre-contractual phase; (2) Relevance of the pre-contractual phase to determine the scope of contractual obligations; (3) Formation and validity. The Report of Subgroup 1 contains questions and issues that Subgroup 1 suggests considering and discussing for each of these areas.

Questions for the Working Group:

- *The Working Group is invited to discuss the three areas proposed by Subgroup 1. Does the Working Group agree to ask Subgroup 1 to develop preliminary guidance on these areas? Should other areas be considered?*
- *How should the work be allocated between Subgroup 1 and Subgroup 3 as regards policy goals concerning the pre-contractual phase?*

D. Rights and obligations of the parties: addressing new IIAs/BITs policy goals through contractual tools

70. The main rights and obligations of the parties in IICs lie at the core of this Project. Although IIL has long focused more on States' obligations, most recent IIAs/BITs have instead been focusing on a more articulated set of rights and obligations between the parties, which includes increasing investors' obligations. Under the first version of the Issues Paper (see [Study L-IIC – W.G. 1 – Doc. 2, Part IV.E.3](#)), the Working Group had been invited to discuss, as part of the discussion on the third layer of content of the future instrument, how policy goals contained in treaty law and soft law documents, mainly in the form of "best efforts," could be turned into contractual obligations, with a view to clarify their scope and specify their contents *vis-à-vis* the need of States and investors to gain more certainty about their rights and obligations.

71. The Working Group at its first session generally agreed that policy goals should be addressed contractually with a broad coverage (e.g., from sustainability to human rights and corporate social responsibility, climate change and the protection of third parties and affected populations, with a special regard for indigenous peoples). It was raised the issue that policy goals are often vague and their interpretation, as the interpretation of human rights concepts, continuously evolves over time, which could make difficult to capture their contents by the means of contract.⁴⁴ Policy goals may also vary depending on the industry sector concerned. The Working Group agreed that these challenges should be addressed by balancing the need for being as specific and concrete as possible with the drafting of model clauses with open textured language and the proposal of a range of options, which leave to the contracting parties to determine which ones would be relevant to their contract.⁴⁵

72. Work on policy goals could build on Article 1.4 of the UPICC on mandatory rules, which include principles of public policy (e.g., human rights, environmental protection), and on the relevant Chapters of the ALIC Guide, which provides examples on how to include policy goals in agriculture and land contracts,⁴⁶ along with the work of organisations that partnered in its drafting.⁴⁷ Regard should be had also to mandatory rules from the jurisdiction in which the (parent) company is located (home State), which would incentivise responsible investments even if the host State was less advanced in prescribing sustainable development norms in its domestic laws. When investors act through local companies or in a joint venture with the host State and domestic law is less advanced, contracts may impose a minimum standard obligation, also on the part of the State, regarding the respect for internationally recognised human rights. On the side of investors, respect of international standards may be achieved by imposing (via contract or a code of conduct) liability on the parent company for breaches of ESG obligations by a local company.⁴⁸

73. The contract may specify the consequences in case the State or the investor does not comply with policy goals obligations (e.g., relief from certain obligations or the timing thereof). In case of a

⁴⁴ The current UN SDGs were part of the 2030 Agenda for Sustainable Development, but thinking has started about the next generation of goals.

⁴⁵ The options should include a general model clause, followed by a set of more specific model clauses that could address specific SDGs or specific standards of the industry. It would be hardly possible to provide equally detailed guidance in all ESG fields since the level of specificity has increased over the years with regard to environmental provisions (EIA, due diligence), while social and governance obligations might be less developed.

⁴⁶ See, e.g. Chapter 4.II, lett. B, of the ALIC Guide, e.g. 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.

⁴⁷ The International Institute for Sustainable Development (IISD) published a list of model clauses designed to integrate principles on responsible business into agricultural contracts.

⁴⁸ In this regard, the Annex to the Proposal for a Directive on EU Corporate Sustainability Due Diligence is a benchmark since it contains a comprehensive list of rights and prohibitions enshrined in international human rights agreements that could be imposed on companies: see the Annex to the Proposal of the European Parliament and the Council for an EU Directive on Corporate Sustainability Due Diligence (Brussels, 23.2.2022 COM(2022), 71, final).

contractual breach, the remedies for non-performance would be applicable, which include withholding of performance and, as last resort, termination of the contract. Alternative methods for the enforceability of the remedies could be addressed contractually e.g., dispute resolution mechanisms that would facilitate enforcement. In case of a State's breach of an obligation, the investor could be entitled to suspend performance, but it was raised that this is not always permitted under domestic laws (e.g. public services). These aspects should be examined against the backdrop of domestic laws to see to what extent the development of contractual remedies is possible. The relevance of non-judicial mechanisms such as the OECD National Points of Contact (NPC) procedures could also be examined in order either to identify areas of interest and derive indications to draft model clauses or to consider active behavioural change as an alternative (contractual) remedy.

74. The contents of recent IIAs/BITs should be inquired, that include the need for investors to comply with domestic law and regulations (e.g., concerning human rights) and encourage investors to voluntarily incorporate internationally recognised standards into their business practice and internal policies (e.g., the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights). The legal relationship between these standards and contractual provisions should be clarified and how policy goals relate to dispute settlement, i.e. if they have an interpretative function and/or they can lay down rights and obligations, based on a general obligation to comply with the laws and regulations of the host State or on a contractual commitment of the investor to comply with its own code or standard. The risk allocation between a State and a private investor is also relevant in case of breach of an ESG obligation.⁴⁹

75. The Working Group did not have time to discuss other impactful policy trends such as digitalisation policies,⁵⁰ including issues such as data protection, cybersecurity, and localisation requirements on IICs,⁵¹ and policies that incentivise SMEs to enter the investment arena.⁵² The Working Group may be willing to discuss the topics under this area, or decide to prioritise other topics and leave this area for discussion at a later stage, depending on resources and time-constraints. 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.⁵³ 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");⁵⁴ (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.⁵⁵ The work of UNICTRAL Working Groups I (Micro- and Medium Size Enterprises) and III (ISDS) should be taken into consideration in this context.

76. Subgroup 3 proposes in its Report to conduct work based on two objectives: (1) compliance with Host State's public policy (2) conformity with the highest international standards; and to

⁴⁹ For instance, a question might be how to allocate the risk in case the investment site is occupied by third parties as a protest because of the alleged impact of the project on climate change.

⁵⁰ See OECD, 2021, p. 38.

⁵¹ *Ibid.*

⁵² 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 to engage in cross-border investment.

⁵³ See, e.g., Article 37 Tunisia-Turkey FTA.

⁵⁴ 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 and the development of corporate governance rules: 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/>).

⁵⁵ 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.

implement these objectives in three areas; (1) pre-contractual documents; (2) the preamble; (3) the contract itself. The Report also includes a work plan on preliminary mapping concerning: (1) policy goals international standards; (2) policy goals in IIAs and Model IIAs; (3) areas of interest by contractual phase or IIC content; (4) relevance of UPICC and ALIC Guide; (5) other IIAs standards to be addressed contractually.

Questions for the Working Group:

- *The Working Group is invited to discuss the objectives, the techniques for implementation and the work plan proposed by Subgroup 3. Does the Working Group agree to ask Subgroup 3 to conduct the work along these lines? Should other topics or areas be considered?*

E. Principles and clauses addressing “change of circumstances”

77. At its first session, the Working Group discussed at length the function and relevance of stabilisation and readaptation clauses, including clauses that provide for the restoration of economic equilibrium *per se* and in their interrelationship with hardship and force majeure clauses. It was found that issues behind stabilisation/readaptation are connected to some extent with the notion of hardship: grey areas may exist between the two and therefore the approach to both concepts should be consistent. It was also considered that the consequences of hardship, force majeure, and the breach of stabilisation clauses might be similar to some extent since there is a tendency under general contract law and in IIC practice, especially for long-term contracts, to keep the contract alive in case of supervening events (e.g., by introducing renegotiation as an option even in cases of force majeure). In addition, it may be difficult to discern cases of hardship from cases of force majeure in concrete practice (see [Study L-IIC – W.G. 1 – Doc. 2, Part IV.F.1](#)).

78. This prompted the decision that, regardless of their different formal qualifications (rights and obligations, performance/non-performance), Subgroup 2 is to examine stabilisation, hardship and force majeure under the common heading of “change of circumstances” with a special angle, i.e. to clearly identify the full range of situations to which they progressively apply (including differentiation, but also possible overlaps) and from the viewpoint of the consequences (remedies) to which they give rise.

1. “Stabilisation” and “adaptation” (restoration of financial equilibrium) clauses

79. In general, it was agreed that the future instrument should provide guidance on “stabilisation” clauses. These clauses are characteristic of IICs and provide a fundamental protection mechanism for investors since changes in the host State’s legislation might affect the costs and envisaged timeline for investment projects. On the other hand, it was also noted that opinions on the history and functions of “stabilisation” mechanisms may differ, that such clauses evolved over time (particularly, into “adaptation” and “renegotiation” clauses), and that stabilisation clauses might not be accepted in certain legal orders, so that other mechanisms may be available to pursue the same goals. During the intersessional work of Subgroup 2, reference was made, for instance, to insurance mechanisms covering legislative change costs and risk diversification through agreements with international lenders.

80. Areas for work that were identified during the first Working Group session include: (1) categorising “legislative changes” and their impact, i.e., interpretation and case law, modification of industry standards, changes to the fundamental legal framework (e.g., human rights), with a distinction between those imposed by international obligations and those spurred by States’ discretionary policy; (2) geographical scope of protection (in the host State and in other jurisdictions connected to the investor/investment); (3) limitations to the material scope of protection (increased cost thresholds to trigger protection, areas of legislation included or excluded). Regard should be given to forward-looking case law and legislative monitoring best practices in place in certain

jurisdictions, that anticipate the impact of legislative change in the interest of investors. Guidance should include limitations and exceptions to stabilisation as well as the need to avoid “reverse discrimination”.

81. The future instrument should provide guidance on how to draft a stabilisation/adaptation or renegotiation clause, and contract practice and arbitral awards should be taken into account in this regard. Solutions have been envisaged in contract practice such as formulas to re-establish economic equilibrium or the extension of the project duration. As it was mentioned during the intersessional work of Subgroup 2, a new model is emerging in contract practice that would not “freeze” law change, but rather the financial equilibrium of contract, prompting a fair repartition of supervening costs of legislative change (“change-in-law” model). Different types of legislative risks, consequent to legislative change, might be categorised in order to propose a fair allocation of costs on a case-by-case basis. As to possible limits to stabilisation, the concept of “proportionality” as interpreted by several courts and arbitral tribunals is to be examined to consider how it would apply to the context of IICs. In general, because of the differing opinions concerning stabilisation/readaptation and the variable forms they can take in transnational practice, the solution could be to develop model clauses with different options for consideration by States that uphold different policies and by investors from different industries. To employ the terminology of the UPICC (i.e., internationally neutral) in drafting the clauses is also relevant, as this would prevent the use of terms that might have slightly different meanings in different legal systems.

2. Relationship of “stabilisation” with “hardship” and “force majeure” clauses

82. As to the relationship of “stabilisation” with hardship/force majeure, a relevant area for work is to explore to what extent hardship and force majeure – as enshrined in Articles 6.2.1-6.2.3 and 7.1.7 of the UPICC – would be relevant to tackle the typical economic and legislative risks that are covered by stabilisation clauses in IICs. Regard should also be given in this context to the principle of “good faith” in Article 1.7 of the UPICC and to the ALIC Guide, which contains guidance on stabilisation clauses (paras 4.137-4.140) and investor-government contracts (paras 5.37-5.40).

83. A main difference between stabilisation and hardship would be that hardship is caused by a wider set of changes of general application, such as a surge in the price of raw materials, while stabilisation clauses would expressly address changes related to the contract, and particularly legislative changes affecting the contract. In general, hardship would be triggered by external events, i.e., events beyond the control of the contracting parties, while stabilisation clauses concerned changes that were within the control of one of the parties, namely the State. In light of the wording of Article 6.2.2(c) of the UPICC on the “(D)efinition of hardship”, which considers “events beyond the control of the disadvantaged party”, an issue is whether, in theory, a legislative change affecting the costs of an IIC would trigger a hardship clause in favour of the investor. Due attention should be given, in this regard, to the fact that the threshold to trigger a hardship clause is high, since the elements in Article 6.2.2 would need to be met cumulatively, and this may deserve some degree of adaptation. Another difference would lie in the fact that the compliance mechanisms tend to be different: in case of hardship, the court or the arbitral tribunal is involved, while in case a stabilisation clause is breached, direct negotiations are usually held between the parties.

84. In principle, in light of the “typicity” of the risk of a State’s unilateral change of its legislative framework, an IIC would always require including both a stabilisation and a hardship clause to cover all type of risks. The future instrument could provide distinct guidance on both types of clauses, allowing the contracting parties to select those they wish to include. Guidance may standardise different options for the allocation of the risk of legislative change between the parties (e.g., in case of “ordinary” or “fundamental” change to legislation). Use of hardship clauses may be implemented by specifying open-ended formulations (“any change” in circumstances) to cover specific risks or by using index clauses (e.g., to address the impact of inflation). Concepts and principles from arbitration practice should be taken into account in the drafting of model clauses.

85. Force majeure is widely recognised across jurisdictions. A force majeure clause is always necessary in addition to stabilisation/hardship for cases in which the performance has become impossible. Guidance on a force majeure clause should cover prolonged force majeure events, which could affect the economic equilibrium of the contract, and the timing for triggering termination rights, as well as the notion of *fait du prince*⁵⁶ and the link between force majeure and investment treaty arbitration, especially the “necessity” defence.⁵⁷ The link could also be examined between “force majeure” and cases where the State is obliged to regulate in the public interest (public health or environmental emergency). An area for work could consist of providing guidance on the possible role of insurance for investors and the question of “uninsurable risk”, e.g. when a facility is destroyed by an unforeseeable event beyond parties’ control before the handover to the State, the question arises about who would bear the costs.⁵⁸

3. Consequences (remedies) of hardship, force majeure and the breach of stabilisation clauses

86. As to the consequences of hardship, force majeure, and the breach of stabilisation clauses, at the first session of the Working Group, it was generally agreed that the future agreement should build on the UPICC, which already contain useful guidance on the consequences of hardship and force majeure. Areas to explore are: (i) the notion of “economic equilibrium” of the contract; (ii) solutions in case renegotiation fails (e.g., a possible role for the arbitral tribunal to adapt the contract with a view to restoring its equilibrium). While hardship provisions in the UPICC require a fundamental change of the “equilibrium of contract”, a more economic approach might be warranted for IICs, so that any factor that might change the equilibrium may give course to renegotiations and/or to (arbitral) adaptation. Guidance as to renegotiation, adaptation and, as a possible ultimate consequence, contract termination, may be taken from the Commentary to Principle IV.6.7 of the TransLex Principles, that refers to the concept of “commercial equivalence” rather than “economic equilibrium” and contains guidelines the contracting parties should consider in a renegotiation process. Time extension, cost protection, contract renegotiation and adaptation are common remedies for hardship and similar clauses, in concurrence with a duty of mitigation of damages.⁵⁹

87. In principle, the ultimate consequences of hardship, force majeure, and “stabilisation” are distinct and can be considered separately: the breach of a stabilisation obligation, as opposed to “events with economic consequences”, would find its natural remedy in compensation and damages, while hardship would give place to renegotiation and force majeure to the exoneration of performance. However, distinct trends in contract practice and the inclination to preserve the long-term contractual relationship in IICs indicate and confirm the need to consider, as common to the three areas, alternative means to settle differences, both by private and public bodies, such as mediation, third-party facilitation, and conciliation procedures, to be discussed separately from

⁵⁶ Guidance on force majeure, including on the “*fait du prince*” theory, is available in Chapter 4 of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming. 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 the 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).

⁵⁷ The necessity defence has been invoked in the context of the financial crisis in Argentina and raises the question of the extent to which it would be possible to contract out of customary international law rules. In principle, if a State is entering into a contract as a commercial legal entity based on domestic law, some of the issues arising from customary international law would not apply.

⁵⁸ In these cases, costs would be normally very high and unlikely to be covered by insurance. Principles could be extracted by arbitral jurisprudence: see the arbitral case on the Channel Tunnel between England and France.

⁵⁹ E.g., when unusual adverse meteorological conditions affect an investment site, the investor might have a duty to protect and preserve the equipment on site, to limit the damages that would be caused by the force majeure event.

dispute settlement clauses. Innovative guidance could be found in this regard in the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming.⁶⁰

88. Subgroup 2 proposes in its Report (as to subtopic 1) to conduct work on “stabilisation clauses” considering three subtopics, namely: (1) Common position on stabilisation clauses; (2) Areas of divergency (consideration of different models); (3) Proposition for further work; (as to subtopic 2) to conduct work on “hardship”, considering seven areas, namely: (1) Definition of hardship (when hardship can be invoked); (2) Effects or consequences of hardship; (3) Relationship with other doctrines; (4) Compensation/damages; (5) Applicable law and hardship; (6) Public policy and hardship; and (7) Model clauses on hardship; (as to subtopic 3) to conduct work on “force majeure” considering seven areas, namely: (1) Definition of force majeure; (2) Requirements for invoking force majeure; (3) Effects of force majeure; (4) Challenges to invocation of force majeure; (5) Long term contracts and renegotiation; (6) Policy and other considerations; (7) Model clauses. The Report of Subgroup 2 contains questions and issues that Subgroup 2 suggests considering and discussing for each of these subtopics and areas.

Questions for the Working Group:

- *The Working Group is invited to discuss the subtopics proposed by Subgroup 2 for each area. Does the Working Group agree to ask Subgroup 2 to develop preliminary guidance along the lines provided in its Report? Should other subtopics or areas be considered?*

F. Compensation and damages

89. At its first session, the Working Group agreed that IIAs/BITs generally leave sufficient flexibility for the future instrument to provide specific guidance on remedies, including compensation and damages. IIAs mainly focus on arbitration and monetary damages, with a lack of guidance as to how to salvage the contractual relationship and how such monetary sum should be calculated. There is then a significant opportunity to provide guidance for contracting parties to consider alternative remedies and methods of dispute resolution with a view to preserve the contractual relationship and to examine criteria for the calculation of compensation and damages as a last resort, in line with the general trend and one of the objectives of this project. As to the interaction between remedies, a clear hierarchy of steps or a default option, e.g., favouring renegotiation before turning to compensation and damages, could be established.

90. As to compensation and damages, it was discussed that the following should be explored: (i) limitation of liability clauses (together with a general principle on the prohibition of punitive damages) and (ii) liquidation of damages clauses as a means to set boundaries in this area and enhance legal certainty. In this regard, relevance could be given to the principle of proportionality, contractual caps, and the duty to mitigate harm, together with a general principle that the amount of claimed damages should be linked to the timing of the investment to avoid the risk of extraordinary awards of damages. Work on the exclusion and limitation of liability clauses should consider clauses that exclude liability for “consequential loss”, an important protection mechanism for investors⁶¹ given that such types of losses can hardly be insured. Guidance on these topics may be found in the UPICC, especially Article 7.4.8 (mitigation of harm), Article 7.4.13 (agreed payment for non-performance), and Article 5.2.3 (exclusion and limitation clauses), as well as in the ALIC Guide. The UPICC may also provide guidance on issues of interest and currency that have an impact on the calculation of damages.

⁶⁰ The Guide discusses options for parties to include specific alternative dispute resolution mechanisms (e.g., special institutions or mediation boards) in their contracts.

⁶¹ This type of clauses is often used in IICs concerning construction and infrastructure projects.

91. Issues of compensation and damages are closely related to the applicable law.⁶² The determination of compensation and damages may depend, indeed, on the legal nature of the contract (e.g., a State contract or commercial contract) and on the approach in a specific jurisdiction. Liquidated damages might be limited to actual loss in certain jurisdictions, while in other jurisdictions their amount is established regardless of the actual loss or whether it had a punitive nature. Therefore, guidance in this area should cover issues of applicable law.

92. Subgroup 1 proposes to conduct work based on the subtopics underlined in its Report.

Questions for the Working Group:

- *The Working Group is invited to discuss the subtopics presented by Subgroup 1. Does the Working Group agree to ask Subgroup 1 to conduct the work on the subtopics, as presented? Should other topics or concerns be considered?*

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

93. At its first session, the Working Group did not discuss issues of transfers of rights and obligations in detail (assignment of the contract, transfer of rights from an investor to another investor or third parties, return of assets). The argument was raised that the future instrument should not develop guidance on the transfer of rights and obligations under the contract (including return of rights) since this would be contract-specific and should be left to the contracting parties. An area for work might be how to cover the possible assignment of claims against the State to third parties (e.g., litigation funds) in the future instrument.⁶³ The question would relate to issues of immunity of State property and would raise aspects of transparency to consider, such as the disclosure of the involvement of a third-party. In addition, it was discussed that the assignment of rights might be subject to the consent of the State party. The existing guidance in the ALIC Guide would be useful to the possible development of model clauses on this topic.

94. Subgroup 1 will start work in this area, if so decided by the Working Group, later in the process.

H. Legal framework and applicable law

95. At its first session, the Working Group was invited to discuss the legal framework applicable to IICs, with special regard to issues of choice of law and the question of the possible application of international or transnational law and principles to investment contracts, including the application of the UPICC (as they are or as adapted) and their relation with the application of the law of the host State (see [Study L-IIC – W.G. 1 – Doc. 2](#), Part IV.H.1)

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

96. The Working Group discussed at length aspects of applicable law reviewing the most relevant issues from different viewpoints, without taking any particular stance. It was agreed that it is often consequential to the investment being located in a certain country that the law of the host State is considered the most closely connected to the investment and thus it is chosen as the law governing the contract. This is also the case when the law of the host State is imposed as the law governing the contract as part of a public tender process, or when it is mandatorily provided as the applicable

⁶² In an arbitral case, in which a breach of an IIC had amounted to a breach of a BIT and the arbitral tribunal had resorted to general principles of international law to determine the compensation, the award was subsequently annulled because the contract was governed by domestic law and contained a numerical cap on compensation.

⁶³ The topic could be covered to some extent by UNCITRAL, which is undertaking work on third-party funding.

law in certain sectors (e.g., oil and gas) by the law of the contracting State given their importance for the State's economy.⁶⁴

97. Nevertheless, it was also raised that transnational principles might play an important role in this area and that the room for international and transnational law principles is progressively increasing in contract practice, e.g. in South America. Transnational principles, indeed, may serve as a neutral applicable law in lieu of, or in combination with, the law of the host State, thereby "transnationalising" the contract. The injection of transnational law principles in the law governing IICs, as well as the international arbitration clause, serve the purpose of detaching, to some extent, the investment relationship from the law of the host State and add some level of neutrality to the contract, often in the interest of the foreign party. Arbitral tribunals often resort to international law, sometimes even in cases in which parties have made an express choice for domestic law.⁶⁵

98. A first area to explore, in this regard, is that of freedom of contract and party autonomy, i.e. if the parties are free to choose the law applicable to the contract, including transnational law ("non-state law"), and what would happen if a choice of law is absent or ineffective.⁶⁶ Freedom of contract and party autonomy would be the conceptual framework universally accepted for commercial contracts,⁶⁷ but IICs may require to abide by the principle of "legality" since the State is subject to the boundaries of its own domestic law and the State could agree to a certain governing law only if it is allowed to do so by its domestic law. In this case, the administrative law in the domestic law of the host State would apply. In any case, even if the parties would be found to enjoy freedom to choose the applicable law, including transnational principles, they could not escape the application of mandatory rules in the host State.

99. A second area of work is to explore if alternative approaches may be taken that consider the complementarity between national and international law (see the model of Article 42 of the ICSID Convention),⁶⁸ and to consider whether this would be appropriate for IICs. Today, the prevailing approach to transnational law is that it has to seriously consider domestic law and strive for a regulation that conjugates the applicable law with the best available practices. If a stance is taken in this sense, the future instrument – as well as the choice of law clause – should clearly set out the interrelationships between the two.⁶⁹ In contrast, if a purely international law-based approach is taken, if any choice is made by the parties or any indicator is in place that points at transnational law, the contents of the law of the host State may be deemed by the arbitrators of limited relevance.

100. A third area to explore is to what extent the UPICC could be (i) chosen as applicable law by the parties, (ii) incorporated as terms of the contract, and (iii) used to interpret and supplement the applicable domestic law. The [UPICC Model Clauses for the use of the UPICC in international commercial contracts](#) might be useful for the development of model clauses. The future instrument, as a soft law instrument, could provide model clauses with different options regarding the choice of the applicable law. Due regard should be given to the difference between the law applicable to the procedure and the law applicable to the substantive provisions of the contract.

⁶⁴ See, e.g., South Africa.

⁶⁵ See the award in the case *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic* (January 1977).

⁶⁶ Usually, it would be for arbitrators to choose based on connecting factors and transnational principles.

⁶⁷ See in, this regard, Article 11 of the HCCH Principles on Choice of Law in International Commercial Contracts.

⁶⁸ Article 42 of the ICSID Convention reflects a balanced approach towards the role of domestic and international law. ICSID has conducted a study on the application of ICSID rules to contract-based arbitration, which would be published in the near future.

⁶⁹ Domestic law and international law might be closely related since aspects of international law might be incorporated in the domestic law.

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

101. At its first session, the Working Group did not address the legal relationship between IICs and investment treaties (IIAs/BITs) in the wider framework of public international law, if not in the context of the discussion on the opportunity to “contractualise” treaty protection standards. 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 content (as well as the content of the relevant contract) and on their 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/or as norms which define the normative playing field with which IICs have to comply.

102. In both regards, issues of applicable law to IICs and the legal relationship between IIAs/BITs and IICs, the Working Group is invited to discuss the subtopics proposed by Subgroup 0 under subtopic 2 of its Report. The Report of Subgroup 0 contains questions and issues that Subgroup 0 suggests considering and discussing for each topic, including issues of coordination of the work of Subgroup 0 with the work of Subgroups 3 and 4.

Questions for the Working Group:

- *The Working Group is invited to discuss the subtopics proposed by Subgroup 0. Does the Working Group agree to ask Subgroup 0 to develop preliminary guidance on these subtopics? Should other topics or concerns be considered?*

I. Dispute resolution clauses

103. At its first session, the Working Group did not have enough time to address issues related to the drafting of “dispute resolution clauses” and the discussion on this topic was postponed to the second session. 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 may 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.

104. As a further area for discussion, the Working Group should consider that, in recent years, arbitration and ISDS mechanisms have been the object of criticism due to a number of factors (perceived lack of transparency, “double hatting”, one-sidedness in favour of investors). The Working Group may wish to consider if the future instrument should provide guidance and appropriate model clauses that include 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 the 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.

105. In conclusion, in line with the principle of preserving the continuity of IICs and of reducing the costs of litigation, the Working Group may also wish to discuss 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,⁷⁰ 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:

- *Could dispute resolution clauses be used to incorporate prescriptions that address some of the criticisms against ISDS (conflicts of interests, transparency)?*
- *How could dispute resolution clauses be improved? Could a model arbitration clause incorporate additional parties' obligations (transparency commitments, publication and circulation of awards, professional pre-requisites of arbitrators, and so forth)?*
- *Should the model dispute settlement clause provide for ADR mechanisms?*

⁷⁰ See, e.g., [the UNCITRAL Convention on International Settlement Agreements Resulting from Mediation \(2019\)](#).

ANNEXE I**ADDITIONAL 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>

ANNEXE II**PRELIMINARY DRAFT STRUCTURE**

Below, a suggested draft structure for the future instrument is set out for consideration. It takes into account the aspects to be covered proposed in Part IV of this paper. The text included under the Chapter titles bullet point form is not being proposed as headings, but merely as a prompts for the future contents.

Recommendation for the Working Group:

- *The Working Group is invited to consider the preliminary draft structure for the future instrument on International Investment Contracts and propose any additional contents that should be included, as well as any rearrangement of chapters as appropriate.*

Heading	Contents
Chapter 1. Introduction	<ul style="list-style-type: none"> • Background and aim of the instrument • Relationship with the UPICC and other instruments • Relationship with IIAs and domestic law • Relationship to international contract practice • Definitions relevant to IICs
Chapter 2. Parties and affected stakeholders	<ul style="list-style-type: none"> • Identity of parties to an IIC • Sources of capacity/authority to enter into an IIC • Parties' rights and obligations • Non-signatory parties • Affected stakeholders
Chapter 3. Pre-contractual phase, formation and validity	<ul style="list-style-type: none"> • Principles applicable to the pre-contractual phase, including on pre-contractual liability and required level of due diligence • Relevance of the pre-contractual phase to determine the scope of contractual obligations • Possibilities for parties to shape the pre-contractual phase • Interests to be considered • Formation • Validity
Chapter 4. Policy goals in IICs	<ul style="list-style-type: none"> • International law compliance • Domestic law compliance • CSR
Chapter 5. Change of circumstances	<ul style="list-style-type: none"> • Stabilisation/renegotiation/adaptation (restoration of economic equilibrium) clauses

	<ul style="list-style-type: none">• Hardship• Force majeure
Chapter 6. Remedies, including compensation and damages	<ul style="list-style-type: none">• Introduction• Pre-arbitration/litigation options for alleged breaches of contract• Types of remedies for breach of contract• Compensation• Damages• Interest• Other issues
Chapter 7. Transfer of rights and obligations (<i>to be confirmed</i>)	<ul style="list-style-type: none">• Assignment of rights• Transfer of obligations• Assignment of contracts
Chapter 8. Choice of Law and Dispute Settlement	<ul style="list-style-type: none">• Choice of law clauses• Dispute settlement clauses