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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 third session.
2. The issues considered in this document were identified by the participants in the first and second 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 third session.
3. This document retains a revised version of parts of the Issues Paper from the second session (Study L-IIC – W.G. 2 – Doc. 2) relating to Preliminary Matters (Part I), General Issues Relating to the Contents of the Future Instrument (Part II), and Scope and Structure of the Future Instrument (Part III).
4. Part IV of this document relates to the content of the future instrument, based on the work conducted by the Working Group and the Subgroups so far. This document 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 third session:
 - **Report of Subgroup 1** on pre-contractual issues in IICs and validity.
 - **Report of Subgroup 2** on stabilisation/renegotiation clauses, hardship, and force majeure.
 - **Report of Subgroup 3** on addressing policy goals in IICs.
 - **Report of Subgroup 4** on choice of law and dispute settlement clauses.
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.

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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, it was suggested during the second Working Group session that the instrument take the form of a self-standing set of Principles of International Investment Contracts with commentary and a set of model clauses. The alternative option would be a Legal Guide with 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.

10. To guide the intersessional work, the Secretariat shared with the Working Group after the second Working Group session a draft template, so that suggestions would be presented in a form that would be closer to the expected output of the project. The template followed a tripartite structure: (i) Principles, (ii) Commentary, and (iii) Model clauses with short accompanying explanations. To the extent possible, the proposals of the Subgroups for the third Working Group session are presented in this format.

Question for the Working Group:

The Working Group is invited to confirm that the future instrument should take the form of a set of Principles with commentary and model clauses.

C. Target audience

11. 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.

12. 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.

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

13. 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).

14. 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);
- 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 Habitatou Touré, Cabinet Habitatou Touré (Senegal);
- 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);
- Mr Stephan Schill, Professor, University of Amsterdam (the Netherlands);
- Mr Christopher Seppälä, Independent Arbitrator (United States/France).²

² The last six 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). Furthermore, Mr Juan Pablo Argentato (Managing Counsel

15. 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:

- European Law Institute (ELI);
- International Bar Association’s (IBA) International Arbitration Committee;
- International Centre for Settlement of Investment Disputes (ICSID);
- International Institute for Sustainable Development (IISD);
- International Law Association (ILA);
- United Nations Conference on Trade and Development (UNCTAD);
- United Nations Commission on International Trade Law (UNCITRAL);
- United States Council for International Business (USCIB) Trade and Investment Committee.

16. 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

17. The Working Group undertakes its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT’s practice, the Working Group has not adopted any formal rules of procedure and seeks to make decisions through consensus.

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

19. The Working Group benefits from research on ICC arbitral awards conducted by a researcher under the oversight of the ICC-IWBL. Two memoranda prepared by the researcher on (i) the application of the UNIDROIT Principles in ICC awards regarding IICs and (ii) the main disputed clauses in IICs subjected to ICC arbitration were presented to the Working Group on a confidential basis at its first session. Furthermore, research is conducted on publicly available IICs by an informal research task force established within the Roma Tre-UNIDROIT “Centre for Transnational Commercial Law and International Arbitration” under the supervision of the UNIDROIT Secretariat. The examination of contracts (and, as a next steps, contract-based arbitral awards) is 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. The preliminary results of the task force, two memoranda concerning (i) policy goals and (ii) change of circumstances in IICs were presented to the Working Group on a confidential basis

of the ICC International Court of Arbitration) and Mr Andrzej Szumanski (UNIDROIT Governing Council Member) take part in the project.

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

at its second session. A third memorandum on choice of law and dispute resolution clauses in IICs will be presented at the third Working Group session.

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

- (a) Development of an instrument on IICs over at least five in-person sessions of the Working Group between 2023-2025
 - (i) First session: 23-25 October 2023 (Rome)
 - (ii) Second session: 13-15 March 2024 (Paris)
 - (iii) Third session: 3-5 June 2024 (Rome)
 - (iv) Fourth session: 25-27 November 2024 (Rome)
 - (v) Fifth session: First quarter of 2025 (Paris)
 - (vi) Sixth session: Second half of 2025 (Rome)
- (b) Consultations and finalisation in 2025
- (c) Adoption by the Governing Council of the complete draft in 2026.

F. Intersessional work

21. 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.

22. 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.

23. 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.

24. 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/renewal/adaptation, hardship, force majeure); (ii) Other clauses typical of IICs.

25. 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.

26. 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.

First intersessional period (November 2023 – February 2024)

27. Nearly all Working Group members and observers were involved in an intense working schedule established by the Co-Chairs of the Subgroups and supported by the Secretariat. Subgroups 0, 1, 2, and 3 kicked off their work and met virtually, mainly to discuss the organisation of their work

and the subtopics assigned to them, and to suggest more precise parameters for each subtopic. Written input was provided by the Subgroup participants to advance the work. The below provides an overview of the meetings held during the first intersessional period:

- SG 0 – First Meeting – 23 February 13:30 – 15:00 (CET)
- SG 1 – First Meeting – 26 January 13:00 – 14:00 (CET)
- SG 1 – Second Meeting – 21 February 13:00 – 14:00 (CET)
- SG 2 – First Meeting – 7 February 13:00 – 14:00 (CET)
- SG 2 – Second Meeting – 29 February 13:00 – 14:00 (CET)
- SG 3 – First Meeting – 2 February 16:00- 17:00 (CET)
- SG 3 – Second Meeting – 20 February 16:00 – 17:00 (CET)

28. The intersessional work conducted by the Subgroups resulted in four comprehensive reports, one for each Subgroup, which were the main object of the deliberations at the second session of the Working Group. A fifth report is expected to be delivered not later than the session of November 2024.

Second intersessional period (April – May 2024)

29. Given the interconnection between the subtopics allocated to Subgroup 0 and the subtopics allocated to other Subgroups, the Co-Chairs of Subgroup 0 decided to continue the work of Subgroup 0 after the third Working Group session.

30. During the second intersessional period, Subgroup 1 focused on two subtopics: (i) pre-contractual issues, and (ii) issues of validity. Following written exchanges, the members of Subgroup 1 finalised their report on these issues, which contains concrete drafting suggestions – including draft principles, commentary and model clauses – on a significant number of topics.

31. Subgroup 2 met twice (virtually) during the second intersessional period. The first meeting was mainly used to organise the work among Subgroup 2 participants. During the second meeting, the participants discussed draft papers on hardship and force majeure that had been produced by members of the Subgroup. The participants also discussed the ‘relational contracts’ theory and its potential relevance for this project. Following the meeting, the Secretariat shared an extract from the Note of the UNIDROIT Secretariat on the UPICC and the Covid-19 Health Crisis (2020)⁴ for consideration of Subgroup 2.

32. Subgroup 3 met once (virtually) to discuss a draft paper drawn up by the Co-Chairs. The discussions mainly focused on the scope of economic, social and governance (ESG) obligations in IICs and the possible role of the home State in the context of policy goals, even if it was not a contracting party. Following the meeting, the Co-Chairs circulated a second and third draft of the paper to all Subgroup 3 participants for comments.

33. Subgroup 4 held its first virtual meeting end of April 2024. During that meeting, it was agreed to start work on the development of model clauses first, followed by a commentary and underlying principles. The participants agreed that the future instrument should provide different options to contracting parties, both concerning choice of law clauses as well as dispute resolution clauses. Furthermore, statistical information was shared on contracts that had been the subject of contract-based arbitrations at ICSID.

⁴ The Note is available at <https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf>.

34. The below provides an overview of the meetings held during the second intersessional period:

- SG 2 – Third Meeting – 15 April 14:00 – 15:00 (CEST)
- SG 2 – Fourth Meeting – 13 May 14:00 – 15:00 (CEST)
- SG 3 – Third Meeting – 3 May 15:00 – 16:00 (CEST)
- SG 4 – First Meeting – 30 April 14:00 – 15:00 (CEST)

35. The Reports of Subgroups 1, 2, 3, and 4 are the main object for deliberation by the Working Group at its third session.

G. Relationship with existing international instruments

36. 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.

37. 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.

38. Although other IOs have sometimes addressed IICs,⁵ their work has mostly targeted public international law instruments (BITs and IIAs). UNCTAD elaborated documents on investment policy options and treaty reform;⁶ the OECD regularly publishes studies on IIL standards and has established a forum to discuss investment policies;⁷ the WTO manages a number of agreements that have an impact on investments and has launched initiatives on investment facilitation;⁸ UNCITRAL conducts work on Investor-State Dispute Settlement (ISDS) reform,⁹ is codifying new standards of conduct for adjudicators in investment disputes in partnership with ICSID,¹⁰ and produced model legislative provisions on “Public-Private Partnership” (PPP), which considered some aspects of PPP agreements that may be relevant to IICs;¹¹ and the HCCH’s expertise on conflicts of law is also essential to this work.¹² 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.

⁵ 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.

⁶ 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>.

⁷ 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>.

⁸ 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).

⁹ 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.

¹⁰ See the UNCITRAL/ICSID initiative on the drafting of codes for arbitrators and judges.

¹¹ See the [UNCITRAL Model Legislative Provisions on Public-Private Partnerships \(2019\)](https://www.uncitral.org/working_groups/3/investor-state).

¹² 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>.

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.

39. Documents elaborated by relevant private sector participants, including model contracts or model clauses elaborated by associations of certain industries, should be considered.¹³

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

40. At its first session, the Working Group recalled the contextual background of the project and agreed with the three “layers of content” of the future instrument: (i) the UPICC as general contract law principles and rules¹⁴, 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.

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

41. 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). Methodologically, the Working Group would 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 was suitable for application to that area. If a UPICC Principle was found to be relevant in the context of IICs, the Working Group would examine whether it might apply as it is or might need adaptation to the specificities of IICs.¹⁵ 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. If no UPICC was found to be relevant, the Working Group would look into contract practice, transnational standards, or strive for a better rule.

42. 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.¹⁶ They have been applied by arbitral practice in different ways, most

¹³ See, e.g., the FIDIC guidance documents on contracts (FIDIC Suite of Contracts or the FIDIC Contracts Guide).

¹⁴ 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.).

¹⁵ 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.

¹⁶ 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

prominently as a means of interpreting and supplementing the applicable domestic law, often to add weight to the tribunal's interpretation of the relevant domestic law, but also as the *lex contractus*.¹⁷ It was advised that the Subgroups examine 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.

B. Principles, rules and clauses in IICs transnational practice

43. Regarding layer (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/renegotiation/adaptation).

44. 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 by governments and industry associations, as well as the principles shaped by arbitral jurisprudence in this area.¹⁸ The ICC model clauses and model contracts will also be taken into consideration.

45. During its first session, the Working Group indicated as areas for work clauses on "pre-contractual responsibility", "change of circumstances",¹⁹ "revenue transfer", "compensation and damages", "choice of law", "dispute resolution", along with "clauses addressing policy goals, including due diligence and affected their parties". "Confidentiality" and issues of interests and currency were also mentioned. The Working Group did not decide whether it would limit its work to key provisions that were characteristic of IICs or rather extend it to a wider range of aspects (joint ventures or associations, issues of 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 forth²⁰).

46. The Working Group generally agreed to develop generic guidance that would be applicable across sectors, combined with industry-specific guidance. It was noted 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 substantially differ depending on the sector.

C. Contractual guidance for aspects addressed in IIL treaty standards

47. Regarding layer (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

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)).

¹⁷ In particular, for issues concerning the form of contract, non-performance, good faith and fair dealing, inconsistent behaviour, common intention of the parties, the duty to achieve a specific result versus best efforts, quantification of damages, set-off conditions, hardship, liability exemption clauses, and force majeure. For an overview of the relevant case-law principle by principle, see the [UNILEX database](#).

¹⁸ 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).

¹⁹ Including "stabilisation" and "adaptation (restoration of the financial equilibrium)", "hardship" and "force majeure".

²⁰ Other clauses specific to IICs practice of IICs would be: clauses on transfer of technology and know-how, clauses on background and foreground intellectual property; 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, etc.

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). 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. Pure replication seemed difficult to achieve and would run the risk of reproducing the flaws of the existing system.²¹ Extracting principles from recent treaties should be treated with caution and could be done as long as contractual substitutes existed (e.g., clauses addressing “change of circumstances”). 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. It is still discussed whether other IIAs/BITs standards might be functionally contractualised, such as a full protection and security-inspired standard.

48. It could be inferred from the Working Group’s reasoning that regulatory stability concerns (including with regard to legitimate expectations, expropriation and regulatory takings) would be covered under functional contractual equivalents, as part of the work of Subgroup 2 on clauses addressing “changes of circumstances”. Legitimate expectations concerns might also be covered under arrangements in the pre-contractual phase (Subgroup 1). As a rule, when a contractual functional equivalent to IIAs/BITs standard existed, the Working Group should examine whether a generally accepted transnational principle could be discerned. If not, the Working Group could propose a contractual rule itself.

III. SCOPE AND STRUCTURE OF THE INSTRUMENT

A. Definition of “International investment contracts”

49. The Working Group was invited at its first session to reflect on the notion of “international investment contracts”. IICs are commonly described in a general manner as contracts (i) negotiated, concluded and executed between a State (or a State-owned entity, agency or 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.²²

50. IIAs usually do not provide a definition of IICs.²³ 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 were possible: providing a definition, providing a list of examples or rather describing the “economic significance” of activities and leaving definitional issues to practice and interpretation. On these terms, arbitral tribunals, in the absence of explicit exclusions, have often come to qualify IICs themselves as “covered investments” and thus assets which deserve protection under IIL.

51. 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.²⁴ Treaty definitions refer to the importance of investors’ nationality as the element that triggers protection

²¹ 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.

²² 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.

²³ 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).

²⁴ 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).

and jurisdiction. IIA reform has recently aimed at narrowing the range of protected investors in order to avoid “treaty shopping”²⁵ and “round-tripping”²⁶ by including real business activity requirements or denial of benefits clauses.²⁷

52. 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.²⁸ 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,²⁹ 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.³⁰

53. At its first session, the Working Group did not discuss whether the future instrument should provide a normative definition of “international investment contracts”, 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 first intersessional period 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.

54. In its Report for the second Working Group session, Subgroup 0 proposed to conduct work on the three concepts separately – (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.

55. During its second session, the Working Group discussed that it might be preferable not to define the term “international investment contracts”. To the extent the future instrument would elaborate on the three sub-concepts separately to clarify the scope of the instrument, it was discussed that the notion of “investment” should be subject to the caveat “except as parties otherwise agree” as had been proposed in the Report of Subgroup 0. Furthermore, in addition to Article 25 of the ICSID Convention, it might be useful to consider the Commentary to the Preamble of the UPICC and relevant UNCITRAL instruments.

Question for the Working Group:

Would the Working Group agree to providing Subgroup 0 with a mandate to develop guidance on the scope of application of the future instrument, considering the Preamble of the UPICC and other relevant existing instruments (e.g., the PRICL, the ICSID Convention, and relevant UNCITRAL instruments), rather than developing a definition of “international investment contract”?

²⁵ The channelling of the investment through a “mailbox company” in the territory of a State party to enjoy its protection.

²⁶ The expatriation by domestic investors of investment capital to reinvest in the home country to obtain protection.

²⁷ See policy developments from 2015 onward in UNCTAD World Investment Reports 2015 and 2016, up through World Investment Report 2022, p. 66 *et seq.*

²⁸ 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.

²⁹ 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.

³⁰ 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

56. The structure and content of the future instrument significantly depend on the format. In case of a set of Principles with comments, the 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 commentary and model clauses. 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.³¹ 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,³² including principles whose formulation has been influenced by the UPICC and principles specific to reinsurance contract law. They refer back to the application of the UPICC as principles of general contract law "as they are" in the areas that did not need adaptation.³³

57. If the option of a Legal Guide is preferred, the Working Group may wish to consider the structure of the ALIC Guide, which aggregates areas of general contract law and thematic areas specific to land investment contracts across seven chapters.³⁴ 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.

58. Based on the discussions during the first and second Working Group session and intersessional deliberations, a preliminary draft structure for the instrument was prepared by the Secretariat on the assumption that the future instrument would take the form of a set of Principles with commentary and model clauses (see Annexe II to this document).

Questions for the Working Group:

The Working Group is invited to consider the preliminary draft structure for the future instrument (Annexe II) when discussing the content of the future instrument.

Should any additional aspects be covered (e.g., on interpretation³⁵ and/or on performance³⁶ and non-performance³⁷ in addition to the guidance on "pre-contractual issues", "form and validity", "hardship" and "force majeure", "compensation and damages")? Should any content be rearranged?

³¹ The PRICL includes five chapters: (i) general part; (ii) duties; (iii) remedies; (iv) aggregation; (v) allocation.

³² In this respect, the PRICL draw on the example of the Preamble of the UPICC (see Art. 1.1.1).

³³ 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).

³⁴ 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.

³⁵ See Chapter 4 of the UPICC.

³⁶ See Chapter 6 of the UPICC.

³⁷ See Chapter 7 of the UPICC.

IV. CONTENT OF THE INSTRUMENT

59. The topics covered in this section offer an attempt to frame the discussion on the possible content of the future instrument, considering the preliminary draft structure of the instrument.

A. Introduction

Questions for the Working Group:

Would the Working Group agree to ask Subgroup 0 to develop a draft Introduction for the future instrument? The Working Group is invited to discuss the proposed content of such Introduction (see Annexe II). Should any modifications be made?

B. General provisions

1. Scope of application, interpretation, usages

Questions for the Working Group:

The Working Group is invited to discuss the proposed content of a possible Chapter 1 on General Provisions. Should any modifications be made or additional aspects be covered?³⁸ Does the Working Group agree with the proposed allocation of work?

2. Definitions

60. 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.

61. 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 the prospective users, especially in relatively new areas (e.g., “contractualised” BITs/IAs standards and other policy goals).⁴⁰

62. 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.

Questions for the Working Group:

- *Should the future instrument contain a list of definitions relevant to IICs? Which legal concepts should be developed with priority, if any?*
- *Would the Working Group agree to provide Subgroup 0 with a mandate to develop a preliminary list of definitions for the third Working Group session, or should this be postponed to a later stage?*

C. Parties, non-signatory parties and affected stakeholders

³⁸ See, for purposes of comparison, Chapter 1 of the UPICC and Chapter 1 of the PRICL.

³⁹ See, e.g., UPICC Art. 1.11.

⁴⁰ 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.).

63. 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.⁴¹

64. 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 could also 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”).

65. 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 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 was not a party to the contract.

66. In connection with this topic, the Working Group discussed whether the State concludes an IIC in its sovereign (public) or commercial capacity. Different views were expressed in this regard by the Working Group. 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”⁴²). 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.

67. Subgroup 1 proposed in its Report for the second Working Group session (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 contained questions and issues that Subgroup 1 suggested considering and discussing for each of these areas.

68. During the second Working Group session, it was suggested that, in addition to the UPICC and the ALIC Guide, the Working Group may wish to consider the guidance provided in the the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming on these topics. Furthermore, it was generally considered beneficial to conduct further work on the issues raised in the Report of Subgroup 1.

69. In view of the third Working Group session, Subgroup 1 decided to translate into the tripartite format the two topics “pre-contractual issues” and “issues of form and validity” and left the topic “nature of the parties” and “compensation and damages” for a later stage.

⁴¹ The Working Group may wish to 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.

⁴² 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.

Questions for the Working Group:

- *Should the future instrument provide specific guidance/contain a specific section on the parties to an IIC and other stakeholders, or should any specificities be covered in relevant substantive provisions, e.g., exploring how the identity of the parties might affect their rights and obligations? If the latter approach is followed, which aspects should be covered and where?*

For instance, the Report of Subgroup 1 for the second Working Group session raised issues such as (i) a possible disclosure obligation of an investor's ownership structure, (ii) implications of the involvement of different entities for liability, (iii) attributability of actions to a State, (iv) possible joint venture agreements, (v) rights and obligations of parties in case of a multiparty contract, (vi) implications of nationality in the context of dispute resolution.

- *Should guidance be provided on the legal capacity to enter into an IIC? If so, would the Working Group agree to cover this in a chapter on Formation and Authority (see Annexe II)? What other aspects should such chapter cover (e.g., the freedom of contract⁴³)?*

D. Pre-contractual phase

70. 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-contractual liability (in particular, the parties' duty to inform), but also issues arising from emerging national and international standards concerning any 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 first intersessional period, it was clarified that the Issues Paper covered both areas as interrelated themes for work⁴⁴ even if precontractual issues fell within the remit of Subgroup 1 and policy goals under Subgroup 3. Coordination would therefore be needed.

71. The Working Group agreed that, in principle, there were significant divergences between legal cultures as regards the pre-contractual phase. From a common law perspective, pre-contractual issues (and liability) were 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 a 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).

72. 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.⁴⁵ 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 specific industry standards) and that can be relied upon across sectors binding both States and investors. Gaps may exist at the level of domestic law, which may

⁴³ At its first session, the Working Group agreed that the future instrument should address the process of formation of an IIC, 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).

⁴⁴ See Study L-IIC – W.G. 1 – Doc. 2, Part IV. D, 1 to 3.

⁴⁵ 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.

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.

73. All these issues might be properly approached by guidance that would raise awareness about the most relevant risks in the pre-contractual phase having an impact on the IIC, including the consequences of the law governing the contract, and suggest proper pre-contractual arrangements. 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. 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 further examined.

74. It was also raised that, especially in long-term contracts, negotiations might occur during the entire lifespan of the contract, and the principles that would be applicable in the pre-contractual phase might also be relevant for negotiations that may take place at a later stage. This might well be the object of a contractual provision concerning principles and procedures that would apply to negotiations.

75. During its second session, the Working Group discussed the Report of Subgroup 1 for the second Working Group session, which proposed that the future instrument covers (i) principles applicable to the pre-contractual phase (considering e.g., article 1.7 of the UPICC on good faith and its interaction with the parties' duty of disclosure, changes of strategy or policy by the private and the public party respectively, and due diligence requirements in the pre-contractual phase), and (ii) the relevance of the pre-contractual phase to determine the scope of contractual obligations (considering e.g., article 2.1.17 of the UPICC on merger clauses). The Working Group generally agreed with this approach. Suggestions were made, *inter alia*, to provide concrete guidance on due diligence obligations with special regard to their reciprocal allocation on the State and/or the private foreign investor, to consider the specificities of relational contracts and the possible relevance of article 5.1.3 of the UPICC on co-operation between the parties, and the role of warranties and "entire agreement" clauses. It was also discussed that it would be useful to consider clauses in IICs contract practice and pre-contractual documents most commonly used, particularly letters of intent and warranties and representations that the investor fully knows the legislation of the host State.

76. The Report of Subgroup 1 for the third Working Group session contains proposals for principles, commentary, and contract language concerning:

- (i) Principles applicable to the pre-contractual phase
 - Risk for own assumptions
 - Freedom to evaluate own interests
 - No liability for failure to reach an agreement
 - Compliance with mandatory rules
- (ii) Relevance of the pre-contractual phase to determine the scope of contractual obligations
 - Entire agreement

Questions for the Working Group:

- *The Working Group is invited to discuss the proposals of Subgroup 1.*
- *Does the Working Group agree to cover in a prospective Chapter on the Pre-contractual phase also pre-contractual aspects concerning policy goals (based on the work of Subgroup 3)? Should any other aspects be covered?*

E. Validity

1. Suggested form

77. During its first session, the Working Group agreed to elaborate guidance on the form of IICs and provide the necessary adaptation of the 'no formal requirement' rule provided in article 1.2 of the UPICC since IICs were usually negotiated and concluded in writing.

78. Against this background, in its Report for the second Working Group session, Subgroup 1 asked for confirmation whether the future instrument should specifically address the form of IICs. The Working Group did not discuss this matter in detail during its second session.

79. The Report of Subgroup 1 for the third Working Group session contains a proposal for a principle requiring that IICs should be drawn up in writing, without prejudice to possible mandatory requirements concerning form in the domestic law of the host State.

Question for the Working Group:

The Working Group is invited to discuss the proposal of Subgroup 1 regarding the form of IICs. Should guidance on the form of IICs be included in a prospective Chapter on Validity or in a Chapter with General Provisions?

2. General provisions

80. Considering Chapter 3, section 1 of the UPICC, Subgroup 1 proposes to cover in this section:

- Validity of mere agreement
- Initial impossibility

Suggestion for the Working Group:

The Working Group is invited to discuss the proposals of Subgroup 1.

3. Grounds for avoidance

81. As to issues of validity of contract, it was discussed during the first Working Group session that the articles of the UPICC concerning duress, improper influence or gross disparity (and other invalidity grounds) might certainly apply to IICs, but in principle there seemed to be no particular arbitral practice or specific situation to address. Therefore, it might suffice to refer to the UPICC as they are.

82. Subgroup 1 proposed in its Report for the second Working Group session to examine the grounds for avoidance in the UPICC⁴⁶ to see whether any adaptations or additional guidance was required. The Report of Subgroup 1 for the third Working Group session contains proposals on:

- Mistake (*suggesting that the relevant UPICC Principles might not be applicable to IICs*)
- Fraud
- Threat, duress
- Gross disparity
- Third persons
- Confirmation
- Loss of right to avoid (*suggesting that the relevant UPICC Principle might not be applicable*)

⁴⁶ Reference was made to articles 3.2.5 (fraud), 3.2.6 (threat), and 3.2.7 (gross disparity) of the UPICC.

- Notice of avoidance or request for renegotiation (*suggesting that the relevant UPICC Principle might not be applicable*)
- Retroactive effect of avoidance
- Restitution
- Damages

Question for the Working Group:

The Working Group is invited to discuss the proposals of Subgroup 1.

4. Illegality

83. Subgroup 1 proposed in its Report for the second Working Group session to examine the provisions on illegality in the UPICC⁴⁷ to see whether any adaptations or additional guidance was required.

84. The question was also raised whether the future instrument should specifically address corruption. During the first Working Group session, it was discussed that work on corruption may prove to be more challenging as international practice had struggled for decades to elaborate some solution without meaningful results. The risk was 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. A hypothesis for work would be to address corruption by contractual means, i.e., taking inspiration from anti-corruption clauses where a contracting party, if the contract turns out to have been obtained through corruption, has a choice between cancellation or damages.

85. The Report of Subgroup 1 for the third Working Group session contains proposals regarding:

- Contracts infringing mandatory rules
- Restitution

Suggestion for the Working Group:

The Working Group is invited to discuss the proposals of Subgroup 1

Should a model anti-corruption clause be drafted, and if so, how? Are model clauses available that have been drafted by industry associations or other organisations?

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

86. 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 increasingly includes 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 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.

87. 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

⁴⁷ Reference was made to articles 3.3.1 (contracts infringing mandatory rules) and 3.3.2 (restitution) of the UPICC.

special regard to indigenous peoples). The issue was raised that policy goals were often vague and their interpretation, as the interpretation of human rights concepts, continuously evolved over time, which might make it difficult to capture their contents by the means of contract.⁴⁸ Policy goals may also vary depending on the industry sector. 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, leaving it to the contracting parties to determine which ones would be relevant to their contract.⁴⁹

88. 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 agricultural land investment contracts,⁵⁰ along with the work of organisations that partnered in its drafting,⁵¹ and/or on the concept of “transnational public policy.” 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 could impose a minimum standard obligation, also on the part of the State, regarding the respect for internationally recognised human rights, or still strive for the highest attainable standard. 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.⁵² An area for further work is also how the parent company that signed the framework contract would ensure the respect of the agreed standards on policy goals by subsidiaries implementing the contract or any other outsourcer that is not party to the IIC.

89. The contract may specify the consequences in case the State or the investor does not comply with obligations deriving from policy goals (e.g., relief from certain obligations or the timing thereof). In case of a 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 Contact Points (NCP) could also be examined in order either to identify areas of interest and derive indications to draft model clauses or

⁴⁸ For instance, the current UN Sustainable Development Goals (SDGs) were part of the 2030 Agenda for Sustainable Development, but thinking has started about the next generation of goals.

⁴⁹ 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.

⁵⁰ 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.

⁵¹ The IISD published a list of model clauses designed to integrate principles on responsible business into agricultural contracts.

⁵² 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).

to consider active behavioural change as a an alternative (contractual) remedy. Other tools to be examined might be monitoring and grievance mechanisms integrating affected third parties interests and mediation or arbitration rules on business and human rights.

90. The contents of recent IIAs/BITs should be inquired, which 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.⁵³

91. So far, the Working Group did not discuss other impactful policy trends such as digitalisation policies,⁵⁴ including issues such as data protection, cybersecurity, and localisation requirements on IICs,⁵⁵ and policies that incentivise SMEs to enter the investment arena.⁵⁶ 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.⁵⁷ 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”);⁵⁸ (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.⁵⁹ The work of UNICTRAL Working Groups I (Micro- and Medium Size Enterprises) and III (ISDS) should be taken into consideration in this context.

92. Subgroup 3 proposed in its Report for the second Working Group session to conduct work based on two objectives: (1) compliance with host State’s public policy, and (2) conformity with the highest international standards; and to implement these objectives in three areas: (1) pre-contractual documents, (2) the preamble, and (3) the contract itself. The Report also included a work plan proposing to conduct a preliminary mapping of: (1) relevant international standards, (2) policy goals in IIAs and Model IIAs, (3) areas of interest by contractual phase or IIC content, (4) relevance of the UPICC and ALIC Guide, (5) possible other IIA standards to be addressed contractually.

93. During its second session, the Working Group generally agreed with the work plan and discussed how it would be useful to develop clear guidance to help contracting parties understand the scope of their ESG obligations. It was agreed that such guidance should cover the pre-contractual

⁵³ 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.

⁵⁴ See OECD, 2021, p. 38.

⁵⁵ *Ibid.*

⁵⁶ 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.

⁵⁷ See, e.g., Article 37 Tunisia-Turkey FTA.

⁵⁸ UNIDROIT’s Project on Collaborative Legal Structures for Agricultural Enterprises 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, producer groupings and others (see <https://www.unidroit.org/work-in-progress/legal-structure-of-agri-enterprise/>).

⁵⁹ 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.

phase (e.g., due diligence and consultations with local communities), the preamble of an IIC, and provisions in the IIC (e.g., specifying the ESG obligations of parties and consequences in case of non-compliance). The point was raised that consistency should be ensured with the work of other organisations in this area. Furthermore, a level playing field was important; caution was expressed about an approach that would lead foreign investors to be subject to higher standards than local investors. The Working Group also discussed possible guidance on performance in the future instrument (e.g., issues that led to a delay in performance or payment). It was finally considered that any work proposal should balance the need for concrete and specific guidance with the necessity for the instrument to be “future-proof”, i.e., not be easily outdated by the continuing evolution of relevant standards, which required a certain degree of generality.

94. The Report of Subgroup 3 for the third Working Group session provides a proposal for a general principle/goal and means to implement such principle/goal.

Questions for the Working Group:

- *The Working Group is invited to discuss the proposal of Subgroup 3.*
- *How should the proposal be further developed by Subgroup 3? Does the Working Group agree to ask Subgroup 3 to develop concrete guidance on the elements described in its Report (preamble, clauses clarifying roles and obligations of the parties, a remedy clause)?*
- *Where should the guidance be included in the future instrument?*

The Working Group is invited to consider Annexe II, which proposes to cover pre-contractual aspects of policy goals in a prospective Chapter on the Pre-contractual phase, aspects concerning the preamble to an IIC in a dedicated Chapter, substantive ESG obligations in a prospective Chapter on Rights and Obligations, and consequences of non-compliance in a prospective Chapter on Remedies.

- *Should the future instrument cover any other rights and obligations of parties?*

G. Principles and clauses addressing “change of circumstances”

95. 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 their interrelationship with hardship and force majeure clauses. It was discussed that issues behind stabilisation/readaptation were 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 was a tendency under general contract law and in IICs 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 practice (see Study L-IIC – W.G. 1 – Doc. 2, Part IV.F.1).

96. This prompted the decision that, regardless of their different formal qualifications (rights and obligations, performance/non-performance), Subgroup 2 was to examine stabilisation, hardship and force majeure under the common heading of “change of circumstances.”

1. Stabilisation and adaptation/renegotiation clauses

97. In general, during the first Working Group session it was agreed that the future instrument should provide guidance on “stabilisation” clauses. IICs are normally long-term contracts where there is a substantial sunk-in cost and returns on investments are possible only after a certain gestation period. Stabilisation clauses provide a fundamental protection mechanism for investors when States adopt legislative or administrative changes in a manner that affects the terms of the contract or make the functioning and profitability of the contract impossible. On the other hand, it was also noted

that the function of “stabilisation” may differ from country to country, that such clauses may provide constraints on States’ regulatory powers in the public interest (especially, climate change), that they 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.

98. Areas for work identified during the first session included: (1) categorising “legislative changes” and their impact, i.e., modification of industry standards, changes to the fundamental legal framework (e.g., climate change or 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, administrative act or practices, case law).

99. During the second Working Group session, it was reiterated that a stabilisation regime would be necessary as a sort of “FET of investment contracts” to ensure certainty to investors in the medium and long run, while being shaped in a manner that would not encroach upon States’ sovereignty in any circumstance, mirroring several emerging principles in IIAs/BITs and model agreements, possibly by incorporating a carve-out in a future model clause. A “one size-fits-all” approach would in any case not do justice to the need to consider different needs and legal frameworks in different areas of the globe. Paramount importance was given to specifically define the scope of a possible model stabilisation clause, with different options, identifying with clarity the formal acts that would fall within its field of application (laws, decrees), the notion of “alteration of economic equilibrium” in relation to those acts and particularly how to calculate the effects of the measure, the necessary connection between stabilisation and adaptation/renegotiation, which remedies would follow (if monetary compensation or continuous renegotiation), and which role and powers would be envisaged for arbitrators in the renegotiation, if any.

100. Subgroup 2 identified in its Report for the third Working Group session three types of stabilisation clauses. The first type is (i) “freezing clauses”, i.e., classical stabilisation clauses that have a freezing effect on the entire State legal framework, which means that after the date of the agreement States cannot make regulations that affect the investor in any manner. A second type is (ii) “fiscal stabilisation clauses”, i.e., clauses with similar effect as the freezing clauses but only on fiscal laws which may take different form (exclusion of all taxation also by reimbursement, exclusion of certain taxes or of the power to increase taxes, limitation of the power to increase taxes beyond a certain level). A third type is (iii) “economic equilibrium clauses” (or “stabilisation and renegotiation clauses” or simply “renegotiation clauses”), i.e., modern stabilisation clauses entailing that, if there were certain trigger events such as a change to the legal, fiscal or economic framework that results in the alteration of the economic equilibrium of the contract, the parties have to renegotiate in good faith to restore the economic equilibrium (by compensating the investor or any other measures ensuring that the economic equilibrium is sustained). Freezing clauses have been subjected to harsh criticism and are out of practice in the oil and gas industry. Fiscal stabilisation clauses are supported by the United Nations Office of the High Commissioner for Human Rights (OHCHR) Principles on Responsible Contracts and the OECD Guiding Principles for Durable Extractive Contracts. The ALIC Guide supports the use of economic equilibrium clauses, while it expressly rejects the use of freezing clauses.

101. Subgroup 2 decided not to develop specific language on a possible model clause on “stabilisation” at this stage in light of the different opinions surrounding the use and contents of such clauses within the Working Group. The Report of Subgroup 2 for the third Working Group session contains two annexes relevant to this topic (a note on non-automatic and limited fiscal stabilisation

and a note on stabilisation in general) and proposes work on the structure of a possible clause, including:

- A substantive provision (scope of the stabilisation clause, whether the entire legal framework or limited to certain fields such as fiscal legislation)
- A procedural provision ('trigger events' of the renegotiation, i.e., disturbance of economic equilibrium)
- Exceptions ("*bona fide*" measures taken in the public interest).

Questions for the Working Group:

- *The Working Group is invited to discuss the proposal of Subgroup 2.*
- *Does the Working Group agree on drafting a model clause on "stabilisation"? If so, how should the proposal be further developed by Subgroup 2? Does the Working Group agree to ask Subgroup 2 to develop concrete guidance on the elements described in the Report of Subgroup 2 (a substantive provision, a procedural provision and exceptions)?*

2. Hardship clauses

102. During the first Working Group session, the participants expanded on the relationship between stabilisation and hardship clauses, exploring the grey areas between the two and in particular to what extent hardship clauses might tackle the typical economic and legislative risks that are covered by stabilisation clauses in IICs. A main difference between stabilisation and hardship was found in that hardship is caused by a wider set of changes of general application in the dynamics of the market, 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. However, due attention was given 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.

103. It was finally held that, in principle, in light of the "typicity" of the risk of a State's unilateral change of its legislative framework, an IIC would 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 wished to include. 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).

104. It was generally agreed that the future agreement should build on the UPICC principle on hardship, which already contain useful guidance, including on the consequences and remedies. Areas to explore would be: (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.⁶⁰ 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.

105. During the second Working Group session, it was considered that the trigger event for hardship required to “fundamentally alter the equilibrium” of the contract, setting a high threshold (with cost and value of the performance as relevant benchmarks) that might need adaptation in the context of IICs and particularly a broadening of its scope. The notion of economic equilibrium, which in commercial contracts has to do with the costs of parties’ performance, in the context of IICs would rather refer to the project cash flow. Court procedures might not be appropriate in the context of IICs and a preference was expressed for arbitration. A framework for adaptation should also be provided, possibly taking into account the relevant ICC Model Clause, including parameters to guide adaptation/renegotiation. A doubt remained as to whether any act of the State that changed or influenced the rate of the guarantees elevating the costs of the contract, as something conditioning the market dynamic, would fall under stabilisation or hardship. It was finally considered that such a hypothesis might fall within both and guidance should be provided in this regard for the sake of clarity.

106. The Report of Subgroup 2 for the third Working Group session contains one annexe relevant to hardship (a note on “relational contract theory”) and proposals for a principle, commentary, and a model clause on hardship presenting different options, in accordance with the tripartite format. As to the principle, Subgroup 2 proposes to conduct work on three sections based on articles 6.2.1-6.2.3 of the UPICC on hardship with some adaptations and suggestions for further discussion and changes: (i) Contract to be observed (obligation to perform), (ii) Definition of hardship (trigger event of the fundamental alteration of equilibrium of contract), (iii) effects of hardship in IICs (renegotiation of the contract, compensation for losses, procedural elements).

107. As to the commentary, Subgroup 2 proposes to conduct work on:

- Whether a party has the right to terminate the contract unilaterally in the event of hardship (possible limitations to the State unilateral right to terminate the contract)
- Whether the parties can request renegotiation of the contract (restore the equilibrium at the date of contract of the day before the cause of hardship)
- Whether the investor may claim compensation for the loss resulting from the hardship (partial or full compensation on the basis of contractual agreement)
- Whether the parties can terminate the contract by mutual agreement and define the terms and conditions applying to the termination
- The role of tribunals/arbitrators
- Remedies (termination/adaptation/full or partial compensation).

108. As to the model clause, Subgroup 2 proposes to conduct work on a text which reflects the principle and different options in relation to the issues explained in the commentary:

- First paragraph: requirements triggering hardship
- Second paragraph: the contract is to be observed
- Third paragraph: procedural requirements to request renegotiation
- Fourth paragraph: no entitlement to withhold performance for the disadvantaged party

⁶⁰ 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, which refers to the concept of “commercial equivalence” rather than “economic equilibrium” and contains guidelines the contracting parties should consider in a renegotiation process. Innovative guidance as regards renegotiation, and indeed alternative means to settle differences both by private and public bodies such as mediation, third-party facilitation, and conciliation procedures in the context of hardship, may be found in the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming.

- Fifth paragraph: good faith in renegotiation
- Sixth paragraph: aims of the renegotiation with different options [adaptation (by the date of contract/by the occurrence of hardship)/compensation (full/partial)/termination]
- Seventh paragraph: failure to reach an agreement and prohibition of withholding performance or termination
- Eighth paragraph: referral to court/arbitration
- Ninth paragraph: remedies by the court/arbitration with different options (adaptation, compensation, termination).

Questions for the Working Group:

- *The Working Group is invited to discuss the proposal of Subgroup 2.*
- *Does the Working Group agree to ask Subgroup 2 to develop the proposed principle, commentary, and model clause along the elements described in the Report of Subgroup 2? How would the Working Group address the issues/options described in the Report? Should the principle, commentary, and model clause address further issues?*

3. Force majeure clauses

109. During the first Working Group session it was generally agreed that 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*⁶¹ and the link between force majeure and investment treaty arbitration, especially the “necessity” defence.⁶² 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 who would bear the costs.⁶³

110. During the second Working Group session there was general agreement that article 7.1.7 of the UPICC would be a good starting point, but it might need adaptation in the context of IICs considering its broad scope and the need to preserve the continuity of long-term contracts. A list of events, exhaustive or open-ended, might add clarity, as it occurs in contract practice. The difference between a temporary and permanent force majeure event, the latter leading to termination, should be inquired in the context of IICs with a view to ensure the preservation of the investment relationship once the event dissolves. Several issues were considered: what should be proven in order to avoid non-performance and thus liability and the payment of damages; how to clearly define a force majeure event, whether of short duration or long duration; how to consider the consequences when the duration of the force majeure event was so long that it would result in a lack of financial equilibrium (e.g., suspension of the cash flow, rising prices in the medium run, etc.); what occurred

⁶¹ 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).

⁶² 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.

⁶³ In these cases, costs would be normally very high and unlikely to be covered by insurance. Principles could be extracted by arbitral jurisprudence (see, e.g., the arbitral case on the Channel Tunnel between England and France).

if there was a failure to give notice on time; and what the consequence of not complying with the notice would be.

111. The Report of Subgroup 2 for the third Working Group session contains two annexes relevant to force majeure (a note on “relational contract theory” and a note on force majeure) and a proposal for a principle, commentary, and a model clause, in accordance with the tripartite format.

112. Regarding the principle, Subgroup 2 proposes to conduct work on six sections based on article 7.1.7 of the UPICC principle on force majeure with some adaptations and suggestions for further discussion and changes:

- Definition of an event of force majeure
- Temporary force majeure
- Notice of force majeure and procedural rules
- Right to termination, withholding performance and requesting money and interests
- Right of renegotiation
- Dispute resolution mechanism on the suspension of performance or termination of contract.

113. As to the commentary, Subgroup 2 proposes to consider the following arguments:

- Requirements of the event triggering force majeure
- Factors relevant in applying force majeure to IICs (substantial investment sums, sunk costs and investment not to be easily dismantled, long-term character)
- Limitation of the right of termination
- Right to termination recognised only after prolonged force majeure (with appropriate mechanisms to ensure a proper evaluation of the consequences of force majeure on the equilibrium of contract)
- Dispute settlement mechanisms in case of disagreement concerning the proper exercise of suspension or termination.

114. As to the model clause, Subgroup 2 proposes to conduct work on the following paragraphs, reflecting the principle and the issues explained in the commentary:

- First paragraph: definition of force majeure and excused non performance, non exhaustive list of events
- Second paragraph: notice of force majeure
- Third paragraph: limitations
- Fourth paragraph: termination following force majeure.

Questions for the Working Group:

- *The Working Group is invited to discuss the proposal of Subgroup 2.*
- *Does the Working Group agree to ask Subgroup 2 to develop the proposed principle, commentary, and model clause along the elements described in the Report of Subgroup 2? How would the Working Group address the issues described in the Report? Should the principle, commentary, and model clause address further issues?*

H. Compensation and damages

115. 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 a 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.

116. 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, consideration 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 investors⁶⁴ 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.

117. Issues of compensation and damages are closely related to the applicable law.⁶⁵ 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 the 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.

118. This subtopic was allocated to Subgroup 1, which did not start work in this area yet.

Suggestion and question for the Working Group:

The Working Group is invited to provide a mandate to Subgroup 1 to explore this subtopic in the next intersessional period, depending on its work plan. How should the work of Subgroup 1 be coordinated with the work of Subgroup 2 on change of circumstances and the work of Subgroup 3 on remedies for non-compliance with ESG standards?

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

119. So far, 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). At the first Working Group session, 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.⁶⁶ The question would relate to issues of immunity of State property and would raise aspects of transparency to consider, such as the

⁶⁴ This type of clauses is often used in IICs concerning construction and infrastructure projects.

⁶⁵ 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.

⁶⁶ The topic might be covered to some extent by UNCITRAL, which is undertaking work on third-party funding.

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 could be useful for the possible development of model clauses on this topic.

120. This subtopic was allocated to Subgroup 1, which did not start work in this area yet.

Suggestion for the Working Group:

The Working Group is invited to provide a mandate to Subgroup 1 to explore this subtopic and consider whether any adaptations to the UPICC (Chapter 9) would be useful. Depending on the work plan of Subgroup 1 for the third intersessional period, this may need to be postponed until after the fourth Working Group session.

J. Legal framework and applicable law

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

122. 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 “contractualising” 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.

123. Issues of applicable law to IICs and the legal relationship between IIAs/BITs and IICs have been covered by Subgroup 0 under Subtopic 2 of its Report for the second Working Group session.

Questions for the Working Group:

Would the Working Group agree to provide Subgroup 0 with a mandate to develop concise guidance on the relationship between IICs and IIAs/BITs as part of the Introduction of the future instrument (see Annexe II)?

2. 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

124. 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

law in certain sectors (e.g., oil and gas) by the law of the contracting State given their importance for the State's economy.⁶⁷

125. 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.⁶⁸

126. 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.⁶⁹ Freedom of contract and party autonomy would define the conceptual framework universally accepted for commercial contracts,⁷⁰ 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 might apply, depending on national legal constructs concerning IICs and the relationship between domestic law and international law. 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.

127. 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),⁷¹ 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.⁷² 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.

128. A third area to explore is to what extent the UPICC and the future instrument 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.

⁶⁷ See, e.g., South Africa.

⁶⁸ See the award in the case *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic* (January 1977).

⁶⁹ Usually, it would be for arbitrators to choose based on connecting factors and transnational principles.

⁷⁰ See in, this regard, Article 11 of the HCCH Principles on Choice of Law in International Commercial Contracts.

⁷¹ 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.

⁷² Domestic law and international law might be closely related since aspects of international law might be incorporated in the domestic law.

129. In this regard, during the second Working Group session, it was held that the UPICC as a manifestation of transnational law were not a departure *per se* from domestic law, but were meant to strike a fair balance between domestic and transnational law and elaborate rules fit for the needs of international economic relationships. States often require investors to include host State law compliance clauses in their contracts. Then, a full delocalisation of IICs would not serve the purpose of having in place enforceable contracts. The challenge is to acknowledge party autonomy as an integral element, but also the consequences of a State being party to a contract while being bound by its mandatory laws, also to ensure contract enforceability. IICs require a certain degree of independence from the domestic law to protect the private party against changes in law, discrimination, and unlawful treatment that would be deemed lawful under the host State law; however, the State is the holder of public interests. Mechanisms are necessary to ensure that governments could agree to dispute settlement other than domestic courts and agree to applicable law other than domestic law, but those mechanisms should not be misused. International and domestic law should be viewed as complementary. More bodies of law may be reconciled for the future interpretation, application and enforcement of the contract. The Working Group should first focus on the contractual domain and on the principles that it would deem necessary to include in a contract, leaving domestic law, international law and investment treaty law on the background; and in a second phase lay down specific criteria indicating at which stage domestic and international law come into play and which role they have.

130. The Report of Subgroup 4 for the third Working Group session contains a number of questions that Subgroup 4 proposes to discuss in the Working Group concerning: (A) selecting the applicable law, and (B) combining applicable laws.

Questions for the Working Group:

(A) Selecting the applicable law

- *What are the principal choice-of-law issues that the future instrument should address?*
- *Which existing templates (e.g. UPICC Model Clauses, ICC Model Clauses, PRICL) are most relevant for consideration? How should they be adapted, if necessary, to the specificities of the future instrument?*
- *Should the future instrument express a preference for a certain choice of substantive law (e.g., the future instrument, UPICC, host State law, other domestic law, transnational law or international law)?*
- *Should different choice-of-law model clauses be envisaged depending on the type of contract being concluded and the relevant sector of the industry (e.g., energy and mining, public works, industrial cooperation)?*

(B) Combining applicable laws

- *If multiple sources of law are included in the model clauses, how should their interrelationship be shaped?*
- *Should the future instrument include a 'mandatory-rules' clause and, if so, should it identify sources or types of such mandatory rules?*

K. Dispute resolution clauses

131. Although arbitration procedures are outside the scope of the Working Group's mandate, this topic should be examined in the context of the project on IICs from a purely contractual perspective, i.e., to the limited extent needed to formulate an appropriate dispute resolution model clause. The scope of the exercise was defined in the initial Issues Paper as drafting a model clause for dispute resolution and exploring the potential inclusion of provisions addressing criticism against ISDS, such as conflicts of interest, transparency, and meeting the present demand for ADR, including fast review of decisions, expert determinations, consultations, good offices and mediation. The Working Group

may rely, in this regard, on the significant experience of the ICC International Court of Arbitration in the administration of disputes on IICs. The Working Group was also invited to take into consideration the work of other IOs.

132. Subgroup 4 initiated its work after the second Working Group session. On occasion of the second session, the participants discussed for the first time the practicability of developing guidance and the possible contents of a dispute resolution model clause for IICs. The IBA Guidelines on Conflicts of Interest in International Arbitration, the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration were mentioned as good starting points. In addition, the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration lays out different measures regarding transparency and conflicts of interest. Emerging alternative dispute settlement tools in the infrastructure and construction industry, such as dispute boards (see the FIDIC Forms of Contract, fourth ed., 1987, article 67), and the use of so-called “grievance mechanisms” (e.g., by the World Bank) were also mentioned as a possible benchmark. The issue was raised of preserving the choice for conciliation and mediation in the sequencing of dispute resolution mechanisms by maintaining ADR voluntary. The Working Group also discussed the practicability of model clauses aimed at avoiding parallel proceedings between contract and treaty cases, while acknowledging the concerns about the validity of waiving treaty rights.

133. The Report of Subgroup 4 for the third Working Group session contains a number of questions that Subgroup 4 proposes to discuss in the Working Group concerning: (A) dispute-resolution provisions in model clauses, (B) contractual model clauses aimed at avoiding parallel proceedings, and (C) contractual clauses addressing issues of transparency and conflict of interests.

Questions for the Working Group

(A) Dispute-resolution provisions in model clauses

- *Should model clauses for dispute settlement provide for litigation or different ADR mechanisms, such as arbitration, dispute resolution boards, fact-finding procedures, mediation, and conciliation?*
- *If so, are distinctions required based on the type of contract (such as administrative law contracts) or the relevant industry sector?*
- *Should the future instrument express a preference for any mechanism (such as mediation) or any forum?*
- *How would these types of dispute settlement mechanism be coordinated among themselves?*
- *Should dispute settlement clauses refer to existing rules, whether institutional or ad hoc?*
- *Should model clauses for dispute settlement provide for mandatory ADR mechanisms? Or should they offer them as a potential tool to settle differences and preserve the contractual relationship?*
- *Should model clauses for dispute settlement address limitation/prescription periods?*

(B) Contractual model clauses aimed at avoiding parallel proceedings

- *Could a model clause help avoid or minimise parallel proceedings? (As an example: "Where the fundamental basis of a claim is contractual, no party may raise such a claim in any forum other than that specified in this Contract.")*
- *Should such a clause include a 'fork-in-the-road' or 'no U-turn' provision?*
- *What relevance should be given to the emerging practice of States requiring investors to waive treaty arbitration?*
- *Should a model clause provide for exhaustion of local remedies as an option?*
- *Should a model clause provide for a waiver of treaty-based arbitration (pre- or post-dispute?)*

(C) Contractual clauses addressing issues of transparency and conflict of interests

- *Should model clauses for dispute resolution consider and regulate issues of transparency (e.g., possible publication of awards and decisions)?*
How would the future instrument relate to the work of other organisations in this regard, such as the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and the IBA Guidelines on Conflicts of Interest in International Arbitration?

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 as discussed in previous Working Group sessions and considering the Reports of the Subgroups for the second and third Working Group session. 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 and propose any additional contents that should be included, as well as any rearrangement of contents as appropriate. It is proposed that a preliminary draft of the instrument is developed based on this structure for consideration of the Working Group during its fourth session in November 2024.

Heading	Contents
Abbreviations <i>(Secretariat)</i>	<ul style="list-style-type: none"> List of abbreviations used in the instrument
Introduction <i>(Subgroup 0)</i>	<ul style="list-style-type: none"> Background and aim of the instrument Relationship with the UPICC and other instruments (clarifying that only IIC-specific rules are set out in the instrument, with "renvoi" to the UPICC as uniform rules of general contract law as in the PRICL) Relationship with IIAs and domestic law Relationship with international contract practice Structure of the instrument
Chapter 1. General Provisions	<ul style="list-style-type: none"> Scope of application <i>(Subgroup 0 or 4)</i> External gaps <i>(Subgroup 0)</i> Exclusion or modification by the parties <i>(Subgroup 4)</i> Interpretation <i>(Subgroup 0)</i> Usages and practices <i>(Subgroup 0)</i> Definitions <i>(Subgroup 0)</i>
Chapter 2. Pre-contractual phase	<p>A. Principles applicable to the pre-contractual phase <i>(Subgroup 1)</i></p> <ul style="list-style-type: none"> Risk for own assumptions Freedom to evaluate own interests (change of strategy or policy) No liability for failure to reach an agreement Mandatory rules Pre-contractual aspects concerning policy goals (e.g., ESG due diligence and affected

	<p>third parties and stakeholders) (<i>Subgroup 3</i>)</p> <p>B. Relevance of the pre-contractual phase to determine the scope of contractual obligations (<i>Subgroup 1</i>)</p> <ul style="list-style-type: none"> • Entire agreement
Chapter 3. Preamble of an IIC	<ul style="list-style-type: none"> • Respect for ESG obligations (<i>Subgroup 3</i>) • Good faith (<i>Subgroup 1/3</i>)
Chapter 4. Formation and Authority (<i>Subgroup 1</i>)	<ul style="list-style-type: none"> • Legal capacity • [Possible other UPICC adaptations]
Chapter 5. Validity (<i>Subgroup 1</i>)	<p>A. Formal validity</p> <ul style="list-style-type: none"> • Form of an IIC <p>B. Substantive validity</p> <p>Section 1: General provisions</p> <ul style="list-style-type: none"> • Validity of mere agreement • Initial impossibility <p>Section 2: Grounds for avoidance</p> <ul style="list-style-type: none"> • Fraud • Threat, duress • Gross disparity • Third persons • Confirmation • Loss of right to avoid • Notice of avoidance or request for negotiation • Retroactive effect of avoidance • Restitution • Damages <p>Section 3: Illegality</p> <ul style="list-style-type: none"> • Contracts infringing mandatory rules • [Corruption, anti-corruption clauses] • Restitution
[Chapter to be discussed]	<ul style="list-style-type: none"> • Possible principles on performance to be adapted (or “renvoi” to the UPICC as principles of general contract law as they might be applicable to IICs)
Chapter 6. Rights and Obligations	<ul style="list-style-type: none"> • ESG obligations and commitment to the highest attainable standard (<i>Subgroup 3</i>) • Obligations towards third parties and affected stakeholders (<i>Subgroup 1 and 3</i>)

	<ul style="list-style-type: none"> • Other parties' rights and obligations typical of IICs⁷³ (to be discussed) (<i>Subgroup tbc</i>)
Chapter 7. Change of circumstances <i>(Subgroup 2)</i>	<ul style="list-style-type: none"> • Stabilisation clauses (fiscal stabilisation v. economic equilibrium adaptation/renegotiation clauses [<i>content to be confirmed</i>]) • Hardship (definition, effect, renegotiation and role of third parties, notice, procedure, compensation, termination) • Force majeure (definition, notice, limitations, termination)
Chapter 8. Remedies, including compensation and damages <i>(Subgroup 1)</i>	<ul style="list-style-type: none"> • Pre-arbitration/litigation options for alleged breaches of contract • Types of remedies for breach of contract • Compensation • Damages • Interest • Non-compliance with ESG obligations, including towards affected third parties (<i>Subgroup 3</i>) • Other issues
[Chapter 9. Transfer of rights and obligations] <i>(Subgroup 1)</i>	<ul style="list-style-type: none"> • Assignment of rights • Transfer of obligations • Assignment of contracts
Chapter 10. Choice of Law and Dispute Settlement <i>(Subgroup 4)</i>	<ul style="list-style-type: none"> • Choice of law • Dispute settlement (e.g., different ADR mechanisms, limitation periods, avoiding parallel proceedings, issues of transparency and conflicts of interest)

⁷³ E.g., the State's right of inspection and to be informed, access to documents, technology/know how transfer clauses, joint ventures, insurance, payment, option rights, pre-emption rights, currency fluctuation, local procurement, minimum amount of investment required over a certain agreed period, and so forth.