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SUMMARY REPORT

OF THE FOURTH SESSION

(25 – 27 November 2024)

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1. The fourth session of the Working Group on International Investment Contracts ("the Working Group") was held in hybrid format from 25 to 27 November 2024 at the seat of UNIDROIT in Rome. The session was attended by 23 individual experts and 13 representatives of institutional observers, including international and regional organisations, as well as members of the UNIDROIT Secretariat and the ICC Institute for World Business Law ("the ICC Institute"). The list of participants is available in Annexe I.

2. The session was chaired by UNIDROIT President Ms Maria Chiara Malaguti ("the UNIDROIT Chair") and the Chair of the ICC Institute Council, Mr Eduardo Silva Romero ("the ICC Chair", together "the Chairs").

Item 1: Opening of the session and welcome

3. *The Chairs* opened the session and welcomed all participants. They congratulated the participants for the progress made during the intersessional period in drafting their reports and a very first set of principles or recommendations and clauses, according to the tripartite template. The Chairs also concurred as to how important it was for the session to focus the work and conclude the scoping exercise, as from the next session the focus would shift to working out a single text. In particular, the final products of the Subgroups would be consolidated and assigned to a Drafting Committee to be designated for further elaboration. They also recalled the widespread attention this project was receiving, which confirmed that demand existed for rethinking investment contracts.

Item 2: Adoption of the agenda and organisation of the session

4. *The UNIDROIT Chair* introduced the Annotated Draft Agenda and the organisation of the session. She proposed discussing the Subgroup reports in the following order: Subgroup 2, Subgroup 3, Subgroup 1, Subgroup 4, Subgroup 0.

5. *The Working Group agreed with the organisation of the session as proposed and adopted the Draft Agenda (UNIDROIT 2024 – Study L-IIC – W.G. 4 – Doc. 1 rev, available in Annexe II).*

Item 3: Adoption of the Summary Report of the third session

6. *The UNIDROIT Chair* noted that the Secretariat had shared the draft Summary Report of the third Working Group session with all participants. *The Working Group confirmed the adoption of the Summary Report of the third session (UNIDROIT 2024 – Study L-IIC – W.G. 3 – Doc. 7).*

Item 4: Update on intersessional work and developments since the third Working Group session

7. *The UNIDROIT Chair* made reference to the Revised Issues Paper (Study L-IIC – W.G. 4 – Doc. 2) and illustrated the continuing work of the Subgroups, namely: Subgroup 0 on general conceptual issues (applicable law, international investment law and contracts), Subgroup 1 on traditional contractual issues (pre-contractual phase, formation, validity), Subgroup 2 on change of circumstances (stabilisation/renegotiation/adaptation, hardship, force majeure), Subgroup 3 on policy goals (sustainability, climate change, human rights), and Subgroup 4 on choice of law and dispute settlement clauses. She invited the experts to remain focused and to elaborate text-based considerations to the greatest extent possible with a view to propose specific language.

Item 5: Consideration of work in progress

8. *The UNIDROIT Chair* drew the attention of the Working Group to the next item on the agenda and invited the Co-Chairs of the Subgroups to introduce the Subgroup reports for the fourth session.

1. Report of Subgroup 2: Change of circumstances

9. *The UNIDROIT Chair* referred to the report of Subgroup 2 on stabilisation, hardship, and force majeure, and invited the Co-Chairs of the Subgroup to illustrate the issues still under discussion, particularly the different options on stabilisation.

1.1 "Stabilisation" clauses

10. *The Co-Chair of Subgroup 2* recalled the different views on the subject matter that were presented by the members. Three principles were identified: (i) the parties might choose not to have a stabilisation clause; (ii) the parties might agree to include a stabilisation/renegotiation clause in the contract if appropriate and with full knowledge of the consequences; (iii) the parties might agree to exclude certain measures from the scope of stabilisation. She mentioned that the Working Group had determined that freezing clauses in a traditional sense, *i.e.,* of general reach, were not suitable and thus they had not been included in the report. Two different types of clauses were included: (i) an economic equilibrium clause, and (ii) a fiscal stabilisation clause in the classical sense, subject to certain conditions. She then gave the floor to the member of the Subgroup who had formulated the draft provisions, commentaries and model clauses included in the Annexes.

11. *Three members of the Subgroup* illustrated Annexes 1 to 3 to the report. *The first member* supported the view that, in line with the OECD work and the *Guiding Principles for Durable Extractive Contracts*, stabilisation clauses should be deemed a mere choice and hence no stabilisation a clear possibility. If present, stabilisation should regard fiscal measures, be limited in time and justified by commercial needs, while public policy laws and regulations should never be stabilised. Stabilisation clauses should never limit rules addressing tax avoidance and investors' shifting profitability, and a premium should be paid for their inclusion in an IIC. *The second member* illustrated Annexe 2 to the report considering that a stabilisation clause should always and only take the form of an economic equilibrium restoration commitment with the widest scope, addressing any factual or formal unilateral intervention by the host State and being endowed with a strict legal framework for termination, but also an exit for severe violations or breaches. *The third member* illustrated Annexe 3 to the report, recalling that the Working Group had agreed that classical freezing clauses should not be included in the instrument, but also that some level of regulatory stability should be offered to the parties. IICs were different from treaties and could be modulated with the State being available to grant some protection in exchange for investment-related advantages. He mentioned that these elements were reflected in both the practice (as examined by the research task force that had been established within the Roma Tre-UNIDROIT Centre for Transnational Commercial Law and International Arbitration, "the Task Force") and the literature, which detected highly diversified formulations with more than eleven types of clauses. He mentioned that, as considered in earlier sessions by a representative of the UNIDROIT Secretariat with a positive consideration by the ICC Chair, he formulated a provision with a plurality of options, which left to the parties to choose what was most suited to the specific context. He then reminded that he had looked into common threads and articulated a text proposal in three parts (general introductory principles, substantive clauses, exclusion clauses), considering in the substantive part the trigger event, its threshold of relevance, and the procedure to follow to obtain balance restoration. He asked whether the title of the clause should be "stabilisation and renegotiation" or merely "renegotiation", and recalled the *UNIDROIT/IFAD Legal Guide on Agricultural Investment Contracts* ("ALIC Guide") and the *Principles of International Commercial Contracts* ("UPICC") as inspiring elements. Qualifying points of the proposal were the "freedom of the parties" to include a stabilisation clause ("if appropriate"), and the knowledge of the

consequences clause, especially reflecting the interest of developing countries.[1] Among the proposed options, the first was an economic equilibrium clause. The triggering event to seek renegotiation needed to be broadly formulated, and it could be a legislative, administrative or even judicial decision with a substantive impact. The investor might not succeed in achieving full protection, especially in the case of fiscal stabilisation clauses as they could be declared unconstitutional,[2] but their inclusion would still perform a function; this risk would not materialise for economic equilibrium clauses, which did not touch upon sovereign functions. In this sense, the relevant threshold for the clause to be triggered would be that not every event had relevance, but only those events which substantially altered the financial balance that had been initially agreed. As to procedure, the investor should inform the counterparty without undue delay, state the grounds and then provide evidence of what significantly altered the financial equilibrium of contract to avoid any bad faith invocation of these clauses. Most importantly, triggering the procedure would not entitle that party to withhold performance. The second option was a stabilisation clause strictly limited to fiscal matters, as admitted by OECD documents (amongst others) and as formulated in contract practice. The trigger event would occur when a State promised a fiscal incentive broadly defined (tax, customs, or any other form) for a limited time of the entire duration and later either removed or reduced what it had granted. Any alteration would amount to a breach of the fiscal stabilisation clause, with the consequence that the State should compensate the investor either monetarily or through comparable alternatives,[3] proportionate to the reduction of fiscal benefits, as an outcome of negotiations or, in case of failure to agree, of dispute resolution. As to exclusion clauses, he mentioned the need for a certain balance since, if an exclusion clause were too broad, the entire stabilisation process, including renegotiation, would become meaningless. Available practice was found to be diverse, with clauses referencing core principles of the constitution, public law, or of a certain legal system. With a global soft law instrument in mind, he considered preferrable a narrow format, restricted only to obligations arising out of international law (treaties, customary international law, general principles and, most importantly, *ius cogens*). Indeed, providing national law as a standard, any change in national law might facilitate the application of the exception. He mentioned that some space was left in brackets where the final instrument should differentiate the position of the "State entity" from that of a "State", and with regard to cases where the same investor could be bound to some conduct. He concluded that divergencies remained in the Subgroup about whether a State that breached a stabilisation clause should provide monetary compensation in addition to renegotiation, or only renegotiation.

12. *The UNIDROIT Chair* thanked the members of Subgroup 2 and opened the floor for discussion, asking speakers to limit themselves to text-based discussion. She considered that, if multiple alternatives were maintained, the instrument should provide guidance to prospective users clearly explaining the different circumstances that would suggest different choices. *The UNIDROIT Deputy Secretary-General* stressed that when offering alternatives, the instrument should strike a balance with the goals of harmonisation. *A member of the UNIDROIT Secretariat* stressed that, based on the memorandum of the Task Force, limited "fiscal freezing" clauses – seemingly combined with "economic equilibrium" clauses - were found to be part of contract practice and highly diverse in

[1] Four considerations bear on whether the parties would include a stabilisation clause: the constraint on the sovereign right to regulate policy goals, the subjection of IICs to non-commercial risks (i.e., stemming from the exercise of public power touching upon the financial equilibrium of contract), the high sunk costs for investors, and the related issue of lenders insisting for some kind of assurance, including some level of stabilisation. Note should also be made to the related issue of how to bind a State with a stabilisation commitment in a scenario where a State company and not the State itself is party to the contract. It was mentioned, in this regard, that some States, such as Egypt, enter into the IIC along with the State company.

[2] For instance, the Israeli Supreme Court and the Nigerian Supreme Court have declared stabilisation clauses unconstitutional.

[3] *E.g.*, rights for extra land for excavation, extending the contract, and so forth.

formulation.[4] They appeared to be related to the specific bargains and the type of risk the investment faced in a given sector or country. Providing different options might at its face seem at odds with a harmonisation policy, but the harmonising effect would consist in offering a unified and well-appraised standard within the field covered by each single option. Finally, he recalled that in previous sessions, a classification of legislative and political risks had been proposed with a view to define who would bear the burden.

13. *One participant*, a first-time observer, wished to welcome the UNIDROIT-ICC Institute initiative as a contribution towards reaching sustainable development goals, avoiding replicating the concerns which led to the backlash against old-generation IIAs and ISDS.[5] She mentioned that several international organisations, including UNCTAD, OECD, and even UNIDROIT in the ALIC Guide, advised using caution as to the inclusion of stabilisation clauses in IICs. On this note, *a group of participants* sought to stress the importance of not interfering in the domestic-law debate of whether freezing clauses (including fiscal) were permissible or not, but rather focus exclusively on an economic equilibrium clause as a purely contractual mechanism to compensate the foreign investor in case of alteration of the financial equilibrium of the contract. It was important to leave flexibility to the parties to reach their own financial equilibrium-based decision, so that they might have contract tools to internalise the costs of new measures.[6] Freezing clauses should not be recommended, while economic equilibrium stabilisation should not be limited to changes in tax law, but be extended to a wider set of cases (i.e., changes in currency regulations,[7] custom duties, financial rates and so forth) and would be subject to a much lower risk to be judged illegal or unconstitutional. *The UNIDROIT Deputy Secretary-General* drew attention to the fact that the hardship principle in the UPICC was taken as a starting point to develop a principle on stabilisation, although in a different context and with different premises, and might provide a model as regarded economic equilibrium clauses and renegotiation. *One participant* recalled the possibility to include under the heading "renegotiation" three types of triggering factors, i.e., changing fiscal or legislative measures, hardship, and force majeure. A well-structured provision should include renegotiation in good faith as the usual remedy and, in case of failure to agree, termination at the discretion of the investor with consequences being clearly defined,[8] or dispute resolution and arbitration.[9]

14. *Another group of participants* strongly supported the idea of offering various options of stabilisation, including a limited fiscal freezing option (to the exclusion of a classical general freezing clause), and to explain their use in the commentary. IICs, indeed, were private contracts where the State - or the State company – and the investor would exchange advantages; not only the State would be a party to the contract, but it would also be "participating" in a commercial share of the joint activity operation. Presenting various options or choices was a very fair approach since for many investors not having in an IIC some stabilisation standard would amount to a walkaway point. Host

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[4] *E.g.*, contracts examined by the Task Force provided for different language or a different conceptual structure when establishing the scope of States' obligations. They also defined exclusions in different manners, such as lists of legislative subjects, references to international treaties or to regional benchmark policies, and even some kinds of warranty or representation by the foreign investor recognising that it was aware of State future policy planning.

[5] She mentioned, in particular, the outcomes of the movement for IIA reform since 2020 (a majority of IIAs safeguarding States' regulatory space through refined approaches, FET replaced or omitted in over 100 countries, over 130 countries redesigning the very concept of expropriation and its consequences, around 140 countries including exceptions for public policy measures).

[6] Less flexibility in the contract would mean that insurers, lenders, and the investors themselves might end up needing to externalise that risk through increased cost, or simply decide not to do the project. Economic equilibrium clauses would essentially allow that risks were addressed when they arose as opposed to dealing with unknown risks at the outset.

[7] It might be the case the case when limitations to convertibility forced the investor to spend returns locally, with losses due to inflation issues

[8] *E.g.*, restitution and how to calculate the expected return from the investment, particularly when investments in infrastructure or natural resources were terminated before returns materialised.

[9] Possibly specifying that the arbitral tribunal or the court should not adjust the contract but merely decide on monetary compensation.

State law compliance was a different issue from stabilisation, that rather regarded an economic aspect, i.e., the increasing costs of compliance stemming from a change in laws.[10] *A significant number of participants* agreed that renegotiation should be prioritised as a remedy, but there were few alternatives to compensation. This should remain on the background to give bite to the stabilisation process and work as a facilitating factor; in the alternative, the investor would remain without protection. *Many participants* proposed to include a preventative mechanism providing for the monitoring of the legislative process in the host State and a duty of the State to issue an early warning and inform in advance the investor of any change in law, determining criteria and solutions for reducing or absorbing the impact, depending on the type of industry and contract, with a view to contain litigation.[11]

15. *The ICC Chair* reminded the Working Group that in ICC instruments, the idea of having as many options as possible was the rule, while it would be up to the players to choose from among the available options. The limited freezing clause could then be available as an option, but presented in a manner that imparted its historical development and criticalities. He agreed that nowadays the core of the discourse on stabilisation should revolve around a properly formulated economic equilibrium clause, since it placed a very clear burden on both parties and fostered the idea of parties' cooperation. On the part of the private entity, it should be clear that, before accepting an economic equilibrium clause, due diligence should be undertaken, especially as to the price in the formula of the economic equilibrium. On the State entity side, the burden would be to know the limits and consequences of any legislative action, *i.e.,* if some regulation was issued that affected the economic equilibrium. As to the consequences, renegotiation only would be preferable to cover losses that occurred before the contract was renegotiated and, if this failed, renegotiation on compensation or only action for compensation. As to legality issues, he mentioned that representations and warranties might help, where both parties recognised that all the clauses in the contract were legal and, if an illegality argument was later raised and the clause was essential for the party to sign the contract, termination should be available as a remedy.

16. Finally, *one participant* drew the attention to the risks involved by a scenario where a transnational principle on stabilisation was shaped in the final instrument that prohibited freezing clauses, but then some States permitted such clauses; or the reverse, where a principle with model clauses would be developed and parties drew on those models in the IIC and then, at a later point in time, a court decision in the involved State found the clause to be illegal under domestic law. *Another participant* questioned if the wording of "full knowledge of the consequences" in case the parties would agree on a stabilisation clause could generate or encourage disputes. *A further participant* made a point on language, since the acts or conduct at hands might not actually constitute a breach, but merely trigger a procedure conducive to renegotiation.

17. *The members of Subgroup 2* expressed appreciation for the feedback received. *One of them* deemed relevant to consider that most practice on freezing clauses was old practice from the 1970s and 1990s, while only some Asian and African States continued to include stabilisation in IICs.[12] He supported the view that a narrow freezing clause limited to fiscal issues might be admissible, but the emphasis should be put on economic equilibrium clauses and renegotiation. The *UNIDROIT Chair* concluded that the Working Group would keep at this stage a multiple choice-solution, providing

[10] Changes in laws requiring increasing compliance costs might be deemed similar to those cases where the State asked to the investor to increase production (e.g., of electric energy due to an increase in energy demand): in both cases there would be an issue of increasing costs that required additional work which should then be compensated.

[11] A case before the House of Lords was mentioned where it had been anticipated to the public that, due to a changing context, legislation would have been amended, and economic actors and civil society were given some time for adaptation of their manner of doing business.

[12] *E.g.*, Cameroon, Iraq and Kurdistan. Azerbaijan would have freezing clauses in specific legislation on stabilisation, but it might still be challenged on a constitutional level, as had occurred in Israel and Nigeria. He considered that none of the developed countries or OECD countries allowed stabilisation clauses, and even though they did include fiscal stabilisation clauses, the latter might be judged illegitimate by courts.

model clauses with options. Consistent with the complexity of such a solution, the commentary should clearly identify the legal nature of the clauses and explicitly elaborate on the vision behind each solution, including how different circumstances might lead to opt for different kinds of clauses, taking into consideration industry specificities, the types of risks and costs involved, and the need for flexibility. The procedural and remedial phases should be clearly articulated, particularly renegotiation, compensation, termination and other possible methods of recovery.

1.2 Hardship

18. On the invitation of the UNIDROIT Chair, *one of the Co-Chairs of Subgroup 2* introduced the proposals of the Subgroup on hardship, consisting of draft principles with commentary and questions for the Working Group, as well as a draft model clause. He explained that the main novelty compared to the proposal discussed at the previous Working Group session was that the draft principles and draft model clause no longer indicated that the disadvantaged party was entitled to request compensation for the loss caused by hardship. The draft principle was now in line with the UPICC, given the feedback that had been received during the third Working Group session about the need to carefully consider whether deviations from the relevant UPICC provisions would be necessary. He invited views from the Working Group on this change of approach. He recalled that the reasons for including compensation as an express remedy in the previous draft had been threefold: (i) providing for compensation as a remedy was in line with the principle of continuity since it could facilitate renegotiations and make it less likely that the contract would be terminated, (ii) an explicit reference to compensation might facilitate the award of compensation by international arbitral tribunals, and (iii) there might be merit in making an explicit reference to compensation if it was already implicitly part of the renegotiation process. It was also noted that French law allowed for compensation on an extra-contractual basis, up to 90% of the operating loss.

19. The Working Group thanked Subgroup 2 for the proposals and commended the work that had been done on hardship.

20. Before turning to the specific proposals, participants made general remarks. *A participant* was of the view that different options for hardship clauses could be provided in the section with model clauses, but he advised against making any amendments to the UPICC provisions in the future instrument. He noted that early literature on investment contracts used the terms "State contracts" or "*contrats d'État*" and highlighted that that the UPICC covered State contracts when the State acted in its commercial capacity. He emphasised that issues such as formation, hardship, force majeure and damages were private law issues, to which the UPICC would appropriately apply as they were. A different question was whether additional, specific principles were needed, as in the case of the *Principles of Reinsurance Contract Law* ("PRICL"), or whether different options for model clauses should be provided, but he cautioned against having a parallel set of private law principles. He recalled that the approach also depended on whether the instrument would cover a broad range of contracts, noting that the term IIC could be broadly interpreted as including contracts concerning an "investment" subject to investment treaty protection and investment arbitration (e.g., based on Article 25 of the ICSID Convention). *Another participant* underlined that this project did not seek to amend the UPICC. Rather, the UPICC were used as a source of inspiration for guidance on the specific types of contracts under consideration in this project, which included the mentioned "State contracts". It was emphasised that the outcome of this project would be an independent instrument, not a modification of the UPICC. *Other participants* agreed that amendments to the UPICC should not be made lightly in the future instrument, but they emphasised that some modifications – including on the definition of hardship – would be appropriate, since the State was not a regular commercial party and IICs were not regular commercial contracts.

21. *The UNIDROIT Secretary-General* clarified that the UNIDROIT Governing Council was competent to decide on the format of the future instrument, upon a proposal by the Working Group. Furthermore, he explained that there were similarities between the different types of instruments

(e.g., principles with commentary, guidance with recommendations, or model clauses with commentary) and that the substantive work that had been conducted so far was therefore key in any case. *The UNIDROIT Chair* indicated that the Working Group had previously discussed that a set of principles would be useful, while a general principle underlying the work was that issues that were already adequately covered in the UPICC would not be addressed. *The ICC Chair* added that it was important for users to have model clauses that could be implemented in IICs.

22. *A member of the UNIDROIT Secretariat* noted that it followed from the research by the Task Force that IICs often did not include hardship clauses. *The UNIDROIT Chair* indicated that starting from this assumption, it would be useful to consider the UPICC but at the same time recognise that the context was different.

23. With regard to the draft principle on the definition of hardship, *one participant* suggested deleting the phrase "*either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished*". She noted that this phrase was appropriate for international commercial contracts, but less so for IICs. She considered that the first part of the sentence was sufficient in the investment context, i.e., "*[t]here is hardship where the occurrence of events fundamentally alters the equilibrium of the contract*". It could then be explained in the commentary why the principle deviated from the wording of the UPICC provision on this point.

24. Similarly, she suggested deleting point (a) in the draft principle on the definition of hardship, which read (in line with the UPICC), "*the events, or their consequences, occur or become known to the disadvantaged party after the conclusion of the contract*". In her view, this criterion was not suitable in the investment context, where investors were generally large companies that were expected to carry out proper due diligence prior to concluding the contract. *Another participant* suggested to refer simply to "*the occurrence of events, the risk of which had not been assumed by the disadvantaged party*" (or similar). *The Deputy Secretary-General* recognised that the formulation of point (a) might seem overly protective, but underlined that it should be read in conjunction with points (b) through (d). *Another participant* suggested making a cross-reference to the section on the pre-contractual phase, which contained guidance on commercial due diligence.

25. *Several participants* suggested specifying in point (c) of the draft principle that the event should be outside the sphere of control of the State, in order to clearly distinguish a hardship clause from a stabilisation clause. *One participant* added that the difference between hardship and stabilisation also followed from Article 1(b) and (d) of the draft model clause. *Another participant* recalled the rationale for the hardship clause and that it covered events that occurred outside the control of the contracting parties. It would therefore not be appropriate to try to find a "culprit" and impose a compensation obligation. He also warned that the hardship clause should not be too broad in order to avoid that it would be invoked too easily by the contracting parties. *Still another participant* noted that he considered it fundamental to provide for a hardship clause in the future instrument, even if such clauses might not be used in practice very often (to date), and that the clause should be tailored to the investment context, by clearly distinguishing it from a stabilisation clause in terms of trigger event. However, in his opinion, the approach to remedies could be the same.

26. With regard to the effects of hardship, *the Deputy Secretary-General* asked whether it had been a conscious choice to refer only in the draft model clause and not in the draft principle to discussions in good faith with respect to renegotiations. *Another participant* suggested specifying the renegotiation procedure (e.g., a written exchange followed by a meeting, referral to a higher level of management if a solution could not be found, etc.) as a means to specify when renegotiations would be expected to be in line with the principle of good faith. She noted that, if the procedural steps would not be respected, this would amount to a breach of contract. *Several participants* suggested including mediation in the renegotiation phase. *The Deputy Secretary-General* proposed adding such guidance on renegotiations in the model clause, but not in the principle. She also noted

that including mediation in the process was in line with the philosophy of the UPICC and party autonomy. *The ICC Chair* expressed doubts about mediation in this context. He explained that public officials tended to be reluctant to sign settlement agreements. A more feasible option, in his opinion, was to consider dispute boards.

27. *One participant* was in favour of indicating that the aim of the negotiations was to restore the economic equilibrium that existed at the time immediately prior to the occurrence of hardship (option 6.B in the draft model clause). He emphasised that the parties assumed some risk by concluding the contract and that it would therefore not be appropriate to restore the equilibrium that existed at the time the contact was concluded (option 6.A). He noted that referring in the commentary to retrospective adaptation, i.e., going back to the moment prior to the occurrence of hardship, would also be useful for compensation.

28. The draft principle and model clause indicated, in line with the UPICC, that the request for renegotiation did not in itself entitle the disadvantaged party to withhold performance. *One participant* noted that there had been cases in which forcing a party to continue to perform had led to that party's bankruptcy. Therefore, he considered that continued performance might not always be in line with the principle of good faith. He wondered whether reference should be made to a possible abuse of rights (or similar). *Another participant* preferred not to insert an abuse of rights criterion. She pointed out that a party that was unable to continue performing would withhold performance. Since this would be a breach of contract, issues such as imminent bankruptcy and abuse of rights would be considered in that context. *The Deputy Secretary-General* pointed out that it was recognised in the commentary to the UPICC that withholding performance might be justified in extraordinary circumstances. Since reference was made to the UPICC commentary in the commentary to this draft principle, such situations would already seem covered. *Another participant* agreed to recognise in the commentary that there might be exceptions to requiring performance, in line with Article 7.2.2(b) of the UPICC. Furthermore, it was noted that there seemed to be repetition in paragraphs 2 and 4 of the draft model clause, since they both indicated that the obligations under the contract should continue to be performed. *One participant* considered that one of the main reasons to exclude withholding performance in the investment context was that the performance related to essential services. However, the situation might be different in cases where the services were not essential. In this respect, he suggested that it would be useful to obtain empirical data on the involvement of SMEs in IICs.

29. Regarding remedies in case of hardship, *several participants* suggested to refer first to contract adaptation and subsequently to termination, since termination was generally a measure of last resort. *One participant* expressed doubts about contract adaptation by courts and arbitral tribunals, noting that these might not have the required expertise to adapt an IIC. *Another participant* noted that judges and arbitrators could make use of experts if needed. In his opinion, the reference to contract adaptation by a court or arbitral tribunal should be kept, also because it incentivised renegotiations between the contracting parties. *One participant* suggested adding the possibility of requesting an expert opinion as a means to remedy the situation, but *another participant* expressed hesitation. It was also mentioned that arbitrators could in any case not decide beyond the prayers for relief (i.e., they had to consider the remedies sought from the tribunal by the parties).

30. With regard to compensation, different views were expressed. *One participant* considered it appropriate not to refer to compensation as a separate remedy since that would assume a breach of contract by one of the parties and since compensation was implicitly embedded in renegotiations and contract termination (with the latter leading to some sort of restitution). *Another participant* was in favour of expressly referring to compensation, noting that it might be monetary or non-monetary in nature. *Still another participant* agreed that there would be room for compensation, which was also recognised in the UPICC in case of contract termination (Article 7.3.5). *Another participant* noted that compensation did not necessarily assume a breach of contract. He was of the view that compensation should not be categorically excluded in case of hardship, noting that the restoration

of the equilibrium could be retrospective and involve some form of compensation to restore the equilibrium that existed just before the hardship event arose. *The first-mentioned participant* clarified that she was against adding compensation as an independent remedy, but she agreed that it may be part of the revision or termination of the contract. Ultimately, there was general agreement that compensation might be part of the restoration of the equilibrium in case of hardship, but there remained different views on whether it should be expressly referred to as a remedy.

31. *A participant* suggested taking into consideration the guidance that existed in this area for public-private partnerships ("PPPs"), since these could be a vehicle for international investment projects. As a general remark, he considered that in the context of PPPs, the draft model clause should be consistent with domestic law, given the nature of the service and the physical presence in the host State. For domestic legislation on PPPs, relevant guidance was provided in UNCITRAL instruments. For hardship specifically, he referred to Chapter IV of the *UNCITRAL Legislative Guide on Public-Private Partnerships* (J.4, "changes in conditions"), as well as Model Provision 44 of the *UNCITRAL Model Legislative Provisions on Public-Private Partnerships*. He noted that the latter mirrored the UPICC and provided detailed guidance on the threshold and conditions for amending a PPP contract. He made two specific points for the consideration of the group: (i) considering that PPP contracts were awarded following a bidding process, it might be challenging to make substantial amendments to such contracts without initiating a new tender process; and (ii) pursuant to UNCITRAL Model Provision 44, it was possible to extend the PPP contract as an alternative to financial compensation.

32. *Another participant* suggested looking at the *ICC Hardship Clause 2003* and the accompanying commentary for inspiration. She noted that some of the comments that had been raised on the definition and remedies of hardship seemed to be addressed there, since the trigger for hardship was formulated more generally compared to the UPICC and it did not envisage contract adaptation by a court of arbitral tribunal. *The ICC Chair* added that it was essential to provide for recourse to arbitration in a stabilisation clause, while for hardship the focus should rather be on renegotiation. He mentioned cases in which investors had sued States for measures taken during the COVID-19 pandemic, which he considered fundamentally wrong.

33. With regard to the question of whether a State should have the right to terminate the contract unilaterally in the event of hardship, *one participant* expressed the view that the State should not be granted such specific right because this was a contractual context with the parties being placed on an equal footing.

34. *One of the Co-Chairs of Subgroup 2* made concluding remarks on the topic of hardship. First, he noted that in the formulation of the draft principles, the Subgroup had sought to retain the text of the relevant UPICC provisions given the directions in the previous Working Group session to respect the UPICC provisions unless there were clear justifications for adaptations. This explained (i) why the reference to good faith had been included only in the draft model clause (it was not mentioned in the relevant UPICC provision), (ii) the order of the remedies in the draft principle (Article 6.2.3 of the UPICC first mentioned termination and then adaptation), (iii) the formulation of point (a) in the draft principle on the definition of hardship (which was the same as the relevant UPICC provision), and (iv) the repetition on not withholding performance in the draft model clause (since it was mentioned in both Article 6.2.1 and Article 6.2.3 of the UPICC). Second, on the point regarding the possible requirement to launch a new tender process in case of changes to a contract that was the result of a bidding process, he noted that this depended on national administrative law, which might provide for exceptions in specific cases. Third, with regard to the comment on the prayers for relief, he noted that if compensation was not expressly mentioned as a remedy, the counterparty might claim that a request for compensation should be declared inadmissible. Fourth, on dispute boards, he agreed that these might be useful, recalling a dispute about a contract price adjustment clause that had been settled by means of a dispute board. Fifth, he wondered whether the distinction between hardship and stabilisation in Section I.C of the report of Subgroup 2 was

correct, given the example mentioned by the ICC Chair on COVID-19 measures taken by the State that were considered to be hardship.

1.3 Force majeure

35. *A member of Subgroup 2* explained that the draft principle on force majeure was based on Article 7.1.7 of the UPICC. The Subgroup only proposed two additions, namely to clarify that the parties (i) retained the right to renegotiate the contract as necessary, and (ii) might stipulate a dispute resolution mechanism. The draft model clause on force majeure had been inspired by the ICC Model Clause. It followed from the draft model clause that termination was a measure of last resort, which should only be possible in case the force majeure event continued for at least 12 months.

36. Regarding the draft principle, a suggestion was made to include the two additions in the explanatory text while indicating that the UPICC provision on force majeure would apply to IICs as it was.

37. With regard to point 1 of the draft model clause, *a participant* asked why the Subgroup had chosen to include a relatively short list of examples of force majeure events. *A member of Subgroup 2* indicated that it had been decided to keep the list short and merely refer to what were expected to be the most common types of force majeure events, noting that it was in any case a non-exhaustive list. *The Secretary-General* asked whether technological issues (e.g., a hack) would be covered by "sabotage". It was agreed to elaborate on such issues in the commentary given their increasing relevance. *Another participant* noted that the question was whether the technological issue was within the spere of control of the party and whether the latter did all that could reasonably be expected to avoid such electronic sabotage.

38. The latter remark led to a suggestion from *a participant* to clarify the meaning of "beyond the reasonable control" of a party. She noted that there were at least two different interpretations of the spere of control: (i) an interpretation based on allocation of risk (in common law jurisdictions), and (ii) an interpretation based on diligence, according to which an event was considered beyond the reasonable control of a party even if the event was within his sphere of risk but it had done what it could to avoid the consequences (mostly in traditional continental law). She recognised that the need for clarification on this point was not specific to IICs, but considered that it could be useful to clarify the interpretation for IICs in the future instrument.

39. The point was raised whether reference should also be made to possible non-performance by third parties as a result of force majeure, which was covered in the ICC Model Clause (long form). It was agreed that Subgroup 2 would look into this. Furthermore, *a participant* observed that the threshold for force majeure was higher under public international law (Article 23 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*) than in the UPICC, noting that the Working Group had made a deliberate choice to follow the contractual standard.

40. With regard to point 2 of the draft model clause, *one participant* asked why the affected party should at its own cost take reasonable endeavours to remedy its inability to perform, given that force majeure was beyond the control of both parties. He pointed out that, in practice, the parties would try to find a solution together. *A member of Subgroup 2* noted that the reference to "own cost" could be deleted but in the first instance, it was normally for the party that invoked force majeure to use reasonable endeavours to remedy its inability to perform, which implicitly meant that this would be done at its own cost. He agreed that, in practice, the parties might end up renegotiating the contract.

41. Regarding point 3 of the draft model clause, *a participant* noted that there seemed to be tension between the example of force majeure mentioned in point 1(j) and the statement that *"[t]he*

failure or inability of either party to satisfy a payment obligation that has arisen under this Agreement will not be excused by Force Majeure". He suggested clarifying and providing interpretative guidance on this issue. *A member of Subgroup 2* agreed that the language could be adjusted to clarify that the two phrases were meant to cover two different situations.

42. *One participant* asked what the threshold for contract termination was. *A member of Subgroup 2* explained that point 4 of the draft model clause contained a temporal threshold, namely that the force majeure event continues for a period exceeding 12 months.

2. Report of Subgroup 3: Addressing policy goals in IICs

43. *The UNIDROIT Chair* invited the Co-Chairs of Subgroup 3 to illustrate their report.

44. *One of the Co-Chairs of Subgroup 3* illustrated the core principle that IICs should comply with "the higher standards of ESG", leaving to a specific assessment if the national standard was higher than the international one or *vice versa*. A point in this area was whether the final instrument would mention in either the applicable law clause or the specific clause on ESG that the IIC was in compliance with ESG and according to which law.[13] Suggesting the mandatory character of ESG rules in IICs would empower courts or arbitrators in the context of the particular dispute to compare legislations and extract the highest standard, so providing a "future-proof" instrument adaptable to the specific circumstances. A second point was whether to include a clause that would be incentivising investors to act in a certain manner, moving beyond what was actually prescribed by the law. As a third point, she stressed the current criticism on the ability of existing conventions to disincentivise corruption and the difficulty of identifying and compensating the real victims, i.e., the public finances and the population. The proposed draft anti-corruption clause drew on some models that existed in contracting.[14] *The other Co-Chair of the Subgroup* drew attention to Annexe 4 to the report, which was on pre-contractual provisions and prepared by doctoral students at the University of Ottawa, looking specifically at indigenous and local communities*. A further member of the Subgroup* noted that CSR was the most quickly evolving field in the area and thus an "anticipation" approach was essential to avoid that the final instrument be outdated upon publication. He continued commenting on the due diligence clause and stressed that the main principle inspiring the clause was that every risk should be assessed in advance of the project in consultation with local communities, and this was reflected in the methodology of placing the due diligence report as a condition precedent to the commencement of the obligations under the contract. Risk assessment should be turned into a continuing obligation by including it in a clause called "monitoring". Flowing from due diligence prior to commencement an action plan should then be formed and implemented, subject to monitoring and necessary adaptations. In the remedial area, the "no trade-off" mechanism was included by which the prevention measures should not be at the sacrifice of certain fundamental principles, but rather aim at eradicating the risk. Finally, cooperation between the parties was paramount, visible from the duties of exchange of information between States and investors, sharing the names of the experts hired for due diligence, and voicing States' concerns during the selection, for the collective benefit of the project.

45. *The UNIDROIT Chair* thanked Subgroup 3 members and asked how this sort of joint obligation would work, i.e., a due diligence obligation seemingly shared between the State and the investor, and how an obligation in favour of third parties would work, in the absence of remedial actions available to those parties. *The ICC Chair* asked what were the legal consequences of the due diligence clause as formulated, if it would work as a pre-condition for further obligation as it proved to happen for investors in arbitral case law, and what the consequences of a more pronounced obligation-sharing approach would be. *A member of the Subgroup* stressed that the main remedy/sanction was

[13] She mentioned that the recent EU CSDD directive was problematic as there was no mention of private international law apart from 29.7, where the mandatory character of the rules was stated.

[14] *E.g.,* the World Bank documents on anticorruption.

that, if the due diligence report was not carried out, the project would not start. The implementation/monitoring phase would be more problematic since the question was what remedy would apply if one of the parties did not comply with the action plan, *e.g.*, a suspension right or payment retention, termination and so forth. This would need specific examination. *Another participant* highlighted that most domestic jurisdictions and even international law nowadays provided for an environmental impact assessment obligation, binding on all States, and the trend was to extend it to human rights. He proposed to substitute "sustainability" with "sustainable development" or "SDGs" even though the latter might lapse very soon, but it was mentioned that "sustainability" had taken over the notion of CSR and had lately achieved a certain meaning and continued use in civil law countries, while being often opposed to ESG (which was more common in common law countries).

46. As to remedies and actions for third parties, o*ne member of the Subgroup* mentioned that lawsuits of recent years witnessed some creative use of traditional legal principles, such as false advertisement or fiduciary duties.[15] The Working Group should consider whether to empower third parties with some remedy or simply mention in the commentary the latest developments in case law, or otherwise create a framework of principles for when the State and/or the investor did not behave properly. *One of the Co-Chairs of the Subgroup* reminded that obligations could only be put on the shoulders of the parties, with no *"in rem"* remedies actionable. *The other Co-Chair* considered that further rules on third parties (indigenous and local communities) might be included in the precontractual phase and further along the life of contract, such as "prior and informed consent".[16] In this last regard, *the Deputy Secretary-General* considered that, while it would be easier to consider consequences of lack of information for third parties (including local communities) as to the impact of the investment on their interests, it should be ascertained which legal consequences would stem from their participation in the precontractual phase if they agreed to the overall project. *One participant* raised the issue of who, between the investor and the State, would bear the risk of third-party legal recourse and actions against the investment project based on human rights violations, which might result in the activities being suspended and delay until responsibilities were ascertained, with increasing costs for the investors.[17] He mentioned that clauses on risk allocation had started to appear in contract practice. *A member of the UNIDROIT Secretariat* mentioned in this regard that in the contracts that had been examined by the Task Force, clauses had appeared where the States tended to shift to the investor the responsibility for environmental, human rights and social damage, obliging the private party to hold the State harmless and placing a duty to indemnify individuals and local communities. He mentioned that the ALIC Guide referred to the practice of concluding IIC-related agreements with local communities. *Another participant* stressed that the due diligence clause gave the impression that the obligation to consult was on both parties. He considered the importance of strengthening the clause and allocating the burden of responsibility to interact with the local community and mentioned that the work of the International Law Commission on protection of persons, communities and the environment during armed conflicts might be of inspiration. *The Co-Chair of Subgroup 3* replied that in the draft proposal due diligence was a joint responsibility between the parties and that the investor had the primary obligation for due diligence, but the State was to approve the investors' initiative and collaborate. She concluded that the "joint responsibility" aspect might be reinforced, also adding mediation rules. The investor would have the leadership role in carrying out the due diligence, but the State had to provide reasonable assistance to the investor, especially in relation to consultation with local populations to prevent violations and further actions or lawsuits.

47. *The UNIDROIT Chair* considered then that there would be a recommendation or principle that urged the parties to have an impact assessment in place conducting the due diligence with a certain

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[15] *E.g.,* to challenge "greenwashing" and other types of conduct.

[16] It was mentioned that the work of FAO on the obligation of free prior and informed consent (FPIC) might guide the work here.

[17] *E.g.*, demobilising and remobilising personnel.

scope, including in the third parties' interest, while the model clause would operationalise the due diligence duty in detail. *A representative from the ICC* noted that the due diligence obligation for the investor should extend not only to its operations, but also to related firms' operations (the due diligence obligation would otherwise be eluded in a very simple manner). However, o*ne participant* cautioned against extending such a standard too far along the value chain, as this would reflect the highest European standards, putting pressure on investors from non-European and developing countries.

48. *The ICC Chair* referred to the anti-corruption model clauses in ICC instruments. He also mentioned case law where the parties, if a corruption case was established, were given the right to choose between cancellation of contract or damages. He referred to criticism of how corruption was often regulated, i.e., that corruption issues were quite often considered on the merits, and the burden of proof was on the private party. *One of the Co-Chairs* mentioned that the trend nowadays was to admit arbitral tribunals' jurisdiction on corruption. *A member of the UNIDROIT Secretariat* referred to case law that recognised the existence of an anti-corruption principle as a matter of transnational public policy[18] and that the extraction of transnational principles from investment case law might be a methodology to consider.[19] *Another participant* drew attention to how different approaches (treaty v. contract law) might be reconciled. One trend in arbitration, and in recent model BITs as well,[20] was to set aside on procedural grounds the entire proceeding as the investment operation was entirely vitiated since the start, while scholarship tended to question the need to sacrifice the reasons of investors if somebody from the State benefitted from corruption.

49. *The UNIDROIT Chair* took again the floor and asked whether, beyond the preamble, the anti-corruption and the due diligence obligations, further investors' obligations would be included in the text of contract, and if so, how they would be shaped, and if a set of incentives (as mentioned earlier) would serve some purpose in this regard. *The Co-Chair of Subgroup 3* confirmed that the intention was to create a fairly strong framework for investors' obligations and reflect specifically on how to create them. She opined that, compared to the past approach of including CSR in private law contracts by prescribing a very vague duty of "obeying international law", a due diligence system with clear scope and detailed risks monitoring, coupled with a specific set of actions and remedies to be put in place, would be much more effective. *Other participants* suggested that recent model BITs and IIAs might provide inspiration to elaborate upon ESG clauses at crossroads between private and public law, but other reminded that an excessively mandatory language would generate litigation. *A member of the UNIDROIT Secretariat* reminded to consider the ALIC Guide as a reference to shape investors' obligations, particularly the difference therein envisaged between due diligence obligations and obligations envisaging specific performance and the table on ESG remedies.[21] He mentioned that the Task Force contracts showed that investors' obligations could be made by reference to several sources, including national and international law or even contract text itself.

50. *The UNIDROIT Chair* concluded that Subgroup 3 would produce a number of principles or recommendations regarding: (i) "sustainability" as an umbrella concept covering policy goals both in the context of the preamble and possibly as investors' obligations with specific commitments; (ii) a map of "incentives" to investors to maintain certain behaviour; (iii) "cooperative due diligence"; (iv) "anti-corruption"; and (v) a standard on the "involvement and protection of third parties" or other stakeholders.

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18 Metal Tech v. Uzbekistan, World Duty Free v. Kenya.

19 This was also suggested by certain contributions from the Consultative Committee.

20 He mentioned the Dutch Model BIT and the most recent Indian one.

21 The ALIC Guide includes a very detailed table for each breach of ESG obligations, particularly renegotiation and collaboration before performance suspension, termination and compensation.

3. Report of Subgroup 1: Pre-contractual issues in IICs and validity

3.1 Pre-contractual phase

51. *One of the Chairs of Subgroup 1* introduced the section of the Subgroup 1 report on pre-contractual issues, focusing on the revisions that had been made to the proposals after the third Working Group session. She explained that each subtopic started by recalling the relevant existing UPICC provision(s), which remained unchanged (point a), followed by commentary that contained explanations on possible tension between the application of the UPICC provisions and the particularities of IICs (point b), and proposed model clauses to address such tension (point c). She explained that, generally, there was a risk that an adjudicator would override contract terms based on the principle of good faith. The model clauses aimed at diminishing such risk and it would therefore be important that they be formally endorsed.

52. With regard to point 1.1.1 on "risk for own assumptions", she explained that it was customary for contracting parties of IICs to carry out commercial due diligence. The proposed model clause specified that each party was expected to provide the information that was requested by the other party, while parties should not be considered to have acted in breach of a duty of good faith if they did not disclose information that was not requested by the other party. Following the third Working Group session, Subgroup 1 had added (i) a limited exception to the general rule (for information that the other party could not request because it could not reasonably be aware of its existence), and (ii) text in the commentary on contracts that were concluded following a tender process, recognising that the bidder might only carry out limited due diligence in such case.

53. *A participant* noted that the draft model clause contained a reference to dispute resolution in case there was a disagreement on the admissibility of any request for information. He raised the question of to what extent issues in the pre-contractual phase should be amenable to dispute resolution in the investment context. He also wondered whether the scope of good faith in the last paragraph of the draft model clause was perhaps too narrow.

54. With regard to point 1.1.2 on "freedom to evaluate own interests", *the Co-Chair of Subgroup 1* noted that following the third Working Group session, the Subgroup had (i) integrated into this point the proposal on "no liability for failure to reach an agreement" (which had been separately presented during the third Working Group session), (ii) added a reference to the possibility of failing to obtain the required approval to conclude the contract, (iii) added text in the commentary on IICs that had been concluded following a tender process, recognising that the dynamics of contract formation were different in such case and that the model clause might therefore not be relevant.

55. *The Secretary-General* wondered whether the draft model clause was formulated too broadly since it also seemed to provide protection in case of bad faith. He referred specifically to the phrase that a party may not be held to have acted in breach of a duty of good faith if, prior to the conclusion of a binding contract, it departed from its negotiating position. *The Co-Chair of Subgroup 1* explained that, in practice, there were situations in which a private investor entered into multiple contract negotiations simultaneously while it was clear that not all contracts would ultimately be approved internally. The aim was to prevent this from being considered to be bad faith. In other words, the idea was to clarify that commencing negotiations did not create an obligation to conclude a contract. *The ICC Chair* added that the draft model clause would also be benefiting the State. He referred to situations in which different State departments might have different views and therefore behave inconsistently during the pre-contractual phase. The model clause would allow the State in such case to ultimately decide not to conclude the contract.

56. With regard to point 1.1.3 on "compliance with mandatory rules", *the Co-Chair of Subgroup 1* explained that the aim was to ensure that terms that had been duly agreed and ratified by the competent bodies of the contracting parties were valid (e.g., tax breaks), even if they deviated from

the law generally applicable in the Host State. Following the discussions during the previous Working Group session, explanations had been added to the commentary to clarify that this clause should be distinguished from a "stabilisation" clause since it did not regulate the future validity of the terms of the IIC but was rather a representation by the State that the terms were valid at the time of entry into force of the contract.

57. *One participant* noted that the proposed model clause was phrased broadly since it referred to the law applicable in the Host State. She wondered whether there might be merit in adding an explicit reference to "mandatory rules". Furthermore, she noted that there might be mandatory rules that were not part of the State's law, e.g., fundamental principles under international law (or what she referred to as "transnational public policy"). With the current formulation, these would not be covered. *Another participant* agreed and pointed out that the same applied to public procurement law, i.e., not all principles mentioned in relevant international instruments might be incorporated in the Host State's law. *The Co-Chair of Subgroup 1* clarified that the intention was to have a representation by the State that the terms were valid and enforceable under the Host State law, so that they could not be contested later on as being not in compliance with that law.

58. *The UNIDROIT Chair* asked whether guidance should be provided elsewhere on international standards in relation to contract negotiations. *Several participants* cautioned against this. It was noted that the representation that had been proposed here was rightly limited to national law because that was within the control of the State.

59. *A participant* understood that the draft model clause was meant to be distinct from a "stabilisation" clause, but he considered that it could still have a similar effect. He therefore wondered whether the clause might raise questions of legality. *The Co-Chair of Subgroup 1* clarified that the clause was a representation by the State that the terms were valid at the time the contract was concluded. It did not regulate the consequences of possible changes to the law after that moment. *A member of the UNIDROIT Secretariat* added that it followed from the analysis done by the Task Force that such representation clause was used in practice. In the ensuing discussion, *the Co-Chair of Subgroup 1* emphasised that the draft model clause was not a stabilisation clause and that issues such as a change in government following contract conclusion were not relevant for this clause. It was suggested to include additional explanations in the commentary so that the meaning of the clause would be clear, or to develop a separate principle that would clarify the meaning of the pre-contractual phase and specify that the model clause was only relevant for the negotiations to enter into an IIC.

60. With regard to "stabilisation", *a member of the UNIDROIT Secretariat* indicated that certain IICs that had been examined by the Task Force contained a clause that envisaged renegotiation in case any privileged treatment or envisaged stabilisation was found to be incompatible with constitutional law or EU law. Such clauses aimed at finding an alternative solution to protect the investor in a similar manner.

61. With regard to point 1.2.1 on "entire agreement", *the Co-Chair of Subgroup 1* explained that IICs were often long and detailed, which created the expectation that they were meant to be exhaustive. The draft model clause aimed at ensuring that the contractual terms were not overridden by interpretations based on behaviour in the pre-contractual phase. It indicated that no duties for either party could be implied on the basis of their conduct or exchange of documents in the pre-contractual phase, or based on a duty of good faith, unless they were necessary to give business efficacy to the contract or were obvious, and did not contradict express terms of the contract.

62. *A participant* referred to the statement in the draft commentary that parties "*may assume that the carefully negotiated contract language will be the sole source of obligations between them*". He wondered how that related to mandatory rules in national or international law.

63. Finally, *a participant* asked a general question on how pre-contractual liability would relate to domestic law. He noted that issues could arise, especially if domestic law did not provide for pre-contractual liability of the State or even prohibited it. *One participant* suggested developing a specific provision on this matter. *Another participant* suggested that this was a general question linked to the applicable law and should be dealt with in that context. *The UNIDROIT Chair* agreed that the matter should be considered when discussing applicable law.

3.2 Validity

64. *A member of Subgroup 1* illustrated the subsequent part of the Subgroup 1 report concerning validity. As a caveat, he noted that several provisions on validity were not applicable to IICs that were concluded after a public tender, as opposed to after direct negotiations. The application of the provisions on validity might also be affected by legality clauses and representation and warranty clauses in IICs.

65. He then turned to the specific proposals of Subgroup 1. With regard to formal validity (point 2.2) and the general provisions regarding substantive validity (point 2.3.1), he explained that no major changes had been made since the third Working Group session. He only noted that it did not seem necessary to develop a model clause for the principle on "initial impossibility" (point 2.3.1.2), but an illustration could be provided. The same applied to several principles included in the section on "grounds for avoidance" (point 2.3.2), i.e., it was suggested to develop illustrations as to IICs rather than model clauses for most of these principles.

66. With regard to "gross disparity" (point 2.3.2.4), he highlighted that the draft principle was an adaptation of Article 3.2.7 of the UPICC but had also been inspired by the provisions in the UPICC on hardship since it provided for renegotiation as a main remedy while adaptation or avoidance of the IIC by the court or arbitral tribunal were last-resort remedies. With regard to "contracts infringing mandatory rules" (point 2.3.2.12), he explained that the draft principle had taken inspiration not only from Article 3.3.1 of the UPICC but also from New Zealand's Illegal Contracts Act 1970 and the Principles of European Contract Law. Under the proposed rule, an IIC would be of no effect to the extent that it was illegal under the laws of the Host State, those of the foreign investor, or any other applicable mandatory rule, whether of national, international or supranational origin. The suggested contract language contained a severability clause, stating that if any part, term, or provision of the IIC was held to be illegal, the remaining portion(s) shall be considered severable and not affected by such determination. Regarding corruption, the recommendation was to adopt an anti-corruption clause such as the ICC Model Anti-Corruption Clause.

67. With regard to point 2.2 on "formal validity", *the Deputy Secretary-General* observed that the draft model clause indicated that an IIC "*shall be considered binding and in force when it is concluded and approved by the competent bodies of the Host State*". She asked whether the last step to the conclusion of an IIC was always the approval by the competent bodies of the Host State. *The relevant member of Subgroup 1* indicated that the idea was to recognise that, if one of the parties was a State or State entity, in addition to the usual means of concluding a contract, there was usually a formal procedure on the side of the State to submit the contract for approval. However, he agreed that the language could be clarified. *The Co-Chair of Subgroup 1* added that, as had been recognised earlier, there might also be a need for formal approval on the side of the investor (e.g., by the Board of Directors).

68. *A participant* noted that the same language was used in the draft model clause under point 3.2.1.3 on "form of contract". She referred to cases where the Host State had challenged the validity of the contract based on formalities when the project was already underway and wondered whether there should be a duty on the State to assure that the formal process had been followed as required. *The UNIDROIT Chair and a member of the Secretariat* added that it followed from the input by the

Consultative Committee that it would be useful to consider issues of representation of the State in the future instrument since this often led to disputes.

69. With regard to corruption, *a member of the Secretariat* noted that several IICs that had been examined by the Task Force contained clauses that referred to the laws of the Host State, those of the foreign investor, and international conventions, and provided for the application of which of these three was most severe. Furthermore, several contracts referred to an obligation to prosecute, and some contained a representation clause relating to corruption or clauses concerning training on anti-corruption. He indicated that more insights might be provided if the Task Force were to continue research in this area.

70. With regard to gross disparity, *a participant* noted that different views had been expressed during the third Working Group session. Therefore, she considered that the question on whether a principle should be developed remained open. *The relevant member of Subgroup 1* responded that he had understood that gross disparity would be covered in the future instrument even if it remained for the parties to decide whether to use it.

3.3 Contract formation

71. *A member of Subgroup 1* noted that the section of the Subgroup 1 report concerning contract formation contained several preliminary observations, namely that IICs (i) were typically complex contracts that were concluded after extensive negotiations; (ii) might be concluded following various previous stages of agreement; and (iii) might involve tender procedures and other procedural requirements, which made the formation process different than for commercial contracts. Since many issues in this section related to the formation of the contract in the first place, model clauses were not always deemed necessary. More generally, the detailed rules on contract formation that may apply in a commercial context might not necessarily apply to IICs.

72. He then moved to the specific proposals in the report. With regard to point 3.2.1.2 on "binding character of contract", he indicated that a question for the Working Group was how to deal with public interest issues that might impact the contract (e.g., a cancellation of an IIC following a change in government). Regarding point 3.2.1.3 on "form of contract", he explained that the draft model clause contained a reference to approval by the competent bodies of the Host State and the investor. Moreover, it was specified that the conclusion of an IIC may also be confirmed by electronic means. With regard to point 3.2.1.4 on "notice", the UPICC provision was considered appropriate and a draft model clause had been developed. Regarding point 3.2.1.5.1 on "manner of formation", the commentary underlined that certain IICs were concluded following a tender process, which deviated from the general rules on offer and acceptance. A question for the Working Group was how to deal with a situation in which notice could not reach one of the parties (e.g., due to war or a *coup d'état*). Draft model clauses had also been developed on "definition of offer" (point 3.2.1.5.2), "revocation of offer" (point 3.1.2.5.4), "mode of acceptance" (point 3.2.1.5.6), "time of acceptance" (point 3.2.1.5.7), and "acceptance within a fixed period of time" (point 3.2.1.5.8). However, for all these model clauses, it was underlined that the process was different in case of a competitive bidding exercise. Regarding point 3.2.1.5.13 on "conclusion of contract dependent on agreement on specific matters or in a particular form", the commentary noted that it was common for complex contracts that parties signed interim documents. With regard to point 3.2.1.5.14 on "contract with terms deliberately left open", the relevant UPICC provision was deemed appropriate and no model clause was considered necessary since the content of such clause might differ depending on the circumstances of the case.

73. As a general remark, *several participants* suggested focusing in the future instrument on aspects concerning contract formation that were particularly relevant for IICs, noting that several details as provided in the UPICC were not pertinent for IICs. It was proposed to develop only a few general principles in this area, without getting into too many details. For instance, *one participant*

suggested deleting the proposals on "manner of formation", "definition of offer", "withdrawal of offer", "rejection of offer", and the provisions on "acceptance", and suggested to rather concentrate on bidding procedures or special approval requirements for IICs, for example. He indicated that it might be useful to develop guidance on what would happen in case of a departure from the relevant bidding rules in the negotiation between the investor and the State (e.g., whether this would lead to the invalidity of the IIC). He was in favour of keeping the provisions on "conclusion of contract dependent on agreement on specific matters or in a particular form" and "contract with terms deliberately left open".

74. *The UNIDROIT Chair* suggested that the Subgroup carefully identify whether there were issues regarding contract formation that were specific to IICs as compared to regular contracts. This could be the case due to the nature of one of the contracting parties of an IIC, namely a State or State entity, or because general principles from investment law needed to be reflected in IICs. She added that, for the part on contract formation, mainly the first aspect seemed relevant. *The ICC Chair* expressed doubt whether there was a need to enter into details on interim documents such as MoUs, suggesting that it might be preferable to focus on developing model clauses for the IIC as such. *A member of the UNIDROIT Secretariat* noted that it might be helpful to think about three possible circles of guidance: (i) a first circle on issues that were specific to IICs and that were therefore not covered in the UPICC (e.g., on stabilisation and policy goals); (ii) a second circle on issues that were covered in the UPICC but for which guidance for IICs might be useful (e.g., on compensation), either by means of new principles or by means of a reference to the UPICC but with commentary and model clauses for IICs; and (iii) a possible third circle on other existing UPICC, considering that these were already used in investment arbitration cases.

75. *A participant* expressed doubts about point 3.2.1.1 on "freedom of contract", noting that the extent to which a public actor was free to contract depended on the relevant domestic law. If the idea was to establish a transnational principle on freedom to contract, a comparative analysis was required, but he doubted whether such principle could be formulated for IICs on that basis, given that many domestic laws contained limitations to the freedom to contract for public actors. In his opinion, the general principle was that domestic law determined to what extent there was a capacity to contract. A question then was what the consequence would be in case a contract was concluded by a public actor and it was established later on that that actor did not have the capacity to contract.

76. *Another participant* agreed on the importance of the role of domestic law on issues relating to contract formation, including possible mandatory rules and the link with the law governing the contract. She noted that the question of whether an actor had the capacity to conclude a contract was also linked to the earlier discussion on a possible representation by parties that they had the authority to conclude a contract. Support was expressed for such representation clause.

77. Still regarding the freedom of contract, *a participant* noted that the UPICC were a soft-law instrument and that the commentary to the UPICC recognised that there were exceptions for States. He considered it important to decide whether the future instrument would only focus on concession contracts (or similar) or whether it would cover a broader range of contracts concerning "investments", noting that in the latter case, many of the provisions concerning commercial contracts would be appliable. *A member of the UNIDROIT Secretariat* agreed that the extent to which certain aspects would be covered in the future instrument depended on the approach to be followed in this respect.

78. *A participant* noted that it followed clearly from the structure of the UPICC that Article 1.1 on the freedom of contract was subject to mandatory rules, since this was stipulated in Article 1.4 of the UPICC. He noted that it was important to consider where to place a possible principle on freedom of contract in the future instrument. He also highlighted the need to verify internal consistency. For instance, he recalled that it was stated elsewhere that approval from the competent

bodies was required (e.g., in point 2.3.1.1), which was relevant for any guidance on the freedom of contract.

79. *The Deputy Secretary-General* indicated that the UPICC did not regulate the capacity to contract, so that a possible principle on this matter would be complementary to the UPICC. She explained that the UPICC provisions relating to agency or representation excluded all situations where the relationship was created by law. In the ensuing discussion, it was noted that the capacity to enter into a contract was not covered by the law governing the contract but rather by the law applicable to each of the contracting parties. It was mentioned that certain domestic laws contained a rule that prevented a State from arguing that it did not have the capacity to enter into a contract when it already did so, and that a similar approach was followed in several ICC Model Clauses. There were also rules in public international law on restrictions for the State to invoke its own law. It was discussed that an adequate balance should be found to prevent an investor from evading rules on capacity to contract in the relevant law while the State would subsequently be unable to argue its incapacity. *One participant* noted that a private lawyer might consider issues of agency while a public lawyer might think of attribution and Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. He proposed being ambitious by attempting to harmonise these approaches.

80. *The Deputy Secretary-General* explained that the UPICC contained guidance on the possible need for public permissions. She noted that the Working Group might wish to consider that and perhaps adapt it to the specificities of IICs (for which, she understood, permissions might not only be required from the outset but also during the life of the contract).

81. With regard to point 3.2.1.4 on "notice", *a participant* observed that paragraph 3 of the relevant principle indicated that "*a notice 'reaches' a person when given to that person orally or delivered at that person's place of business or mailing address*". He wondered what the reference to "person" meant for the State party (e.g., a minister or someone from a government department, etc.). He suggested looking at case law of national courts arising out of enforcement of summons, i.e., to take inspiration from how the summons of the court were delivered to a State.

82. With regard to point 3.2.1.5.1 on "manner of formation", *a participant* noted the draft principle indicated that the conduct of the parties was sufficient to show agreement. Doubts were expressed on whether this would work in a contract that involved the State, since there might be a need to comply with specific procedural requirement (e.g., if an investor would start building and nobody objected, it did not mean that there was agreement on the project). Therefore, *some participants* wondered whether such provision on formation was needed. If so, it was suggested to carefully consider its formulation. *A member of the UNIDROIT Secretariat* added that there might also be the need for approval of the project from an ESG perspective.

3.4 Remedies

83. *One of the Chairs of Subgroup 1* made several introductory points: (i) the Working Group was invited to consider how to arrange remedies, compensation, damages in the future instrument; (ii) the Subgroup was conscious of the criticism on the approach to damages in arbitration practice and it was hoped that the future instrument could contribute to identifying solutions, noting also that damages were not the only possible remedy; (iii) the Subgroup had taken the UPICC as a starting point, while the output and structure might have been different if the starting point had been to identify issues in IICs; (iv) a challenge was that the remedies might differ depending on the type of IIC; (v) there might be situations in which remedies would be combined (e.g., termination and damages); and (vi) the interaction between the UPICC that were deemed relevant for IICs and the model clauses would need to be clarified.

84. Following a question from a participant on point (iii), *the Co-Chair of Subgroup 1* clarified that the Subgroup had analysed the suitability of the relevant UPICC provisions (in Chapter 7) to IICs and had developed draft contract language. The discussion then turned to the specific proposals of Subgroup 1. Regarding point 4.3.2 on "performance of non-monetary obligation", *the Deputy Secretary-General* explained that the relevant provision of the UPICC (Article 7.2.2) should be read in conjunction with the commentary thereto, and that there were several caveats and exceptions that might apply, making the provision balanced and reasonable.

85. With regard to point 4.5.1 on "right to damages", *a participant* observed that the suggestion in the UPICC provisions seemed to be that every non-performance would result in damages, and that the subsequent compensation was linked to harm. He wondered whether there could be alternative remedies. *The Co-Chair of Subgroup 1* confirmed that this was the reasoning in the UPICC, although she agreed that there should be a range of remedies for non-performance. *Another participant* expressed the view that, in common law jurisdictions, damages were the first in line, and it was not possible to oblige contracting parties to continue a project if they did not want to.

86. Regarding point 4.5.2 on "full compensation", *a participant* suggested deleting the second part on compensation for non-pecuniary harm from the principle and the draft model clause, given that it did not seem pertinent in the context of IICs. Furthermore, she suggested providing some examples in the commentary to clarify the concept of full compensation in the investment context. *The Co-Chair of Subgroup 1* indicated that claims for moral damages might also arise in the investment context. *Another participant* suggested to replace the examples "physical suffering or emotional distress" by "reputational or moral damages" (or similar), instead of deleting that part.

87. The discussion then turned to point 4.5.4 on "foreseeability of harm". *One participant* considered that the reference to foreseeability might be confusing and inappropriate for IICs. He noted that the Draft Articles on Responsibility of States for Internationally Wrongful Acts did not contain such reference in the context of restitution. *Other participants* considered the "foreseeability" of the harm a fundamental factor. *One participant* noted that it was a core principle in common law jurisdictions, and that it was also linked to the possibility for parties to obtain insurance to protect themselves. *The Secretary-General* suggested that limiting recoverable harm to what was foreseeable was especially relevant to protect the investor when it was the non-performing party. *The initial participant* explained that he considered the concept of foreseeability confusing and complex in the context of IICs since a State could do anything due to its sovereign powers. This made essentially everything either foreseeable or unforeseeable. As an example, he referred to expropriation.

88. In the ensuing discussion, it was clarified that foreseeability of contractual loss or harm and foreseeability of non-performance were two distinct matters. The first was covered in Article 7.4.4 of the UPICC and point 4.5.4 of the Subgroup 1 report, which specified that the concept of "foreseeability" should be interpreted narrowly and that it was a flexible concept, giving wide discretion to the adjudicator. The provision on foreseeability of harm did not regard the cause of the harm (which could be breach of contract, expropriation, etc.). Since reference had been to expropriation, *a member of the UNIDROIT Secretariat* added that consideration could be given to developing specific guidance on compensation in the context of expropriation. It was also discussed that harm to the environment raised complex questions, not only in the investment context but more generally. *The UNIDROIT Chair* suggested highlighting this in the commentary. Finally, *a participant* made the point that issues concerning damages were related to the applicable law, i.e., that the consequences of a breach of rules of customary international law would be determined by international law while a breach of obligations in a contract governed by a domestic law would be governed by the latter.

89. Related to the *Draft Articles on Responsibility of States for Internationally Wrongful Acts, a participant* noted that these did not cover the contractual aspects of State responsibility, which was

a distinct area. He indicated that it was recognised in the literature that public international law had not addressed issues of damages in an appropriate way, at least with regard to damages arising from contracts. He emphasised that public international law was problematic in this respect, while the relevant UPICC provisions had been developed after careful consideration, appropriately balanced the interests of the parties, and could enhance predictability. Reference was made to the Chorzów Factory formula in investment arbitration and a possible new project by the International Law Commission on damages.

90. With regard to point 4.5.10 on "interest on damages", *a participant* referred to a recent publication by UNCTAD which had shown that the application of compound interest might in practice double the amount of the compensation. She was in favour of recommending simple interest rather than compound interest, at least for the post-award phase. Linked to this, *another participant* suggested to develop guidance on maximum recovery (or similar wording).

91. With regard to point 4.5.13 on "agreed payment for non-performance", *the ICC Chair* noted that one of the main criticisms made by States in the context of investment arbitration concerned the extent of the amount of damages claimed and of the awards rendered by arbitral tribunals. He wondered whether there would be merit in a model clause on liquidated damages that could limit the amount of damages that might result from the contract (i.e., as a control mechanism).

92. Several suggestions were made on possible additional elements to be considered in the future instrument. *One participant* suggested to add guidance on the possible suspension of performance. *The Deputy Secretary-General* noted that this seemed covered to some extent under point 4.2.1 on "withholding of performance". *Another participant* suggested providing guidance on the method for the calculation of damages. He noted that clarity in this regard may be helpful given the different legal and technical concepts in this area. *Another participant* preferred not to try to formulate guidance on the calculation method since it was dependent on factual and industry-specific factors, and subject to debate among accounting and valuation experts.

93. *Some participants* suggested developing a principle that prohibited double recovery. *One participant* noted that inspiration could be sought from the Draft Articles on Responsibility of States for Internationally Wrongful Acts. *The Deputy Secretary-General* explained that Article 7.4.2 of the UPICC indicated that full compensation should consider "*any gain to the aggrieved party resulting from its avoidance of cost or harm*". The idea was therefore that the aggrieved party should not receive more than the damage. *A participant* added that Article 7.4.8 of the UPICC on the duty to mitigate harm was also relevant in this context. He expressed doubts whether a new provision on double recovery would be necessary. *The initial participant* clarified that he meant preventing double recovery obtained through different proceedings (e.g., contract-based and treaty-based claims). *The Deputy Secretary-General* confirmed that this was not addressed in the UPICC but hinted that it might be a procedural matter, perhaps not limited to IICs.

94. *The UNIDROIT Chair* provided suggestions for the way forward. She noted that the logic was to develop principles, with clear explanations in the commentary – especially if it was considered that a specific UPICC provision was not deemed suitable for IICs in its current form – followed by model clauses. With regard to the suggestions that had been made regarding possible additional aspects to be addressed in the future instrument (e.g., double recovery), she suggested developing proposals for consideration by the Working Group during the next session.

4. Report of Subgroup 4: Choice of law and dispute settlement clauses

95. *One of the Chairs of Subgroup 4* thanked the members of the Subgroup for their helpful contributions to the report, the UNIDROIT Secretariat, and the Task Force for having shared the valuable outcome of its research on choice of law and dispute settlement clauses in IICs. He recalled that Subgroup 4 had decided to first develop draft model clauses, to provide a concrete basis for

discussion, while principles and commentary could be developed later on. Furthermore, the work of Subgroup 4 had been guided by several general principles: (i) the instrument had to account for diversity since there was no one-size-fits-all approach to choice of law and dispute settlement clauses in IICs; (ii) the developments in investment treaty arbitration could provide helpful insights (e.g., the trend to provide greater clarity on treaty provisions, and lessons could be drawn from the issues that had arisen in international investment disputes); and (iii) the instrument had to consider the work of other international organisations in this area. A question for discussion was to what extent such work should be incorporated into the instrument and to what extent it could simply be referenced.

4.1 Choice of law clauses

96. *One of the Chairs of Subgroup 4* indicated that the Subgroup had greatly benefited from the memorandum of the Task Force on choice of law clauses, and from a presentation by ICSID on contract-based investment arbitration. In the report, the Subgroup had tried to distil some key principles from the variety of approaches to applicable law that could be seen in practice. The report provided a menu of basic options for contracting parties. Specifically, Section A provided draft model clauses on the primary source of applicable law. Existing practice showed that most IICs referred to the domestic law of the Host State as applicable law (possibly in combination with another source), but the draft model clauses also provided alternative options on the primary source of law, namely the UPICC, the future instrument, or the law of a third State. Section B provided draft model clauses for situations in which the parties wished to add a secondary source of law, e.g., "rules of international law" or "generally accepted principles of commercial law". He noted that paragraph 24 of the report contained questions for discussion by the Working Group.

97. *A participant* suggested to consider different layers of applicable law, building on investment arbitration where five types of applicable law could be discerned: (i) the law applicable to the contract, (ii) the law applicable to the arbitration clause, (iii) the law governing the seat, (iv) the procedural law, and (v) the law applicable to enforcement – which was less relevant in this context. *The Co-Chair of Subgroup 4* clarified that this part of the Subgroup 4 report focused only on the law applicable to the contract.

98. *A participant* noted that the law applicable to the contract would still be heterogeneous. For instance, if parties chose a law other than the domestic law of the Host State, the latter law would remain relevant for administrative and public law aspects; if the UPICC were chosen as applicable law, they would need to be supplemented by other law (e.g., property and tort law) for non-contractual issues, and so forth. Therefore, she considered that the draft model clauses in the report did not provide the full spectrum. *The Secretary-General* agreed that a granular analysis would be useful, since not all aspects of the contract would be regulated by the same law.

99. *A participant* suggested to examine the model clauses for the Use of the UPICC as a source for inspiration to provide clarity to contracting parties. She pointing in particular to the model clause under point (4), which referred to the domestic law as governing law and the UPICC as a means to interpret and supplement that law. *The ICC Chair* agreed that that was a useful example. He cautioned against a combination of domestic and international law that would be perceived as imposing international control over the Host State's law.

100. In response to the question in the report regarding conflict of law rules, *the ICC Chair* was in favour of explicitly excluding the conflict of law rules of the relevant domestic legal system. He noted that this was the approach followed in most contracts and that it would be in line with the spirit of the UPICC to select a specific substantive law rather than relying on conflict of laws rules. *The Co-Chair of Subgroup 4* agreed.

101. In response to the question in the report whether a "mandatory rules" clause should be added, *the ICC Chair* noted that it might be useful to do so, since it might be reassuring for States to specify that mandatory rules were applicable even if a certain law was chosen as applicable law.

102. With regard to Section B, *a participant* suggested clarifying what was meant by "primary" and "secondary" sources of law, recognising that the mode of interaction between the two was complex. He recalled that he had expressed support for *dépeçage* in the previous Working Group session, while others had been sceptical about that. He also noted that there was a tendency to push for international law in investment treaty arbitration, which was explained due to the role of public international law, while for IICs, the role of international law and its relationship with domestic law might be different. It was agreed that it was important to clarify the relationship between different sources of law.

103. *The Working Group* discussed that the guidance to be provided on applicable law also depended on the format and content of the future instrument. If the future instrument would be a set of principles with model clauses, the principles themselves could be chosen as applicable law to the contract or as a means to interpret and supplement the applicable law, in a similar way as the UPICC. The approach might be different in case the future instrument would only provide model contract language.

104. *One participant* expressed concerns about the emphasis in the report on the use of international law and transnational law as the secondary applicable law to IICs and, specifically, their "gap-filling" or "corrective" function. He noted that it followed from the memorandum of the Task Force that it was not common for IICs to provide for a combination of domestic law and international law as governing law. If it was deemed necessary to refer to international law and transnational law as a secondary source of law, he suggested specifying (i) which were the relevant international norms, and (ii) to which aspects of the contract these could be applicable. He considered that the formulation of draft model clause B.1, which was taken from Article 42 of the ICSID Convention, was not appropriate because it would give an adjudicator the power to override domestic law as it saw fit.

105. *Another participant* noted that the UPICC were known, were widely used, and had already been applied to some extent in investment arbitration cases. He was of the opinion that, if the scope of the future instrument was limited to concession agreements, the UPICC provisions could be incorporated in the contract or chosen as applicable law, while the relevant elements of the domestic law (e.g., concerning public law) would still apply. Making use of the UPICC would bring an additional layer of certainty and predictability, which was beneficial for both the investor and the State. He added that, if an issue arose and the contracting parties would seek recourse to an international arbitration tribunal, the latter would recognise and apply the contractual provisions provided that they did not contravene international public policy. An interesting question would be whether private law or public international law remedies would then apply.

106. *The Working Group* generally agreed that it would be useful to develop a model clause that provided for the application of domestic law in combination with the UPICC or the future instrument. This was considered preferable to referring generally to "international law" or "principles of international commercial law" since such broad reference would not provide the required clarity for contracting parties. *A participant* agreed that it would be useful to explicitly refer to the future instrument as a means to complement or interpret the applicable law. She noted that a similar mechanism was already included in the arbitration law of Panama, which stipulated that arbitrators had to apply the law chosen by the parties but should take into consideration the UPICC in any international arbitration. *The Secretary-General* added that it would be in the interest of investors to have a neutral component as applicable law. He explained that, for similar reasons, the applicable law to bonds issued by developing jurisdictions tended to be a set of international principles or the law of a third State to diminish risks relating to unilateral changes to the Host State's law.

107. *The Deputy Secretary-General* raised the question whether, apart from the chosen law, the model clause should refer to other sources of law that would be applicable in any case, especially those with a public law nature (e.g., soft law).

108. *A participant* suggested also providing guidance on what happened in the absence of a choice of law. He noted that this has been deliberately addressed in Article 42 of the ICSID Convention, limiting the applicability of conflict of laws rules. *The Co-Chair of Subgroup 4* wondered what type of guidance could be provided on this point, especially if the focus was on developing model contract language. *The UNIDROIT Chair* noted that it might be covered in a principle. *The Co-Chair of Subgroup 4* responded that a principle could not determine the applicable law in the absence of a choice by parties due to its non-binding nature. It was agreed that this would be further reflected upon.

109. With regard to the question of whether to incorporate or cross-refer to other international instruments, *one participant* noted that it might be preferable to copy relevant texts in the future instrument and adapt them as necessary to make them less susceptible to change over time. *Another participant* indicated that many of the issues under discussion by the Working Group were addressed in the *Guide on the Law Applicable to International Investment Arbitration* of the Organization of American States, which could usefully be considered going forward. *The Secretary-General* added that the *Principles on Choice of Law in International Commercial Contracts* of the Hague Conference on Private International Law should also be considered.

110. *One participant* supported the view that *"renvoi"* and conflict rules should be excluded both when an express choice of law was made and in absence of choice. Indeed, in the first case, the arbitrators would apply the substantive law principles in the law chosen by the parties, while in the second case leaving the arbitrators free to apply a *"renvoi"* would lead to unpredictability. *The Co-Chair of Subgroup 4* replied that there was sufficient consensus in the Working Group that conflict of law rules should be excluded. On the absence of choice of law by the parties, he argued that any set of principles in this area would depend on the final outcome: in the context of contractual guidance, it would be pointless to suggest a solution that would not be the preferable one, while for a set of stand-alone principles that would apply to contracts, it would make sense to foresee all kinds of situations, including absence of choice.

111. *The UNIDROIT Chair* expressed the view that hopefully the process would conclude with a list of principles, that might target not only contracting parties, but also legislators and arbitrators, and therefore covering absence of choice would be recommendable. *Another participant* pointed out that, in absence of party choice, contractual issues would be subject to their proper conflict rule and depending on the connecting factors, each issue might be subject to a different law. The parties might decide, within the scope of their choice (contract law as opposed to tort or property law), which is the contractual law that applied to guarantees or sales and apply different laws. However, she suggested that this would amount to an interference with party's flexibility and, in relation to the application of public international law, that was not within the power of the parties to decide whether public international law was applicable or not to an IIC.

112. *There was general consensus in the Working Group* that at the private law level, it was up to the parties to decide whether they wished different parts of the contract to be regulated by different legal systems. That different laws might apply to a contract[22] might result in a certain degree of confusion, but party choice should be respected. *The Chair of the Consultative Committee* reminded that a final say on this point was given by the Hague Principles recognising party autonomy in this area. *Other participants* stressed that, as a principle, a IIC was not to be deemed a creature of public international law and thus there was no reason to apply international law as a default rule, but the parties might still decide to choose it. This was found to be in line with Article 42 of the ICSID Convention which dictated that party autonomy should be respected, with international law as a

[22] *E.g.,* an arbitration clause regulated by English law.

fallback rule to address certain aspects related to States. In any case, public international law could and should not be excluded from a contractual setting as that of IICs since it was particularly relevant for articulating a protection of policy goals. Public international laws dictated to what extent it applied to IICs and, today, it was not the same as it had been in the 1960s. Indeed, it not only limited but also empowered States to take some action and increasingly created obligations on investors so that public international law principles on policy goals (e.g., corruption, money laundering) would apply *per se*, regardless of party choice.[23]

113. *Other participants* stressed the distinction between *dépeçage* and characterisation issues involved by IICs. If a certain situation or event caused a hardship, this would amount to a contractual issue and the choice of law of the parties should be looked into. However, if a change in law occurred and the IIC included a stabilisation clause, the breach of a stabilisation clause would raise a violation of public international law. In general, many participants agreed, based on their experience, that *dépeçage* would only complicate the framework leading to various practical problems, including uncertainty, and that the final instrument should only reaffirm the right of the parties to apply different laws to separate parts of the contract, while not encouraging its use beyond the limits of strict necessity.[24]

114. *One of the Co-Chairs of Subgroup 4* thanked the participants and mentioned that they would not support the idea of providing too many options in the choice of law clause because this would run counter to the purpose of providing clarity to prospective users. A central issue was rather the relationship between the host State law and public international law, which had raised some concern along the discussion as, if the reference to public international law was left generic and broad, it would open the floor to trump domestic law. It was, however, particularly interesting to hear from participants that public international law would also include policy principles (e.g., ESG). They would not apply *per se*, as not all of them were part of international public policy, but of course they would bring in many principles and cover many concerns that would not be left to domestic law.

115. *The Co-Chair of Subgroup 4* finally thanked the participants for their comments and indicated that the Subgroup would reflect on how to address them in the next draft.

4.2 Dispute settlement clauses

116. *The UNIDROIT Chair* invited the other Co-Chair of Subgroup 4 to illustrate the sections of their report relating to dispute settlement clauses, while stressing the importance of well-drafted dispute settlement rules. *The other Co-Chair of Subgroup 4* took the floor and mentioned that, as dispute settlement clauses had not been discussed to much extent in earlier sessions, it would have been useful for the Subgroup to hear opinions on general issues such as how to allocate text in the different parts of the format, with which level of specificity, and how much the final instrument should be linked with the work of other international organisations. Other issues that needed discussion were: whether to include negotiations that might prevent arbitration from proceeding and how they should be articulated (i.e., providing for joint committees in the model clauses or notes in the commentary); whether to include mediation, often not facilitated by IIAs and not internalised by States' bureaucracies, despite recent developments; whether a separate clause for court proceedings was necessary, together with the arbitration clause; whether and with which specificity

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[23] *The Chair of the Consultative Committee* reminded the Working Group in this regard that private contracts could never override public international law and that the early arbitral cases, hardly criticised, were trying to complement very specific private law situations in legal orders where rules on interest, force majeure or restitution were lacking, by making reference to general principles of law in Article 38 of the Statute of the ICJ.

[24] *Dépeçage* could be useful to parties for practical reasons, for instance when the parties would be dealing with mandatory laws that prohibited some of the choices made in the final instrument (e.g., penalty clauses or exclusion of liability). To some extent, the parties might want to avoid difficulties and have, for instance, penalty clauses in the contract regulated by a different law from the one applicable in general.

to cover counterclaims that, while being an enormous question in the IIA arbitration context, were allowed as default rule in a contractual setting; whether to consider conditions and limitations on consent that, again, seemed to be tied to the IIA context where States consented to an indefinite number of disputes with indefinite parties, thus envisaging limitations; how to articulate notice of intent to submit an arbitration, cooling off periods and their legal effects, given their paramount function in engaging the parties in preventing disputes before they reached the stage of the adversarial process that only arbitration might settle; and how to cover waivers, taking into account that the final instrument had the purpose of complementing investment law reform.[25] In this regard, the question was what could be waived, and *the other Co-Chair of Subgroup 4* suggested that the parties could not waive all of their rights, as IIAs included umbrella clauses exactly because a State might act extra-contractually as sovereign. However, often the private parties to an IIC dressed contractual actions as umbrella clause actions, which might be waived from treaty arbitration. Another approach to waivers might be to give effect to a choice of forum when the fundamental basis of a claim was of a contractual nature,[26] even though when the fundamental basis of the claim was to be found in a treaty standard the tribunal might decide in a different manner. Other points were: how to cover sovereign immunity, which despite being covered by many contracts examined by the Task Force, were subjected to national legislation and would hardly provide – regardless of any contractual language – a legal basis for award enforcement against government non-commercial assets; how to deal with transparency, which was seemingly difficult to handle in non-institutional contexts, despite recent advancements from UNCITRAL; how to address professional conduct, recently regulated by the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution; and finally the approach to non-disputing party submissions, as *"amicus curiae"* briefs, given the role played in voicing the concerns of local communities and their relevance in most recent arbitration rules.

117. *The ICC Chair* mentioned as a key element that the dispute settlement mechanism to be offered should be very simple and should not try solve all the problems of IIA arbitration. Many of the issues raised had been discussed by the ICC Commission on Arbitration in 2012 before the ICC Rules of Arbitration of 2012 were modified and, as a result of that discussion, recommendations to States and private entities were prepared specifically addressing model dispute resolution clauses.[27] He expressed doubts as to whether conditions and limitations on consent should be covered, as the extension of the arbitration clause could be addressed pursuant to the applicable law to the arbitration clause, but he agreed that notice of intent should be covered. He supported a multi-tiered clause providing consultations, negotiations and possibly mediation, while waivers of IIA arbitration should be addressed since States would not like to adhere to a system if they could be adjudicated elsewhere. Sovereign immunity, transparency and *"amicus curiae"* interventions might be dealt by reference to ICC instruments, while as to professional codes of conduct, his opinion was that each arbitration system had its own rules to ensure the independence and impartiality of arbitrators. In general, the approach should consider fixing the limits of the contractual system, as UNCITRAL was doing in parallel for the treaty arbitration system.

118. *Some participants* referred to the whole body of work carried out by UNCTAD and under UNCITRAL's Working Group III to reform the investment treaty system as a possible inspiration. *Another participant* commented positively the proposals on transparency and waivers but stressed a marked bias in favour of arbitration as a default rule, discarding the policy considerations that might play in favour of domestic courts. He added that the final instrument might well include a model forum selection clause more in line with the ALIC Guide, although he recognised that the Task Force memorandum clearly indicated that arbitration was the prevalent choice by the parties. He proposed

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25 *E.g.*, "fork in the road" rule.

26 He mentioned the "Woodruff" case of 1903 before the US-Venezuela Mixed Claims Commission and the more recent Vivendi annulment case.

27 Including a transparency and confidentiality clause and a waiver of immunity clause.

to include various grievance mechanisms for non-contracting parties and to give more weight to dispute boards and expert determinations.

119. *A representative from the ICC* considered that 17 ICC model commercial contracts had been updated in 2024, which included dispute resolution clauses and mediation as an option. He recalled four options concerning mediation in ICC instruments[28] and advocated for taking inspiration from what the ICC had developed. He mentioned the experience accumulated by the mechanism for mediation under the ICC mediation rules, where the mediators were appointed by the International Centre for Amicable Dispute Resolution (ADR), which might work as a reference and be included in the final instrument without the need to reinvent the mechanism.[29] As to waivers, he invited the Working Group to ascertain whether the current clauses would cover claims by the shareholders of the investor and pleaded to avoid clauses that would allow submitting concurrent claims after a certain period of time. As to transparency, he referred that some jurisdictions had mandatory rules in State-private arbitration, which could be included in the commentary as informative elements.

120. *One participant* agreed with the UNIDROIT Chair that guidance should be given to users as to dedicating time to draft well-articulated dispute settlement clauses, which were often left to last-minute negotiations. He relied on his experience to consider that in most cases mediation, especially when compulsory, was viewed by the public party as a purely formal opportunity, as it would be regarded as an implicit admission of responsibility. The *UN Convention on Mediation* might provide more room for States to accept mediation in the future.[30] *Another participant* mentioned that UNCITRAL had adopted guidelines on mediation and model provisions describing the most critical issues. An overarching obligation on transparency might be achieved through reference to the *Mauritius Convention* or the *Institutional Arbitration Rules on Transparency in Treaty-based Investor-State Arbitration.*

121. *Many participants* agreed on the relevance of the notice of intent and generally agreed on the need to focus on non-adjudicatory remedies (diverse from mediation), including in the sequence negotiations, direct consultations between the parties, negotiations through other entities, experts' determination and dispute boards, with a role for local communities in solving certain disputes. Mediation should not be mandatory but still included as a separate option. *Other participants* agreed that the tools of the ICC's ADR Centre, as well as the ICSID instruments (including the new mediation rules), might work to achieve dispute prevention. *One participant* reminded that a recent case in Brazil, opposing the State regulator and a major company, was partly settled through an *ad hoc* mediation mechanism established under the auspices of the Court of Accounts, overcoming fears of public officials to abide mediation. *Another one* noted that some areas of the world were more amenable to mediation (*i.e.*, Asia-Pacific) and that the new system providing that the outcome of mediation was produced in an arbitration award might result more acceptable to public officials. Mediation should be available at any stage, including during the adjudicatory phase. Indeed, many cases were discontinued even at an advanced stage because of agreements between the parties.

122. *The UNIDROIT Chair* commented in this regard whether the advocated interaction between different tools would bring about a hybridisation of the dispute settlement system adding complications to the matter. *Some participants* replied that the tools would work well if their different

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[28] Self-mediation, obligations to consult about mediation, obligations to start mediation before starting arbitration, the obligation to start mediation for a certain period of time and the possibility to start arbitration only after that period of time.

[29] He mentioned that the ICC Mediation Rules, despite seeing fewer cases than ICC arbitration every year, had indeed a very active caseload: from 2023, 37 requests for mediation had been received by the ADR Centre which involved 90 parties and, among those 90 parties, six were States or State entities. In 2024 alone, the ICC's ADR Centre had appointed 24 mediators.

[30] A lot of initiatives were flowing from the positive momentum created by the Singapore Convention, such as – amongst others – a guidance note published by the International Mediation Institute on the profile of mediators selected for the mediation of investor-to-state disputes, which were supposed to need specific skills.

nature was preserved and boundaries were kept clear and defined.[31] *A representative from the ICC* reminded that the ICC had launched a task force on ADR for the purpose of providing guidance on how to combine different tools in an effective manner to settle disputes. The task force had issued two instruments in 2023.[32] The main guidance was to open windows for introducing different mechanisms[33] that produced anticipated discussion on which claims could be solved separately, including the possibility for the parties to ask the arbitral tribunal for a preliminary view of the case; which might lead the parties to agree, since later on they would lose leeway to achieve an agreement in favour of the arbitral tribunal decision. *The Deputy Secretary-General* recalled that the trend in favour of avoidance of disputes was also present in traditional civil procedure, particularly in the *ELI-UNIDROIT Model European Rules of Civil Procedure,* while expert determination in relation to force majeure was suggested in the *UNIDROIT/FAO/IFAD Legal Guide on Contract Farming*.

123. *One participant* argued that some guidance on counterclaims might be included, particularly when they regarded ESG related to the investment but not included in the contract. *Another participant* agreed that counterclaims were allowed under ICSID rules, but might be articulated in a broader sense, especially outside the ICSID scope of application, not being limited to those arising out of the dispute but arising from the entire contractual transaction or in relation to its broader framework. *Other participants* argued against covering counterclaims since those aspects would be covered by arbitration rules, while widening the scope to ESG would mean becoming entangled with domestic jurisdiction courts. *A member of the UNIDROIT Secretariat* clarified that the discussion on counterclaims came out of the parallel debate in treaty arbitration on the one-sidedness of IIAs/BITs and, while it was perfectly understandable that counterclaims were the rule in a contractual setting, some guidance in the commentary might reinforce ESG policies that did not work in investment treaty arbitration.

124. *The ICC Chair* considered that counterclaims not arising out of a breach of the contract, but from a breach of further rules, were usually taken into account in purely commercial arbitration in two manners, *i.e.,* through the wording of the arbitration clause itself that consented, *e.g.*, to consider environmental counterclaims, or by the proper law applying to the contract, *e.g.*, if it contained provisions prohibiting contamination or other related matters. Guidance in the commentary might grapple with this crucial issue, considering the criticism against IIA arbitration. It was considered that guidance on counterclaims was not a minor issue as, after the issuing of the final instrument, the body of arbitrators would largely remain the same, and it would be natural that the entire jurisprudence that was developed under the ICSID Convention might be deemed to apply to contractual arbitration.

125. *The Co-Chair of Subgroup 4* thanked the Working Group for the insights received, both on specific issues and as to the general philosophy of the exercise. He valued the suggestions on keeping things simple and identifying their added value without replicating the complexity which affected ISDS. He recalled as an appropriate method to clarify what issues were superfluous and what were suitable for incorporation in the principles or model clauses, or allocated in the commentary.

5. Report of Subgroup 0: Introduction

126. *The UNIDROIT Chair* invited the Co-Chairs of Subgroup 0 to illustrate their report. *The Co-Chair of Subgroup 0* noted that the work was not as advanced as the work of the other Subgroups, but this also depended on how the entire project would be moving forward. While many introductory issues were not controversial, the issues for debate were: the scope of application, particularly if the final instrument would contain principles that could serve as the applicable law to a contract; external

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[31] *I.e.*, a mediator might not act as an arbitrator.

[32] One on effective conflict management and the second on facilitating settlement in international arbitration.

[33] Dispute boards, advisory bodies, joint committees, mediation.

gaps, especially whether the host State's domestic law should be coupled with or supplemented by international law (in line with Article 42 of the ICSID Convention); and exclusions and modifications if the instrument related to domestic law, mandatory laws, and how it related to international law. Finally, a paramount issue was whether there was consensus in the Working Group as to whether a definition of IIC was needed. As an "opt-in" instrument, he suggested that there should be no need to define IICs since it would be up to the parties to judge if the instrument was suitable for them, provided that the instrument did not interfere with any domestic law or international law rule. Conversely, if the final instrument and its principles would apply to a certain type of contracts independently of party choice, a definition might be necessary.

127. *The Secretary-General* invited the Working Group to reflect whether the scope of application of the instrument would require at least some functional definitions for the purposes of the application of guidance or principles by prospective users. *The Chair of the Consultative Committee* considered that, for the purpose of any definition, a reference to "State" or "State entities' contracts" would suffice. The final instrument would typically apply to classical concessions and licences or natural resources, but it would not discount application to other types of contracts. *Some participants* supported the idea that definitions were necessary to set the scope, as in the PRICL and that external gaps should be covered, but left for a later stage, while business usages in the UPICC sense should be determined by IIC sectors (e.g., *"lex petrolia"*). *Other participants* distinguished between definitions with a normative meaning, as opposed to descriptions factually covering to which situations the instrument would apply.[34] *Many participants* mentioned the intrinsic difficulty in normatively defining what an IIC was, taking into account the initial discussion on their legal nature, the types of contracts that would fall therein, and the need for the instrument to be future-proof.

128. *The UNIDROIT Chair* asked whether the final instrument could take stock of the many existing definitions of IICs, but without taking any position, except the necessary existence of a relationship between a private party and a State or a State entity. This would create some boundaries without getting into complex definitional issues. *The ICC Chair* concurred that any discussion of IIC definition should be avoided. Indeed, while contribution to economic development, duration and risk might be elements to consider, the case law was evolving in a complicated manner and the only distinctive element to prevent ordinary sales from falling into the picture would be the long-term nature. *The Secretary-General* considered that, irrespective of the opportunity to provide a conceptual definition of IICs, some other basic concepts should be necessarily articulated for the purposes of determining their use in this instrument. *The Deputy Secretary-General* supported the methodology of "illustrations" that might be of use to concretely clarify the scope of the instrument. *The Co-Chair of Subgroup 4* agreed that certain specific concepts that were to be used generally across the instrument would need to be defined in order to maintain a uniform interpretation.

129. *The UNIDROIT Chair* concluded the discussion on the report of Subgroup 0, mentioning the importance of the introduction as an essential step to illustrate the background and aims of the instrument and facilitate its use.

Item 6: Organisation of future work

130. *The* UNIDROIT *Chair* took the floor and thanked all the participants for the contribution to the discussion that was a turning point for the elaboration of the future instrument. She communicated the dates of the future sessions: 1-3 April and 10-12 June 2025, both in Paris, while the final session would be scheduled for 27-29 October 2025, in Rome. She scheduled the end of January 2025 as the deadline to complete the Subgroup reports and the text of the provisional instrument. All texts would then be joined and assigned to the Drafting Committee. The text would be split in two parts and discussed again, the first half in the April session and the second in the June session. The Drafting

[34] An example of description might be found in the UNCITRAL Model Law on International Commercial Arbitration, where "commercial" was described in a footnote rather than defined.

Committee would be formed in January and would officially be in charge of elaborating the future instrument. The text to be completed by the end of January 2025 would be the starting point and might be freely revised, modified or integrated. By summer 2025, a text would be available that could be discussed in order to have a product for the October session to be sent out for assessment by the Consultative Committee and for public consultation by interested stakeholders. In parallel, initiatives might be undertaken to seek the opinion of selected subjects. Another session might be held in the first semester of 2026 before approval of the final version by the UNIDROIT Joint Governing Council and General Assembly of the Centenary, on one side, and the ICC's governing bodies, on the other, at the end of 2026. In the process, in mid-February 2025, a workshop would be held with FIDIC professionals and further subjects to gain insight into construction contracts and further aspects that needed to be explored. Following specific questions from participants, *the UNIDROIT Chair* clarified that the Consultative Committee included also experts appointed by States that were not members of UNIDROIT and particularly developing countries. She took note that the compilation of responses of the members of the Consultative Committee and a summary of responses had been circulated to the Working Group and that it would be integrated in the intersessional work. She noted that both the text for consultation and responses would be published on the website, while the methodology of work to select possible elements of concern from the contribution would be examined in later sessions.

Items 7, 8: Any other business; Closing of the session

131. In the absence of any other business, *the UNIDROIT Chair* thanked the Working Group participants for their valuable contributions and closed the session.

ANNEXE I

LIST OF PARTICIPANTS

MEMBERS

Ms Maria Chiara MALAGUTI *Chair*	President UNIDROIT
Mr Eduardo SILVA ROMERO *Chair*	Chair ICC Institute Council
Mr José Antonio MORENO RODRIGUEZ *Chair of the Consultative Committee*	Professor Founding Partner, Altra Legal
Mr Lauro GAMA	Professor Pontifical Catholic University of Rio de Janeiro
Ms Margie-Lys JAIME	Professor University of Panama Of Counsel, Infante & Pérez Almillano
Ms Ndanga KAMAU *remotely*	Ndanga Kamau International Lawyer - Arbitrator - Counsel Founder, Ndanga Kamau Law (the Hague)
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Ms Deborah RUSSETTI	Lecturer Università Cattolica del Sacro Cuore

ANNEXE II

AGENDA

1. Opening of the session and welcome
2. Adoption of the agenda and organisation of the session
3. Adoption of the Summary Report of the third session (Study L-IIC – W.G. 3 – Doc. 7)
4. Update on intersessional work and developments since the third Working Group session
5. Consideration of work in progress
    a) Draft proposals of the Subgroups and draft structure of the future instrument
    b) Feedback from the Consultative Committee
    c) Other matters identified by the Secretariat
6. Organisation of future work
7. Any other business
8. Closing of the session