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Fifth session (hybrid)
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SUMMARY REPORT

OF THE FIFTH SESSION

(1 – 3 April 2025)

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1. The fifth session of the Working Group on International Investment Contracts ("the Working Group") was held in hybrid format from 1 to 3 April 2025 in Paris. The session was attended by 24 individual experts and 8 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 drew the attention of the Working Group to the need to examine the preliminary Draft Master Copy of the instrument that had been circulated to the participants, focusing the attention on the structure, possible inconsistencies, and the improvement of language. They explained that the Draft Master Copy was not more than a purely provisional compilation of the texts proposed by the Subgroups and that it needed to be significantly improved. *The UNIDROIT Chair* clarified that the aim of the session was to give the Drafting Committee clear directions on drafting but also on some policy decisions still to be made, while *the ICC Chair* highlighted the need for the ICC to include its input, particularly as regarded model clauses and the various results published by its committees. Both Chairs invited the participants to hold very specific text-based discussion.

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 Chapters of the preliminary draft Master Copy in the following order: Chapter 3, Chapter 4, Chapter 5, Chapter 7, followed by a general discussion on Chapters 6 and Chapter 8.

5. *The Working Group agreed with the organisation of the session as proposed and adopted the Draft Agenda (UNIDROIT 2025 – Study L-IIC – W.G. 5 – Doc. 1, available in Annexe II).*

Item 3: Update on intersessional work and developments since the fourth Working Group session

6. *A representative of the UNIDROIT Secretariat* updated the Working Group on the intersessional progress made prior to the fifth session. She explained that the Subgroups had concluded work on their reports and delivered the outcome at different deadlines around the end of January. Subgroup 0, in charge of the Introduction to the instrument and Chapter 1, had decided not to update its Report as it was deemed to be related to the contents of other Chapters, still to be defined. A Drafting Committee composed of six members was established, which refined the preliminary draft Master Copy of the future instrument to make it more readable and formulated comments and questions to the Working Group. A Secretariat's Report compiled the questions Chapter-by-Chapter to guide the discussion in view of the fifth session. She also recalled that an intersessional workshop on international investment construction contracts had been held on 3 March 2025 – in collaboration with FIDIC – and that a report of the Workshop had been circulated to the Working Group.

Item 4: Consideration of work in progress

a) Draft Chapter 3: Pre-contractual Phase

7. *The UNIDROIT Chair* drew attention to Chapter 3 of the Draft Master Copy on the Pre-contractual phase and invited the relevant member of the Drafting Committee to illustrate the content of the Chapter and the work done so far, as well as possible criticalities.

8. *The Drafting Committee member* started from the first sub-section on the Principles applicable to the pre-contractual phase, Regulatory scope and pre-contractual documents (A.1), and highlighted how there had been a change in methodology, abandoning a systematic overview of the UNIDROIT Principles to focus on what was specific to IICs. Consequently, the text did not replicate the structure of the UPICC, which were mostly deleted, but rather included principles peculiar to investment contract negotiations. In this vein, there was a perception that issues of regulatory scope would also apply in the pre-contractual phase (and not only when a contract had been concluded and fully in force). In particular, the principle that the State should maintain during IIC negotiations – which might be long and complicated – its own regulatory scope in the public interest might be viewed to contradict some prominent UPICC, such as good faith and unfair dealings or inconsistent behaviour (Arts. 1.7 and 1.8) or liability for negotiations in bad faith (Art. 2.1.15). This was also deemed relevant to the investors' commercial strategies. During long-lasting and complicated negotiations, the understanding of public interest in a certain State might change (along with ensuing legislation). The same was true for market conditions or a company's set of objectives. The State might not know whether the Parliament would ratify the contract, and the investor might not know if the board would approve. Therefore, the commentary gave a background on the desirability of a principle that would shield both the State and the investor from the consequences of a regulatory change or the modification of commercial strategy, allowing the negotiating parties to break off the negotiations subject to such restrictions they might have expressly agreed in pre-contractual documents. A caveat would be made for international competitive bidding where long-lasting individual negotiations might be lacking and thus the dynamic would be different.

9. *One participant* sought to put forward a preliminary general remark on the relationship between the future instrument and investment treaties before moving to text-based discussion. She considered that the trend seemed to be that treaty protection would hold, international investment agreements (IIAs) would be amended or reformed, and thus any future instrument should consider how it would relate to or complement existing and future treaties. She also raised an issue of terminology, noting that the Draft Master Copy sometimes departed from investment law terminology and other times remained aligned to it, and this might create confusion; she suggested that terms should be carefully chosen and, when departing from accepted language, accompanied by explanatory notes as to their meaning and relationship to central investment law concepts. *Another participant* further discussed that IIAs were foreseen to endure, but their reform would likely take a great amount of time, during which the system was not sustainable; the future instrument might therefore provide States and investors with a free-standing tool as an alternative to treaties. She added that IICs were currently concluded in great numbers, as shown by PCA disputes, and she agreed that the relationship between the future instrument and treaty regimes should be examined as, in the end, treaty protection was triggered by a measure of exercise of public power, but the future instrument should provide independent courses of action. *A representative of the Secretariat* recalled that the issue of addressing the relationship between the future instrument and investment treaty law had been framed since the first version of the Issues Paper as of paramount importance. A future instrument might work under or in combination with the normative contents of applicable IIAs, but also in absence of IIAs or under a waiver of treaty arbitration; how to build a bridge between the future instrument and current or future IIAs, clarifying their interplay in different contexts, was therefore a crucial issue to consider. *The UNIDROIT Chair* took note and suggested that such considerations would prove relevant within the context of the discussion on the introduction of the future instrument. *A further participant* wished to raise an issue of structure concerning Chapter 3 on the Pre-contractual phase. He mentioned that the Working Group had to define clear criteria on what of the UPICC or IIC-specific principles or adaptations would be left in or taken out. He commented that certain principles therein, such as

good faith or regulatory scope, might be placed in the initial Chapters, while the manner they applied to IICs could be articulated only and exclusively through model clauses. He also mentioned that clarification would be needed on why certain UPICC applied (or not) to IICs, or how they applied to IICs. *A representative of the UNIDROIT Secretariat* recalled, in this last regard, that the Chapter was conceived as only including principles specifying or excluding the application of certain UPICC to IICs (*e.g.*, good faith) in a manner to some extent derogating from the UPICC, but the Working Group should consider that, in principle, in the final version of the future instrument a short introduction to the Chapter would explain which UPICC did not apply to IICs, which UPICC applied as they were, and which UPICC applied with specific adaptations from that same Chapter, thus adding clarity to the whole narrative. In addition, some of the general principles to which Chapter 3 provided adaptations or exclusions were already included in Chapters 1 and 2 but needed to be developed. *Another participant* noted that a Chapter on the Pre-contractual phase including both principles on transactional documents and due diligence would seem heterogenous and therefore in need of further assessment. *A further participant* stressed that due diligence obligations were different in character and needed to be considered during the entire life of contract; the importation of due diligence in the Chapter on rights and obligations could then make sense.

10. *A participant* wished to comment in this last regard that international competitive bidding was the preferred solution for a great number of infrastructure investment operations, especially in developing countries and with the support of international financial institutions (IFIs); therefore, a reference to pre-contractual "procedures" might be preferred.

11. *The ICC Chair* clarified in this regard that, based on practice, hybrid situations might occur where, in the context of an international competitive bidding procedure, the bidding papers indeed contained a draft contract proposed by the State with some clauses imposed on the bidder, which could not be negotiated, and other clauses that could be negotiated by the final chosen bidder. He proposed that some lines in the commentary might address these hybrid situations where principles for negotiated contracts also applied to IICs stemming from competitive bidding procedures.

12. *Other participants* subscribed to the latter position, one emphasising that in her experience not only the parties had room for manoeuvre to negotiate a certain set of clauses, but also financiers, including IFIs, that had their own standards to include in the contract as conditions for financing. She also clarified that such a principle on regulatory scope in the pre-contractual phase, designed as a peculiarity of IICs which departed from the UPICC, should rather be recognised from the outset as part of the principles that applied in respect to States when agreeing to IICs. She firmly objected to any principle that would constrain States' choice of contractors in the pre-contractual phase. *Another participant* raised the issue of how to explain the relationship between the UPICC when taken as wholly applicable to an IICs and the specific principles formulated for the pre-contractual phase, the reach of which should be transnational (and perhaps be tested against the backdrop of different domestic laws), and how to make arbitrable – as it currently occurred in treaty arbitration - possible disputes arising out of the negotiations (*e.g.*, through pre-contractual documents).

13. *One participant* agreed with the latter opinion that a principle on States' regulatory freedom needed to be included in Chapter 1 on General Provisions, as to prescribe its application across the whole contract, with cross-references at least in the principles concerning the pre-contractual phase (with regard to good faith and pre-contractual liability) as well as the stabilisation principle, or rather an independent contractual principle with an independent and more specific wording. He also mentioned that the pre-contractual phase as defined in the current structure might be characterised more properly as "formation of contract" and be joined with Chapter 4 and invited the Working Group to consider whether a chapter on principles on the pre-contractual phase was necessary to the structure of the instrument. He also noted that some simple model clauses might suffice. He agreed that no primary obligations should be inferred for the parties in the pre-contractual phase, particularly as to change of policy. He finally opined that excluding a violation of the good faith

principle in the event of a change of policy or commercial strategy should not be taken as suggesting bad faith behaviour. The fact of the matter was that excluding certain situations from the standard of good faith was difficult, as in the UPICC it could not be waived; in this regard, careful language was needed both in the principle and in the commentary to avoid misinterpretation.

14. *One participant* sought to confirm that good faith was necessary and should not be excluded as a general provision of the instrument, in the interest both of States and investors, but certain legal effects should be expressly excluded or contracted out of with specific and clear language. *Another participant* agreed and recalled that both good faith and liability for negotiations in bad faith should not be excluded, nor should it be taken for granted that disputes would not arise out of changes in law and policy or commercial strategies since experience showed that litigation on this very much occurred in practice (including before national courts). *The ICC Chair* added that even in legal orders where the distinction between public and private law was clear (and administrative law prevailed), there were protections for investors and contractors where a State or State official committed a fraud in the process: in these cases, private investors would expect to have a cause of action. *A further participant* warned that what was formulated as a clause excluding a breach of good faith might amount to a principle, asking if there would be merit in triggering a dispute resolution clause in the pre-contractual phase to cover cases where a cause of action was anyway available under treaty law.

15. Finally, *one participant* considered if the sub-section should refer to the pre-contractual process rather than documents since there was no reference to specific types of documents (such as letters of intent), which might vary from one sector to another, depending on the type of contract.

16. *The Drafting Committee member*, invited by the UNIDROIT Chair, then introduced further sections and subsections, expressing perplexity on the use of representations and warranties (R&W) in the pre-contractual phase, and explaining the philosophy underlying the principle on the relevance of the pre-contractual phase to determine the scope of contractual obligations and the entire agreement clause. She recalled that UPICC Art. 4.3(a) mentioned preliminary negotiations between the parties as relevant circumstances in interpreting the contract, UPICC Art. 4.8 mentioned the intentions of the parties and good faith as a source to supplement the contract, and UPICC Art. 5.1.2(c) mentioned the intentions of the parties in good faith as a source of implied duties between the parties. In line with international contract practice, which showed extensive contractual language to regulate the details of its interpretation to prevent unwanted implied conditions or legal effects, the sub-section suggested including a clause expressly stating that the contract was completely exhaustive as to the obligations between the parties (entire agreement clause).

17. *The ICC Chair* pointed out that the inclusion of the R&W methodology stemmed out of a proposal by the ICC but it still had to be developed. He listed as an example a clause stating that the parties had the legal capacity to enter into the contract (including the arbitration clause) or had undertaken proper due diligence before contracting. *A representative of the UNIDROIT Secretariat* added that, since the June 2024 session and in attachment to the second revised Issues Paper, the structure in Annexe 2 reported a reference to R&W in several Chapters to highlight the possible use of this methodology under different headings.

18. *Some participants* objected to the inclusion of R&W among the principles dedicated to the pre-contractual phase, as the contract was not signed yet, but they still supported the suggestion of including an entire agreement clause in the instrument since it would prevent importing into the contractual relationship all previous versions of the commitments formulated during the negotiations or possible treaty commitments. *One participant* supported the importance of an entire agreement clause as well as a tool to prevent implied terms or interpretations of contract obligations contradicting expressed terms, but recalled that, by a reading of the IICs examined by the research

Task Force established under the Roma Tre-UNIDROIT Centre for Transnational Commercial Law and International Arbitration ("the Task Force"), it was clear that R&W were scattered around in several parts of the text of contracts, being used with different aims and functions (including on legal capacity, due diligence and so forth), which laid out the ground for thinking whether and how they should be used in the future instrument.

19. In this regard, the *Chair of the Consultative Committee* recalled the common law connotation of the expression "R&W" and invited the *UNIDROIT Deputy Secretary-General* to expand on the UNIDROIT methodology, particularly as regarded neutral language. She took the floor and confirmed that UNIDROIT instruments usually avoided using expressions that could be traced back to legal concepts pertaining to a certain legal system, to prevent them from being charged with the normative meanings they kept in their original environment and to maintain a uniform interpretation in line with the transnational character of the instrument. She also proposed to consider if language that was widespread and consolidated in contract practice – since it performed specifically necessary functions – could be translated into model clauses rather than normative principles with a functional approach. Specific text in the commentary might further explain their role in relation to different legal systems.

20. *One participant* objected to the position regarding entire agreement in Chapter 3, proposing its relocation to Chapter 1 on interpretation or rather Chapter 6 on rights and obligations, since it included language with an obligatory character. He also expressed doubts on the connection suggested in an earlier intervention between the entire agreement clause and investment treaties, such being a matter of waiver of arbitration. *Other participants* agreed on including R&P in rights and obligations. A further participant warned that R&P were used in contracts with different meanings and that, while they might be placed in several Chapters, a fair solution might be to set a general principle in the initial chapter, which might broadly explain the methodology without going into the merits, rather illustrating in the commentary how it could be used and what functions it might fulfil in specific areas where it could be applied simply through model clauses.

21. *The UNIDROIT Chair* summarised the discussion and noted that, based on the views expressed by the participants, some of the principles might be relocated and distributed in Chapters 1 and 2 (e.g., States' regulatory powers), others in Chapter 4 under formation of contract (*e.g.*, a principle on IIC pre-contractual negotiation, when relevant). She highlighted that by avoiding duplications and re-arranging contents for macro-areas (for instance, by aggregating all contents related to sustainability into a single Chapter, covering also pre-contract and the entire cycle of contract monitoring), fewer selected Chapters and principles might finally remain in place. This would be in line with the criterion that the instrument should only cover principles that were affected by the specificities of IICs and that had no relevance to ordinary contracts. A principle on good faith specifically adapted to IICs should reiterate the duty to act in good faith and cooperate, protecting the resources invested in negotiations while considering parties' freedom to change their policies, particularly the State in the public interest. A principle concerning R&W might be included in Chapter 1, while due regard should be given to the difference between negotiated and non-negotiated IICs; in the latter case, a principle should reiterate some level of liability or responsibility in the pre-contractual phase. Any formulation in this last regard – *some participants* added - should examine whether it would be appropriate to use peremptory or endeavour language, considering the size and capacity of developing or least developed States. Finally, the need for flexibility was stressed, which might be incorporated as a renegotiation mechanism, as well as the need to reconsider pre-contractual issues during the discussion on the applicable law later in the process in June.

b) Draft Chapter 4: Formation, Parties and Authority

22. *The UNIDROIT Chair* then passed to Chapter 4 of the Draft Master Copy on Formation, Parties and Authorities and invited the relevant member of the Drafting Committee to illustrate the work done so far.

23. *The Drafting Committee member concerned* illustrated that Chapter 4 was dedicated to issues concerning the formation of an IIC, particularly how the contract was formed and which steps made it complete, definitive and binding between the parties or by which it could be amended. He confirmed that several elements recurred in Chapter 4 that had also been discussed under Chapter 3, and they might need to be formulated more generally and relocated between Chapter 4 (from Chapter 3) and the initial Chapters 1 and 2. He especially mentioned the entire agreement clause that limited the reach and scope of contractual rights and obligations, that should be derived and determined only and exclusively in accordance with the final contract as signed, and the issue of necessary differentiation between negotiated and not negotiated IICs (*e.g.*, under public procurement procedures). He recalled that a part of the work done in the Chapter had been inspired by the UPICC and adapted to the needs of IICs, particularly the principle on "terms deliberately left open", where it was clarified that open terms did not imply that the contract was not binding; this principle was perceived as especially important for IICs to the extent that they were long-term contracts that could not foresee all cases of life and which included mechanisms to ensure flexibility during the entire duration of contract. Another UPICC-inspired principle would be that of "notice", its importance lying in that it would add clarity through a framework for communications between the parties, based on a well-structured model clause. In relation to issues concerning the nature of the parties of an IIC, he considered that principles were included to address the necessary approval by the competent authorities of the public signatory, as well as by the bodies of the foreign investing company. He confirmed, in relation to the latter, that a general principle on parties also dealing with approval procedures might be added before, in the initial Chapter. Following a notation by *the UNIDROIT Chair* that authority to bind the parties, particularly the State, was dealt with in several chapters, including in Chapter 5 on validity, which might suggest some reallocation, he mentioned that a general legal capacity principle concerning the parties might be better dealt with in the right order in an initial Chapter, also taking into account IIC practice as examined by the Roma Tre-UNIDROIT Task Force, which evinced the R&W methodology frequently used to deal with this subject matter.

24. *One participant* stressed in this last regard the importance of a complete principle on parties' capacity, including the identity and nature of the parties as well as the legal consequences stemming therefrom; a principle in this area should identify which body would be empowered by law to bind the State or a State entity (the Prime Minister's Cabinet, Ministries, public corporations, regional governorates and municipalities or what were called *"personnes territoriales"*) and clarify in particular which were the competent representatives or officials in charge (Ministers, Chairmen or CEOs of public companies, Governors, Mayors) that could sign an IIC on behalf of the State, depending on the domestic applicable rules. He noted that a paramount question was whether State-owned enterprises should be considered public entities and if they were able to bind the State. *Another participant* added that parties should come first, before formation, and be clearly identified (was a Ministry part of the State? Was a public authority or agency part of the State?) together with their authorised representatives. Ministers and other public officials or charges in publicly-controlled companies would not act in their personal capacity, but rather in their institutional capacity and so bind the State and subsequent Ministers, according to the principle of State continuity.

25. *A further participant* considered that Principle 7 and particularly the commentary and the model clause, as formulated, went well beyond the form of contract, mentioning issues of competence of the signatory to sign the IIC. He identified three issues in this area: (i) the identity of the public parties signing an IIC, *i.e.*, the State or a State enterprise, controlled or not controlled by the State, with different legal consequences (since the actions of an enterprise not controlled by the State might not be attributed to the State, including that it would not be able to promise a

stabilisation clause); (ii) issues of competence, *i.e.*, domestic legal rules on the internal distribution of work that stated which department was entitled to enter into an IIC with a foreign investor; (iii) issues of legal capacity to bind the State, which derived from the internal distribution of competence, but informed which subject at the highest level in the relevant administration, according to the applicable domestic rule (often of constitutional character), might sign the IIC and bind the State. He noted that, in this last regard, problems might arise as to due diligence and R&W, as a foreign investor might be required to know internal rules on representation or be granted a R&W that the public signatory had legal capacity, but later this might be objected to by the State as contrary to internal regal rules (*i.e.*, no capacity of the public signatory to release R&W). It followed that the three aspects had to be fully articulated in the principle and the commentary, as well as possible model clauses.

26. *Other participants* mentioned different kind of practices in this area between the parties such as, in addition to R&W, the exchange of powers of attorney or documents attesting to legal capacity to represent and bind the State, the practice of asking legal opinions of the State authority concerned, State attorneys and lawyers, or external independent lawyers, on whether the public party was empowered to sign by law. It was also suggested to include an extended definition of parties, clarifying what that meant, in comparison with instruments such as the UNCITRAL Model Law on Arbitration that provided such a definition.

27. *The UNIDROIT Deputy Secretary-General* also added that the UPICC may provide inspiration on issues of authorities' approval in their principle on the application for public permission when a contract did not provide anything on the subject matter. *Another participant* wished to remember that rules on legal capacity or authority approval were also provided in Chapter 5, where legal capacity was viewed as a requirement for the substantive validity of an IIC. *One further participant* opined in this regard that the relevance of the nature of the parties and legal capacity in several regards and their inclusion in multiple chapters might suggest including all those elements in one single chapter on legal capacity, in accordance with the selective approach that was suggested earlier in the process.

28. *Some participants* denied the relevance of any type of verbal agreements or assurances that might be granted to foreign investors that were not formalised in writing or passed through the approval procedures of the authorities, as the primary agreement. It was also mentioned that in many countries oral testimony could not be used to provide evidence of contracts beyond certain value thresholds, while new technologies such as "deepfake" videos might be used fraudulently; therefore, the written form would remain a guarantee, including in electronic format in accordance with the rules provided by the UNCITRAL Model Law on Electronic Signatures.

29. Moving to Principle 8 on the binding character of contract prohibiting modifications or termination unless in accordance with the same terms of contract, *the UNIDROIT Chair* commented that the alternative formulations (A, B) wished to consider a situation where there was no regulatory freedom and another where a safeguard of the latter was included. In other words, in situation A, once an IIC was signed, the rights generated in favour of the foreign investor could not be altered, while in situation B, any regulatory change would likely affect the contractual rights previously formed.

30. *One participant* supported version B, recalling that in many jurisdictions, such as the Arab countries, contracts prevailed over legislation and regulations if they were not contradicting a mandatory rule, as a matter of public policy.

31. *One participant* opened an aside on what would occur when the parties – as often happened – did provide for *de facto* modification of contract and behaved in line with the agreed amendment without passing through the official approval of the authorities. *Another participant* replied in this regard that, in general, the principle of *"parallelisme des formes"* would apply and that, as to the

legal relevance of amendments not approved by the authorities, this would mainly depend on whether the sector required parliamentary approval (*e.g.*, natural resources) and on the legal regime in the host State. This would suggest a more general approach, which did not interfere with domestic rules.

32. *A further participant* considered that, in principle, the first formulation would work well since it specified that any amendment or the termination of an IIC should be ruled in accordance with the terms of contract. However, in many countries there were rules that provided the right of the State to terminate the contract for reasons of public interest, coupled or not with the obligation to pay full compensation, without any possibility to derogate by contract from such a mandatory principle of public policy. This would lead to the question of what law would govern the IIC, since possibly a governing law other than the host State law might provide otherwise. *A group of participants* agreed that this was an issue depending on the applicable law and that possibly a reference to the "applicable law" was missing in Principle 8. *Some participants* expressed the view that reference should be made to the "applicable law", others supported the reference to "national or domestic law", thus covering issues of public interest or public policy. *A further participant* considered that a reference to "the applicable law" would mean nothing if not specified as the law that the parties selected as the governing law of contract in the choice of law clause. She also added that the contract could not prevail over the State's sovereign regulatory powers.

33. *One participant* drew attention to the fact that the inclusion of a reference to "national or domestic law" in this area should be critically assessed, as the domestic law referenced would be in principle the law of the same State which was party to the IIC and could then be changed by the same State party to the agreement, which was exactly the reason why the ICSID Convention referred in article 42 not only to the law of the host State, but also to international law.

34. *A representative of the UNIDROIT Secretariat* recalled that the first option in Principle 8 would amount to a so-called "intangibility" clause, which some legal scholars characterised as slightly different from stabilisation clauses, as they would prevent specific contractual modifications which derived from administrative measures affecting the contract or from changes of contract law in the host State. *Another participant* agreed and noted that the first alternative in Principle 8, read together with the principle *"pacta sunt servanda"* in the first lines of the commentary, would then be akin to a stabilisation clause, much more drastic than the economic equilibrium clause (and the limited fiscal freezing clause) included in Chapter 7, which would approach the techniques for the internationalisation of contract used in the 1960s.

35. *The ICC Chair* sought to clarify in this regard that the future instrument could not solve complex issues of interaction between legal orders, including the international one, but that the aim of the project was exactly to provide an applicable law for future IICs, well-enough defined, articulated and balanced, while any element of national law that the parties might wish to introduce would be beyond the reach of this project. *A representative of the UNIDROIT Secretariat* further added that, in line with the theory and practice of transnational law, the future instrument would provide by implication a set of certain and clearly defined transnational substantive principles for IICs that would be offered to parties of future IICs and that they would chose as the applicable law to their contracts, while any issue that would not be covered by the principles would be for the parties to cover by indicating the governing law, or for the legal order with the closest connection, *i.e.*, the law of the host State. State public policy would not be affected if the instrument was well balanced and offered clarity in this regard.

36. *One participant* considered that the second option in Principle 8 would offer safeguards since it would include the language "subject to [cross-reference to the principle on regulatory freedom]"; at the same time, he mentioned that the cross-reference to regulatory freedom would not be a blank check to make any change to the relevant IIC, because only a *bona fide*, non-discriminatory exercise of regulatory powers in the public interest would remain legitimate. In this

regard, another participant mentioned that the intangibility principle in question would only deprive the State of the right to amend or terminate the contract unilaterally, while not touching upon the legitimate use of legislative or regulatory powers. This would be in line with the principle "*pact sunt servanda*" which was accepted in most civil law codes and in common law, as well as in international law as a general principle of law.

37. *The UNIDROIT Chair* considered at this point whether the fact that the principle on the binding character of contract was a general principle accepted in most legal traditions and already included in the UPICC would suggest keeping it out of the instrument, as it would in any case apply to IICs. The Working Group agreed to set the issue aside for further assessment and discussion once issues of stabilisation, remedies (including termination), and applicable law had been further defined.

38. Moving to the text of Principle 9 on "Manner of formation", *the ICC Chair* then invited the Working Group to further discuss whether the reference to a different form for IICs resulting from competitive bidding was justified. It was mentioned that IICs resulting from public procurement would not be entirely negotiated and signed but rather result from the procedure of identification of the best bidder and the final acceptance of its tender by the State through the award letter, with the consequence that they would still result in a contract in written form. Usually, all bidding documents were attached to the final acceptance which were undersigned by the tenderer and formed part of the final contract.

39. The ICC Chair then turned to discuss whether the different types of formation of procurement contracts – and accordingly, any other part of the instrument that needed specification on this point – should be covered by specific language in Principle 9 or in a more general provision, or rather addressed only in the commentary. *One participant* noted that bidding procedures were quite harmonised and defined in the guidelines of international financiers or in the UNCITRAL instrument on PPPs. Also, FIDIC had developed a Red Book, a Yellow Book and a Silver Book that were in line with international practice. *Participants* agreed that, at least on written form, there was only one principle that was applied across different types of contracts, and thus Principle 9 could be rephrased and merged into one single principle with Principle 7, while the commentary would give notice of the different procedures or manner for formation when it came to procurement contracts.

40. *The Working Group* then largely agreed that Principle 10 on "Writing in confirmation and entire agreement", inspired by the relevant UPICC, was fulfilling the same function of the text on an entire agreement clause in Chapter 3 as previously discussed; it was decided to merge the two texts into a single principle. *One participant* noted that the Principle might not be in line with IIC practice when it stated that the IIC prevailed over bidding documents and all communications and exchanges before the stipulation, but it was finally agreed that all those documents were usually incorporated in the final contract.

41. *A representative of the UNIDROIT Secretariat* then clarified that most of the Principles included in Chapter 4 still to be commented were largely inspired by the corresponding UPICC and, in line with approach to select only IIC-specific principles, could be assessed properly and possibly deleted if found to be generally applicable or not relevant to IICs.

42. *The Drafting Committee member* argued in this regard that while certain UPICC provisions might be applicable as they were, the Working Group should consider that the draft text to be commented upon still offered model clauses that were not present in the UPICC and that were deemed used to apply the relevant UPICC to IICs. He then continued illustrating Principle 11 which, in line with the relevant UPICC, concerned situations where, if the parties had agreed that a contract had to be in a particular form, it was not to be concluded until that form was achieved. This was deemed to be relevant in the context of IICs, where certain legislation provided for the contract to be in a certain form.

43. *Some participants* commented that the last part of the sentence in para. 1 of the commentary ("while minor terms which the parties have not settled may subsequently be implied either in fact or by law") could be perceived to be quite problematic for IICs, where parties were not open to implications not specifically agreed and the State was bound by the legality principle and public authorities' approval.

44. *The ICC Chair* invited the Working Group to examine Principle 12 on "Terms deliberately left open", which referred to situations where the fact that the parties were unwilling or unable at the time of conclusion to define certain aspects of the contractual relationship would not impede the contract from coming into existence, if its essential terms were agreed. This was deemed especially relevant for IICs as complex long-term contracts that included many special mechanisms for the adaptation of contract over the course of its duration. In this regard, *one participant* commented that practice showed how many IICs, *e.g.*, the contracts based on the Qatar PSA Model Contract, as examined by the Task Force, did include a significant number of "gap-filling" clauses. *Another participant* suggested to clarify what "essential terms" were, to be deemed by reference to whether certain clauses where "material" or "fundamental" to the contract. In contrast, elaboration on what constituted "minor terms" would also add clarity. It was finally mentioned that the referral to arbitration when parties did not agree on the terms left open should be considered in the context of renegotiation clauses.

45. *The ICC Chair* finally invited the Working Group to examine Principle 13 on "Notice". *Some participants* noted that a principle on notice not strictly linked to any specific step of the formation of contract or the nature of the parties or authority was seemingly not fitting with the nature of Chapter 4. Since a framework for communications and notice between the parties was deemed to be especially relevant for IICs in many areas (*e.g.*, arbitration, renegotiation and adaptation, suspension of performance or termination), it was felt that notice could have been set in the initial Chapter on "General provisions". The discussion then switched, on instance of *the ICC Chair*, to whether a principle on notice would really fit with the approach of selecting and including in the future instrument only selected principles that were specific to IICs and essential to addressing some of their criticalities (*e.g.*, stabilisation, ESG). The participants agreed that the Principle would be set aside for further assessment at a later phase.

c) Draft Chapter 5: Validity

1. <u>Legal capacity</u>

46. *A member of the Drafting Committee* explained that draft Principle 14 on legal capacity had been developed by Subgroup 1 after the fourth Working Group session. It established, among other things, that "[e]ach party to an IIC must possess the legal capacity to enter into binding agreements under the laws applicable to its legal status, including domestic and international regulations governing foreign investment". For States, the commentary explained the relevance of domestic law and public international law (*e.g.*, the Articles on State Responsibility for Internationally Wrongful Acts (ASRIWA)). Furthermore, reference was made to Article 1.7 of the UPICC on good faith. The draft Principle and commentary were accompanied by a draft model clause.

47. *Another member of the Drafting Committee* added that there was a discrepancy between public international law and commercial law regarding State liability in international contracts. Under public international law, a State could not use its own laws as a defence if it exceeded its legal authority, and if a State entity made promises beyond its powers, the State was still held accountable. Commercial law, in contrast, followed the principle that liability depended on whether the contracting party had the legal capacity to bind the principal (in this case, the State). The draft guidance suggested that the principle of good faith in the UPICC might help bridge this gap, by providing the State party with responsibility for clarifying the internal division of competence to the

investor and requiring the investor to exercise due diligence in understanding the State's scope of authority. Reference was also made to the practice of requesting legal opinions and representations as means to address the lack of clarity in such matters.

48. *A participant* observed that paragraph 75 of the introduction referred to both legal capacity and illegality, which were separate legal concepts. It was suggested that Chapter 5 should focus solely on legal capacity, while illegality should be covered elsewhere.

49. The explanations on public international law and private law led to a discussion on the characterisation of IICs. *Some participants* suggested that IICs were private law contracts, and public international law would not intervene in the formation of the contract except to ensure it did not breach public policy. They recalled that the private law nature of IICs had been discussed in previous sessions and should be specified in the instrument, since the approach to several legal issues (*e.g.*, concerning damages) depended on it. *Another participant* cautioned that IICs might not always be considered private law contracts. *The ICC Chair* questioned the need to classify IICs, given the international focus of the instrument. *A participant* agreed that it would be preferable not to characterise IICs as a certain category of contracts for the purposes of the instrument since that was a contentious issue. *Another participant* suggested that the applicability of private and public law rules could be examined issue by issue.

50. *The ICC Chair* noted that the application of the mentioned public international law principle was normally limited to arbitration clauses. He asked whether the proposal was to extend it to any issue of legal capacity regarding IICs. *A member of the Drafting Committee* confirmed this. *The participants* discussed that it could be deemed a transnational principle that arbitration clauses between a State or State entity and an investor were valid irrespective of what the domestic law said. *The Chairs* suggested covering this in Chapter 9 on dispute resolution.

51. *The Working Group* generally expressed support for the draft guidance in paragraph 77 and further. *A participant* recalled the *lex ferenda* nature of this exercise and suggested making a policy decision on what the requirements for validity of an IIC should be (*e.g.*, the extent to which each party should be responsible for finding or disclosing information on the other party's capacity). *Other participants* noted that the draft guidance struck a sensible balance between due diligence obligations and obligations to furnish information. *The Working Group* agreed that the principle of good faith was relevant for both parties. *A participant* added that the guidance would also be of practical use for arbitral tribunals that had been struggling with cases in which it was unclear whether a party was part of the State.

52. Following a proposal by the UNIDROIT Chair, *the Working Group* agreed to provide a general discussion on the parties to IICs in the beginning of the instrument, *e.g.*, in Chapter 2. *One participant* noted that the guidance on legal capacity could be moved to the Chapter on Formation and perhaps be expanded to cover parties more generally. Alternatively, it could be a self-standing topic.

53. The discussion then turned to the language of draft Principle 14. *The participants* agreed with the general principle in paragraph 1. Regarding paragraph 2, *a participant* suggested removing the reference to the "place of incorporation or principal place of business" of legal persons in point (b) since it was a contentious issue. Alternatively, it could be moved to the commentary and inspiration could be taken from investor-State arbitration jurisprudence, without the need to explicitly refer to any case law. *Another participant* agreed and doubted whether it would even be necessary to discuss the issue; while it was relevant in investment treaty cases, for IICs the parties would make representations about their legal capacity. *Another participant* considered it important to provide guidance on State-owned enterprises (SOEs), noting that issues could arise both about whether a State was bound by a contract signed by an SOE and about the extent to which an arbitral award might be enforced *vis-à-vis* the State. He added that the legal nature of an SOE (*i.e.*, whether it

was a private entity or part of the State) was governed by the law of the host State. Ultimately, *the ICC Chair* suggested that paragraph 2 be moved to the suggested discussion on parties earlier in the instrument.

54. In paragraph 3, it was agreed to delete point (b) since "investment treaties, arbitral jurisprudence, and customary international law" might each point to a different solution. It was also noted that point (b) seemed inconsistent with point (a), which referred to national law.

55. It was suggested to delete the reference to "the principles of legal certainty and legitimate expectations" in paragraph 5. If needed, the commentary could mention the aim of contributing to legal certainty.

56. Regarding the commentary, *a participant* observed that reference was made only to Article 7 of the ASRIWA while Articles 8 and 9 were also relevant, for entities that were not organs of the State. Instead of explicitly referring to these Articles and explaining their contents, he suggested extracting the policy from them, namely that (i) if the contracting party was a ministry, the State was bound, and (ii) if it was a public enterprise, it had the ability to bind the State provided that it performed governmental functions or was under the control of the government. *Another participant* supported this proposal and suggested that the Working Group decided, as a general matter, to what extent reference should be made to the ASRIWA and other aspects of public international law.

57. Discussion then shifted to the draft model clause. On the proposal of *the ICC Chair*, it was agreed to start the model clause with a representation from both parties about their legal capacity (*e.g.*, "each Party represents that it has the capacity to enter into this IIC" or similar). *A participant* recalled the suggestion to avoid the term "representations and warranties", which derived from common law, and using neutral language (*e.g.*, "declarations") instead.

58. In paragraph 1, it was agreed to replace "administrative or judicial regulations and decisions" by "administrative regulations and judicial decisions".

59. The Working Group discussed whether the model clause should include a reference to requesting a legal opinion. *Several participants* suggested nuancing the language in paragraph 2 (*e.g.*, adding "where appropriate" or "if necessary") or strongly recommending the use of legal opinions in the commentary rather than requiring it as part of the model clause. *Others* preferred keeping the reference, noting the value of legal opinions for large and small investors alike. *The ICC Chair* considered that a representation by both parties should provide sufficient reassurance. Ultimately, it was agreed to move the reference to a legal opinion to the commentary.

2. Validity of mere agreement

60. *A member of the Drafting Committee* explained that no draft Principle had been provided since the UPICC provision was considered applicable. The draft commentary indicated that, based on Article 3.1.2 of the UPICC, the mere agreement of the contracting parties was sufficient for the valid conclusion, modification, or termination of an IIC – with no requirements of "consideration" or "cause". The draft model clause stipulated that parties agreed that the substantive validity and enforceability of the IIC did not require more than the mere agreement of the parties.

61. *A participant* doubted that, in practice, there were IICs without consideration. *The Deputy Secretary-General* clarified that the terms "consideration" and "cause" were not used in the UPICC because they were general concepts that could be seen to be substituted by the specific rules on formation and validity. She also noted that it was difficult to find a *commercial* contract without a counter performance, but the question was whether it would be necessary to use the term "consideration" here. She asked whether there would be any reason to specify what would be needed for the valid conclusion of an IIC (apart from the parties' agreement). If deemed useful,

the commentary could refer to elements that would be necessary to be sure there was the intention of the parties to be bound by the contract.

62. In the ensuing discussion, it was pointed out that amendments or additions to IICs could be unilateral and without consideration. Overall, *the Working Group* agreed that the UPICC provision could apply without adjustments. *The Deputy Secretary-General* added that it could be considered to provide illustrations in the commentary or in the introduction to the Chapter about unilateral promises or specific evidence requirements for modifications to an IIC.

63. It was suggested to remove the caveat "subject to the applicable law" from the draft model clause since it could introduce other requirements for the valid conclusion of a contract.

64. *A participant* emphasised that it was important to promote the UPICC as applicable law, which could be chosen by the parties and applied by arbitral tribunals. *The Deputy Secretary-General* proposed discussing the relationship between the applicable law, the UPICC and the Principles in the future instrument in the context of Chapter 9. She suggested that, if the UPICC were chosen as applicable law, the provisions of the UPICC would be applicable, complemented by the specifications or modifications in the future instrument. If the parties chose another applicable law, she suggested that the Principles in the future instrument could still be used to interpret that law or parties might refer to them in their contract, subject to the mandatory rules in the applicable law. *A member of the UNIDROIT Secretariat* added that the UPICC and the future Principles would likely be chosen as applicable law in combination with the domestic law of the host State. *The ICC Chair* agreed that the general recommendation should be to apply the UPICC and the future Principles as applicable law. It was agreed to discuss the suggestions for applicable law clauses during the next session.

3. Initial impossibility

65. *A member of the Drafting Committee* explained that it had been determined that Article 3.1.3 of the UPICC could apply to IICs without modification. No specific principle was therefore proposed – only commentary and a model clause.

66. *A participant* noted that in the investment context, issues of delay or difficulties in performing the contract might arise at the outset. He suggested examining these issues to consider how they might be addressed.

4. Mistake, fraud, threat

67. *A member of the Drafting Committee* indicated that the UPICC provisions on mistake, fraud and threat could be relevant to IICs. Therefore, no specific principles had been proposed, but a model clause on mistake had been developed, as well as illustrations on fraud and threat.

68. As a general matter, *the ICC Chair* recalled that the idea was to explain in the introduction that the UPICC provisions would apply as they were unless the instrument provided specific modifications. He wondered whether illustrations should be provided in case UPICC provisions were deemed applicable without adjustments. *A participant* considered it preferable not to provide illustrations if there was no ICC-specific Principle or commentary.

5. Gross disparity

69. *A member of the Drafting Committee* explained that Article 3.2.7 of the UPICC could be relevant in situations where there was an unjustifiable power asymmetry at the time of conclusion of an IIC, but he acknowledged that the applicability of this provision in the investment context was controversial. He explained that, if the UPICC as a whole were deemed applicable to an IIC,

the application of Article 3.2.7 could not be avoided since it was a provision of mandatory nature pursuant to Article 1.5 of the UPICC.

70. *A participant* cautioned that gross disparity as a ground for avoidance could be misused by parties to an IIC. If it was impossible not to apply it due to its mandatory nature, the commentary could explain how misuse of this provision could be avoided. *Other participants* agreed that the issue of gross disparity was problematic and required particular attention.

6. Contracts infringing mandatory rules

71. *A member of the Drafting Committee* introduced draft Principle 16, which had been inspired by Article 3.3.1 of the UPICC but was not identical. Paragraph 1 stated that an IIC was of no effect if 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. Paragraph 2 specified when illegality might arise, paragraph 3 contained a separability provision and paragraph 4 provided a rule on the effects of an infringement of a mandatory rule.

72. *A participant* asked how "investment" would be defined in the future instrument, since that would impact the illegality provision. *The ICC Chair* recalled that the Working Group had agreed not to provide such definition in the future instrument (and more generally, to avoid definitions as much as possible) given the complexity and since the instrument should be future-proof. *A participant* agreed and added that, should a definition of "protected investment" nevertheless be provided, it should reflect that investments should aim at enhancing development in the host State, in line with ICSID case law.

73. *A participant* suggested clarifying the timing for determining illegality, *i.e.*, whether the Principle applied only at the time of entry into the contract or also to subsequent changes.

74. *Several participants* expressed concerns about the broad formulation of paragraph 1. It was suggested to clarify whether reference was made only to mandatory rules or to any laws of the host State or the investor. It was noted that the latter seemed implausible since it was possible to contract out of certain rules of domestic law, and that illegality was normally limited to violations of mandatory rules. It was also suggested to clarify whether the reference to the laws of the investor referred only to the contracting party (which seemed the intention) or also, *e.g.*, to the investor's shareholders.

75. Furthermore, concerns were expressed about the use of the term "public policy" in paragraph 2, which risked being interpreted too broadly. *One participant* agreed that the interpretation of "public policy" was controversial and that the distinction between "public policy" and "mandatory rules" was complex. However, he noted that the formulation in paragraph 2 was general and preferred leaving it as it was. *Another participant* suggested that inspiration might be drawn from the Final Report of the International Law Association Committee on International Commercial Arbitration on the topic of public policy in the context of enforcement of international arbitral awards. The text of paragraph 2 could then either be left in the draft Principle or be moved to the commentary.

76. *Another participant* suggested reflecting in the Principle or commentary that principles of illegality had to be applied in a balanced manner with a view to achieving a fair outcome for both parties, as tribunals had also sought to do. As an example, he mentioned that two countries had recently concluded an interpretive note to their free trade agreement to clarify that trivial breaches of the host State's law would not nullify the investment. *Other participants* supported the idea that the violation had to concern something that was "material" to the contract or "of fundamental importance" in order to be illegal.

77. On paragraph 3, it was noted that the issue of severability was complex and that the text might need to be clarified depending on the approach the Working Group wished to take. For instance, pursuant to the Vienna Convention, a treaty was void in its entirety if, at the time of its conclusion, it conflicted with a peremptory norm of general international law, while the approach was different if the norm was created after the treaty's conclusion. It was also noted that it was unclear from the drafting of paragraph 3 who decided that a provision was illegal.

78. On paragraph 4, *a participant* expressed doubts about advising the court or arbitral tribunal about what to do if the applicable law did not prescribe the effects of an infringement on an IIC.

79. *A participant* noted that draft Principle 16 seemed to address two distinct issues: (i) infringement of mandatory rules, and (ii) illegality. He suggested treating these conceptual issues separately, which received support from others. For instance, while the severity of the infringement was irrelevant in case of violations of mandatory rules, it might be relevant for other types of infringements. He suggested that Article 1.4 of the UPICC should be the starting point for the draft Principle on mandatory rules, but since that provision applied across the board (not only for the formation of a contract), it might fit better in Chapter 9 on applicable law. *The ICC Chair* asked whether the part on illegality should remain in Chapter 5 or be moved elsewhere.

80. *A participant* considered that the language in Article 3.3.1 of the UPICC and the accompanying comment were suitable also for IICs. *A member of the Secretariat* added that the comment to Article 3.3.1 of the UPICC addressed several of the issues that had been raised in the discussion (e.g., regarding the scope (mandatory rules only) and the seriousness of the infringement).

81. On illegality, *the ICC Chair* noted that in contract-based investment arbitration, it was clear that an arbitral tribunal could annul an IIC based on illegality. In treaty-based investment arbitration, however, it was debated whether legality was an issue on the merits or a jurisdictional issue. He pointed out that contracts thus offered an advantage because they provided clearer guidance on how to address the issue of illegality.

82. Ultimately, the Working Group agreed to refer to Article 3.3.1 of the UPICC for contracts infringing mandatory rules, while illegality would be addressed separately in Chapter 5, reflecting in the commentary that it was an important issue in investment arbitration.

7. Corruption

83. *A member of the Drafting Committee* indicated that the section on anti-corruption contained two proposals for consideration by the Working Group: the ICC anti-corruption clause and a draft model clause that had been developed by Subgroup 3. *One of the Chairs of Subgroup 3* explained that the latter clause took into account that one of the contracting parties was a State or State entity. Article 1 provided a declaration by the State that it was fully committed to fighting corruption. This would be supported by a list of international instruments to which the State was a party, which would form the minimum basis for assessing contracting parties' conduct. Article 2 consisted of a declaration by the investor that it was fully committed to fighting corruption, which would be evidenced by listing the internal procedures it had put in place. Article 3 stated that neither party would enter into a corruption pact directly or indirectly related to the investment, and Article 4 expressed the need for cooperation between the parties to prevent corruption. Article 5 referred to the commitment of parties to protect whistleblowers. Article 10 contained a best-efforts obligation to identify and compensate the victims of corruption, which was a challenging issue.

84. In the ensuing discussion, it was agreed to strengthen the wording in paragraph 172 by saying that the parties "should" adopt an anti-corruption clause (rather than strongly

recommending it). *The participants* generally agreed that corruption should be viewed as a special case of illegality.

85. *A participant* suggested aligning the terminology to the greatest extent possible with the United Nations Convention Against Corruption (UNCAC), *e.g.*, perhaps referring to "corrupt activities". *A Chair of Subgroup 3* noted that the relevant definitions would follow from the instruments to which the State was a party.

86. *A participant* asked how the declarative statement in Article 1 would work in practice, *i.e.*, whether the list of international instruments would include only those ratified by the State or whether it would be broader. He also asked how this related to the reference in the second paragraph to "internal legislation". *The drafter* explained that the intention was to convey the State's firm commitment to combating corruption. The second paragraph reflected that international commitments were sometimes implemented in, or complemented by, national law. She highlighted that the guidance should be adaptable to local specificities and different industry sectors.

87. With regard to Article 5, *a participant* noted that different views existed across the world about the protection of whistleblowers, with some countries being sceptical given incidents in the past. *The drafter* acknowledged that there were different views and approaches. She invited others to provide drafting suggestions to perhaps nuance the language.

88. *A participant* reflected on the practical challenges of Article 9, which required States to undertake to sanction persons involved in corruption "without undue delay". While the intention to act swiftly might exist, real-world constraints – such as judicial backlogs – might hinder immediate enforcement. *The drafter* agreed but considered it preferable to keep the phrase to signal the desired commitment to timely action.

89. *A participant* asked whether Article 10 was meant to create a third-party cause of action, which the drafter confirmed.

90. The discussion then turned to the general approach in the draft model clause of Subgroup 3. *A participant* expressed doubts about the approach, which seemed to effectively amount to creating a "mini treaty" on corruption within the contract. *Another participant* agreed that the focus should be more limited, namely on what the consequences of corruption would be on the IIC (*e.g.*, whether it would be null and void), the appropriate remedies and the jurisdiction of arbitral tribunals to address issues of corruption. Other matters would be determined by the applicable law.

91. *The drafter* agreed that a key point that was missing from the current text was that contracts could not reduce or override existing legal obligations, *i.e.*, party autonomy did not extend to disregarding mandatory anti-corruption norms. She considered that the consequence of a finding of corruption would be invalidity of the IIC and that there should be a financial remedy (which, *e.g.*, could be paid into a fund to the benefit of those who were the victims of corruption). *Another participant* suggested simply recommending that arbitrators develop appropriate remedies.

92. *A member of the Secretariat* indicated that it followed from the research undertaken by the Task Force that anti-corruption clauses commonly contained three elements: (i) a representation that parties had taken steps to prevent corruption, (ii) a mechanism for cooperation and training, and (iii) a clause specifying that the most stringent applicable law – whether national, international or otherwise – governed corruption-related matters. Furthermore, he noted that the instrument could provide a scale of remedies, not solely termination, considering the general principle of continuity of contract.

93. *A participant* expressed the view that corruption was defined in criminal law. He suggested including the ICC anti-corruption clause and perhaps adding a statement expressing the will of the contracting parties to prevent corruption in line with international standards. *Several other participants* agreed that the ICC model clause should be the starting point, while additions or adaptations could be made. It was noted that paragraph 4 of that clause was rightly restricted in scope to the contractual consequences of any non-compliance with the anti-corruption clause.

94. *A participant* explained that the ICC anti-corruption clause was subject to review and that the reference to the 2011 ICC Rules in the clause should be updated to the 2023 version, which was aligned with UN anti-corruption provisions. *Another participant* agreed and suggested, as a general matter, adding the phrase "and its updates" (or similar) when referencing international instruments to ensure the instrument was future-proof.

95. *A participant* suggested that the Working Group consider the ICC Arbitration Commission's Document on Red Flags or Other Indicators of Corruption in International Arbitration.[1] *Another participant* urged caution, noting that although red flags might be useful when considered alongside other factors, reliance on factors like a country's general reputation for corruption risked introducing bias. *The first participant* acknowledged that geography was listed as a red flag and explained that this reflected broader frameworks like the UNCAC and OECD guidance, which identified similar indicators. She suggested that it would be inappropriate to ignore red flags entirely, as arbitrators and judges commonly relied on them. Instead, the Working Group could consider explaining in the commentary that the use of red flags should be handled carefully to avoid bias.

96. *A participant* raised concern about misuse of the corruption defence by States. While corruption should be addressed, she highlighted a need to balance anti-corruption efforts with fairness to investors. It was also pointed out that corruption might not only arise when a contract was concluded, but also at a later stage.

97. *A participant* stressed the need to oblige both parties to comply with anti-corruption norms. Furthermore, he suggested distinguishing between (a) corruption during the formation of the contract, which may render the contract itself tainted; and (b) corruption during performance, such as improper payments made after the contract had been validly concluded. These distinctions raised questions about appropriate remedies – whether annulment or monetary damages – and highlighted the challenge of addressing such complexities in a concise clause, though the need for robust provisions was clear. Moreover, he highlighted that, in practice, the State was made up of various actors whose actions might not be centrally coordinated, which led to complex questions of fairness and the imputation of knowledge under domestic law. He also noted that the applicable standard of proof could significantly affect the ability to establish corruption (whereby he considered balance of probabilities to be the adequate standard in commercial cases).

98. *Another participant* emphasised that the arbitral practice on corruption was inconsistent on many issues (*e.g.*, the standard of proof, use of red flags, and the role of arbitral tribunals, with some passively assessing presented evidence and others taking a more active stance). Given these complexities, he suggested developing guidance that incorporated, by reference, other documents and best practices, rather than trying to resolve such issues within the Working Group. *The drafter* agreed to do so where possible but cautioned that many issues were not addressed in detail in other international instruments.

99. *A participant* noted that it was possible that alleged corruption would later be found not to be corruption by a competent authority (*e.g.*, a court). He suggested the Working Group consider

[1] Available at https://iccwbo.org/wp-content/uploads/sites/3/2024/12/2024-ICC-Red-Flags-or-Other-Indicators-of-Corruption_ICC-DRS-Bulletin.pdf.

the implications this might have for the arbitral tribunal (whether and how such finding should influence the tribunal's assessment).

100. *The UNIDROIT Chair* concluded the discussion by emphasising that the focus must remain on contracts. While broader considerations could to some extent be considered, such as third parties, the goal was to modernise and improve IICs, without overreaching. She proposed formulating the Principle on corruption in a rather general manner. The more detailed issues that were included in the proposal of Subgroup 3 could be reflected in the commentary, referencing established standards. She considered that the focus should be on a representation or obligation for both parties and clear rules on the contractual consequences of corruption. She emphasised the importance of aligning the future model clause with the ICC's anti-corruption clause. It was agreed to examine, and where necessary adapt, the updated ICC model clause once it had been finalised.

101. Ultimately, the Working Group agreed that (i) corruption should be covered as part of illegality; (ii) the focus should be on the contractual consequences of corruption; (iii) the draft Principle should be formulated in rather general terms, with details provided in the commentary; and (iv) the updated ICC anti-corruption clause should be taken as a starting point for the model clause.

8. Mandatory rules

102. *A member of the Drafting Committee* introduced the text and proposed moving it to an earlier Chapter since it touched on foundational issues. She explained that the purpose was to reconcile special regimes that sometimes applied to IICs with Article 1.4 of the UPICC on mandatory rules. She highlighted that certain IICs might involve special administrative or tax regimes approved by competent State authorities that deviate from general laws. To avoid that Article 1.4 of the UPICC cast doubt about the enforceability of these special regimes, it was suggested to include a model clause or Principle clarifying that (i) the terms that deviated from the law generally applicable in the host State were approved by the competent bodies; and (ii) the State represented and warranted that, at the time of the contract's entry into force, the special regime was valid and enforceable under domestic law. Importantly, this was not a stabilisation clause – it made no commitment about future legal changes but merely affirmed the legal validity of the regime at the contract's outset. *The Working Group* did not provide specific suggestions on this topic.

d) Draft Chapter 7: Change of Circumstances

103. *The UNIDROIT Chair* moved to Chapter 7 and proposed to discuss the draft guidance on "stabilisation" clauses first.

104. *A participant* suggested reconsidering the title "Change of Circumstances" for Chapter 7 since that terminology was interpreted in some jurisdictions to cover only hardship. He proposed considering the common law term "Frustration of Contract" instead. However, *other participants* preferred keeping the current language. *A member of the Secretariat* added that it was preferable to use neutral language in UNIDROIT instruments.

1. "Stabilisation" clauses

105. *A member of the UNIDROIT Secretariat* and *one of the Chairs of Subgroup 2* explained that the preliminary draft Master Copy contained two alternative text proposals, the main differences being that (i) the first proposal expressly referenced the option of not having any stabilisation clause (while this was implied in the second proposal), and (ii) the proposals differed as to the content and conditions for fiscal stabilisation clauses.

106. Regarding the first text proposal, *a participant* suggested to delete point 5 from the model fiscal stabilisation clause since stabilisation was granted objectively to the project and not subjectively to the investor – the stabilisation should therefore apply even after a sale or transfer of the project to a new owner. He also reiterated his view that stabilisation clauses should cover any unilateral intervention by the host State, which distinguished them from hardship clauses. *Another participant* noted that for mining and petroleum projects, the stabilisation regime might apply to the project as such, but for public private partnerships, a special fiscal regime might be granted to a specific person. Also, investment projects that followed a procurement process would have selected a specific legal person. Instead of deleting point 5, she suggested taking into account that the situation might differ depending on the type of contract.

107. *The UNIDROIT Chair* suggested to discuss the second text proposal.

108. *A member of the Drafting Committee* introduced the second text proposal. He explained that, while he had initially been reluctant to use the term "stabilisation" clauses due to their controversial nature, additional research had convinced him that the term should be kept in the title because financiers of investors often required some form of stabilisation and it was widely recognised in contract practice. However, he suggested expanding the title so that it would become "stabilisation and renegotiation clauses". He explained that the phrase "with full knowledge of the consequences" in draft Principle 31(1) was intended to make parties aware of the competing considerations regarding stabilisation and renegotiation clauses when negotiating an IIC, as was elaborated in the commentary. Draft Principle 31(2) covered different types of "stabilisation" clauses, not only an economic equilibrium clause (as he had initially proposed) but also a fiscal stabilisation clause and a hybrid stabilisation clause since the Working Group had agreed to provide a range of options to contracting parties. Draft model clauses had been developed for each type of clause. Finally, he invited views from the Working Group on draft Principle 31(3) relating to regulatory freedom with the aim of achieving public policy objectives. Specifically, he asked whether to keep it here or move it elsewhere in the instrument as a more general principle, and he sought views on the language ("*bona fide*, non-discriminatory and in the public interest"), which was based on customary international law.

109. *A participant* referred to research she had done on stabilisation clauses in the context of renewable energy contracts, which had concluded that freezing clauses in particular should not be included in such contracts since they hindered States' flexibility to adapt to evolving science and climate regulations. *Other participants* recalled that the Working Group had previously agreed not to include general freezing clauses among the options in the instrument.

110. *A participant* expressed doubts about the phrase "with full knowledge of the consequences", questioning how such knowledge could be defined, who bore the responsibility for ensuring it, and whether it fairly reflected the uncertainty and risk that stabilisation clauses were meant to address. Furthermore, he considered that the focus of the debate around stabilisation clauses should be less about States' regulatory powers – which were broadly accepted – and more about determining who bore the financial consequences when States exercised such powers. *One of the Chairs of Subgroup 2* agreed that the Working Group would need to decide on the approach to consequences in case of non-compliance with stabilisation commitments, pointing out that the first text proposal included a draft model clause and commentary on monetary compensation. *Another participant* added that changes in circumstances affected not only the financial aspects of a contract, but also how the investment project was implemented and supported. She stressed the importance of ongoing cooperation between the State and the investor, noting that adapting to change was inevitable and should be managed fairly and collaboratively. *A member of the Drafting Committee* indicated that compensation was not mentioned in the second proposal because economic equilibrium clauses focused on renegotiation, which could lead to various outcomes. He warned that including compensation could make the clause resemble a general freezing clause.

111. *A member of the Secretariat* invited participants to express their views on (i) whether the explicit option of not having a stabilisation clause should be kept, and (ii) whether the requirement to demonstrate the need for a fiscal stabilisation commitment should be kept (both were included only in the first text proposal). *A member of the Drafting Committee* recalled that the Working Group had previously discussed not to pursue the two ends of the spectrum – either not having a stabilisation clause at all or including a freezing clause – but to concentrate instead on middle-ground solutions. He still supported that approach. *A participant* suggested adapting the language in draft Principle 31(1) by deleting "if appropriate" and simply stating that the parties "may agree to include or exclude" a stabilisation and renegotiation clause. This formulation would also recognise the varying regulatory risks across different industries.

112. *A member of the Secretariat* suggested clarifying from the outset that general freezing clauses were not provided for, by moving the explanations that were provided in this regard in paragraph 283 to the commentary under draft Principle 31(1). That same commentary could also note that parties might choose not to include any stabilisation clause. In this way, the commentary to the first Principle regarding "stabilisation" would recognise the full range of options, while the remainder of the section would focus on three types of clauses: economic equilibrium clauses, fiscal stabilisation clauses and hybrid clauses. *The Working Group* expressed support for this approach.

113. Finally, two issues were raised for future consideration. The first was how a stabilisation clause might affect an arbitration clause. Reference was made to a case whereby a newly-created State organ wanted to intervene in an arbitration proceeding and the opposing party argued that this was not possible since the arbitration clause had been "stabilised". The second issue was how emerging "right to regulate" clauses in treaties might interact with stabilisation and renegotiation clauses in contracts. It was agreed to examine both issues (the first in the context of Chapter 9).

2. Hardship and Force majeure

114. *The UNIDROIT Chair* noted that the proposed draft Principles on hardship and force majeure were very similar to the provisions in the UPICC. She recalled that the approach was not to repeat UPICC provisions unless they required adaptation or elaboration. She therefore invited the Working Group to decide whether to keep any guidance on hardship and force majeure in the future instrument. She invited a member of the Drafting Committee to elaborate on the proposals.

115. *A member of the Drafting Committee* noted that, even if the guidance on hardship and force majeure was very similar to that under the UPICC, it might be preferable to retain it in order to signal the importance of these notions for IICs to users of the future instrument. On hardship specifically, he explained that Subgroup 2 had previously proposed to explicitly refer to a compensation mechanism – differently from the UPICC provisions – but the Working Group had preferred not to do so. While not proposing to reopen the discussion, he suggested it could still be an element worth considering since the Working Group had recognised the relevance of the continuity of public services (as opposed to contract termination).

116. *The ICC Chair* indicated that the ICC model clauses on hardship and force majeure should be considered. They could either be integrated into the future instrument, or cross-reference could be made to them.

117. *Several participants* were in favour of keeping both hardship and force majeure in the future instrument, even if the approach was similar to that in the UPICC. They emphasised the long-term nature of IICs and the relevance of guidance on change of circumstances for such contracts.

118. *One participant* noted that whether to cover hardship and force majeure depended on the approach; if the instrument was meant to be comprehensive, such aspects should be included, but it would risk duplicating the UPICC and ICC clauses. If the instrument would focus only on selected

issues; it might not be necessary to cover them. A possible compromise could be to mention aspects like hardship and force majeure while noting that they were adequately addressed in other instruments. *A participant* expressed support for the compromise solution, noting that it could provide completeness while avoiding redundancy – highlighting that not all users of the instrument might be familiar with other instruments like the UPICC and the ICC model clauses. She emphasised that it should be easy for users to consult such other instruments, *e.g.*, by including hyperlinks in the future instrument. *Another participant* agreed and argued that the primary goal should be to provide practical value to contracting parties. She suggested following a "pedagogical" approach, whereby the available options should be clearly set out for the reader. Regarding hardship and force majeure, she agreed that not only the UPICC provisions but also the ICC model clauses should be referenced since the latter offered more detailed guidance. *Another participant* suggested, as a general matter, adding all the relevant ICC model clauses in the preliminary draft Master Copy, under the draft guidance for each topic. Similarly, he noted that it would be useful to receive, for each Chapter, the relevant clauses from IICs that had been examined by the Task Force.

119. On compensation, *a participant* suggested mentioning that parties could introduce a compensation mechanism in their contract if they wished to do so, to signal that the options were not only renegotiation or termination. *Another participant* supported including compensation, which would also be a reason for covering hardship and force majeure among the selected issues, if that was the approach to be taken. She agreed with the importance of public service continuity but also stressed the investor's need for compensation, especially where a substantial upfront investment was made long before any profit was realised. She warned that, without adequate safeguards, a State might invoke hardship or force majeure once key infrastructure was in place, leaving the investor uncompensated for sunk costs and profit. *Another participant* generally agreed but pointed out that the State would not be able to successfully invoke force majeure unless the criteria to establish it were met. He suggested addressing arbitrary conduct of the State as a distinct matter in the context of Chapter 6. *The Deputy Secretary-General* agreed that it might be helpful to indicate that a compensation mechanism could be introduced. However, she cautioned that if the language of the UPICC provisions were to be adapted, it should be made clear that any changes were merely formal and specific to IICs. Otherwise, there could be confusion as to whether a substantive change to the UPICC was being proposed.

120. *A participant* raised the point that the difference between hardship and force majeure should be clear. While the distinction was well-defined in the UPICC, the preliminary draft Master Copy also contained an economic equilibrium clause that could be seen to encompass hardship – which, in his view, was the preferred approach. He therefore suggested reconsidering the need for a hardship clause and focusing instead on force majeure.

121. However, *other participants* preferred keeping both stabilisation clauses and hardship. It was noted that the distinction between stabilisation and hardship clauses was described in paragraphs 273 to 275. Stabilisation covered unilateral acts of the host State while hardship concerned unforeseen circumstances that were beyond the control of the contracting parties. If the stabilisation clause was to cover hardship, it would need to be redrafted because it currently explicitly referred to a measure adopted by the State. It was also noted that the consequences might differ; following the breach of a stabilisation clause, renegotiation might result in full compensation of the investor's loss whereas arbitral tribunals typically awarded only a certain percentage of the loss following hardship (*e.g.*, 75 or 80%). Ultimately, *the Working Group* agreed on the difference between hardship and stabilisation and the need to cover them both in the instrument. *One participant* suggested placing draft Principle 32 after draft Principle 34, in order to first set out the definition of hardship (draft Principle 33).

122. *A member of the Secretariat* indicated that it followed from the research by the Task Force that IICs did not commonly contain hardship clauses. The principle of continuity of contract, on the

other hand, was clearly visible, with contracts limiting termination to prolonged force majeure events or even excluding it.

123. *A participant* suggested shifting the focus from traditional clauses to five questions for contracting parties facing a change of circumstances: (i) who caused the change (a contracting party or an external factor); (ii) was there a legitimate justification for the action; (iii) what are the consequences for the investment; (iv) how should those consequences be addressed (*e.g.*, renegotiation, compensation, termination); (v) what would the dispute resolution mechanism be if the matter could not be resolved between the parties (whereby she emphasised the importance of mediation and conciliation as means to avoid costly arbitration).

124. *The UNIDROIT Chair* concluded that the Working Group agreed that hardship and force majeure should both be covered. She suggested explaining the differences between the various types of clauses (stabilisation and renegotiation, hardship, force majeure) in the introduction to Chapter 7. That introduction or the commentary could also recognise that hardship clauses were often absent in IICs due to functional replacements.

125. *A member of the Secretariat* suggested that the introduction to Chapter 7 could start with a recognition that hardship and force majeure clauses were relevant for IICs (referencing the relevant UPICC provisions) but explain that specificities might apply in the investment context (*e.g.*, regarding compensation) and that model clauses were provided. The focus could then shift to stabilisation and renegotiation clauses, explaining that a special feature of IICs was that one of the contracting parties had the possibility to change the equilibrium of the contract by taking regulatory measures. This could be followed by Principles on stabilisation and renegotiation. *Another member of the Secretariat* added that, if changes to the UPICC provisions on hardship and force majeure were proposed, normative Principles might need to be provided.

126. *The Working Group* agreed that model clauses should be provided for hardship and force majeure (not only cross-referencing the ICC clauses). *The ICC Chair* preferred placing the clauses in an Annexe, while *a participant* suggested (also) including them in the main text. *The UNIDROIT Chair* added that the approach should be consistent throughout the instrument.

127. *The UNIDROIT Chair* noted that a key issue was whether a court or arbitral tribunal should have a role in renegotiation processes and contract adaptation in case of hardship. She suggested that meditation might be a more acceptable solution, although she recognised that mediation was more challenging in the investment context than for commercial contracts. *Several participants* agreed, with *one participant* suggesting that reference could be made to Chapter 9 on dispute resolution with arbitration as a last resort. If mediation or other alternatives failed, instead of revisiting those processes (*i.e.*, tribunal-led renegotiation), an arbitral tribunal could focus on the consequences of non-performance of the contract.

e) Draft Chapter 6: Rights and Obligations

128. *A member of the Drafting Committee* explained that Chapter 6 started with a new draft Principle 18 on the State's obligation to provide physical protection and security to the personnel and assets of the investor. The draft Principle was in line with the due diligence standard under public international law, according to which it should be assessed whether the State took necessary measures in the circumstances to protect the individuals and assets from actions of third parties. The phrase "to perform the international investment contracts" clarified that it covered activities that related to the IIC. The draft Principle was accompanied by a commentary and two illustrations.

129. As a general matter, *a member of the Drafting Committee* suggested splitting Chapter 6 into distinct sections on obligations of States, on the one hand, and obligations of investors, on the other. *The ICC Chair* agreed and suggested mentioning the obligations of investors first.

130. *A participant* noted that the draft Principle seemed in line with a provision that was commonly included in construction contracts obliging the project owner to provide the investor unrestricted access to the site. *Another participant* suggested providing for a right of the investor to suspend performance in the event of a delay by the host State in performing its commitments under the IIC. He noted that, in some jurisdictions, the investor did not have such right since it was considered incompatible with the principle of maintaining the continuous and orderly provision of public services. *The drafter* agreed and suggested covering it in the envisaged new section on obligations of States.

131. *A member of the Drafting Committee* expressed some perplexity as to the reference to the "obligation to monitor" in the title of the principle, as monitoring obligations would be wider than providing protection and security. *Another member of the Drafting Committee* asked whether the reference in the comment on the exclusion of "any other security or stability" was referring to legal stability or stabilisation and if this was reflected in the title. Consequently, on a suggestion of *the drafter*, it was agreed to change the title of draft Principle 18 to "State's obligation to provide physical protection and security" and add a reference to "legal stability" in the commentary. On a similar note, *a participant* expressed perplexity as to the use of the expression "to be able to perform the investment contract", as it might imply that security obligations would refer only to the limited scope of investment performance or cease once performance was completed and not cover any event or damage to assets that would occur just after completion. *The drafter* accepted the objection and accordingly proposed to include wording such as "obligations related or relating to an investment contract".

132. *A participant* asked whether the draft Principle covered the scenario in which an investor used private security forces, noting that there had been incidents in the past where such forces had caused harm to members of the local population. *The drafter* acknowledged that he had not thought of this scenario and that it required reflection. He provisionally suggested that it could be mentioned in the commentary to the draft Principle on illegality, since the investor was required to act in accordance with the laws of the host State, or it could be included in a second provision where the investor was required to not only abide by local law but also engage in specific conduct.

133. *Other participants* questioned whether a simple reference to host State law compliance would suffice since the investors' obligation to comply with host State laws was usually a requirement for the investment to be established and run properly, and it would not operate in an adequate fashion where the investor acted in joint venture with the State or the State did not enforce local law or left room for the investor to behave as it wished. A specific principle would then be required that looked at international human rights standards in this area. *Another participant* considered that acting contrary to local law or international standards infringing recognised rights of local populations would typically imply a counterclaim in treaty arbitration and asked how this would make its way into an arbitral contract claim. *The drafter* agreed and suggested that a separate and specific provision might be placed in the section of Chapter 6 on investors' obligations and be accompanied by specific language that ensured that it might be the legal basis for a contract claim. *Another member of the Drafting Committee* reinforced the option to have a separate provision in the two sections as, quoting the recent ICJ case on "Certain Iranian assets", he recalled that the standard required of States as to the obligation to provide physical security was relatively low (*e.g.*, a due diligence standard), while the logic of investors' obligations would require a much higher standard, possibly with specific results to be achieved.

134. *A representative of the UNIDROIT Secretariat* noted that IICs examined under the Roma Tre-UNIDROIT Task Force had not provided many examples of clauses obliging States to provide physical security, however such an obligation might be derived from clauses imposing a general obligation on the State to cooperate or assist the investor. In relation to the position of State entities, he mentioned several examples where they were called to put all their best endeavours in assisting the investors to obtain protection and assistance from concerned authorities.

135. *The ICC Chair* asked whether the language of the draft Principle should be adapted if the contracting party was not a State itself, but a State entity. *One participant* agreed and noted that the manner in which the principle was formulated would make it impossible for public entities parties to the IIC other than the State to abide by the principle, proposing language such as a duty of cooperation of the State entity in supporting the investor to obtain security from the States' authorities. *The drafter* agreed and replied that a second phrase could be added referring to the obligation of State entities "to make all efforts" or "cooperate" with the investor to obtain security by the relevant State authorities.

136. *The ICC Chair* next invited the member of the Drafting Committee concerned to illustrate the Principle on expropriation. *The drafter* expanded first on the scope of the principle that would include both direct and indirect expropriation. He mentioned that the wording stated the "expropriating or nationalising nature" of the measure as the trigger of the provisions to track the latest developments on what constituted indirect expropriation, which would take into account the nature of the measure itself and not the effects. He recalled that the provision included the typical three requirements for expropriation to be internationally legitimate (public purpose; non-discriminatory character; prompt, adequate and effective compensation), but added a fourth in line with recent investment arbitration ("due process of law").

137. *The ICC Chair* expressed some perplexity as to whether the Principle should mention "expropriation" as this would be strictly related to sovereignty, while in a contractual setting "unlawful termination" might suffice, with the commentary explaining how it would cover direct or indirect expropriation. *Some participants* supported this view, one arguing that such wording would cover both those legal trends that found in expropriation a necessary fidelity to the notion of property, with the investor being deprived of some asset in property or controlled by the investor, and those who did not, another maintaining that it was not clear what expropriation would add to unlawful termination in a contractual context, leaving apart those cases where it included a different standard for calculating compensation. *Other participants* agreed that the notion of "unlawful termination" would not cover certain measures by the State, such as tax measures, that would make the investment unprofitable or unsustainable without depriving the investors of assets or property, or cases where a contract clause was abused to terminate the contract. *One participant* reminded the Group that a methodological underpin of the instrument would be not to import terminology from specific legal traditions with a certain "legal baggage", suggesting that "taking of property" would have a certain meaning under the U.S. constitutional law doctrine. In this specific context, she warned against departing from the language of international investment law without specific explanations. In this regard, *another participant* asked whether there were reasons to use the expression "prompt, adequate and effective compensation" instead of "full compensation".

138. *A representative of the UNIDROIT Secretariat* illustrated that IICs examined under the Roma-UNIDROIT Tre Task Force included examples both of provisions using the word "expropriation" and others closer to more technical or neutral language such as "events of default".

139. *Other participants* noted that the Principle should address the difference between lawful and unlawful expropriation and their consequences as regards damages, partial expropriation, measures prohibiting the transfer of investors' revenues, the timing of compensation implied in the wording "accompanied by" (domestic law varying on this matter), and how this worked where the State was party to the IIC. *A participant* proposed whether the principle should differentiate situations where a State entity versus the State was party to the contracts and cover those situations where a State abusively exercised its rights, establishing a set of remedies, including on calculating damages, different from ordinary contractual remedies. *Another participant* warned in this regard that plenty of new-generation IIAs operated carve-outs excluding certain types of measures from the reach of expropriation provisions (so that States willing to utilise the future instrument should go through their treaties to ensure consistency) and that including a whole formula for calculating compensation would be problematic.

140. *The ICC Chair* then invited the relevant member of the Drafting Committee to introduce the sections of Chapter 6 relating to ESG and other policy goals. *The drafter* began by highlighting that a peculiarity of ESG and policy goals' principles was that they were scattered throughout the instrument in Chapters 1, 2, 3, 5, 6, and of course the Introduction. He mentioned that this highlighted the principle of continuity of ESG, running from the general provisions in Chapter 1, through language for the preamble of an IIC in Chapter 2, pre-contractual due diligence in Chapter 3, anticorruption in Chapter 5, and rights and obligations in Chapter 6. He asked the Working Group to express its opinion on the initial comments put forward by the Drafting Committee, particularly on whether these elements should remain scattered throughout the instrument or combined in a single chapter on ESG, suggesting that the allocation in a macro-chapter might make it easier for future users of the instrument to skip and ignore ESG obligations. Some of the participants who had contributed in the relevant Subgroup toward shaping ESG principles took the floor, *one participant* noting that consolidating them all into a single chapter would bring some benefit as they all retained some common fundamentals (references to international hard and soft law, continuity throughout the contract) while making it clear that they would not be optional, *another participant* considering that even if it were decided to include all ESG principles in one chapter, a general principle should in any case be flagged in the initial chapters. It was also mentioned that gathering all elements into a single chapter would help to provide guidance across sectors and avoid repetition, since an investment project in an industrial park would require abiding by different standards compared to an investment close to a local community, sacred sites or a natural heritage site.

141. *The drafter* took note of the above and considered that Principle 6 in Chapter 2 might remain there as a general remark on the relevance of ESG obligations for the whole instrument, also taking into account the importance in terms of novelty of the introduction of ESG subject matter in the final instrument and the necessity to remain generic; indeed, the future instrument – as often repeated – should remain future-proof and stand up against the likely quick evolution of hard- and soft-law standards in the area in the coming decades. In this regard, it was mentioned that language should be carefully refined in order to avoid impinging on public international law issues, and that the use of "sustainability" throughout the instrument in place of "ESG" would more likely resist the challenge of time (including the reform of the United Nations Agenda 2030), with accompanying explanations in the commentary to avoid linking it to a concept exclusively from civil law.

142. *A participant* then, recalling the earlier discussion on the possible collusion between the State and the investor in not adopting or enforcing proper human rights standards (see above para. 133 on the use of private security forces), wished to draw the attention of the Working Group and the Drafting Committee to the need for considering – the investor and the State on the same footing for what concerned sustainability and human rights obligations, reiterating the principle that the State could not impose on private entities what it did not impose on itself. This would help to tackle situations where a company was required to align to a highest standard in a host State where human rights were not respected. In terms of drafting, this would mean that sustainability obligations, or a fair amount of them, should be placed in a third section of Chapter 6 on obligations placed on both parties. In this regard, the issue was raised that, currently, as regarded consequences of breach, remedies were provided only in cases of infringement by the investor, while if obligations were common to both parties, they should also be provided in the event of violations by the State.

143. In this last regard, *a representative of the UNIDROIT Secretariat* reminded the Working Group that, in order to set out a full range of remedies both on the side of investors and States and in the event of obligations placed on both parties, the Working Group should look at the table included in Chapter 5 of the ALIC Guide. This also meant that the experts should address the relationship between sustainability obligations and remedies in Chapter 8 of the future instrument. He recalled the distinction in the ALIC Guide between due diligence obligations and obligations

implying a specific result or performance and noticed that some sustainability obligations might be more specific to investors in line with the catalogue provided in Chapter 5 of the AfCFTA (*e.g.*, socio-economic development obligations, such as training, research performance requirement or local sourcing, health and safety on the workplace), while others might be well placed in a common chapter. He finally considered that a general provision might provide a neutral legal form for investors' obligations (including remedies), while subsequent provisions might address specific subject matters across sectors or types of investment (*e.g.*, climate change and zero emissions, biodiversity, social protection, training obligations, human rights, local community protection or development).

144. The discussion then reverted to drafting issues and particularly the question whether a single sustainability chapter or an allocation of sustainability principles throughout the instrument would be preferred. It was finally decided that a general principle should be kept in the initial chapters, particularly Chapter 2, and most of the more specific provisions in Chapter 6, allocated in a single Chapter on sustainability, while the principle on corruption would stay in Chapter 5. The allocation of contents would in any case be subject to further assessment, also in relation to the pre-contractual due diligence and remedies.

f) Draft Chapter 8: Remedies

145. *The UNIDROIT Chair* invited the Working Group to engage in a preliminary high-level discussion on Chapter 8 on "Remedies (including compensation and damages)" with a view to provide the Drafting Committee with some directions to prepare a full and more detailed discussion during the June session. *A member of the Drafting Committee* took the floor and illustrated that the text was never discussed and in its current version simply incorporated the UPICC on remedies providing questions to the Working Group on how to develop the text, adapt it to IICs specificities or discard inadequate provisions. He agreed with the UNIDROIT Chair that the first principle on "Pre-arbitration/litigation options for alleged non-performance" could be moved to Chapter 9 in the arbitration section, while the second principle of continuity of contract, underpinning the whole instrument, might be placed among the general principles in the initial chapters, particularly Chapter 2. He then recalled that the text continued addressing remedies for non-performance, particularly conditions for withholding performance, cure by the non-performing party, exemption clauses, additional periods for performance, full compensation and non-monetary damages. He then noted that the text included provisions on the right to performance and performance of monetary obligations, also inspired by the UPICC (particularly Art. 7.2.1), and performance of non-monetary obligations, relating to specific contractual obligations. He mentioned that this last principle would hardly find a place in courts or abitral tribunals since several reasons made it difficult to order a specific performance in investment disputes. He then mentioned the rules on repair or replacement or defective performance and on judicial penalty ("*astreinte*"), both inspired by the UPICC: the first would hardly be deemed adequate to IICs as long-term contracts being rather conceived around sales with a one-time performance, while the second would depend on courts or arbitral tribunals' powers under the law of the seat or *lex fori*. He concluded that the principle on change of remedy, inspired by UPICC Art. 7.2.5, would instead broadly reflect IICs' practice as in the investment law context all usual remedies converged on compensation and damages.

146. *The participants* generally agreed on relocating the principles placed at the beginning of Chapter 8 in Chapter 9 and Chapter 2. *One participant* stressed that certain aspects of the UPICC-inspired principles would hardly be adequate to IICs, expressly mentioning the distinction between simultaneous and consecutive performance, or the compensation for delay in performance. Likewise, the section on exemption clauses would scarcely apply to IICs where they conferred discretion to courts or arbitrators to integrate the contract. *A participant* mentioned that principles on performance would be the core of discussion, while *another* supported the inclusion of a principle on the primary interest or duty of the parties to perform the obligations they undertook in the

contract. She also drew attention to the fact that many remedies had already been covered in specific Chapters (*e.g.*, on change of circumstances and sustainability) and thus the Working Group should carefully examine which remedies – or which aspects of the relevant remedies – were specific and which had a general character and thus should be placed in Chapter 8. She also mentioned that, on the one hand, in certain cases the instrument needed to give more "bite" to its provisions through providing for adequate remedies (*e.g.*, sustainability obligations), while on the other hand, the balance between States' and investors' treatment might be altered by the fact that certain remedies could not be ordered *vis-à-vis* States, or States could hardly be expected to be ordered to implement a remedy, such as continuing an investment project.

147. *A participant* noted that a specific principle or model clause should address limitations to withholding performance in line with IICs' practice, particularly contracts on energy production or the provision of essential services, which could not be suspended for reasons of public interest. She also supported the possibility to include a provision on *"astreinte"* in the interest of both investors and States, *e.g.*, when they would claim violation of sustainability obligations, as this would reflect an emerging IIC practice.

148. *The UNIDROIT Chair* then invited the member of the Drafting Committee concerned to illustrate a provision on double recovery, noting that it would still have to be discussed whether it would be placed in the specific section on expropriation or in the general Chapter on remedies. *The drafter* explained that the *raison d'être* of the provision was that one of the parties to a dispute, which had already availed itself of a remedy in the form of compensation, should not be using an alternative form to seek compensation for the same transaction. The use of the expression "transaction underlying an IIC" was used to avoid receiving compensation for the same transaction based on different causes of action (a claim based on the IIC, on a treaty, on national law before courts). The concerned subject might well initiate a claim for the same transaction if the compensation it achieved under a previous claim was insufficient.

149. *A participant* questioned whether the provision as currently drafted would bring about an issue of overreach by the Tribunal, since she agreed that, if the cause of action was different, then also the form of remedy would be different. She also pointed out, as to the amount of compensation and damages, that if the no double recovery rule included the exception of being allowed to obtain the balance if a first claim was not satisfactory enough, or rather once a claim was chosen (*e.g.*, a contract claim instead of a treaty claim), then whatever was achieved was achieved, and the issue could not be raised again. She finally mentioned the need for clarity and fairness regarding the policy choice to be made in this area. *Another participant* objected that it was not simply an issue of cause of action, but rather of different loss. If a compensation claim was brought for an oil loss and then for the environmental damage remediation, these would be two different losses and would not imply double recovery. He then opined that claiming under a contract and then under a treaty was not only an issue of different causes of action, but also of an entirely different instrument, *i.e.*, of different applicable law.

150. *A participant* noted that in many countries the same loss might be characterised as an issue of contract responsibility or as tort, but the claimant had to choose one or the other for the same set of facts and could not twice claim compensation and damages. She then questioned if the rule would cover issues of claims by the investing company and its shareholders.

151. *The UNIDROIT Chair* took the floor and clarified that a preliminary issue for the Working Group would be to decide whether to include a double recovery rule in the instrument, as it was doubtful whether it might be fully considered a matter for contract; she mentioned that endeavour language might suffice in this regard. She then commented that matters of parallel claims by the investing company and its shareholders and other parallel proceedings were being discussed at UNCITRAL in Working Group III, and thus it should be assessed whether they would fall within the scope of the

instrument. In principle, they could be covered in the commentary, taking into account issues of coordination with the work of other international organisations.

152. *A representative of the UNIDROIT Secretariat* mentioned that the provision at hand should be coordinated with the waiver of court or treaty arbitration that was included (or at least it had been discussed whether it could be included) in Chapter 9. He noted, in relation to earlier interventions, that a distinguishing criterion might be recovery for losses or damages stemming from the same facts or events, or recovery for the same type of losses or damages. He wondered whether a situation where a party obtained some form of compensation under a renegotiation clause and later claimed further compensation for the same facts or damages under an arbitral contract or treaty claim or in court would be covered by the rule. He finally considered whether the substantive notion of unjust enrichment might help to frame the issue.

153. *The UNIDROIT Deputy Secretary General*, called by a participant to consider whether such a provision would overreach what the instrument could rule (*i.e.*, if it should be limited to transactions or claims arising out of the contract), mentioned that the UPICC already contained a general principle that damages were "compensatory" in nature and therefore a claimant could not ask for more compensation as regarded the loss or damages that it had suffered. The specificity here, as regarded IICs, was that parties' behaviour might breach entirely different types of obligations, based on a contract, a treaty or domestic law.

154. *One participant* warned that the rule at hand was to be framed in terms of costs and allocation of risk: the parties, in case of breach of contract, should know what would be the foreseeable consequences of the breach in accordance with contractual criteria of risk allocation. He mentioned that issues of legality would fall outside the scope of the instrument. *Another participant* agreed that, to have in place a workable rule in this area, it should be seriously taken into account whether to elaborate a waiver of arbitration, discussing whether it was within the reach of this instrument to cover all possible causes of action that might justify compensation for a certain injury. She also made the point that the provision as formulated referred to parties to the contract and thus it would not include different subjects possibly having a claim, such as shareholders; she added that this might be dealt with by defining the very notion of "parties" more broadly, which was what was occurring in contract practice, thus settling the problem of double compensation of different entities. She finally brought up an issue of formulation, suggesting that the current wording of the provision would suggest that compensation might be claimed only once for disputes arising out of the transaction, while a long-term contract might engender several disputes.

155. *A participant* suggested that, once clarified that double recovery was not an issue of cause of action but rather damages for losses or injuries, the principle might be framed not as double recovery but rather as a prohibition of "duplicative damages", *i.e.*, a party could not be granted damages that were duplicative of damages awarded by another tribunal in relation to the same transaction under the relevant IIC. *Another participant* flagged the issue of "*res judicata*" and reminded the Working Group that in certain countries, if the claimant had multiple causes of action, once it went to court and chose one cause of action, it could not go back and reframe the action for the same issue. She mentioned that *"res judicata"* really varied across legal orders and thus some explanatory lines could be included in the commentary, especially because in certain countries it was not part of public policy and therefore the parties had the right in their contracts to organise the *"res judicata"* effects as they wished.

156. *One participant* wished to clarify an earlier intervention, stressing that the discussed provision would overreach what the instrument could achieve, since a waiver of arbitration could hardly extend its effects beyond the contract covering any breach of an investment treaty and precluding a treaty claim. *Another participant* mentioned "no U-turn" provisions in investment treaties and noted that they were designed to preclude proceedings or additional proceedings relating to a measure, so that if a party decided to start a proceeding to recover damages in court,

it could still bring a treaty claim, but it should abandon any other proceedings. This was meant to force parties to make choices. He confirmed that a similar rule in the instrument would mainly pursue the same goals and that it was then relevant to coordinate with continuing work in UNCITRAL Working Group III on waivers of arbitration.

157. *The UNIDROIT Chair* at this point asked the relevant member of the Drafting Committee if he had adequate instructions by the Working Group to move forward. *The drafter* confirmed that he had sufficient information and stressed that, based on the discussion, the right concept to frame the provision would not be the cause of action or transaction arising from the IIC but rather injury or recovery of consequences of injury. He also pointed out that, while he originally perceived that the provision was of a procedural nature, *i.e.*, parallel proceedings, it should rather be conceived as dealing with a substantive issue and should be reframed accordingly.

158. As a general matter, *the UNIDROIT Chair* concluded that the Working Group generally agreed to develop a focused instrument that would address key issues specific to IICs, while still following the general lifecycle of a contract – *i.e.*, starting with general provisions (*e.g.*, the principle of cooperation); formation, parties and authorities; rights and obligations of the parties; change of circumstances; remedies and dispute resolution. The contract's lifecycle would also be followed in the Annexe, which would provide an overview of all the model clauses. It would be clarified at the beginning of the instrument that, for the issues that were not specifically addressed, the UPICC could apply (which was linked to applicable law). Nevertheless, in each Chapter, there may be a need to clarify more specifically which UPICC provisions were relevant.

Item 5: Organisation of future work

159. *The UNIDROIT Chair* thanked all the participants for the fruitful discussion. She announced that during the sixth session scheduled from 10 to 12 June 2025 in Paris (followed by a Drafting Committee meeting on June 13th), the Working Group would focus on the Chapters that had not been discussed in detail during this session, i.e., the Introduction and Chapters 1, 2, 6, 8, and 9. The seventh session - from 27 to 29 October 2025 – would be devoted to a comprehensive analysis of the entire draft instrument. Before that session, the draft would be submitted to the Consultative Committee and the ICC Arbitration Commission for feedback. It was envisaged to organise another session in January 2026. After that session, if the UNIDROIT Governing Council agreed, a consultation would be launched on the draft instrument. The consultation feedback would be considered during a final session later in 2026, after which the instrument would be finalised and submitted for approval to the Governing Council.

Items 6, 7: Any other business; Closing of the session

160. *The Chairs* expressed their gratitude to law firms Bredin Prat and Clifford Chance for having hosted the Working Group on the second and third meeting day.

161. 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 *remotely*	Professor University of Panama Of Counsel, Infante & Pérez Almillano
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Mr Chin Leng LIM	Professor The Chinese University of Hong Kong
Mr Minn NAING OO	Managing Director Allen & Gledhill Myanmar
Ms Emilia ONYEMA	Professor SOAS University of London
Mr Aniruddha RAJPUT	Consultant Withers LLP
Mr August REINISCH *remotely*	Professor University of Vienna
Mr Jeremy SHARPE	International Arbitrator

Ms Habibatou TOURÉ *remotely*	Arbitrator, Founding Partner Habibatou Touré Law Firm

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Ms Meg KINNEAR *remotely*	Founding Member LKDR LLC

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Mr Francisco TREBUCQ	Counsel ICC International Court of Arbitration

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Ms Anna VENEZIANO	Deputy Secretary-General
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ANNEXE II

AGENDA

1. Opening of the session and welcome
2. Adoption of the agenda and organisation of the session
3. Update on intersessional work and developments since the fourth Working Group session
4. Consideration of work in progress
    a) Master Copy of the Draft Instrument
    b) Other matters identified by the Secretariat
5. Organisation of future work
6. Any other business
7. Closing of the session