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Sixth session (hybrid)
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SUMMARY REPORT

OF THE SIXTH SESSION

(10 – 12 June 2025)

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1. The sixth session of the Working Group on International Investment Contracts ("the Working Group") was held in hybrid format from 10 to 13 June 2025 in Paris. The session was attended by 12 individual experts and 7 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 recalled the examination of the first half of the Draft Master Copy conducted during the fifth session of the Working Group and drew the attention to the need to examine the second half of the preliminary draft Master Copy to give direction to the Drafting Committee as to the structure of the future instrument to settle inconsistencies, develop the text and refine the language with the aim of shaping a complete document in view of the October 2025 session.

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

4. The Chairs introduced the Annotated Draft Agenda and the organisation of the session. They proposed discussing the Chapters of the preliminary draft Master Copy in the following order: Chapter 2 ("General Principles of an IIC"), Chapter 6 ("Sustainability"), Chapter 8 ("Remedies, including compensation and damages"), Chapter 9 ("Choice of law and dispute settlement clause"), and finally Chapter 1 and the Introduction.

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. 6 – 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* took the floor and informed the Working Group that the Drafting Committee had met twice at the end of April and the beginning of May to discuss how to update the draft Master Copy in line with the discussions of the fifth session. Following the directions given by the Working Group, the Drafting Committee had revised the structure of the future instrument, merging Chapters 3 and 4 under the heading "Formation" and moving up several principles that had been deemed general principles of IICs in Chapter 2 (e.g., State regulatory freedom, Parties to an IIC). Sustainability issues, both in the pre-contractual phase and during the life of contract, were provisionally pooled together in a separate Chapter 6. The Drafting Committee had also drafted some new guidance, such as a principle on performing obligations in good faith and not acting arbitrarily during the performance of contract in Chapter 5. Finally, it had conducted further work of adaptation on the first half of the instrument, which would be completed in the coming months before the seventh session. *The ICC Chair* further added that the ICC and ICSID were coordinating to elaborate a common proposal to include text on ICC and ICSID arbitration in the future instrument.

Item 4: Consideration of work in progress

a) Draft Chapter 2: General Principles Applicable to IICs

1. <u>Freedom of contract and form of an IIC</u>

7. *A representative of the UNIDROIT Secretariat* illustrated Chapter 2, recalling that some areas had still not yet been fully developed and that there was merit in considering whether a specific principle should be developed in those areas or rather whether the existing UPICC could apply. An example was "freedom of contract" (UPICC Art. 1.1). It had initially been discussed, taking inspiration from the first version of the Issues Paper, that there might be merit in some derogation in light of the specificities of IICs stemming from mandatory rules on public procurement and in specific sectors like energy or exploitation of natural resources, with investment codes or rules applying to State-owned enterprises somehow limiting the State freedom of contract. On the other hand, the commentary to UPICC Art. 1.1 already emphasised possible exceptions to this principle in certain economic sectors. Another example was Principle 11 on the "form" of an IIC, currently included in Chapter 4 on Formation, that the Working Group had expressed a desire to move up to Chapter 2 during the previous session, in line with the placement of the principle on form in the UPICC in the initial section. The question was whether a principle on "form" should be kept in Chapter 2 and how it should be formulated.

8. *One participant* wished to consider the issue of freedom of contract in IICs and considered that the relevant UPICC principle might be referred to without adaptation but stressed the importance of considering the relevance of mandatory rules on public procurement or energy in IICs, not only in the procurement phase but also during performance. He recalled that, in many countries, IICs might be characterised as "*contrats administratifs*" and be integrated with "*clauses exorbitantes*" as part of the public policy of the State due to their connection to public utilities. To avoid this, he proposed to state clearly in the initial part of the instrument that an IIC exclude the application of mandatory rules as a matter of public policy.

9. *A further participant* supported the view that no reference to the public-private divide should be included in the instrument, as domestic courts would not give any weight to the parties' characterisation, but rather to substance and the applicable law; if the applicable law, for instance French law, prescribed that the IIC was a PPP, it would characterise the IIC as an administrative contract. *The prior participant* replied that this would not be the case in arbitration: in an arbitral setting, if the parties had characterised the IIC as a commercial contract and not an administrative contract, the arbitrators would maintain the parties' characterisation. This also might happen before courts in many jurisdictions beyond France. *Another participant* agreed that many jurisdictions did not contemplate the concept of administrative contracts; nonetheless, she supported the view that the instrument should refrain from any such characterisation to ensure that it applied inclusively to the widest possible set of contracts. Finally, *a further participant* sought to suggest that some UPICC provisions, notably regarding the qualification of the contract as commercial, might inspire a principle in the new instrument that an IIC should not be characterised under domestic law, but rather by general qualifications provided by international law or a specific transnational rule.

10. *The Deputy Secretary-General* highlighted the existing link in the UPICC between party autonomy and the specific principle that described the extent to which mandatory rules applied to a commercial contract. She mentioned that if a specific principle on freedom of contract and party autonomy with relevant derogations was introduced, it should be considered whether to maintain a separate provision on mandatory rules or rather incorporate it in the same article.

11. *A participant* expressed the view that the two separate principles on freedom of contract and mandatory rules already existed in the UPICC and, if the approach was kept that the future instrument would only supplement the UPICC where adaptation to IICs specificities was needed,

then she did not see the need to repeat those principles. She added that adjustments might be necessary in the context of UPICC Art. 1.4 on mandatory rules mentioning special regimes on IICs, the more so that Chapter 5 now included a clause on transfer of money that most likely needed to meet the requirements of a special regime in some legal systems. An adaptation to the principle of freedom of contract might be necessary as regarded limitations stemming from public international rules on investment protection, specific to IICs. *Another participant* added in this regard that the interplay between the IIC and the applicable investment treaties should be carefully described. She also mentioned that, having in mind the average State and the average investor that might be the target of guidance in the future instrument, the adaptation of Art. 1.4 should consider standards for protection of the local specificities under national and international sustainability obligations.

12. *The ICC Chair* expressed the view that IICs were always in written form and any modification should be in writing, and that this should be covered in the initial Chapter, including a reference to bidding procedures. He also mentioned the increasing use in IICs of "non-application of estoppel" clauses, meaning that if the parties behaved in a manner contrary to the clauses of the contract (e.g., a public officer), none of the parties could rely on this behaviour to eschew contract obligations.

13. *One participant* reiterated the need for a principle that IICs be drafted in writing, due to the continuous change of civil servants in governments and the existing references in the draft to modifications in writing and the entire agreement clause. *Another participant* stated that, this being a departure from the UPICC, the written form of IICs should be specifically prescribed, while non-application of estoppel might be covered by the UPICC Art. 1.8 on Inconsistent behaviour or by the good faith principle, which might be modelled around the ICC clauses. *Yet another participant* agreed that an IIC had to be in writing (as well as, logically, also modifications thereto); he added that, in some jurisdictions, contracts for the exploitation of natural resources (gas, oil, mining) were promulgated by law based on constitutional provisions, which meant that even modifications had to be promulgated by law.

14. *The Secretary-General* opined that since written form was provided by national laws as a mandatory rule this would be already covered by the UPICC and would not need adaptation. Then, he expressed doubt that a principle on form should prescribe its legal effects; e,g., if a form "*ad solemnitatem*" was prescribed, an IIC in non-written form would be null and void. *The ICC Chair* and *another participant* replied that lack of written form would amount to an issue of validity, particularly in relation to compliance with national law. *Other participants* supported the view that the future instrument should avoid repeating principles already established in the UPICC if their legal effects concerning IICs might be described in the commentary or if a model clause was made available, to render the instrument less lengthy. *A further participant* agreed not to exceed in the length of the instrument but also reminded the Working Group that IICs were normally 100+ pages long. *The Deputy Secretary-General* supported the view that written form for IICs might be addressed in the commentary, to address the relevance of written form for different settings of an IIC as well as to describe the correct interpretation regarding the reach of mandatory rules. *Another participant* questioned the need for a model clause on form and concluded that a principle on form had a prescriptive or descriptive character (i.e., educational or informative) since parties would not negotiate a clause on written form but rather make it in written form.

15. *One participant* considered the alternative between including a principle on form or referring to the UPICC and tackling the issue in the commentary and, since if the issue was not tackled in the instrument, the UPICC "*telles quelles*" would apply, it followed that a requirement of form should be included as regarded IICs. She mentioned that, since the instrument could not have an impact on the applicable law rules on form, the instrument might only impose a contractual requisite of written form through a model clause. She also positively considered the formulation in Principle 11 and sought to draw attention to a possible repetition in Principle 13 and the need to differentiate and clarify the language on bidding procedures, which might be intended not to refer to written

form. *Another participant* wished to clarify that form in Chapters 2 and 3 hinted at different functions, the former referring effectively to written form, the latter belonging to formation of a contract in that it referred to the notion that certain special or mandatory laws imposed specific procedures for approval to be followed. *Other participants* confirmed that a principle of written form for IICs was necessary and that it should not simply be included in the commentary.

16. *One participant* referred to special or mandatory requirements under domestic law in the context of the principle on respect of mandatory norms and considered that the current formulation set a very high threshold. He mentioned that, for certain type of IICs (e.g., energy), this would include constitutional provisions, including special regimes providing for authorities' approval, but in many other cases, other types of IICs might be covered by consistent State practice or lower administrative rules not rising to the level of constitutional relevance. He suggested that the current formulation of the principle might then be rephrased to state that the IIC shall not restrict the application of or replace special or mandatory requirements "as per the applicable law or established practice of the State". The same principle might then consider the issue of written form of the contract. He continued mentioning the need to be educational in the future instrument and provide guidance on the fact that an IIC was to be concluded in a written form. *Another participant* referred to UNCITRAL instruments on form, particularly on public procurement and PPPs, and sought to suggest to seek coordination with the sister organisation. *The Secretary-General* clarified in this regard that a mention might be made of relevant UNCITRAL instrument(s) in the commentary with regard to the relevant aspects, but that there seemed not to be any intention of modifying UNCITRAL rules in this area. *The UNIDROIT Chair* added that the wording of Principle 11 on form was declaredly taken from an UNCITRAL instrument and thus aligned to it.

17. The UNIDROIT Chair clarified that issues of interrelationship between the UPICC and the future instrument would be dealt with in the introduction and be mirrored in the initial principle on the scope of application and the purpose of the new document, so that the reader knew that either the UPICC applied or the new principles applied since they were adaptations to the specificities of IICs, while the commentary would elaborate and provide further guidance.

18. At this point, a discussion was opened on issues of language consistency, particularly on the necessity to ensure use of consistent language throughout the instrument to avoid repetition, also through precise cross-referencing. Consistency in language should be ensured especially when defining investors and investment, as a description of the scope of the instrument, as in some parts there were references to investors, in others to the notion of investment. *One participant* recalled that the Working Group had decided to remain flexible and not provide a technical definition of investment, rather providing a general statement, perhaps inspired by the case of *Joy Mining v. Egypt* or the well-known "Salini Test", where the accent was placed on the contribution to economic development in the host State. *A further participant* sought to reiterate that generally accepted features of an IIC might well be covered by the commentary. *The Secretary-General* noted that different wordings, such as "a contract validly entered" versus "conclude" or "conclusion" of an IIC in Principle 12, should be aligned (or, alternatively, explained).

19. At this point, *the UNIDROIT Chair* summed up the discussion and considered that there was agreement on not including a principle on freedom of contract, that Principle 11 on written form should be moved up to Chapter 2, and that procedures for approval would remain in Chapter 3 on Formation (though with some reformulation, considering requirements provided by domestic mandatory law). She added that there seemed to be some disagreement on whether written form for an IIC should be covered only in the commentary, but this would be revised once the Drafting Committee provided full text. She then passed the floor to a member of the Drafting Committee to illustrate Principle 6.

2. Parties to an IIC

20. *The member of the Drafting Committee* elaborated on the function of Principle 6 to prospective users, parties to an IIC, considering the complex nature of parties in IICs compared to commercial contracts. He mentioned that the Principle sought to describe, as a statement of fact, the possible different parties to an IIC, but also implied some normative meaning. Indeed, it described possible parties on the side of the State (e.g., ministries and departments as organs of the State, State enterprises) but also referred to any other entity competent to enter into and perform the ICC that, despite being independent from the State, still exercised some public function (e.g., sovereign wealth funds). This broad description would extend the application of the attribution and organic theory to prevent an important set of contracts, also in light of arbitral case-law which excluded the public nature of certain entities deemed not to be under the control of the State (see *Tethyan Copper Company v. Pakistan*). On the part of the investor, the Principle described who the other party to the contract was, particularly the "foreign investor". He mentioned that, in principle, the protection provided by the future principles would not relate to national investors, but this would be open to discussion. He mentioned that, in defining the "foreign" nature of the investor, arbitral tribunals shifted from the initial "incorporation theory" to prioritising the "seat" or the "effective existence" or "operation" of an enterprise. Currently, the preponderant treaty practice required some connection or some existence of the investing enterprise in a State different from the host State. Thus, the Principle proposed as a reference the natural or legal person having "the principal place of activity" outside the host State. He noted that many questions would arise in relation to what enterprises would be protected by choosing one or the other element, the main issue to be discussed being whether the instrument should prevent the opportunistic setting up of an enterprise in a State to enjoy protection. Another issue would be whether to consider an exception to the "foreign character" of the investor where a registration was required by law in the host State.

21. *The UNIDROIT Chair* considered that the articulation of the principle on the investor side would bear on the scope of the instrument; she expressed a preference for a definition of IICs, also addressing domestic vehicles, while the part describing the State side might be renamed "attribution" since it aimed at settling issues of attributing an action by the organs of a State. *One participant* agreed on this point and considered the need to use appropriate language (i.e., acting "on behalf of" rather than "on the side of" the State). She also mentioned that this was why she had argued in favour of a description of the investment since certain types of public parties might not necessarily exercise regulatory powers. Taking inspiration from the expanded definition in art. 25 of the ICSID Convention, which defined the widest contours of an investment, the principle might refer to a contracting State or any constituent subdivision or agency of a contracting State designated to the purpose by that State. This would leave to the domestic law in the host State to declare which enterprises in which the State held shares or an interest would be able to bind that State and accept liabilities on behalf of. The question would remain open whether nationals of the host State that had registered an enterprise abroad and sought foreign investors' protection behind the shield of that enterprise, despite being substantively national, would legitimately enjoy protection. She was in favour of a principle including nationals among protected investors, to avoid providing foreign investors with additional incentives and protections not available at the domestic level.

22. In this last regard, *another participant* considered that the international practice under ICSID jurisprudence would be quite different, limiting protection to foreign nationals (see *SIAG v. Egypt*). He mentioned that referring to a natural person in the third paragraph (extending to domestic investors) would be a technical error since only the different legal subjectivity of a legal person would justify the extension of protection. *Still another participant* wished to recall that, at a contractual level, the issue might be dealt with by the parties, while a general principle, inspired by art. 25 of the ICSID Convention, might simplify the issue, for instance referring to "an investor having the nationality of another state or treated as such because of foreign control". *A further*

participant agreed that Principle 6 would affect the scope of protection and suggested to refrain from being normative when describing foreign nationality, particularly by avoiding one connecting factor or another. She also mentioned that the instrument could not generate protection where it was not available. *Other participants* agreed on the purpose of the principle as meant to inform the reader of the future instrument about the complexity of the parties on both sides (not only the articulations of a State, but also of a multinational company, i.e., the headquarters, the subsidiary in one country or another). *A participant* considered that all reasoning stemming from investment treaty arbitration case law should not be imported into a contractual setting since the parties in such a setting would be very careful about nationality issues so to prevent any free riding.

23. *The Secretary-General* took the floor and wished to invite the Working Group to consider that a future instrument should provide some guidance to users about the issue of nationality of the investor, as related to the scope of the instrument. This might include, by different means (a principle or commentary), drawing attention to the principal connecting factors normally used to refer the investor to a certain legal order. Providing options would provide utility to readers, since this was a soft-law instrument and not a treaty. He then drew attention to the possible inclusion of the territorial entities of a federal State (such as Canada) on the side of the State. *A representative of the UNIDROIT Secretariat* reminded the Working Group that, generally, text describing an IIC and the parties to an IIC would also be allocated in the Introduction and in a separate Principle in Chapter 3 on legal capacity; thus, a paragraph (or another principle) on attributability might be placed in Chapter 3 since the normative issue at stake was precisely the legal capacity to bind the State or by what conditions a national investor might be provided protection, the introduction describing all options and the normative part being included in Chapter 3 without expressing preference to a specific connecting factor amongst the others. *The Deputy Secretary-General* suggested to consider possible connections between issues of attributability and agency and representation under the UPICC.

24. At this point, *the member of the Drafting Committee* asked whether the Working Group would opt to include (or not) only foreign investors. *One participant* expressed concerns about including national investors under the scope of the instrument, as this might create tension with the host State domestic law, some element of "*extranéité*" being necessary to trigger protection. *Another participant* argued that the ICSID Convention tried to balance the need for a connection with a foreign legal order with the necessity to cover situations where a national company was involved, as it often occurred, by art. 25.B, which considered both foreign control of a national company and situations where the parties considered the national company as foreign. Guidance along these lines would be useful to future readers. On a related note, she mentioned that the complexity of the party on the side of the investor might also affect the dispute settlement clause when a national company in the host State, a subsidiary or other entity related to a company group, had signed the IIC, but the procedure was to involve the parent company as the real investor. *Other participants* sought to support an earlier position that natural persons should not be mentioned in Principle 6, as IICs were always signed by a legal person, and mentioning natural persons would raise the complex issue of dual nationality.

25. Next, the Working Group addressed the situation where the IIC was signed between a State and one or more other States (such as the "Just Energy Transition Partnership" or the recent US-Ukraine partnership on minerals and rare earths) or with sovereign wealth funds, thus raising issues of qualification of the acts of these entities as *jure imperii*.

26. *The two Chairs* concluded on this topic that Principle 6 might include a statement that IICs were concluded between a public and a private entity, providing guidance on the most relevant issues and criticalities, without including too-strict definitions, which would reduce flexibility and the scope of application. They then proposed that the Drafting Committee would receive a mandate to propose text providing solutions on the issue of the investor's nationality, if national investors should be covered and to what extent, how to define foreign nationality, and how to include State

entities investing abroad such as sovereign wealth funds and State-owned enterprises. They also considered the need to coordinate with the work of the International Law Commission on non-binding agreements. *The Chair of the Consultative Committee* mentioned in this regard the OAS work in this area and the Duncan Hollis Report.

3. Good faith and cooperation

27. *A member of the UNIDROIT Secretariat* illustrated possible alternatives as regarded the drafting of the principle on good faith and cooperation. She mentioned that one option would be to keep a general principle here, later followed by specific applications: for instance, good faith in negotiations during the pre-contractual phase or as regarded the performance of contractual obligations, or cooperation as a principle informing the relationship between the parties during the due diligence phase or in assisting the parties in the performance of their obligations in Chapter 5. Another option would be to consider that the good faith and fair dealings principle in the UPICC might apply "*telle quelle*" and therefore refer back to the UPICC.

28. *One participant* wished to consider that many references to good faith were present in the draft Master Copy, as regarded negotiations in the pre-contractual phase, the entire agreement clause, and pre-contractual liability: they amounted to specifications of the principle in the IIC context rather than derogations, but they still indicated how good faith should be restrictively applied when referred to IICs. Therefore, there was a need to specify how Article 1.7 of the UPICC was to be interpreted in a very narrow manner, preventing an expansive interpretation. This would be in line with the model good faith clause for model turnkey contracts produced by the ICC, which was very restrictive compared to Article 1.7 of the UPICC and which might be used as a starting point. *Another participant* argued that a principle of good faith should be included, especially considering that this was alien to the common law tradition, and that its legal effects be carefully described. *A further participant* wished to stress that good faith and fair dealings should specifically be examined as regarded the manner they worked in the IIC context, including whether they implied different sets of obligations. He mentioned that the commentary to the UPICC mentioned abuse of rights in the framework of good faith and that abuse of rights was frequently used in investment arbitration to address situations where an investment was structured to achieve protection beyond the foreign nationality requirement; its bearing on these situations should be examined.

29. *The Secretary-General* recalled that the commentary to Art. 1.7 of the UPICC reported many examples of what constituted, on one side, good faith, and on the other side, fair dealings. He mentioned that Art. 1.7 was one of the cornerstones of the UPICC and that there was a need for a strong set of justifications if it was to be adapted here. *The Deputy Secretary-General* added that the principle of good faith in the UPICC found several concrete applications throughout the instrument and clarified that it was not meant to create new obligations, but rather to qualify the manner in which other related obligations were performed, particularly describing the behaviour of the parties in the performance of their obligations. She agreed that it would not be suited in a traditional manner to the IIC context, but that it could be specified with regard to specific relevant situations.

30. *The UNIDROIT Chair* recalled that, in an earlier discussion, the fusion of good faith and cooperation had been meant to provide specification of the principle with a view to give relevance to an overarching principle of cooperation which typically informed IICs as long-term contracts bearing on sectors of public interest, implying a sort of joint venture between the parties that should be somehow preserved. Cooperation would provide a principle that called upon the parties to address the entire array of situations that might occur during the investment relationship, giving special regard to sustainability issues, due diligence, and so forth.

31. *One participant* recalled the diversity of IICs compared to commercial contracts and the inclination of IICs to achieving economic development according to the Salini test, which called for an adaptation to UPICC Art. 1.7 in the new instrument. *Another participant* supported the inclusion of a principle in this area, highlighting that good faith led to cooperation, and that cooperation was of paramount importance to IICs. Many obligations in IICs were interdependent and could not be performed without the cooperation of the other party (e.g., issuing permits or authorisations). Good faith, which in common law was elevated to the level of having to behave with good will in the performance of contract, and cooperation were the subject of impressive literature in the context of construction contracts, and this was an indicator that there would be something missing if the instrument did not cover this area. *Other participants* agreed that a tailored principle on good faith should be developed, bearing specific IIC obligations in mind that would benefit from stating a clear duty to cooperate in several fields, all while trying to contain the tension between the instrument applying across sectors and the need to be specific (for instance as regarded the obligation of the parties to collaborate to clean up and restore the environment when the investment was completed).

32. *The ICC Chair* concluded that there was a clear need to develop the notion of good faith through examples of cooperation within the framework of investment contracts, and the Drafting Committee was mandated to propose language at the next session.

4. Respect of sustainability

33. *The ICC Chair* then called upon the Working Group to discuss Principle 7 in Chapter 2 on respect of sustainability. *One participant* sought to draw attention to the wording "the parties shall commit to pursue the investment covered by the contracts in accordance with the highest international standards, with regard to achieving the goals of sustainable development and climate change prevention". She mentioned that these areas were changing swiftly over time and that including a time when this obligation arose would be an option, suggesting the time of conclusion of contract, which would bear on foreseeability and thus on the normative principles on remedies, including damages. She stressed that the question was how to deal with the evolution of the standard after the conclusion of contract. *Another participant* proposed to restructure Principle 7, starting from a definition of sustainability and making it clear that it covered CSR and ESG, clearly stating the need for a holistic approach to sustainability. She then replied to the previous remark suggesting to include language in the commentary that sustainability continuously evolved and that any evolution of the standard should be considered in the context of the monitoring of the entire lifecycle of contract, thus allowing adaptation of the performance to new scientific discoveries. She considered that the absolute imperative sustainability language would rather underline the factual necessity that all actors should have to contribute toward solving environmental and social issues and to enhance good governance and human rights. It should be read more as an aspiration than in legal terminology. She moved on, clarifying that the highest international standard to attain would be a minimum and would never imply to lower the national standard in the host State: if this was higher, then that would then step in as the reference. She finally considered that paragraph 7 on the State's right to regulate in the area of sustainability should be kept but coordinated with the following principle on regulatory freedom, while paragraph 8 on cooperation between the parties on sustainability would be a case of specific application of the principle discussed under good faith and therefore might deserve earlier consideration in the section and elsewhere in the Chapter or greater instrument.

34. *Still another participant* pleaded in favour of a balanced and objective instrument on sustainability since requiring an excessive or uncertain obligation of investors would make it unacceptable and would minimise the use of the future instrument. She stated that an absolute imperative of sustainability could be desirable, but something less might be more achievable and realistic, also considering that the remedy for breach of a sustainability standard obligation was termination. She then stressed the difficulty of identifying the highest international standard since

many standards competed in the market that were slightly different (e.g., the EU Sustainability Directive and the OECD Guidelines for MNCs), and many doubts would arise about which would be higher compared to the other and which the investor was bound by.

35. *A member of the Drafting Committee* wished to reply to an earlier intervention on the time at which the highest international standard on sustainability should be considered by the investor. He argued that most treaties and IICs equally included host State compliance clauses that the investor was to respect and adapt along the entire life of contract, the only difference being in case of a change in law falling within an economic equilibrium clause, with the possibility of right to the absorption of the costs of compliance. He also stressed that crystallising sustainability commitments at a certain time would make them evaporate in a certain number of years (without providing substitutes). He agreed on the uncertainty enshrined in the notion of "highest international standard" and the difficulty to capture it, as well as on the issue that the more specific the instrument was, the more the standard would be soon outdated. He stated that it was not even easy to identify a "balanced" standard, as differences existed among firms concerning what would be appropriate or not, and if legislation should be more gradual or strive for fully fledged obligations (see the recent EU "Omnibus Package", postponing new sustainability obligations to a later phase). He then stressed some adaptation of the text of Principle 7, particularly the language of "sustainability" in place of "ESG" as an umbrella concept to cover all previous notions (ESG, CSR) and the addition in a prominent position of sustainability in line with considerations during the previous sessions, with a view to meeting the demand for protection of the entire planet, and not only the environment. *Another participant* agreed on the reaction of business to the "rollback" on sustainability, as this would bring forward significant costs to dismantle what had been done over the years, and he supported the view that national standards might often be higher and should apply. He then suggested to use caution as regarded timing of sustainability obligations, as most issues arose at the end of the investment, when there was the need to restore the environment in and around the investment site.

36. *One participant* replied that the sustainability part of the instrument remained very complex. On one side, it was very contentious at legislative and business level, on the other side, it needed a strong posture, as requested by civil society, being linked to the destiny of the world and future generations. She recalled the recent drawback stemming from the "EU Omnibus Package" and the contradictory move that had reversed years of advancements, requested by the same industries. She mentioned that, when drafting the text under discussion, there had been no intention to propose language on remedies for violation of sustainability obligations since this was meant to be covered by the general chapter on remedies; however, a scaled obligation would be necessary, graduating the remedies, as termination would remain the very last resort. Parties would first meet and consult to settle differences and find solutions, particularly if the events bringing about a violation had not been foreseeable, before going down the path of termination.

37. *The Secretary-General* recalled that the new instrument would be soft law, by implication optional for the parties, and if the highest international standard was kept as wide and generally defined as currently, this would likely engender the risk that private sector would not opt for it. This was exactly what happened at the EU level. A standard should be commercially viable and consider what would happen if standards moved back and how to codify this, especially in the context of long-term contracts. In addition, the choice as to the highest international standard should be coordinated with the choice-of-law chapter, where party autonomy prevailed and the parties could choose a lower standard.

38. *The UNIDROIT Chair* took the floor and argued that the introduction should include language that investments were a means to fight poverty and boost development and their link to sustainability – to try to show the positive part of investment that was also ultimately linked with sustainability. That could be the starting point of the logic of investment. She then considered that States' obligations on sustainability were really difficult to be implemented in a contract, being a

subject matter for treaties or action plans and so forth along with, similarly, the frequent obligation of States in investment treaties not to lower their own standards, a sort of "reverse" stabilisation clause. Yet a path should be set out to impose some kind of obligation regarding sustainability on the State to balance the obligations placed upon the shoulders of the investor. On another note, she then remarked that the new instrument would also include investors' protections, and that this should be visible in the instrument as a component in equilibrium with modernised investors' obligations, which stemmed from public law, so that new obligations were established, in a balanced manner, for both parties.

39. *One participant* reiterated the issue that some domestic legislation might provide a higher standard than international standards, and a provision should clarify that, when the domestic standard was higher, it prevailed, in the same manner that investment treaties provided that if a more favourable investors' regime existed then that should be applied. He then stated that fixing a time for the sustainability obligation to arise would be at odds with the stabilisation principle and thus should be discarded. He then addressed the issue of the evolution of the standard, referring to the possibility of drafting an annexe to provide international standards that could be selected by the parties (e.g., OECD Guidelines, EU standards), leaving the parties free to choose. He then referred to paragraph 3 of the Principle and suggested to specify phases of contract where the due diligence obligation arose, which parties were obliged to conduct due diligence, and how this would fit in different industry sectors. He made the example that, in most investment operations, the investor was better placed to conduct due diligence, particularly as regarded the impact of its technologies on the ground, but in other fields, such as concerning a forest to be given in concession for mining, the State might be better placed. The commentary would be the right place to explain the matter. *Another participant* made the case for an overriding sustainability principle, placed early in the instrument, that might be linked to good faith, and suggested to not be overly influenced by rollback, since this might change in few years with political change.

40. *Still another participant* sought to clarify that the issue of fixing a clear time for the determination of sustainability obligations and the commitment to the highest international standard was paramount to give the investor clarity about the scope of its obligations. This should not be mixed with stabilisation issues or the State's power to raise the standard to a higher level by legislation; in principle, this would have legal consequences in terms of mandatory norms that the investor should apply, but it would not be in breach of contract. *Another participant* opined that the instrument would provide guidance in the commentary on how to deal with due diligence and sustainability standards, but a contract was ultimately a matter of party autonomy and it would be up to the parties to select the adequate standard while respecting public policy and mandatory norms.

41. *One participant* recalled that Principle 7 was just one part of a complex structure in Chapter 6 which included specific due diligence obligations and further standards: what would apparently look unbalanced in Chapter 3 would appear differently if read together with Chapter 6. *Another participant* reinforced this point and stressed that balance was intrinsic to the structure of Principle 7, which was a general principle and addressed both parties in light of the principle of cooperation, while further parts of the instrument clarified the scope of the obligations falling on each of the parties.

42. *The ICC Chair* concluded that the instrument might include a scale of intensity as regarded sustainability obligations that might adapt to different industries (energy, oil and gas, construction) and moved on to the next section.

5. State regulatory freedom

43. *A representative of the UNIDROIT Secretariat* referred to section F and recalled that the Working Group (at its fifth session) had determined to include a general principle in Chapter 2 on

"State Regulatory Freedom" which had not been developed, inviting participants to provide indications to the Drafting Committee. *The ICC Chair* asked the participants if it was appropriate to include such a statement in a contract since this reflected a well-established principle linked to State sovereignty. Such a principle would also be in tension with the stabilisation clause.

44. *One participant* argued that, in a contractual setting, the only function of such a principle would lie in restating the core issue of the State being free to take its decision in accordance with the principle of sovereignty on condition that, if this had an impact on the investment, it was ensured that an expropriation or similar would not remain without compensation. The commentary should convey this core function. *Another participant* considered that, while in another context and circumstances, such a statement of principle would not make sense, nowadays the reiteration of regulatory freedom lay very much at the heart of States' concerns, and a new instrument addressing investment law reform, even from a contractual point of view, would otherwise be perceived at least as incomplete. *A further participant* recalled that a stabilisation clause would in no manner prevent the State from exercising its regulatory power, provided by constitution and public international law.

45. *Other participants* agreed on the point that the instrument could not affect the right to regulate but only the consequences of its exercise on the contract, and that the inclusion of some statement in this regard would have a relevant "signalling" effect.

46. *One participant* argued that a principle on regulatory freedom would not only have a signalling effect, but rather normative relevance, addressing situations where the State could make changes in regulations without having the duty to compensate. A too-broad principle would disrupt the scope of the stabilisation obligation, while a too-narrow principle would allocate all the burden for changes in regulations to the State. He mentioned that arguments had been carried out for decades between commercial lawyers and public international lawyers, the former arguing that, if specific provisions on regulatory powers were not included in the contract (or a treaty), they would not have relevance, the latter taking the opposite position, that regulatory power always applied as a principle of public international law. Only after the *Methanex* case had the right to regulate come into the mainstream. He mentioned that the general principle was then restated in the *Oscar Chin* case and, thus, that State regulatory freedom should be included in the instrument and delimited in its contours, also including a statement that it was not a *carte blanche* for the State, but rather had some constraints.

47. *The ICC Chair* proposed to consider that there was sufficient consensus to address this issue in Chapter 2 and reiterate the regulatory freedom of the State while considering existing constraints and including a cross-reference to the principle on stabilisation.

6. Mandatory rules

48. *A member of the Drafting Committee* then introduced Principle 8 concerning mandatory rules, inspired by Art. 1.4 of the UPICC. The Principle would give an account, by way of addition or adaptation, of the existence of special legal regimes that the parties might have agreed to and the State granted in exchange for, or to attract the investment, in the form, e.g., of a special tax regime or other incentives; the normative assumption was that such special regimes should be approved and ratified by the competent authorities in the host State in accordance with the constitutional, administrative and applicable law, and it would be different from the ordinary regime applicable in the concerned legal order. It would not be a stabilisation clause as it would not say anything about the future. She clarified that Principle 8 established a commitment and initially included a representation and warranty (R&W) that a State would have done what was necessary to obtain approval so that, in case this did not happen, there would be a legal basis for the commitment to be enforced. She also added that, at the previous session, it had been determined that R&W

terminology applied particularly in common law contracts and therefore it was suggested to replace this with the expression "declarations and assurances".

49. *One participant* made the point that such an adaptation would not fall under the notion of mandatory rules, since creating a special regime by contract and authorities' approval would not amount to creating mandatory rules. It would be advisable to refer back to Art. 1.4 of the UPICC "*telle quelle*" and then clarify that special regimes might apply. *The member of the Drafting Committee* replied that the underlying idea was that special regimes agreed between the parties and approved by the competent authorities (derogatory tax treatment, money transfer, and so forth) would amount to a derogation of normally applicable mandatory laws. An example might be that the fiscal law applied a withholding tax of 15% on money transfer, but the agreed regime exempted the investor from the withholding tax. *Another participant* argued that, if the special regime was approved and ratified by law, this would still amount to subsidiary legislation, which would not contravene mandatory laws. A different situation would occur if the parties had agreed to a special regime and no law of approval were passed, thus engendering a *contra jus* regime; in her view, special regimes approved by law would not need consideration in the instrument. *A further participant* referred to his earlier comment proposing the exclusion of any characterisation of the IIC as a "*contrat administratif*" and its exorbitant clauses so to exclude the application of related mandatory rules, and suggested considering to place such an element in relation to Principle 8. *Other participants* agreed that they did not see the connection between special regimes in IICs and a classical notion of mandatory norms.

50. *The Secretary-General* hinted at two situations in this context: one being when a special regime was agreed and approved by the law in the host State, this itself creating new mandatory laws and thus implying no need for a principle to be included; the second being when the parties agreed to the special regime in the IIC, but the law of approval procedure still had to be fulfilled and, based on the IIC, the State had a contractual obligation to pass it through the Parliament or other relevant procedure and the investor having a contractual right to require the State to approve it based on a valid contract with all legal consequences. This latter situation might be addressed by the principle under discussion.

7. Continuity

51. *A representative of the UNIDROIT Secretariat* then illustrated that the draft Master Copy included at this point a placeholder for a principle of continuity. This principle, in fact, would enshrine the special interest in keeping IICs alive and providing continued public services, as exemplified for instance by concrete applications such as having a prolonged procedure to qualify protracted force majeure events and the exit from contract or limiting the possibility of suspension of performance vis-à-vis a non-performance. The point was whether a general principle should be placed in Chapter 2 with a view to incentivise the parties to conduct themselves in a manner which ensured the preservation of the contract. In such a regard, *the Deputy Secretary-General* invited the Working Group to consider a possible reformulation of the title of the principle, maintaining the value of an IIC as well as considering the link with the principle of the parties' cooperation, which was the basis for keeping the IIC alive and ensuring its continuity. She mentioned that this principle might be deemed to be two-sided, i.e., as referring to maintaining either the value of the contract or the continuity of public services, and it might find its way into the chapter on remedies with specific applications.

52. *One participant* highlighted the importance of this principle in IICs as it related to public utilities in every country (energy, infrastructure, urban transit, railways, airports). He mentioned that it had to be coordinated with other principles in the instrument. One would be stabilisation in the context of assignment or transfer of contract, which often pursued the aim of preserving the continuity of public services by substituting the investor with another investor. In this area, a provision should ensure that the stabilisation commitment by the State passed through the

assignment procedure with the IIC to the new private party, on the ground that it was related to the investment and not to the investor. Another point was that, in the context of remedies, it should be clearly stated that, under certain conditions, performance cannot be withheld vis-à-vis non-performance (as a derogation from the principle *inadimplenti non est adimplendum*) precisely in order to ensure the continuity of contract. *Another participant* found herself in agreement with the earlier assertion that continuity might be consolidated with cooperation and the idea of highlighting specific application in the relevant chapters, such as not withholding performance when regulating remedies. *A further participant* also stressed the link with hardship in current Chapter 7.

53. *The ICC Chair* summed up that the two options to be explored by the Drafting Committee should be to either have a general principle merged with cooperation or move it to the chapter on remedies (accommodating specific applications) and then moved to the next section on notice.

8. Notice

54. *A representative of the UNIDROIT Secretariat* recalled that, at the previous session, the Principle on notice in then-Chapter 4 on formation had been proposed to be moved up to the general principles in Chapter 2 since it was relevant not only in formation but throughout the instrument. It was also queried whether adaptation was really needed since the relevant UPICC might be referred back to without modifications. *A member of the Drafting Committee* illustrated that the formulation on notice in the UPICC was quite broad, and some level of reformulation might help, especially considering the necessary parallelism with the necessity of written form for IICs.

55. *One participant* recalled the importance of a clear rule on notice in IICs, since many rights, such as the right of termination, might not be regularly exercised if clear rules on notice and on evidence of notice were not available. He mentioned that notice would be relevant in many other parts of the instrument. *Another participant* mentioned that this would be comprehensively covered by the existing UPICC without a need for adaptation, provided there was proper explanation in the commentary. *Other participants* agreed that notice would be such relevant in many respects, particularly in the chapter on remedies, and thus a general principle or including a back-referral to the UPICC in Chapter 2 would make sense. *Another participant* considered that, if a general principle was included in Chapter 2, he would still see the need for having a special notice rule in the dispute settlement chapter: in fact, rules on notice were becoming increasingly relevant, as evidenced by increasing consideration in recent treaty law, which included more and more often the specification of addressees for notice (e.g., the Ministry of Justice). *A further participant* added that States quite often required, within the area of public contracts, notice to be sent within strict timeframes and through formal channels (often digital), and this should be reflected in the new instrument, while *another* confirmed, based on a recent case at the Paris Court of Appeal, that rules for communication and notice during the life of the contract and notice in the context of an arbitral procedure had to be different, the latter requiring a higher level of formality.

56. *One participant* considered whether a rule on notice in the instrument, surely necessary, would really impact the legal framework for notification in various legal orders, as its content might be framed as mandatory law. *Another participant* sought to test the notice principle in the UPICC in special situations, such as when a State was in turmoil and it was not clear which was the legitimate government, and he mentioned that, based on the text, notice would result in legal effects when reaching the physical or mailing address of the relevant department, regardless of whether a rebel group or a foreign power occupied the office. It would remain to be seen whether mere commentary was sufficient here. *A further participant* clarified that there were three aspects to consider: form of notice, obligation of notice, and issues of validity in case requirements were not met.

57. *The ICC Chair* concluded that a back-referral to the UPICC might be included at the end of Chapter 2, with some lines of commentary, along with specific provisions when deemed necessary

in the relevant chapters, particularly validity, change of circumstances, termination and dispute settlement, if they required specific adaptations, also taking into account their likely nature of mandatory rules in many legal orders. *The UNIDROIT Chair* invited the Working Group to reflect on whether there any other general principle deserved consideration in Chapter 2, and the overall structure of the Chapter since, as currently structured, the summary of content did not make it easy to grasp the rationale. Some line of connection between the sections had to be forged.

b) Draft Chapter 6: IICs and Sustainability

58. The ICC Chair moved to Chapter 6 on IICs and sustainability and invited a member of the Drafting Committee to illustrate its content.

59. *The relevant member* recalled that the proposal had prevailed at the last session to consolidate all parts of the instrument on sustainability into a single Chapter and replace "ESG" with "sustainability", aligning terminology. The main addition was a dedicated sustainability remedy clause, and it remained to be assessed whether that should be placed in the general remedy chapter. A question in that regard was whether, despite being a scaled clause, it might be perceived by investors as being too harsh, having special regard to due diligence monitoring obligations throughout the contract execution until completion and in the post-termination or expiration phase. A question that investors often posed to legal consultants was when the contract ceased to yield effects in terms of liabilities; this was felt relevant for issues of sound financial management and thus engendered business hostility to legal principles that survived the completion or expiration of contract. *A representative from the UNIDROIT Secretariat* referred to the need to review the structure and where different layers of due diligence intersected or overlapped (sustainability due diligence, human rights due diligence, climate change due diligence).

60. *One participant* mentioned that there might be overlap in the Chapter since it had been drafted by different people at different times and that it needed some coordination and adjustment. *Another participant* recalled the earlier discussion on the highest attainable standard and warned against having a standard too far flung from reality; he supported an aspirational standard, leaving it to the parties to arrange proper contractual content, and also considering the specific public international law obligations the State had to abide by.

61. *The ICC Chair* highlighted the complexity of this point, agreeing about the ethos of the instrument, but also with the need to find properly balanced solutions. *The UNIDROIT Chair* posed a question of structure. She mentioned that, going through the draft, there were the different phases of the contract's lifecycle (general principles, pre-contract, rights and obligations), but in terms of presentation of content, which was essential to the perception of the instrument (including as a balanced instrument), aggregating all sustainability issues into a single chapter did not clearly set out the balance between the obligations of the State (expropriation, physical protection and security, transfers) and those of the investors (sustainability). She concluded by stressing the need to re-think the structure and perhaps include sustainability in Chapter 5 on "Rights and obligations".

62. *One participant* added a layer of complexity, recalling a case where Mexico had asked Solaris to compensate for environmental damage ten years after it had left the operative site. He questioned how a time cap could apply to these situations and what would happen when, *medio tempore,* an assignment occurred and how the latter would affect damage causality (and what limitations would apply). *Another participant* sought to take a position on both issues: she mentioned that sustainability would permeate the entire instrument and thus a general principle should be left in Chapter 2, while the separate aspects of sustainability could be moved back to each relevant phase of contract, as had been done in an earlier version, so that it read better; a time cap was not easy to consider as elements of environmental damage, for instance relating to

the soil, might be evident only years after the exit from the investment, even hidden until decades later.

63. *The member of the Drafting Committee* reminded the Working Group that guidance on statutes of limitations might be considered, still considering that, depending on jurisdiction, a five-, six-, or ten-year term might apply, and in some jurisdictions, there might even apply the principle of "*imprescriptibilité*" (no statute of limitations). When applicable, consideration of existing terms of statutes of limitations might provide ideas for a debt cut. *A representative of the UNIDROIT Secretariat*, in relation to the issue of structure and content, invited the Working Group to consider whether sustainability commitments should be placed in Chapter 5 within the section on investors' obligations. This would allow a flexible representation of the balance between State obligations to protect and investors' obligations to respect sustainability, which had been among the main tensions animating the project since its inception. He mentioned that this would create some criticality as regarded the circumstance that sustainability should enshrine shared obligations between the State and the investor; however, it had been determined in earlier sessions that there was a primary responsibility of sustainability protection (within the terms of due diligence) on the side of the investor and a secondary responsibility on the side of the State: this criticality might be reconciled through reference to the principles of cooperation and assistance by the State to the investor in performing its obligations. He then recalled the question in the draft Master Copy on simplifying the structure of due diligence, reporting and planning obligations (sustainability, human rights, climate change) and mentioned that the manner in which they were structured did comply with some contractual standards provided by NGOs (e.g., the IISD Model Clauses) but might perhaps be simplified in terms of presentation by investigating the relationship between due diligence and reporting/planning obligations with a view to presenting a single architecture for a due diligence procedure – including reporting and planning – and then providing single sections (or paragraphs) applying that procedure to different domains (sustainability in general, human rights, climate change), highlighting for each their own specificities. Such a simplification, while referring to and not modifying existing international standards, might provide a value added in itself to the future instrument in terms of certainty and simplification for businesses. In addition, international standards or documents relevant to each domain should be referenced, having in mind that, in accordance with the IBA Report on the Use of ESG Contractual Obligations, every international standard was deemed to have relevance to one domain or industry or another. Specific language in the commentary might address the issue of evolving standards or standards substituting those referred to in the instruments that later became defunct.

64. *The member of the Drafting Committee* considered that, in fact, Chapter 6 on Sustainability, as drafted, would now give the impression of an over-sized chapter, out of proportion with the other chapters and providing some redundancy due to the above-mentioned drafting by several individuals at different times; this needed to be coordinated. *One participant* supported the re-allocation of sustainability in three different settings, i.e. pre-contract, duration of contract, and post-contract phase, based on a teleological approach, i.e. the function of each commitment. Commitments in the pre-contractual phase would be different from those of the contractual phase, but they were related in that the outcome of the pre-contractual due diligence would be the basis for planning (and thus partially provide a benchmark for contractual behaviours in) the next phase, together with the outcome of further reporting and planning throughout the entire life of contract. Due diligence, planning and reporting during the duration of the contract might also have some relevance to the post-contract phase. He then reflected that sustainability provisions should include substantive obligations in relation to each area, such as environmental and climate change commitments, social and human rights, and good governance. In relation to the issue of statutes of limitations in the area of sustainability, he mentioned that in India and in several Latin American countries, statutes of limitations were not a restriction when it came to environmental damage and sustainability issues. He proposed that, after the completion or expiration of a project, a post-contract examination of the environmental impact should be conducted and submitted to the State:

once approved by the State, there should not be the possibility of re-opening it except in very specific situations.

65. At this point, *the UNIDROIT Chair* asked the participant if the post-contractual phase would still involve a contractual liability. *The participant* replied that these remedies would normally be available under public law and thus would work outside the contract, but because of the special intertwinement between private and public law in IIC, this issue needed to be deepened. Two options, he mentioned, before the Working Group: not to comment at all on the issue or rather approach it from the contractual angle, which would not override constitutional principles, but if a court moved ahead with an action on the investor liability, an action could remain for the investor to ask compensation since it was agreed the issue could not be re-opened.

66. *Another participant* mentioned that, when dealing with sustainability, it should be considered that the contract interacted with the host State's mandatory law, including based on clauses that provided for compliance with the whole of the host State's law, which did not provide for a statute of limitations and often enjoyed constitutional protection. This would go beyond environmental and climate change issues and include labour rights, human rights, and local communities' rights. One approach might be to draw the attention of States and investors to such issues in the commentary and invite them to consider how to deal with it. However, the point was critical, and it would not be easy to find the right balance, e.g., who would bear responsibility for an oil spill when the State had checked and monitored the investment and the investor had carried out its due diligence procedures, yet the harmful event occurred anyway. Some States might be stronger in applying monitoring procedures and providing penalties if some standards were not respected; other States – and particularly least developed countries – might not have the resources to monitor, and the subsequent liability action might be the last resort available. *One participant* supported the idea to move each aspect of due diligence into the relevant chapter, i.e., pre-contract, formation, and rights and obligations, with a clarification of which obligations would be on the State and which on the investor. Drawing a parallel with confidentiality clauses, she then proposed to reflect on which IIC obligations might survive the expiration of contract.

67. *A further participant* wished to recall attention to the methodology: she noted that thriving sustainable investment was the aim and what followed was how to reach that aim, i.e. providing details of what the parties had to do, taking into account that operations under an investment would not be similar and that the new instrument could not replace the work that parties had to do when negotiating and regulating an investment. In this vein, stating the general principles in the body of the document and then providing an annexe with details and technicalities might help bring clarity and release the pressure on the main document, so that it might appear more balanced and concise. As to post-contract liability, she considered that the post-contractual phase might still be considered contractual if so regulated, but the reach of any contract clause beyond the survival of contract would depend on the type of rights that were protected, some possibly reaching beyond the contract, others not, due to them bearing on other rights (e.g., confidentiality v. non-compete clauses). A case-by-case approach might help since certain sustainability standards might reflect mandatory law (and thus enjoy "*imprescriptibilité*", while others derived from soft law and were treated differently.

68. *Other participants* agreed that sustainability provisions should be allocated where relevant with an eye to proportions and balance, but the substance should also be examined: contractual sustainability commitments, regardless of the contract/pre-contract liability debate, would imply a contractual liability when contravening mandatory laws in the host State and would be endowed with remedies according to the general chapter, and if the breach qualified as fundamental then even termination would be available. *The Chairs* expressed perplexity over providing an annexe on sustainability, while *other participants* agreed. *Another participant* returned to the issue of post-contract liability and stressed that certain types of damages might become evident in the long run; three types of actions might have relevance: (i) actions between the parties, where one sought to

ascertain that the other was in breach and had to compensate; (ii) a third party acting against one of the parties of contract – but this would not be a contractual claim; and (iii) a third party acting against the party but which would not be responsible for the harmful event because of its particular legal position (e.g., as the owner of the site), whence the contractual regime providing for the party being able to claim indemnification from the other party to cover possible third-party actions. These last indemnification provisions would last as long as third parties were not bound by statutes of limitations.

69. *The UNIDROIT Chair* summarised, recalling that the general principle on sustainability in Chapter 2 should address all parties and take for granted that nowadays an investment should be sustainable; she then mentioned sustainability commitments relevant to each chapter and proposed to have flexibility in Chapter 5 on rights and obligations, where the parties to an IIC would be offered a set of sustainability obligations (on the State, on the investor, shared obligations) with the option of a fully-fledged obligation or the possibility to scale the intensity of commitments. *A member of the Drafting Committee* recalled the "*théorie du bilan*" in France, which considered the positive impact of renewable energy projects rather than their negative impact (in the course of approval procedures) and agreed with the UNIDROIT Chair that the preamble should better highlight the positive impact of investments. *Another participant* supported the reference – beginning in the preamble and throughout the instrument – to "sustainable investment" in order to clarify that this was an instrument to boost sustainability in the investment sector.

70. *The ICC Chair* wished to stress that there seemed to be consensus on a general principle on sustainability in Chapter 2 and redistributing all specific aspects of sustainability among the chapters. *A representative of the UNIDROIT Secretariat* added that the general principle in Chapter 2 would inform the meaning and interpretation of specific commitments in specific chapters and that Chapter 5 on rights and obligations might be construed around the general aspirational standard to be pursued (the "highest international standard" or the "highest attainable international standard") and be followed by options for a full obligation, due diligence obligation or best efforts, offered for choice to the parties, depending on the sector or areas. He continued that, looking at the ALIC Guide, the question remained as to obligations of specific results which contributed to make an investment sustainable. He mentioned that Chapter 5 of the African Investment Protocol also provided a full list of obligations of result, including local sourcing, hiring personnel, funding to the local communities and providing public services, as a sort of compensatory measure.

71. *The UNIDROIT Chair* expressed the view that using an annexe would weaken sustainability and highlighted the need for considering, within the concept of having obligations with different intensities, the possibility to include obligations providing specific results, that the parties would then choose to include in the IIC.

72. *A member of the Drafting Committee* considered that many international environmental agreements were annexe-based, and this was exactly the reason why the Paris Agreement had less "grip" than the Kyoto Protocol. Including details about the general principles in the annexe would not amount to a normative degradation but to incorporation by reference. He was sceptical about offering too many options, since that would push towards the lowest possible standard, while the instrument should strive for a realistic standard in terms of feasibility. A different issue would be the diversity of the standards from one sector to another (e.g., climate change standards would not apply to all sectors). He questioned the possibility of identifying different levels of intensity of sustainability obligations, including cases where it was not an issue of negotiation by the parties, but rather guidance for legislators.

73. *One participant* wished to provide further comments to the text of Chapter 6. She first mentioned the reference in paragraph 3 to "local NGOs" and wished to recall that national courts used to be selective and filter those entities that had a legitimate interest in participating in any procedure based on certain criteria, and thus certainty was necessary to avoid the impression that

all entities might have access to the process. With reference to paragraph 10, she considered whether the completion of due diligence should be characterised as a condition precedent to the commencement of the investment operations, or even to the entry into force of the contract, since the due diligence might clarify necessary interventions and thus costs, with an impact on contract terms (like price). She then referred to paragraph 6 and the committee composed of representatives of the investor and the State and asked whether there was a need to be more specific about what happened in cases of disagreement within the committee. She finally considered that the due diligence paragraph assigned the main responsibility for the process (and the ensuing mitigation plan) to the investor, as best placed to assess the impact of the investment on the ground, but she questioned what would happen if the due diligence showed that other actors, including the State or other public or private entities, would be involved in the investment area and whether the State would not be better placed to conduct the process in that case.

74. *Other participants* replied that the legitimacy of the NGOs' standing would derive from national law, i.e., they needed to be properly constituted under domestic law, and the reference to "local" was not casual but rather logical, that local NGOs were the most active and knowledgeable of the situation on the ground. *Another participant* considered that not all jurisdictions required NGOs to be legally registered and that there was also an issue of cost of the engagement not to discard. *A further participant* recalled that it was not only an issue of registration, but also of accreditation, with certain NGOs, despite being properly registered, not being accredited to represent certain interests in certain sectors. Finally, *one participant* stressed that the language referred to "relevant stakeholders that could be negatively affected or potentially affected" and thus narrowed the scope of eligible entities.

75. *The UNIDROIT Chair* suggested that reference might be made in the commentary to selective rules, referring to the OECD Guidelines on MNEs and related papers that established criteria for representation of stakeholders, thus anchoring the selection to established international practice.

76. *The participant* then continued referring to the model clause language and wished to note that the reference to the parties' obligation to comply with all sustainability-related international law, national law, protocols, guidelines, rules, and other soft law, or sector-specific guidelines related to the investment, would seemingly expand the scope of the standard too much. This would not help to identify the standard when competing guidelines existed, or when one contradicted another. She sought more clarity in the provision concerning subsidiary subcontractors and investors' partners, as it could mean that the investor was responsible for its partners or, alternatively, that the investor had the obligation to include correspondent due diligence clauses in contracts with subcontractors. She appreciated, in para. 1.4, the relativisation of the absolute imperative of sustainability with regard to human rights due diligence by reference to the obligation to maintain a due diligence process appropriate to the investor's size and the circumstances. She mentioned references to the 2011 UN Guiding Principles on Business and Human Rights as a good choice since they would create more certainty than open definitions. She asked whether the warranty in para. 1.5 on the investor's full disclosure of information should somehow be qualified or restricted (e.g., for trade secrets) and how to define the notion of control by the investor in para. 1.8. As to the indemnification clause in para. 1.9 against any and all losses, also including arbitral awards, settlements, costs, expenses of whatever kind, she opined that it was too broad to include procedures where the investors did not have the chance of being involved. Finally, she commented upon paragraph 268 of the commentary and doubted whether it would be possible to include in the future instrument a conclusive list of legal and soft-law instruments, which would hardly be possible to comply with.

77. *One participant* commented that the difficulty in being specific was that this was not a contract but needed to cover all possible cases or sectors, and then there would be the work of adaptation by the parties, and this created complexity in drafting the principles and particularly the model clauses, which might perhaps be named differently. She recalled her experience on

sustainability clauses and their evolution over the years from mere best efforts to long prescriptive annexes, and she pointed out that those annexes were normally written carefully considering their compatibility with local laws, which made it difficult to draft model clauses to be included in the future instrument without knowing the applicable domestic law. This was why the text available in the future instrument was to be considered more as guidance for negotiation and drafting rather than actual model clauses.

78. *The earlier participant* agreed that such a solution might be chosen to prevent confusion with the ICC clauses. *The Secretary-General* reminded the Working Group that such a solution would require amending the whole document, while the relation between the two was clear: a principle would describe a policy and the model clauses should turn the policy into contract language. *The Deputy Secretary-General* strengthened this point and mentioned that contract guidance would go into the commentary, while perhaps some more effort might be made to correctly frame the model clauses' content. *A representative from the UNIDROIT Secretariat* added that the IISD model clauses circulated earlier might prove to be a good benchmark to consider.

79. *One participant* commented on paragraph 1.6 and wondered whether the definition of total emissions would include downstream emissions (also called "scope three emissions" or "value chain emissions") and recalled recent decisions from the UK Supreme Court and Scotland that these types of emissions had to be taken into account in environmental impact assessments. *Another participant* returned to the earlier discussion and suggested to create sub-categories for each type of project to allow more specificity in drafting, to select and distinguish language for commentary and language for model clauses, and to select specific documents as guidance for drafting the contract (OECD, UN). *A further participant* supported the idea of having principles that remained generally worded because sectoral standards also rapidly evolved, and it was not advisable to be overly specific. This was also why remedies for sustainability breaches, particularly termination, should be instead placed in the general chapter and not have a specific connection with the substantive chapters. She then concluded by supporting substantive guidance on drafting rather than specific model clauses.

80. *The Secretary-General* explained that this was a methodological point and could be overcome by more careful drafting: guidelines entailed a discursive document describing issues of interest with recommendations, a model law could translate the recommendations into legislative language, while a set of principles would agree on the policy, which could be turned into model clauses. He mentioned that most of clauses on sustainability resembled principles, but some more reflection could bring them close to model clauses, which should not be complete, but might leave room for references to international standards or national laws within brackets.

81. *One participant* commented on Principle 27 on the supply chain and the need for it to be coordinated with reference to partners and others at pages 71 and 72 of the draft Master Copy. *Another participant* identified the reference to parties' cooperation in the sustainability model clause as a strength of the document, which would be found encouraging by businesses as an opportunity to avoid future disputes by working together, the State and the investor. He then mentioned that the language in para. 1.8 placed the responsibility on the investor to prevent or mitigate adverse potential adverse effects and fully remediate, and that it would be worthwhile to revise the language to gear it towards cooperation.

82. *The ICC Chair* then moved to examine Section D of Chapter 6 on affected third parties and indigenous populations, not without mentioning that this was a really significant section for South American investment projects, which all involved some relationship with local stakeholders and indigenous people, so that it would be important for the investor to know what to do. *One participant*, a prior member of the Subgroup which had drafted the text, recalled that this part was a subset of the general due diligence procedure, a set of principles that would somehow be incorporated in the procedure that applied if third parties or indigenous populations were involved.

She noted that they appeared more normative rather than model clauses but could in principle be turned into contract language. Principles 28 to 34 were about consultations, while Principle 35 is about free prior and informed consent, including what UN declarations and FAO documents required. She proposed that, if a procedural annexe was not included, then it might be placed as a subset of due diligence.

83. *One participant* supported the inclusion of an obligation to consult with indigenous people and the boards of local populations. *A representative of the UNIDROIT Secretariat* invited the Working Group to examine language in the Principles that referred to consultations to better define the scope of consultations, timing and the relevance of the final opinion of affected third parties, also in light of the current debate on a social licence to operate. *One participant* proposed that the Working Group should consider to what extent it could have an impact in this area where constitutional protection existed: at least from the Canadian perspective, there would not be the possibility for local communities to bar a project.

84. *The Secretary-General* concluded by highlighting that several parts of text in the section were not worded as principles but rather as guidance and could be moved to the commentary, if deemed proper. *The UNIDROIT Chair* mandated the Drafting Committee to re-allocate the parts on sustainability to the relevant chapters of the instrument and to reformulate text in accordance with the indications provided by the Working Group.

c) Draft Chapter 8: Remedies, including compensation and damages

1. Introductory remarks

85. *The ICC Chair* moved to discuss Chapter 8 on remedies. Preliminarily, *a representative of the UNIDROIT Secretariat* recalled that the titles of the relevant UPICC provisions had been reproduced, but not the text, which to date remained unmodified. She mentioned that most of the principles were to be examined with a view to consider whether they should be deleted due to the Working Group having assessed their applicability to IICs "*telles quelles*". At the end of discussion, only those principles would remain that needed adaptation to IICs and commentary explaining how the UPICC would apply.

86. *A member of the Drafting Committee* illustrated the Contents of Chapter 8. He considered the centrality of the chapter in a possible transnational legal framework for IICs and flagged that the text had not been fully discussed but rather made a few comments and recommendations: he mentioned in sequence that judicial penalty under Principle 39 was usually regulated by the substantive or procedural law of the jurisdiction of the host State and was likely not fit for the instrument; he expressed perplexity on the provision on notice; he noted the need to discuss the threshold for anticipatory non-performance and questioned the convenience of having provisions on restitution mostly concerning contracts to be performed at one time. In the context of calculation of compensation and damages, particularly certainty of harm, he mentioned the need to discuss compensation for the loss of a chance in the context of IICs.

87. *One participant* wished to refer to the principle on withholding of performance as a general example of how the Chapter should be adapted to IICs specificities. He mentioned that the principle was followed by a model clause stipulating that the performance could not be withheld, in line with the principle of continuity of an IIC and the duty to ensure public services in many legal orders which did not consent the investor to activate the exception "*inadimplenti non est adimplendum*". He proposed to include very narrow exceptions to this Principle for cases where the State was in fundamental breach (e.g., a significant delay in payments to the foreign investor), granting the foreign investor the right to withhold performance for some time, legally framed as a suspension of the obligation. He then continued that the exception against a non-performing party was a right

in civil and commercial contracts, but not in administrative contracts, and he mentioned jurisprudence in Egypt which had considered very strict exceptions to this principle in cases of fundamental breach. *Another participant* continued discussing UPICC Art. 7.1.3 and considered that the idea that both the parties had to perform simultaneously and, if one did not perform, the other party could withhold performance, was clearly based on sales contracts and did not match with the IIC context, where certain performances were simultaneous, others consecutive, and so forth. He concluded that granting a general right to withhold performance in the IIC context would disrupt the contract and thus supported the deletion of the principle and explanation in the commentary.

88. *One participant* sought to call upon the Working Group to reflect on whether UPICC Principle 7.1.3 applied as it was or whether some adaptation was necessary; if it resulted not needing any adaptation, then at least some information and warning was needed in the commentary that, even by operation of host State or otherwise applicable law, supply of public utilities could not be withheld. She reflected that if this principle operated by law, then the UPICC 7.1.3 did not need to be restated, but rather accompanied by commentary suggesting to address this in the IIC, along with a model clause that established the consequences, how compensation was calculated, and so forth. Still taking into account the methodology in place, which would suggest to delete many of the UPICC and refer back to them as they were, she invited the Working Group to reflect on the illustrations relevant to IICs in the current text and how to re-use them.

89. *The ICC Chair* suggested to consider, in light of experience, to include contractual text precisely to suggest contractual avenues for the calculation of damages, such as limitation of liability clauses, penalty clauses, and liquidated damages clauses, which would be particularly appreciated by States, to address the possibility of investors' excessive claims. *The UNIDROIT Secretary-General* noted that IICs were long-term contracts but also complex bundles of contracts that might envisage a number of requirements for performance, some of which might not be simultaneously executed, while others would be simultaneously executed. He concluded by inviting careful reflection as to whether UPICC Art. 7.1.3(1), which should address those complexities, should be completely left out of the instrument. He also invited discussion as to whether there was a need to be granular in the analysis of the different elements of IICs or treat them more generally. *The Deputy Secretary-General* wished to react on the use of illustrations, detached from a principle, and considered the possibility to turn them into commentary and be used as guides for shaping the model clauses. *A representative of the UNIDROIT Secretariat* noted that a methodology of drafting was proposed in the "Draft structure of the future instrument" attached as Annexe 2 to the Revised Issues Paper produced for the fourth session in November 2024, at footnote 70 (Study L-IIC – W.G.4 – Doc 2). The instrument would include (i) adapted UPICC, (ii) "renvoi" to non-modified UPICC with, where appropriate, guidance or commentary on the application of some specific UPICC to IICs, and (iii) IIC-specific principles. The guidance or commentary on the application of some specific non-modified UPICC would be placed at the beginning of each thematic chapter, as well as explanation on the UPICC that would be deemed inapplicable to IICs. He then mentioned that the Task Force constituted under the Roma Tre-UNIDROIT Centre for Transnational Commercial Law had found a wealth of information on clauses excluding indirect and consequential damages, damage caps, penalties and, in some cases, the principle that the harmed party could act for the higher damage, and insurance obligations.

90. *Another member of the Drafting Committee*, who had participated in the review of Chapter 8, considered that the text still needed a lot of work, starting from the UPICC and providing adaptations. He mentioned that the previous point by the representative of the UNIDROIT Secretariat, recapitulating the initial methodology, might have merit, particularly clarifying which UPICC did not apply, so that it would be implied that the remaining UPICC applied. However, there was still need for some adaptation. He mentioned the importance of providing insights on practice and aligning the instrument to investment trends in contracting.

91. *One participant* enumerated a number of points that were specific to IIC practice: (i) exclusion of indirect damages and consequential loss, (ii) provision of liquidated damages, and (iii) how to assess liquidated damages. He mentioned that guidance should be provided on liquidated damages since they were regulated differently in commercial contracts compared to administrative contracts. In Arab Countries and particularly in Egyptian case law, they were equalled to penalty clauses with a punitive nature, imposed on the contractor with no link to actual losses, as a means to ensure the continuity of public services. Recent legislation had changed this point and provided several mechanisms to mitigate liquidated damages when works had been partially completed or when there was no actual loss. This was an application of the principle of proportionality, which had spread in the jurisprudence of national courts, included in the common law system under the authority of the *Dunlop* case in 1914, through the *Cavendish Square Holding* case in 2016.

92. *Another participant* mentioned that there was a difference in discussing contractual non-performance and a violation of public international law. He supported the view that the UPICC worked and interacted well with so many model contracts as the main reference in transnational law when it came to private law contracts, and thus there was no need to re-invent the wheel. The UPICC were presumed to be used by private parties, but also States, particularly the 2016 edition, which had integrated the needs of long-term contracts. He drew a sharp distinction between private and public law, and he mentioned that, when it came to private law issues, the UPICC were the reference and should be used without adaptation, since international law was really ill-equipped to deal with compensation and damages or any other remedy. He finally concluded supporting the idea that most adaptations should go into the commentary and the model clauses.

93. *The ICC Chair* summed up the proposals on the table, particularly removing the principle on withholding performance or rather keeping it by way of strict exception to the principle that in IICs performance could not be withheld or suspended before non-performance of the other party. *The Secretary-General* wished to react to a previous statement that consequential damage should be excluded in line with IIC practice; he mentioned that the UPICC clearly explained what consequential damages were in a very reasonable manner. He would then support the earlier position that, if the UPICC were to be amended, this should be made only by providing significant justifications. *The ICC Chair* agreed that the instrument might suggest a model clause excluding consequential damages unless there was wilful misconduct or gross negligence.

94. *The participant that had earlier supported the exclusion of consequential loss and indirect damage* agreed that the instrument should not impose a clause excluding consequential damages, but rather provide it as a choice for the parties. He added that the principle of proportionality should be integrated into the criteria for calculation of damages and compensation.

95. *The UNIDROIT Chair* concluded that there was general consensus on the need to restructure draft Chapter 8. She suggested reviewing the Chapter's proposals individually to assess, in each case, whether modifications to the UPICC provisions or the inclusion of ICC-specific commentary were warranted. If not, the corresponding text could be deleted.

96. *A participant* considered that the UPICC provisions on non-performance were relevant to IICs. Therefore, she saw no need to repeat them. If, as a matter of fact, an IIC did not give rise to a particular issue covered in the UPICC provisions, then those provisions would simply not apply – there would be no need to make that explicit. She, in principle, supported developing commentary that would discuss specificities of IICs in relation to UPICC provisions on non-performance. However, she wondered whether a consistent approach would need to be followed; if commentary was developed for some provisions, it might need to be done across the board.

97. *The Deputy Secretary-General* noted that developing commentary only for some UPICC provisions could be justified by the merit in those cases of giving IIC-specific guidance. For other

provisions, there might be no need for such guidance. *The UNIDROIT Chair* agreed. She said that commentary could be developed for specific UPICC provisions if the Working Group felt that there were criticalities on those issues in the investment context. Furthermore, additional (new) principles on remedies could be developed on issues that were not covered in the UPICC. *A member of the Secretariat* added that, for instance, remedies for breaches of sustainability commitments could be addressed in an additional principle unless the remedies in the UPICC were deemed sufficient. He also recalled that, in addition to commentary to existing UPICC provisions, model clauses would be developed where deemed useful. Chapter 1 would clarify that the UPICC provisions applied to IICs unless otherwise provided in the instrument and subject to the IIC-specific commentary in the instrument. He added that the Working Group would need to determine how to legally construe the relationship between the UPICC and the future instrument. This was also relevant for the chapter on applicable law. Reference could be made there to choosing as applicable law the UPICC in combination with the future instrument or only the future instrument – if it was clearly set out in Chapter 1 that the latter included the UPICC.

98. *A participant* asked which instrument would prevail in case of conflict (the UPICC or the future instrument). *The UNIDROIT Chair* clarified that it would be explained in Chapter 1 that the UPICC provisions, while designed for international commercial contracts, also applied to IICs, subject to the specifications in the future instrument. *A participant* added that the future instrument would supplement the UPICC whenever they applied to a contract. This was done not by overriding the UPICC (it was not a new edition of the UPICC) but rather by providing adjustments when those were needed due to the special nature of IICs.

2. Time of performance; non-performance defined; interference by the other party

99. *The Deputy Secretary-General* pointed out that the provision on "time of performance" was covered under "performance" in the UPICC (Art. 6.1.1). She suggested considering the structure of the UPICC in the discussions. A question was raised whether any other UPICC provisions on performance should be considered in the instrument. *One participant* was of the view that several of those provisions (e.g., Art. 6.1.2 on performance at one time) were not appropriate for the investment context. However, *another participant* pointed out that an investment relationship might consist of several contracts that governed different aspects, some of which might be one-time contracts. In that case, the UPICC provision on performance at one time could be applicable. She considered that there was no need to disapply the UPICC provisions on performance and non-performance generally; if they were not relevant in the factual circumstances (e.g., no one-time contract), they would simply not apply. Following a suggestion by *the Secretary-General*, it was agreed to address the relationship between multiple contracts in the future instrument (e.g., cross-default clauses).

100. Ultimately, *the Working Group* concluded that the UPICC provisions on "time of performance", "non-performance defined" (Art. 7.1.1), and "interference by the other party" (Art. 7.1.2) were appropriate in the investment context. The text on those issues would therefore be removed from the draft Master Copy.

3. Withholding performance

101. *The Deputy Secretary-General* referred to the two examples provided in the draft commentary to Article 7.1.3 of the UPICC (paragraph 395 of the draft Master Copy). She considered the second example, concerning the continuity of public services, a clear specificity of IICs. *A member of the Secretariat* added that the requirement that public services must continue was a consideration of particular importance in IICs, as was corroborated by the findings of the Task Force. Regarding the first example, concerning costs incurred by a party that is withholding performance, *the Deputy Secretary-General* pointed out that withholding performance was not a

mandatory remedy in the UPICC. Therefore, a party that did not wish to withhold performance because it would not be in its economic interest, was not obliged to do so. She added that the principle expressed in the model clause, namely that parties could stipulate in their contract that performance could not be withheld, already followed from the UPICC since withholding performance was not mandatory.

102. *The ICC Chair* agreed that the UPICC provision was appropriate, but suggested considering that (i) withholding performance might not be desirable or legally possible for certain contracts pertaining to a public service, and (ii) it would be useful to explain in the commentary that parties might opt out of the general principle reflected in the UPICC, even if it already followed from the UPICC that the provision was not mandatory. He explained that parties might wish to exclude withholding performance in certain construction contracts, to ensure the project would be finalised. He suggested developing a specific model clause that would modify the general principle of *exceptio non adimpleti contractus. A participant* agreed that it would be helpful to explain in the commentary that parties could modify the general principle, as this was often seen in practice.

103. *A participant* explained that, in several jurisdictions, investors did not have the right to withhold performance if the IIC was an administrative contract. He was in favour of granting investors the right of *exceptio non adimpleti contractus* in exceptional circumstances, in line with case law in those jurisdictions.

104. *The UNIDROIT Chair* concluded that explanations on the continuity of public services and the freedom of parties to decide whether to follow the general principle on withholding performance or not, would be provided in the commentary.

105. It was noted that some contracts included clauses that required continued performance during dispute settlement, which could help arbitral tribunals and other adjudicators order such continuation. It was agreed to address that in the chapter on dispute resolution, while adding a cross-reference here.

106. *A participant* asked whether only States could insist on continued performance or also investors. Furthermore, he wondered whether the reference to the UPICC provision implied that a party could withhold performance even if the contract stated otherwise – as was often the case for IICs. He suggested that it might be unclear to readers what position was taken if this was not clearly addressed. *Another participant* understood that the guidance would apply to both parties. In the ensuing discussion, it was noted that a State could withhold performance by not paying instalments due under the contract. *Vice versa*, if the State did not fulfil its payment obligation, the investor could withhold performance to exert pressure.

107. *The Deputy Secretary-General* reiterated that the relevant UPICC provision was not mandatory. Therefore, providing a limitation in the contract to the right to withhold performance (for one or both parties) was not contrary to the UPICC. She sought clarification on whether the Working Group intended to adopt a general principle that, in IICs, withholding performance (at least for one party) should be treated as the exception rather than the rule.

108. Following a question on the "mandatory" nature of the UPICC, *a member of the Secretariat* clarified that (i) in the UPICC, only certain provisions were mandatory; (ii) in the future instrument, the UPICC would apply unless otherwise provided. *The Deputy Secretary-General* suggested explaining in the future instrument that, where the UPICC applied as general contract law, parties generally had the possibility to derogate from them.

109. *The UNIDROIT Chair* concluded that the commentary would be updated in line with the discussions and that a new, more specific model clause would be developed.

4. Cure by non-performing party

110. *The UNIDROIT Chair* invited comments on the draft commentary to Article 7.1.4 of the UPICC, on "cure by non-performing party".

111. *The Deputy Secretary-General* noted that it followed from the draft commentary that a model clause and commentary could be useful since cure of non-performance might not always be the appropriate approach for IICs. *A member of the Secretariat* underlined the importance of cure by the non-performing party for the continuity of services and contract preservation – which was all the more important for IICs given their long-term nature. He agreed that commentary and perhaps illustrations and model clauses would be helpful. He also explained that it followed from the research of the Task Force that the process to be followed in case of non-performance was important; investors usually had the obligation to notify the State of non-performance, and if that was not done, the State had step-in rights (could substitute the investor or act itself).

112. *The UNIDROIT Chair* concluded that the commentary could emphasise the need for a procedure to cure non-performance, perhaps accompanied by examples based on IIC practice.

5. Additional period for performance

113. *A participant* observed that the UPICC provision on "additional period for performance" (Art. 7.1.5) made reference to withholding performance. It was agreed to align the approach in the commentary to Article 7.1.5 of the UPICC with the general approach to withholding performance (see above).

6. Exemption clauses

114. *Some participants* considered that exemption clauses should not apply to sustainability obligations; they suggested a carve-out for such obligations.

115. *A participant* expressed support for the text in paragraph 405 of the draft Master Copy, which emphasised that exemption clauses should be read in light of the entire contract and reflecting a fair distribution of risk between the parties. She suggested adding that exemption clauses reflected the parties' assessment of what they deemed a fair balance between their respective interests. *The Deputy Secretary-General* agreed that paragraph 405 made a valid point in highlighting that something seemingly unfair might not be so if it reflected a negotiated balance between the parties.

116. *A participant* wondered whether Article 7.1.6 of the UPICC could be unfair for exploration and extraction contracts, where the investor ran the risk that no natural resources were found. He also pointed out that the commentary assumed that a judge or arbitrator would assess whether invoking an exemption clause would be "grossly unfair" and wondered whether this approach was appropriate in the investment context. On the first point, *the Deputy Secretary-General* pointed out that the UPICC provision expressly referred to the need to have regard to "the purpose of the contract", meaning that the type of contract and the usual distribution of risk had to be considered to avoid interpreting the provision in an unfair way. If needed, the commentary could provide explanations on the application of the UPICC provision in such situations. Furthermore, she explained that the UPICC provision favoured a rule granting broad discretion to the adjudicator. In this context, the provisions of the UPICC on interpretation of the contract would apply—meaning the clause had to be understood in the context of the entire contract, not in isolation.

117. *The UNIDROIT Chair* concluded that the commentary would be updated as had been suggested, including by explaining that some contractual provisions – possibly all the clauses on sustainability – could not be exempted.

7. Performance of a monetary obligation

118. *A participant* emphasised the importance of ensuring that money could be transferred in the investment context. This was addressed in draft Principle 23 on Payments and Transfers. She suggested adding there a representation that appropriate approvals for the transfer of money had been given, as an adjustment to the interpretation of Article 1.4 of the UPICC. If commentary on Article 7.2.1 would be kept in the future instrument (which she did not deem necessary), it could refer to Principle 23.

119. *Another participant* noted that sanctions were increasingly affecting how contracts and payments were performed – raising complex issues around force majeure, especially since case law on the matter was inconsistent. *The Deputy Secretary-General* wondered whether this issue, though important, would affect the general rule that monetary obligations must be performed. While sanctions could impact performance – possibly as an event of force majeure or hardship – they remained external to the contract and might not affect the general rule.

120. *Another participant* considered that Article 7.2.1 of the UPICC could be prone to misinterpretation and misuse in the investment context given the long-term nature of IICs (e.g., when selling monetary claims to obtain third-party funding and claim compensation). He therefore suggested that it should not apply, although he was unsure how a possible principle or commentary on this matter should be formulated.

121. *The UNIDROIT Chair* concluded that the commentary could be updated to address the points raised in the discussion.

8. Performance of non-monetary obligation

122. *A participant* raised a question about the relationship between Article 7.2.2(b) of the UPICC and hardship. He noted that hardship was not a reason to withhold performance, while point (b), which related to an imbalance in the contract from the outset, suggested that performance could be withheld if it was unreasonably burdensome or expensive. He considered that for IICs as long-term contracts, parties should either invoke hardship where it was applicable or perform and accept the consequences of poor negotiation. *Another participant* agreed that this was an important point.

123. *A participant* expressed doubts about the appropriateness of Article 7.2.2(e) of the UPICC in the investment context. She wondered whether it would conflict with earlier discussions in the Working Group that behaviour should not be considered a basis for modifying an IIC; if a party did not require performance within a reasonable time, this was an expression of behaviour. She also doubted whether point (e) was appropriate for sustainability obligations, noting that those should be performed irrespective of whether the other party asked for it.

124. *A participant* suggested examining whether this UPICC provision fit with the new, IIC-specific obligations that were introduced in the instrument (e.g., on physical protection and security). *Another participant* agreed and expressed doubts about the application of Article 7.2.2(a) of the UPICC, and specifically how the reference to performance being "impossible in law or in fact" related to clauses on stabilisation and physical protection and security. He added that he assumed that point (a) derived from civil law since common law often provided a strict performance requirement. He warned that a more "humane" approach to non-performance might have the opposite effect in the context of IICs.

125. *The Deputy Secretary-General* explained that Article 7.2.2 of the UPICC was formulated as it was to cater for the approaches to remedies by courts in both civil and common law systems. She explained that there were circumstances in which judges did not require specific performance, but rather damages. The UPICC provision did not exclude specific performance as a remedy, but

provided a list of exceptions for situations in which alternative remedies would be more appropriate. She also explained that the commentary in the UPICC explained how this provision related to hardship. To avoid that the application of this provision might unintentionally override stabilisation clauses or other IIC-specific obligations, she suggested clarifying in the provisions concerning those obligations that they were not meant to be displaced. *The Chair of the Consultative Committee* emphasised the relevance of the commentary in the UPICC and the aim of the UPICC, which was precisely to bridge the gap between civil and common law systems. He considered the value of this project to be that it placed the UPICC at the forefront as a tool for parties to base their relationship on a uniform legal framework.

126. *A participant* emphasised the point made by the Deputy Secretary-General that if specific performance was not ordered, it did not mean there would be no consequences to non-performance. Reimbursement of damages would still be available, which was in any case the most important remedy in arbitration. She suggested explaining this in the commentary. She preferred providing explanations in the commentary rather than changing other provisions in the instrument (e.g., on stabilisation). *Another participant* agreed that the commentary should explain that damages would still be available as a remedy. It was agreed to clarify this in the illustration as well (paragraph 417).

127. *A participant* agreed that arbitral tribunals did not often order specific performance. However, she pointed to the possible consequences of the UPICC provision on provisional measures – noting that tribunals tended to order or recommend specific actions (rather than money) as provisional measures. For instance, in a scenario in which a State changed its law in breach of a stabilisation clause (and the contract contained a clause on not withholding performance), the investor might request specific performance as a provisional measure—seeking to have the State comply with the stabilisation clause until the arbitral tribunal issued its decision. Despite the clause on not withholding performance, such provisional measure could be hampered by Article 7.2.2(a) since the change in law made it "impossible in law" for the State to perform. She also noted that it might be challenging to solely address these issues in the commentary; while the latter could explain specific nuances, it could not diverge too much from the principle itself.

128. *Other participants* considered that arbitral tribunals would – and should – be very reluctant to order specific performance if it would result in a State breaching its domestic law. Strong doubts were also expressed about whether a tribunal could order a State not to change its law or undo a change in law. *One participant* deemed Article 7.2.2 an important safeguard in international arbitration. He suggested taking inspiration from the approach to restitution in the ILC articles; restitution was the primary remedy in customary international law, and a tribunal could order that unless it was materially impossible or disproportionate. Some international investment agreements (e.g., the US Model BIT) also clarified that the State had the option not to comply with an order of restitution and pay damages instead. *Another participant* noted that arbitral tribunals might also be restrained by procedural law to order certain interim measures. She suggested clarifying in the commentary that Article 7.2.2 of the UPICC was not in any way meant to affect alternative remedies (importantly, damages), the possibility to request provisional measures, or the State's power to regulate. *The UNIDROIT Chair* concluded that the commentary should be updated along those lines.

9. Repair and replacement of defective performance

129. It was agreed that there were no IIC-specific issues to be addressed in relation to this provision of the UPICC. Therefore, this part would be removed from the draft Master Copy.

10. Judicial penalty

130. *A member of the Drafting Committee* explained that it had been suggested that Article 7.2.4 of the UPICC on "judicial penalty" was inappropriate in the investment context because it would be regulated by domestic procedural or substantive law.

131. *A member of the Secretariat* recalled that, if the Working Group considered this provision inappropriate for IICs, it would need to explain why (rather than deleting it).

132. *Several participants* considered that this UPICC provision was appropriate in the context of IICs. Penalties could be a useful incentive for performance, and there would be no issues of interference with possible domestic law provisions limiting the extent to which States might be subject to these types of penalties since national mandatory rules would in any case apply pursuant to Article 1.4 of the UPICC. It was also noted that penalties for delay were quite common, in particular in construction contracts. The commentary could touch upon relevant considerations in the investment context (e.g., the possible exclusion of penalties in arbitration clauses).

133. *One participant* noted that the article presumed that (i) proceedings had been initiated before an arbitral tribunal, (ii) the tribunal had the power to order specific performance and made use of it, and (iii) the tribunal could order penalties. He expressed doubts whether these circumstances would exist in the investment context.

134. *Another participant* considered that these circumstances might indeed exist in the investment context, e.g., if a party refused to participate in an arbitration proceeding despite a contractual obligation (a penalty would then be equivalent to a default award against a non-participating party) or if a party did not comply with an order concerning the disclosure of documents.

135. In the ensuing discussion, *some participants* made the point that arbitral tribunals, unlike courts, did not necessarily have the power to impose "penalties". It was also noted that they might apply an adverse inference if one of the parties did not comply with a specific order, but this was taken into account in the allocation of costs and not imposed as a "punishment".

136. *Other participants* considered that the UPICC provision on penalties was relevant in the investment context. It was emphasised that investment arbitration was not necessarily institutional but could also be *ad hoc*. It then depended on the *lex arbitri* what kind of powers the tribunal had, which could include the power to issue penalties in case parties did not comply with an order. Furthermore, if contracting parties applied the future instrument, which incorporated the UPICC provision, the arbitral tribunal had the power to issue penalties based on parties' consent, unless it contradicted a relevant mandatory provision. It was suggested that any potential issues or specificities in the context of IICs could be addressed in the commentary. For instance, *one participant* suggested explaining in the commentary that it was not uncommon in investment arbitration to reflect disobedience with tribunal orders in the costs awarded. *Another participant* considered that a penalty more closely resembled interest for late payment than costs allocated between the parties; it was an incentive to perform. She proposed explaining in the commentary that penalties could be based on contract and procedural law, and that the powers of arbitral tribunals depended on the *lex arbitri*.

137. *The Chair of the Consultative Committee* emphasised more generally that the UPICC had been carefully drafted following a robust and inclusive process and that any suggested modifications to its provisions would need to be extensively discussed before making a decision.

138. *The Deputy Secretary-General* explained that it followed from the word "may" in Article 7.2.4 that penalties were a discretionary tool for courts and arbitral tribunals; if they did not have such power or did not wish to apply it, they did not have to. She also clarified that a penalty did not

exclude any claim for damages – as explicitly stated in the provision – and should be distinguished from a contractually agreed payment for non-performance or delays.

139. *A participant* asked whether the Working Group took the stance that arbitration would be the only possible dispute resolution mechanism, which she advised against. *Several other participants* agreed that the Working Group should not only consider arbitral tribunals but also courts. It was noted, among other things, that certain issues – e.g., concerning intellectual property – were sometimes carved out from the arbitration ambit. *A member of the Secretariat* explained that references in the UPICC to the "court" included arbitral tribunals, pursuant to the definitions in Article 1.11. *A member of the Drafting Committee* agreed that courts had to be considered as an option in the future instrument, given the relevance in the investment context of recourse to courts in the host State. He pointed out that this was covered in Chapter 9 of the draft Master Copy.

140. *The UNIDROIT Chair* concluded that the UPICC provision was deemed relevant and that the specificities concerning its application in the investment context would be addressed in the commentary.

11. Change of remedy

141. *The Working Group* agreed that the UPICC provision on change of remedy (Art. 7.2.5) was appropriate for IICs.

12. Right to terminate the contract

142. *A participant* noted that non-compliance with contractual sustainability obligations required a scaled response, with termination as a last resort. She suggested that this should be reflected in the text of draft Principle 43. Moreover, she proposed indicating in the section on termination that non-performance of sustainability commitments was governed by a specific provision later in the instrument. *The UNIDROIT Chair* observed that, based on the direction of the discussion, the likely outcome for Chapter 8 would be to make a general reference to the UPICC – particularly Chapter 7 on non-performance – with IIC-specific commentary, alongside a dedicated section with additional provisions specific to sustainability.

143. *A participant* considered that, given their special nature, IICs required stricter rules on termination, such as a longer timeline beginning with formal notice and more rigorous procedures, compared to ordinary commercial contracts. *The UNIDROIT Chair* pointed out that this seemed to apply to any long-term contracts and was covered in the UPICC. She suggested underlining the importance of continuity and contract preservation for both parties in the commentary.

144. *A participant* proposed to consider the possible unilateral termination of IICs by host States. *The UNIDROIT Chair* responded that such situations seemed to relate rather to abuse of rights. *Another participant* doubted whether unilateral termination by the host State could be labelled as abuse of rights. He explained that, in some jurisdictions, the State had the right to unilaterally terminate an IIC for reasons of public interest (subject to compensation of the investor) and contractual clauses that aimed at preventing the State from exercising such right were null and void. He asked whether such right to unilateral termination should be entirely excluded in the instrument.

145. *A member of the Secretariat* noted that the contracts reviewed by the Task Force typically listed various events as grounds for termination, while also reflecting an effort to preserve the contractual relationship where possible. He indicated that the Working Group would soon receive a memorandum of the Task Force with the main findings in this area. With regard to unilateral termination, he recalled that the Working Group had considered a proposal to refer to "unlawful termination" in the context of a draft text on expropriation during its previous session, but it had

ultimately decided to retain the term "expropriation". *Another member of the Secretariat* noted that unilateral termination would seem to be covered by draft Principle 22.

146. *The Secretary-General* observed that the draft commentary on the right to terminate (paragraph 432 of the Master Copy) already recommended that parties to IICs list the specific grounds for termination in their contract. He suggested that the relevant paragraph could be expanded.

147. *The UNIDROIT Chair* concluded that the relevant UPICC provision (Art. 7.3.1) would remain unchanged, while explanations on its application in the investment context would be provided in a commentary, which could also build on findings from the Task Force and cross-refer to the draft Principle on expropriation.

13. Notice of termination

148. *The UNIDROIT Chair* observed that it was proposed in the Master Copy to make adjustments to Article 7.3.2 of the UPICC on "notice of termination" for its application in the investment context. *A member of the Secretariat* explained that the proposal was twofold: (i) specifying that a notice of termination should be made "in writing", and (ii) deleting paragraph 2.

149. *The Deputy Secretary-General* explained that paragraph 2 derived from the CISG and was considered a rule in the context of commercial contracts, namely that an aggrieved party should give notice before terminating a contract due to late or non-conforming performance by the other party, given that there were less severe responses to non-performance. If the Working Group considered that this rule should not apply to IICs, she emphasised the need for clear explanations for its exclusion.

150. Following a suggestion by *a participant*, it was agreed not to modify paragraph 2, but to indicate in the commentary that the parties might develop contract language to exclude its application if they did not consider it appropriate in the context of their contract.

14. Anticipatory non-performance; Adequate assurance of due performance; Effects of termination in general; Restitution concerning contracts to be performed at one time

151. *The Working Group* agreed that Articles 7.3.3-7.3.5 of the UPICC did not require specific treatment in the case of IICs.

15. Restitution concerning long-term contracts

152. *A participant* considered that the principle that restitution was only available for the future (i.e., with effect *ex nunc* and not for past performance) was problematic in the context of IICs. She recalled that IICs like those for oil or mineral exploration entailed large upfront investments by the investor, which were typically only recovered after many years. If the contract was terminated after investments in the initial phase but before revenue started, restitution *ex nunc* would raise issues. She suggested flagging this asymmetric flow of money in the commentary, so that parties could consider addressing the consequences this had for restitution in case of termination in their contract (e.g., agreeing on a mechanism permitting costs incurred prior to termination to be recovered).

153. *Another participant* wondered whether this issue could be addressed by means of remedies for non-performance (e.g., damages), but it was clarified that those would not apply if the contract was lawfully terminated.

154. *The UNIDROIT Chair* wondered whether this issue was specific to IICs but agreed that it could be flagged in the commentary.

16. Remedies for non-compliance with sustainability obligations

155. *A member of the Secretariat* indicated that a draft Principle 43 on remedies for contractual sustainability obligations had been developed after the fifth Working Group session. The draft principle was accompanied by commentary and a model clause. In addition to providing feedback on the substance, she suggested confirming the placement of this section in the future instrument, i.e., whether it should stay in the chapter on remedies or be moved elsewhere.

156. *A participant* proposed that, instead of having this section, it could be specified in the sustainability clauses that a breach of sustainability obligations might be deemed to be a breach of contract or even a fundamental breach of contract, which entitled the other party to terminate the contract.

157. *Another participant* in principle supported a specific provision on sustainability in the chapter on remedies, but emphasised that it should start with a principle of cooperation between the parties. She proposed a structured, multi-step approach: in case of any breach of sustainability obligations, the parties must first confer and attempt to stop and remedy the breach; second, if cooperation fails, the more diligent party should have the right to act to address the breach; third, if disagreement persists, reference should be made to the dispute resolution clause. She proposed including an expert-based mechanism in such clause. She recalled discussions about the need for a monitoring mechanism for sustainability commitments, and suggested that it could include an expert group that would be available to the parties to address any issues that required action. Only as a final resort, and if the breach was fundamental, should termination be considered, following the standard termination provisions. She offered to assist in drafting a principle and model clause along these lines. *Several other participants* agreed that such an approach would be preferable to the current proposal. It was highlighted that the guidance should aim at aiding performance and that it would be useful to recommend a standing mechanisms to help resolve disputes. *The ICC Chair* observed that if the Working Group regarded the principle of cooperation as fundamental, it should be systematically embedded within the instrument's remedies and dispute resolution mechanisms. *A member of the Secretariat* noted that the proposed approach was in line with IIC practice as examined by the Task Force. In addition, some contracts referred to substitute powers of the State, grievance mechanisms, and experts involved in due diligence and dispute resolution, with the costs borne by the investor.

158. *The Deputy Secretary-General* recognised that, following comments by others, the draft Principle and model clause would likely be redrafted. Nevertheless, she provided some suggestions on the current drafting. First, she suggested providing clear explanations on any additional remedies that were not part of the UPICC. As an example, she referred to point (2)(d) of draft Principle 43 concerning the removal of any operating licence, which seemed to go beyond a contractual remedy. Second, she proposed specifying that the list was not exhaustive and adjusting the order, starting with general remedies followed by more specific remedies. For instance, the right to hire a third party at the defaulting party's expense (point (2)(h)) was a common general remedy, although it could be worth highlighting explicitly. Third, she suggested clarifying the reference to "financial sanctions" in point (2)(e) (i.e., whether this meant damages or something else).

159. Other suggestions on the current proposal included (i) reflecting the logical sequence of remedies (mentioned in paragraph 454) in the model clause, (ii) removing the reference to "double jeopardy" since that was a criminal law term, while unjustified enrichment was already covered in the guidance on "no double recovery".

160. *The ICC Chair* concluded that the draft principle and model clause would be redrafted, considering the principle of cooperation and the other points raised by the participants.

161. *The Chair of the Consultative Committee* pointed out that the duty of cooperation was a derivation of the good faith principle, which was covered in the UPICC. He also highlighted that Article 5.1.3 of the UPICC on "cooperation between the parties" was widely applied in practice; it followed from the UNILEX database that it was one of the most cited provisions. He agreed with providing comments and explanations on the UPICC provision, but advised against developing a new principle. *A participant* expressed doubts about the second part of the UPICC provision, which qualified cooperation to when it could reasonably expected for the performance of obligations. She was in favour a straightforward duty to cooperate in the investment context. *Another participant* considered that the UPICC provision would not need to be contradicted, but explanations could be provided on its meaning for IICs. *The Deputy Secretary-General* explained that the language in Article 5.1.3 emphasised reasonableness and expectations to ensure the principle did not override the contractual allocation of rights and obligations. This was highlighted in the commentary, which also highlighted that cooperation is even more significant in the context of long-term contracts. She noted that this explained the Working Group's earlier decision to elevate the principle of cooperation to the level of a general principle, alongside good faith.

162. *A participant* recalled the suggestion of including a monitoring mechanism that could also play a role in dispute prevention. Reference was made to mechanisms established by the State in Egypt and Korea. *Another participant* advised that such mechanisms should include representatives from both parties and to keep in mind capacity problems of States. *The ICC Chair* indicated that the World Bank had advocated the creation of ombudsperson-type mechanisms for investment, which had been taken up by several jurisdictions. In the ensuing discussion, it was suggested to distinguish between (i) one-stop-shops or ombudspersons for foreign investment established by the State, and (ii) investment-specific monitoring committees with representatives of both parties that would also engage in disagreements between parties. It was discussed that the first could be mentioned in the commentary as a good practice, but should not be "contractualised" as an obligation for the State. *A participant* noted that the draft Master Copy (page 76) already contained a proposal to establish a "joint committee" in the specific context of environmental protection, which could usefully be expanded. Furthermore, it was suggested to consider UNCITRAL's draft toolkit on prevention and mitigation of international investment disputes.

17. Criteria for calculation of compensation and damages

163. *A member of the Drafting Committee* explained that this section followed the UPICC provisions. He noted that there were no suggestions for modifications with regard to the first two UPICC provisions that were cited in the section, namely Article 7.4.1 ("right to damages") and Article 7.4.2 ("Full compensation"). *The ICC Chair* added that, more generally in this section, it seemed that the proposal was to follow the UPICC without modifications. He asked whether there was any additional guidance to be provided.

164. *The Secretary-General* noted that the draft commentary on full compensation (paragraph 460) was misleading, because it presented the requirements for claiming loss of profits as specific to IICs, while they were in line with the general rules on consequential damages.

165. *A participant* proposed including a reference to the principle of proportionality in this section, which he considered fundamental for calculating damages and ensuring they did not become punitive. He explained that the civil codes of several Arab countries provided for a test of proportionality in calculating damages. Furthermore, the application of penalty clauses was rejected in the UK common law system, as followed from several landmark cases. *Another participant* highlighted that the future instrument should address the key concern for States in the current ISDS regime, which was not the obligation to pay compensation when in breach, but the often

excessive amounts they were required to pay. This could be done through a principle of proportionality or criteria for the calculation of damages.

166. *The ICC Chair* outlined three possible ways to address concerns about excessive damages while remaining within the UPICC framework: first, through standard contractual tools like limitation of liability or liquidated damages clauses; second, by incorporating the principle of proportionality; and third, though more complex, by addressing the methodology used to calculate damages, particularly clarifying when methods like the discounted cash flow (DCF) approach were appropriate, given its increasingly broad and sometimes questionable application.

167. *The Deputy Secretary-General* explained that the UPICC established a framework on damages that indeed aimed at achieving proportionality, even if that term was not used. While it started with a principle on full compensation, this was qualified by the subsequent provisions. She suggested focusing on the elaboration of model clauses in order to guide parties on how to address the calculation of damages in the contract to avoid undesirable outcomes.

168. *A participant* referred to a recent UNCTAD publication,[1] which confirmed empirically that the application of the DCF methodology had significantly increased over time. He observed that over the past 25 years, there had been a quiet shift in how damages were assessed – particularly with an increased use of the DCF method. Now, a reverse trend was emerging, with States and other organisations considering aspects such as disallowing compound interest. While cautioning against developing rigid principles amid this evolving landscape, he suggested providing guidance on elements like foreseeability and directness in the commentary and offering optional model clauses to help guide damage assessment without being prescriptive. He indicated that the UNCTAD publication noted that international investment agreements (IIAs) traditionally did not address remedies, but this had changed over time, with the majority of IIAs concluded in the last five years dealing with remedies. They mostly addressed issues such as causation and foreseeability, which were covered in the UPICC. He suggested to consider the language in some of these more recent IIAs (e.g., the Canadian Model BIT (especially Article 40(5)) and the Türkiye-United Arab Emirates BIT). The approach taken in those IIAs was compatible with the UPICC but could be considered to provide additional explanations and context in the commentary. *The ICC Chair* agreed that it would be useful to provide guidance in the commentary on the calculation of damages based on examples like the Canadian Model BIT. *Another participant* made reference to the Colombia-Spain BIT as another example that may be helpful to consider.

169. *The Chair of the Consultative Committee* also agreed. He indicated that the UNCTAD report flagged many issues in damages awards and provided guidance on how such issues were addressed or could be addressed in new-generation IIAs. He considered the issue of damages the most pressing problem in the investment context and saw this project as an opportunity to provide valuable guidance since contracts could clearly allocate risks and demarcate the amount of damages that could be claimed. He deemed the UPICC provisions appropriate and suggested providing explanations of key issues in the instrument accompanied by options for parties to consider (e.g., on evaluation techniques, the type of losses that could be recovered, causation, and mitigation factors). He noted that the World Bank Guidelines of 1992 and the latest edition of the International Valuation Standards (IVS, 2024) could be usefully considered for this purpose.

170. *Another participant* suggested that the Working Group consider limiting damages for future profits to investments with an established history of profitability, restricting the use of DCF to going concerns with proven profitability, and capping future profits to reasonable returns to prevent windfalls. Additionally, he proposed introducing mechanisms for tribunals to appoint independent experts to provide objective damage assessments and balance the influence of party-appointed

[1] See Compensation and Damages in Investor-State Dispute Settlement Proceedings - IIA Issues Note, No. 1, 2024.

quantum experts. *The ICC Chair* suggested discussing the issue of expert appointments in the context of dispute resolution, noting that he considered it a key part of the problem. *The Deputy Secretary-General* agreed that expert determination should be discussed separately and carefully, noting that it was a general issue in long-term contracts, not only in IICs.

171. *A participant* argued against developing blanket rules on methodology for the calculation of damages because industry contexts varied significantly. For instance, in infrastructure projects like toll roads or bridges, disallowing DCF until after a project was operational could create a moral hazard – it could incentivise expropriation once the infrastructure was built. Thus, he suggested keeping in mind that approaches should be industry-specific. He also raised the point that large claims were not necessarily speculative. He noted that some projects had strong feasibility studies that significantly reduced risk, making them targets for expropriation once proven to be viable. Since only a tiny fraction of exploration projects became profitable mines, companies relied heavily on the income from those to fund ongoing exploration. This reinforced his argument against applying blanket rules to valuation or compensation. In response, *another participant* noted that there had been cases with very similar circumstances, yet significantly different damages awards. He made a comparison between the *Bear Creek* and *Copper* cases, which had large differences in the damages awards due to the methodology that had been used.

172. *A participant* highlighted that many States had noted that the issue was not the standard for damages but rather how tribunals applied it – especially the use of compound interest. *The ICC Chair* noted that model clauses could provide different options, including a clause stipulating that simple interest should apply. *Another participant* agreed that different options should be provided to allow parties to choose the approach that they deemed appropriate. He indicated that he expected the future instrument to be highly valuable and widely used so long as it remained balanced. He emphasised the need to provide IIC-specific guidance and offer sufficient protection to investors in order to encourage the instrument's use and promote foreign direct investment. *Another participant* explained that compound interest was originally meant to offset inflation and incentivise timely payment of debts. However, in practice it could be abused – when compound interest became excessive, creditors might delay enforcing judgments to accumulate more money, making it more profitable to wait. This underscored the need to approach the use of compound interest with caution. *A further participant* added that the growing practice of selling arbitral awards added complexity, as third-party funders or buyers might delay enforcement for financial gain. This further supported the argument against compound interest.

173. *A participant* suggested to take into account that in contract-based investment arbitration, different from treaty cases, the domestic law of the host State tended to play a key role since it was often chosen as the applicable law. This informed the calculation of damages. She highlighted that model clauses with clear criteria would be very useful for both contracting parties and tribunals. *Other participants* agreed on the importance of clear contractual provisions, noting that parties were free to choose the approach they deemed suitable in their contract, provided that it did not contradict mandatory rules in the applicable law. In this context, it was mentioned that some jurisdictions had a mandatory rule stipulating that the amount of interest, whether simple or compound, could not exceed the principal amount. *The ICC Chair* indicated that, in practice, even if the contract identified an appropriate governing law, the risk of excessive damages remained since domestic laws often did not specify the methodology to be applied, resulting in parties' reliance on economic experts that used DCF as the method.

174. *The Working Group* concluded that the UPICC provisions on damages were relevant to IICs. It was agreed to provide different options for the approach to damages for contracting parties to consider, by means of commentary (which would also explain the potential consequences of the various approaches) and model clauses.

18. Limitation of liability and penalty clauses

175. *The ICC Chair* recalled that it had been agreed to develop guidance and model contract clauses on limitation of liability and liquidated damages. *The Deputy Secretary-General* agreed that the focus should be on commentary and model clauses rather than developing new principles in this area (e.g., the UPICC already addressed liquidated damages as an agreed payment for non-performance). She suggested highlighting in the commentary that these clauses were often not just sector-specific but also contract-specific.

19. No double recovery

176. *A member of the Drafting Committee* explained that the draft proposal on double recovery had been updated after the fifth Working Group session, to clarify that parties should not obtain compensation more than once for an injury suffered due to breach of the IIC.

20. Assignment

177. *The Secretary-General* asked whether there would be merit in considering legal issues arising out of the assignment of claims to a litigation fund.

178. *Several participants* preferred not to cover this in the future instrument. They pointed out that this was a complex, controversial topic and a developing area, that issues depended on national law, that it was up to the parties to decide how they would fund claims, and that the focus in the instrument should be on the contractual framework for IICs and how it can facilitate the performance of investment projects.

179. *The Deputy Secretary-General* indicated that, if nothing would be said in the instrument, the assignment of litigation claims would be governed by the general rules on assignment. She also pointed out that several existing instruments did cover third-party litigation funding, including the UNIDROIT-ELI Model European Rules of Civil Procedure. If it would not be addressed in the future instrument, she wondered whether this should not at least be explained, given its importance.

180. *The ICC Chair* asked whether the idea would be to develop a model clause that would indicate, for instance, that prior consent of the State was needed for the assignment of investment claims.

181. *The Secretary-General* said that this could indeed be an option. He explained that, in the absence of specific guidance, anti-assignment clauses would typically apply, as reflected in the UPICC. On the one hand, a model clause could assist States if it stipulated that assignment of claims to third parties was only possible following the prior consent of the State. On the other hand, restricting the assignment of claims risked that weaker investors might not be able to properly defend themselves.

182. *A participant* reiterated his view that the instrument should not address this topic. He noted that there was no crystallised practice to consider, that jurisdictions had different approaches to champerty (it was allowed in some jurisdictions and still prohibited in others), and that it would not be possible to address everything in the instrument.

183. *Another participant* asked whether possible guidance would cover also the assignment of the investment project by the investor to a third party. *The Secretary-General* responded that this would need to be decided by the Working Group, but that it would be difficult to imagine that the performance of the investor could be assigned to another party without prior authorisation of the State – also because the project might have been awarded through a procurement process. A more likely scenario would be that litigation claims would be assigned to a third party and in that case, the question was whether the State's prior authorisation should be required.

184. *A participant* suggested to distinguish among three types of assignment. First, assignment of the contract – on this, contract practice was clear that assignment was not possible without prior authorisation of the counterparty. Second, assignment of a claim – with many countries prohibiting the assignment of future claims but allowing the assignment of claims without prior consent of the other party once a dispute had arisen. Third, assignment of a judgment or arbitral award – for which generally no prior authorisation of the counterparty was required. She explained that third-party funding originated in Australia as a form of human rights protection, namely, to allow consumers to obtain access to justice. Nowadays, however, third-party funding was no longer about access to justice but rather a matter of financial convenience. She suggested at least addressing it in a minimal way in the future instrument, e.g., by expressing a view about this development without going into details.

185. *The Secretary-General* clarified that, given the approach taken in the future instrument, the absence of discussion meant that the UPICC provisions on assignment (Chapter 9 of the UPICC) would apply. He invited the Working Group to examine those provisions and discuss whether they were appropriate in the investment context, where one of the contracting parties was a State. For instance, he pointed out that Article 9.1.9 of the UPICC on "non-assignment clauses" provided that the assignment of a monetary claim was effective even if it was prohibited in the contract. The application of this provision meant that, while this could result in damages for breach of contract, the claim was validly transferred.

186. *A participant* noted that Article 9.1.9 of the UPICC regulated the effects of assignment on third parties. She argued that the clause was presumably designed this way because the UPICC only addressed the contractual relationship between parties, and not proprietary effects involving third parties. She doubted whether the future instrument should go beyond the scope of the UPICC.

187. *The Secretary-General* responded in the negative, highlighting that he only wanted to warn against the potential consequences of the UPICC provision. He noted that there seemed to be a trend towards curtailing non-assignment clauses (e.g., the UNIDROIT Model Law on Factoring not only overrode anti-assignment clauses but also excluded the possibility of compensation) and he therefore suggested that the Working Group discuss the desired approach.

188. *A participant* highlighted that third-party funding or assignment could still play a role in improving access to justice, especially for smaller companies. He also explained that companies that did have the necessary resources to pursue investment litigation were often hesitant to do so due to the high costs and internal burdens; many preferred accepting a discount on the claim to having to go through litigation. He considered it important to retain the possibility of claims' assignment since it encouraged parties to respect the contract and it preserved the deterrent effect of arbitration clauses by keeping the threat of litigation alive.

189. *A participant* observed that the UPICC already indicated that the assignment of a contract required the consent of the other party (Article 9.3.3). This was typically also included in legislation in countries where certain IICs (e.g., concerning natural resources) required specific legislation. For IICs, he suggested adding in the future instrument that the State should not unreasonably withhold such consent.

190. *A member of the Secretariat* noted that it could be an option to develop commentary that outlined the potential advantages and drawbacks to different approaches, also depending on the size of the investor and the State. He also indicated that the forthcoming memorandum of the Task Force could provide useful background information (e.g., some contracts required the lender's prior consent for assignment).

d) Draft Chapter 9: Choice of Law and Dispute Settlement

1. Choice of law

191. *A member of the Drafting Committee* introduced draft Principles 45 ("party autonomy"), 46 ("applicability of mandatory rules") and 47 ("public interest rules and standards"). He noted that there were still fundamental questions to be discussed, including whether these Principles were needed. For instance, draft Principle 46 was in line with Article 1.4 of the UPICC, so the question was whether it could be deleted and whether any IIC-specific guidance should be provided via commentary.

192. With regard to draft Principle 46, *a participant* questioned whether the reference to rules of international origin might result in the incorporation of the entire body of international law, potentially creating significant confusion. Furthermore, he argued that the broad reference to rules of "supranational" origin was vague and could cause legal uncertainty if the specific applicable norms were not clearly defined. *Another participant* considered that the principle was not needed because it was a repetition of the UPICC. If kept, it would need to be coordinated with draft Principle 8 on special regimes. *A further participant* suggested deleting the final phrase ("which are applicable in accordance with the relevant rules of private international law"). He argued that while this reference was appropriate for international commercial contracts, it might be less suitable for IICs, where public international law played a significant role. He cautioned that relying solely on private international law could risk arbitral tribunals overlooking applicable rules of public international law, as these might not be identified through private international law mechanisms.

193. *The Chair of the Consultative Committee* suggested to have regard to the HCCH Principles on Choice of Law in International Commercial Contracts (HCCH Principles), which contained clear guidance on mandatory rules and public policy, and had also been reflected in the *UNCITRAL-HCCH-UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contract, with a Focus on Sales* (Tripartite Legal Guide).

194. On draft Principle 47, *a participant* wondered whether a principle should be kept or whether it would be sufficient to provide guidance through commentary. If a principle were kept, she proposed adding a reference to "sustainability" and to international "practice". *Several participants* were in favour of removing draft Principle 47. It was argued that it risked diluting or even undermining the guidance on sustainability offered in other Chapters. It was suggested that it would be preferable to clearly state in those sustainability sections that the provisions were substantive and could not be compromised. If the principle were kept, it would need to be coordinated with the other sustainability sections.

195. *One participant* was agnostic on whether draft Principle 47 should be kept but emphasised that, if the applicable law was the domestic law of the host State, international norms should be considered to ensure that at least the minimum sustainability standards set by international law were respected. Without this, there was a risk that investors might rely on weaker local laws that fell short on human rights or environmental protection.

196. *A member of the Drafting Committee* explained that the section also contained three sets of draft model clauses (on the primary source of applicable law, the secondary source, and a combination of multiple sources of applicable law). He noted that the reference to "the future instrument" in the first model clause might need to updated and explicitly mention the UPICC given the close relationship of the instruments. Furthermore, he invited the Working Group to discuss the desired level of detail in the model clauses and the accompanying commentary. For instance, he raised the question whether the relationship between the future instrument and the law of the host State should be specified (e.g., whether these applied on an equal, complementary or hierarchical

basis) and whether the reference to national law should include a reference to its rules on private international law.

197. *A participant* noted that model clauses on choice of law were important to encourage parties to IICs to select an applicable law (even if most IICs nowadays contained a choice-of-law clause).

198. *The ICC Chair* underlined that the instrument should recommend the UPICC as the applicable law. *A participant* argued that the assumption was that the future instrument would apply if the UPICC applied. To avoid repetition with the UPICC, she suggested replacing the current draft model clause and commentary (paragraph 489) with a model clause and commentary that would explain the relationship between this instrument, the UPICC, and international law. If it was decided to retain the current approach, she suggested indeed adding a reference to the UPICC in the model clause. Furthermore, she advocated against the exclusion of conflict-of-laws rules of the *lex fori* since those were necessary to designate the law that would apply to all issues that were not addressed in the UPICC and this instrument (e.g., in the area of property law, tax law, etc.). She added that parties did have the possibility to exclude the application of private international law rules of a third country if the latter's law was chosen as applicable law. However, in such case, she suggested that it would be more effective to simply stipulate in the contract that it was governed by the substantive rules of [third country [X]]. Finally, regarding the relationship between a primary and secondary source of law, she highlighted that the UPICC could not derogate from mandatory rules (Article 1.4 of the UPICC). Therefore, the UPICC and the future instrument could only be the primary source in relation to non-mandatory rules.

199. *A participant* cautioned against overcomplicating the instrument with detailed private international law, as most parties to IICs were unlikely to be familiar with it. She suggested excluding such rules, while acknowledging it might be a radical stance. *The Secretary-General* disagreed; he considered that, in line with an earlier intervention, the HCCH Principles should be the starting point for guidance on private international law; at a minimum, these should not be contradicted in the future instrument. He suggested that the Secretariat assist the drafters in developing proposals for the section on choice of law, including the role of private international law.

200. *A participant* emphasised that it was important to clarify the relationship between the UPICC and the future instrument. He doubted that it would be sufficient to note that the current instrument was complementary to the UPICC since this would raise questions among parties and arbitral tribunals on which of the two prevailed in case of conflict. In the ensuing discussion, it was clarified that it was assumed that the UPICC applied and that the future instrument could be seen as a *lex specialis* that adjusted or complemented the UPICC where necessary, given the specific features of IICs.

201. *Another participant* suggested that the model clause on selecting the primary source of law should list the domestic law of the host State as a first option, in line with the current practice. The role of international law was often rather to supplement or interpret the domestic law. She also noted that comments from other participants on draft Principle 47 could perhaps be addressed in the commentary to the second set of model clauses (paragraph 491), which already contained a reference to international law.

202. *A further participant* recalled that the objective was that the UPICC and the future instrument would be chosen by parties as the governing law. He therefore expressed doubts about draft model clauses A.3 and A.4. He suggested focusing on the UPICC and the future instrument and providing guidance on their relationship with other sources of law.

203. *The Deputy Secretary-General* recognised that domestic law played a strong role – more so than in commercial contracts – but this would not preclude the use of soft-law instruments like the UPICC and the future instrument if this was allowed. She suggested that the issue was not about

creating a legal hierarchy but about ensuring the instrument could fulfil its intended purpose (improving contract practice and supporting clarity and consistency in IICs). To this end, she proposed making the instrument's potential functions more explicit, e.g., (i) the principles in the instrument could be chosen by parties as applicable law (together with the UPICC) if this was permitted by conflict-of-law rules, adding that they could also be chosen in arbitration; (ii) guidance and model clauses were provided to help contract drafting in line with those principles; and (iii) the instrument could be used to interpret or supplement the domestic law if that was the law chosen by the parties, possibly with a general reference to international law or practice.

204. In response, *a participant* raised a concern about the role of private international law in limiting party autonomy. He questioned whether it undermined the very purpose of choice of law – namely, to enable parties to avoid the law of certain jurisdictions in favour of others. *The Deputy Secretary-General* clarified that conflict-of-law rules would not generally curtail party autonomy, e.g., most of the rules applicable to arbitration proceedings allowed parties to choose any applicable law. However, conflict-of-law rules for court proceedings tended to be stricter, e.g., in some jurisdictions parties were not allowed to choose soft law as governing law.

205. *Another participant* supported the suggestion to clearly point to the possible function of the UPICC and the future instrument in the interpretation of domestic law. She emphasised this because it was a very important function of the UPICC in practice and because it permitted interpreting domestic laws in a harmonised way. She underlined that she therefore did not agree with an earlier suggestion to delete this function of the instrument in draft Principle 1.

206. *The Secretary-General* emphasised the need for flexibility since IICs were complex contracts. He suggested that the instrument should allow parties to choose different applicable law rules for different parts of the contractual relationship. He noted that the HCCH Principles provided useful guidance on this. *A participant* advised cautioning parties about the complexities of *dépeçage*, seeing no reasons to depart from the approach taken in commercial contract practice.

207. *A member of the Secretariat* pointed to the questions, which suggested, *inter alia*, that the Working Group discuss the role of the future instrument as governing law. He noted that the sources of law could be subdivided into three "boxes": the first concerned the primary source of law, the second related to the secondary source of law, and the third concerned international law. He suggested discussing whether the future instrument – which included the UPICC – should be recommended as the primary or secondary source of law and what the relationship with domestic law should be. In line with other interventions, he emphasised that the future instrument could only be the applicable law for the issues it (and the UPICC) covered. He suggested that the future instrument should prevail over domestic law to the extent it did not contradict domestic law. In any case, if the chosen law was a combination of the instrument and domestic law, the relationship between the two should be made clear (e.g., whether one of the sources interpreted and supplemented or complemented the other source, whether it filled gaps or whether the relationship was strictly hierarchical or, to the contrary, equal). Regarding the role of international law, he recalled that references to "general principles of international law" and the like had been criticised in the past. However, international law had changed over time, e.g., with the addition of rules on sustainability, and the future instrument would contribute to legal certainty by providing guidance on issues such as stabilisation and sustainability in IICs.

208. *The Chair of the Consultative Committee* asked whether the instrument would include a provision or model clause encouraging parties to adopt it. He considered that a reference to this instrument was sufficient since by adopting that the parties would also be adopting the UPICC, as they were referenced and integrated in the instrument as appropriate. He noted, as others had, that parties could only select this soft-law instrument as applicable law if allowed by the legal framework, such as arbitration rules (which allowed choosing non-State law) or national laws that permitted the use of non-State law (as was the case in several jurisdictions in Latin America). In

his view, the goal was to spare parties from having to copy all the UPICC provisions into their contracts by allowing them to choose the future instrument as applicable law. He added that, even if national law was chosen as governing law, the parties could integrate the model clauses that were to be provided in the instrument into their contract, in which case the instrument could still influence the interpretation of the contract.

209. *The ICC Chair* expressed doubts about the term "adopting" the instrument since it not only contained principles but also commentary and model clauses. He wondered whether the text of the draft model clauses should therefore be made more specific (e.g., referring to specific principles in the future instrument rather than the instrument as a whole). He confirmed that the objective was clearly that parties use the instrument. He indicated that the draft model clauses already pointed to the future instrument (which indeed integrated the UPICC) as a possible source of applicable law. He considered that the draft model clauses effectively provided the parties with a range of options.

210. *A participant* underlined the pedagogical function of the future instrument, which required that understandable terminology be used. She therefore cautioned against using terms such as "primary" and "secondary" sources of law. *A member of the Secretariat* agreed that it was important not to use overly complex terms, given the educational function of the instrument.

211. *A participant* suggested following the approach of the Preamble in the UPICC, which first stipulated that the UPICC applied when the parties agreed that their contract be governed by them. For this instrument, she proposed that it might be reversed, i.e., that the UPICC applied unless the parties had agreed otherwise.

212. With regard to international law, *a participant* underlined that it was important for sustainability aspects and underlined the need to address issues of hierarchy. Specifically, she considered it useful to clarify how an IIC related to a possible bilateral investment treaty (BIT), e.g., drawing the attention of the contracting parties to the need to examine to what extent the BIT provisions applied to the contract and to what extent the contract could provide otherwise. *The Secretary-General* agreed that such advice would be fundamental.

213. *Another participant* underlined that any possible principles and/or model clauses on choice of law should be coordinated with draft Principle 1 on the purpose of the instrument. *A member of the Secretariat* agreed. She recalled that Subgroup 0 had initially proposed to delete the reference to the interpretative or supplementary function of the instrument in draft Principle 1. The Secretariat had developed an alternative option, which reinserted this function given earlier discussions in the Working Group that this was arguably going to be the most relevant function of the instrument. She proposed clarifying the relationship between the UPICC and the current instrument at the beginning of the instrument, e.g., by stipulating in Chapter 1 that the instrument complemented the UPICC, which applied subject to the interpretation in this instrument (or similar). Chapter 1 could also list the functions of the instrument, with a cross-reference to Chapter 9 in the commentary given the relationship with choice of law. If the relationship between the instruments was clarified from the outset, the model clauses in Chapter 9 could build on this.

214. *Another participant* observed that there was consensus on enabling parties to use the future instrument in their IICs. She emphasised that clear guidance was needed on how to reference it effectively as applicable law, especially given that host State law played a significant role in IICs. She stressed the importance of developing not only model clauses but also commentary that explained the relationship between different sources of law and provided guidance for adjudicators in cases of conflict. She considered this essential for the instrument's effective implementation.

215. *A participant* considered that the focus should be on explaining the relationship between different possible sources of law. She suggested first referring to the UPICC and the future

instrument as applicable law, then explaining what happened if domestic law applied in combination with those instruments, and so on. *A member of the Secretariat* agreed that the model clauses should be accompanied by guidance in the commentary. She referred to the *Model Clauses for the Use of the UPICC* (UPICC Model Clauses) and suggested taking inspiration from those, including for developing specific clauses that would address the use of the future instrument in dispute settlement. *The Deputy Secretary-General* added that the UPICC Model Clauses fulfilled a pedagogical function in clarifying that the UPICC could be chosen both at the initial stage of choosing a law to govern a contract but also after a dispute arose about the contract. She agreed that it might be useful to follow a similar approach in this instrument.

216. *The ICC Chair* concluded that section A of Chapter 9 would be updated by the Drafting Committee to address the suggestions that had been made.

2. Dispute settlement

217. *A member of the Drafting Committee* introduced Section B of Chapter 9 on dispute settlement. He recalled that, in previous discussions, the Working Group had suggested to (i) keep the section simple, focusing on those issues that were most useful for parties to be addressed; and (ii) rely on existing instruments and model clauses where possible. He explained that the section had been streamlined after the fifth session and asked the Working Group whether it now covered the right issues. The section included five draft principles on negotiations, mediation/conciliation, dispute resolution forum, avoiding parallel/sequential proceedings, and counter claims, accompanied by draft model clauses where appropriate.

218. *The ICC Chair* explained that the ICC Institute, in cooperation with ICSID, would develop a proposal on which existing instruments and clauses could usefully be referenced. This proposal would be submitted to the Drafting Committee for its consideration by the end of July.

219. *A representative of ICSID* expressed gratitude to UNIDROIT and the ICC Institute for having been involved in the project. She noted that guidance on dispute settlement was at the core of ICSID's mission, and particularly important in light of its objective to promote contract-based dispute resolution. She recalled that ICSID had primarily been created to resolve disputes based on investment contracts and, although there had been a shift towards investment treaty arbitration, still 16-20% of cases were contract-based. She considered that arbitration or litigation should be a measure of last resort, underlining the importance of other alternative dispute resolution (ADR) options, such as negotiations and mediation. She noted that this project had the potential to benefit both States and investors by providing greater clarity on key issues, as well as enhanced flexibility and choice in dispute resolution. Regarding draft Principles 48 and 49, she noted that most dispute resolution clauses in their cases included amicable settlement, ADR and arbitration, typically in sequence. However, ADR could also be effective after arbitration commenced. Approximately 43% of contract-based cases were settled or otherwise discontinued before an award was issued. In light of this experience, she suggested (i) including an option for mandatory ADR in the model clause, (ii) highlighting in the commentary that negotiation and mediation could be pursued at any stage, and (iii) preserving flexibility in the choice of ADR mechanisms. With regard to draft Principle 50, she was in favour of flexibility, enabling contracting parties to customise the dispute resolution option to their needs. Since it would be challenging to list all options, she supported a generic principle. She advised against including specific model clauses, but if these were provided, she proposed to include links to relevant existing clauses considering that these changed over time. Finally, she suggested to mention the option of expedited arbitration in the commentary to encourage its use. *The ICC Chair* thanked ICSID for its valuable and active contributions to the project.

220. *Another participant* supported the intervention made by the ICSID representative. He was in favour of setting out different options for parties to consider, without suggesting a specific

approach. He suggested that, in addition to institutional arbitration, the option of *ad hoc* arbitration should be mentioned. He also suggested adding references to existing instruments and ongoing work by other organisations that might be helpful for parties to consider. Finally, he asked whether the Working Group intended to address limitation periods.

221. *The ICC Chair* proposed adding guidance about notice of disputes (as a follow-up to the earlier discussion about notices, see above). He was doubtful about addressing limitation periods in the instrument.

222. Regarding draft Principle 48, *a participant* suggested providing guidance in the commentary on the meaning of a negotiation process. She referred to an example in practice where a party had invited the other party to negotiate, but the latter had not responded. The question was what the consequences would be in such case, e.g., whether it should be deemed that a negotiation process had taken place. *Another participant* proposed explaining in the commentary that if a party failed to effectively engage in a settlement process or if it was evident from the circumstances that such a process would be futile, it would be acceptable to directly start arbitration proceedings (i.e., suggesting that bypassing the settlement step should not give rise to an issue of inadmissibility in such cases).

223. On draft Principle 49, *a participant* invited the Working Group to reflect on mediation *versus* conciliation, noting that there was a trend towards the former in the context of ISDS while there seemed to be a push towards conciliation in public international law. *Another participant* argued that the differences between these two processes had begun to decrease at international level. She therefore suggested not to differentiate between the two, but rather to explain in the commentary that parties could choose between these processes. *One participant* cautioned that the label of the process remained relevant to some extent, e.g., to decide whether the process fell within the scope of the *United Nations Convention on International Settlement Agreements Resulting from Mediation* (Singapore Convention). However, *other participants* pointed out that a settlement agreement resulting from conciliation could also be enforceable under the Singapore Convention. At the same time, they agreed that there would be a benefit in using both terms in the instrument, since they both were used by international organisations and in practice. *One participant* suggested that it might suffice to mention both processes in the commentary, explaining that legal differences might exist depending on the applicable law. *Another participant* referred to the *ICC Mediation Guidance Notes*, which distinguished between mediation and conciliation and highlighted the option for parties to request a mediator to issue a non-binding evaluation. He suggested including a reference to this option in the commentary, noting that, in his experience, it was a useful tool in practice.

224. Regarding the draft text of Principle 49, *a participant* emphasised the importance of recommending that parties agree on a dispute resolution process in their contract, before a dispute arose. She suggested making this clearer in the text, noting that the reference to "at any time" might not be sufficiently clear. Signalling that there were other options in addition to arbitration might also be a useful message to arbitrators, who were sometimes reluctant to give room to mediation and conciliation when an arbitration proceeding was already ongoing. *Another participant* expressed doubts about the reference to "controversy" in the draft Principle. He suggested it might better fit in the model clause. He also doubted whether the final phrase was necessary, i.e., "without prejudice to the legal position or rights of any party".

225. *A further participant* suggested (i) adding a reference to "[in accordance with the rules of […]]" in draft Principle 49, in order to clarify that parties could insert a reference to a specific set of rules to govern the mediation/conciliation process, and (ii) adding in the commentary that mediation and other mechanisms were available throughout the process, even if arbitration had already been initiated. On point (i), *another participant* advised against mentioning the rules of specific institutions in the principle; she considered that such references would fit better in the commentary.

226. With regard to the draft model clause accompanying Principle 49, *a participant* pointed out that UNCITRAL had adopted a model provision that allowed voluntary mediation, which also provided guidance on issues such as how to initiate mediation and the relationship with arbitration. If the Working Group would recommend voluntary mediation, he proposed simply using UNCITRAL's model provisions. The option of mandatory mediation could then be mentioned in the commentary.

227. *Other participants* agreed that that it was preferable not to prescribe a mandatory pre-adjudicative process, so that parties would not be forced to wait while no progress was made. They suggested keeping the model clause flexible (i.e., not including mediation as a mandatory prerequisite for arbitration), while the commentary could explain both voluntary and mandatory mediation, and perhaps strongly encourage parties to follow certain steps. It was also argued that, if parties chose mandatory mediation, it was advisable to establish a specific timeline rather than keep the process open-ended.

228. *A member of the Secretariat* recalled that the Working Group had previously decided not to recommend mandatory mediation. However, it was free to reconsider this decision and, in any case, mandatory mediation could be encouraged in the commentary, as had been suggested. He pointed to the questions under draft Principle 49, inviting the Working Goup to discuss issues such as a possible reference to institutional mediation rules, guidance on a combination of mediation and arbitration ("med-arb") and mechanisms to make mediation work for public officials. *The ICC Chair* recognised that there were many existing instruments on mediation and arbitration, but wondered how these could be referenced without overwhelming the future instrument with too many quotes and cross-references.

229. *A participant* observed that the draft model clause accompanying Principle 48 overlapped with option 2 of the draft model clause accompanying Principle 49 since both referred to "discussions" and "negotiations". He suggested clarifying this. Related to this, *another participant* indicated that a distinction was usually made between "direct negotiation" and "negotiation through a third party" (the latter encompassing mediation). She suggested adding the word "direct" in draft Principle 48 to clearly distinguish it from the mechanisms covered in Principle 49. She proposed explaining in the commentary that parties typically used several mechanisms, e.g., negotiation as a first step, followed by mediation or conciliation before proceeding with arbitration.

230. Furthermore, it was noted that draft Principles 48 and 49 both referred to "the agreement" while reference was made to "investment contract" in other parts of the instrument. The terminology would need to be made consistent. Similarly, it was suggested to consistently use the phrase "arising out of or in connection with" in the principles on dispute settlement.

231. *A participant* asked whether draft Principle 50 concerned the avenue for arbitration or whether it also included the place for mediation or other types of ADR. He wondered whether the future instrument should recommend a step-by-step process and, if so, what the trigger events from moving from one step to the next (e.g., negotiations to mediation, etc.) should be. *The ICC Chair* indicated draft Principle 50 would be redrafted based on proposals from the ICC and ICSID.

232. Regarding draft Principle 51, *the ICC Chair* noted that it raised the complex issue of waiver, given the coexistence of investment contracts and treaties. For States, it was problematic if investors could pursue treaty arbitration alongside or after contractual dispute resolution. Although waivers were therefore important, he observed that the current drafting maintained a separation between contract and treaty claims, leaving the issue unresolved. *Another participant* agreed that the draft principle resembled a fork-in-the-road provision rather than a waiver. She suggested strengthening the wording to make it more imperative and emphasised that not only the State but also the investor might breach contractual obligations. *A further participant* expressed doubts about the phrase "fundamental basis of the claim", arguing that even a contractual issue might find its fundamental basis in a treaty. It was also noted that "claimant" in the draft model clause might not

be the right term, considering that only investors could waive treaty claims in investment arbitration. *The ICC Chair* noted that the intent was for investors to choose between contract and treaty claims when both arose from the same facts. However, he agreed that the current wording did not resolve the practical issues and suggested that further reflection on this complex matter was needed. *A participant* added that draft Principle 51 did not address the full range of options to avoid parallel or sequential proceedings. For instance, another option was the consolidation of proceedings. He also mentioned the possibility of shareholder claims existing in parallel with claims of the investor itself, which was not addressed in the current proposal.

233. *A participant* inquired whether the intention was to also cover scenarios in which a State started judicial proceedings before a national court. *The ICC Chair* indicated that, if the parties had signed a contract containing an arbitration clause, the investor could raise an objection to the court's jurisdiction. *Other participants* agreed but emphasised the value of explicitly stating this in the commentary to help prevent national courts from proceeding regardless.

234. Regarding point D on transparency and conflicts of interest, *a participant* noted that it would be important to address not only confidentiality and transparency of information, but also non-party submissions. On point E concerning counterclaims, he explained that this issue was typically addressed in arbitration rules, so he was doubtful to what extent it could be addressed in a contractual principle. He added that the matters discussed in points C, D, and E of Chapter 9 were also under consideration by UNCITRAL Working Group III, which was preparing a set of draft provisions to be discussed at its upcoming September 2025 session.

Item 5: Organisation of future work

235. *The UNIDROIT Chair* explained the envisaged next steps of the process. First, the Drafting Committee would meet the next day and in the coming weeks to update the draft Master Copy in line with the outcome of this session. The Drafting Committee would also consider whether there were important aspects that ought to be addressed in the instrument but had not yet been included. If major gaps were identified, these could be discussed during a virtual intersessional meeting of the Working Group.

236. As a next step, the aim was to send an updated version of the draft Master Copy to the Consultative Committee by the end of July, for feedback by mid-September 2025. In parallel, the ICC Institute would share the draft Master Copy with the members of the ICC Institute Council and the Emeritus Council as well as a few other experts.

237. The seventh Working Group session would take place between 27-29 October 2025 at the seat of UNIDROIT in Rome (followed by a meeting of the Drafting Committee on 30 October). During that session, the Working Group would review the updated draft Master Copy, which would address the feedback received during the fifth and sixth sessions, and examine the comments from the Consultative Committee and the ICC constituents.

238. After the seventh session, the draft text would again be shared with the Consultative Committee, to allow them to see how their comments had been addressed and give them another opportunity to provide feedback by end-December 2025.

239. It was proposed to hold the eighth Working Group session between 19-21 or 20-22 January 2026 in Rome (followed by a meeting of the Drafting Committee the next day). *The Chair of the Consultative Committee* suggested postponing the eighth session to February or early March 2026, while *another participant* stressed the importance of receiving the documents well in advance should the original January dates be maintained, in light of the holiday period. *A further participant* requested more generally that the Secretariat ensure timely distribution of the meeting documents ahead of each session.

240. Following the eighth session, the draft instrument would be submitted to the Working Group for fatal flaw review at the end of February 2026. The text resulting from that process would be submitted to UNIDROIT's Governing Council with the proposal to hold a public consultation between end-May to end-July 2026. *The UNIDROIT Chair* explained that, in addition to the public consultation, the Secretariat would organise targeted consultations with specific stakeholders – recognising the importance of diversity in terms of geography, industry sectors and interest. She indicated that stakeholders could possibly be asked to provide feedback on specific elements or questions based on their expertise. She welcomed any ideas and assistance from the Working Group for these targeted consultations. For instance, it was discussed that the International Law Association was represented in the Working Group but could also be asked to provide feedback on specific matters within their expertise, e.g., by means of targeted questions or a virtual meeting.

241. The ninth and final Working Group session was envisaged to take place at the end of September or in October 2026, with a view to submit the final draft instrument to UNIDROIT's Governing Council for adoption in December 2026. *The ICC Chair* added that a close-to-final draft instrument would have to be shared with the ICC's Executive Board for approval in October 2026, and that it would be highly beneficial if the Annual Conference of the ICC Institute, which was normally held in October or November, could be devoted to the instrument.

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

242. In the absence of any other business, *the UNIDROIT Chair* expressed gratitude the ICC Institute for having hosted the Working Group, thanked the participants for their valuable contributions and closed the session.

ANNEXE I

LIST OF PARTICIPANTS

MEMBERS

Ms Maria Chiara MALAGUTI *Chair*	President UNIDROIT
Mr Eduardo SILVA ROMERO *Chair*	Chair ICC Institute Council
Mr José Antonio MORENO RODRIGUEZ *Chair of the Consultative Committee*	Professor Founding Partner, Altra Legal
Mr Lauro GAMA	Professor Pontifical Catholic University of Rio de Janeiro
Ms Margie-Lys JAIME	Professor University of Panama Of Counsel, Infante & Pérez Almillano
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Mr Aniruddha RAJPUT	Consultant Withers LLP
Mr Jeremy SHARPE	International Arbitrator

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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 fifth 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