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SUMMARY REPORT

OF THE SEVENTH SESSION

(27 – 29 October 2025)

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1. The seventh session of the Working Group on International Investment Contracts ("the Working Group") took place from 27 to 29 October 2025 at the seat of UNIDROIT in Rome. Online participation was possible for those who were unable to attend the session in person.

2. The session was attended by 19 individual experts and 10 representatives of institutional observers, including international and regional organisations, along with 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.

3. The session was chaired by former 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

4. *The Chairs* opened the session and welcomed all participants to the meeting.

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

5. *The UNIDROIT Chair* introduced the draft agenda and the organisation of the session. It was proposed to discuss the chapters of the draft master copy in chronological order, with the exception that Chapter 8 would be discussed during the first day of the session.

6. *The Working Group adopted the draft agenda (UNIDROIT 2025 – Study L-IIC – W.G. 7 – Doc. 1, available in Annexe II) and agreed with the proposed organisation of the session.*

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

7. Upon invitation by the UNIDROIT Chair, *a member of the UNIDROIT Secretariat* updated the Working Group on the intersessional work since the sixth session. She explained that the Drafting Committee had revised the draft chapters of the master copy in line with the outcomes of the fifth and sixth sessions. The Drafting Committee had met directly after the sixth session in Paris and had subsequently held four virtual meetings in July 2025. On 1 August 2025, the updated version of the master copy been submitted to the Consultative Committee for feedback. The Secretariat had received seven responses, which were organised into a document (UNIDROIT 2025 – Study L-IIC – W.G. 7 – Doc. 3 (confidential)) that had been distributed to the Working Group for discussion during the present session. After the circulation of the meeting documents for this session, an additional response had been received from one member of the Consultative Committee, who had emphasised the importance of considering the ongoing work of other organisations (UNCITRAL, UNCTAD) and existing instruments (*e.g.*, from the United Nations Economic Commission for Europe (UNECE) on concessions and public-private partnerships).

8. She explained that the Working Group had received the version of the draft master copy that had been submitted to the Consultative Committee. Any changes subsequently made by the Drafting Committee to address comments from the Consultative Committee were shown in the document (UNIDROIT 2025 – Study L-IIC – W.G. 7 – Doc. 2 (confidential)). Compared to the version of the future instrument that had been considered by the Working Group at its sixth session, a main change was that the guidance on sustainability-related aspects, which used to be in a dedicated chapter, had been reallocated to different chapters. Therefore, the draft master copy now contained eight chapters instead of nine. Furthermore, as previously agreed, guidance that was in line with the UNIDROIT Principles of International Commercial Contracts ("UPICC") – *i.e.*, aspects for which the Working

Group agreed that the UPICC provisions could apply to international investment contracts ("IICs") as they were (mostly in the chapters on formation, validity, and remedies) – had been deleted.

9. She suggested that the Working Group discuss the chapters one-by-one, whereby (i) the Secretariat would briefly introduce the main changes compared to the version of the draft master copy that was discussed during the sixth session, and (ii) the Working Group was invited to consider the comments of the Consultative Committee.

10. *The Chairs* thanked the members of the Drafting Committee for the impressive amount of work done since the sixth session.

Item 4: Consideration of work in progress

a) Draft Chapter 8, Section A: Choice of law

11. *The UNIDROIT Chair* drew the attention of the Working Group to document UNIDROIT 2025 – Study L-IIC – W.G. 7 – Doc. 2_add (confidential) and invited a member of the Secretariat to provide an introduction.

12. *A member of the UNIDROIT Secretariat* explained that, in line with the discussions in previous sessions, the focus in this section was on the possibility for contracting parties to an IIC to choose the future instrument as applicable law to their contract. The section now contained a single Principle 45 on party autonomy; the previous draft principles on mandatory rules and public interest rules had been deleted. The draft commentary referred to party autonomy as a general principle and recommended that parties to an IIC agree on the applicable law in advance and clearly stipulate it in the contract. The draft principle was accompanied by two sets of model clauses with commentary. Model Clauses A were developed for parties wishing to choose the future instrument – which implied a concomitant choice of the UPICC – as the rules of law governing their contract (A.1) or dispute (A.2). Model Clauses B could be used by parties wishing to choose a particular domestic law as the law governing their contract (B.1) or dispute (B.2), with a supplementary role for the future instrument (including the UPICC). The Working Group was invited to discuss the overall approach in the chapter and to express its views on (i) how to reference the future instrument in the draft model clauses (*i.e.*, whether to refer to the instrument as such or only to specific principles), and (ii) how to consider the role of international law.

13. *A member of the Drafting Committee* thanked the members of the Secretariat for their assistance in revising this section following the sixth session. He welcomed the focus on the instrument as possible choice of law and its relationship with domestic and possibly international law, noting that this approach reduced complications and made the chapter more practical and useful for contracting parties.

14. *The UNIDROIT Chair* thanked the Drafting Committee member and the Secretariat for their work, and opened the floor for comments. *The Working Group* joined the Chair in congratulating the drafters, with *several participants* noting that the text had significantly improved.

15. As a general matter, *a participant* suggested cross-referring to this section in Chapter 1, underlining the need to be coherent. It was discussed that Principles 1 and 2 addressed the instrument's scope and function, while Principle 45 concerned the law governing the IIC – two distinct, albeit related, matters. It was agreed that this relationship could be clarified in the commentary to Principle 45 with a cross-reference to Principle 2.

1. <u>Scope of party autonomy</u>

16. *The Working Group* generally agreed that the role of party autonomy should not be overstated since there were clear limits. *Some participants* suggested to nuance the text of draft Principle 45, *e.g.*, by adding "subject to national, international, and supranational mandatory rules", "to the extent allowed by the applicable legal framework", "within the applicable legal framework", or "provided that the law governing the public actor permits such choice".

17. In particular, *some participants* recalled the relevance of mandatory laws and suggested explaining that a choice of applicable law would not restrict the application of mandatory rules of national or international law. *A participant* noted that awards that violated mandatory rules or public policy could be set aside. He suggested clarifying the meaning of the concept of mandatory rules in the commentary since he was unsure whether its interpretation in the UPICC was the same as under public international law. *Another participant* suggested clarifying in the commentary that contractual provisions were always subject to general principles of public policy, as already followed from Article 1.4 of the UPICC on mandatory rules. He explained that the commentary to that provision made reference to "rules of private international law" since those rules informed the determination of courts and arbitral tribunals as to which mandatory rules applied. He also noted that, if the UPICC applied as governing law and a dispute was brought before an arbitral tribunal, they no longer encountered the limit of the ordinary mandatory rules of any domestic law.

18. *A member of the UNIDROIT Secretariat* recalled that the previous version of Chapter 8 included a principle on mandatory rules, which the Working Group had agreed to delete since it considered that Article 1.4 of the UPICC would apply. Therefore, since the relevant UPICC provision was deemed applicable, no reference to mandatory rules was made in the text of draft Principle 45, while explanations on the applicability of mandatory rules and "overriding" mandatory rules were provided in paragraphs 7 and 9 of the commentary. *The Deputy Secretary-General* added that the "overriding" mandatory rules that would apply in case of arbitration covered some elements of public international law, while it did not cover ordinary mandatory rules of the otherwise applicable law – although the parties were free to agree to designate other rules as mandatory in their contract. She suggested clarifying this in the commentary.

19. *Another participant* noted that, in practice, State actors were sometimes pressured into, or unknowingly agreed to, contracts that contravened the host State's domestic law. He emphasised the importance of the principle of legality from a public law perspective and favoured a formulation that would combine the principle of party autonomy with a recognition that it applied to the State actor only insofar as permitted under the domestic law. He considered that the references to mandatory rules and illegality in other parts of the instrument might not be sufficient to clarify the interplay between party autonomy and domestic legality. Similarly, he expressed concern that paragraph 2 of the commentary overstated the role of party autonomy in private-public contracts, including IICs. He emphasised that the general principle across domestic legal orders was the principle of legality, which limited a public actor's authority to contract or arbitrate. He suggested that the principle of legality be the starting point, while party autonomy applied to the extent permitted for the public actor under domestic law.

20. *A further participant* suggested noting first that party autonomy in choosing the applicable law to international contracts was broadly accepted and then clarifying its application to IICs by referencing the principle of legality. *The ICC Chair* supported the suggestion to introduce a sentence about the principle of legality in the commentary, noting that it was important for the interpretation by arbitrators of ambiguous contract clauses. *Other participants* also expressed support.

21. *The Working Group agreed that Principle 45 should state the general rule of party autonomy, while explanations tailored to IICs should be provided in the commentary, including by means of a reference to the principle of legality.*

22. *The UNIDROIT Chair* invited further comments on the commentary to draft Principle 45.

23. *A participant* suggested restructuring the first three paragraphs so that the commentary would (i) discuss the role of applicable law, (ii) explain the benefits of agreeing on an applicable law, and (iii) elaborate on the limits to party autonomy. In paragraph 1, it was suggested to replace the phrase "can serve to provide guidance on the interpretation of the provisions of the IIC" with "will regulate the rights, obligations, remedies, and other legal consequences, including …". In paragraph 2, it was suggested to (i) make the first sentence more general, deleting the reference to "most jurisdictions across the world"; (ii) replace "dealings" with "relationship" in the second sentence; and (iii) link the sixth sentence on freedom of parties to choose non-State rules of law to the concept of party autonomy. In paragraph 3, it was suggested to amend the sentence starting with "[t]hese options are not exhaustive". In particular, *a participant* proposed that the text should more accurately reflect choice-of-law practice in IICs. In practice, the applicable law was typically the host State's domestic law, while designating the law of a third State seemed less common. *Another participant* agreed that parties to an IIC commonly chose the host State's law as applicable law, but he was hesitant about emphasising this in the instrument. He was in favour of offering options that the Working Group considered suitable for IICs. *A further participant* considered that the possibility of designating a third State's law should not be ignored since it was used in practice. *The first speaker* agreed that the text could both reflect the practice (including the possible reference to a third State's law) and recommend a desired approach for the future. *Another participant* strongly supported developing the instrument with a forward-looking approach, consistent with the progressive vision of the UPICC's founders. He recalled that, during the drafting of the Hague Principles on Private International Law, many believed that States would not accept non-State law as applicable law, while several Latin America countries had now recognised its applicability. *It was agreed to update the commentary to draft Principle 45 in line with these suggestions.*

2. Renvoi

24. *A participant* suggested clarifying that *renvoi* should be excluded, so that a choice for particular rules of law would be interpreted as referring solely to the substantive law of the parties' choice. *Another participant* argued that, when parties referred to specific law in a contract, it was clear that they were selecting its contract law, regardless of whether the clause explicitly referred to "substantive" law or excluded conflict-of-laws rules. *A member of the UNIDROIT Secretariat* explained that the exclusion of *renvoi* was already covered in paragraph 13 of the document. Support was expressed for the draft text.

25. As a general comment, *several participants* cautioned against trying to cover too many issues in each principle, arguing that this undermined clarity and was unnecessary when issues were already addressed elsewhere (*e.g.*, there was no need to cover *renvoi*, public policy, or mandatory rules in the text of Principle 45). They emphasised that the principles should remain simple and user-friendly for contract drafters, and that excessive language – both in the principles and the commentary – may obscure rather than clarify the text.

26. *The Drafting Committee was provided with a mandate to reflect on whether additional explanations on renvoi and the scope of a choice-of-law clause should be provided.*

3. Model Clauses A.1 and B.1

27. *The Working Group* generally expressed support for draft Model Clauses A.1 and B.1. *A member of the UNIDROIT Secretariat* agreed with providing model clauses both for applying the future instrument as a primary source of law and for using it to interpret and supplement domestic law. However, he strongly preferred the former since it would ensure that, if a dispute arose and arbitration proceedings were initiated, the instrument would apply, with the only restriction being "overriding" mandatory rules.

28. *A participant* proposed to remove the phrase "[and, with respect to issues not covered by the Principles, by the law of [State X]]" in draft Model Clause A.1. He noted that this phrase suggested that the instrument was insufficient, which would necessarily be the case since it was impossible to cover all aspects, and could hamper the objective of "contractualising" aspects of international law in a specific way. *The ICC Chair* agreed that this phrase opened the door to uncertainties, while the objective was to offer legal certainty to the parties to an IIC.

29. *Another participant* explained that, in her understanding, the objective of the phrase was to provide parties with fallback rules in case issues were not covered in the instrument. She recalled that, pursuant to Article 1.6 of the UPICC, if an issue fell within the scope of the UPICC but was not settled therein, it should be settled to the extent possible in accordance with the underlying general principles. If it was not possible to find a solution in this manner, the issue should normally be solved under the otherwise applicable law (*i.e.*, the law that would have applied to the contract had the parties not chosen the UPICC). Her understanding was that the phrase in question meant to enhance party autonomy, by providing parties the possibility to specify the law that would apply to contract law issues that were not settled in the instrument or the UPICC and could not be solved based on underlying general principles. She suggested better explaining this in the commentary. *Another participant* agreed.

30. *The Deputy Secretary-General* recalled that the objective was to enhance legal certainty and predictability by complementing the already comprehensive provisions in the UPICC with additional IIC-specific provisions. Against this background, she asked whether it was likely for contract issues to arise that could not be resolved by the instrument in combination with the UPICC. If this was unlikely, she suggested deleting the phrase in brackets from draft Model Clause A.1 and mentioning this rare possibility only in the commentary. *A participant* responded that she had experienced only one issue in practice that was not covered in the UPICC and could not be solved by underlying general principles, namely how to allocate risk among a plurality of creditors in case of a force majeure situation that partially prevented performance. That situation would need to be settled in accordance with the otherwise applicable law, *i.e.*, the law that would govern the contract if the parties had not chosen the UPICC. She indicated that it would be preferable if parties could choose the applicable contract law in such exceptional cases but agreed that it would be sufficient to explain this in the commentary.

31. *The Working Group agreed to remove the phrase "[and, with respect to issues not covered by the Principles, by the law of [State X]]" from draft Model Clause A.1. It was also agreed to explain in the commentary that, for exceptional contract law issues that were not covered in the instrument and the UPICC, and which could not be resolved by underlying general principles, parties could specify a fallback option in their contract to avoid the application of the contract law that would apply pursuant to conflict-of-laws rules.*

32. *A participant* suggested deleting the explanations about issues *outside* the scope of the instrument in paragraph 6 of the commentary to Model Clause A.1. *Another participant* observed that these explanations concerned non-contractual issues. She suggested clarifying in the commentary that a choice of law did not extend to areas beyond contract law – such as company, property, competition, or tax law – which remained governed by the laws designated by the applicable conflict-of-laws rules. Parties could choose the applicable contract law rules, while other rules – including mandatory rules – might also apply, but not because the parties chose it. The commentary could thus clarify that conflict-of-laws rules applied to matters beyond party autonomy. *Other participants* agreed that this should be explained in the commentary. *The Deputy Secretary-General* advised caution in using the term "contract law" when referring to the UPICC, noting that they also encompassed issues falling more broadly within the law of obligations. *It was agreed to clarify in the commentary (paragraph 6) that, for non-contractual issues that fell outside the scope of the instrument and the UPICC, the applicable law would be determined by means of rules of private international law.*

33. The discussion then turned to the question of how to reference the future instrument in the model clauses. *A participant* suggested referring to "the UPICC as complemented by this instrument". *The ICC Chair* noted that the draft Principles varied in nature – some operated as direct rules, while others were only descriptive or advisory. He proposed limiting the Principles in the instrument to provisions that could function as directly applicable rules and moving all other guidance to the commentary. If this approach were adopted, he agreed that reference could be made to the UPICC as complemented by this instrument. *The Deputy Secretary-General* suggested that, instead of changing the black-letter rules, the commentary could recognise that the Principles varied in nature and explain that, if parties chose this instrument as governing law, it would apply depending on its content.

34. *Another participant* suggested referring, first, to the instrument and, second, to the UPICC. He considered that it may not be sufficient to note in the commentary to draft Principle 1 that a reference to this instrument would include a referral to the UPICC. *A member of the UNIDROIT Secretariat* explained that there were two options: (i) consistently referring to both the future instrument and the UPICC, or (ii) clarifying at the outset that the UPICC applied "*telles quelles*" if the instrument did not specify otherwise, meaning that the UPICC were incorporated into this instrument. He emphasised that the second option was simpler and that proposed language was already provided in the commentary to Principle 1.

35. *One participant* expressed doubts about the formulation of draft Model Clause B.1 and wondered whether there would be merit in referring solely to domestic law, noting that such law was often chosen as applicable law in practice and that the substantive provisions in the instrument provided mechanisms to avoid its misuse. However, *other participants* supported the current formulation, emphasising that it was important to make parties to an IIC aware that they could use the future instrument, together with the UPICC, to corroborate or complement a chosen domestic law. This would help interpret IICs in a harmonised way, contributing to legal certainty and predictability. It was also useful for adjudicators, and practice showed that courts sometimes *ex officio* chose an interpretation of a domestic law that was compatible with the UPICC. *The UNIDROIT Chair suggested acknowledging in paragraph 11 that IICs were often governed by domestic law, while leaving the rest of the paragraph as it was.*

4. Model clauses A.2 and B.2

36. Following a question of a participant, it was explained that draft Model Clauses A.2 and B.2 addressed the substantive law applicable to a dispute and were based on the Model Clauses for the Use of the UPICC, which offered, in addition to model choice-of-law clauses for a contract, distinct model clauses that could be used by parties in case a dispute arose after a contract had been concluded. *The Deputy Secretary-General* indicated that it followed from practice that the UPICC were more likely to be invoked when a dispute had arisen than as a choice of law in the contract from the outset. *Some participants* advised against offering distinct clauses for the contract and for a dispute since it would add complexity and could lead to confusion.

37. *The Working Group agreed to delete Model Clauses A.2 and B.2. Instead, it would be explained in the commentary that Model Clauses A.1 and B.1 could be adapted, as appropriate, for use by parties that had not chosen the instrument as governing law to the contract from the outset but wished to use it as applicable law to a dispute that had arisen later.*

5. Model Clause B.3

38. *Several participants* argued that the model clauses should not include a general reference to "international law" since that concept was less precise than the concrete rules offered in the future instrument, including the UPICC. They were, therefore, in favour of deleting draft Model Clause B.3. *A participant* emphasised that international law and soft law were relevant for issues of sustainability.

She suggested reflecting this in the choice-of-law section to ensure coherence throughout the instrument. *Other participants* noted that the sustainability obligations embedded in the instrument would automatically apply whenever the instrument governed the contract. *One participant* suggested that, while not providing a model clause referring to "international law", the commentary could mention that the parties to an IIC could consider referring to international law in their choice-of-law clause. *Another participant* suggested that coherence in the instrument on sustainability could be ensured by mentioning in the commentary that, if parties referenced specific international instruments on sustainability in their contract, these had to be considered. She cautioned that not referring to international law at all could have implications for provisions that incorporated public international law concepts, such as expropriation. *A further participant* suggested mentioning in the commentary that, for foreign investors – unlike domestic investors – not only contractual terms applied; they were also protected by treaty obligations arising from investment treaties, which formed part of the host State's legal system.

39. *The ICC Chair and a member of the UNIDROIT Secretariat* agreed that it would be preferable not to make a general reference to international law. It was noted that some aspects in the instrument effectively "contractualised" international law standards, and it would therefore be preferable for the instrument's more specific and precise guidance to apply, rather than leaving room for the broad and potentially uncertain application of international law. *The member of the Secretariat* recognised that Article 42 of the ICSID Convention referred to international law, but that was in the absence of a choice of law, while here, the objective was for parties to choose a governing law and stipulate it in their contract. Similarly, he cautioned against referring to investment treaties since that could cause confusion about the applicable type of dispute resolution mechanism. He concurred that it could be clarified in the commentary that these model clauses were about a choice of governing law to the contract, which did not preclude that international law could play a role in other ways (*e.g.*, for sustainability obligations).

40. *The Working Group agreed to delete draft Model Clause B.3 and related paragraph 15 of the commentary. The Drafting Committee was provided with a mandate to reflect on a possible reference to international law in the commentary.*

6. Consistency with Principle 2

41. Upon invitation by the UNIDROIT Chair, *a member of the UNIDROIT Secretariat* explained that draft Principle 2 concerned the application of the instrument, similar to the preamble of the UPICC. Following the sixth session, the Drafting Committee had reinserted paragraphs (3) to (5).

42. *A participant* observed that the functions of the instrument mentioned in draft Principle 2 were the same as those of the UPICC. Instead of repeating them in a principle, she suggested explaining these functions in the commentary to Principle 1 on the relationship of this instrument with the UPICC.

43. *The Deputy Secretary-General* noted that a distinct principle could be useful in this specific context, even if it repeated what was in the UPICC. Including a dedicated principle on the application of this instrument would improve clarity, transparency, and usability for readers by providing explicit guidance rather than relying on long comments in the general introduction to the instrument or in the commentary to Principle 1, which covered another matter. She added that the same approach had been followed in the Principles of Reinsurance Contract Law (PRICL). *Several other participants* agreed that it was preferable to keep Principle 2. They pointed out that the preamble of the UPICC was about the application of the UPICC, while this principle was about the use of this new instrument. Furthermore, spelling out the multiple ways in which the instrument could be used, right at the beginning, could facilitate its influence and application in practice.

Paragraph 1

44. *The ICC Chair* wondered whether there would be merit in explicitly mentioning the model clauses provided in the instrument. *A participant* suggested explaining in the commentary to Principle 1 that the instrument included principles and model clauses. *Another participant* asked whether Principle 2(1) would apply if parties to an IIC had incorporated some of the model clauses in the instrument into their contract – *i.e.*, whether adjudicators could then use the principles in the instrument to interpret the contract. *The Deputy Secretary-General* noted that there was no precedent based on the UPICC for this issue. This was considered an important point to be clarified in the commentary, by making explicit reference to the model clauses. Furthermore, it was suggested to delete "overly" in paragraph 6 of the commentary.

Paragraph 2

45. While *one participant* expressed doubts about the reference to *lex mercatoria* in Principle 2(2), *the majority of participants* was in favour of keeping this reference. It was noted that it meant to capture any indication of parties that they wished to apply transnational law and that parties were free to choose whether to refer to *lex mercatoria* in their contract or not. If they did, the instrument could apply, while if the contract did not refer to *lex mercatoria*, this paragraph would simply be irrelevant. *A participant* noted, in addition, that the reference to *lex mercatoria* helped reduce the gap between administrative and commercial contracts. He suggested explaining in the commentary that the application of *lex mercatoria* was optional since some States might deem it inappropriate if an IIC was qualified as an administrative contract.

46. *A further participant* suggested further elaborating on the concept of *lex mercatoria* in the commentary since some interpreted it narrowly as referring only to recognised usages and not best rules like the UPICC. *Another participant* advised against such explanations. *A member of the UNIDROIT Secretariat* indicated that Chapter 1, Section C, contained a placeholder for explanations on the role of relevant usages and industry practices against the background of Article 1.9 of the UPICC. He added that it followed from the research of the Task Force that IICs often contained references to generally accepted industry practice.

47. Regarding the commentary, *a participant* suggested deleting the reference to the UPICC in paragraph 7, fourth sentence. However, *another participant* preferred keeping the latter reference. He suggested clarifying that, first, the contractual provisions prevailed, followed by the UPICC, and finally the general principles of private international law.

Paragraph 3

48. *A participant* observed that draft Principle 2(3) indicated that the instrument could be applied when the parties had not chosen any law to govern their contract, while draft Principle 45 only pointed to the law chosen by the parties. To be coherent, he proposed complementing draft Principle 45 with a default rule to clarify which rules of law would apply in the absence of a choice of law. He recalled that Subgroup 0 had deemed "opting in" to the instrument appropriate because it meant parties agreed to apply it. However, caution had been expressed about other uses since not all principles could be deemed to be transnational principles.

49. *Several participants* considered the guidance to be consistent: Chapter 8 encouraged parties to an IIC to make a choice of law for their contract, which could be the instrument, and Principle 2 indicated that the instrument applied if parties had chosen it as applicable law to their contract (paragraph 1), or in other situations. Whether an adjudicator would apply the instrument in the absence of parties' choice remained to be seen, but they saw no harm in providing this option.

50. *The Secretary-General* noted that there was no international consensus on which law should apply to international contracts in the absence of a choice, although the most common solution was to point to the law that was most closely connected to the contract. He cautioned against prescribing

a solution for contracts generally because this fell within the remit of the Hague Conference on Private International Law. However, examples could be provided or a conflict-of-laws rule could be provided for IICs specifically, as was done in other UNIDROIT instruments for other areas (*e.g.*, digital assets, factoring). *The participant who raised the issue* clarified that he meant to suggest a specific solution for IICs only. He noted that the default rule could be to apply the law that was most closely connected to the contract, which would generally be the domestic law of the host State.

51. *Several participants* argued that parties to an international contract might not be served by the application of a domestic law, especially if such law contained provisions that the parties had not envisaged. They were in favour of using the UPICC to interpret the contract rather than defaulting to any national law, and they preferred to avoid getting into the complexities of conflict-of-laws rules in the absence of a choice of law.

52. *Some participants* suggested that coherence between draft Principles 2 and 45 could be ensured by clarifying in the commentary that the absence of a choice in favour of this instrument did not imply a negative choice *against* the instrument. It was suggested to mention in the commentary to Principle 45 that, in the absence of a choice of law, adjudicators may resort to the instrument in line with Principle 2(3). *Another participant* preferred not to add explanations on a negative choice, since the UPICC used a similar argument to point to the UPICC, rather than domestic law, as applicable law in the absence of a choice. *The Deputy Secretary-General* explained that the equivalent provision in the UPICC could be applied by arbitrators when it could be inferred from the circumstances that the parties intended to exclude the application of any domestic law, *i.e.*, in the case of a negative choice for domestic law. The UPICC would then be applied by the tribunal only if accepted by the parties. Although controversial to some extent, because it offered an international solution rather than applying the otherwise applicable domestic law, she noted that it had worked well in practice. She invited the Working Group to discuss whether the same approach was appropriate for IICs.

53. *The ICC Chair* agreed that Principle 2(3) was important for IICs and ought to be kept. He noted that, in practice, one of the parties might propose using this instrument and the arbitral tribunal might deem that more appropriate than specific domestic law. He referred to ICC case 7110 as an example that might be considered by the Working Group.[1] *Several other participants* agreed, noting that arbitral tribunals might feel more compelled to apply this instrument rather than domestic law, since it formed a neutral, international set of rules tailored to IICs.

54. *The participant who had raised the issue* recognised that Principle 2 appropriately identified several situations in which the instrument could apply, including when parties had not chosen a law. However, Principle 45 only addressed party choice, leaving a gap when no choice was made. To avoid inconsistency – where Principle 2 allowed application of the instrument but Principle 45 gave no guidance – he suggested specifying a default applicable law in Principle 45, similar to the approach taken in the ICSID Convention.

55. *Another participant* understood that Principle 45 in its current form might be considered inconsistent or incomplete because it provided a normative rule only on party autonomy without specifying what happened if parties did not exercise such autonomy by choosing an applicable law. *The Secretary-General* suggested that the law most closely connected to the contract might be the

[1] An English company and an Iranian government agency entered into nine equipment-supply contracts without choosing any specific national law to govern them. Some clauses instead referred to resolving disputes according to "laws or rules of natural justice." The arbitral tribunal's majority interpreted this as a *negative choice of law* – an intentional exclusion of any particular domestic legal system – and held that the contracts should be governed by general legal rules and principles regarding international contractual obligations. It concluded that the UPICC are a core part of widely accepted international contract norms and therefore constitute the proper governing law for the contracts (*addition Secretariat*).

most suitable; it would likely often point to the domestic law of the host State but could also refer to other laws depending on the connecting factors for different parts of the contract.

56. *Several participants* noted that the objective was to provide substantive rules and that specifying the applicable law when the parties had made no choice might fall outside the scope of the project. It was discussed that this was a complex issue that should not be sought to be solved in this instrument since several approaches were defendable; the issue should rather be left to arbitral tribunals when confronted with a specific dispute. It was also noted that the UPICC also did not provide such conflict-of-laws rules. *One participant* proposed adding a chapeau in Principle 2 that would clarify that (i) paragraphs 1 to 3 referred to the application of the instrument as primary source of law, (ii) paragraphs 4 and 5 concerned the role of the instrument as secondary source, and (iii) paragraph 6 covered the model function of the instrument. *Another participant* suggested mentioning in the commentary to Principle 45 that, in case no choice of law had been made, the matter would be decided by the adjudicating authority. On Principle 2(3), he noted that the commentary already referred to "exceptional situations", but it could be clarified that this was not a default rule.

57. *A participant* noted that the approach to this issue would also depend on whether the instrument would specify the meaning of IICs. *Another participant* recalled that the Working Group had previously decided not to adopt a definition of "international investment contract". He emphasised that the instrument must remain flexible enough to apply to diverse and evolving types of projects. Instead of a definition, illustrative guidance could be provided, *e.g.*, noting that contracts aimed at development in the host State could be considered IICs.

58. *A participant* suggested, first, warning against the perils of not selecting an applicable law. Second, it could be explained that, in the absence of a choice, there were different methods for arbitrators to determine the applicable law. Third, the advantages of applying the instrument, including the UPICC, could be underlined.

59. *The UNIDROIT Chair concluded that brief explanations could be added in the commentary to Principle 45 on the possible determination by an adjudicator of the applicable law in the absence of a choice of the parties in the contract.*

Paragraph 4

60. *A participant* noted that reference was made in Principle 2(4) and the commentary (paragraph 9) to the instrument as a basis to interpret or supplement international uniform law instruments. She suggested adding "*vice versa*" or similar wording in the commentary, since other international instruments might also be important for the interpretation of this instrument and might evolve over time. *The UNIDROIT Chair* noted that the interaction between different soft-law instruments was complex and might require further reflection. *The Deputy Secretary-General* suggested mentioning international instruments in the specific context where they might be useful for the interpretation of the instrument.

Paragraph 6

61. *A participant* noted that Principle 2(6) referred to the instrument serving as a model for national and international legislators. He suggested adding that it could also be useful for the drafters of contracts or model contracts. *The Deputy Secretary-General* noted that such use was in line with the UPICC, even if it was not mentioned explicitly in its preamble. *The Working Group agreed to add a paragraph in Principle 2 on the use of the instrument as a model for contract drafters, with reference in the commentary to the model clauses provided in the instrument.*

b) Draft Chapter 1: General provisions concerning the instrument

1. Principle 1

62. *The UNIDROIT Chair* referred to Chapter 1 and asked the participants to go through the text systematically, principle by principle, taking into account the comments from the Consultative Committee. She mentioned that the introduction and the Background and Purpose section of the instrument were still missing and would be worked out at the end of the process.

63. *A representative of the Secretariat* recalled that the Drafting Committee had developed Principle 1 to explain, from the outset, what the relationship between the instrument and the UPICC was. The first paragraph of the Principle set the scope, indicating the focus on IICs, while paragraphs 1 and 2 explained the concept and the main features of such contracts, without providing a technical definition as by a previous resolution of the Working Group. The second paragraph of the principle explained that the instrument modified the application of some of the UPICC provisions in order to account for the specificities of IICs. The third paragraph explained that matters of general contract law not specifically covered in this instrument were to be settled in accordance with the UPICC, while paragraph 4 of the commentary explained that, where the UPICC were not modified, any reference to the instrument would be meant as including the UPICC "*telles quelles*". Some comments from the Consultative Committee reiterated the idea of having a definition of IICs and foreign investors, or to explain further what "public interest" would mean. The Drafting Committee was of the idea of keeping the approach of avoiding a definition, but it had added some language on the public interest dimension of IICs in paragraph 1 of the commentary.

64. *A participant* recalled earlier discussions on choice of law and wondered whether, for the sake of clarity, the third paragraph might include wording on "contract law issues" (not settled in this instrument) since readers who were not familiar with the UPICC and the instrument might think that issues not relating to contract law would also be settled by the UPICC. *Other participants* agreed, including *the UNIDROIT Deputy Secretary-General*, even though she considered that the UPICC were deemed, at least in some legal systems, to also cover issues that fell under obligations in general.

65. *One participant* noted that paragraphs 1 and 2 of the commentary did not refer to the international dimension of IICs, while in the subsequent Principle 4 on "Parties to an IIC" and its commentary there was reference to the counterparty of the State having to be a foreign investor and the possibility for the State to apply this instrument to all investors, whether foreign or domestic. She proposed that Principle 1 already mention such an element of "internationality" and also that a foreign investor, even if incorporated domestically, might enjoy investment protections provided in this instrument, which would correspond to the principle of equality before the law. *Another participant* replied that Principle 4 was clear in stating that the investor may be an entity incorporated, having its place of business, control or principal activity outside the host State or inside the host State; she added that extending the scope to domestic investors in general might result controversial, and she finally proposed to mention investment protection in the commentary to Principle 1 when describing the distinction with commercial contracts, as this was the special feature of IICs, *i.e.*, enjoying extra protection that came from the combination of different sources. *A further participant* noted that one member of the Consultative Committee considered that the application of the instrument to domestic investors was not in line with IIA practice: however, a contractual instrument was different from IIAs and might well extend the protection to local investors, owing to the principle of equality and other constitutional principles. He finally considered that Principle 1 had to clearly establish a priority between this instrument and the UPICC: the instrument would apply first while the UPICC would apply when an issue was not covered by this instrument. *Another participant* highlighted that any decision taken in this regard should be uniform throughout the instrument. *A further participant* reminded the Working Group that a discussion had already taken place on the topic of foreign and domestic investors, with some participants considering that domestic investors could not be included: since the future instrument could not include a normative claim on

this point, the final position was to define foreign investor, but take a balanced approach and leave the State the possibility to grant protection to national investors. *One participant* recalled that the only question to address, most likely in the commentary, was to what extent the instrument might apply to IICs when it was doubtful whether the private party was a foreign or domestic investor and, as a consequence, the investment international or domestic (the typical distinguishing element being, under ICSID, foreign control of a domestic entity). *Participants* agreed that such an issue would be left to the decision of the parties and that the instrument should avoid being excessively prescriptive.

66. *Some participants* made some drafting suggestions concerning the formulation of the distinctive features of IICs and the terminology. *One participant* suggested to refer to "normal commercial contracts" (instead of "ordinary"), while another deemed the expression "commercial" not fit for such contracts, involving a significant, long-term public interest on the side of the State, even though the private party might earn significant profits. *A further participant* suggested to totally avoid qualifiers as they would complicate future interpretation by users. *Another participant* suggested using "concern" instead of "govern" (in relation to "projects of public interest") to include share purchase agreements. *Other participants* proposed to refer to "conflicts of law" or "applicable law" instead of "private international law" since such language might be more suitable when issues of a public-law nature were involved or even to cover contractual issues not covered by the instrument and the UPICC.

67. *One participant* drew attention to Principle 1 and considered that, as formulated, it gave the impression that the UPICC offered the default applicable law to IICs, while the Principle only wished to say that the UPICC applied to the extent they were not modified by the future instrument and they were considered appropriate. He suggested not to formulate paragraph 3 as a gap-filling provision (for which Principle 45 existed) but rather say that this instrument modified the application of the UPICC in the context of IICs to account for their specificities, and add that the UPICC applied where appropriate, *i.e.*, to the extent they were not inconsistent with the future instrument. *Another participant* recalled the comment by the Consultative Committee that the instrument should not be overly prescriptive and suggested to conform the language in Principle 1 and the commentary to an advisory style since parties were drafters of IICs. She then proposed to split Principle 1 into two principles, *i.e.*, scope and the relationship with the UPICC, and clarify in the latter that issues not settled in the instrument would be covered by the UPICC. *Other participants* responded that the scope and relationship with the UPICC were strictly connected since if Principle 1 stated that the instrument applied to IICs, modifying the UPICC, and should be read in conjunction with the UPICC, then the scope of application of the UPICC should be considered the same as the scope of this instrument, with the exception of what was regulated in the instrument.

68. *The UNIDROIT Chair concluded that there was agreement to keep the Principle, while clarifying that the reference to the UPICC in Principle 1 was not a gap-filling exercise as for the relationship between the instrument and the applicable law in Chapter 8, but rather an issue of scope of the instrument. Language in the commentary should be added to clarify this point. On the discussion concerning international versus domestic investors, she concluded that it was up to the parties to make their choices whether to apply or not the instrument to domestic companies or domestic transactions under specific circumstances, which might also include that the qualification of the investor, whether foreign or domestic, might be an issue covered by the applicable law and therefore not left to party autonomy. The instrument would provide advisory language and identify issues the parties had to consider.*

2. Principle 2

69. *The UNIDROIT Chair* then passed the floor to *a representative of the Secretariat* to illustrate the considerations of the Consultative Committee on Principle 2, noting that such a Principle had already been discussed for what regarded its consistency with the Section on choice of law in Chapter 8. She recalled that doubts had been expressed as to the concept of *lex mercatoria* and the use of

the instrument to "interpret or supplement domestic law" as well as on references to "public international law" and that such issues had already been covered in earlier discussions during the session and that the commentary could provide clarifications.

70. *One participant* recalled that the instrument did not refer to public international law, except where specifically relevant, and that such a reference in the commentary of Principle 2 to "general principles of law" should not be meant as referring to public international law, *i.e.*, the parties intending to refer general principles of international law, and thus this should be clarified. *Another participant* suggested that such a reference would not be necessary as the instrument, by implication, was of another nature, *i.e.*, a soft-law instrument, available by party choice. She noted that, in her country, IICs would typically refer to domestic law and in addition to "*general principles of international law relating to the economy"*, while in the last decade such formulations had been excluded from major IICs in the energy and construction sectors, but such a practice would not be relevant to how this instrument would be chosen by the parties. *A further participant* agreed to such an approach, reminding the Working Group that such a reference to general principles and the *lex mercatoria* was taken by the UPICC and simply referred to implied choice of the instrument, so that the reference was to be meant as to general principles of commercial law; the commentary should be revised accordingly to avoid inconsistent interpretations by public international lawyers. Even though *a participant* warned against excluding the relevance of public international law within the general principles of law, *many participants* agreed on the need to provide clearer language, *one in particular* recalling the practice in the Libya oil cases to refer to general principles of law to internationalise the contract under Article 38(1)(c) of the ICJ Statute (and further literature on this topic).

71. Such a position was also supported by *the ICC Chair*, who reiterated that a possible reference by the parties to general principles would just open a further door for the instrument and the UPICC to be applied by adjudicators, while if any reference to public international law was deemed proper, this would require re-opening the discussion on choice of law. *The UNIDROIT Chair* further wished to address the concern of some participants about the internationalisation of IICs, suggesting to include a clear statement, where suitable, that there was no intention to internationalise the contract and that the instrument was firmly rooted in the logic of contract law.

72. In this last regard, *some participants* agreed on the contractual logic underpinning the instrument but warned against resorting to broad statements against internationalisation; they supported the use of balanced and careful language, *one* recalling that public international law came into play with regard to sustainability, *another* referencing the many international standards that came into play in various sections of the instrument, including obligations of the State and investors' protections. *Another participant* wondered whether the issue might be addressed titling the principle "applicability" instead of "application" of the Principles. *The UNIDROIT Chair* recalled a proposal in the earlier discussion to add explanations in the chapeau of Principle 2 by clearly identifying the six situations covered there in three groups (normative use, interpretative use, educational use). In this regard, *a further participant* noted that, from the research of the Roma Tre-UNIDROIT Task Force, it resulted that there were a very high number of States having formulated a model IIC, so that a further use might be added to Principle 2: possibly inspiring the modelling of harmonised model investment contracts.

73. *The ICC Chair* agreed with this last proposal as a possible point 7 in the list of Principle 2. *The UNIDROIT Deputy Secretary-General* recalled that such a solution would not run counter to the logic of the UPICC since, from its very first version, the correspondent principle in the UPICC was enlarged based on proposals by those who applied them in practice (*e.g.*, also serving to interpret domestic law): she stated that there should be a well-articulated explanation in the commentary of the reasons why such a function is added, compared to the UPICC. *Other participants* agreed that the instrument, endowed with such a wide array of recommendations and model clauses, was to be deemed particularly well-suited to target negotiators of IICs or drafters of model agreements, with

the UPICC being resorted to more and more for guidance in or application to IICs (as credited in a recent report to the International Academy of Comparative Law), and thus such a function could be included in the text of the Principle and explained in the commentary.

74. *The UNIDROIT Chair thus concluded the discussion on this point directing the Drafting Committee to include a seventh point in Principle 2 on guidance for negotiators and corresponding explanations in the commentary*.

3. Sections B, C, and D

75. *The UNIDROIT Chair* then passed to discussion on sections B, C and D on "exclusion or modification by the parties", "usages and practices" and "definitions", which still needed to be added, whether in the form of principles or mere commentary to the relevant UPICC, if applicable. *A representative of the Secretariat* recalled that Section B, in parallel to UPICC art. 1.5, referred to what principles the parties could not derogate from when using the UPICC for their contracts. Another approach discussed in the Drafting Committee would consider all principles derogable but include a principle that explained that the main aim of this instrument was to achieve a balance between investment protection and sustainable investment. Section C was discussed with reference to a possible explicit consideration of certain industry practices, while usages between the parties were considered less relevant due to legality concerns. Lastly, Section D concerned definitions, and some suggestions had been provided by the Consultative Committee; the need to ensure consistency with the terminology of other international organisations was highlighted.

76. *The ICC Chair* recalled a recent shift by FIDIC to include in their standards the so-called "golden principles" approach, *i.e.*, those feature of FIDIC contracts that the parties should not exclude if they wished the contract to function properly. *Many participants* supported the proposal to consider such an approach in the context of this instrument.

77. As for usages and practices, *one participant* argued that the issue would be covered by the reference to *lex mercatoria*, while other participants objected that industry standards were being largely developed by associations of industries in many sectors (oil and gas, mining and extractive industry) regarding many aspects, including sustainability and how to conduct impact assessment and involve local communities. *Another participant* agreed and added that such industry standards would not be accurately covered by the label *lex mercatoria*, while usages and practices would fit better. *A further participant* concluded that UPICC art. 1.3 would cover such a phenomenon quite nicely: the commentary might explain the relevance, while specific text might be considered throughout the instrument, when relevant, including on sustainability.

78. On definitions, *another participant* considered that such an approach might be eschewed, if the Working Group so wished, since a full set of definitions would unduly freeze the instrument into a rigid framework of meanings, while reality evolved and might call for more flexibility.

79. *At this point, the UNIDROIT Chair concluded the discussion and took note of the comments for consideration by the Drafting Committee in developing the missing sections.*

c) Draft Chapter 2: General principles applicable to IICs

1. Principle 3

80. *The UNIDROIT Chair* then turned to Chapter 2. *A representative of the Secretariat* reported that Principle 3 on the "Form of an IIC" had been relocated from Chapter 3 on Formation after discussion in the June session and illustrated the comments received from the Consultative Committee.

81. *A member of the Drafting Committee* suggested not to incorporate the comment by the Consultative Committee that a failure to respect form requirements for amendments would render such amendments unenforceable since the legal consequences of not complying with the written form would depend on the otherwise applicable law. *One participant* agreed and recalled that in such a situation unenforceability was often attached to the materiality of the term that had been amended. She also suggested to consider possible waivers for specific situations, such as those where a State agency would allow the investor to make a performance not provided under the IIC, giving verbal assurances that written formalisation would come later, but then the formal amendment never came and the agency continued to benefit from such performance.

82. *A member of the Drafting Committee* expressed doubts about the fact that the reference in paragraph 4 to the conclusion of an IIC confirmed by certain means (physical signatures, secure electronic signature, and so forth) did not include a reference to other special mandatory requirements as in paragraph 3. *Another member of the Drafting Committee* noted that such a concern was addressed by the broader language in paragraph 4, using the expression "any means" and referring to confirmation, not conclusion. *The previously-mentioned member of the Drafting Committee* agreed, while *another participant* noted that the expression "any means" could be made clearer by replacing it with the expression "in one of the means specified, or otherwise".

83. *A participant* argued, supported by *a further participant*, that the issue of consent of the competent body in the host State or corporate organs in Principle 3 was not an issue of form, but should rather be considered elsewhere, for instance under Principle 7 on "specific arrangements duly approved by the competent bodies". *The ICC Chair* agreed that such issue did not seem to pertain to the form of the contract. *A member of the Drafting Committee* clarified that Principle 7 was not meant to be a principle on how contracts should be approved, but rather specify that UPICC art. 1.4 as to the respect of mandatory law could be derogated from if the State granted special treatment, upon certain conditions and with due respect of the procedures for approval by competent bodies (*e.g.*, a special tax regime differing from the generally applicable tax regime duly approved by law). She then proposed to address the issue by dividing the rule in Principle 3 into one part devoted to form, and another to validity of consent. *Another member of the Drafting Committee* recalled that such a discussion about the validity of consent when entering into the contract had already taken place and that the Working Group had decided to keep it separate vis-à-vis legal capacity. He then continued, suggesting that the formulation could be left as it was since the expression "form" was broad enough to include all the steps leading to the formation of the contract, including the expression of consent. The *other participants* agreed.

84. *A member of the Drafting Committee* noted that there was a reference in Principle 3 to the UNCITRAL Model Law on International Commercial Arbitration and also to the United Nations Convention on the Use of Electronic Communications, and proposed to add text considering that, with the evolution of the international understanding of electronic communication and related practices, the provisions in this instrument could also be deemed to evolve in parallel and needed to be in alignment with newly emerging standards and practices.

85. *The UNIDROIT Chair* agreed on the suggestion to make a reference to the UNCITRAL Model Law on Electronic Commerce and its possible dynamic interpretations by including specific text in the commentary, but then considered that, in general terms, it was a difficult topic to address how different instruments of soft law could interact and whether one could actually influence the interpretation of the other. While rules on systematic interpretations of treaties existed, guidance on interactions between non-binding instruments would be much more complex since the issue was much more debated. *The UNIDROIT Deputy Secretary-General* supported introducing a short clarification that the understanding of "*written form*" might shift over the years, and while already covered by existing international instruments, it might evolve with language and technology. *The UNIDROIT Chair* added that very careful language might be included in the introduction, where the "future-proof" logic of the instrument would be also described, along with the need to adapt the

instrument – and the contract – to evolving standards, including soft-law standards. *Other participants* and *members of the Drafting Committee* supported the inclusion of specific references to the evolving character of definite instruments of soft law developed by other international organisations when mentioned, not necessarily recommending that any development must automatically be reflected, but simply noting that the understanding of a certain standard or legal concept might continue to evolve. In the case of Principle 3 and the UNCITRAL Model Law, the addition might be along the lines of: "the understanding of 'written form' has evolved over time in international instruments, and may continue to evolve in the future." Such a formulation would not amount to an endorsement, but rather to an acknowledgment, leaving it for the reader to interpret. *Another participant* then considered that there were other parts of the instrument where issues of written form and formation might have relevance (Chapters 3 and 4) and therefore consistency and coordination should be ensured through similar language and cross-references.

86. *The UNIDROIT Chair concluded that there was agreement on the approach suggested by the Deputy Secretary-General, i.e., that there should be a clarification on specific issues, where relevant (such as form), that the understanding of a certain legal concept might evolve over time, including how it was interpreted by international instruments, as language and technology evolved, in addition to some general remarks in the introduction.*

2. Principle 4

87. *The UNIDROIT Chair* then turned to Section B and Principle 4 on "parties". *A representative of the UNIDROIT Secretariat* recalled that this had been Principle 6 in the earlier draft and that the reference to a natural person had been deleted in paragraph 3 since it was suggested that an investor should always be a legal person. There had ensued an extensive discussion on the nationality of the investor, and it was proposed to address some general aspects in the commentary to Principle 1, and the normative aspects — such as attributability or legal capacity to enter into a contract — in the specific principle of legal capacity, which was now reflected in the new version. The remaining issue to discuss was whether it was appropriate to keep a dedicated principle and commentary on parties, or whether this should be split between the commentary to Principle 1 and the principle on legal capacity.

88. *A participant* noted that consistency had to be ensured between Principle 4 on "parties", Principle 1 on "scope and the relationship with the UPICC" and Principle 11 on "legal capacity"; he reiterated his support for leaving the parties free to apply this instrument to national investors and keeping Principle 4 as it was. He then asked the Working Group whether the wording of Principle 4 would actually include State-owned companies which were not public entities, often with a 100% ownership of the shares by the State but registered in the commercial registry and maintaining a private legal personality, particularly if they could really be considered as part of the State. *Another participant* replied, recalling the ICSID Convention's reference to "constituent subdivisions and agencies" of the State, rather than "organs of the State" or "State enterprises", which would cover the concern expressed by the earlier participants, embracing companies or enterprises that exercised governmental functions, and that a State had specifically tasked with managing an entire sector. He then added that the concept of "foreign control" in the ICSID Convention would help to redefine the meaning of "foreign" investor, covering all those cases where countries required that IICs be entered into with a domestically-created subsidiary. Lastly, he did not understand the reason to exclude natural persons, since though it was rare, it might still happen that an individual endowed with significant funds might decide to conclude an IIC with a State. *A further participant* agreed but clarified that such an extension to private companies exercising a public function, as it occurred when the State gave a mandate to a subsidiary or affiliate to negotiate and conclude an IIC and act as an intermediary of the State would be covered by the expression "any other competent entity". She then reiterated that "foreign" should be linked to the "nature of the investment activity" and include a domestically-incorporated company with foreign participation and control.

89. *Other participants* partially agreed but took the position that Principle 4 might not be necessary. *One participant* suggested to delete it, but if kept, proposed to modify the expression "either the State or State entities" and clarify more specifically what "State entities" would be. She then suggested coherence with Principle 1 as to wording on the issue of applicability to domestic investors, using consequent language (such as by adding to paragraph 2 "when this instrument applies to a foreign investor, that investor means…"). Finally, she considered that the issue of the term foreign investor was more complicated than it seemed, as it encompassed not only incorporation but also other criteria such as the place of business or activities and the seat, and that, even though the choice was not to have a definition of IIC, in the end such a definition might prove necessary. *A member of the Drafting Committee* agreed with the position of the UNIDROIT Chair and an earlier participant, that the focus should be on the content and the nature of an IIC, so that if the contract was international in nature, whether the investing party was locally registered or not did not matter. Such an approach would be consistent with that of UNCITRAL and of many other international and national frameworks; such an approach might be explained in Principle 1 on scope with no need for Principle 4 or resorting to the language of ICSID, which would be at odds with the UNIDROIT methodology of using neutral terminology. *One participant* agreed and made the case of an IIC with an ICC clause applying this instrument or incorporating parts thereof where reference was made to ICSID concepts. *Another participant* recalled earlier discussions of the function of Principle 4, meant as an explanatory principle on parties without any pretence to put forward a normative claim, and supported the view that, by incorporation of elements on parties into the commentary to Principle 1, Principle 4 might have become redundant. Lastly, *a participant* suggested not to use the concept of "private party" since in many cases in practice investors might be of a public nature, or at least provide a qualification on this point.

90. *The UNIDROIT Chair concluded the discussion on Principle 4, noting the general consent in the Working Group to delete the Principle and turn much of its contents, particularly in paragraph 3, into language for the commentary.*

3. Principle 5

91. *The UNIDROIT Chair* then examined Principle 5 on "multiple contracts", and *a representative of the Secretariat* explained that it was a new principle that, based on the assumption that in practice IICs were often a bundle of interdependent contracts, encouraged the parties to regulate such interdependency and ensure that they were consistent each other, particularly through a model clause specifying which contracts were interrelated, setting out a hierarchy for interpretation, considering elements on cross-default or severability, and choice of law and dispute resolution, which would be linked to the last chapter of the draft instrument. One point discussed by the Drafting Committee had been whether to keep this model clause unitary or split it and move the part on choice of law and dispute resolution to Chapter 8. Comments had been provided in the feedback received by the Consultative Committee.

92. *The member of the Drafting Committee* who drafted Principle 5 clarified that the function of the text was to encourage the parties to consider such aspects and that how to deal with contracts' interdependence was entirely left to their choice, when possible; the commentary in paragraph 23, replying to a Consultative Committee comment, served to clarify that the intention was not to influence the law on validity, but simply contractually allocate the effects of what the law on invalidity states between the parties. She then mentioned the advantages and disadvantages of splitting the model clause between Chapter 2 and Chapter 8.

93. *Many participants* supported the view that the Principle and the model clauses should stay as they were, while a cross-reference in Chapter 8 might ensure readability and coherence when users had to draft the contract. It was suggested that the text might be re-allocated between the model clause and the commentary depending on the drafting approach and that the clause should be shaped as opt-in rather than opt-out. *One participant* suggested to include the wording "when an

IIC consists", "investment", or "investment project" rather than "an IIC" and to include more guidance on the need to possibly apply the same law to the set of contracts to ensure coherence (particularly on the validity of the dispute settlement clause throughout the contracts), even though certain contracts, such as on financing, might require a different choice in practice.

94. *The UNIDROIT Chair* agreed on these points and suggested to expand the commentary to more carefully reflect the contents of the Principle and the model clause, to make the parties aware of the consequences of their choices. She attributed special importance to coherence in regulating the interdependence of formally different contracts, all marked by economic unity under the investment project, as this would address a more general concern in international investment law and provide a concrete tool to prevent parallel proceedings. *The UNIDROIT Deputy Secretary-General* commented on the model clause and asked whether the reference to a "material breach" of an interrelated contract, from which legal consequences derived for other contracts, which was a departure from the terminology of the UPICC ("fundamental non-performance"), was justified to account for the specificities of IICs. She mentioned that, if no specificity needed to be addressed (such as in reference to specific domestic law language), the commentary should at least clarify that the instrument did not mean to depart from the language of uniform law instruments and refer to something different, or even to modify the language. *The UNIDROIT Chair* considered that issues might be raised if the parties chose a specific governing law instead of this instrument or some domestic law interpreted or supplemented by this instrument.

95. *The relevant member of the Drafting Committee* agreed that terminology should remain neutral and that the logic should be that of describing the substance in a manner that the model clause would work even under domestic law that the parties might choose, so that if, for instance, English law was chosen, the adjudicator would interpret "fundamental non-performance" as a "material breach". *Other participants* agreed on this point, *one* noting that fundamental breach might be viewed as broader than material breach.

96. *A participant* raised the issue that Principle 5, as formulated, referred to multiple contracts between the same parties and did not address nor provide guidance on multi-party contracts, which were a significant component of investment projects, where related contracts were concluded with different entities, including with separate entities (although very strictly connected with the original parties). *Another participant* referred to the practice in liquefied natural gas (LNG) or construction projects of having a contract between the State and the main contractor, and between the latter and subcontractors or suppliers. *The member of the Drafting Committee* also referred to paragraph 19, where reference was made to connected contracts entered into with third parties, such as those regulating credit facilities provided by a pool of banks or providing sales to finance the project.

97. *The UNIDROIT Chair concluded the discussion by deferring to the Drafting Committee the task of expanding the commentary on this topic, as it would be complex to address such matter in the model clause, since related contracts with third parties might be concluded with different timing. The instrument would provide an account of these aspects, but specific choices would remain in the hands of the parties and depending on the circumstances of the case.*

4. Good faith and cooperation

98. *The UNIDROIT Chair* referred to "good faith and cooperation" and noted that a principle was lacking in this regard. She asked the Working Group whether such a reference should be put at the end of the Chapter so as not to interrupt its sequence. *A representative of the Secretariat* illustrated that the approach taken in earlier sessions was that good faith and cooperation were extremely relevant to IICs, but that there was no need to adapt the relevant UPICC. As a consequence, text had been added to explain why they were important to the investment context, while leaving to other parts of the instrument to include specific applications to IICs, particularly in Chapters 3, 5 and 8.

99. *The participants agreed that the reference made sense before including specific provisions on good faith in Chapter 5 on rights, and obligations of the parties, but if the UPICC remained the default position, then there was no need to reiterate the Principle. The UNIDROIT Chair then concluded that the reference could be deleted.*

5. Principle 6

100. *The UNIDROIT Chair* then referred to Principle 6 on sustainable investment, and *a representative of the Secretariat* recalled that the Drafting Committee included some revisions after the last session, such as "shall endeavour to pursue" instead of "shall commit", to soften the language and describe the concept of "highest international standards" more concretely.

101. *The relevant member of the Drafting Committee* reminded the Working Group that the current version of the principle (shared with the Consultative Committee) had been revised during the intersessional period, following the instructions received at the last Working Group session. Many paragraphs had been consolidated to make it more readable, and the main changes concerned the need to graduate the intensity of the commitment while considering the need to render more concrete (or less vague) the concept of highest international standards. The final compromise had been to use the language "shall endeavour to pursue the investment in accordance with the highest international standards". The reference to the highest standards had been kept since no viable alternatives had been found, and it was explained in the commentary that alternative options would be seen as downplaying sustainability. A concern remained about how to render in a more concrete and specific manner such concept, as it was felt that the instrument could not contain a full list of instruments or standards for the parties' consideration. He then connected such discussion to the feedback of the Consultative Committee, which had made it clear that such textual choices were well received by States as setting out a very firm standard, with only a few comments stating that such a formulation might seem overly prescriptive or difficult to accept.

102. *One participant* flagged a number of terminology issues, suggesting alignment with the concept of "higher international standards" throughout the Principle (and the instrument), instead of referring to "internationally recognised higher standards". She considered whether the reference to "factors" and "benefits" in the text of the Principle was appropriate. She suggested to add "potentially affected stakeholders" as a more general catch-all expression, covering not only Indigenous peoples and vulnerable local communities but all types of stakeholders, as in the OECD context. She then noted that the commentary should provide examples of hard- and soft-law international standards such as the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, the ILO Declaration on Fundamental Principles and Rights at Work, and so forth, and that sustainability commitments should be catered to the capacity, means and size of the parties to the contract. *Another participant* suggested to replace part of the phrase "this principle is to be understood as a bilateral requirement implying mutual obligations of each party" in paragraph 1 with "requirements to which each party is subject", also considering that there could be more parties (as the discussion on multiparty contracts had indicated), and in section 4 of the model preamble language to soften the phrase "whereas the object of the contract is to ensure compliance with international obligations in terms of human rights, environmental protection, and the fight against corruption" with "one of the objectives of the contract" or "an important objective of the contract". She then considered whether a line could be added in the model preamble language, such as "whereas it is acknowledged that the investor has an interest in the predictability of the investment conditions". She lastly noted that, while the language had been softened in paragraph 2, the other paragraphs continued to resort to "shall", and she wondered whether this instrument would be in the condition of creating a "shall obligation", going on to suggest wording such as "it is of the utmost importance that the parties endeavour to…" or similar.

103. *One participant* suggested consulting with experts on issues concerning participatory rights of Indigenous populations, as the FPIC Principle might be viewed as applying only to such populations and not all stakeholders, and would be, to a certain extent, dependent on the applicable law. She also mentioned that, in relation to paragraph 6 of the model preamble language on the State's exercise of regulatory power, caution was needed when putting such constraints on regulatory freedom (measures which were *bona fide*, non-discriminatory and in the public interest) since the State could legitimately discriminate vis-à-vis foreigners (*e.g.*, immigration laws, land property, and so forth). On the issue of references to hard- and soft-law standards, *another participant* noted that such standards might be non-exhaustively enumerated in the commentary, while describing how they might evolve and be adapted. He also replied to an earlier intervention, supporting the "shall endeavour to pursue" language, as this was an obligation of conduct (and not result) defining the steps to be done rather content obligations, which would help to scale the intensity with flexibility, taking into account the nature of the provision (general principle) to be turned into model preamble language. There was agreement on this point, that the endeavour language in the first two paragraphs of the Principle ("shall be the primary focus", "shall consider", "shall endeavour to pursue") should remain unchanged, along with the "shall include" language in the last paragraph, which referred to a full obligation, which paired with the obligation to launch sustainability due diligence in Chapter 3 on "formation". He finally noted the need to coordinate the reference to the State's regulatory power in the model preamble language with the decision to include a principle in Chapter 2 on regulatory freedom and with the principle on stabilisation in Chapter 6.

104. *A further participant* considered that the language on "mutual obligations on the parties" would not be suitable for multi-party situations, which had been discussed earlier, nor the obligation to pass sustainability commitments along the supply chain to subcontractors and suppliers. *A member of the Secretariat* reminded the Working Group that the latter was addressed in Chapter 5.

105. In response, *the member of the Drafting Committee* replied that the Consultative Committee had justifiably reacted to the notion of mutual or bilateral obligations as a shared State/investor responsibility, and he pointed to the possibility of adding commentary to describe how such obligations or commitments would be transferred along the supply chain, taking into account that the expectation that such obligations permeated the whole chain should be left to a specific articulation by the parties, considering the existing different levels of normative standards on whether such obligations should be upheld at the first rung or further rungs down the supply chain. He then agreed on possible side-effects of local regulations on issues of consultation with local communities, reflected in some concerns expressed by the Consultative Committee (as regarded, for instance, Indigenous populations not recognised by the State), which were chosen by the drafters to not be addressed since they were perceived as lowering the level of commitment to sustainability, but they would in any case be covered by applicable mandatory rules, if any. He agreed with an earlier intervention that the need to adapt the principles on sustainability to the size of the investor and complexity of the investment was in line with other comments from the Consultative Committee which highlighted that too many details on sustainability standards would be impractical for smaller parties or smaller projects; this aspect had indeed been addressed in the revised version by adding some paragraphs to indicate that the parties were at liberty to relax some of the standards in the text if the level of their investment did not justify such detailed due diligence. He mentioned, supported by *a participant*, that some elements might be added to the commentary of Principle 6 as to how such commitments applied to SMEs, recalling that other parts of the instrument, for instance those devoted to sustainability due diligence and the related model clause, contained similar references and therefore it was important to avoid redundancies.

106. *One participant* reacted to the proposal to add language on predictability and to a further qualification by *the UNIDROIT Chair*, who asked the Working Group whether such a reference should be general or specifically referred to sustainability. In general, she warned against taking an approach that would include limitations to sustainability commitments in this principle, proposing that a general principle in the preamble be devoted to predictability, which was very important in an

instrument on IICs. She also clarified that adaptation of sustainability commitments to the size of the State (including smaller or coastal States) and the investor and the circumstances of the project should be dealt with in other, more specific parts of the instrument (*e.g.*, due diligence) since the general principle should remain the same.

107. *The UNIDROIT Secretary-General* thanked one of the participants for highlighting the need to ascertain how the FPIC principle would apply to local communities and Indigenous populations and welcomed the need to consider the contribution of subject matter experts on such an issue.

108. *The UNIDROIT Chair concluded that the endeavour language should be kept as it was (as well as the "shall" language in the last paragraph) and that predictability should be fashioned as a general principle rather than a limitation to sustainability. She considered that there was agreement in the Working Group that the commentary would describe how such commitments would apply to smaller States and SMEs, depending on the complexity of the investment, with due caution to avoid any implication of downplaying sustainability concerns and to avoid redundancies and overlaps with more specific text provided in other parts of the instrument. As to references to hard- and soft-law instruments, she noted agreement that the commentary should provide examples of the most relevant, striving for diversity across sectors, globally and regionally, and covering the main areas (environment, human rights, labour), while clarifying that they were illustrative and not exhaustive.*

6. State's right to regulate

109. *The UNIDROIT Chair* considered the new text in Chapter 2 proposing a principle on State regulatory freedom. *A representative of the Secretariat* reminded the Working Group of the decision in the previous session to include such a principle in Chapter 2, which had led the Drafting Committee to propose text with three options: (i) a general provision on regulatory freedom, (ii) the same provision, but with a qualification that such provision was subject to the terms of contract, and (iii) no provision, considering that stabilisation already covered such a matter.

110. She then summarised a comment submitted by the International Institute for Sustainable Development (IISD) that strongly supported reiterating the State's right to regulate in the public interest, as also supported by the Consultative Committee. Having such a principle here and throughout the instrument would ensure that States retain their inherent right to regulate in good faith without undermining the integrity or objectives of the instrument; it would make it explicit that when a State adopted a good-faith measure of general application to protect health and safety or address environmental threats and promote social justice, then that measure would rightfully take precedence. This would be essential towards building trust and predictability between the contracting parties, as investors would understand in which situations regulatory action was permissible and assess risks accordingly, while States could participate more confidently in investment projects, knowing their fundamental regulatory functions were respected.

111. *The relevant member of the Drafting Committee* provided the background of the proposal, clarifying that option 1 set out a general regulatory right, as specified under customary international law (*bona fide*, non-discriminatory, public interest) applying across the instrument. He considered that such an approach might imply the risk that such principle be invoked to redefine the impact of the terms of contract and particularly the Chapter on change of circumstances, including stabilisation, hardship and force majeure. Option 3 would be the opposite solution, *i.e.*, to not provide any general principle as a contract was not a BIT and a State would be aware when negotiating an IIC of whom it was contracting with, having the possibility to negotiate, reduce, add, supplement, etc. to conserve its regulatory space. In such a scenario, not having a principle on regulatory freedom would not create any negative effect as such. Option 2 was a middle-ground proposal centred on the idea of formulating a principle on regulatory freedom but clarifying that it was subject to the limitations specified in this instrument and the concretely-concluded terms of the IICs, such as stabilisation clauses, hardship clauses, and other provisions, while retaining the customary international law

requirement that such regulation, whichever adopted, had to be *bona fide*, non-discriminatory, and in the public interest.

112. *The UNIDROIT Chair* noted that, whatever decision was taken, the commentary should be particularly clear in stating that regulatory power was an issue of public international law concerning the State's right to establish laws and regulations, but had nothing to do with the contract. Caution was needed in order to clearly delineate what pertained to treaties, which were significantly changing the logic of investment protection in some parts of the world, and what concerned contracts. While having no impact on issues of public international law, the instrument, as a soft law, should be designed to identify the criticalities and to highlight the possibilities provided by contracts to create a balanced framework for protection, while preserving regulatory space.

113. *One participant* expressed the view that a general principle on State regulatory power, if included in the instrument, would not be especially effective. The State's right to issue legislation and regulations was based on the constitutional provisions of every State and recognised by public international law, and a contract would have no influence on that. If a State exercised its regulatory power in a non-*bona fide*, discriminatory manner, then the affected party could not use the contract as a legal basis to challenge such use of power, but rather constitutional norms before courts. A principle might be included in the instrument to simply defer to State sovereignty and for the sake of declaring that such instrument was consistent with international standards. *Another participant* agreed and, recalling the text of the CETA (Comprehensive Economic and Trade Agreement between Canada and the European Union), reiterated that "non-discriminatory" exercise of regulatory power did not pertain to the international standard and that the text should be aligned to treaties. *A further participant* considered that, in general, a principle on regulatory power was not necessary in a contractual instrument and that, if included, there would be a risk that preamble language might be used, in conjunction with other principles in the instrument, as a defence to evade contract terms on investment protection. However, taking into consideration that all new-generation BITs referred thereto, as well as the comments of the Consultative Committee, if the decision was taken to include such a principle, the wording should be very carefully considered and aligned with treaty language, to avoid frustrating the exercise. Lastly, *one participant* noted that earlier she had proposed not to refer to the concept of stabilisation, as such an approach would import all controversial issues around such concept. She mentioned that regulatory issues should be dealt with at the contractual level together with issues of predictability and under the heading of cooperation and renegotiation between the parties, which would lead to compensation. Cooperation would mean that the public party should inform the investor of how regulation evolved.

114. *A representative of the Secretariat* noted that a principle on regulatory power in Chapter 2 was meant to be turned into model preamble language. Having regard to the distinction between descriptive and innovative principles, the former relating to aspects of public law or public international law that the instrument could have no impact on, it would simply describe what existed in public international law while the terms of contract would still enshrine the agreement between the State and the investor on private law commitments to deal with the impact of regulatory measures on the IIC. A principle might not consider issues of proportionality as regarded the exercise of public power if not in a descriptive manner in the commentary, while other principles would consider issues of renegotiation, economic equilibrium and compensation.

115. *The UNIDROIT Chair concluded that a principle and model preamble language should be drafted that would take a middle ground between options 1 and 2, and the commentary needed to be expanded to carefully consider all the issues involved.*

7. Principle 7

116. *The UNIDROIT Chair* then turned to examine Principle 7 on specific arrangements duly approved by competent bodies; she noted that there were no comments by the Consultative

Committee nor specific questions to discuss. She then posed the more general question of whether the references to the UPICC located before the principles adapting to IICs were meant to be kept in the final version, and whether it had been considered to clarify that no UPICC were relevant for special principles not included in the UPICC.

117. *A member of the Drafting Committee* explained that the solution chosen had been to indicate, when relevant, the UPICC that were adapted by the instrument to IICs' specificities, to signal their relevance for easier readability without repeating the entire text. *A contrario*, the absence of any reference to the UPICC would implicitly mean that it was a matter of special principles for which no rule could be found in the UPICC.

118. *The UNIDROIT Chair concluded that a reference to the UPICC for which an adaptation was included in the instrument might either be left as a separate section before the commentary or included at the beginning of the commentary.*

d) Draft Chapter 3: Formation

1. Principle 8

119. *The UNIDROIT Chair* moved on to Chapter 3 on Formation, noting that Chapters 3 and 4 could be further streamlined, and clarifying that all editing and simplification would be undertaken by the Drafting Committee unless there were specific indications that needed to be addressed by the Working Group.

120. *A member of the Drafting Committee* noted that concerns about the vagueness of good faith had been addressed by expressly referring to article 1.7 of the UPICC, and that Principle 8 was intended to allow parties to adjust their policies during negotiations without such changes being regarded in themselves as a breach of the duty of good faith, even where the change was unilateral or occurred at a late stage of the negotiations.

121. *A participant* drew attention to unilateral changes occurring at the latest stages of negotiation, which in certain legal systems might entail a right to compensation for the other party. It was clarified that the principle made a specific policy choice and sought to also cover such changes of policy, including in the later stages of negotiation, if there were no other reasons for objecting to their legitimacy.

2. Sustainability due diligence in the pre-contractual phase

122. *A representative of the Secretariat* recalled that this section further developed the reference to sustainability due diligence already addressed in Principle 6, providing a specific principle, commentary and a model clause. She noted that, while sustainability previously formed a stand-alone chapter at the time of the June 2025 session, it had now been relocated to the Chapter on Formation. She further noted that concerns raised by the Consultative Committee regarding the unclear consequences of non-compliance had been addressed through a reference to Chapter 7 on Remedies. She also noted that other comments from the Consultative Committee had considered the section overly prescriptive. *Another member of the Secretariat* wished to draw attention to the tension between how the principle was articulated, as being contemplated in the pre-contractual phase, and IIC practice, as ascertained by the Task Force, where due diligence was in the great majority of cases contemplated in the pre-commencement phase and considered as a condition precedent. He invited the Working Group to consider possible adjustments to the principle and the commentary, as corporate pre-contractual due diligence might often overlap with publicly-regulated due diligence and impact assessment procedures in the host State, which appeared more and more often to be set out by State legislation and applied in a pre-operation context rather than a pre-conclusion context.

123. *One participant* noted that the provision was appropriately located in the chapter on contract formation, as pre-contractual obligations naturally belonged there, and recalling the fact that Subgroup 3 had interpreted such a commitment as a corporate due diligence, raised the question of how it would interplay with State impact assessment methodologies. She also considered that, based on the connection of this section with Principle 6, it might have merit not to have a full principle here but rather some introductory language defining how Principle 6 would be articulated in the context of due diligence. *A member of the Drafting Committee* replied that, while the general principle was placed in a different context and was supposed to be transformed into preamble language, in the context of formation, a mandatory principle would necessarily be formulated to impose a specific commitment on the parties, especially because it sought to require the application of "higher international standards", if stricter than national standards. *Another participant* considered that, as had been mentioned by the Secretariat, due diligence might occur after finalisation and before the operations, and recommended aligning the whole commentary to the change made in paragraph 10 ("prior to finalising the contract" into "prior to the commencement date" of the works). *A further participant* addressed earlier concerns of adding flexibility to the wording and scaling the commitments depending on the kind of risk by placing the phrase "the size and capabilities of the parties and the risks of adverse impacts of the project" before "the type and scale of the investment project". Lastly, *one participant* suggested that the reference to consultation with local communities in the model clause should be placed in square brackets to clarify that it applied only where relevant, since not all IICs involved local communities.

124. *The UNIDROIT Chair summarised that the principle on sustainability due diligence in Chapter 3 on formation (as the one in Chapter 5 on rights and obligations) should not be presented as the mere implementation of the general principle set out in Chapter 2, as such an approach lacked clarity and coherence each principle having its proper function in each phase of the life-cycle of the IIC. She emphasised the need for a clearer drafting technique, possibly through an introduction or a principle, to ensure consistency and ease of reading.*

3. Principle 9

125. *The UNIDROIT Chair* then moved to discuss Principle 9 on legal capacity. *A representative of the Secretariat* recalled that Principle 9 on legal capacity had been substantially revised from the approach taken at the last session. She noted that the new text used softer language and encouraged parties to include contract wording on verifying and acknowledging capacity, supported by updated commentary and a model clause. She added that the focus had shifted toward each party declaring its own legal capacity as a representation and warranty, rather than assessing the other party's authority. She further reported two Consultative Committee comments, supporting the use of this softer formulation and requesting clearer commentary to distinguish international law attribution from contractual binding effect under domestic law.

126. *A member of the Drafting Committee* noted that the current commentary to Principle 9 clarified the distinction between the attribution of authority under public international law and the contractually binding nature of agreements. The revised clause followed commercial practice where parties represented and warranted their legal capacity, while also imposing a duty on the other party to verify the public information available to confirm this capacity. *A participant* raised the question of how to address situations in which a lack of legal capacity or representative authority arose after the contract had been concluded but became relevant at the stage of contract modification. He suggested that this issue might require clarification in the commentary. In reply, *a member of the Drafting Committee* stated that imposing a general duty to inform every time capacity changed would be excessive, but agreed that the issue should be addressed in the commentary.

127. *The UNIDROIT Chair summarised that the commentary would be updated in line with the suggestions.*

4. Principle 10

128. *A member of the Drafting Committee* explained that the principle might be labelled as one of the aforementioned "descriptive" principles and functioned as advisory guidance rather than a strict rule, encouraging parties to include contract clauses that clearly set out their rights and obligations in order to ensure predictability and limit excessive discretion by adjudicators in using negotiations, reasonableness and good faith to determine the content of contractual obligations. To address some comments from the Consultative Committee, she suggested revising the text to replace the reference to the intended result of the contract, with wording stating that additional obligations could be implied only where they were necessary to implement the contract or were obvious and consistent with its express terms.

129. *A participant* noted that it was unclear what level of contractual interpretation the Drafting Committee had intended for the principle, particularly in light of different approaches to interpretation and evidentiary rules. He observed that clarifying duties could either expand or limit obligations depending on the interpretation, and he expressed concern that the commentary did not sufficiently explain the permissible scope of interpretation. He suggested that language such as "no adding new duties" or more detailed illustrations could help, while stressing that this was a concern rather than a concrete drafting proposal.

130. *The UNIDROIT Chair summarised that the points raised would be taken into account in the drafting process. She recalled that no comments had been received on "writings in confirmation" or "terms deliberately left open".*

e) Draft Chapter 4: Validity

131. *A representative of the Secretariat* noted that Chapter 4 on validity had been significantly streamlined after the last session since the references to the UPICC were largely deleted, while few comments had been received from the Consultative Committee.

1. Principle 12

132. *A member of the Drafting Committee* asked whether the model clauses had been intended to suggest that the relevant UPICC provisions should not apply to IICs, since the commentary appeared to question their suitability for such contracts. She then sought clarification on the purpose of the model clauses, as her reading was that they implied an exclusion of those UPICC rules. In reply, *another member of the Drafting Committee* stated that the UPICC continued to apply to issues of impossibility of performance and mistake. He explained that the purpose of the model clauses was to record the parties' agreement that impossibility did not affect the validity of the contract and that, after considering the grounds for mistake under the UPICC, the parties concluded that no such grounds existed in their case. He emphasised that these clauses were intended to confirm the application of the UPICC and to reduce the space for later disputes, rather than to exclude those rules.

133. *A participant* noted that referring to impossibility of performance was unnecessary if the UPICC already applied by default. He expressed serious concern about the model clause on mistake, arguing that a party cannot validly waive a right based on a mistake that it might not even be aware of. In his view, such a clause was legally problematic, as it either required excluding the doctrine of mistake altogether or accepting the risk that a genuine mistake could exist. *The member of the Drafting Committee* stated that he understood the concerns raised and suggested deleting the model clauses. He explained that the Working Group had intended the UPICC grounds for invalidity to remain applicable, and that removing the model clauses would better reflect that intention. *Another member of the Drafting Committee* added that the model clauses should be deleted and replaced

with a brief introduction to the Chapter, explaining that the UPICC applied by default unless expressly modified.

134. *The UNIDROIT Chair* stated that the Chapter should follow the same approach used elsewhere by simply referring to the UPICC without modification. She also emphasised the need for consistent editing throughout the document, noting that the illustration box appeared only in this part. She then asked for clarification on the scope of the deletions, specifically whether the removals concerned section A, section B, or both, so that only what was necessary to delete would be deleted.

135. *A member of the Drafting Committee*, supported by *other members*, clarified that her comments concerned subsections B2, C2 and C3, which mainly contained illustrations, and suggested to move such parts to the introduction of the Chapter. *A participant* noted that avoidance usually worked retroactively, but Principle 12 paragraph 2 allowed a tribunal to limit that effect when public interest so required, especially to keep public services running. He questioned whether public interest should be the only factor, and suggested that the text should also reflect the investor's substantive rights and legitimate expectations, so that the rule balanced public interest and investor protection.

136. *The UNIDROIT Chair summarised that the model clauses would be deleted and that sections B and C would in principle retain only Principle 12, subject to the discussion on Principle 13, since it was the sole provision involving a substantive change, with all other material moved to the introduction.*

2. Principle 13

137. *The UNIDROIT Chair* moved to Principle 13 on illegality, and *a representative of the Secretariat* recalled that, although the matter had already been discussed during the April session, the Drafting Committee had not yet had the opportunity to update the text accordingly. It was noted that one written comment had since been submitted, which proposed clarifying that the notion of illegality under Principle 13 should explicitly extend to violations of *ius cogens* norms and fundamental principles of international law.

138. *A member of the Drafting Committee* explained that Principle 13, paragraph 1, was drafted broadly enough to cover illegality under host State law, the law of the State of the investor, and other national, international and supranational mandatory rules, including *jus cogens* and fundamental principles. *Another Drafting Committee member* questioned whether the reference to the law of the investor's State should remain, since, in her view, only the law governing the contract and other applicable mandatory rules should determine illegality, while the investor's own law might only affect performance. In response, *several participants* suggested that illegality should be centred on the law applicable to the contract, but that the commentary should also explain how other mandatory rules, such as those of the investor's home State or supranational norms, could in some cases render the contract illegal and might be taken into account through private international law.

139. *The Chair of the Consultative Committee* stated that this discussion showed that articles 1.4 and 3.3.1 should be kept as they were. Article 1.4 covered violations of mandatory rules outside the contract (for example, public international law) and left their consequences to that external legal system. Instead, article 3.3.1 only dealt with violations of mandatory rules under the law governing the contract and either applied the solution in that law or, if needed, a reasonable solution based on clear criteria. Together, these rules covered both situations without mixing up contract law and public international law.

140. *One participant* replied, recalling issues of sustainability, that Principle 13 should not focus only on the law governing the contract, because parties usually already ensured that they complied with that law. Instead, the key function of Principle 13 was to include mandatory rules from other legal systems that might apply to the investment, especially in sustainability matters. The idea was

that a foreign investor should not do in a host State what would be illegal in its own State, for example, serious environmental harm that would be prohibited at home. She found paragraph 2 acceptable, suggested a small redrafting of paragraph 3 for clarity, and considered paragraph 4 unclear and partly overlapping with paragraph 3, so it should be reconsidered. *Another participant* disagreed and stated that Principle 13 was not the right place to address the issue of sustainability. Since Principle 13 was in the chapter on validity, it should focus on the applicable law and on mandatory rules that could invalidate a contract. He added that the Principles should instead clearly state elsewhere that IICs could not be used to contract out of mandatory rules of the law of the State or the investor, or peremptory norms of international law.

141. *The ICC Chair* highlighted that, while sustainability concerns were important, they should be dealt with in other parts of the project or through different instruments, rather than in this specific provision. *A member of the Drafting Committee* agreed with the ICC Chair and added that the provision raised several important difficulties. First, he questioned how different mandatory rules, *e.g.*, those of the investor's home State and those of the host State, would interact if they were incompatible. Second, he stressed that illegality also had to be viewed over time, since a host State might later change its mandatory laws in ways that seriously harmed or even terminated an investment, highlighting the need for stabilisation or renegotiation clauses. He also warned that broad references to "morality or public policy" could be used unpredictably against investors.

142. *A participant* mentioned that Principle 13, paragraph 2, should be confined to the validity of the IIC at the time of its conclusion, determined by the applicable law and other mandatory rules, while issues such as later changes to the law, stabilisation or renegotiation arrangements, and State interference belonged elsewhere, and that, in any event, contractual performance remained subject to domestic and international mandatory rules that parties could not contract out of. *A group of participants* noted that, in common law, courts would not enforce a contractual obligation if fulfilling it would be unlawful under the law of the place of performance. They added that illegality was not confined to the moment when the contract was concluded but could also appear during performance, and that enforcement courts such as those in England applied a narrow notion of public policy and might still enforce awards that conflicted with mandatory rules. In their view, this made the treatment of illegality more complex and required particular caution when one party was a sovereign that could change the law.

143. *A participant* highlighted that he disagreed with the previous idea of treating all subsequent mandatory rules as issues of illegality, explaining that one had to distinguish between, first, rules that retroactively invalidated a category of contracts and thus operated at the very root of the agreement, and second, rules adopted after conclusion that merely made a particular act of performance unlawful so that the contract remained valid while its performance was frustrated or impossible.

144. *Another participant* further emphasised with regard to paragraph 3 that all matters relating to dispute resolution, including separability, should be gathered under a single, comprehensive dispute resolution principle, rather than be scattered across different provisions.

145. *A member of the Drafting Committee* and *still another participant* both questioned paragraph 4. They felt that issues like severability and invalidity should be treated under the applicable law clause. They also noted that paragraph 4 mixed different situations, where the governing law did not itself make a breach illegal, and cases where third party or host State mandatory rules had to be considered and might have effects other than illegality. They believed the text should clearly separate these situations and link each one to its specific legal consequence.

146. *The UNIDROIT Chair* clarified that her question was whether, in this scenario, the proposed principle was meant to supersede article 3.3.1 of the UPICC or to operate alongside it as a complementary rule.

147. In reply, *a member of the Drafting Committee* suggested that the Group should simply rely on article 3.3.1 of the UPICC, which already addressed the concerns on illegality and made a separate principle unnecessary. *A participant* pointed out that, if the text only referred to the UPICC and this paragraph disappeared, the project would lose its model clause on illegality. He therefore proposed keeping a revised model clause and moving it to Chapter 8 on applicable law. *The ICC Chair* agreed that the clause should be relocated, explaining that it regulated the investor's duty to comply with the State entity's law during performance rather than the validity of the contract, so it would fit better in another chapter. *Another member of the Drafting Committee* argued that the provision raised a real illegality issue and proposed a new legality principle, with separate paragraphs on compliance with host state law, home state and supranational law, and peremptory norms, as a special rule for IICs rather than a mere addition to UPICC article 3.3.1.

148. *One participant* stressed that *jus cogens* should be clearly covered, noting that it was in principle already included through the reference to mandatory rules of national, international or supranational origin. *Another participant* observed that mandatory rules of the host State and the investor's home State applied in any event and could not be derogated from by contract, so a clause on illegality was purely contractual in nature; he therefore had no objection to keeping the provision and even suggested adding a standard representations and warranties clause, both to align with common practice in IICs and to signal to the international community the project's commitment to public policy, morality, and mandatory rules.

149. *The UNIDROIT Chair summarised that the Working Group agreed to remove Principle 13 and simply rely on the UPICC to deal with contractual legality, while preserving the substance of the discussion, including possible model clauses, to be placed in other parts of the instrument, such as the provisions on parties' obligations. She further noted that, because the UPICC already addressed mandatory rules, including jus cogens, it would be more appropriate to explain in the Chapter's introduction and in the other relevant parts of the instrument how these rules operated in the specific context of IICs, rather than drafting an additional principle on the issue.*

150. *The UNIDROIT Chair* invited the Working Group to decide the approach to Principle 12 now that it had been agreed to delete Principle 13.

151. *A member of the Drafting Committee* suggested deleting Principle 12 and instead referring directly to article 3.2.14 of the UPICC, with accompanying commentary explaining how courts or arbitral tribunals might adjust the retroactive effects of avoidance in light of the specific circumstances of the case and the public interest.

152. *The UNIDROIT Chair emphasised that, as for all questions of validity, the starting point should be the application of the UPICC rules, while the commentary should explain the specific features and challenges of IICs and how they affected contract drafting and negotiation, and therefore concluded to delete Principe 12. She suggested that this context-specific guidance, possibly supported by carefully worded model clauses, was the best way to adapt the UPICC to IICs without changing their underlying logic, which remained that of general contract law.*

3. Gross disparity

153. *A participant* suggested that, as for the entire section on validity, the part on gross disparity preceding Principle 12 would benefit from fuller commentary, noting that the current text largely just referred to the UPICC. From a business perspective, she explained, gross disparity had been one of the most controversial UPICC provisions, as SMEs might invoke it to seek renegotiation during performance; therefore, additional guidance was needed to clarify that it was assessed at the time of the contract's conclusion and to address its implications along supply chains and for SMEs.

4. Restitution

154. *The relevant member of the Drafting Committee* recalled that the text on restitution remained unchanged since the previous session of the Working Group and noted that only one comment had been submitted on this provision. She explained that a comment from the Consultative Committee had raised three concerns: firstly, the text did not address how to deal with partial restitution or situations involving third parties; secondly, it did not specify how completed performances under an illegal IIC might be appealed or challenged; lastly, it did not clarify how to manage potential tensions between the illegality principle and protecting the rights of parties who had already partly performed. She observed that these comments collectively suggested a possible need for additional guidance on restitution.

155. *A member of the Drafting Committee* suggested that, since restitution was closely linked to the provision on illegality and did not alter the content of the UPICCs, it should be dealt with mainly in the commentary, following the approach already adopted by the Group.

156. *The UNIDROIT Chair agreed on the comments on both gross disparity and restitution and suggested that illustrations were very useful when applying the UPICC because they concretely showed how the principles worked and what consequences they might have in the IIC context. She explained that examples appeared only under some principles for now simply because the text was still a work in progress, and she would prefer to have more illustrations throughout the text.*

5. Corruption

157. *The UNIDROIT Chair* moved to the section on corruption and invited a member of the Drafting Committee to illustrate its content. *A representative of the Secretariat* recalled that the Working Group had already engaged in extensive discussion on corruption during its fifth session. At that time, two proposals had been on the table: the ICC Anti-Corruption Clause and a separate proposal from Subgroup 3. After considerable debate, the Group had agreed to take the ICC clause as the primary basis while considering whether certain elements from Subgroup 3 should be incorporated into the commentary. She noted that this integration had not yet been carried out, and that the current draft simply reproduced the ICC clause and its commentary. She further emphasised that the Working Group still needed to decide whether to develop a stand-alone principle on corruption, whether to retain all or only one of the ICC options, and whether any aspects of Subgroup 3's proposal should be included.

158. *A number of participants* agreed that corruption had be dealt with explicitly, but should not automatically make an IIC invalid, since corruption could take many forms and there was also a public interest in preserving agreements. They argued that tribunals should decide the consequences case by case and ensure that investors did not profit when they knowingly participated in corrupted systems. *Several participants* suggested that the instrument should simply set out a clear ban on corruption for both investors and States and then direct users to the ICC Anti-Corruption Clause for practical guidance, since that clause would help parties raise allegations in arbitration and, together with article 3.3.1 of the UPICC and standard representations and warranties, already provided a solid framework. *A member of the Drafting Committee* agreed that corruption should be addressed expressly but noted that the Working Group still needed to decide whether to adopt the ICC clause, refer to it, or take another route, and warned that questions such as how serious the corruption had to be and what consequences should follow, for instance whether a small bribe by a minor official should affect a large and complex contract, had to be clarified before the text could move forward.

159. *The UNIDROIT Chair* suggested that the ICC's Red Flags or Other Indicators of Corruption in International Arbitration should also be expressly referenced in the instrument, given that they were already being applied in practice. She then asked whether the envisaged principle on corruption could be placed in the Chapter on general principles, for example after the sustainability principle, so that it would set out a general standard without directly regulating issues of legality or illegality.

160. *Several participants* underlined that corruption should be treated as a substantive issue and that detailed guidance for arbitrators, including the ICC's Red Flags and the indications coming from the forthcoming updated report of the Task Force, should appear in the commentary rather than in the black-letter rules. *A member of the Drafting Committee* favoured a separate principle on corruption to be placed in Chapter 2 of the instrument, close to the sustainability principle, because investment projects were highly exposed to corruption risks and the topic deserved clear and visible treatment. *Another participant* agreed that the anti-corruption provision should stand on its own, though the sustainability principle should still refer to it, and suggested that the commentary briefly draw on ICC materials, consider elements from the previous Subgroup 3's formulation to be incorporated, state an absolute prohibition of corruption, and encourage judges and arbitrators to take a more active role in dealing with corruption in disputes.

161. *The UNIDROIT Chair summarised the discussion and proposed introducing a separate principle on corruption in Chapter 2, placed immediately after the sustainability principle, so that the instrument clearly stated a general anti-corruption standard without directly entering into questions of validity and illegality. It was further agreed to streamline the text to the ICC Anti-Corruption Clause, while keeping the ICC model clause itself attached, and that Chapter 4 would contain no new principles but would instead explain how the UPICC rules on validity applied to investment contracts.*

f) Draft Chapter 5

1. Principle 15

162. *The UNIDROIT Chair* moved on to examine Chapter 5 and Principle 15. *A representative of the Secretariat* noted that a Consultative Committee participant had suggested adding a reference to FET, but the Drafting Committee had considered that this issue had already been discussed and did not need to be reopened. Another comment was that some of the language in the Chapter might be too prescriptive. Another Consultative Committee member had proposed that the commentary to Principle 15 should clarify that a State's legitimate use of its regulatory powers, such as reasonable policy or regulatory changes, should not in itself be treated as arbitrary or unreasonable conduct, and that the commentary should clearly distinguish such conduct from abusive or discriminatory behaviour.

163. *The Chair of the Consultative Committee* observed that recent FET case law sometimes treated contractual terms as not creating legitimate expectations, leading in practice to the overhaul of contract terms, and he suggested that the commentary should acknowledge this tension and give some guidance so that future treaty drafting would not let FET interpretations undermine what the parties had agreed. *A participant* proposed that the instrument briefly refer to treaty standards such as FET and especially to investors' legitimate expectations, noting that arbitral practice had not developed a clear and consistent definition and that guidance could help balance the interests of the host state and the investor. *A representative of the Secretariat* added that many IICs, as ascertained by the Task Force, already contained clauses that, although not described as FET, might be broadly seen to have a similar or partially similar effect by requiring the State and State administrations to behave fairly in conducting administrative procedures or restricting governmental measures that would prevent the investor from performing, and he suggested that if the Working Group considered it proper, such contractual techniques might be reflected at least in the commentary.

164. *The UNIDROIT Chair* summarised that Principle 15 would remain as a general chapeau and that its black-letter text did not need to be changed, while the commentary should be significantly expanded, including explanations on how representations, warranties and other contractual mechanisms could give effect to the obligations described in the Principle. The Working Group would not introduce a FET clause in the text. As to the concerns expressed on treaty interpretation and respect for contractual arrangements, she suggested that they be addressed in the introduction or

commentary rather than in the Chapter on rights and obligations. She noted that, although contract law was subject to domestic and treaty law, the instrument could still state that treaty interpretation should, as far as possible, avoid undermining what the parties had agreed in their contract.

165. *A member of the Drafting Committee* cautioned against telling States how they should negotiate treaties, warning that this could provoke resistance to the instrument itself. Instead, he suggested using more neutral language, merely inviting treaty negotiators to take the instrument into account as a helpful reference, since whether it was actually used would depend on its own merit. *The Chair of the Consultative Committee* agreed and clarified that the aim was not to impose mandatory rules on States, but to suggest in a subtle way that adjudicators and States take the instrument into account so that treaty interpretation would not frustrate what the parties had agreed.

166. *The ICC Chair* next suggested that the commentary on Principle 15 could be expanded to highlight corollary duties such as cooperation and loyalty between the parties, particularly in light of sustainability and ESG considerations, while leaving open whether these duties should be expressly mentioned in the black-letter text. As a reply, *a participant* stressed that cooperation required explicit attention and merited a dedicated commentary, given its functional importance in the performance of long-term investment contracts. She further noted that loyalty raised conceptual difficulties due to a lack of consensus on its precise contours, suggesting caution before embedding it in the text. *A member of the Drafting Committee* emphasised that cooperation should be framed as a general and overarching duty, ideally reflected in the general introduction to the instrument or Chapter 2, to avoid the risk of it being misinterpreted as an additional obligation attached to every contractual clause. He supported expanding the commentary, possibly with illustrations, while preserving sufficient flexibility.

167. *The UNIDROIT Chair* then asked for views on whether Principle 15 should clearly state that both parties could not use the contract to avoid mandatory rules. She noted that this might in practice require investors to follow certain home State or other standards that were not binding in the host State, as discussed earlier as to home State legislation and supply chains. She invited the Working Group to consider whether they wanted to include such a rule at this point in the text.

168. *A participant* suggested that Principle 15, as a general clause on good faith and non-arbitrary conduct, could be a suitable place to state that parties could not circumvent mandatory norms, and that this obligation should bind both parties. *A member of the Drafting Committee* voiced doubts, arguing that Principle 15 should focus on how contractual obligations were performed and interpreted, rather than on broad questions about mandatory rules. *Another participant* agreed that the rule against contracting out of mandatory law should instead be formulated as a general principle outside of Chapter 5, with Principle 15 only recalling it (in the commentary) as an example of good faith. *A further member of the Drafting Committee* added that mandatory rules were a general issue and should not appear in the black-letter of Principle 15, though a brief reference in the commentary could still help readers. *The Chair of the Consultative Committee* questioned what this new rule would add, since the UPICC already contained provisions preventing contracts from violating public policy, and asked whether the Working Group was adding anything substantively new.

169. *The UNIDROIT Chair noted that the relevance of mandatory rules was clear, but it remained unresolved where to address it. She explained that it might be recalled in the commentary to Principle 15 or as a separate general principle in Chapter 2 that applied across the whole instrument. She concluded the Drafting Committee should work on possible formulations and determine how it should ultimately be expressed in the text.*

2. Obligations of the investor on sustainability

170. *The UNIDROIT Chair* noted that the section on investors' obligations currently a blank placeholder but could not remain so, as it was one of the most important parts of the instrument.

She invited the Working Group to decide which investor obligations to include in this section and whether some commitments that were so far considered shared responsibilities, such as due diligence, could be placed under investor obligations.

171. *A representative of the Secretariat* explained that IICs, as ascertained by the Task Force, often required the investor to source local goods and services, to partner with local firms, and to hire local workers; national legislative policies also set out for providing training, education, know-how and technology transfer, and sometimes the submission of reciprocally accepted development plans. He stressed the need to keep a fair balance between the duties of the State and those of the investor, with sustainability understood as a shared responsibility in which the investor had the main role and the State had a duty to cooperate, and he noted an emerging practice of benefit sharing with local communities, leaving open whether the instrument should address this directly or refer to existing international standards.

172. *A participant* stressed that the text should include a continuing due diligence obligation for investors, carried out with the cooperation of the State, in addition to the due diligence already required in the pre-contractual phase. She also noted that the difference between due diligence and impact assessment was unclear and needed to be clarified. She explained that "pre-contractual due diligence" covered the early stage when the investment was being shaped and served as a preventive tool to avoid foreseeable social or environmental problems. She added that during the performance of the contract, investors needed to maintain ongoing vigilance, especially in sustainability and environmental matters, because adverse impacts might only appear some time later. She also noted that beneficiaries of due diligence or impact assessments might include third parties, such as affected communities. In this regard, *another participant* suggested that the Working Group should keep using the term pre-contractual because the term pre-establishment would create confusion with pre-establishment rights and market access rights in international investment law.

173. *A member of the Drafting Committee* observed that the text already contained many investor obligations, especially in Sections D and E, and warned that adding more might raise issues of an imbalance. He proposed that the introduction clarify that the commercial terms agreed by the parties remained in place and that the instrument only offered additional guidance. *Another member of the Drafting Committee* and *a group of participants* agreed that the existing provisions already covered pre-commencement of the operations and ongoing due diligence and monitoring, and that the main task was to reorganise and streamline these materials, possibly by placing the shared obligations section before the separate provisions on investors and States.

174. *A group of participants* noted that the instrument should not try to predetermine specific models of community benefit projects, since local and Indigenous needs and negotiated outcomes greatly differed. Instead, the principle should focus on making sure investors actually delivered on their shared benefit commitments, supported by pre-contractual responsibilities on both investors and States. They argued that investor due diligence also had to address social impacts (and not only environmental or climate change issues), while States should carry out their own audits, so that ongoing monitoring of compliance was a joint task for both sides.

175. *The UNIDROIT Chair summarised the discussion and proposed that investor obligations be organised into three areas: local content requirements, community development and benefit sharing, and environmental and social or labour requirements (including decommissioning), drawing on the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts and the forthcoming memoranda of the Task Force. For State obligations, she suggested adding a principle on State assistance, including access to sites, authorisations, and administrative support. For shared obligations, she proposed distinguishing between a due diligence principle placed in the formation phase in Chapter 3 (pre-contractual and pre-commencement or pre-operations), followed by specific areas such as climate, environment, social issues, and human rights, and a continuous due diligence principle to be placed in Chapter 5, which should clarify the contours of the obligation of reporting*

and monitoring. She lastly confirmed that the Drafting Committee would re-structure the parts on sustainability due diligence, reallocating the text in line with such an approach, and add new text in line with the Working Group's instructions.

3. Principle 17

176. *The UNIDROIT Chair* moved on to examine Principle 17 on expropriation. She noted that the Working Group was divided on whether an expropriation principle was needed at all, and she suggested that concerns about limited contract practice could be addressed by stating in the text that such clauses were rare but that the Principle offered model wording where States chose to use them. She then invited the Working Group to confirm whether they wished to retain an expropriation principle and, if so, to consider how to revise paragraph 2 and respond to the concerns raised by the Drafting Committee.

177. *One participant* raised doubts about paragraph 1. She noted that it largely followed investment treaty language but did not have the backing of customary international law, so ideas like expropriation and public purpose would end up depending on different domestic laws. She suggested adding a police powers clause to explain when a regulation in the public interest was not to be deemed an expropriation, and she recommended that the text clearly acknowledge the State's right to expropriate and focus on the conditions for using that right. She also observed that expropriation clauses were rare in contracts and, when they existed, they were often explicitly linked to domestic law.

178. *A member of the Drafting Committee* replied that the State's right to expropriate was well established, but the idea of police powers was often misunderstood, and the link between expropriation and the right to regulate had to be drafted with care. He also proposed revising paragraph 17(1) by using more common treaty wording such as "same effect" or "tantamount to" instead of "measures which had the same nature", so that both direct and indirect expropriation were clearly covered. He warned that referring to expropriation of "the assets of the investor" could invite claims about individual assets rather than the investment as a whole, insisting that expropriation should be assessed at the level of the entire investment. *A participant* stressed that any definition of expropriation should remain at a high level, with detailed explanations placed in the commentary. He noted that commentary should distinguish direct takings from indirect measures, and should clarify that general, proportionate and non-discriminatory regulations did not qualify as expropriation.

179. *The UNIDROIT Chair* agreed that a high-level principle should be retained but emphasised the need to provide a short conceptual explanation of expropriation in the commentary, since many users would not be public international lawyers. *The ICC Chair* stated that paragraph 2, which required a State entity to "take necessary steps to persuade the State" not to expropriate, did not work in practice. He suggested either replacing it with some form of indemnity obligation or deleting it and stopping at paragraph 1.

180. *A participant* agreed that the persuasive obligation was ineffective because State decisions bound all entities; she favoured focusing instead on the nature, timing and forms of compensation. *A member of the Drafting Committee* explained that paragraph 2 was originally drafted as a soft compromise, but he was now open to revising or removing it, warning that an indemnity clause would likely be strongly opposed by State-owned enterprises. The drafter recalled that paragraph 2 was added for cases where the counterparty was a State enterprise, but now considered the duty to "take necessary steps to persuade the State" unrealistic and hard to enforce, suggesting that the Working Group either delete it or find alternative wording while avoiding strict indemnity duties for such entities. *Another participant* nevertheless saw value in keeping a separate model clause, since State enterprises might in practice wish to make advance commitments if expropriation appeared likely.

181. *The UNIDROIT Chair concluded that, if both paragraphs were retained, the commentary should explain that the principle was drafted with the State in mind, while noting that different situations might arise in practice that required separate clarification in the model clause.*

4. Principle 16

182. *The UNIDROIT Chair* turned to Principle 16 on physical protection and security and invited any further reactions before closing the topic. *A representative of the Secretariat* reported that the Consultative Committee's main points regarded the need to soften its intensity and make it more flexible to contextual conditions. Such feedback had already been addressed through revised wording in the comments, which now explicitly referred to the prevalent circumstances of the host State. She added that other comments had emphasised that the obligation should remain a "best efforts" standard and not be drafted as overly strict.

183. *A participant* noted that the issues discussed in Principle 17 about distinguishing between the general principle and when State enterprises were involved were equally relevant for Principle 16. In his view, the Principle should address only the State, while any additional language addressing the role of State enterprises should be placed in the model clause rather than in the Principle itself.

184. *The UNIDROIT Chair summed up that there was agreement on the approach to Principles 16 and 17. She acknowledged that the discussion had moved quickly and then invited the Working Group to provide any final observations on Principle 18.*

5. Principle 18

185. *A representative of the Secretariat* recalled a comment from the Consultative Committee that the text on payments and transfers in Principle 18 should explicitly state that the investor's right to make payments and transfers freely and without delay was subject to the laws and regulations of the host State, in order to balance investor needs with the host State's control over financial flows and macroeconomic stability. *A member of the Drafting Committee* replied that such a reference to compliance with national law would undermine the protective function of the clause, and therefore he did not support the proposal. *The UNIDROIT Chair* concluded that the Working Group would not take up this suggestion at this stage and closed the discussion on Chapter 5.

g) Draft Chapter 6, Principle 23

186. *The UNIDROIT Chair* opened the discussion on Chapter 6, inviting comments on the stabilisation and renegotiation clauses. *A representative of the Secretariat* recalled that Principle 23 and its commentary had not changed since the previous draft. She noted that the main comment from the Consultative Committee regarded Principle 23.3, proposing an explicit reference to the principle of permanent sovereignty over natural resources and to exclude State measures regulating, conserving or reallocating natural resources for the benefit of the population from stabilisation commitments, in order to avoid undue investor claims and to remain consistent with such principle and human rights obligations.

187. *A participant* stressed that the reference to "short term or long term" in paragraph 1 needed clarification. In her experience, IICs did not allow the equilibrium clause to be triggered after only one or two years of loss, because losses might be offset in later years. She explained that practice often required a multi-year loss or a threshold before renegotiation could be requested. She also emphasised that an investor had to first be in compliance with its contractual obligations, and she suggested that the commentary clarify these points. *Another participant* responded that paragraph 1 only concerned the start of renegotiation, not remedies such as compensation, and simply enabled the parties to explore whether the imbalance could be addressed. *A member of the Drafting Committee* explained that "short term or long term" referred to the impact of the State measure on

expected economic returns, not the timing of a claim. He noted that paragraph 1 described the trigger event, while the procedural requirement to act "without undue delay" appeared in subparagraph (a).

188. *A participant* suggested, as regarded paragraph 2, that the instrument should recognise that, although investors normally might not suspend performance, there could be very exceptional situations where suspension should be allowed. He explained that administrative law practice in some jurisdictions permitted temporary suspension when the State stopped payments for long periods, and he proposed addressing this in the commentary, not in the black-letter text. *Another participant* raised an editorial concern. She noted that Principle 23 departed from the structure used elsewhere, because the model clause options were placed inside the principle rather than in a separate section. She asked whether there was a specific reason for this change. *A member of the Drafting Committee* explained that the structure had been designed to show that parties might choose between different stabilisation options, each with different consequences. He added that the reference to short-term and long-term effects was intentional, since a late-stage loss could still undermine the whole investment. He agreed that the commentary could provide further clarification.

189. *A participant* suggested that the Drafting Committee also review paragraph 3, as some wording might be missing and certain parts of the text might not yet have aligned with the terminology of the UPICC on notions such as best efforts and obligations of result.

190. *The UNIDROIT Chair summarised the discussion on this point, delegating to the Drafting Committee to take note of the considerations of the Working Group on stabilisation. She concluded that, for the provisions on hardship and force majeure, the remaining work was mainly editorial; the ICC-derived parts of text should be streamlined so that their drafting was more consistent with the rest of the instrument.*

Item 5: Organisation of future work

191. *The UNIDROIT Chair and the ICC Chair* jointly explained that the Drafting Committee would conduct intersessional work with a view to revise the draft master copy of the future instrument based on the indications elaborated by the Working Group during this session. She invited the participants of the Working Group to send written comments as soon as possible to support the drafting work. She noted that the Working Group would hold a three-hour online meeting in three weeks' time in order to finalise the examination of certain parts of the instruments that were not discussed during this session.

192. A further version of the draft master copy, as updated, would be submitted to the Consultative Committee for a second round of comments. At its eighth session, scheduled from 19 to 21 January 2026, the Working Group would consider the feedback by the Consultative Committee for inclusion in the draft master copy. Afterwards, the Drafting Committee would conduct further intersessional work to provide an updated provisional draft that would be considered for further assessment by the Working Group in April 2026 and then submitted to the UNIDROIT Governing Council in May 2026 to obtain approval for a public consultation. The general feedback provided by interested stakeholders at the end of the public consultation would be submitted for consideration to the Working Group, and the final approval of the instrument was envisaged for its ninth and final session in October 2026. The ICC would conduct its own approval process in parallel, which required clearance by the ICC Dispute Resolution Governing Body and then by the ICC Board, with the aim of securing approval during the same timeframe.

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

193. In the absence of any other business, *the UNIDROIT Chair* 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 Diego FERNANDEZ ARROYO	Professor Sciences Po
Mr Lauro GAMA	Professor Pontifical Catholic University of Rio de Janeiro
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Mr Pascal PICHONNAZ	Professor University of Fribourg Past President of the European Law Institute
Mr Michele POTESTÀ *remotely*	Partner Lévy Kaufmann-Kohler

Mr Stephan SCHILL	Professor University of Amsterdam
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Mr Fernando GAZZELLA (*remotely*)	Intern

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Ms Deborah RUSSETTI	Lecturer Università Cattolica del Sacro Cuore
Ms Xueji SU	Assistant Professor Faculty of Law University of Macau
Ms Shengzhe WANG	Visiting Scholar

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 sixth Working Group session
4. Consideration of work in progress
    a) Master Copy of the Draft Instrument
    b) Feedback from the Consultative Committee and ICC Institute
5. Organisation of future work
6. Any other business
7. Closing of the session