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SUMMARY REPORT
OF THE EIGHTH SESSION
(19 – 21 January 2026)

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1. The eighth session of the Working Group on International Investment Contracts (“the Working Group”) took place from 19 to 21 January 2026 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 18 individual experts and four representatives of institutional observers, including international and regional organisations, as well as members of the UNIDROIT Secretariat and the ICC Institute for World Business Law (“the ICC Institute”). The list of participants is available in [Annexe I](#).

3. The session was chaired by UNIDROIT President Emerita 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.

5. *The UNIDROIT Chair* recalled that a workshop on this project, jointly organised with the Asian Development Bank, would be held in Manila and online on 9 February 2026, which Working Group participants were invited to attend.

Items 2, 3: Adoption of the agenda and organisation of the session; Update on intersessional work and developments since the seventh Working Group session

6. *The UNIDROIT Chair* introduced the draft agenda and the organisation of the session. She highlighted the importance of the session, which aimed to reach agreement on a full draft text to be shared with the Consultative Committee by the end of February 2026. She underlined that the Working Group was expected to make any final policy decisions during the session to allow the Drafting Committee to finalise the text. She explained that the Drafting Committee had addressed most of the input provided by the Working Group during its seventh session (October 2025) and the virtual follow-up meeting (November 2025). However, some parts of the Master Copy still required revision. The UNIDROIT Secretariat would guide the Working Group through the text, indicating, where appropriate, which parts had not yet been updated, in order to avoid reopening unnecessary discussions.

7. *A member of the UNIDROIT Secretariat* added that the intention had been to share the draft Master Copy with the Consultative Committee after the seventh session; however, this had not been possible due to time constraints affecting the Drafting Committee’s revision work. She explained that the Working Group had received both a clean version of the draft Master Copy and a redline version showing the changes made by the Drafting Committee since the seventh Working Group session. It was proposed to prioritise discussing the parts that had not been discussed during the seventh session or the virtual follow-up meeting. These included some subsections on remedies (Chapter 7), the draft text on hardship and force majeure (Chapter 6), and dispute settlement (Chapter 8). Subsequently, it was suggested to discuss the updated texts on sustainability, followed by draft Chapters 1, 2, 4, and 5.

8. *The Working Group* adopted the draft agenda ([UNIDROIT 2025 – Study L-IIC – W.G. 8 – Doc. 1](#), available in [Annexe II](#)) and agreed with the proposed organisation of the session.

Item 4: Consideration of work in progress: Master Copy of the Draft Instrument

9. *The UNIDROIT Chair* drew the attention of the Working Group to the draft Master Copy (UNIDROIT 2026 – Study L-IIC – W.G. 8 – Doc. 2 (confidential)).

a) Draft Chapter 7: Remedies

10. *A member of the UNIDROIT Secretariat* indicated that the Drafting Committee had updated Sections A, B, C, and E.1 of Chapter 7 following the virtual meeting in November 2025. *The UNIDROIT Chair* opened the floor for comments.

11. *A participant* recalled that he had made two suggestions concerning the structure of Chapter 7 during the virtual meeting: (i) moving the subsection on withholding performance (A.1) down since it was an exception to the general principle of continuity, and (ii) moving the section on termination (C) to the end of Chapter 7, after current section G on no double recovery.

12. *A member of the UNIDROIT Secretariat* explained that the Drafting Committee had deemed it preferable to adhere to the greatest extent possible to the order in the UNIDROIT Principles on International Commercial Contracts (UPICC). She suggested explaining in the introduction to the Instrument that it generally followed the sequence in the UPICC for the sake of readability. She added that the section on double recovery could be moved within Chapter 7 since that was not covered in the UPICC. *The relevant participant* agreed with following the sequence of the UPICC as a general rule unless the specificities of international investment contracts (IICs) justified a different approach. He argued that the latter was the case for termination, which better fit at the end of Chapter 7. *Another member of the UNIDROIT Secretariat* noted that withholding performance served as a means of incentivising compliance or cure and it was therefore appropriate that it appeared earlier, while termination was a remedy of last resort. He also indicated that no general principle derogating from the withholding of performance could be identified in the IICs examined by the Roma Tre-UNIDROIT Task Force, possibly due to the application of mandatory rules governing contracts involving public services. He added that many contracts explicitly referred to the relationship between contractual remedies and remedies under the applicable law (*e.g.*, stating that the former did not prejudice the latter), which could perhaps be reflected in the commentary.

13. *The Drafting Committee was invited to consider these points.*

1. Introduction

14. *The UNIDROIT Chair* suggested adding a heading for the introduction to Chapter 7, which could explain the general approach before listing the various types of remedies. *The Deputy Secretary-General* supported this idea and suggested that references to overarching principles could be placed at the beginning or end of the chapter, as such principles remained essential for determining the nature, scope, and amount of remedies.

15. In paragraph 312, *a participant* suggested to add “and the applicable law” after “based on the contract”. *The Deputy Secretary-General* explained that the intention had been to point to the contract as primary point of reference, but the sentence could be rephrased if deemed necessary. *Another participant* agreed that the contract normally prevailed, provided that it did not contradict mandatory rules of the host State. He therefore suggested adding a reference to domestic law. As an example, he noted that the civil code of many Arab jurisdictions contained a mandatory rule requiring an arbitrator or judge to exercise review over the quantum of damages since that amount must be proportional to the actual loss. *The ICC Chair* preferred stating in the introduction to the Instrument that there may be limitations from mandatory provisions of domestic law, rather than repeating this in the introduction to each chapter.

16. *A participant* expressed concern about the formulation of paragraph 313, which referred to monetary compensation as “the most appropriate remedy” in investment disputes. She noted that such statement might give the wrong impression, recalling that the Working Group had previously discussed the importance of the principles of cooperation and continuity. *The ICC Chair* agreed and suggested referring to cooperation and the objective of continuity of contract between paragraphs

312 and 313. *The Deputy Secretary-General* suggested replacing “appropriate” by “common” or “usual”, but *the first participant* cautioned against such language – underlying the need to depart from the practice in treaty-based arbitration. A *participant* observed that that tribunals in both treaty and contractual arbitration often lacked the power to compel States to take specific non-monetary actions, such as injunctions or the return of an investor’s property. Because these remedies might be challenging or impossible to enforce, he suggested presenting monetary remedies as a baseline or fallback option when other forms of relief were impractical, unenforceable, or unacceptable to a party.

17. On restitution, a *participant* wondered whether its qualification as “other” remedy in paragraph 316 was appropriate since restitution of goods, equipment, and other assets was often one of the principal remedies in case of termination of an IIC. *The Deputy Secretary-General* explained that, in the UPICC, restitution was a consequence of termination rather than a remedy in itself. She therefore suggested mentioning “termination” in paragraph 316. *The first participant* clarified that, especially in construction contracts, restitution of equipment operated as a remedy for parties owning or holding equipment on site, also in order to mitigate future damages and to facilitate the calculation of damages. She suggested addressing this in the text. *Another participant* agreed, noting that the subsection on restitution concerning long-term contracts currently did not cover this type of restitution. He asked whether the equipment would be returned to the investor or would rather be taken over by the State or State entity in order to complete the works. *The first participant* indicated that IICs rarely addressed such situations in detail but both solutions seemed reasonable and could be mentioned in the text. *Another participant* echoed that restitution was not a remedy but rather a consequence. She suggested mentioning in the commentary that restitution of equipment might play an important role in the quantification of damages. A *further participant* wondered whether the FIDIC model contracts might already address this for construction contracts, while it should be kept in mind that this Instrument should cater for different types of IICs. A *member of the UNIDROIT Secretariat* noted that production sharing agreements also tended to contain detailed clauses on restitution, often requiring the transfer of ownership or use to the State upon termination. In this context, restitution functioned as a legal effect of termination, and might arise not only at the end of the contract but also upon partial performance. *The Deputy Secretary-General* suggested making the text more nuanced, avoiding the impression that termination – and consequently, restitution – was always exceptional.

18. *The Drafting Committee was invited to update the text in line with these suggestions.*

2. Section A: Types of remedies for non-performance

19. Regarding the draft Model Clause on “no exemption from liability”, a *participant* highlighted the need for consistency; in this clause, reference was made to “fraud, wilful misconduct and/or gross negligence” while the draft Model Clause under paragraph 405 referred to “wilful misconduct or bad faith”. With regard to the second part of the clause, relating to sustainability, he suggested clarifying that such clause only applied where specific sustainability obligations had been included in the contract. *The Drafting Committee was invited to update the text in line with these suggestions.*

3. Section B: Right to performance

Performance of monetary obligation

20. Regarding the draft Model Clause on “assignment of claims”, a *participant* noted that it might be unreasonable to require the prior written consent of the State for assignment of claims to an affiliate of the investor. She suggested adding “save for assignments to an affiliate” or similar language. *Another participant* supported this proposal. *The ICC Chair* observed that assigning a contract to an affiliate lacking the same financial capacity as the original investor could raise concerns for the State, and suggested addressing this in the commentary by clarifying that assignment without

State consent should be limited to affiliates meeting equivalent requirements. In the ensuing discussion, it was agreed to refer to the concept of reasonableness in the commentary, which would provide the necessary flexibility to address situations that might not require prior written consent, for example in case of intra-group assignments. It was also suggested that parties could be encouraged to expressly specify additional limitations in the IIC where they consider the reasonableness standard to be insufficient.

21. *A participant* questioned how the proposed guidance on assignment would apply in situations where a State withheld payment and (i) the investor became bankrupt and was taken over by a trustee, or (ii) the investor's insurance policy covered such a situation, in which case the investor might seek to substitute the insurer for itself for purposes of the insurance claim.

22. *A member of the UNIDROIT Secretariat* recalled that assignment had been discussed at the sixth Working Group session, with particular attention to Article 9.1.9 of the UPICC, which provides that the assignment of a monetary right is effective despite a non-assignment clause. The question was whether this rule should apply to IICs, or whether a different approach would be needed given their specific features. It was recalled that, in the absence of an express provision, the UPICC provisions applied by default. *Another member of the Secretariat* added that assignment was important in the investment context since unauthorised assignment was often a trigger for termination of the contract. *The Deputy Secretary-General* explained that the limited effect of non-assignment clauses was in line with developments for other types of contracts.

23. *A participant* suggested distinguishing between assignment of (i) claims and (ii) contracts. She supported the draft Model Clause for (i), while she suggested addressing (ii) elsewhere – adding that the nature of IICs would likely make them non-assignable to a third party unless the parties discussed it and appropriate guarantees were in place. *Other participants* suggested addressing assignment of claims, and in particular third-party funding, in Chapter 8 on dispute settlement.

24. *The Secretary-General* agreed that a distinction should be made between assignment of contracts and claims, and that assignment of the contract would normally not be possible in the investment context. He recalled the need to consider whether Article 9.1.9 of the UPICC was appropriate for IICs, explaining that it could limit a State's ability to prevent the assignment of claims – an issue with practical significance given the prevalence of third-party funding. *The Deputy Secretary-General* added that it might be helpful to clarify the consequences of a non-assignment clause in the investment context (i) between contracting parties (e.g., whether it would give rise to a claim for damages), and (ii) *vis-à-vis* third parties.

25. *A participant* expressed support for expressly adjusting the application of Article 9.1.9 of the UPICC for IICs, since non-assignment clauses were common in IICs and served legitimate purposes, and parties would be surprised if such clauses were rendered ineffective. *The Working Group agreed.*

26. *The UNIDROIT Chair* concluded that the commentary would be updated to include a reference to reasonableness, distinguish between assignment of claims versus contracts, and adjust the application of Article 9.1.9 of the UPICC.

Performance of non-monetary obligation

27. *A participant* questioned the suggestion in paragraph 348 to allow the State not to comply with an order of specific performance and instead renegotiate the contract terms or pay damages, noting concerns about the appropriateness for the State to initiate renegotiation if it was the non-performing party. *The drafter* explained that this solution had been included in response to discussions about the challenges of ordering specific performance against a State party – it was meant as a contractual solution to address issues relating to the feasibility and enforceability of court or arbitral orders for specific performance. *The UNIDROIT Chair* added that the intention of paragraph

348 had been to allow parties to agree together to renegotiate the contract; it would not be a unilateral decision of the State.

28. *It was agreed that the text would be updated to (i) clarify that parties could together agree to renegotiation, (ii) recall the general principle that courts and tribunals should strive to give orders that were enforceable under the applicable law, and (iii) explain that there might be situations in which specific performance was not feasible. In terms of alternatives to specific performance, it was agreed to mention both renegotiation (which could, e.g., lead to a time extension) and damages.*

Penalty imposed by a court or arbitral tribunal

29. *Some participants questioned the reference to “mandatory” law in draft Principle 25, noting that parties’ agreement should not be limited to what was permitted by “mandatory” law. At the same time, it was discussed that the language should not give the impression that the parties could only agree to coercive monetary measures if the law expressly permitted this. It was agreed to formulate the second sentence of draft Principle 25 negatively (e.g., such agreement may be made between the parties unless they are prevented from doing so under the applicable law).*

30. *A participant suggested to clarify the meaning of the concept “coercive monetary measures” also considering that the UPICC used the term “judicial penalty”. Another participant suggested clarifying in the commentary the distinction between substantive monetary penalties under civil law and procedural penalties imposed by arbitral tribunals. A further participant agreed that clarification on the scope of this provision would be useful, noting that it could be misread as requiring investor consent for any type of domestic-law penalties or sanctions. A member of the UNIDROIT Secretariat clarified that draft Principle 25 concerned a specific type of penalty, as had been discussed during the virtual follow-up meeting, namely a penalty imposed by a court or arbitral tribunal to incentivise compliance with an order of specific performance issued by such forum. It was agreed to further clarify in the commentary that Principle 25 did not address fines or sanctions for non-compliance with otherwise applicable law.*

31. *With regard to the amount of the monetary measure, a participant suggested considering making an analogy with English case law, which excluded the application of contractual penalty clauses, for instance by requiring that the monetary penalty be proportional to the loss from non-performance or delayed performance. However, other participants preferred not to mix concepts regarding contractual penalty clauses with the monetary coercive measures referred to in Principle 25 in order to avoid confusion. It was agreed not to refer to proportionality in the commentary.*

32. *Regarding paragraph 355, it was proposed to clarify that monetary penalties might serve as an incentive for performance without affecting damages claims, even where the State was both the aggrieved party and the recipient of the penalty proceeds.*

33. *In draft Model Clause option 1, it was agreed to replace “a court or arbitral tribunal” with “the applicable dispute resolution forum” (or similar wording, such as “adjudicatory”), in order to avoid the impression that the clause created an additional forum where the IIC already contained a specific dispute resolution clause referring either to arbitration or to judicial proceedings.*

34. *Regarding draft Model Clause option 2, it was agreed to clarify in the commentary that such agreement between parties to not seek judicial penalties was without prejudice to possible penalties imposed by a court or tribunal *ex officio*.*

35. *The Drafting Committee was invited to update the text in line with these suggestions.*

4. Section C: Termination

Right to terminate the contract

36. *A participant* noted that the draft Model Clause under paragraph 362 would need to be adjusted to the purposes of the Instrument (*e.g.*, it currently referred to “senior lenders” and a right of substitution that might not apply to all IICs). *Another participant* agreed, adding that the cure period for the investor and the period for which the State could extend that period in paragraph 00.1 were unclear (*e.g.*, whether the limit was 90 days or the extension could be longer if parties so agreed), while the cure period for State default in paragraph 00.2.1 seemed to be at least 90 days. *A member of the UNIDROIT Secretariat* indicated that the memorandum of the Task Force on remedies contained examples of clauses that could usefully be considered for the revision of this draft Model Clause. *It was agreed that the Drafting Committee would carefully review the language of the draft Model Clause and tailor it to IICs. To this end, the participants were invited to share any drafting suggestions with the Secretariat for consideration by the Drafting Committee.*

37. *A participant* suggested that the commentary in this subsection might be an appropriate place to refer to the restitution of equipment, as discussed earlier (see paragraph 17 above).

Restitution concerning long-term contracts

38. *A participant* wondered whether there was a need to refer to “long-term contracts” in the title since IICs were assumed to be long term. *The drafter* explained that this specification was needed since the UPICC contained distinct provisions on restitution with respect to contracts to be performed at one time, on the one hand, and long-term contracts, on the other.

39. *A participant* suggested reconsidering the placement of the draft Model Clause under paragraph 371 since it seemed to address decommissioning rather than restitution upon termination of an IIC. She also made several suggestions concerning the text of the Model Clause: (i) to make it sector-neutral (*e.g.*, removing references to mines and copper ore stockyards); (ii) to specify that termination payments should not only consider the value of the plant and machinery (mentioned in paragraph 00.1.(a)), but also investor-built infrastructure and sunk costs, such as exploration expenses; (iii) to consider whether it was always appropriate not to pay any termination payment to the investor on account of investor default (paragraph 00.2), noting that the State might benefit from infrastructure built by the investor, which might constitute unjust enrichment for the State; (iv) to consider referring to a neutral appointment system for the valuer (paragraph 00.4(a)); (v) to adjust the reference to a partial completion date (paragraph 00.4(c)), which seemed related to a specific underlying contract; and (vi) to consider whether the waiver in paragraph 00.6 was appropriate, noting that a contractual agreement on compensation upon termination would not necessarily exhaust all potential investor claims (*e.g.*, under investment protection regimes).

40. On point (ii), *a member of the UNIDROIT Secretariat* emphasised that IICs were complex and often already internalised arrangements for infrastructure and related costs, particularly in sectors such as energy (*e.g.*, providing for the transfer to the State of infrastructure as part of the investor’s contribution to economic development). He therefore recommended using flexible commentary language that acknowledged different contractual structures, sector-specific practices and varied mechanisms for cost recovery.

41. On point (vi), *the ICC Chair* noted that the intention might have been to limit the remedies to those in the contract in order to avoid parallel actions against the State (treaty-based and contract-based arbitration).

42. *The Drafting Committee was invited to consider these points when updating the text.*

5. **Section D: Remedies for non-compliance with sustainability obligations**

43. *A participant* made several suggestions regarding draft Principle 26 and offered to submit drafting proposals in writing: (i) to add a cross-reference to Principle 6; (ii) to clarify the aim of parties “conferring” on sustainability issues in paragraph 2, *e.g.*, by integrating elements from the commentary (paragraph 373) into the text of the principle; (iii) to reconsider the reference to expert determination in paragraph 3, suggesting that mediation or conciliation might be preferable; (iv) to reconsider paragraphs 5 and 6, emphasising that termination or damages were remedies of last resort; (v) to split paragraph 7 into two parts since it covered distinct matters; and (vi) to reconsider the reference to “severity” in paragraph 376 of the commentary.

44. *Another participant* expressed support for the structure and step-by-step approach in draft Principle 26, which signalled that the objective was to achieve compliance with sustainability commitments. He cautioned against cross-referring to Principle 6 to avoid repetition, considering that sustainability was already a cross-cutting element in the Instrument, and expressed support for the option of expert proceedings as a means to resolve a dispute, *e.g.*, about technical environmental obligations. He argued that sustainability-related remedies were intentionally set out separately to preserve their specificity and emphasis and considered that referring to remedies elsewhere would dilute their importance.

45. *A further participant* suggested making the provisions of draft Principle 26 on dispute settlement (paragraphs 2 to 4) consistent with the guidance provided in Chapter 8.

46. Regarding paragraph 7, *a participant* noted that it might not be accurate to refer to the remedies in paragraph 6 as “cumulative” since some of them rather seemed alternatives. *The drafter* indicated that clarifying which remedies could be combined would be overly complex, as compatibility depended on the context. He noted that seemingly incompatible remedies might still be combined in nuanced ways, and concluded that genuinely incompatible remedies would be self-limiting, since a party would lack a legitimate interest in pursuing them simultaneously. *Another participant* agreed, noting that established principles already prohibited double recovery. He suggested recalling in the commentary that cumulative remedies did not permit unjust enrichment.

47. *Another participant* asked whether the remedies could be pursued independently or whether they were intended to constrain the discretion of the adjudicator during the dispute settlement proceedings pursuant to paragraph 4.

48. *Another participant* strongly suggested focusing in draft Principle 26 on the monitoring mechanisms discussed in paragraphs 373 and 374 as means to achieve compliance with sustainability obligations. She noted that dispute resolution was covered in Chapter 8 and the remedies largely repeated those in the UPICC (incorporated by reference in this Instrument).

49. *A member of the Secretariat* noted that a list of remedies might be useful, considering that the approach to non-compliance with sustainability obligations tended to be different (more focused on cooperation) than that for other contractual breaches. He agreed with the suggestion to add references to mediation and conciliation, and highlighted the need for coordination with the guidance on sustainability in other parts of the Instrument, which already emphasised the need for cooperation and procedures such as conducting due diligence and preparing a mitigation plan.

50. *Another member of the Secretariat* suggested the Drafting Committee reflect on the elements to be included in Principle 26, avoiding repetition and overlap with what was already covered in other chapters. Some aspects of the current text could be included in a model clause (*e.g.*, a list of remedies, if that was deemed useful). This proposal received support, whereby it was reiterated that the focus should be on efforts to achieve compliance while remedies were a last resort.

51. *The UNIDROIT Chair concluded that draft Principle 26 should be limited to highlighting distinctive elements of addressing non-compliance with sustainability obligations, including any added procedural or step-by-step elements. The Drafting Committee was provided with a mandate to streamline the text and to clarify key points in the commentary and the future model clause.*

6. Section E: Compensation and damages

Full compensation

52. *As a general matter, participants praised the Drafting Committee for the quality and clarity of the text, noting that this was a particularly challenging area for providing guidance.*

53. *A participant suggested clarifying the approach to loss of profits (paragraph 383), either by adopting a policy stance, clearly stating that no position was taken, or advising contracting parties to carefully consider the implications of the compensation amount.*

54. *Some doubts were expressed about the reference in paragraph 385 to several accounting techniques to identify “the fair market value” of the investment, which could be seen as favouring such method over others. It was also suggested to delete the reference to “expropriation” from that sentence since the aim was to provide guidance about compensation generally.*

55. *One participant suggested mentioning the different approaches to calculating damages, with reference to UNCITRAL’s Draft guidelines on the calculation of damages and compensation in ISDS. However, another participant expressed caution since it was still a work in progress. More generally, she cautioned against importing elements of investment treaty practice into this Instrument.*

56. *A participant noted that paragraph 385 contrasted forward-looking (DCF) and backward-looking (sunk cost) valuation methods. He suggested also adding a reference to market valuation techniques – such as comparable transactions or stock market prices – which were often used to assess reasonableness and could provide a balanced valuation for both operational and pre-operational projects.*

57. *A participant considered that valuation and damages methodology would be a core and critical part of the Instrument, noting the lack of clear guidance for experts and tribunals in practice. He suggested providing guidance on different valuation approaches and their implications, as concerns about excessive damages stemmed from practical calculation methods rather than from established legal principles. Another participant agreed, noting that an analysis of a recent ICJ advisory opinion appeared to signal a shift from a *right* to regulate to a *duty* to regulate, with potential implications for the valuation of damages.*

58. *The ICC Chair agreed that using terms like fair market value was sensitive. He suggested starting from the UPICC and recognising that different valuation methods existed, but not going beyond that. The UNIDROIT Chair agreed that the discussion should be grounded in the UPICC and proposed explaining at the beginning of the commentary that this was a deliberate policy choice. She emphasised that in contracts – also with a State as a party – damages should be treated through contractual logic. The work of other organisations on other levels could be acknowledged, but the focus should be on how to mitigate debates on damages through contractual design. A participant strongly supported this approach, emphasising that the UPICC already provided a sophisticated framework to damages, balancing civil and common law approaches.*

59. *A participant agreed that compensation was a crucial topic but questioned whether this Instrument could provide substantive guidance on its application in IICs. He noted that it could offer parties options (e.g., appropriate compensation, liquidated damages, or lump-sum compensation) but the main challenge was procedural: divergent expert valuations. He therefore proposed focusing*

on procedural solutions (*e.g.*, tribunal-appointed independent experts) rather than seeking to provide substantive rules. Some support was expressed for this proposal, but it was also noted that appointing an independent expert alone would not fully solve the issue since parties would still need to agree on a valuation method.

60. *A participant* asked whether the focus in this subsection was primarily on expropriation or whether it also intended to address issues similar to those in international commercial contracts, such as termination for convenience. This led to a discussion on the general approach to compensation and expropriation in the Instrument.

61. *A participant* suggested explaining in the introduction that this Instrument did not displace public international law. He recalled how the UPICC recognised that if a mandatory rule of public international law was violated, the consequences of that mandatory regime applied – not the contractual regime.

62. *Another participant* cautioned against importing public international law standards and the debate on damages and full compensation into contract law. *A further participant* explained that the approach to expropriation in Chapter 5 was contractual. No specific guidance was provided there on compensation for breach of the expropriation standard; reference was simply made to protection from expropriation as a contractual protection with contractual consequences. He suggested either completely deleting the paragraph on fair market value and similar concepts or merely recognising that there were debates around damages in other areas but explaining that the focus here was on contracts and the role of the UPICC. *The ICC Chair* noted that, if the contract was expropriated, this would be addressed as repudiation or illegal termination of the contract. *A participant* added that it was also possible that the underlying assets were expropriated.

63. *The UNIDROIT Chair* concluded that (i) the commentary should start by explaining that compensation and damages in this Instrument were contractual in nature, grounded in the UPICC, and (ii) the draft Model Clauses did not fully serve this purpose and required redrafting.

64. She asked the Working Group to clarify its preference with regard to the second part of commentary – whether the Drafting Committee should update it based on the input about valuation methods provided or significantly shorten it, merely acknowledging existing debates and the work of other organisations but reiterating that the focus here was contractual.

65. *A member of the Secretariat* asked whether the approach would be to establish an independent, contractual standard for expropriation, without incorporating international law. While expropriation might have public-law consequences nationally, the contract only addressed the contractual consequences. References to valuation methods and the work of other organisations could be made illustratively, but the Instrument would provide a distinct UPICC-based framework. *The UNIDROIT Chair* indicated that the approach was to contractualise the function of some international law principles without importing the public international law approach to damages.

66. *Several participants* were in favour of expanding the commentary to further explain the concept and approach to full compensation in the UPICC.

67. *One participant* recalled the criticism in the area of damages and reiterated the need to explain the different valuation methods and provide options in Model Clauses, along with guidance on the consequences of these methods. *The UNIDROIT Chair* advised against providing advice or recommendations favouring one valuation method over another. *Another participant* agreed that the Instrument should not endorse or select a specific method, but also agreed that it should be explained that multiple methods existed for calculating damage and compensation, to ensure contracting parties were aware of the options.

68. *The ICC Chair* suggested a threefold approach: (i) rely on the UPICC's full compensation principle; (ii) include contractual clauses, such as liquidated damages or limitation of liability, to provide certainty; and (iii) in cases where the contract did not specify how to calculate damages, acknowledge that this was done by comparing actual *versus* counterfactual scenarios, with various economic methods available but no legal principle fully resolving the issue. *A participant* supported the suggested approach. He asked whether different consequences or liquidated damages provisions should apply to breaches of standard commercial contractual obligations *versus* "contractualised" public international law obligations, such as expropriation or physical protection and security. He suggested this could be addressed through a general statement advising parties to tailor remedies according to the nature of the obligation. *The ICC Chair* responded that differentiated treatment was conceivable and could be mentioned in the Instrument but that liquidated damages or limitation of liability clauses generally did not distinguish between different types of breaches.

69. *A participant* asked whether Principle 18 on expropriation, which permits the State to expropriate in certain circumstances, created tension with Articles 7.4.1 and 7.4.2 of the UPICC. *Another participant* explained that permitting expropriation under specific conditions should not be interpreted as an excuse for non-performance, and that the payment of compensation for expropriation, on the one hand, and damages, on the other hand, were two distinct matters.

70. Regarding the draft Model Clauses, *a participant* suggested also considering the interaction with liquidated damages clauses (*e.g.*, whether liquidated damages would be deducted from the overall damages or not).

71. *The Drafting Committee was invited to update the text in line with these suggestions.*

Interest for failure to pay money

72. *A member of the Secretariat* noted that a participant in the Consultative Committee had argued that interest should accrue as simple interest at a commercially reasonable rate from the date of expropriation until payment, and that it may be suspended if the investor obstructed or delayed the calculation or repayment of compensation. She recalled that the Working Group had previously decided to refer to simple and compound interest (as was done in paragraph 387) without prescribing a specific approach.

73. *A participant* argued that the Instrument should present alternative approaches to interest and refer to party autonomy, explaining that any choice remained subject to mandatory rules of the applicable law, including public policy limitations found in some jurisdictions (*e.g.*, restrictions on compound interest or caps on interest exceeding the principal). *Another participant* agreed that it was important to provide clear guidance on the role of mandatory rules in IICs, drawing on the approach in the HCCH Principles on Choice of Law in International Commercial Contracts. *A further participant* also agreed that guidance on different types of interest would be helpful, noting that States were concerned about the use of compound interest in investor-State dispute settlement.

74. *The UNIDROIT Chair concluded that the commentary would be updated accordingly and that the draft Model Clauses should be tailored to IICs.*

Currency in which to assess damages

75. *A participant* suggested linking the guidance to other parts of the Instrument that referred to payments in a freely convertible currency. *The UNIDROIT Chair* added that a model clause should also be developed for this subsection. *The Drafting Committee was invited to update the text in line with these suggestions.*

Agreed payment for non-performance

76. *A participant* underlined the need to clarify the relationship between liquidated damages clauses and other damages provisions.

77. *Another participant* expressed support for the approach advanced in this subsection, emphasising the need to ensure proportionality with the actual loss in line with English case law. *Some participants* observed that the treatment of liquidated damages in this subsection was largely inspired by common law. They suggested making the language in paragraph 397 more neutral and referencing the principle of proportionality.

78. It was explained that the FIDIC clause on delay damages was only intended as a starting point and would need to be tailored to IICs (e.g., it currently seemed to limit liquidated damages to defaults of the investor only). With regard to the draft Model Clause on liquidated damages for non-compliance with regulatory requirements, it was suggested to make a cross-reference in the commentary to the section on stabilisation, considering that a State had the power to amend the regulatory requirements.

79. *The Drafting Committee was invited to update the text in line with these suggestions.*

7. Section F: Limitation and exclusion of liability

80. *The Deputy Secretary-General* noted that exemptions from liability were covered in two different sections of Chapter 7. *A member of the Secretariat* proposed to combine this section and subsection A.4 on exemption clauses to the extent possible. *The drafter* explained that the latter was based on the UPICC and addressed to adjudicators, while this section was directed to contracting parties – offering guidance on how to formulate exemption and limitation clauses. Therefore, he proposed adding cross-references rather than combining the two. *The matter was left to the Drafting Committee.*

81. *A member of the Secretariat* referred to a comment from the Consultative Committee recommending that liability for corruption, fraud, gross negligence, wilful misconduct, or violations of non-derogable obligations (e.g., human rights, environmental protection, labour standards) should not be subject to limitation or exclusion in line with good faith and public policy. *It was suggested that the Drafting Committee reflect on this and ensure consistency among the different formulations regarding non-derogable liability (see paragraph 19 above).*

82. *A participant* asked whether any suggestion would be made to exclude punitive and moral damages as a matter of principle, noting that some of the draft Model Clauses seemed to allude to this, but there was no explicit commentary or principle on the approach to these issues. He explained that an increasing number of voices called for the explicit exclusion of moral and punitive damages from investment treaties. *The drafter* drew the attention of the Working Group to paragraph 382, which noted that the UPICC provision on full compensation also allowed for compensation for non-pecuniary harm.

83. *A participant* noted that awarding damages for moral (intangible) harm was highly controversial in many jurisdictions, particularly in the MENA region. Courts differed on whether such damages could be awarded, especially to companies *versus* individuals, and might even vary their approach depending on the case. He suggested that the commentary mention this controversy and leave the matter to party autonomy, subject to the mandatory rules of the applicable law.

84. *Another participant* referred to draft Principle 17 on physical protection and security, which extended both to assets and personnel. While damage to assets could be quantified, this was challenging for physical harm. He suggested that a possible approach might be to explain in the

commentary that moral damages were envisaged only in specific cases where the breach concerned an intangible right that could not be quantified.

85. *A further participant* recalled that Article 7.4.2(2) of the UPICC referred to non-pecuniary harm, such as physical suffering or emotional distress, and noted that other UPICC provisions (e.g., on certainty and proof of harm) also applied. She suggested using this framework as a starting point. *The ICC Chair* added that the UPICC seemed to *de facto* exclude punitive damages due to the various criteria on damages, which could be explained in the commentary.

86. *It was agreed to explain the approach in the UPICC to punitive damages and moral damages in the commentary and to develop dedicated model clauses.*

87. Regarding the draft Model Clause on “liability of government of XYZ”, it was suggested to clarify in the commentary that the State was generally the contractual party to an IIC and could therefore incur liability, whether it concluded the contract itself or was represented by another entity. Exceptionally, there could be an exclusion of liability for the State for acts or omissions of such other entity.

b) Draft Chapter 8: Choice of Law and Dispute Settlement

1. Section A: Choice of law

88. *A member of the UNIDROIT Secretariat* explained that the draft text on choice of law had been updated in line with the discussions during the seventh Working Group session. Draft Model Clauses A.2 and B.2 regarding the substantive law applicable to a dispute, and draft Model Clause B.3 on international law, had been deleted. Furthermore, the commentary to draft Principle 28 had been updated following discussions on the principle of legality, and she suggested discussing whether the revisions were sufficiently clear.

89. Support was expressed for the change in formulation of draft Principle 28, which now referred to “rules of law” to cover the choice for non-State rules of law as governing law to an IIC.

90. In the draft Model Clauses, it was suggested to shorten the reference to the Instrument as governing law (e.g., “UNIDROIT-ICC Principles of International Investment Contracts”).

91. *A participant* asked why there were two draft Model Clauses. It was explained that the draft Model Clauses were inspired by the Model Clauses for the Use of the UPICC. Model Clause A could be used by parties wishing to use the Instrument as primary source of law, while in Model Clause B the Instrument was used to interpret and supplement another primary source of law – likely the law of the host State.

92. *A participant* suggested making reference to sustainability, recalling that the Instrument encouraged parties to an IIC to pursue the investment in accordance with the “highest international standards” in this field. *A member of the UNIDROIT Secretariat* recalled that, during the seventh session, the Working Group had agreed to delete draft Model Clause B.3 and considered that the role of international standards was sufficiently addressed in the sections concerning sustainability throughout the Instrument, but a cross-reference could be added in the commentary. It was also noted that some sustainability norms might form part of mandatory rules rather than choice of law. *A participant* added that, in the sections on sustainability, the parties were encouraged to specify the relevant sustainability standards in an annexe to their contract, which was not necessarily a choice of governing law. However, she agreed that a cross-reference to this approach could be added in the commentary.

93. *A participant* emphasised the importance of excluding *renvoi*. It was explained that this issue was addressed in paragraphs 410 and 421 of the commentary.

94. *The Drafting Committee was invited to update the text in line with these suggestions.*

2. Section B: Dispute settlement

95. *A member of the UNIDROIT Secretariat* recalled that the Working Group had previously considered, at its fifth and sixth sessions, a draft text on dispute settlement based on the input of Subgroup 4. That draft text had been expanded based on the input on dispute resolution provided over the course of the project. In line with the multi-tiered approach often followed in IICs, this section provided guidance on direct negotiations between the parties, third-party amicable dispute settlement mechanisms such as mediation, conciliation, expert proceedings and dispute boards, and – ultimately – arbitration or judicial proceedings. In addition, guidance was provided on avoiding parallel or sequential proceedings by means of waivers, transparency and conflicts of interest in investment arbitration, and counterclaims.

96. *A participant* suggested drawing on FIDIC's Clause 20, underlining the relevance of dispute boards before resorting to arbitration. It was explained that paragraphs 438 and 439 already covered dispute boards and were accompanied by a generic draft Model Clause inspired by models from FIDIC and the ICC.

97. In draft Principle 31, it was suggested to replace "the" adjudicatory forum with "an appropriate" adjudicatory forum, and to note in the commentary that there may be limitations on party autonomy in the choice for the forum (*e.g.*, when selecting a court in a third country, depending on whether the country was bound by the Lugano Convention). It was also suggested to streamline paragraphs 442 to 444, considering the role of smaller arbitration institutions as well.

98. *A participant* deemed the reference to "the law applicable to the arbitration agreement" in paragraph 454 unclear. He asked whether the intention was to remove that sentence, noting that it was placed in square brackets. It was acknowledged that this sentence could indeed be deleted.

99. Regarding draft Principle 32(2), it was observed that the aim was for the investor choose whether to pursue treaty-based or contract-based investment arbitration, which could be done by means of a waiver of either proceeding – a matter that was also under consideration in UNCITRAL Working Group III. Against this background, it was suggested that more neutral language be used, for instance by adding the word "consider" (the investor is encouraged to "consider waiving") and to explain the relevant factors for that consideration in the commentary.

100. Later, *the UNIDROIT Chair* examined a list of remaining issues, particularly parallel proceedings and counterclaims.

101. As for counterclaims, *the participants* agreed that extending the scope of counterclaims to include any dispute arising out of or in connection with the contract had the advantages of avoiding the triggering of separate proceedings and of preventing inconsistent findings by different tribunals. *One participant* also reminded the Working Group that assignment of claims, as distinct from contract assignment, would require the existence of a dispute, and should therefore be re-allocated in Chapter 8, Section B. *Another participant* recalled the previous discussion on the non-availability of certain contractual protections when a State entity signed the IIC (whence the need to consider the obligation of means to make the necessary steps to persuade the State as an imperfect substitute of a full protection). He mentioned that, even though there was a trend to include waivers of treaty arbitration in IICs, he would feel uneasy in encouraging the parties, and particularly the investors, to waive their rights, particularly under treaties, where in certain cases IICs did not have protection available that was indeed available under the treaty (*e.g.*, an IIC signed by a State entity and a

change in tax legislation). On the other hand, the issues might present different implications depending on whether it was the investor or the State to waive its rights. The solution might be to encourage choosing one path among the multiple paths available, following the approach of fork-in-the-road provisions. *Another participant* doubted whether waivers of treaty claims were at all valid and whether an IIC was the right place to deal with them. *A further participant* considered that it was an issue of party autonomy and thus it was to be left to the choice of the parties and the self-limitations they wished to apply to their access to justice, whether under a contract or a treaty.

102. At this point of the discussion, based on the above, *the ICC Chair* suggested to keep the first paragraph of Principle 32, encouraging to avoid parallel proceedings, and delete paragraphs 2 and 3 of the same principle, the contents of which would be moved to the commentary, where the intricacies of waivers would be addressed. Such commentary should take into account the trend to include waivers in IICs as well as the need to avoid double claiming and double recovery, urging the parties to make a definitive choice as to the path that would best suit their interests. *One participant* stated that she was not convinced to delete the second and third paragraphs of the Principle since waivers were still the best tool to avoid parallel proceedings. *Another participant* considered that Principle 32 in its entirety, including the paragraphs under discussion, seemed harmless since it used non-binding language, effectively an encouragement to consider waivers; deleting the term “right” and developing the commentary might be sufficient to better describe its meaning and scope.

103. *A member of the Secretariat* noted that the Principle encouraged waiving the right to initiate judicial proceedings and arbitral proceedings “other than those provided for in the IIC”, which might be intended not only to refer to a waiver of “treaty claims”, but also of claims that were not available under the IIC (e.g., when signed by State entities). The waiver might then identify the claims that were waived and those that were not waived.

104. *A further participant* proposed to divide Principle 32 into two separate principles, with Principle 32a encouraging to avoid parallel or duplicative proceedings. Principle 32b would instead factor in the timing and address the fact that parties would hardly waive their rights before the claim had arisen. This second Principle would then read “at the earliest possible moment, parties who have the possibility to seize another court or tribunal of a dispute should be encouraged to waive that other possibility”. She also agreed on avoiding the term “right” and use more flexible language.

105. *The member of the Secretariat* summed up that three positions were being discussed, one proposing to keep Principle 32 as it was, while explaining complications of waivers in the commentary; a second suggesting to keep only the first paragraph and turn paragraphs 2 and 3 into commentary that would encourage parties to waive claims with awareness of the intricacies of such choice, and a third that would look at waivers from the different angle of timing, prescribing to take a decision on waivers at the earliest possible moment.

106. *The UNIDROIT Chair* considered that a majority of the room seemed to support keeping only the first paragraph of Principle 32 and deleting the second and third paragraphs while adding the concepts discussed into the commentary to explain the utility and complications of waivers, including that they could end up being non-enforceable.

c) Draft Chapter 6: Change of circumstances

1. Stabilisation and renegotiation

107. *A member of the UNIDROIT Secretariat* recalled that two Consultative Committee comments concerning stabilisation, specifically Principle 23.3 on the exclusion of certain measures, had been raised earlier but not discussed in depth. The comments questioned whether the carve-out should expressly refer to national security and to the principle of permanent sovereignty over natural resources. It was noted that, while the current wording of Principle 23.3 was broad, the only remaining question was whether explicit references should be added.

108. *One member of the Drafting Committee* expressed the opinion that in the current state of international relations and current affairs it would not be possible not to consider the growing interest of States in the protection of their national security interests. *Another participant*, supported by *further interventions*, argued that, exactly because of the existing state of play in the international community, including references to national security interests as exceptions to stabilisation in IICs would significantly affect the contractual framework for regulatory stability and jeopardise the effectiveness of the principle.

109. The discussion extended to whether the list in Principle 23.3 was to be deemed a closed list or rather open-ended. *A participant* suggested to include expressions such as “notably” or “including” as to turn what in the current formulation was seemingly a closed list into an open list. *Another participant* noted that it was beyond doubt that a measure that was *bona fide*, non-discriminatory manner, and pursued a legitimate public purpose could be taken and could not be limited by contract, including for national security reasons, but further extended the discussion to whether the Instrument should provide (or suggest) that the parties needed to address the consequences of such measures being taken, particularly whether they could be taken subject to compensation or some other kind of rebalancing of rights and obligations under the IIC or whether, to the contrary, the risk was purely on the private party. He mentioned one solution would be inviting the parties to address the consequences in some form or another but provide for a default rule in case the parties did not reach an agreement.

110. *A member of the Drafting Committee* addressed such issues, recalling that Principle 23.3 was included to follow the pattern of so-called economic equilibrium clauses (definition, trigger event, carve-out provision); when the carve-out had been discussed, the conclusion had been made that a closed list was to be included and that adding the word “including” and turning it into an open list would have emptied stabilisation and made the principle ineffective. The opposite solution would have given the State a “*carte blanche*” to do whatever it wished, provided it satisfied the conditions and parameters provided by the Principle. To some extent, keeping the list closed also addressed the issue previously raised by a participant concerning the legal consequences of the exclusion (since within such a limited scope of application of the exclusion the investor would not obtain protection and the State would not be bound to provide the restoration of the economic equilibrium or compensation). He continued expressing perplexity on whether to include an exception relating to national security, which would concern executive actions, and noted that if the Working Group would opt for inclusion, he would support a separate principle that should be conceived narrowly, such as in the context of Article XXI of the GATT. In relation to sovereignty over natural resources, he argued that an open list – or even a closed list – including such a ground for exclusion would substantively empty stabilisation commitments as a very large majority of IICs were in the domain of natural resources and this had already been exhaustively discussed in earlier sessions.

111. *The UNIDROIT Chair* reminded the Working Group that the sense of this exercise was not to re-open the debate, but rather address the comments of the Consultative Committee, *i.e.*, whether to include references to national security and sovereignty over natural resources, including through the commentary.

112. *A member of the Drafting Committee* agreed that, based on the clarifications provided, the list of exclusions could not be left open and neither could a reference to national security be included. Indeed, with the recent wave of revocations of mining concessions in various countries in mind, a reference in Principle 23.3 to national security or natural resources as an express exclusion would give the public party free standing to disregard licences, and such an approach was not fitting with the goal of striking a fair balance between the principle and its exceptions. *A participant* noted that any principle could hardly justify an investor being entitled to compensation if a government sought to introduce *bona fide* and non-discriminatory environmental or social legislation. He mentioned that the Working Group rightly wished to limit the scope of such exclusions to stabilisation to a restricted set of measures, beyond which the State would be bound to pay compensation, thus maintaining the economic equilibrium and preventing a *mala fide* use of such principle or clause. He then noted that

as long as the State introduced legislation that reflected evolving international standards on social legislation or environmental legislation in a *bona fide* manner, in pursuit of the public interest, and in a non-discriminatory manner, it would not be bound to pay compensation; however, if it went far beyond the scope of Principle 23.3, such as grounding any change in law or administrative action on (extended) national security or sovereignty over natural resources, despite such concerns having a constitutional grounding, then it should be bound to restore the economic equilibrium or pay compensation. He added that such principle was formally recognised in the law of many countries and particularly in the Middle East and the Gulf Countries. In this respect, *a member of the Secretariat* noted that earlier comments by the Consultative Committee had suggested that a methodology to select those measures that were justified under an international obligation could be extracted from the Philip Morris v. Uruguay and Eli Lilly v. Canada awards, where it had been found that public interest measures impacting foreign investments (in the cases at hand concerning public health) were legitimate and excluded a right of compensation if grounded on significant and long-standing evidence in accordance with international standards.

113. *Another participant* noted that it could be more acceptable to turn the list of grounds for exclusion open-ended if it were balanced through a reference to proportionality, in addition to *bona fide* and non-discriminatory. Proportionality would allow for balancing but still not allow a State to interfere with the equilibrium struck in the IIC in each and every situation, thus opening doors to a wider list of potential competing public interests while preventing automatic application.

114. *The member of the Drafting Committee* reiterated that such discussions on proportionality and the scope of exclusions in Principle 23.3 had already been addressed during earlier sessions and considered in the overall balance. He added that earlier discussions had ascertained how proportionality, especially supported by arbitrators and experts adhering to German constitutional doctrine and the jurisprudence of the ECHR but not universally accepted, had significant oscillations in doctrinal interpretation, which might result in three or four different doctrines of proportionality. Placing the current discussion in context, he drew the attention of participants to the fact that Principle 23.3 had been conceived as a limited exception to the principle on stabilisation in 23.2 – both economic equilibrium clause and limited fiscal stabilisation – that would in any case be of limited use based on Principle 23.1 (“if appropriate” and “with awareness of consequences”). Parties would carefully assess whether a stabilisation clause was appropriate for inclusion in the IIC and, being aware of the consequences, the State would consider whether a national security clause should be spelt out in the list, while the default rule suggested by the Instrument would be to limit it to international obligations concerning human rights, social legislation, labour, environmental protection and climate change. Commentary language might be enough to address such issues.

115. At this point of the discussion, *another member of the Drafting Committee* noted that some confusion on whether the exclusion would apply to both economic equilibrium and limited fiscal stabilisation (including a hybrid of the two) stemmed from the fact that Principle 23.3 included a paragraph which made reference to paragraph 2 of Principle 23.2, whereas it should actually make reference to both paragraph 1 (economic equilibrium) and paragraph 2 (limited fiscal stabilisation). Another source for confusion was that limited fiscal stabilisation was actually also dealt with in paragraph 3 (with paragraph 4 dealing instead with hybrid stabilisation). She noted that the drafting should be revised accordingly and finally addressed the debate on proportionality, suggesting to add a reference to a “necessity test”, meaning that only measures “necessary to comply” (with the relevant obligations) would be excluded. *One participant* agreed that rewording would iron out current discrepancies in the formulation of the provisions and relevant subparagraphs of Principle 23, but the new formulation would still need to make clear what was actually excluded and what the legal consequences would be. If it applied specifically excluding the right to renegotiation and compensation in its entirety, it would imply that any State measure being taken for justified reasons and falling within its scope, though having a drastic impact on the economic equilibrium, would be unilaterally borne by the private party to an IIC, which would seemingly run counter to a sense of fairness and reasonableness. *A member of the Secretariat* noted that a reference to “necessity”, if

interpreted as in a GATT Art. XX context, would significantly restrict the excludable State measures to those that were necessary to achieve the purpose, *i.e.*, those adopted in situations where measures with a lesser negative impact on private interests were not practicable.

116. *One participant* expressed concerns about the “Principle 23.2 does not apply” language in Principle 23.3, reminding the Working Group that Principle 23.2 also included definitions. He then agreed not to include national security in the list and wondered whether it was reasonable to entirely exclude the right to renegotiate based on Principle 23.2 based on the exclusions in Principle 23.3 since the legal regime of renegotiation was conceived as extremely flexible. *Another participant* noted that economic equilibrium and fiscal stabilisation clauses were sensitively different methodologies to address regulatory stability, the former being more akin to hardship and the latter a classical freezing, and proposed to split Principle 23.2 into two different principles, each dealing with its consequences. This would facilitate the drafting of exclusions in Principle 23.3. *The member of the Drafting Committee* reacted by suggesting to keep the structure simple as any further splitting of the text would engender other problems, while the reasoning underlying Principle 23 in its three-pronged articulation had been clarified in earlier discussions (advice for negotiation in 23.1, type of stabilisation clauses together with procedures and consequences in 23.2, and conditions for exclusions in 23.3).

117. *A representative of the ICC* added a further point in favour of considering a redrafting of Principle 23.2, noting that the reference to compensation included under paragraph 3 in relation to paragraph 2 dedicated to fiscal freezing (and not under paragraph 1 covering economic equilibrium) could leave interpretative room to imply that a private investor would not have recourse to compensation in dispute settlement in case of breach of an economic equilibrium clause. *The member of the Drafting Committee* replied that the investor could ask for compensation under both types of situations, the only difference lying in the legal consequences and the procedure to be followed: (i) if the economic equilibrium was altered, the investor should notify the triggering event to the State party together with evidence of the reduction of the economic return and renegotiation would start to agree on the necessary steps to restore the initial equilibrium, but if the parties would not come to an agreement – or the agreement was not in good faith (*e.g.*, the amount was not satisfactory) – the investor would still have an arbitral claim to ask for compensation; (ii) if the fiscal stabilisation clause was breached, the distinctive feature of it compared to economic equilibrium clause would lie in that, being the former a freezing clause but limited to taxation measures, once the investor had informed the State of the loss due to regulatory change, the consequence would immediately be a monetary compensation or an equivalent measure (rebates, additional concessions) to close the gap between the initially agreed fiscal treatment and the new treatment. However, also in this case, if the State did not grant compensation or any equivalent or the investing party was dissatisfied with the amount of compensation, it would equally be entitled to invoke the dispute resolution procedure to achieve satisfaction.

118. At this point of the discussion, *the UNIDROIT Chair* noted that there seemed to be enough consensus in the room to leave the drafting as it was, *i.e.*, not include references to national security and sovereignty over natural resources in Principle 23.2, with the exception of the necessary rewording in order to clarify the consequences of the breach of the economic equilibrium and limited fiscal freezing. She then considered that most of the participants seemed to support keeping the list of exclusions closed. *A member of the Secretariat* added that it still needed to be decided whether under the exclusions provided in Principle 23.3 no right to renegotiation and compensation was envisaged, and he noted that such a decision might interplay with the decision to keep the list open or closed, since depending on the legal consequences, then it also might be deemed opportune to open or close the list.

119. *A participant* considered it too restrictive not to have an opportunity to renegotiate, recalling the general approach of the Working Group to strive for a balanced instrument that should at least provide an opportunity to renegotiate for certain measures which fell within the realm of the public interest. *The Deputy Secretary-General* suggested to consider the possibility of a carve-out to the

carve-out, while *the UNIDROIT Chair* recalled that the Principles included in the Instrument were by implication high-level and could be shaped by the parties in the actual IIC depending on the differing circumstances in which regulatory or legislative actions were made.

120. *One participant* expanded on the notion of “the differing circumstances” of the case and noted that in certain cases the State would give extensive consultations involving investors in the process that would lead to adopting and implementing the new measures, while in other cases, particularly when it was a matter of executive or administrative action, the new measure would come unexpectedly, and this would indeed be the case where investors should be given an opportunity to consult and renegotiate with a certain degree of flexibility. In this regard, *the UNIDROIT Chair* considered that it was not within the mandate of the Working Group to tell States how to inform investors about their legislation, but the commentary might suggest best practices, as mentioned in earlier sessions as regarded certain pronouncements of the House of Lords, in a manner whereby investors were given an opportunity to participate and express their position, at least on implementation issues.

121. *A member of the Drafting Committee* noted that the issue under Principle 23.3 still needed to be clarified, as that Principle excluded stabilisation and permitted a State to change the legal framework in certain areas; therefore, a breach was in principle missing, and a breach would usually be the basis for claiming certain legal consequences in a dispute resolution procedure if renegotiation failed. Even accepting that a legal basis for a dispute settlement claim was available, the point was what the investor would claim: if compensation could be claimed and on what basis, if adaptation of the IIC could also be claimed, if termination with restitution was an available remedy. *A representative of the ICC* recalled her earlier intervention that, in order to prevent confusion, Principle 23.2.3 should be reworded, deleting “the State shall compensate the investor either through monetary compensation or other comparable alternatives” and mirroring the language in Principle 23.2.1.

122. *The relevant member of the Drafting Committee* noted that the reference to compensation in Principle 23.2.3 was not to be tied to general remedies that were dealt with elsewhere, but rather to non-compliance with the fiscal stabilisation clause and the loss suffered due to change in law, which was a different matter from remedies. He added that in order to strike a balance between the obligation to compensate the fiscal stabilisation breach under Principle 23.2.1 or to restore the economic equilibrium under Principle 23.2.1 and avoid that all the burden was on the State, the decision had been to exclude compensation of fiscal change and reduction of agreed economic returns where the State would regulate in a *bona fide* manner, non-discriminatorily and in the public interest in certain areas such as human rights, social and labour legislation as well as environmental protection and climate change. The carve-out did exist in contract practice and did add a burden on the investor in case certain types of regulations were enacted by the State, but it was a precise policy choice. The opposite policy option would have been to impose an obligation to renegotiate on every matter, which would make the carve-out less useful and basically inexistent. The purpose of the carve-out was precisely not to give a right to renegotiate to the investor under certain conditions and in certain areas, but of course in a contractual setting the parties might then agree to articulate the scope of the carve-out as they wished and based on circumstantial elements. If the policy decision was changed, the Working Group could decide to incorporate a renegotiation provision related to those areas that were now excluded with two possible options: (i) to provide for a renegotiation right, but without allowing dispute settlement claims; (ii) to provide for a renegotiation right and also allow dispute settlement claims, which would rather have the function of clarifying that even in such areas compensation could be due.

123. *A participant* stressed in this regard that Principle 23.3 dealt with issues that “the Instrument wished the States to do” (human rights, environmental and social protection) rather than issues that “States wished to do”, and to some extent the exclusion provision laid down a framework to incentivise taking such commitments. The context was slightly different when it came to national security and permanent sovereignty on natural resources, since the latter did not regard issues that

the Instrument wished to encourage be done by States. Principle 23.2 might need some rewording and clarification as regarded the relationship with Principle 23.3, but the distinction was to be kept as fundamental.

124. *The UNIDROIT Chair reiterated the conclusions, particularly that the Working Group had decided to maintain the possibility to include stabilisation clauses though with some limitations, which took the State's right to regulate into account to a limited extent, i.e., new principles of law on climate change, the environment, social standards and human rights. National security and sovereignty on natural resources would not be mentioned, and the list would be kept closed. The list would be maintained as a closed list, and there would be no special renegotiation or compensation rights under the exclusion in Principle 23.3, if properly applied. She continued that a proportionality test, meant as a mitigation of the right to regulate in Principle 23.3, even though controversial as to its content, might be a policy choice, as it was becoming more and more a primary test to ascertain the legitimacy of certain legislative measures, but the easiest manner to consider its possible impact would be to expand on its possible role in the commentary and not to mention it in the black-letter rules.*

125. In this regard, *the Secretary-General* suggested to consider tightening the meaning of public interest to avoid abuse, for instance considering adding language to the commentary that would reflect how it could be interpreted in the narrowest manner (*e.g.*, as mentioned, in relation to national security). He then pondered whether a possible answer to certain comments in this area by the Consultative Committee was that national security was too broad a concept and would open the carve-out to a too-large range of grounds for depotentiating stabilisation of its function.

126. *The relevant member of the Drafting Committee* argued that a reference to proportionality even in the commentary would open a Pandora's box as to interpretation. *The Chair of the Consultative Committee* returned to the discussion on remedies in the context of stabilisation and, recalling the similarity between stabilisation and hardship under the economic equilibrium model, noted that if negotiations failed in a hardship situation, the hardship provision would provide for termination or adaptation, while in a stabilisation context the consequences were still not clear. *The ICC Chair* noted in this regard that there was a trend, not in public contracts but rather in gas price review cases, to grant authority to the arbitral tribunal to decide how the contract should be performed going forward. Therefore, a possible solution might be that, if renegotiations failed, a third party, such as an arbitral tribunal (or expert determination and dispute board procedures), should be seized with the power to decide and rapidly adapt the IIC.

127. *The participants* then discussed how granting the power to adapt contracts "*ab externo*" was hardly accepted in all legal systems and that even the business world was divided, some advocating for a possible role of judges or arbitrators in adapting contracts (this might be traced back to civil law systems), and some rejecting any possible external intervention (such a latter approach aligning to the common law approach that tribunals should strictly abide by party will and refrain from any addition, the last resort remaining compensation). Those who felt closer to the civil law perspective suggested to avoid specifying the remedies in the stabilisation section and leave the issue to the remedies section in Chapter 7, as it would be up to the interested party to decide whether a breach was in place, make a claim and select the relevant remedy, while it was then to the decision-maker seized of the case to decide whether the remedy was appropriate.

128. *The relevant member of the Drafting Committee* accepted that a cross-reference to the dispute resolution chapter might be included in the stabilisation Principle and clarify in the commentary that, inevitably, remedies would follow, but opposed the opinion that an arbitrator could amend an IIC – a principle that, he mentioned, was only to be found in the Qatari Model Law (but not in contract practice). *Another member of the Drafting Committee* expressed the view that such a cross-reference might be added, instead, to the hardship section – that did not differentiate significantly from stabilisation – exactly because in that context a specific scale of remedies was contemplated, including the possibility to adapt or terminate the contract. *The first member of the*

Drafting Committee reminded the Working Group that such a discussion had already taken place, and it had been decided that stabilisation would be kept as a different principle, referring to a different set of circumstances than hardship. He granted that a cross-reference to remedies in stabilisation sounded rather different than the approach taken in hardship, but recalled that hardship was general while stabilisation referred to State action.

129. *The ICC Chair* tied stabilisation and hardship to the same phenomenon, *i.e.*, an alteration of the economic equilibrium of the contract and, as a consequence, the solution in each of the two situations was to reestablish that economic equilibrium. He mentioned that if with hardship the Instrument gave the power to the adjudicator to readjust the contract, it was not clear on which grounds such power would not be granted under similar conditions on stabilisation issues. That was the solution that had already been established in the UPICC. *The Chair of the Consultative Committee* supported this view and added that if a cross-reference was made generally to the Chapter on remedies in the stabilisation principle, the consequence would be that there was not adaptation of the IIC, since adaptation in the UPICC was only provided for hardship, and thus such an approach would lose sight of the same essence of the economic equilibrium model and the aim of preserving the life of the contract, which both implied a restoration of the economic equilibrium through negotiation and, absent agreement, through adaptation by a third party.

130. *A participant* recalled the intrinsic difference between stabilisation and hardship, the latter being due to unforeseen circumstances of general nature that did not relate to host State intervention, while the former implying that the alteration of the economic equilibrium was due to State conduct and thus exclusively attributable to the State. In the case of hardship, the parties would share the loss as the general circumstances which caused the alteration of the economic equilibrium were beyond control of both parties and not attributable to one of the two. As a consequence, compensation for loss, if attributed, would not be entirely granted but rather allocated in percentages between the parties. *A member of the Drafting Committee* added that the aim of stabilisation was also to make sure that the State would not abuse its power to change the law. She considered that the remedy chosen by the Working Group for stabilisation was renegotiation, as for hardship, but the Working Group needed to decide what would happen if negotiation on stabilisation failed and why there the same solution would not be provided for hardship (*i.e.*, adaptation).

131. She then asked to consider the language of paragraph 217 in Principle 23.1, where it was mentioned that a State entity would not be able to bind the State, while if the contract was with a State entity, the renegotiation could bind the State entity itself. *Another member of the Drafting Committee* replied that, in case a State entity signed the IIC, the circumstances that caused the alteration of economic equilibrium would be beyond the State entity sphere of control since it was the State to adopt the change in law. State entities would then make the hardship provision available to the private counterparty and could not in any case offer a fiscal stabilisation provision because they were not in the condition to do so. *The other member of the Drafting Committee* in turn replied that this showed even more how similar hardship and stabilisation were, since the same situation would trigger stabilisation with the State and hardship with the State entity.

132. *A participant* wished to clarify that neither an articulation of the State nor a State-owned company could preclude the Parliament from exercising its legislative power or the executive power to issue regulations. Whether the contract was concluded by the host State itself, a public entity, or a State-owned company as a private entity, in all cases stabilisation would not cause any limitation to State power, it being a mere contractual clause that aimed to compensate the investor in case of alteration of the economic equilibrium, it made no difference. In such respect, the *earlier-intervening member of the Drafting Committee* considered that also a State entity (*i.e.*, different from the State) could assume the risk of a change in law and ensure restoration. She added that a regional or a municipal measure might also trigger an alteration of the economic equilibrium, and it should be clarified whether that fell within the scope of the stabilisation principle. She then pointed out that the assessment of the economic return and economic equilibrium should not be tied to the timing of conclusion of the IIC, since many factors or circumstances might intervene between conclusion and

the event that triggered the alteration (e.g., COVID-19). Additional language to address this might be “also taking into consideration the impact of changes not due to the measures adopted by the State”. She also recalled that in the first model clause, the phrase “make the necessary changes to the contract” might not capture the essence of the matter since restoration of the economic equilibrium might not necessarily result by the changing the terms of the contract, but also, for instance, by entering into another contract at a lower price for other products, that altogether would be profitable for the investor. She finally considered that 60 days to renegotiate was too short and that “removing or reducing tax, customs or other fiscal incentives” appeared rather limited and should also include introducing new taxes or increasing existing tax rates. She concluded that the hybrid clause was rather similar to the economic equilibrium clause and wondered whether it was necessary. In such regard, *another participant* noted that references and differentiated treatment of State entities should be revised and coordinated, not only in this section but throughout the Instrument, and particularly with reference to Chapter 5 where standards on physical protection and security, expropriation and transfers were dealt with.

133. *The UNIDROIT Chair* confirmed the earlier conclusions: that the principle would keep the same language with no reference to national security and sovereignty over natural resources, while exclusions, narrowly conceived, would not imply a right to renegotiation and compensation. The Drafting Committee had a mandate to consider how to reflect the emerging considerations in the commentary.

2. Hardship

134. *A member of the UNIDROIT Secretariat* recalled that the Working Group had already agreed to refer to the ICC Model Clauses on hardship and force majeure, without objections, and noted that this was the final opportunity to suggest changes to the model clauses or the commentary. She then referred to the Consultative Committee comments that requested clearer guidance on how hardship would apply to IICs, having mostly been elaborated for the needs of commercial contracts, and noted that such a comment could be addressed by expanding the introduction to Chapter 6 on the relationship between hardship, force majeure, and investment law. Regarding hardship, the comments supported continuity of performance but suggested clarifying in the commentary that State resource or capacity constraints might affect how continuity was ensured in situations of crisis.

135. *A participant* noted that continuity of performance was addressed in this section by including a default rule that withholding performance would be generally barred in a hardship situation or at most it would have a very exceptional nature, being granted to the investor only in case of exceptional circumstances. *A member of the Drafting Committee* noted that the comment was so specific that it needed to be addressed in the commentary rather than in the black-letter rule.

136. *The UNIDROIT Chair* agreed with such a consideration and directed the Drafting Committee to address the comment in the commentary rather than with a new principle. *A member of the Secretariat* then illustrated a Consultative Committee comment referring to paragraphs 248 and 249 that such a section should specify that where the domestic law of the host State allowed for unilateral termination of contracts under certain circumstances, this possibility should take precedence, as continuity of performance was not always beneficial for either the host State or the investor. Indeed, it might be appropriate to allow either party to terminate the contract where continued performance would become unduly burdensome, thereby ensuring a balanced approach that protected both parties.

137. *The UNIDROIT Chair* considered in this regard that continuity should be treated as a high-level principle, but if there was specific legislation in a specific context or circumstance, such legislation would apply or would be reflected by the parties in the agreement itself. *Most participants* agreed and considered that unilateral termination based on justified grounds (i.e., if the IIC became economically unpracticable or unsustainable) should always be permitted and thus specifically

regulated by the parties in the IIC, if they so wished; however, it was to be stressed that the tension between continuity (through adaptation vis-à-vis economic impracticability) and termination was specifically and better addressed under hardship rather than unilateral termination. *A member of the Secretariat* reminded the Working Group that the IICs examined by the Roma Tre-UNIDROIT Task Force provided examples of clauses that provided contractual remedies and did not preclude legal remedies provided in the law chosen as the law governing the contract or the otherwise applicable law.

138. *Another member of the Secretariat* illustrated a comment from the Consultative Committee that hardship under IICs might also arise from events outside the control of both parties, such as sabotage, terrorist attacks, or actions by third States due to geopolitical tensions. These situations, while not always making performance impossible (and thus falling under force majeure), could render performance excessively onerous and destabilise the contractual equilibrium. In such cases, it would not be sufficient to leave compensation solely as an element of renegotiation. Prolonged or inconclusive renegotiations risked leaving the investor without an effective remedy, which could discourage investment in high-risk environments. To address this, the commentary should recognise that parties should have the option to agree that compensation operated as an independent and express remedy for hardship in addition to renegotiation and that such compensation would only be due where the hardship event was not attributable to the conduct of either party, it caused a substantial disruption of the economic equilibrium, and renegotiation failed to restore equilibrium within a specified timeframe. The comment clarified that renegotiation should remain the primary mechanism, but where stalemate occurred, States and investors might choose several solutions, such as whether compensation would be automatic according to the project's nature (*i.e.*, a pre-agreed compensation fallback that could ensure predictability and a minimum of protection), determined by tribunal, or limited to certain hardship events, such as terrorism or third State acts.

139. *Some participants* agreed that such solutions might be illustrated in the commentary. They considered, supported by the Secretariat, that the section already provided for guidance concerning compensation deriving from hardship, but the situation where negotiations failed was not directly addressed, nor were pre-agreed compensation fallback clauses. They noted that renegotiation in the hardship context did not exclude the application of the section on remedies, which might lead to compensation, to address the Consultative Committee comment there was the need to explain the connection in the hardship section, *i.e.*, how remedial measures for hardship considering compensation might be applied when renegotiations failed.

140. The discussion went on to further issues, such as the need to clarify the differences and complementarities between stabilisation and hardship in the introduction to the whole Chapter and in the introductory notes to the section on hardship. It was determined that that would be the best place to explain how certain events, if under the sphere of control of the State party, might trigger stabilisation, while if not under control of the State party (and thus possibly qualifying as force majeure, but not implying absolute or consolidated impossibility and rather causing a significant alteration of the economic equilibrium of the IIC), they might trigger hardship. It was also reiterated that hardship might apply, absent a different type of risk allocation, where a State entity or a territorial articulation different from the State was party to the IIC and the hardship depended on acts of the State (or the central State). In such regard, it was mentioned that in the model clause at page 76, paragraph 1C, in the definition of the conditions to trigger hardship, the events were referred to as "beyond the control of the disadvantaged party and of the State", while no reference was made to State entities, and the Group agreed that such wording should be rephrased. In particular, it was noted that was sufficient to refer to "parties" and that a check should be conducted throughout the Instrument to ensure consistency where necessary.

3. **Force majeure**

141. *A member of the UNIDROIT Secretariat* noted that similar comments from the Consultative Committee had been made as to force majeure, particularly one suggesting that the commentary should clarify that while compensation was not a default remedy under force majeure, the parties should have the express option to agree *ex ante* on risk-sharing mechanisms (partial compensation, insurance triggers, revenue-balancing arrangements), particularly for high-impact force majeure events where losses were outside both parties' control and insurance coverage might be unavailable. Such clauses would support bankability, ensuring that long-term infrastructure and energy projects remained financially viable despite catastrophic events, but they would in parallel respond to a principle of fairness, preventing disproportionate burdens where prolonged force majeure benefitted one side, for example the State that would retain revenues while operations were suspended. Providing guidance on agreed and fair contractual frameworks for addressing such risks would also align with IIAs' practice that increasingly and consistently included war clauses requiring States to compensate investors for losses arising from armed conflict, insurrection, or civil strife. Compensation would not be treated as a mandatory rule, but rather as a flexible agreed solution that gave the parties a menu of options to address catastrophic risks. Indeed, standard force majeure rules excused performance but did not provide compensation, which might leave investors without remedy despite irreversible capital losses.

142. *A member of the Drafting Committee* agreed that such a solution would promote certainty and stability in the face of disrupting events that might deprive an investment of all its value. She recalled that certain force majeure events might still be considered within the sphere of control of the State party (currency restrictions, and so forth). She noted that the clause as it stood only provided for the suspension of contract without any right to compensation and, in addition, it gave either party the right to terminate. She considered that the policy choice was whether the clause could be adjusted by providing for some level of compensation, in case the trigger was either independent or dependent on the behaviour of the contracting State, or whether it could be adjusted by excluding it from the force majeure events, but otherwise providing some sort of stabilisation.

143. *Some participants* agreed that it would be appropriate to introduce a compensation mechanism subject to the agreement of the contracting parties, without superseding party autonomy, as a mechanism of risk allocation or sharing to protect investment capital in cases of very high-threshold events that would disrupt the investment. *Other participants* felt that such a proposal would change the very nature of force majeure, since force majeure was about events beyond control of the parties and provided for a legitimate suspension of performance excluding liability on the side of the non-performer. Currency restrictions would fall under the hardship scenario as, despite being cited in the current model clause on force majeure from the ICC, they were meant in a commercial setting where as triggering events they would be beyond control of the parties, while in an IIC setting a State was party to the agreement, so at least the wording should be corrected accordingly to clarify that it meant events triggered by a third State. In such regard, *a member of the Drafting Committee* noted that the commentary should clarify the need to very carefully consider how the relevant UPICC on force majeure applied in such a situation, as it had been decided not to provide an adapted principle. *The earlier-intervening member of the Drafting Committee* pointed out that "beyond the control of the affected party" in the model clause meant only "beyond the control of the investor" and permitted to apply the force majeure clause to events that were within the control of the State, the other party to the contract. She insisted that, one of the parties being a State, many of the events traditionally considered in the ICC clause as triggering force majeure could not be considered purely force majeure events in an IIC context, with two consequences: on the one hand, force majeure giving grounds for termination, a State might be tempted to trigger a force majeure event in order to terminate the contract, which needed specific consideration in the Instrument (*e.g.*, by limiting termination); on the other hand, the capacity of the State to trigger a force majeure event should give a cause for some sort of compensation as the Consultative Committee submission had intended.

144. *The UNIDROIT Chair* considered that the Consultative Committee comment was broader than just an issue of compensation; it recalled the need to provide burden-sharing mechanisms, guarantees such as insurance, and forms of risk allocation. *A member of the Secretariat* considered that IICs examined by the Task Force included certain examples of force majeure clauses that integrated some form of compensation, including by the extension of the expiration period, commensurate to the period of suspension. Some clauses also included insurance obligations to deal with such situations.

145. *One participant* considered that commentary to the model clause on force majeure, duly revised, might include guidance on how to adjust the general clause in a manner that addressed the concerns of the comment from the Consultative Committee. *Another participant* suggested that model clause language might be integrated into the commentary or as a sub-clause of the ICC clause to clarify to readers how to allocate the risk for catastrophic events that might disrupt the investment.

146. *The UNIDROIT Chair* closed the discussion and summarised accordingly that the Drafting Committee should examine how to address the matter brought to the attention of the Working Group by the Consultative Committee without altering the overall structure of the principle of force majeure, nor depart from it. The commentary should clarify that, where either party may terminate the contract in the event of force majeure, the State should not be entitled to invoke termination where the impediment was caused by the State itself. This approach would preserve consistency with the ICC clauses and the UPICC, while preventing opportunistic use of force majeure.

d) Sustainability

147. *A member of the UNIDROIT Secretariat* recalled that the sustainability provisions had been reorganised and streamlined to remove overlaps and better reflect contract practice. He explained that the revised text was built around a single integrated sustainability due diligence process, combining pre-contractual assessment and ongoing monitoring during the entire lifecycle of the contract. Redundancies had been eliminated and aligned throughout the three relevant sections in Chapter 2, Chapter 3 and Chapter 5, particularly where certain principles initially placed in Chapter 5 were reiterating concepts already included in Principle 6 of Chapter 1, or where the due diligence standard and procedure in Chapter 5 replicated the guidance provided in Chapter 3 on pre-contractual (or pre-commencement) due diligence. In particular, corporate pre-contractual due diligence in Chapter 3 on formation and impact assessment and management language in Chapter 5 on rights and obligations were aligned into one section concerning pre-contractual due diligence as they both referred to formation; the remainder of Chapter 5 was turned into a general contractual standard prescribing cooperation between the parties on the due diligence process during the life of the contract, and in line with earlier considerations, the continuing monitoring obligations were clarified, introducing commentary text on periodic reporting, updating, adaptation to evolving standards, the resort to grievance mechanisms, and the reconsideration of the role of the joint committee, renamed “Joint Sustainability Committee”. Sustainability obligations were mainly framed as investor obligations with State support where appropriate, while supply chain obligations remained linked to the operational phase. He invited the Working Group to consider whether further refinement was needed.

1. Chapter 2, Principle 6

148. *The UNIDROIT Chair* recalled that a minor suggestion regarding Principle 6.1 could be addressed by the Drafting Committee. This concerned adjusting the wording in paragraph 1 to avoid implying that contracts necessarily involved only two parties, by replacing the reference “both parties” with language such as “each party” or “all parties”.

149. *A member of the Drafting Committee* questioned the use of the word “shall” in paragraph 1, while *another member* recalled that the Working Group had earlier defined an overall approach to the use of “shall” in combination with aspirational language (“shall endeavour to achieve”), noting that the Consultative Committee had supported such approach as sufficiently flexible.

150. *Other participants* expressed support for the current approach, including the use of “shall” in paragraph 1. *One participant* suggested that Principle 6 should remain unchanged except for very minor drafting adjustments that did not affect its substance. She also noted that the phrase “higher or comparable” national standards in paragraph 31 of the commentary required clarification; the intention was for the more demanding sustainability standard to apply.

2. Chapter 2, Principle 7

151. *The UNIDROIT Chair* moved to Principle 7 on anti-corruption, noting that the ICC anti-corruption clause was included as model clause.

152. *A representative of the ICC* explained that a proposal for a streamlined commentary had been shared with the UNIDROIT Secretariat. She recalled that the ICC clause offered three options, as shown in paragraph 36. Following streamlining work, only Option I and Option II had been retained, with shortened commentary focused on their core elements, while Option III was excluded to avoid overlap with broader issues such as environment and sustainability. She noted that a reference to the ICC website would remain available for access to the full set of clauses, and that the overall objective was to significantly reduce the length of the commentary.

153. *A participant* suggested that corruption was governed by mandatory rules of criminal law in the host State throughout the entire lifecycle of an IIC. He noted that Principle 7 therefore did not (and in fact could not) add new legal effects, but he considered it appropriate to retain the provision to reflect this legal reality and to affirm the importance of anti-corruption within the Instrument.

154. *A member of the Drafting Committee* replied that paragraph 37 already addressed the issue by empowering the parties to determine the contractual consequences of non-compliance, thereby confirming the contractual nature of the provision. She suggested that this sentence might better fit in the chapter on dispute resolution, or a cross-reference could be reconsidered. She also raised the recurring question of whether model clauses should be incorporated by reference into the text or rather adapted, and whether reference should be made in the model clause to the term “Contract” or “IIC” since consistency should be ensured throughout the Instrument. *Another participant* responded that the text was currently being streamlined, while the decision on how such clauses should be referenced or adapted remained for the Drafting Committee. *A further member of the Drafting Committee*, in relation to an earlier intervention, suggested adding in the commentary that the guidance provided here was without prejudice to other applicable rules, national or international (e.g., of criminal law).

155. *The UNIDROIT Chair* concluded that the commentary could explain that several legal consequences under different laws might exist, without prejudice to them, while making clear that the principle itself addressed contractual consequences only.

3. Preamble model language in Chapter 2

156. *The UNIDROIT Chair* moved then to the draft Preamble language in Chapter 2, inviting comments on the updated language of the preamble and views on whether there should be a separate principle on regulatory freedom.

157. In paragraph 5, *a participant* proposed replacing “prevention” of climate change with “mitigation” to better reflect the parties’ capacity to address climate impacts. *Other participants*

agreed that the objective was rather to prevent the aggravation of climate change. Support was expressed for the suggestion to use “mitigation”, although it was also mentioned that this term had a specific meaning in the Paris Convention and might be deemed of limited reach if not coupled with adaptation, finance, and so forth; alternatively, more generic language could be used, such as “addressing the challenges of climate change” in order to reflect the effort made while considering that the parties might not by themselves prevent the impact of climate change. In paragraph 6, *a participant* recommended clarifying the reference to “international standards”, *e.g.*, adding the word “relevant” to signal that it referred to standards relevant to the specific project or sector.

158. *A member of the Drafting Committee* commented that the considerations in paragraph 48 should be described as “one of the reasons” for investor protection, rather than “the reason”. She also suggested adding a reference to the principle of *pacta sunt servanda* in paragraph 50, and replacing “must” with “endeavour” language in paragraph 55 to ensure consistent wording on adherence to the highest international standards. In reply, *another member of the Drafting Committee* cautioned against referring to *pacta sunt servanda* in the commentary, noting that although it was a contract law principle, its use in this context could suggest the internationalisation of IICs and trigger implications of public international law. He therefore suggested avoiding this terminology to prevent confusion, while still recognising the importance of contractual stability without limiting the regulatory freedom of the State. *The previous speaker* suggested referring to “sanctity of contract” if that would help avoid confusion with public law experts.

159. *A participant* noted that paragraph 48 should not assume that all foreign investment generated employment, as this was not always the case. Different views were expressed on whether the text should state that foreign investment “may”, “should”, or “shall aim to” generate such benefits. *A member of the Drafting Committee* warned the Working Group against being too assertive in order not to hint to excessive expectations and get into the debate which was triggered by the Salini test.

4. Chapter 3, Principle 10

160. *The UNIDROIT Chair* moved to Principle 10 on sustainability due diligence (Chapter 3), briefly recalled the approach, and invited comments on the principle, its commentary, and the model clause.

161. As a general remark, *a member of the Drafting Committee* suggested that the term “due diligence” might be clarified as a due diligence “assessment” to improve clarity. *A participant* considered the reference to “broader sustainability due diligence” in paragraph 2 of Principle 10 to be vague and suggested clarifying it.

162. The attention then shifted to the draft model clause. *A participant* suggested that wording similar to that used in the model clause on freedom to negotiate be added in the heading to the draft model clause, in order to clarify that it applied to the pre-contractual phase, including documents such as letters of intent or memoranda of understanding.

163. *Another participant* noted that paragraph 16 of the draft model clause used narrative language that did not fit well with contractual drafting and proposed moving that content to Chapter 5 or addressing it through a cross-reference, while emphasising that greater attention should be given to regulating this issue in Chapter 5. *A participant* agreed that the first sentence of paragraph 16 of the model clause was redundant, while the remaining content could be moved. He also suggested that paragraph 17 of the draft model clause did not fit in this section and would be more appropriate in the part dealing with remedies.

5. Chapter 5, Principles 20-22

164. *The UNIDROIT Chair* moved to Chapter 5 and noted that a general question on the introduction to Chapter 2 would be deferred until all chapters had been reviewed, and proceeded to Principles 20 to 22 starting at page 58.

165. *A participant* suggested that the wording in paragraphs 179 and 181 needed redrafting, as several terms were unclear and did not provide sufficient guidance to the parties, and the statement that the principles were not comprehensive required clearer expression.

Investor-State shared obligations on sustainability

166. *A participant* suggested that the title of Paragraph C should omit the reference to “investor-State” so that it referred to “shared obligations on sustainability”. *Another participant* suggested using a single, consistent term such as “contracting parties”, noting that the party on the State side could also be a State entity. He emphasised the need for consistent terminology throughout the Instrument. For instance, the Instrument referred both to “investor” and to “foreign investor”. He noted that inconsistent terminology could create legal uncertainty and affect the scope of protection.

167. *A participant* further suggested that Principle 20 should go beyond a general call for cooperation and clearly recognise that sustainability involved concrete obligations for both parties, and therefore the notion of a single defaulting party *vis-à-vis* a specific sustainability obligation might not be appropriate. It was also suggested to clarify how conflicts between applicable standards should be addressed, by indicating that contractual obligations should not be less demanding than the highest relevant international standards or applicable law, depending on which was most ambitious. *Another participant* suggested revising the wording on continuous due diligence so that it reflected a cooperative, good faith obligation of the contracting parties, rather than language that might later serve as a basis for substantive liability claims. *A further participant* suggested removing the reference to pre-contractual due diligence in Principle 21 as redundant, clarifying or deleting paragraph 8 of the model clause, and explaining references to consultation of local communities, including free prior and informed consent.

168. *A participant* suggested that Section C of Chapter 5 should expressly include the principle of proportionality, so that sustainability obligations such as monitoring reporting and committees would reflect the scale of the project and its environmental impact, and should allow for differences across industries, including the use of mitigation where full avoidance of impacts was not feasible. *Another participant* agreed and noted that existing language in international sustainability instruments could be used.

169. *A member of the Drafting Committee* noted that paragraph 1 framed sustainability as bringing about binding obligations to uphold the highest international standards, while Principle 6 referred only to efforts to pursue such standards, and stressed the need for internal consistency and pragmatism. He observed that the reference to best efforts to anticipate future developments in the model clause was vague for contractual use and suggested replacing it with clearer procedural duties, drawing on the monitoring approach discussed under Principle 10 and coordinated with Principle 21. He also added that paragraph 198 and the related list of sources might require alignment with Principle 10 to ensure consistency across the Instrument.

170. *A member of the Secretariat* stated that the text in Chapter 5 would be retained as a mandatory sustainability due diligence principle applicable after the contract was concluded. He explained that the provision had been adapted from earlier drafts to avoid repeating Principle 6 and had been reframed as an obligation of cooperation rather than a substantive due diligence standard that was already established in Principle 6 and at the beginning of Chapter 5 under Principle 16 on performing obligations in good faith. He noted that specific commitments identified during the pre-

contractual due diligence phase would inform the binding obligations in Chapter 5, with primary responsibility placed on the investor, but support and cooperation from the State. He added that the provision could still be revised, removed, or relocated, and that questions remained on how these obligations related to management plans and future investor obligations.

171. *Another member of the Secretariat* explained that Principle 20 was intended to operate within the broader framework set out in Chapter 2, which addressed higher international standards and acknowledged the difficulty of identifying them in practice. She recalled that the purpose of Principle 20 was to focus on the specific sustainability obligations that the parties had identified through the sustainability due diligence and chosen to include in their contract. To address concerns about consistency with Principle 6, she suggested that the opening wording of paragraph 1 could be clarified or adjusted so that it clearly referred to concrete contractual obligations rather than general standards. She also noted that developments in sustainability standards could affect these contractual obligations over time, which explained why monitoring and adaptation elements were included within Principle 20.

172. *The UNIDROIT Chair* summarised that the approach did not prescribe which sustainability obligations should apply. Instead, it referred to the sustainability obligations that the parties themselves decided to include in the contract, thereby avoiding placing the responsibility on the Instrument to determine substantive standards. She further explained that the structure followed a progressive logic, moving from a general principle of cooperation on sustainability to specific contractual obligations, and then to ongoing due diligence and monitoring procedures. She noted that this overall approach constituted the key policy choice, while detailed drafting could be adjusted later to reflect this structure more clearly.

Obligations of the investor on sustainability

173. *A member of the Secretariat* recalled that the Secretariat had already shared a set of reference materials for possible model clauses with the relevant members of the Drafting Committee, including a preview of the annex to the policy goals memorandum and existing clauses drawn from practice, as examined by the Task Force. He noted that these materials reflected a wide range of approaches found in investment contracts, from general commitments to detailed policy frameworks, particularly in areas such as local content, benefit sharing, and local development as well as labour and social standards or environmental protection. He explained that such clauses often combined substantive obligations with implementation standards, allowing flexibility for investors while embedding obligations within procedural mechanisms.

174. *A participant* suggested that model clause paragraph 8 under Principle 21 was redundant and overly broad. The participant explained that the indemnity language did not clearly relate to continuous due diligence or sustainability obligations and could create unclear and excessive liability. The participant therefore suggested that the paragraph should either be removed or revised to strictly link any indemnity to breaches of due diligence, or otherwise be addressed in a separate model clause. *Some other participants and members of the Drafting Committee* agreed.

175. *The UNIDROIT Chair* summarised that the relevant provision should be removed from the text.

Principle 22

176. *A participant* suggested that Principle 22 should be drafted more narrowly by limiting investor obligations to all relevant stages of the project supply chain. It was further suggested that paragraph 212 should clarify that the obligation applied only to entities under the control or deemed control of the investor. He also observed that paragraph 213 did not add substantive value beyond the content of black-letter rule and could therefore be reconsidered and shortened. In addition, concerns were raised about internal consistency in terminology, noting that while the principle referred to best

efforts, the model clause used the term guarantee, which could be read as imposing an unintended strict results-based obligation and should therefore be aligned.

177. *A participant* suggested clarifying whether Principle 22 was intended to impose strict liability on the investor for acts within the supply chain. *Another participant* responded that no strict liability was envisaged, explaining that the use of best-efforts language limited the obligation to diligence and did not create strict responsibility.

178. *A participant raised* the question of whether the principle functioned as a mandatory rule or a default rule, and whether it could be excluded or modified by agreement of the parties. In reply, *another participant* stated that the obligation should be mandatory to ensure that investors exercised best efforts regarding their supply chains. He added that it was unclear how the State could be linked to supply chain responsibilities. However, *a further participant* stated that it was difficult to treat a best-efforts obligation as mandatory. She noted that the issue raised broader questions about party autonomy in relation to sustainability provisions. She cautioned that, while not all provisions could be non-derogable, the core objectives of sustainability should not be subject to opting out by the parties but should rather be privileged by the Instrument. Subsequently, *another participant* suggested distinguishing mandatory rules of the applicable law from mandatory contractual obligations, noting that contractual obligations could be amended by mutual agreement, while remaining binding unless so modified.

179. *A participant* suggested that sustainability obligations under Principle 22 raised a recurring cost issue. She noted that without addressing cost allocation, such obligations risked being ineffective. *Other participants* agreed that the commentary could acknowledge the cost element and leave it to the parties to negotiate, taking into account differences in bargaining power and contract types. It was also noted that cost considerations could influence supply chain choices, as larger suppliers with established compliance capacity might be favoured over smaller enterprises, thereby affecting how benefits were distributed among companies and countries.

180. *The UNIDROIT Chair* summarised that Principle 22 would be retained with the supply chain provision, while the discussed adjustments would be addressed in the commentary. She considered the Instrument was soft law in nature and therefore could not impose mandatory obligations. She explained that the text could make strong recommendations on sustainability, but parties remained free to adopt or modify the Instrument as they wished. She referred to the example of the FIDIC Golden Principles, which were developed to highlight core values that users were strongly encouraged to respect. She suggested that a similar approach could be adopted in the Instrument to identify provisions regarded as particularly important, while avoiding any formal limitation on party autonomy. She added that the matter of cost allocation was to be reflected in the commentary.

Distinguishing Subcontractors from Supply Chain Obligations

181. *The Secretary-General* suggested to consider if in Principle 22 subcontractors and suppliers should be distinguished as legal consequences of the extension of the due diligence obligation of the investor along the supply chain. He explained that subcontractors were easy to control through direct contractual provisions, as they executed specific parts of the main contract. However, the upstream supply chain presented greater challenges due to multiple intermediaries and distant suppliers, making control much more difficult. He suggested separating the treatment of subcontractors from supply chain obligations in the text, noting that extending duties all the way up to raw material producers created significant practical difficulties.

182. *A participant* agreed with the proposal to distinguish between subcontractors and suppliers. She emphasised the importance of the value chain, particularly regarding human rights, labour rights, land rights, and Indigenous populations' rights, using coffee production as an example. She suggested that the commentary should distinguish between subcontractors and clarify the composition of the value chain while differentiating legal consequences.

183. Regarding the legal status of subcontractors and how to address them, *participants and Drafting Committee members* expressed converging views. *One participant* explained that, technically, subcontractors were not parties to the main contract based on privity of contract principles, so Principle 22 did not directly extend due diligence obligations to them. However, in practice, a solution was often found through the host State's prior written consent mechanism, which required compliance with environmental, social, and human rights standards in subcontracts. He noted that the construction industry involved numerous subcontractors across a significant number of industries, making this a practical concern. *A member of the Secretariat* recalled that indicative text had been added to the model clause by the Secretariat for consideration, which obliged the investor to include clauses extending the due diligence obligations upstream in contracts with subcontractors and outsourcers. Such text was found in IICs examined by the Task Force.

184. As to where to regulate subcontractor obligations, *a member of the Drafting Committee* suggested either expanding Principle 5's commentary on multiple contracts or addressing it within the sustainability provisions themselves, emphasising that if subcontractors were included, the standard should be higher than the best-efforts approach used for supply chains. *Another member of the Drafting Committee* disagreed with addressing such an issue in Principle 5, arguing that it concerned interaction, hierarchy, and severability rather than sustainability issues, and recommended keeping subcontractor obligations within the sustainability provisions. *A participant* noted that the model clauses on due diligence already addressed subcontractors, suggesting this was a coordination issue that should be explained in more detail in the commentary with references to the relevant model clauses.

185. *The UNIDROIT Chair* summarised that there was broad agreement on several key points regarding subcontractors and supply chain obligations. First, the concept of supply chain should be understood broadly, as it was interchangeable with value chain and chain of activities. Second, Principle 22 should remain as a broad provision without changes to its black-letter text. Third, the complexity of different relationships (subcontractors versus suppliers) should be addressed through the commentary rather than the principle itself, explaining that different legal consequences applied depending on the type of entity involved.

Obligations towards third parties and affected stakeholders

186. *The UNIDROIT Chair* moved to discuss letter F, which was a placeholder section on obligations toward third parties and affected stakeholders. She indicated that the Working Group needed to provide instructions to the Drafting Committee on whether to include a section addressing these obligations.

187. *A participant* suggested that this section should serve as a brief reminder to contracting parties about potential adverse impacts on third parties and stakeholders. She proposed including a very short black-letter rule with an explanation emphasising the prevention of damage to these groups. *Another participant* questioned whether a binding rule was necessary, suggesting the content could be placed in the commentary instead to simply draw parties' attention to third-party impacts.

188. *Another participant* noted that the Instrument already contained provisions regarding Indigenous peoples as third parties in the due diligence sections. This raised questions about whether Section F would be redundant. *The participants* agreed that under existing provisions, third parties such as Indigenous peoples and local communities were beneficiaries of positive obligations rather than parties to the contracts themselves, with their interests considered to prevent damages to them.

189. *A member of the Secretariat* questioned whether Section F was necessary, noting that obligations toward third parties were already addressed elsewhere in the Instrument. He pointed out that the due diligence provisions and model clauses on investor obligations, particularly regarding local development, already covered third parties as beneficiaries. He suggested that if the Working

Group properly developed the model clauses on investor obligations and due diligence methodologies, Section F could be adequately covered without creating a separate provision.

190. *A member of the Drafting Committee* agreed with concerns about Section F, explaining that third-party protection should derive naturally from existing pre-contractual due diligence provisions. He warned that creating an express obligation toward third parties could lead to complications regarding third-party claims under the contract. *A participant* similarly questioned the value of a stand-alone Section F, suggesting instead to strengthen wording in existing relevant sections and frame provisions more positively to benefit local communities. She deferred final resolution to the Drafting Committee. *Another participant* disagreed with the previous position and argued for retaining Section F. She maintained that this section was important and should remind parties in the principle that the goal was to prevent damages to third parties, who should be taken into consideration for this purpose.

191. *The UNIDROIT Chair* concluded that no consensus was reached on Section F. She proposed distributing the content across other sections and closed the discussion on this point.

e) Draft Chapter 1: General Provisions Concerning the Instrument

1. Principle 1

192. *The UNIDROIT Chair* asked a member of the Secretariat to illustrate the relevant issues. He reminded participants that in earlier sessions it had been decided to mention in Principle 1's commentary that the Instrument included model clauses and to delete Principle 4 on Parties and integrate its essential elements into the commentary to Principle 1 (particularly clarifications regarding the investor and the State and the leeway left to the parties to decide whether to apply the Instrument to national subjects, such as companies incorporated in the host State, keeping a neutral approach compared to that of other organisations). He finally considered that the Chapter still included a number of placeholders for discussing the inclusion of further text (exclusions and modifications, usages and practices, definitions). *The UNIDROIT Chair* then expanded on a comment from a State in the Consultative Committee, recalling that certain entities might not be under the control of the State but still might be performing activities within the competence of a State, and suggesting to reduce potential disputes by clarifying in the commentary that in cases of ambiguity or disagreement, adjudicators should give significant weight to the host State's determination on whether such an entity was performing public functions within its legal order. Next, she addressed another comment from the Consultative Committee suggesting that the text should reflect the wording of the International Law Commission's draft articles on responsibility of States. She considered that in both cases the Drafting Committee had noted that this might be a matter of international law and not to change the wording (the ARSIWA framework possibly not being sufficient to address all situations arising out of the IIC).

193. *Two participants* deemed it sensible to delete Principle 4. One expanded on the need to explain in the commentary that there were typical situations (State or State entity and private foreign investors) and more atypical situations to be described where the Instrument left flexibility to the parties as to the further situations in which it would apply. The other suggested to add a subheading on parties to expand on how the State party could be articulated. *Another participant* agreed, recalling earlier discussions about Chapter 5 on the possible double role of State as a State and as a SOE that could not have or be attributed regulatory powers, since a clear clarification in such context (and well-coordinated with other contexts in the Instrument) would help to define the legal treatment and the obligations arising out of the IIC, as well as aid readers in understanding the model clauses. As to the first comment from the Consultative Committee, *a participant* noted that whether the evidence on the legal status of an entity might be relevant was in the first place a question of law (moreover not necessarily a matter of international law but rather domestic law), which raised the

question of how to provide guidance in the commentary. *Another participant* agreed and argued that this was exactly the reason Principle 4 had been deleted, as it could not enshrine a normative claim on domestic law, but should rather be descriptive, while trying to describe all possible situations (including on the reach of domestic laws) and providing commentary and guidance.

2. Principle 2

194. *The member of the Secretariat* then addressed Principle 2, where it had been determined to clarify, in the chapeau and/or the commentary, that the functions of the Instrument could be subsumed under three subheadings: (i) the use of the UPICC as a primary source, (ii) as a secondary source, or (iii) as a model for a legislator or a negotiator. It had also been decided to explicitly mention the model clauses in the commentary and clarify whether Principle 2.1 would apply if parties had incorporated some of those clauses into their contract (*i.e.*, what incorporation meant in terms of applicable law, if there was not a direct choice), which could go under the commentary of the new para. 7.

195. With reference to the applicable law through designation of general principles of law, the *lex mercatoria*, or other similar legal systems, *one participant* asked whether the current prescriptive terminology used in several points of Principle 2 could be transformed into more permissive language ("may"). Such a shift would also reflect a policy, since it might be more appropriate to reflect the reality that the principles in the Instrument could not always be deemed general principles of law. She then suggested to add to para. 8, on the choice from arbitrators as "appropriate law", the phrase "in accordance with applicable rules on how to determine the applicable law", reflective of the fact that, under some systems, it was not possible to choose rules of law to govern. *A second participant* supported the first remark, suggesting "could" rather than "may", but would opt to maintain a more peremptory language to align to the UPICC framework and avoid importing – via less prescriptive language – legal sources the Working Group did not want to import. *A third participant* agreed as to "could" ("may" being too light) and recommended to clarify that, in case an IIC was under consideration, this Instrument would specifically apply, with the UPICC only secondarily, if not adapted or excluded.

196. *The Deputy Secretary-General* clarified that "may" was the terminology used in the UPICC and any change to "could" or other expressions would be taken to engender some meaning, thus requiring explanation; leaving wording as it was might be an option, explaining the expressed concerns in the commentary.

197. *Another participant* commented on paragraph 8, suggesting to delete "through a conflict of law process", because often arbitration rules provided for *voie directe* in applying the law. *The former participant* agreed and noted that her proposed addition ("in accordance with applicable rules on how to determine the applicable law") would be broad enough to include the *voie directe*. *The earlier participant* and *the UNIDROIT Chair* agreed that the relationship between the UPICC and this Instrument would be carefully described in the general introduction. *A further participant* noted that the words "choice of law" had been added to limit the discretion of an adjudicator to go out of the domain of standard conflict-of-law rules and apply public international law standards. He added that broadening this again, as suggested, would amount to re-inviting public international law, while "choice of law" would essentially anchor at one of the domestic jurisdictions.

198. *The UNIDROIT Chair* agreed that the policy choice had been made, and earlier proposed additions had been taken, but underlined that the language should be carefully discussed in the Drafting Committee for its possible implications for importing public international law.

199. *A representative of the ICC* referred to paragraph 5 as one where explanations about the relationship with the UPICC would need to be added. *One participant* agreed with the Secretariat's point of keeping language consistent with the UPICC and using language that would clarify beyond

doubt that, if the parties designated the Instrument as the governing law of their IIC, that included by necessity the application of the UPICC. *Another participant* raised doubts that the Instrument could be made applicable through a conflict-of-law methodology if it was not part of the domestic law. This argument was supported by *another participant*, who mentioned that the Rome I Regulation did not allow for the application of “rules of law” (including soft or non-State law) and a recent decision of the French Court of Cassation had reiterated the issue. She concluded that the future Instrument should use cautious words on this point because it might suggest a choice by the parties of non-State law at a first stage that might be invalidated at a later stage.

200. *The Deputy Secretary-General* recalled that this had been considered by the Working Group to be a matter of choice of law, *i.e.*, whether parties might choose non-State law would depend on the choice-of-law rules of each legal system, and if a reference included the possibility to choose “rules of law” instead of “law”, this was usually understood as including non-State law. The Instrument, like the UPICC, did not purport to change the policy chosen by each legal system that parties could not choose non-State law, but simply referred to the possibility that, if allowed, the parties might choose non-State law, including by referring to general principles of law, *lex mercatoria*, and the like. Where such was not allowed, the reference to this Instrument might simply be intended as related to filling the gaps of the contract.

201. *A participant that had intervened* noted that the proposed additional language (“according with the applicable rules on how to determine the applicable law”) precisely addressed such a concern, *i.e.*, whether applicable rules allowed the application of non-State law. *A further participant* noted that the commentary should also consider that, in some jurisdictions, the concept of *le contrat administratif* rejected the application of any law other than the host State’s law (including non-State law and thus the future Instrument). *The participant who opened the discussion* clarified that, in his opinion, at least in the context of an arbitral tribunal choosing the appropriate law absent party choice, this would not imply a necessary recourse to a conflict-of-law methodology, with *other participants* agreeing that this would fall under the applicable arbitration rules. *Another participant* reiterated concerns that leaving so much space to arbitral tribunals to choose the appropriate law in an IIC context (different from an international commercial contract context) would mean inviting internationalisation from arbitrators, which was a policy choice the Group excluded since the beginning, expressing concern that the future Instrument might be limited in its application in many legal systems, as expressed by some participants. Finally, *still another participant* considered that the Instrument could not in any case preclude any choice by the arbitrators.

202. *The ICC Chair* reminded the Working Group that, beyond issues of choice of law and non-State rules, the main benefit of the Instrument was to propose model clauses and the entire array of other uses therein proposed. *A member of the Secretariat* also recalled that reference to the use as appropriate law by adjudicators was in reference to this Instrument, as articulated by the Working Group, and not vague international law standards; on the contrary, any such generic reference could now be made more concrete, meaningful and determinate in its contents by arbitrators through resorting to this Instrument.

203. In relation to the issue of whether the reference to this Instrument implied a reference to the UPICC, *one participant* raised the reverse issue: whether a reference to the UPICC included in an IIC before this Instrument was adopted should be interpreted (or might be intended by arbitrators) as a reference to this Instrument. *Other participants* did not agree, as this would imply that the arbitrators interpret a choice of law that could not even be considered implicit.

204. *The UNIDROIT Chair* closed the discussion on these points, clarifying that the new Instrument could not change the logic of the UPICC and that the persisting discussion on non-State law and the policy intention not to internationalise IICs could be distinctly declared in the incipit of the Instrument. She then recalled comments from the Consultative Committee recommending that the commentary

clarify that the supplementary or corroborative function of the Instrument should apply only to the extent the applicable domestic law did not explicitly provide otherwise.

205. *A participant* noted that this would depend strictly on party autonomy, and therefore it would only apply if the parties had agreed to confer such a corroborative function to the Instrument in the IIC. *Another participant* objected that those comments were meant to refer to respect of mandatory laws in the host State, if its mandatory laws did not allow foreign or non-State law to perform such a function, and therefore a clarification on the issue was desirable.

206. *The Deputy Secretary-General* would opt for a more limited reading of the comment, to prevent the Instrument from being used as an external source to influence the interpretation of domestic law regardless of whether mandatory. She noted that the UPICC were applied in case law most commonly (by far) in relationship with applicable domestic law, especially to interpret or fill gaps, irrespective of any theoretical assumption on whether this was possible or not. She suggested to leave this question open, without too many qualifications, since if adjudicators ascertained that using the Instrument to supplement or interpret domestic law was not allowed under the applicable law, they would simply not apply it, and if they did not ascertain this or applied it *contra legem*, the decision would be subject to challenge. *The Secretary-General* recalled numerous decisions quoting the UPICC in the interpretation of domestic law. *The Chair of the Consultative Committee* agreed and cited a Report of the International Academy of Comparative Law from 2018 that had compiled decisions in such regard across continents; he then recalled that the Instrument was referring to a contractual context, *i.e.*, interpreting the domestic law applicable to a contract in an international context to understand its meaning in accordance with an international setting (and not the interpretation of domestic law in relation to a purely domestic context). *Another participant* agreed that mandatory laws applied in all cases and thus excluded such a function from being performed if not permitted.

207. *The UNIDROIT Chair* concluded that the Instrument should say as little as possible about the debate on the choice of rules of law (if extending to non-State law) since the issue was left to the applicable law in relation to party autonomy, but it should clearly exclude in the introduction that the Instrument meant to allow for the internationalisation of IICs. She recalled that the Working Group had chosen for paragraph 7 to keep the same language used in the UPICC ("may"), and for para. 8 to mandate the Drafting Committee with the task of determining the proper language, taking into account different approaches to the choice of non-State law and considering the amendments which were proposed during the discussion.

3. Placeholders

208. *The UNIDROIT Chair* then moved to discuss the three placeholders in Chapter 1, and particular the first on modifications and exclusions which referred to UPICC art. 1.5, providing that some of its principles could not be excluded by the parties, being somehow "mandatory", even though it was still soft law. *A member of the Secretariat* shared that the Working Group had postponed examination of this matter to when the substantive content of the Instrument was clearer. Three approaches were possible: (i) using the "mandatory law" language identifying which principles could (or were suggested) not to be excluded by the parties, (ii) mimicking the "golden rules" approach used in recent FIDIC instruments (as recalled by *the ICC Chair*), which was another way to approach the same issue, and (iii) a third approach mentioned in earlier sessions that the Instrument could clarify that the parties should keep the balance as struck in the Instrument. He mentioned that the third approach stemmed from the fact that many principles in the Instrument were not peremptory and implied a flexible appraisal by the parties (*e.g.*, scaling the intensity of sustainability obligations); inviting the parties not to significantly alter the whole balance of the Instrument would then be key.

209. *One member of the Drafting Committee* considered that the Instrument could either provide a list of "non-excludable" principles, which would raise the difficult issue of identifying those principles

one by one, or take the approach of describing the key pillars of the Instrument, formulating the expectation that the parties would include certain commitments (e.g., on sustainability and anti-corruption), the latter resulting likely more feasible, even though more vague. A *second participant* noted that the same UPICC Art. 1.5 used a vague formulation, and that non-excludability should be indicated in the relevant principle of the Instrument.

210. A *representative of the ICC* raised a significant two level-issue in such regard: (i) one was whether the Instrument included some "golden principles", i.e., highly recommended (language preferable to "mandatory"); and (ii) the second was how to deal with the effects of UPICC Art. 1.5 in the context of this Instrument, which incorporated the UPICC: would the UPICC that were "non-excludable" in the context of international commercial contracts remain "non-excludable" in the context of IICs as well? If so, would it be proper to label them "mandatory" or rather "recommendable"? *The ICC Chair* recalled, in this regard, the tripartite distinction in South American civil codes between elements of contracts (essence, nature, accidents) and then referred to stabilisation, sustainability, and dispute settlement as the essential elements without which an IIC would no longer be envisaged as in the Instrument.

211. A *member of the Drafting Committee* suggested that those principles with golden status in the UPICC should be kept as they were since the UPICC were part of the overall normative setting arranged under this Instrument. She then continued by stating that since the principles included in this Instrument adapted those UPICC that were considered to need adaptation, all the principles included in the Instrument should be deemed important to IICs (otherwise the Instrument would not function, as it worked as an adaptation of the UPICC). She concluded that all principles were of essence, and there was no need to draft a list. *One participant* recognized that all the principles were fashioned with permissive language and the language of UPICC Art. 1.5 would not match the approach taken in the Instrument; therefore, she supported the use of the "highly recommended" or "essential" language in the commentary to highlight the need not to contract out of sustainability commitments and to comply with them. *Another member of the Drafting Committee* agreed on not having a stand-alone principle and clarifying in the commentary the importance of the provisions included in the Instrument, it not being possible to identify the most relevant one by one, including due to some legal orders not accepting, for instance, stabilisation commitments.

212. *The Deputy Secretary-General* commented that the direction the discussion was taking appeared to align with the commentary to UPICC Art. 1.5, where it was stated that only a few provisions were of a mandatory character (because of their importance in the system of the Principles), but also clarified that, because of the particular nature of the Principles as "soft law", this usually had no consequences. *The UNIDROIT Chair* reinforced this point, reminding the Working Group that IICs were still contracts and thus what was generally of essence for contracts should be of essence also for IICs. A *member of the Secretariat* also recalled that the Instrument only included some substantive elements typical of IICs (States' obligations on investment protection, stabilisation, investors' obligations on sustainability) that were deserving of equal consideration and that, since the Instrument included options for scaling certain commitments, it was especially difficult to settle the issue of relevant provisions with a definite list; it would be better to include a principle inviting the parties, while scaling commitments, to keep the overall balance of rights and obligations as struck in the instrument.

213. *The ICC Chair* concluded that the *Drafting Committee* was mandated to include commentary explaining the relationship with Art. 1.5, what was of essence for an IIC or highly recommended in the Instrument, and the reference to the overall balance of rights and obligations.

214. A *member of the Secretariat* then moved to the second placeholder on usages and practices, recalling UPICC Art. 1.9, which in turn referred to internal and external usages, i.e., those agreed or established between the parties and those the parties should have known since they applied in a certain economic sector. The discussion would be whether the Working Group should adapt Art. 1.9

or not, or exclude (totally or partially) its application, since it was doubtful whether a principle conceived for commercial contracts would equally apply to IICs. He mentioned that, in earlier discussions, there were references to the need to protect the parties when they relied on practices established between them (despite being against the letter of the contract), including in an IIC context (particularly, construction contracts) and that the IICs examined by the Roma Tre-UNIDROIT Task Force included many clauses referencing usages and accepted practices of the industry in the area of performance, sustainability, choice of law and dispute settlement, sometimes with the clear intent to balance references to domestic law or filling gaps.

215. *One participant* recalled experiences in the energy and construction sectors and recalled that complex investment operations, which might imply multiple connected contracts, usually required compliance and consistency with usages and practices of the relevant industry sector(s) insofar as they did not run counter to mandatory laws in the host State. He pointed out that there was a need to clarify, because of the principle of privity of contract, that the State and the investor had to respect usages and practices relevant to related contracts of which one of the two, and principally the State, was not party to. *The Chair of the Consultative Committee* expressed the opinion that UPICC Art.1.9 was equally applicable in an IIC context, supported by *a member of the Drafting Committee*.

216. *The UNIDROIT Chair* concluded that there was no need to include an adapted principle but rather commentary to UPICC Art. 1.9 clarifying that the Instrument applied across different sectors, which strongly required industry usages and practices to be applied, and such application be reflected in the contract.

217. She then addressed the third placeholder on “definitions” and considered that, as for the general tendency in this Instrument to refrain from definitional exercises, a principle on definitions was not strictly necessary.

218. *A representative from the ICC* agreed and considered that, for States, the issue of defining what the expression included had been discussed earlier in the session and would be covered under the commentary to Principle 1.

219. *The UNIDROIT Chair* concluded that such an approach should be sufficient for any definitional issue.

f) Draft Chapter 2: General Principles Applicable to IICs

220. *A member of the Secretariat* then moved on to Chapter 2. Apart from minor drafting issues, two relevant issues were still left to be discussed. The first was whether the new version of the draft Master Copy including the recognition of the right to regulate in preamble language was in line with the decisions taken at the previous session, or whether a principle needed to be drafted.

221. *One participant* noted that the principle (or lack thereof) of the State’s power to regulate or to promulgate legislation was based on constitutional provisions and therefore he was indifferent to including such mention in the preamble or a provision (or not at all); however, including a declaratory provision might make sense. *Another participant* was in favour of keeping the notion in the preamble since that was also under discussion within Working Group III at UNCITRAL, and if a decision was taken in such regard, a provision would be fashioned in that context in treaty language.

222. *One participant* raised an objection to leaving the right to regulate in the preamble; it was such an important point that it could find a proper place in a principle, with the difficulty lying in connecting it directly to the limitations possibly envisaged by the contract. *Many other participants* supported this view. *A member of the Drafting Committee* agreed with including a principle and suggested to look at the table of contents of the Instrument and ascertain whether it would make

sense to have it as a principle or not. *A participant* agreed on having a principle, suggesting to strive for less rather than more language, as had been done for anti-corruption.

223. *Other participants* objected, again, that a general principle could in the first place apply to the entire Instrument and overhaul the delicate balance built in the stabilisation and hardship provisions, as well as in other parts of the Instrument, for instance precluding the availability of certain remedies. *An earlier-intervening participant* objected that text along those lines (“unless the parties agree otherwise, nothing in this Instrument or an international investment contract detracts from or limits the State's right to regulate”) would not have an impact available remedies. He argued that the right to regulate, in some manner, should remain a principle that governed IICs.

224. *The UNIDROIT Secretary-General* then suggested that the participants take into account the comments provided by the delegates to the Consultative Committee and accommodate the recognition of the right to regulate in the Instrument in a proper manner, considering the need to act with reasonability and not to alter the balance of the Instrument. He wondered whether a principle on States’ regulatory powers, with cross-references to the sections where such powers were somehow considered or subjected to contractual covenants, could turn out to be a feasible solution.

225. At this point, *the UNIDROIT Chair* suggested whether a middle course between the two positions could consist of keeping the recognition of the States’ right to regulate in the preamble without formulating a principle, but dedicating a specific subsection with a subtitle (which would appear in the table of contents) to such an issue in the introduction, where the key pillars of the Instrument would be explained. The text would expand on the relevance of the right to regulate in the domain of IICs, highlighting its importance while providing guidance on how the Instrument dealt with regulatory issues.

226. *One of the previously-mentioned participants* objected that the inclusion in the preamble would already amount to a significant compromise. *More participants* agreed that text in the introduction, with subtitles and indication in the table of contents, combined with preamble language, would serve the purpose of signalling the status of the right to regulate. *Another participant* warned against referring in a principle to States’ regulatory powers and then listing possible limitations, as parties could simply not contract out of States’ sovereign powers. She mentioned that, when the States used their powers, there were contractual, indirect consequences, but this was already included in the Instrument and described in several parts; then, she concluded there was no need for a principle with limitations beyond the preamble. *Other participants* agreed, pointing to the right to compensation under the economic equilibrium stabilisation model and the exclusions in Art. 23(3).

227. *Numerous participants* referred to the need to be balanced and find a compromise between the existence of State regulatory powers and investors’ interests, carefully balancing all the interests at stake. The substantive issue was clearly defined, as the State’s power to regulate was not under discussion nor limitation; it was only an issue of the private law consequences that would stem from contract clauses included in the relevant IIC. The point was one of formal expression or formulation. *A member of the Secretariat* recalled that many parts of model preamble language just reflected principles, and in case a principle on States’ regulatory freedom was not included, it would be clearly missing in the list of principles. Such a choice should be clearly justified. *The Deputy Secretary-General* noted that the commentary was the most suitable place to deal with issues of balancing interests since it included more nuanced language.

228. *The UNIDROIT Chair* concluded that the Drafting Committee would be tasked with elaborating text for the introduction dedicated to the States’ right to regulate and to be coordinated with model preamble language, while containing clear indications about the fact that this Instrument operated in a contractual (and not treaty) setting, that could adequately address State powers, with only the possibility to cover the private law consequences of the exercise of regulatory rights.

229. *The member of the Secretariat* then illustrated the second issue, *i.e.*, the placeholder on notice. He recalled that earlier sessions had stressed the importance of notice, and one proposal was whether to refer to the relevant UPICC, include commentary and guidance on how it applied to IICs and then cross-reference specific principles and rules on notice in validity, change of circumstances, remedies and dispute settlement, where available. He also noted that IICs examined by the Roma Tre-UNIDROIT Task Force contained many clauses with certain specificities that might be considered as benchmarks in this regard.

230. *One participant* recalled the importance of establishing a legal framework on notice, particularly on when notice issued by one party bound the other party, that would then apply to all the sections that implied or provided for notice to trigger certain contractual procedures (a renegotiation or termination notice, a consultation or arbitration notice). *Another participant* agreed but noted that a full framework would go beyond the scope of this Instrument, which should limit itself to indicating to the parties that they had to clarify who were the representatives empowered to receive notice and by which means a notice was in place, but not too much beyond that. *A member of the Drafting Committee* agreed with the interventions and considered that the commentary should invite the parties to consider the applicable UPICC Art. 1.10 and introduce adaptations in their IIC since it would not be the most suitable for IICs. In this regard, *a member of the Secretariat* recalled that the relevant UPICC referred to oral notice and notice to persons, which might call for adaptation in the IIC context. *Another participant* agreed with the last intervention and suggested to consider whether a variation was of essence, such as identification of the State articulation or agency to be reached. *A further participant* agreed that notices in the IIC context should be in writing, and in most jurisdictions this would amount to a mandatory rule.

231. The UNIDROIT Chair concluded that the Drafting Committee was mandated to examine what would be the most appropriate solution for this matter.

g) Draft Chapter 4: Validity

232. *A member of the Secretariat* illustrated that there were some issues left to discuss in Chapter 4. First, since they had deleted the principle on “initial impossibility”, they should consider deleting the model clause. Second, the commentary on “gross disparity” needed to be expanded to address issues raised by IICs. Third, it was decided to delete Principle 14 (formerly 13) on “illegality” on the grounds that the UPICC would apply, but also to preserve the substance of the discussion on compliance with host-State law – which could not be dealt with under the validity Chapter (to avoid turning all non-compliance issues into invalidity issues) – by providing for a model clause in Chapter 8, that would amount to a representation, or in any other chapter the Working Group deemed appropriate.

233. *The Chair of the Consultative Committee* asked whether any “adapted” principle included in previous versions would survive in this Chapter. *The member of the Secretariat* clarified that the final approach, if confirmed, was similar to Chapter 7 on Remedies, *i.e.*, a referral back to the entire UPICC Chapter on validity, which would apply “*telle quelle*” with commentary explaining the reasons and the logic of its application to IICs. For instance, with the deletion of the former principle on “restitution”, the commentary would address the suggestion from the Consultative Committee to consider the specificities of restitution (as a consequence of invalidity for illegality) in the context of IICs.

234. *The UNIDROIT Chair* noted that such an approach, *i.e.*, a Chapter without (adapted) principles, provided further justifications to have a structured table of contents that should give readers a picture of the full contents of the Instrument. *Some participants* expressed their support to such a proposal and confirmed the approach taken.

235. *The UNIDROIT Chair* concluded that the decision was taken to have a Chapter without any principles but with commentary explaining how it would apply to IICs.

h) Draft Chapter 5: Rights and Obligations

236. *The UNIDROIT Chair* started from Principle 16 on the performance of contractual obligations in good faith. *The member of the Secretariat* recalled that the Working Group had decided to expand the commentary to better define the scope and reach of such Principle, particularly as regarded arbitrary or unreasonable conduct, including by looking into whether some contractual mechanisms such as representations and warranties could give effect to the obligations described in the Principle, or how cooperation between the parties was crucial due to the complexity and long duration of IICs. He finally noted that two comments from the Consultative Committee proposed, respectively, to consider cooperation and sustainability under Principle 16 and to include text suggesting that the State's exercise of legitimate regulatory powers could never by itself be considered arbitrary or unreasonable conduct.

237. *A Member of the Drafting Committee* reminded the Working Group that, at some stage, a reference to an ICC clause on good faith in turnkey contracts had been included in the Instrument. She mentioned that she would find it useful to reproduce the gist of that model clause, even if not reproducing it entirely or in the same fashion, with special reference to the rule that performing the IIC as it had been agreed could never amount to non-performance.

238. *The UNIDROIT Chair* took the floor again and asked whether, given the great amount of cases where good faith was mentioned, it might be helpful to add cross-references, illustrations or examples of how good faith could be implemented. *The Secretary-General* recalled the need to explain the reasons why such a principle was established and what would be added to the good faith principle in the UPICC, since it could otherwise give the impression that the Instrument wished to opt out of good faith as formulated in the UPICC.

239. *The ICC Chair* suggested to look at UPICC Art. 1.7 on good faith as the general principle and the multiple mentions to good faith in this Instrument as “corollaries” which followed as consequences in several areas: he mentioned that a corollary of good faith in the context of stabilisation was that, if the State exercised its regulatory power “*bona fide*”, there would not be any right to compensation.

240. *One participant* asked to reflect on whether, despite using the same term “good faith” in many contexts, the underlying idea was different, and thus the risk was to connect contexts that had different implications. *Another participant* noted that performance of contractual obligations in good faith was a fundamental pillar of contract law across legal systems. He mentioned that if it was mentioned in many contexts of the Instrument and then not mentioned in another context, that would be attributed a meaning by readers, potentially creating inconsistency.

241. *The Deputy Secretary-General* recalled that, first of all, UPICC Art. 1.7 was not displaced or adapted, and therefore it applied. Second, it had been decided to have a principle on performance of obligations in good faith in this Chapter, mainly on grounds of avoiding any reference to international trade and adding the terminology “not acting arbitrarily or unreasonably”, which to some extent would add meaning and content to such principle in the context of IICs. She mentioned that one possibility was to delete the principle and explain in the commentary how good faith would apply in the performance of contractual obligations, since it was a bit odd to refer to the application of a UPICC provision without referring to the provision itself. *The UNIDROIT Chair* considered that Principle 16 was not exactly good faith but rather stemmed out of a need for balancing rights and obligations between States and investors, with a reference to the duty of avoiding arbitrary or unreasonable conduct. She mentioned that she would keep the Principle as it stood in terms of

internalising and turning into contractual rights and obligations what in other contexts might not even be seen as contractually binding, which was a pillar of the entire exercise; the commentary should clearly explain that this was not the good faith under Art. 1.7 of the UPICC, and the relationship should be clarified.

242. *A member of the Secretariat* recalled the earlier discussion on good faith in Chapter 2 and UPICC Art. 1.7 while referencing good faith when necessary throughout the Instrument and particularly when it needed a specific application in certain contexts, such as in the case of performance of rights and obligations. He continued that, particularly in IICs where a party was a State (or a State entity) and held a public power, the performance of contractual obligations in good faith could come closer to the State's obligation to act and perform in a non-arbitrary or unreasonable manner (*i.e.*, not using that power arbitrarily or in an unreasonable manner). On the side of the investor, the meaning of Principle 16 might be framed more patently from the angle of considering the obligation to respect and comply with the laws of the host State, just as the same Principle had been pointed out in earlier discussions as a portion of the Instrument where compliance with host-State law might be dealt with, as a symptomatic figure of performing obligations in good faith, together with other parts of the Instrument, such as Chapter 2 on general principles and Chapter 8 on choice of law.

243. *The UNIDROIT Chair* concluded that Principle 16 should not be considered a replication or substitution of Art. 1.7 of the UPICC, but rather a principle on performance of contractual obligations which referred to good faith, cooperation, and not acting arbitrarily or unreasonably as standards to consider in the context of IICs. *By this perspective, the commentary should elaborate more on its scope and meaning.*

244. She then moved on to Principle 18 and referred to a comment from the Consultative Committee that suggested to retain the "public purpose, non-discriminatory and due process of law" requirements for lawful expropriations but to delete the reference to "a prompt, adequate and effective compensation"; instead, the comment suggested referring to an amount, time and manner of compensation that should be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected by the expropriation.

245. *A member of the Drafting Committee* suggested that such comments were inspired by an investment treaty mindset, *i.e.*, perceiving this Instrument as a bilateral investment treaty rather than referring to a contract. Such an instrument could not settle the expropriation standard, which not even many constitutions did. The Instrument was providing a contractual standard with contractual consequences that would result in the Chapter on remedies rather than into a standard on expropriation. *Another participant* agreed and wished to add that this sort of signalling that the Instrument operated in the context of a contract should be reflected in very clear language in the introduction to the Chapter and in the commentary to Principle 16, as it would be easy to expect some confusion in readers. *A further participant* agreed but asked whether it could be in any case useful to state in the commentary that different approaches existed on the expropriation standard.

246. On this issue, *the UNIDROIT Chair* considered that the standard on expropriation was heavily regulated in many jurisdictions and suggested that one approach could be that Principle 18 limited itself to underscoring that it was strongly advisable that the parties address the issue of expropriation in the IIC, taking into consideration the domestic law of the host State.

247. *A participant* objected that expropriation was regulated in certain jurisdictions, even in constitutions, but not in every jurisdiction, and thus the Instrument might try to define what expropriation was and how to turn such an issue in a contractual issue. *Another participant* considered that one of the main objectives of this project was to suggest contractual terms that would facilitate sustainable, high-quality investment, and that in some cases where the investor might not have recourse to a claim of expropriation through a treaty, a principle in this Instrument

– and a corresponding clause in the IIC – might be the only means to provide that kind of security that would facilitate the investment.

248. *The UNIDROIT Chair* then referred to another comment from the Consultative Committee, that any legitimate exercise of regulatory freedom which resulted in measures adopted in good faith and for the protection of the public interest were not to be equated with expropriation, and that this should include cases where such measures incidentally caused a significant adverse economic impact on the investor.

249. *A Member of the Drafting Committee* interpreted the comment as a positive assessment of the draft text, as it had been drafted to avoid the debate on the “sole effects” doctrine. *Another participant* wished to refer to the contractual approach to expropriation that was mentioned earlier and commented that Principle 18 was in any case referring to “prompt adequate and effective compensation”, which clearly came out of the old public international law formula: she thus wondered why, if the remedies were found in Chapter 7, a formula referring to “fair market value” was not chosen instead of the old public international law standard. Then, she questioned what the consequences would be of an illegal expropriation based on such a principle, since there were heated discussions about whether the fact of not paying compensation alone made an expropriation illegal and whether this called for a different assessment of compensation. She warned that just labelling such a standard as “contractual” would not isolate the Instrument from giving relevance to public international law or national law.

250. *A representative of the ICC* considered that Principle 18, as formulated, might be deemed quite uncontroversial, but, to tie back to the comment from the Consultative Committee, noted that it lacked guidance on the relevance of or compatibility with national laws dealing with expropriation. He suggested to reflect on possible references to domestic laws (for instance, clauses stating that the standard would be subject to national law). He turned to the second model clause (*vis-à-vis* State enterprises or other entities related to a State) and mentioned that the formulation should be clear in stating that there was an obligation of means and not results; in this vein, he proposed to shift the language from “should take the necessary steps to try to persuade the State” to “shall do its best efforts to persuade the State”, the latter not implying that the State entity was obliged to change the State's mind. He finally mentioned Principle 22 (“the investor shall make its best efforts to ensure”) and supported the view of aligning language and ensuring consistency.

251. *A member of the Drafting Committee* mentioned that using the expression “try to persuade” would lower the level of commitment by the State entity to a very low threshold, which was not in the interest of the Instrument: he noted that the Principle and the model clause patently engendered an obligation of effort (or means) and not outcome (or result), as it referred to “necessary steps to persuade” and not “undertakes to persuade”. He noted that mentioning “best efforts” rather than “necessary steps” amounted to reinforcing the obligation rather than softening it, and that such a formulation stemmed from the need to commit the State entity to put in place some behaviour to the benefit of the investor and the whole investment operation in contexts where it lacked the competence of power to decide. Raising the threshold would generate litigation, providing the investor with the possibility to suit the State entity.

252. *A participant* asked the room to reason concretely and try to understand what the “necessary steps” would consist of, if there was an objective standard to apply, what evidence of certain steps would be, and which advice a legal consultant would be able to provide to a State entity (or an investor) on how to operate under such a standard. *The earlier-intervening member of the Drafting Committee* replied that this would really depend on the facts and circumstances of each case, but hypothetically the State entity should prove that it wrote a letter to the competent Ministry (if expropriation depended on a Ministry regulation) and that, possibly, meetings were held to address the matter. *The participant* noted that such a type of commitment was exactly what was expected, as it could be an empty obligation, not really concrete or effective, meaning that with little effort the

standard was met but without real impact. *The member of the Drafting Committee* replied that imposing a higher level of commitment would create different grounds for responsibility (akin to objective responsibility) for acts and circumstances which did not fall under the sphere of control of the State entity.

253. *Another member of the Drafting Committee* proposed to set aside the alternative “necessary steps/best efforts” language and opt for “appropriate steps”. She mentioned that the State entity would only be required to take appropriate measures to persuade the competent authority, but once effort was made, it could not be called upon to respond to not having succeeded in attaining the objective: the true aim of this model clause was to ensure cooperation by the State entity (beyond formal competence). *The earlier-intervening member of the Drafting Committee* replied that, in earlier work conducted on interpretative issues before the International Court of Justice concerning the duty to negotiate, “appropriate efforts”, “necessary efforts” and “best efforts” had been considered as implying a scale of progressively more intense commitment, with “appropriate” being the least intense. It was considered in this regard that “necessary” might have been perceived as being particularly (and even too) intense since it implied the steps needed to achieve the result, and no other alternative, even though they implied a special limitation of the interests of the State entity. *The other member of the Drafting Committee* replied that in such a case, in line with UNIDROIT’s methodology, if the language “appropriate, necessary, best efforts” conveyed a peculiar legal meaning that the Instrument did not wish to import, the terminology should be changed in its entirety.

254. At this point, *the Deputy Secretary-General* reminded the Working Group that the UPICC included the notion of “best efforts” and so, if the Working Group wished to change the terminology, there was the need to clearly explain the reasons. She mentioned that, in order to align the language to the UPICC, and if the Working Group attributed the same meaning to such a legal concept, it would have been preferable to use the concept of “result” rather than “outcome”. She considered that the need to opt for neutral terminology arose when a certain legal concept was firmly rooted in one legal family rather than another.

255. *A participant* expressed the opinion that the model clause under discussion applied to situations where, lacking a treaty, the IIC would provide an imperfect substitute, but still a certainty of protection for investors. He considered “to take necessary steps to persuade” as a clearly-defined obligation to take all steps without which it would be impossible to persuade the State, be that a formal communication or any other step targeting the subject that has the power to implement a decision on behalf of the State and which must be performed in good faith, *i.e.*, not an empty communication, but a genuine communication that was adequately shaped in terms of form and substance in view of the objective to persuade. He noted that such a commitment had value in all situations where there was no other path to directly access the State’s authority and that the necessary steps were to be intended not only as “legal” steps which triggered the procedure to seize the organs of the State with a possible decision on the matter, but also circumstantial steps, such as simply making known to the State an issue of which the State could not have even been informed. He finally encouraged the Working Group to view the clause not as a catalyst for litigation, but rather as a dispute-avoidance device that incentivised the State or State-owned entity, or any other affiliated entity, to make the necessary efforts to preserve the circumstances that allowed the investment to continue and not result in a dispute. He considered that the stronger this provision was (in the direction of encouraging that type of cooperative work needed to influence a State decision that would not degrade or destroy the investment), then the less likely it would be that a dispute would arise.

256. *Many participants* agreed on this view, particularly on the conception of legal and circumstantial necessity of the steps to be taken to persuade the State. *One participant* made the argument that the dynamic of the State entity not having the competence to decide or bind the State could also be found in the relationship between the centralised state and regions or municipalities

when they signed an IIC, which was impacted by expropriation decided at the central level. She asked the room whether in this case too such regional or municipal authorities should be subjected to an obligation to take the necessary steps to persuade the State to change decisions negatively affecting the investment. *Another participant* argued that regions or governorates and municipalities should be considered public juristic entities, depending on the qualification they enjoyed under national law, and thus they were part of the State, and there would be joint liability of the State for the acts of lower territorial articulations and *vice versa*.

257. *The member of the Drafting Committee* considered that this would indeed be a new dynamic; for a region or municipality which could not bind the State but rather be impacted by its action, “appropriate steps” might be better tailored than “necessary steps”, since such a public entity would have the duty to go through public procedures, administrative rules and hurdles that might make it difficult even to send a letter or organise a meeting. He proposed to provide clarity and guidance on such dynamics in the commentary by indicating that “necessary steps” was the standard, but then it might be applied more or less strictly depending on the circumstances of the case. *A participant* proposed to use language such as best efforts “to settle the issue” or “take measures” rather than “persuade the State”.

258. *At this point, the UNIDROIT Chair s concluded that a consistency check with the UPICC should be made by the Drafting Committee as to the terminology used in the model clause, while the commentary would add the elements from the discussions to explore the different circumstances where an issue in the relationship between a State and a State entity (including public entities) would arise.*

259. The UNIDROIT Chair then examined Principle 19 on payments and transfers, where a similar placeholder existed as regarded State entities. She noted that a comment from the Consultative Committee had suggested to acknowledge the investor's right to make payments and transfers relating to the IIC freely and without delay, but explicitly state that such rights were subject to the laws and regulation of the host country.

260. It was understood that a high number of States were reforming their BITs and model investment treaties subjecting investors’ right of free transfer in transferable currency to the right of the State to adopt regulation to ensure the stability of its balance of payments, for instance when the State was experiencing foreign exchange difficulties. *A member of the Secretariat* recalled that the Principle, as formulated, already included an exception referring to serious balance of payments and external financial difficulties, threat, and cases where in exceptional circumstances payment and transfers could cause serious difficulties for the macroeconomic management of the State, and it also seemed to go beyond the existing state of the art, considering many other cases, such as for instance enforcement procedures and recording of evidence. He finally considered whether it was reasonable to place on the State entity, in the same manner as for expropriation, the obligation to persuade the State since freedom of payment and transfer really depended on a normative framework, while exceptions were in principle limited in time.

261. *Further participants* considered that regulations on freedom of payments and transfers, and the exceptions, were really within the sovereign sphere and mostly reflected competences of central banks that even the State, in the classical sense, could not compel or persuade to take certain decisions. Domestic law was decisive in this domain.

262. *The UNIDROIT Chair concluded that the placeholder could be deleted and recalled that they still needed to consider the formulation of a new principle on State cooperation and assistance to the investor and allocate the task to the Drafting Committee.*

Item 5: Organisation of future work

263. *The UNIDROIT Chair* then communicated the next steps in the timeline. She mentioned that the next deadline was set for the end of February, when the full draft text of the Instrument, already revised, must be submitted to the Consultative Committee. She then invited the members of the Working Group to participate in a 9 February workshop, co-organised by UNIDROIT and the Asian Development Bank, to collect input on the draft Instrument. She continued by reminding the Working Group that the sections on sustainability would be subjected to review by selected experts and consultants suggested by some of the Working Group participants, with a view to align the draft Instrument to current international practice. A meeting of the Consultative Committee was scheduled for 30 March 2026 to discuss the draft master copy. The final draft with the feedback of the Consultative Committee would then be circulated to the Working Group at the beginning of April and discussed during an online meeting on 16 April 2026. By 24 April 2026, the final version of the draft Instrument would be submitted to the UNIDROIT Governing Council to obtain authorisation for a public consultation. Such public consultation would take place from the end of May until the end of July. The participants of the Working Group would be required to present the Instrument to selected institutions and associations of industry (global and regional) to obtain their feedback during the consultations. Once comments and submissions would be received, they would be consolidated and discussed by the Working Group at its ninth and final in-person session, from 19 to 21 October 2026. From 22 to 23 October 2026, a two-day workshop would discuss the Instrument, bringing together important arbitration institutions and possibly arbitrators. *The ICC Chair* pointed out that the draft Instrument would undergo a similar process under the ICC system of governance, having to pass the scrutiny of several bodies.

264. At this point, *the UNIDROIT Chair* reminded the participants to send their written submissions to the Secretariat as soon as possible for immediate consideration and integration into the draft Master Copy.

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

265. In the absence of any other business, *the Chairs* thanked the participants for their valuable contributions and closed the session.

ANNEXE I**LIST OF PARTICIPANTS****MEMBERS**

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Mr Diego FERNANDEZ ARROYO <i>remotely</i>	Professor Sciences Po
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ANNEXE II

AGENDA

1. Opening of the session and welcome
2. Adoption of the agenda and organisation of the session
3. Update on intersessional work and developments since the seventh Working Group session
4. Consideration of work in progress: Master Copy of the Draft Instrument
5. Organisation of future work
6. Any other business
7. Closing of the session