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**Item No. 5 on the agenda: Preliminary endorsement and authorisation to proceed with public consultation**

**(b) UNIDROIT Principles of International Commercial Contracts and Investment Contracts**

(prepared by the Secretariat)

<i>Summary</i>	<i>Update on the joint UNIDROIT-ICC Institute project on the UPICC and International Investment Contracts and submission of draft instrument for authorisation to launch a consultation</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the status and development of the project. It is invited to consider the submitted draft instrument and to authorise the Secretariat to commence a consultation on the draft instrument as further revised by the Working Group and Drafting Committee.</i>
<i>Mandate</i>	<i>Work Programmes 2023–2025 and 2026–2028</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<i><a href="#">UNIDROIT 2022 – C.D. (101) 21</a>; <a href="#">UNIDROIT 2022 – A.G. (81) 9</a>; <a href="#">UNIDROIT 2023 – C.D. (102) 13</a>; <a href="#">UNIDROIT 2023 – C.D. (102) 25</a>; <a href="#">UNIDROIT 2024 – C.D. (103) 10</a>; <a href="#">UNIDROIT 2024 – C.D. (103) Misc. 2</a>; <a href="#">UNIDROIT 2025 – C.D. (105) 11</a>; <a href="#">UNIDROIT – C.D. (105) Misc. 3</a>; <a href="#">UNIDROIT 2025 – A.G. (85) 3</a>; <a href="#">UNIDROIT 2025 – A.G. (85) 14</a>.</i>

**I. INTRODUCTION**

1. The purpose of this document is to update the Members of the Governing Council on the progress of the project on the UNIDROIT Principles of International Commercial Contracts (UPICC) and International Investment Contracts (IICs), and to seek the Governing Council's authorisation to commence a consultation on the draft instrument.

2. After briefly recalling the background of the project and its initial work ([Section II](#)), this document summarises the activity of the Working Group since the 105<sup>th</sup> session of the Governing Council in May 2025 ([Section III](#)) and introduces the draft Principles and Model Clauses that have been developed by the Working Group on IICs over the course of eight Working Group sessions

([Section IV](#) and the [Annexe](#)). As a next step, the Secretariat proposes to commence a consultation on the draft instrument, which would be followed by at least one more Working Group session in October 2026 ([Section V](#)).

## II. BACKGROUND AND INITIAL WORK

3. The project on IICs aims at developing guidance on the modernisation and standardisation of contracts between States (or State-related entities) and investors. It explores the interaction between the UPICC and common provisions in IICs, and seeks to address, at the contractual level, a series of developments in the area of international investment law, including the debate on the balance between the interests of States in pursuing public-purpose objectives and the interests of investors in a predictable and stable legal environment; the lack of consistency in arbitral decisions; the increasing focus on sustainable investment; and the call for greater transparency and legal certainty.

4. The project was proposed by, and is undertaken in cooperation with, the International Chamber of Commerce’s Institute of World Business Law (ICC-IWBL). Upon recommendation of the Governing Council at its 101<sup>st</sup> session in June 2022 ([C.D. \(101\) 21](#)), the project was included in UNIDROIT’s 2023-2025 Work Programme with high priority ([A.G. \(81\) 9](#)).

5. At its 102<sup>nd</sup> session (May 2023), the Governing Council took note of the preparatory work that had been conducted by the Secretariat in cooperation with the ICC-IWBL ([C.D. \(102\) 13](#)) and authorised the Secretariat to establish a Working Group. Furthermore, it granted the Secretariat flexibility to establish a Consultative Committee, to allow for a wider participation of experts, ensure that national and regional sensitivities and realities be duly considered, and increase transparency *vis-à-vis* UNIDROIT Member States ([C.D. \(102\) 25](#)).

6. Pursuant to the mandate provided by the Governing Council, the Working Group on IICs was established in June 2023. Co-chaired by Professor Maria Chiara Malaguti (UNIDROIT President Emerita) and Mr Eduardo Silva Romero (Chair of the ICC-IWBL Council), the Working Group consists of 25 individual experts in the fields of contract law and international investment law<sup>1</sup> that work together with representatives of eight international and regional organisations selected as institutional observers. Moreover, a Consultative Committee was established in December 2023, chaired by Governing Council Member Mr José Antonio Moreno Rodríguez and initially composed of experts and government representatives appointed by 27 Member States.

7. The first session of the Working Group took place in October 2023 at the seat of UNIDROIT, while the second session, in March 2024, was hosted by the ICC-IWBL in Paris. Between the two sessions, intersessional work was conducted in five thematic subgroups<sup>2</sup> to deepen the discussion in specific areas. The Working Group carried on with a progressively more specific scoping exercise, aimed at identifying selected content for the future instrument. It also discussed the format of the future instrument, expressing a preference for a self-standing set of Principles with commentary, accompanied by model clauses where appropriate. The Governing Council received an update on the

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<sup>1</sup> See [UNIDROIT’s webpage on International Investment Contracts](#) for the list of individual Working Group experts and public meeting documents.

<sup>2</sup> Subgroup 0 on (i) definitions and conceptualisation of IICs, (ii) relationship with domestic law and International Investment Agreements, (iii) interaction with the UPICC; Subgroup 1 on (i) pre-contractual issues in IICs, formation and validity, (ii) parties, non-signatory parties, and affected stakeholders, (iii) remedies, including compensation and damages, (iv) transfer of rights and obligations, (v) other UPICC that may need adaptation; Subgroup 2 on (i) change of circumstances (stabilisation/renegotiation/adaptation, hardship, force majeure) and (ii) other clauses typical of IICs; Subgroup 3 on (i) policy goals in IICs, (ii) other Treaty standards to be functionally addressed at the contractual level; Subgroup 4 on (i) choice of law clauses, (ii) dispute settlement clauses.

first two Working Group sessions at its 103<sup>rd</sup> session (May 2024) and recognised that the project had made significant progress since the Council's 102<sup>nd</sup> session ([C.D. \(103\) 10](#); [C.D. \(103\) Misc. 2](#)).

8. During its third session, held in June 2024 at the seat of UNIDROIT, the Working Group considered reports that had been prepared by the subgroups during the intersessional period, as well as a preliminary draft structure for the future instrument.

9. After the third session, in June 2024, the Secretariat provided an update to the Consultative Committee on the projects developments. The update was accompanied by a first request for input in the form of a questionnaire on matters under consideration by the Working Group. In parallel, the Secretariat invited a number of non-Member States with significant investment relations to appoint experts to the Consultative Committee as observers. This resulted in the appointment of 13 additional experts from eight non-Member States. In total, 35 States are now represented in the Committee. Furthermore, in October 2024, the Secretariat organised a virtual intersessional workshop to allow the Task Force on IICs (organised under the Roma Tre-UNIDROIT Centre for Transnational Commercial Law and International Arbitration) to present three memoranda with relevant clauses extracted from open-source IICs. The three memoranda provided legal analysis on: (i) policy goals and sustainability clauses, (ii) clauses concerning change of circumstances, and (iii) choice of law and dispute settlement clauses.

10. The fourth Working Group session took place in November 2024 at the seat of UNIDROIT. The reports of the five Subgroups as revised at the end of the third intersessional period were the main object of discussion. The Working Group also took note of the input received from the Consultative Committee and requested the Roma Tre-UNIDROIT Task Force to conduct further research on relevant clauses in publicly available IICs.

11. Following the fourth session, a Drafting Committee was established with the aim of developing a preliminary draft of the future instrument based on the Working Group discussions and the input by the Subgroups.<sup>3</sup> The Drafting Committee met three times between February and March 2025. Furthermore, in March 2025, UNIDROIT and the ICC-IWLBL, in cooperation with the International Federation of Consulting Engineers (FIDIC), organised a virtual workshop on international investment construction contracts. High-level FIDIC experts participated in a roundtable discussion that focused on (i) the specificities of international construction contracts, (ii) clauses on sustainability and due diligence obligations, (iii) the pre-contractual phase and the conclusion of IICs, (iv) change of circumstances, and (v) applicable law and dispute settlement clauses.

12. The fifth Working Group session, held in April 2025, was hosted by the ICC-IWBL in Paris. During the session, the Working Group considered the final reports of the subgroups, as well as a first preliminary draft of the future instrument ("draft Master Copy") that had been prepared by the Drafting Committee. Following the fifth session, the Working Group met twice (virtually), in April and in May 2025, to discuss revisions to the draft Master Copy.

13. The Governing Council, at its 105<sup>th</sup> session (May 2025), received an update on the developments of the project since May 2024 ([C.D. \(105\) 11](#)). It welcomed the update, expressed appreciation for the significant progress made since the 103<sup>rd</sup> Governing Council session, and agreed to recommend maintaining the project in the 2026-2028 Work Programme with high priority ([C.D. \(105\) Misc. 3](#)). The General Assembly, at its 85<sup>th</sup> session (December 2025), confirmed the Governing Council's recommendation to maintain the project on IICs in the 2026-2028 Work Programme with high priority until its completion ([A.G. \(85\) 3](#); [A.G. \(85\) 14](#)).

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<sup>3</sup> The members of the Committee are Ms Giuditta Cordero-Moss, Mr Lauro Gama, Mr Pierrick Le Goff, Mr Minn Naing Oo, Mr Aniruddha Rajput, and Mr Jeremy Sharpe. Mr Chin Leng Lim joined the Drafting Committee after the eighth session. In addition, the Chair of the Consultative Committee and Member of the Governing Council Mr José Antonio Moreno Rodríguez participates in the Drafting Committee.

### **III. WORKING GROUP ACTIVITY SINCE THE 105<sup>TH</sup> SESSION OF THE GOVERNING COUNCIL**

#### **A. Sixth session of the Working Group (June 2025)**

14. The sixth session of the Working Group took place from 10 to 12 June 2025 in Paris. The main object of discussion was the updated preliminary draft Master Copy, in particular the draft chapters that had not been discussed in detail by the Working Group at its fifth session. With regard to draft Chapter 2 (General Principles Applicable to IICs), the Working Group discussed issues such as freedom of contract and form of an IIC, the parties to an IIC, the importance of the principle of good faith and cooperation, and the need to emphasise parties' commitment to sustainable investment.

15. With regard to draft Chapter 6 on Sustainability, the Working Group agreed to distribute the draft Principles and guidance on sustainability issues among the draft Chapters, which followed the lifecycle of an IIC, rather than grouping them together. A general Principle on sustainable investment would be covered in Chapter 2, sustainability due diligence in Chapter 3, and specific sustainability obligations in the chapter on Rights and Obligations of the parties. Participants discussed how to balance investor and State responsibilities – generally agreeing on primary obligations for investors, supported by State cooperation – and ensuring standards remained aspirational yet realistic.

16. Concerning Chapter 8 (Remedies), there was broad agreement that the UPICC provisions were appropriate. The focus would therefore be on targeted commentary and model clauses for IIC-specific issues. Among the issues discussed were whether certain remedies should be restricted (e.g., withholding performance) given the need for continuity of public services. Participants emphasised the importance of preserving long-term contractual relationships through mechanisms such as cure, cooperation, and structured procedures before escalation to termination, which should remain a last resort, particularly for sustainability breaches. While the UPICC framework on damages was largely endorsed, proposals were made to promote contractual tools to limit excessive awards (e.g., liquidated damages clauses based on the UPICC provision on agreed payment for non-performance). There was strong support for developing a cooperative, multi-step approach to remedies for sustainability breaches – prioritising dialogue, mitigation, and possibly expert mechanisms before dispute resolution – while ensuring the overall framework remain balanced, flexible, and practically useful for both States and investors.

17. With regard to draft Chapter 9 (Choice of Law and Dispute Settlement), there was broad agreement to avoid duplicating UPICC provisions (e.g., on mandatory rules). Participants emphasised that the instrument should serve multiple functions: as applicable law (where permitted), as guidance for drafting, and as a tool to interpret or supplement domestic law. On dispute settlement, there was consensus to keep the framework streamlined, flexible, and aligned with existing practice, prioritising alternative dispute resolution (ADR) mechanisms as preferred first steps, with arbitration or judicial proceedings as a last resort. The discussions highlighted the importance of multi-tiered dispute resolution clauses and flexibility to use ADR at any stage. Additional issues included avoiding parallel proceedings, possible waivers and consolidation of proceedings, transparency, and counterclaims. The Working Group also considered whether assignment – especially of litigation claims to third-party funders – should be addressed in the future instrument. There was openness to limited clarification in the commentary on different types of assignment and their practical implications.

#### **B. Sixth intersessional period (June-October 2025)**

18. Directly following the sixth session, the Drafting Committee met to revise the draft Master Copy in line with the directions of the Working Group. Furthermore, four virtual meetings were held in July 2025. This resulted in an updated version of the draft Master Copy, which was shared with the

Consultative Committee – on a confidential basis – on 1 August 2025, for feedback by 10 September 2025.

### **C. Seventh session of the Working Group (October 2025)**

19. The updated draft Master Copy was the main subject of discussion by the Working Group at its seventh session, which took place from 27 to 29 October 2025 at the seat of UNIDROIT in Rome. The discussions focused on draft Chapters 1 (General Provisions concerning the Instrument), 2 (General Principles Applicable to IICs), 3 (Formation), 4 (Validity), 5 (Rights and Obligations) and 8A (Choice of Law). While discussing these Chapters, the Working Group also considered the input and feedback provided by the Consultative Committee. Furthermore, as background information, the Working Group received memoranda from the Roma Tre-UNIDROIT Task Force on (i) expropriation, (ii) physical protection and security, and (iii) State assistance clauses.

20. Regarding draft Chapter 1 on General Provisions, the discussion focused the instrument's relationship with the UPICC and on the application of the instrument. It was agreed to avoid rigid definitions, and leave the possible inclusion of domestic investors to party autonomy, and clarify in the commentary that the reference to the UPICC delineated the instrument's scope. The Working Group further discussed the adoption of possible "golden principles" (the application of which parties should not be able to exclude) and the relevance of usages and industry practices.

21. With regard to draft Chapter 2, the Working Group agreed to delete the stand-alone Principle on parties and retain the existing draft concerning the form of an IIC (in writing), interdependent contracts, and sustainable investment. The Working Group adopted a middle-ground approach regarding the State's right to regulate by drafting model preamble language that balanced public-law regulatory powers with private contractual protections.

22. The discussion on Draft Chapter 3 focused on refining Principles 8 through 10. Principle 8 clarified that parties could adjust policies during negotiations, including late or unilateral changes, without breaching the duty of good faith. Principle 9 on legal capacity was revised to use softer, commercial-practice language. Principle 10 provided guidance on setting out contractual rights and obligations to ensure predictability and limit excessive interpretation.

23. Regarding draft Chapter 4 on Validity, the Working Group agreed to delete the draft Principles since the UPICC provisions on validity were deemed appropriate for IICs, while retaining IIC-specific commentary and model clauses, where useful. It was agreed to include a Principle on anti-corruption in Chapter 2.

24. Regarding draft Chapter 5, it was agreed to retain a Principle on performance in good faith and expand the commentary concerning the need for cooperation and loyalty. Investor obligations on sustainability were clarified to cover local content, community development, benefit sharing, and ongoing sustainability monitoring, coordinated with State duties to assist and cooperate.

25. With regard to draft Chapter 8A on Choice of Law, the discussion mainly revolved around the necessity of balancing the broad acceptance of party autonomy with the principle of legality inherent in public law. It was agreed that the draft Principle should state the general rule of party autonomy, while limitations such as the application of overriding mandatory rules would be addressed in the commentary. The Working Group supported two model clauses: Model Clause A, which could be used by parties wishing to designate the future instrument as the primary governing law, and Model Clause B, which enabled use of the future instrument to supplement a chosen domestic law.

**D. Seventh intersessional period (October 2025-January 2026)**

26. Directly following the seventh session, the Drafting Committee met in Rome to revise the draft Master Copy in line with the directions of the Working Group.

27. A virtual follow-up meeting to the seventh session was convened on 21 November 2025 to address sections of the draft Master Copy that had not been covered during the October session.

28. The Working Group discussed the types of remedies for non-performance, including the proposed limitations to withholding performance, as well as the need to clarify the purpose of exemption clauses. With regard to the section on the right to performance, it was agreed to delete the black-letter rule on performance of monetary obligations since the relevant UPICC provision would apply. Furthermore, it was suggested to update the draft guidance on judicial penalty, stipulating that Article 7.2.4 UPICC should not apply by default in the investment context.

29. Addressing the section on termination, the Working Group instructed the Drafting Committee to emphasise stricter procedural thresholds and specific grounds for termination including corruption and breaches of representations, adopt a uniform standard for notice throughout the entire instrument, and clarify that the draft guidance on restitution applied in the context of contract termination.

**E. Eighth session of the Working Group (January 2026)**

30. The eighth session of the Working Group took place from 19 to 21 January 2026 at the seat of UNIDROIT in Rome. The discussions focused on several chapters as well as on the Consultative Committee's feedback.

31. Regarding draft Chapter 1, the Working Group discussed the updated draft Principles 1 and 2 on the scope and application of the instrument, as well as placeholders on (i) exclusion of modification by the parties, (ii) usages and practice, and (iii) definitions. It was agreed to develop guidance on (i) and (ii), against the background of Articles 1.5 and 1.9 of the UPICC.

32. As for Chapter 2, the Working Group decided to recognise States' regulatory freedom in the model preamble for IICs and to address it in the introduction to the instrument. Regarding Chapter 4 (Validity), it was agreed that the UPICC provisions were appropriate, so that only IIC-specific commentary would be provided.

33. With regard to Chapter 5, it was agreed to provide more specific guidance on good faith performance; on the contractual nature of the expropriation provision; and on how such provision and the rule on payments and transfers would apply in case a State entity, rather than the State, was a signatory of the IIC.

34. The discussion on the relevant sections on sustainability in Chapters 2, 3, and 5 focused on the restructuring and streamlining of such parts, and the inclusion of new text to address the continuous monitoring of sustainability obligations through reporting on the implementation of the management plan, as well as its updating and adaptation. The Working Group confirmed such an integrated due diligence approach and continued discussing the extension of the continuous sustainability monitoring and contractual obligations along the supply chain, opting to distinguish between subcontractors and suppliers. It confirmed the need to develop specific sustainability obligations for investors.

35. On Chapter 6, the discussion revolved around the articulation of the Principle on stabilisation and renegotiation clauses and its relationship to hardship and force majeure. The Working Group resolved to provide a reformulation of the paragraphs on economic equilibrium clauses and fiscal

freezing clauses, clarifying the respective consequences and available remedies. It also confirmed a closed-list approach for exclusions in the public interest, declined to add national security or sovereignty over natural resources as grounds for exclusion, and clarified that no right to renegotiation arose under those exclusions. As for force majeure, it was discussed whether specific consideration should be given to events of force majeure caused by the State party and if allocation of risk clauses should address major events of force majeure.

36. With regard to Chapter 7, the discussion focused mostly on: clarifying the importance of continuity and cooperation between the parties even in the remedial phase, with monetary compensation as a fallback option; clarifying the role of restitution either as a consequence of termination and as regards its implication during the life of the contract; updating the commentary to include a reference to reasonableness, distinguish between assignment of claims versus contracts; and clarifying the approach in the UPICC to punitive and moral damages.

37. Regarding Chapter 8, the Working Group expressed appreciation for including the concept of “rules of law” to cover the choice of non-State rules, and decided not to include any reference to sustainability, already covered by the relevant sections and the Principle on mandatory rules. Regarding dispute settlement, it was agreed to move part of the draft principle on parallel proceedings (on waivers) to the commentary.

## **F. Involvement of the Consultative Committee**

38. As mentioned above (see para. 20), on 1 August 2025, the Secretariat shared the then-latest version of the draft Master Copy with the Consultative Committee on a confidential basis, for feedback by 10 September 2025. The Secretariat received eight responses, comprising 111 comments from States’ delegates. At its seventh and eighth sessions (in October 2025 and January 2026, respectively), the Working Group on IICs carefully considered and discussed at length the comments submitted by the Consultative Committee.

39. On 3 March 2026, the Secretariat shared with the Consultative Committee an overview of all comments received from participants in the Consultative Committee during the consultation round, together with reactions and explanations from the Working Group following its seventh and eighth sessions. Members and observers of the Consultative Committee were invited to submit feedback on the updated version of the draft instrument by 2 April 2026.

40. A virtual meeting of the Consultative Committee took place on 30 March 2026, providing an opportunity to exchange views and raise questions ahead of the deadline for feedback. The participants, experts from eight Member States and three non-Member States, commended the efforts of the Working Group and expressed appreciation for the opportunity to further engage with the Secretariat. Suggestions provided by Consultative Committee participants included clarifying Principle 2 on the functions of the instrument (especially the reference to “incorporation” of the Principles in an IIC and the fact that the list of functions was not exhaustive); clarifying the relationship between Principle 6 on sustainable investment and the draft model preamble language; expanding the guidance on issues of illegality; clarifying the relationship between the types of investor protection offered in the draft instrument and those provided under investment treaties; and providing for possible risk-allocation mechanisms in case of force majeure. Two Consultative Committee members also submitted written comments after the virtual meeting.

## **G. Virtual follow-up meeting to the eighth session (April 2026)**

41. A virtual follow-up meeting to the eighth session took place on 16 April 2026 in order to consider (i) the changes to the draft Master Copy made by the Drafting Committee following the eighth Working Group session; and (ii) the feedback from the Consultative Committee. The Working Group welcomed the comments by the Consultative Committee and discussed how each of them

could best be addressed, typically by expanding the commentary. Following the meeting, the Drafting Committee in cooperation with the Secretariat updated the draft instrument.

## **H. Informal consultations and awareness-raising activities**

42. Since the 105<sup>th</sup> session of the Governing Council, the Secretariat has presented the project on IICs at several events.

43. First, the project was discussed during UNIDROIT's International Programme for Law and Development (IPLD Africa Plus in June 2025 and IPLD BEPCAC in September 2025).

44. On 20 June 2025, Professor Maria Chiara Malaguti, Co-Chair of the Working Group, and Mr Rocco Palma, Senior Legal Officer, participated in a seminar on "Clear Language and International Investment Contracts" at the Inland University of Norway in Lillehammer. They presented, respectively, an overview of the project and reflections on clarity and drafting style in the ongoing work on the instrument.

45. On 9 December 2025, the project was presented by Senior Legal Officer Mr Palma and Senior Legal Officer Ms Myrte Thijssen to staff from the Asian Development Bank (ADB) during a dedicated virtual roundtable. This was followed by a consultation workshop with the ADB on 9 February 2026, hosted at the ADB Headquarters in Manila (the Philippines), with hybrid participation. Prof. Malaguti and Mr Palma participated in person, and Ms Thijssen participated remotely. The workshop brought together experts from the Working Group and representatives from multiple ADB departments, including the Office of the General Counsel, the Office of Safeguards, and the Economic Research and Development Impact Department. The purpose of the workshop was to discuss feedback from ADB staff on the existing version of the draft Master Copy, which had been shared with a group of ADB experts on a confidential basis. Following the joint opening remarks of Prof. Malaguti and Ms Roberta Casali, Vice President of ADB, the first session focused on the assessment of investment protections contractualised in the draft instrument against the backdrop of ADB's policy on assistance in treaty reform. ADB presented its work on international investment agreements, including its International Investment Agreement Toolkit and technical assistance programmes for member countries. The second session focused on sustainability obligations and a comparison between the sustainability-related guidance offered throughout the draft instrument and the ADB's Environmental and Social Framework. The third session focused on the draft guidance in the future instrument on issues of general contract law, including the possible impact of investment laws on its applicability, and ADB's contract practice. The workshop concluded with the ADB General Counsel reaffirming the organisation's commitment to continue the strong collaboration with UNIDROIT in developing adequate legal frameworks and practical contract guidance for the Asia-Pacific region.

46. On 3-4 February 2026, Ms Thijssen presented the project during the UNIDROIT Middle East and North Africa (MENA) Transnational Law Academic Symposium on "Transnational Commercial and Investment Law and Middle East Regional Developments", which brought together academics and practitioners from the MENA region.

47. On 12 February 2026, Mr Palma delivered a seminar on the project at the Chinese University of Hong Kong (CUHK). The seminar was chaired by Working Group member Prof. Chin Leng Lim and attended by the Dean of the Faculty, Prof. Chao Xi, along with numerous scholars and students. The presentation illustrated UNIDROIT's methodology as applied to investment contracts, the key pillars of the draft instrument, and its relationship with the UPICC, specifically addressing the dual approach to robust investor protections and enforceable sustainability commitments. This seminar facilitated a high-level academic exchange on the instrument's general aims and structure, effectively reinforcing its visibility and conceptual reception within the broader Asian legal community.

48. On 26 March 2026, Prof. Malaguti and Ms Thijssen presented the draft instrument during Paris Arbitration week, in a panel with Ms Claudia Salomon (President of the ICC International Court of Arbitration), Mr Eduardo Silva Romero (Co-Chair of the Working Group), Mr Juan Pablo Argentato (Managing Counsel, ICC) and Ms Giuditta Cordero-Moss (Professor at the University of Oslo, member of the Working Group).

#### IV. DRAFT INSTRUMENT

49. This section provides a brief overview of the content of the draft instrument. The latest version, as iterated by the Drafting Committee following the virtual follow-up meeting to the eighth session of the Working Group, is enclosed as an annexe to this document. The Drafting Committee has strived to incorporate the main substantive changes for the consideration of the Governing Council. The instrument is subject to review by the Working Group before the launch of any public consultation (see Section V below).

50. The draft instrument consists of an Introduction and eight Chapters:

- Introduction. The introduction serves the purpose of providing general guidance to prospective users on how the instrument should be read, understood and used in practice. Specifically, it contains key points on the background, scope and purpose of the instrument; the features of international investment contracts; the recognition of States' regulatory freedom in a contractual setting; sustainability and investment contracting; the need for balance between investors' and States' rights and obligations; the role of the UPICC and the interpretation of the instrument; of the approach to applicable law and dispute settlement; the corroborative function of the instrument; the purpose and utility of the commentary and model clauses offered in the instrument; issues of terminology and the capacity of the instrument to adapt to future changes; and its structure and relationship with the UPICC.
- Chapter 1: General Provisions Concerning the Instrument. This Chapter primarily describes the scope, purposes and functions of the instrument. In particular, Principle 1 explains that the instrument contains Principles inspired by the UPICC provisions and adapted to account for investment contracts' specificities, while it incorporates by reference those UPICC that were found to apply "*telles quelles*". The commentary illustrates investment contracts' features as long-term contracts underpinned by significant public interests, the economic sectors in which they are commonly used, and the most relevant types. It also identifies the parties to an IC as States and State-related entities on one hand, and private foreign investors on the other. Along the lines of the UPICC Preamble, Principle 2 sets out the main functions of the instrument: as a governing law of contract, to supplement or interpret domestic law or uniform instruments, and as a source of inspiration for legislators or negotiators. With regard to Article 1.5 of the UPICC on exclusions or modifications, it is clarified that all Principles in the instrument are in principle essential and that, if the parties exclude or modify their application, such adaptations should reflect the overall balance of interests reflected in the instrument. Principle 3 adapts Article 1.9 of the UPICC on usages and practices to the context of investment contracting, specifying that usages that are not explicitly referenced in an IIC may serve a gap-filling role, but should not override the terms of the contract.
- Chapter 2: General Principles Applicable to IICs. This Chapter sets out the foundational Principles for investment contracts. Principle 4 on form requires IICs to be concluded in writing, while Principle 5 addresses the interaction between the various contracts that may govern complex investment operations. Principle 6 calls on the parties to adhere to the highest international standards on sustainability, recognising the need for proportionality, and Principle 7 addresses anti-corruption, model anti-corruption clauses. Principle 8 covers

specific arrangements granted to foreign investors to be duly approved by competent bodies. Finally, Chapter 2 covers the formal requirements for notice and provides model language for a preamble to the contract which, among others, addresses the paramount question of the balance between States' regulatory freedom and contractual commitments taken by the parties.

- Chapter 3: Formation. This Chapter governs the pre-contractual phase and the conclusion of IICs, be they concluded through negotiations or competitive biddings. Principle 9 clarifies the scope of application of good faith in the pre-contractual phase, particularly that a change in policy by the State or the investor would not by itself amount to a violation of good faith in this particular context. An essential element is found in Principle 10, which prescribes that the investor, with the cooperation of the State, perform sustainability due diligence in the pre-contractual (or pre-operations) phase and throughout the whole duration of the contract, also providing for consultations with local communities and Indigenous populations. Principle 11 addresses the parties' duty to ascertain and acknowledge the other party's legal capacity and disclose information to the other party on request. The subsequent Principles address the relevance of the precontractual phase in determining the scope of contractual obligations, namely the entire agreement, writings in confirmation, and terms deliberately left open.
- Chapter 4: Validity. This Chapter starts by explaining that the UPICC provisions on validity apply "*telles quelles*" to investment contracting without need for normative adaptation. It provides IIC-specific commentary on four aspects: (i) substantive validity; (ii) grounds for renegotiation, adaptation or avoidance (mistake, threat, gross disparity); (iii) illegality; (iv) restitution in case of illegality. The section on illegality addresses the approach in the UPICC to contracts infringing mandatory rules. The chapter contains a model severability clause and several illustrations tailored to the investment context.
- Chapter 5: Rights and Obligations. This Chapter sets the stage for investment-related rights and obligations assumed by both the State party and the investor, prioritising substantive aspects critical to the modernisation of investment contracting, namely investment protection and sustainability. The Chapter starts with Principle 14 prescribing the duty to perform contractual obligations in good faith; it addresses arbitrary or unreasonable conduct and abuse of contractual rights, and it extends its application to all the rights and obligations provided therein. The rest of the Chapter is divided into two main sections:

Section C provides for States' obligations on investment protection (Principles 15-18). Principle 15 covers the State's obligation to ensure the physical protection and security of the investor's personnel and assets. Principle 16 establishes the prohibition of expropriation of the investor's assets, except if certain conditions are met. Principle 17 recognises the right of the investor to freely make payments and transfers relating to the IIC into and out of the territory of the host State, crucial to performing investment operations, while providing a framework of exceptions in the public interest. Principle 18 covers State cooperation and assistance, which is important to operationalise the investment and enable its day-to-day execution through administrative facilitation, infrastructural support, and security coordination. Principles 15-18 are formulated against the background of typical investor protections in investment treaties, but they provide for contractual standards with fully contractual consequences, meaning that any breach entitles the aggrieved party to activate the remedies provided in Chapter 7.

Section D covers sustainability obligations (Principles 19-21). Principle 19 contains a general principle of cooperation between the parties on the performance of sustainability commitments. Next, model clauses on specific sustainability obligations are provided, covering aspects such as commitments to respect human rights, labour, social, and environmental standards, contribution to local development (e.g., purchasing local goods and

hiring local personnel), and community development agreements. Principle 20 requires the investor to conduct continuous sustainability monitoring, including reporting, updating and adaptation to evolving standards and circumstances. The parties are encouraged to establish a Joint Sustainability Committee to oversee the continuous monitoring process. Such committee could also facilitate consultations with third parties and play a role in resolving sustainability disputes. Principle 21 requires the investor to make its best efforts to extend its sustainability obligations to subcontractors and suppliers.

- Chapter 6: Changes of Circumstances. This Chapter addresses distinct situations in which evolving circumstances may affect the performance of an investment contract: stabilisation and renegotiation clauses (Section B), hardship and force majeure (Section C). The situations are different in character. Stabilisation and renegotiation addresses regulatory change due to State action, the hardship a fundamental change of the economic equilibrium of contract, and force majeure events that result in impossibility of performance. The threshold for invocation, the procedure to be followed, and the available outcomes and remedies differ. Renegotiation appears across the three but carries different meanings and consequences depending on the context. Principle 22 on stabilisation and renegotiation clauses reflects the long-term nature of IICs and the need to balance contractual stability with the State's regulatory freedom. The Principle indicates that the parties may agree to include a stabilisation and renegotiation clause in their contract, if appropriate and with awareness of the consequences. It excludes classical "freezing" clauses, which have been met with severe criticism, and limits the options to economic equilibrium clauses and limited fiscal stabilisation clauses. The Principle provides elements on the trigger event, procedure, legal consequences and available remedies. Importantly, it provides an exclusion for measures adopted by the State to comply with obligations on environmental, social, or human rights. Hardship and force majeure, instead, are mainly dealt with by reference to the UPICC, with adaptations to investment contracting as well as ICC-inspired model clauses. Principle 23 on force majeure clarifies that renegotiation remains possible, and the commentary refers to possible risk-sharing mechanisms as well as the need to carefully draft force majeure clauses in order to avoid situations in which the State could trigger or rely upon its own sovereign acts in order to suspend or terminate the contract.
- Chapter 7: Remedies, Including Compensation and Damages. This Chapter provides guidance on the remedies available to the parties in the event of non-performance. Given that IICs typically involve the public interest and are long-term in nature, parties are expected to have an interest in maintaining their contractual relationship to the greatest extent possible. The Chapter therefore emphasises the duty of cooperation and the principle of continuity, while recognising that effective remedies must be available. To that end, the Chapter mostly builds upon the UPICC provisions on non-performance. It provides commentary where IIC-specific guidance is needed on the application of the relevant UPICC provisions and adds a few new Principles owing to the special needs of investment contracts.

In particular, it addresses: (i) types of remedies for non-performance (withholding performance, cure by non-performing party, additional period for performance); (ii) the right to performance (performance of monetary and non-monetary obligations, and Principle 24 on penalties imposed by a court or arbitral tribunal); (iii) termination (including notice and restitution concerning long-term contracts); (iv) remedies for non-compliance with sustainability obligations (Principle 25); (v) compensation and damages; (vi) limitation and exclusion of liability; and (vii) no double recovery (Principle 26). The section on compensation and damages is particularly crucial: given the possibly speculative nature of damages in complex investments, the instrument refers to the UPICC framework to govern the right to damages and their calculation, relying on the UPICC provisions on full compensation, certainty of harm, foreseeability, mitigation, and contributory fault, and suggesting that the

parties resort to liquidated damages clauses or limitation and allocation of damages clauses to ensure certainty and a fair allocation of risk.

- Chapter 8: Choice of Law and Dispute Settlement. This chapter is divided into two main sections; Section B covers choice of law and Section C addresses dispute settlement. Section B contains one principle, on the scope of party autonomy (Principle 27). It stipulates that an IIC is governed by the rules of law chosen by the parties. The commentary provides explanations, among others, on the extent to which parties may choose non-State rules, such as those contained in the instrument. In reiterating the centrality of party autonomy in investment contracting, in respect of applicable mandatory laws, it invites the parties to make an express choice to ensure certainty and predictability. It contains two model clauses: one designating this instrument (including the UPICC) as the primary source of law governing the contract, the other pointing to the instrument as a secondary source to supplement or interpret the primary law chosen by the parties (most likely host-State law or the law of a third State). Section C encourages parties to agree in advance on a dispute resolution process, which may include several steps, including direct consultations between the parties (Principle 28), mediation, conciliation and other alternative dispute resolution mechanisms, such as expert proceedings and dispute boards (Principle 29), before the option of an adjudication forum, which may be an arbitral tribunal or court (Principle 30). The instrument promotes multi-tiered dispute resolution clauses, carving out wide space for voluntary settlement and amicable dispute resolution. The instrument concludes by providing guidance on avoiding parallel or sequential proceedings, including by suggesting waivers of treaty arbitration (Principle 31), issues of transparency and conflicts of interest in investment arbitration, and a Principle recognising the right of parties to bring counterclaims in the broadest possible manner (Principle 32).

## **V. PROPOSED NEXT STEPS**

51. It is proposed that the Governing Council authorises the Secretariat to undertake a consultation to seek broad feedback on the draft instrument. As consistent with UNIDROIT practice, the public consultation is expected to involve: (i) the launch of a dedicated webpage on the UNIDROIT website that allows interested parties to access the draft instrument and provide comments; (ii) the circulation of the draft instrument directly to interested parties; and (iii) the organisation of consultation events to discuss the content of the draft instrument with stakeholders. Participants in the Working Group on IICs would be invited to disseminate information on the consultation among their networks and participate in consultation events.

52. The ninth session of the Working Group on IICs is scheduled to take place at the seat of UNIDROIT between 19 and 21 October 2026. During this session, the Working Group will consider the comments received on the draft instrument during the consultation period, as well as any additional work that may have been conducted by the Drafting Committee, supported by the Secretariat, during the intersessional period. Directly following the October session, UNIDROIT will host a two-day event with major arbitration institutions and practitioners, which will provide an excellent opportunity to discuss the draft instrument. Furthermore, the draft instrument will undergo the necessary internal scrutiny and approval processes within the ICC.

53. The draft instrument will then be finalised and submitted to the Governing Council at its December 2026 session for final evaluation and adoption.

54. As noted above, the draft instrument enclosed to this document reflects the revisions of the Drafting Committee in response to the changes agreed in the virtual follow-up meeting to the eighth Working Group session on 16 April 2026, during which the latest feedback from the Consultative Committee was discussed. The Drafting Committee and Working Group are further revising the draft

Principles and Model Clauses in advance of the instrument being shared for public consultation, if so authorised by the Governing Council. An oral update on the status of such revisions will be provided to the Governing Council during its 107<sup>th</sup> session. The Secretariat will make the revised instrument available to the Governing Council members upon request.

## **VI. ACTION TO BE TAKEN**

55. *The Governing Council is invited to take note of the update on the status and development of the project. Furthermore, the Governing Council is invited to consider the submitted draft instrument and to authorise the Secretariat to commence a consultation on the draft instrument as further revised by the Working Group and Drafting Committee.*

**ANNEXE**

**DRAFT**  
**UNIDROIT-ICC PRINCIPLES AND MODEL CLAUSES**  
**FOR INTERNATIONAL INVESTMENT CONTRACTS**